

Troubling Assessments:

Custody and Access Reports and their
Equality Implications for BC Women

by Shahnaz Rahman
and Laura Track

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TABLE OF CONTENTS

Executive Summary	1
Introduction	3
Methodology	5
PART 1: THE OVERVIEW: How Custody and Access Assessments Work	
What are Custody and Access Assessments?	7
Who Conducts Custody and Access Assessments?	8
What Happens in a Custody and Access Assessment?	9
PART 2: THE RULES: Guidelines and Training for Assessors	
Family Justice Counsellors	12
Social Workers and Clinical Counsellors	14
Psychologists	15
PART 3: THE CONCERNS: How custody and access assessments impact women's equality and what can be done about it	
An Illusion of Objectivity?	18
Necessity and Overuse	24
Costs and Delays	27
Validity of Psychological Tests	31
Confidentiality and Informed Consent	35
Screening for Violence	37
Allegations of Sexual Abuse of Children	45
Diversity of Cultural Norms	48
Conclusions	52
Selected References	54

Executive Summary

Women's equality demands legislation and policy that protect women's rights to safety, security, and personal autonomy. BC's new *Family Law Act* takes significant strides towards this goal by placing considerable emphasis on the issue of family violence and its relevance to fair decisions about the custody of children. However, one place in which this essential focus is lacking is with respect to custody and access assessments, which may be prepared by outside professionals in disputed custody cases. Through consultations with women, advocates, lawyers and other professionals, West Coast LEAF has learned of a number of serious concerns with the ways in which these assessments are prepared and relied on by the courts.

Custody and access reports provide the court with a professional's evaluation of the parenting capabilities of divorcing spouses involved in litigation over the custody of children. These reports, also known as "Section 15 Reports," set out the professional's assessment of the child's needs and each parent's capacity to meet those needs, and often make recommendations for the parenting arrangement that would best fulfill the child's best interests, in light of the parents' capacities. The reports are conducted by a number of different professionals, including family justice counsellors and psychologists.

When they are conducted with sensitivity and informed by a strong understanding of the dynamics of family violence, custody and access reports can illuminate important issues between the parents and the children and help judges make decisions that are in everyone's best interests. But the concerns that have been shared with us suggest that there are fundamental and systemic problems with the way these assessments are being prepared, and the ways in which they are being relied upon by the courts.

Key Concerns:

- There are no binding guidelines or directives that govern the preparation of the reports.
- Women’s experiences of violence and abuse at the hands of their husbands have been ignored by assessors and, in some cases, used to paint women as “hysterical” or “vindictive.”
- Many judges give significant weight to the opinions and recommendations made by assessors, leading to concerns that they are allowing assessors to usurp their proper decision-making role.
- Assessments have been conducted without sensitivity to cultural difference, accommodation of those for whom English is not their first language, or adequate protection of confidentiality.
- Many low-income women cannot afford legal representation and do not qualify for legal aid in these important cases. Without a lawyer, challenging a problematic report is extremely difficult.
- Demand for publicly funded assessments consistently outstrips supply, leading to significant delays. At upwards of \$8,000, the cost of a privately prepared assessment is out of reach for most families.

West Coast LEAF believes that women’s equality is not served by the regime governing custody and access reports as it currently stands. A rights-respecting system of family law – one that promotes best outcomes for children and families – must invest in women’s equality. Addressing these concerns and implementing the reforms recommended in this report will bring us one step closer to this critical goal.

Introduction

Imagine leaving a marriage after years of physical and emotional abuse, only to have a psychologist disbelieve your story and recommend custody of your kids to your ex. Imagine inviting a stranger into your home during one of the most stressful and difficult times in your life, in order for them to assess your parenting skills. Imagine being in court without a lawyer and trying to cross-examine a psychologist on their assessment of your mental health, or having a custody assessor criticize you for your cultural traditions. These are some of the experiences women shared with West Coast LEAF regarding their experiences going through custody and access assessments in family law cases.

Custody of children is often one of the most difficult and contentious issues between divorcing spouses. While the majority of separating parents are able to develop a post-separation parenting arrangement without the need to go to court, in some cases, the intervention of lawyers, mediators and judges is required to reach a fair resolution that protects the best interests of the child or children.

When parents are unable to reach a parenting agreement between themselves and

the matter must go to court, the judge may seek out the professional opinion of a third party with the necessary training and expertise to conduct a custody and access evaluation and prepare a report for the court.



These expert reports can be helpful to judges by providing the court with information about children and parents that might be otherwise unavailable, and which could assist the judge to make important and difficult

decisions affecting children and their families. The reports can also be a useful way of putting the child's wishes and views before the court. Sometimes they help parents reach a parenting agreement on their own, without the court's continued intervention. When done well, custody and access reports can provide the court with insight into the family's situation and help judges come to decisions that foster the health, safety and well-being of the children.

At the same time, however, custody and access reports can be costly, time-consuming and stressful for parents and children. They can also operate to perpetuate pre-existing societal biases against women, particularly immigrant women, women with disabilities, and Aboriginal women. Advocates and women West Coast LEAF consulted with, who have had experience either going through or assisting women through custody and access assessments, reported concerns about assessor bias and refusal to take allegations of violence and abuse seriously, culturally inappropriate testing and methodologies, language barriers, and privacy issues, among other concerns. Compounding the problems raised by women and advocates, there are no consistent standards or directives that bind all professionals preparing custody and access reports in BC.

Commitment to equality is an essential principle in a free and democratic society, and underpins Canada's constitution and the rule of law.¹ The family law system has massive impacts and implications for women's equality, and must operate, and be seen to operate, in a way that fosters women's equality and promotes women's safety, security and autonomy. The issues raised by women and their advocates in this report indicate that there are systemic problems with the way custody and access reports are prepared and used by the courts in BC. The myriad concerns associated with custody and access reports lead us to question what can be done differently to better protect the safety, security and equality of women and their children.

¹ R. v. Oakes, [1986] 1 S.C.R. 103.

Methodology

West Coast LEAF embarked on this research project after many years of receiving calls from women who had undergone custody and access assessments, and who perceived that the reports prepared in their cases exhibited bias, dismissed their concerns regarding spousal violence and abuse, or otherwise resulted in unfair outcomes. Community advocates, transition house workers, and some professionals involved in preparing these assessments also communicated to us their frustration and concern about the impact of these reports.

The purpose of this study is not to undermine individual assessors, but to uncover the systemic barriers that make women vulnerable to disadvantage in the family law system. West Coast LEAF's research methods in this study included a respectful approach to women's lived experiences, informed by the recognition of existing inequalities, systemic discrimination, and gender bias in our society.

We designed this research project to investigate the preparation, use, and impacts of custody and access reports, with a particular focus on the experiences of immigrant, non-English speaking, and low-income women. The information and analysis contained in this report reflects a combination of legal and academic research, and interviews and consultations with mothers, advocates, family law lawyers and other professionals involved in the preparation of custody and access reports.

We engaged in one-on-one discussions, focus groups and telephone and e-mail correspondence with women, front-line advocates, assessors and lawyers throughout the preparation of this report. Notes from all conversations were compiled and sorted to identify significant themes, issues and concerns.

We had limited participation from psychologists in our consultation processes. Specific questions around psychological testing and its relevance to parenting assessments were sent out to 15 psychologists, who were randomly selected from the BC Psychological Association website. We received only 3 responses. Our attempts to engage the Board of the BC College of Psychologists in a dialogue about the project were also largely unsuccessful.

The aim of this research is to provide a snapshot of some of the issues and concerns raised by the courts' reliance on custody and access reports in family law cases and the way in which these reports are prepared. The experiences shared with us by women and front-line advocates cannot be considered representative of all women's experience, and the small sample sizes involved do not allow us to make generalizations about the majority of women's experiences. However, the individual experiences highlighted in this report reflect underlying, systemic problems with the practice and application of custody and access assessments. Board of the BC College of Psychologists where the system surrounding these reports allows for the types of experiences we've heard about in our research (experiences that are not isolated in nature), the system itself must be held responsible for allowing bias and misinformation about culture, gender, disability and power to operate within the family law system.



PART 1. THE OVERVIEW:

How Custody and Access Assessments Work

What are Custody and Access Reports?

Custody and access reports provide the court with a professional's evaluation of the parenting capabilities of divorcing spouses involved in litigation over the custody of children. The authority to order these evaluations comes from section 15 of BC's *Family Relations Act* (the "FRA"),² which allows a judge to ask for an expert report evaluating the ability of separating spouses to provide for the best interests of their children.³ These custody and access reports, also known as "Section 15 Reports," set out the professional's assessment of the child's needs and each parent's capacity to meet those needs, and often make recommendations for the parenting arrangement that would best fulfill the child's best interests, in light of the parents' capacities.

² R.S.B.C. 1996, c. 128. A new *Family Law Act* (S.B.C. 2011, c. 25) was proclaimed in November 2011. A number of its provisions are already in force, but the majority of the new Act, including the provision pertaining to custody and access assessments, is not expected to come into force until March 2013. BC's new *Family Law Act* does away with the language of "custody" and "access" and replaces it with concepts including "parenting time," "parental responsibilities," and "contact." Section 15 of the FRA is reflected in the new Act in section 211, without any substantial alterations in language.

³ Section 15 of the FRA provides:

Expert witnesses in family matters

15 (1) In a proceeding under this Act, the court may, on application, including an application made without notice to any other person, direct an investigation into a family matter by a person who

(a) has had no previous connection with the parties to the proceeding or to whom each party consents, and

(b) is a family counsellor, social worker or other person approved by the court for the purpose.

(2) A person directed to carry out an investigation under subsection (1) must report the results of the investigation in the manner that the court directs.

(3) A person must not report to a court the result of an investigation under subsection (1) unless, at least 30 days before the report is to be given to the court, the person serves a copy of the report on every party to the proceeding.

(4) If satisfied that circumstances warrant, the court may grant an exemption from subsection (3).

Judges are most likely to order custody and access reports in highly contentious cases, where the parents' evidence may be conflicting and contradictory, and where the parties are unlikely to be able to resolve the dispute themselves. Judges may request information about a specific issue of concern between the parents, or the request may be quite general and broad, conferring a significant amount of discretion on the assessor to conduct the evaluation and make recommendations about suitable parenting arrangements.

Once prepared, the custody and access report is provided to each of the parents and to the court, and becomes a part of the parties' court file. While the ultimate decision about custody and access is made by the judge, an assessor's recommendations hold considerable influence, and many judges give considerable weight to the assessor's findings and opinions when making their decisions.⁴

Who conducts Custody and Access Assessments?

Section 15 of the *FRA* says that the person who conducts a custody and access assessment must be a family counsellor, a social worker, or another person who has been approved by the court. The law also says that the professional who does the assessment and prepares the report should be someone who has not had any previous connection with the parents, unless they agree otherwise.

There are a number of different professionals involved in doing assessments including social workers, psychologists and clinical counsellors. Some may have taken courses and may have had supervised clinical experience conducting custody assessments. Some may have extensive professional experience doing evaluations for the courts and may conduct many assessments each year. Other assessors may have little or no academic background or supervised experience conducting assessments, and may only do a few assessments each year, in addition to their therapeutically oriented practice.⁵ In BC, there is no commonly accepted qualification, nor any mandatory educational or training program that all custody and access assessors must take.⁶

⁴ Ministry of the Attorney General, "Judges' Satisfaction with Custody and Access Reports: A Survey of BC Supreme and Provincial Court Judges" (31 March 2005).

⁵ K.A. LaFortune and B.C. Carpenter, "Custody Evaluations: A survey of mental health professionals" (1998) 16 Behavioral Sciences & Law 207.

⁶ Nicholas Bala and Annelise Saunders "Understanding the family context: Why the law of expert evidence is different in family law cases" (2003) 20 C.F.L.Q. 277.

In BC Supreme Court cases, psychologists usually prepare section 15 reports; in Provincial Court, it is most often a Family Justice Counsellor (“FJC”) who does the evaluation.⁷ FJCs are employees of the court who often have a background in social work, psychology, or family mediation. FJCs receive extensive training on how to perform custody and access assessments and prepare reports (discussed below).

Psychologists often administer a number of psychological tests to both the children and their parents in the course of the assessment, and may even make diagnoses of psychological problems. FJCs are not qualified to administer these types of tests; their reports tend to focus on the family’s situation more generally, describing the safety of the home, for example, or the views of the child.

There may be a tendency for judges to give more weight to an assessment prepared by a professional with “higher status,” such as a psychologist or a psychiatrist, than to one prepared by a social worker or a family counsellor.⁸ However, this may not be warranted. An Ontario Family Court judge observed that “there is a tendency to want to draw lines based upon the expert’s professional and level of training, and yet there is little to suggest that such lines can be validly drawn. Within this inexact science of prediction, no one profession seems to have claim to any superiority.”⁹ The specific training and experience on parental assessments and the judgment of the professional involved seem to be much more important than their level of education or professional status.

What happens in a Custody and Access Assessment?

The law is very vague about what is supposed to happen in a custody and access assessment. Section 15 of the *FRA* provides no guidance to assessors regarding what is expected in their assessments or reports. The section simply provides that a judge may order an investigation into any “family matter,” a term which is not defined. It is up to the judge to direct the assessment process. The judge may ask the assessor to answer particular questions or address specific issues, such as whether a parent’s home will be safe for the child, and can limit the scope of the assessment by requesting a report on only one or two discrete issues.

⁷ JP Boyd’s BC Family Law Resource Blog, “Section 15 Reports” (3 December 2009) online: <<http://bcfamilylawresource.blogspot.ca/2009/12/section-15-reports.html>>.

⁸ Bala and Saunders, *supra* note 6 at 289.

⁹ G.M. Thomson, “Judging judiciously in child protection cases” in R. Abella & C. L’Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (Markham: Butterworths, 1983) at 220.

BC's new *Family Law Act*,¹⁰ which was passed in November 2011 and will come into force in March 2013, does away with the language of "custody" and "access" and replaces it with concepts including "parenting time," "parental responsibilities," and "contact." Section 211 of the new Act is similar to section 15, and authorizes judges to order expert assessments in cases where parenting time is in dispute.¹¹ The new Act contains somewhat more direction to professionals about what they should be assessing and reporting on. The new Act says that a court may order a person to assess the needs or views of a child in relation to a family law dispute, as well as the ability and willingness of the parents (or other parties to the dispute) to meet the child's needs. One positive aspect of the new Act is its considerable emphasis on issues of family violence and the impact of violence on the best interests of children. Unfortunately, section 211 does not direct assessors to consider or address violence in their reports.

The usual process of a custody and access assessment involves the assessor meeting with each of the parents separately, and then with each one again in the presence of the children. If the children are old enough, the assessor will usually also speak to them separately. Assessors may also speak with other people who know the children and the parents, including teachers, family members, friends, neighbours, counsellors and therapists. Assessors who are qualified to do so (i.e., psychologists) may also conduct psychological tests on the parents and children.

¹⁰ S.B.C. 2011, c. 25.

¹¹ Section 211 provides:

Orders respecting reports

- 211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [*Care of and Time with Children*], one or more of the following:
- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
- (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

The assessor prepares a report on the basis of their observations, and provides that report to the court and the parties. Either party can compel the professional who conducted their assessment to attend court, and can ask the assessor questions about the contents of the report and the methods they used in order to reach their conclusions. Issues of bias or limited knowledge of family dynamics on the part of assessors can be challenged in court through cross-examination of the expert. Challenging a mental health professional on their evidence is very difficult, however, given the professional's specialized knowledge and expertise. Lawyers themselves struggle with this challenge, and parents without access to a lawyer will face an extremely difficult task in trying to question assessors about their findings and recommendations. In many family law cases, the parties, and particularly women, are often self-represented. A recent study found that 80% of the people involved in family law cases in BC are navigating the system on their own.¹² There is little legal aid available to help parents address custody and access issues, and because women's incomes tend to be lower on average than men's, and women are more likely to be economically disadvantaged by a marriage breakdown, they are even more likely to be unable to afford a lawyer.¹³



¹² Kim Nursall and Neal Hall, “‘Lay litigants’ add to delays in B.C. courts” (5 June 2012) *The Vancouver Sun*.

¹³ See Alison Brewin and Lindsay Stephens, *Legal Aid Denied: Women and the cuts to legal services in BC* (West Coast LEAF and the Canadian Centre for Policy Alternatives, BC Branch: September

PART 2. THE RULES:

Guidelines and Training for Assessors

Family Justice Counsellors

Family Justice Counsellors (“FJs”), who perform most of the custody and access assessments ordered in BC Provincial Court, receive guidance in the preparation of their reports from the Family Justice Services Manual of Operations (the “Manual”).¹⁴ The Manual contains detailed instructions setting out the process for conducting custody and access assessments and providing the reports to the court.

The Manual directs FJs to assess the parents for violence and power imbalance in their relationship with one another, the impacts of spousal violence on the children, as well as any acts of physical or emotional violence towards the children. The report must indicate that the clients have been assessed for violence, power and control issues, and any history of violence in the relationship must be presented in the report. In particular, the assessor must present the violence in the context of each spouse’s parenting capabilities, and the report must reflect its impacts on the children.

The Manual also contains a strong endorsement of the Ministry of the Attorney General’s Violence against Women in Relationships Policy, which directs FJs to screen for violence and other power and control imbalances in every family case. The Manual notes that it is “vital for family justice counsellors to identify intimate partner violence,” since the presence of relationship violence will necessitate a special approach on the part of the counsellor to working with the family. The Manual also discusses the dynamics of relationship violence, and reminds counsellors that victims of abuse may not recognize that they have been living in an abusive situation; they may blame themselves or experience denial, and may need help to understand the dynamics of violence, control, and abuse in their relationships. The Manual directs counsellors to be sensitive to concerns related to safety and protection, and to be aware of the ways in which concerns may arise due to language and cultural differences, sexual orientation, disability, isolation and other factors.

¹⁴ Online: <<http://www.ag.gov.bc.ca/justice-services/publications/fjsd/policy/manual.pdf>>.

Family Justice Services has developed an assessment form for screening and early assessment of family violence and other issues often involved in separation and divorce cases. The Assessment Tool screens for domestic violence, child protection issues, mental health issues, drug and alcohol abuse, and financial issues.¹⁵ The Assessment Tool is used in every case a FJC begins work on, and instructs the counsellors to ask questions about safety and fear of violence every time they meet with a new client. The Tool has recently been adapted specifically for use in custody and access assessments, and FJCs receive training on its use.

As part of their education and training, FJCs also complete a course called Custody and Access Report Writing, offered by the Justice Institute. In addition, they take courses on family violence and its impacts, substance use, and multicultural issues arising in family law cases.¹⁶

All custody and access reports prepared by FJCs are reviewed by the Local Manager of the Provincial Custody and Access Service before being submitted to the court. The Local Manager works to ensure that all policy, standards and legislative considerations have been followed in the preparation of the report. FJCs also discuss the report with the parents once it has been completed, and parents have an opportunity to ask questions or seek clarification on the report's contents. At the outset of the assessment process, parents are provided with information about how to raise any concerns they may have going forward. Complaints may be made to the Local Manager; concerns she is unable to resolve can be forwarded to a Regional Manager. Further avenues for discussing concerns or pursuing complaints would be the Provincial Executive Director, and, finally, the Ombudsperson.¹⁷

¹⁵ See "Users' Guide: Family Justice Services Centre Assessment Tool" online: <<http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/index.htm>>.

¹⁶ See Justice Institute of B.C., Family Justice Program Courses, online: <<http://www.jibc.ca/programs-courses/schools-departments/school-public-safety-security/corrections-community-justice-division/programs/family-justice#courses>>.

¹⁷ Ministry of Justice Family Justice Services Branch, Provincial Custody and Access Assessment Service, Client Acknowledgment Form.

Social Workers and Clinical Counsellors

Like Family Justice Counsellors, both social workers and clinical counsellors have specific standards that guide their work on custody and access assessments. The British Columbia College of Social Workers (“BCCSW”) (the regulatory body for social workers) and the BC Association of Clinical Counsellors (“BCACC”) (the society that regulates clinical counsellors on a voluntarily basis) have each enacted Standards of Practice for Custody and Access Assessments, which outline the knowledge requirements and expected procedures for the preparation of assessments.^{18,19}

Both sets of Practice Standards address the issues of violence and domestic abuse, and direct social workers and registered clinical counsellors to assess and, if appropriate, discuss, the presence and history of violence when conducting their interviews with parents, and to include any allegations of sexual, emotional or physical abuse in their report. They are expected to have skills and knowledge in issues of power and control and the cycle of violence, techniques for assessing the presence of family violence, and knowledge of the effects of family violence on children.

Social workers and registered clinical counsellors are directed to approach the assessments and the issue of child custody from social, emotional, developmental, relationship and cultural perspectives, taking into account the broader social context and the complex host of influences affecting the family members’ lives. They must consider the child’s community as part of appropriate custody and access arrangements, taking into account the cultural and community supports available to the child. They are also reminded to undertake assessments in a neutral, objective and impartial manner, and are required to state any biases they may hold in regards to custody and access in their reports.

¹⁸ British Columbia College of Social Workers, “Child Custody and Access Assessments Standards of Practice” 2010.

¹⁹ BC Association of Clinical Counsellors, “Code of Ethical Conduct, Standards of Clinical Practice & Guidelines for Registered Clinical Counsellors: Child Custody and Access Assessments and Reports” (Compiled December 2008, last amended June 2011).

Importantly, the BCCSW Standards of Practice for Custody and Access Assessments clarify the different roles a social worker may play in matters related to child custody, emphasizing that counsellors who have acted as therapists to any family member should not undertake assessments or make recommendations about custody and access. The Standards for registered clinical counsellors do not proscribe counsellors who have previously had a therapeutic relationship with one of the parents from undertaking a custody and access assessment, but they do direct the counsellor to make every effort to ensure that their role as an assessor is understood by the parties.

Complaints about social workers and registered clinical counsellors may be made to their respective regulatory bodies. For both types of professionals, an Inquiry Committee receives and investigates complaints regarding aspects of its members' practices. However, in the case of clinical counsellors, the Inquiry Committee will not investigate a complaint against a counsellor concerning a custody and access report unless the Committee is also provided with evidence that the court which ordered or received that report was critical of either the counsellor's assessment process or the resulting report.²⁰ Under this policy, reports that do not receive significant scrutiny and critique from the judge will not be investigated. Given many judges' extremely deferential approach to these reports and the frequent absence of any critical analysis of the assessor's conclusions, this policy may create barriers to holding counsellors accountable for biased or poorly prepared reports.

Psychologists

Unlike Family Justice Counsellors, social workers and clinical counsellors, psychologists are not bound by any specific guidelines, policies or directives that relate directly to their preparation of custody and access assessments. The BC College of Psychologists' Practice Advisory #3, a one-page document on psychological assessments in custody and access cases, merely sets out the different kinds of assessments psychologists may be called on to do, but provides no guidelines or direction for the proper preparation of the reports. The College of Psychologists did at one time have a specific policy pertaining to custody and access reports; however, the Custody and Access Assessments Standard has not been in effect since a general Code of Conduct came into effect in February 2002.

²⁰ *Ibid* at section 1.3.



Psychologists in BC are bound by that Code of Conduct, which contains numerous provisions relevant to the preparation of custody and access reports.²¹ In particular, section 11 of the Code of Conduct regulates procedures for all types of assessments. The Code of Conduct requires that psychologists be impartial and unbiased; they must remain independent and not act as an advocate for either party, and they must be aware of any personal or societal biases that may affect the objectivity of their recommendations. They must limit their practice to the areas of competence in which they have gained aptitude and proficiency through education, training and experience. In conducting assessments, psychologists must

gather information in a manner that is appropriately comprehensive, objective and balanced. Psychologists must also undertake sufficient examination of the parties and the situation they are reporting on in order to substantiate any conclusions or recommendations they make, and their conclusions and recommendations must follow logically, consistently and clearly from the information gathered during the assessment process.

²¹ College of Psychologists of British Columbia, “Code of Conduct (Schedule F of the Bylaws of the College of Psychologists of B.C.)” (1 January 2009).

Unlike Family Justice Counsellors and other professionals who prepare custody and access reports, psychologists are not directed by their Code of Conduct to screen for family violence or to consider the impacts of alleged family violence on the best interests of the children. Nor are psychologists necessarily trained to understand the dynamics of family violence or the gendered power imbalances that may exist in abusive spousal relationships. There is no mandatory course pertaining to issues of violence against women and children for psychologists who prepare custody and access reports, and no formalized training on how to prepare an effective, balanced and unbiased custody and access report that is responsive to issues of violence, power imbalance and abuse within the family.

While there are no specific risk assessment tools or directives to psychologists to screen for family violence, some psychologists certainly may incorporate these considerations into their assessments. However, without training and clear guidelines setting out a framework for assessing situations of violence in high conflict custody cases, psychologists may not have a full understanding of the gendered dynamics of family violence. Assessments may be undertaken inconsistently, and without the level of rigour and thoroughness necessary to ensure judges have the information they need to make decisions that promote the safety of women and their children.

PART 3. THE CONCERNS:

How Custody and Access Assessments Impact Women's Equality and What Can Be Done About It

While well-prepared custody and access reports can and do provide valuable assistance to judges deciding contentious custody and access cases, over the years West Coast LEAF has heard from many women and their advocates about significant concerns regarding how these assessments are conducted, and the extent to which they are relied on by the courts.

Given the stress, delay, and financial burden that custody and access assessments can impose on separating spouses and their children, a crucially important question is whether the assessments are worth it – do custody and access assessments provide judges with impartial and helpful information that allows them to make decisions that are in the best interests of children and promote women's safety and equality?

An Illusion of Objectivity?

The answer to the question of whether custody and access assessments truly assist judges to make informed decisions that are in the best interests of children and families depends on whether assessors are providing the courts with objective assessments that are based on widely accepted, current scientific knowledge, or whether they are merely expressing personal opinions that should be entitled to no more weight than the opinion of anyone else, particularly someone who knows the child well.

Assessors charged with preparing custody and access reports meet the parents and children in highly stressful and emotional circumstances: the parents' relationship has ended, and they are now locked in a dispute over the appropriate parenting arrangements. These events take their toll on both parents and children, and may affect the way they present during the assessment. Further, parents, aware of the assessor's role, are likely to try to be on their best behaviour during the assessment, leading to an artificial and potentially inaccurate picture of the child's home life and the parent's capacity to provide for the child's best interests.

The new *Family Law Act* makes the best interests of the child the only relevant consideration in disputes about appropriate post-separation parenting arrangements.²²

Determining a child's best interests is no simple task. Judges and assessors must consider what types of activities, characteristics and personal qualities are "best" for the child, and their assessment of these factors will

depend on their own values and priorities. For example, one psychologist may view a child's hard work and desire for achievement as a form of obsessive-compulsive behaviour, while another may view it as healthy ambition.²³



In applying the best interests of the child standard, judges and assessors may, due to their own experiences or biases, invoke a normative and idealized image of parenting in a white, middle-class, heterosexual, two-parent family. A woman who deviates from this normative model of motherhood, whether due to her race, her sexuality, her class, her single-parent status or her disability, risks being viewed negatively to some degree, regardless of her actual history of caregiving for the child.²⁴

When my son was having a difficult time with separating from his wife, and a section 15 report appeared a possibility, I consulted a family lawyer. She told me "You should go to Dr (a psychologist), he always favours the fathers." She explained that this was well known in family law circles.

– Research participant

²² Section 37(1).

²³ T.R. Litwack, G.L. Gerber & C.A. Fenster, "The proper role of psychology in child custody disputes" (1979-1980) 18 J. Fam. L. 269 at 296.

²⁴ Susan Boyd, *Child Custody, Law and Women's Work* (Don Mills, Ontario: Oxford University Press Canada, 2002) at 13.

A study of Ontario psychiatrists, psychologists and social workers involved in custody and access assessments suggested that many of these professionals exhibit deeply held personal biases that influence their work, and few of those who exhibited bias were aware of how their own attitudes and experiences might influence their assessments and recommendations.²⁵ One particularly troubling finding from this study was that less than one-third of assessors agreed with the statement that adults rarely lie when they say their ex-spouse has sexually assaulted or hit them. These results suggest that when a woman discloses abuse to a custody and access assessor, there is a very good chance that the assessor will not believe she is telling the truth. When this disregard for her experience is reflected in the assessor's report, either by ignoring it or using it to suggest she is lying in an effort to prevent her ex-husband from seeing the child, the resulting custody and access order from the court is highly unlikely to adequately protect the mother's safety or the child's best interests. Taking women's allegations of violence seriously is an essential component of a truly unbiased assessment, and accords with significant scientific research and analysis regarding the gendered dynamics of family violence.²⁶

Questions of parental capacity and a child's best interests inevitably involve an element of subjectivity, value judgment and speculation. This is true of both judges and those who prepare custody and access assessments. However, psychologists and psychiatrists who prepare these assessments are often viewed by the courts as disinterested experts who are providing the court with impartial, scientific evidence. Judges may be inclined to see a report prepared by a court-appointed professional as completely neutral and objective. However, even an assessor appointed by the court can be influenced by his or her own personal and professional biases, while at the same time, the assessor's own values and reactions to the parent they are assessing can impact the parent's behaviour. The stress caused by the assessment and a desire to please the assessor may cause parents' behaviour to change dramatically, resulting in observations that do not accurately reflect the family's everyday reality.

²⁵ P.J. Caplan and J. Wilson, "Assessing the child custody assessors" (1990) *Review of Family Law* 27(3) 121.

²⁶ See the discussion below under the heading "Screening for Violence".

While it is understandable that judges want to rely on trained professionals with expertise on parenting, it is imperative that judges not delegate their responsibility for determining the parenting arrangement that is in the child's best interests, based on all the evidence before the court. Indeed, granting too much authority to the assessor to determine the appropriate parenting arrangement can result in a trial judge's decision being overturned on appeal.²⁷ Judges should carefully craft their directions to assessors, ensuring that they are only requesting an assessment of the issues that are directly relevant to the case before them. Assessors must be cognizant of their role and the instructions given to them by the court regarding the scope of their assessments; assessors who overstep the limits of their role and make recommendations regarding custody and access, when none were sought by the judge, are acting inappropriately.²⁸

An Ontario judge articulated the proper approach to decision-making in custody and access cases where an expert report has been produced: "Expert opinion is of great value in these cases, but the decision must be made by the court. It is a responsibility that cannot be delegated."²⁹ The BC Court of Appeal has affirmed that "it is open to the trial judge to accept all, part or none" of the assessor's report.³⁰

While the ultimate decision resides with the judge, many judges do rely heavily on the findings and recommendations contained in assessment reports. A survey of BC judges found that sixty percent of responding judges said that they gave considerable or substantial weight to recommendations contained in the reports, and see the reports as an independent source of evidence and unbiased information.³¹ Given their importance as a tool for judges in making critical decisions about the best interests of children, it is essential that these custody and access reports be as accurate, unbiased, and sensitively prepared as possible.

²⁷ *Strobridge v. Strobridge* (1994), 4 R.F.L. (4th) 169.

²⁸ *Fawcett v. Fawcett*, 1999 CanLii 2011 (B.C.S.C.).

²⁹ *More v. Primeau* (1977), 2 R.F.L. (2d) 254 (Ont. C.A.).

³⁰ *Chera v. Chera*, 2008 BCCA 374.

³¹ Ministry of the Attorney General, *supra* note 4.

There are a number of ways that parties can challenge the objectivity, reliability or reasonableness of an assessor's report. The assessor may be called to testify at the trial, and can be questioned under oath about the conclusions they have drawn in their report and the methodology they used to reach those conclusions. Cross-examining an expert witness takes considerable skill and expertise, and is extremely difficult for a self-represented party to do effectively on her own. As discussed above, women disproportionately do not have access to counsel in family disputes, in part due to the severely underfunded family law legal aid system in BC, and therefore face additional obstacles to challenging assessments in court.

Parties can also appeal a judgment that they believe was wrongly decided, or where they think the judge placed too great a reliance on an assessor's report. Launching an appeal is expensive and time-consuming, and may be a practically impossible step for women to take without the assistance of a lawyer.

Additionally, parties can seek out the input of a second expert to analyze the report prepared by the first assessor. The second assessment may uncover faulty methodology, a lack of up-to-date knowledge, or improperly drawn conclusions. However, the parent's inability to pay for the cost of this rebuttal report may prevent this from occurring. Without the assistance of a second expert, lawyers may be unable to challenge an assessor in these areas because their own knowledge may be limited. A self-represented party would be doubly disadvantaged. In one recent case, the second assessor hired to review a report prepared by a colleague found its methodology to be so flawed and unprofessional that she felt obliged to report the first expert to their professional body.³²

Recommendations

- The BC government should implement a mandatory province-wide training regime for all professionals preparing custody and access reports. This standardized training regime should cover topics including the dynamics of family violence, particularly gendered power dynamics; cultural considerations; mental health issues; substance use; and the impacts on children of witnessing spousal abuse. The training should be developed in consultation with anti-violence experts, and refresher courses should be offered frequently to provide assessors with updates on new research and knowledge in these areas.

³² A.C.J. v. R.C., 2006 BCSC 1336 at para. 51.

- Government should develop binding and consistent standards and guidelines governing all assessors in their conduct of custody and access assessments and the preparation of the reports. The guidelines should advise assessors to avoid making recommendations on the parenting arrangement they deem best unless such recommendation is explicitly requested by the judge.
- The professional bodies governing assessors must ensure there are meaningful and accessible complaints procedures for parents who are subject to an evaluation they deem biased, inaccurate, or otherwise problematic. Complaints should be investigated regardless of whether a court has critiqued the report.
- Judges should provide clear and specific directions to assessors regarding the scope of the assessment they wish to see prepared. Whenever possible, they should seek an evaluation of a limited number of specific and discrete issues, and instruct the assessor not to wade into other areas.
- Judges should take care to maintain their exclusive role as the final decision maker and finder of fact. They should be cautious about accepting an assessor's recommendations without any corroborating evidence and avoid delegating their authority and responsibility to determine the arrangement that will best promote the child's best interests.
- Government should adequately fund legal aid so that low and middle-income parents have access to legal representation in these complex matters. Where a biased or otherwise problematic evaluation has been tendered by the other side, legal aid should cover the cost of preparing a rebuttal report.

Necessity and Overuse

The assessment process can be time-consuming, intrusive and expensive, and assessments are neither necessary nor desirable in every case. Parents don't have a "right" to have an assessment done, and the court can always decline to order that one be conducted. There are clear cases when an assessment should not be ordered, such as when it is apparent that one party is using the assessment process as a delaying tactic, a fishing expedition, or to wear the other party down. Where only one of the parties is seeking an assessment, they bear the burden of establishing a basis for ordering the report, and the report should be ordered only if it is necessary to assist the court in determining what parenting arrangement would be in the best interests of the child.³³

In *Young v. Young*, the Supreme Court of Canada suggested that experts should be used sparingly in child custody cases, calling it a "modern myth" that experts are always better placed than parents to assess the needs and best interests of the child.³⁴ Supreme Court Justice L'Heureux-Dubé noted that expert testimony, while helpful in some cases, is often inconclusive, contradictory and speculative, and may be affected by the professional values and biases of the assessors themselves.³⁵ She also reflected on the extent to which some judges have come to rely on the recommendations of experts in custody and access disputes, believing them to possess objective, scientific knowledge that allows them to "know" what is in the child's best interests. The Court concluded that in most circumstances, the custodial parent, who is involved in the day-to-day care of the child, will generally have the best vantage point from which to assess the child's needs, and is in the best position to provide the most reliable and complete information to the judge regarding the child's best interests.

³³ *D.S. v. E.P.S.*, 2011 BCSC 1102 at para. 52.

³⁴ *Young v. Young*, [1993] 4 S.C.R. 3 at para. 117.

³⁵ Madam Justice L'Heureux-Dubé was dissenting in this case, but the majority of the Court agreed with her comments about the role of expert witnesses in custody and access cases.

The Supreme Court Family Rules³⁶ provide direction to the Court on the factors they should consider when deciding whether to order an expert report. The Rules say the Court may consider the complexity of the issue, the expense of appointing the expert, whether the appointment will expedite or delay the trial, the interests of justice, and any other consideration the court considers relevant.³⁷ The Honourable Donna Martinson, a retired judge of the Supreme Court of British Columbia, suggests that judges should also ask themselves the following questions before ordering an assessment:³⁸

- What are the real issues in dispute, and is an expert necessary to resolve them? If so, what is the specific purpose of the report?
- What type of expertise is needed to effectively address the issues that arise, and does the expert being considered have the specific expertise needed?
- Does the expert have the appropriate cultural competence needed?
- Is the expert neutral, without any preconceived, biased notions about parenting roles?
- How will the views of the child be considered?
- Is psychological testing required? If so, what kind of testing and what is its purpose?
- If translation is required, how will it be effectively provided throughout the process?
- How will the privacy of the contents be assured?

She concludes:

“While expert parenting reports can be very useful in achieving settlement, in contested cases in which the opinion is challenged, the Judge has a critical role to play. The Judge will carefully evaluate the expert’s qualifications, the effectiveness and fairness of the process by which the report was created, and the reasons given by the expert for reaching the opinion, to determine what weight (importance), if any, should be given to the opinion. Deferring to an expert opinion without such an analysis would be tantamount to allowing the expert to usurp the role of the Court.”

³⁶ B.C. Reg. 169/2009.

³⁷ Rule 13-5(5).

³⁸ E-mail correspondence of 18 May 2012 between the author and the Honourable Donna Martinson.

Recommendations

- Judges should carefully consider whether an evaluation is truly needed in the custody and access case before them. A report should only be ordered when it is clearly needed to assist the judge to determine the parenting arrangement that is in the best interest of the child, and where there is evidence an assessor could uncover that is unlikely to come before the judge in any other way.
- In addition to the factors set out in the Supreme Court Family Rules, judges should also consider the questions set out by the Honourable Donna Martinson, above, when deciding whether to order a custody and access assessment.

Costs and Delays

Custody and access reports are both publicly and privately funded. Publicly funded reports are prepared by Family Justice Counsellors, who are government employees working within the family justice system. Demand for publicly funded reports consistently outstrips resources, and the insufficient government funding allocated to their preparation results in significant delays to the resolution of family cases.³⁹ Publicly funded assessments can take anywhere from six months to over a year to complete, depending on the courthouse at which the case is being heard.⁴⁰ Surrey and Vancouver are notoriously overburdened courts; rural communities without a permanent court also face considerable delays, if they can access an assessment at all. The rights and best interests of children can be severely impacted by delays in the resolution of these important family issues.

Because of the delays associated with publicly-funded assessments, some families opt to pay for reports prepared by professionals in private practice, including psychologists and clinical counsellors. These reports can generally be prepared



within three to six months, but their cost is likely to be at least \$8000.⁴¹ Indeed, the costs associated with the preparation of custody and access reports and the assessor's testimony at a trial can be prohibitive for many parents. The new *Family Law Act* gives judges the authority to allocate the fees relating to an assessment among the parties, or to require one party alone to pay for the assessment.⁴² The courts must be very careful about ordering custody and access assessments in situations where the family's financial resources are limited. Women shared with West Coast LEAF that judges had ordered assessments in their cases even when they had clearly stated that they were unable to pay for them.

³⁹ Ministry of the Attorney General Justice Services Branch, *Family Relations Act Review, Chapter 8: Children's Participation* (Victoria: Civil and Family Law Policy Office, 2007) at 9.

⁴⁰ <http://bcfamilylawresource.blogspot.ca/2009/12/section-15-reports.html>

⁴¹ Personal communication between the author and a Vancouver-based family law lawyer.

⁴² Section 211(5).

Judges have expressed their frustrations with these short-comings in the family justice system. In a family law decision in 2002, Justice Burnyeat said:

It continues to be unacceptable that the institutional delay in preparing and forwarding such Reports makes them unavailable or of limited use to the Court when the parties are not in a financial position to pay for those Reports so that they must rely upon the Province. ... The best interests of all of the children of this Province are not met by these Reports only being available in a timely manner where the parents of those children can afford to pay for the cost of preparation of the Reports. On questions of custody and access where a s. 15 Report would assist the Court in dealing with these issues, the finances available to the parents should not be a pre-condition to the timely availability of the Report.⁴³

In some cases, the parent who wants the assessment conducted is willing to pay for it him or herself. Of course, only a parent with access to substantial financial resources will be able to take this step. Women are much more likely than men to be economically disadvantaged by the breakdown of a relationship; numerous studies show that after separation, women's incomes decrease significantly, while men's decrease much less, and may even increase.⁴⁴ Single mothers experience the highest rate of poverty in Canada, and this economic inequality is exacerbated for younger women and women of colour.⁴⁵ Women who have experienced violence or abuse are particularly financially vulnerable. Men as a group have a greater earning capacity than women do,⁴⁶ and may also have greater control over the family's finances prior to the resolution of the case. This places men in a better position to pay for custody and access assessments and to fund ongoing litigation.

⁴³ D.A. v. J.A., 2002 BCSC 607.

⁴⁴ See *Moge v. Moge*, [1992] 3 S.C.R. 813 at 873-4, see also 853-73. See also Amelia Hill, "Men become richer after divorce" *The Guardian* (25 January 2009).

⁴⁵ G. Brodsky, M. Buckley, S. Day and M. Young, *Human Rights Denied: Single Mothers on Social Assistance in British Columbia* (Poverty and Human Rights Centre, 2005) at 16.

⁴⁶ Julie Cool, "Wage gap between women and men" (Parliamentary Information and Research Service: Social Affairs Division, 29 July 2010).

Judges must be particularly cautious about accepting the assessments and recommendations of an expert retained by only one of the parties. While the expert may not necessarily testify in support of the party paying him or her, the party's lawyers are likely to choose the assessor who is most likely to support their client's interests. Thus, a report that is highly favourable to the party who paid for it should be treated with caution by the courts.

Psychological testing of parents and children will further increase costs. At three to six hours per person for a battery of psychological testing, excluding the in-depth interviewing and clinical observations that also often take place, the psychologist's fee for the custody and access assessment can quickly (and perhaps unnecessarily) mount.⁴⁷

"In cases where the other party has more income and can afford both legal counsel and a psychological assessment, there is a clear inequity between the parties. The lack of equity is compounded when there is a history of abuse by the other party. Surely the best interests of children should not be measured by who can afford the best legal representation and has access to the most resources."

– Amber Prince, Vancouver-based Legal Advocate

Courts should also be aware of the potential for assessments to be requested by one of the parties in order to purposely stall or delay the proceedings. Delay in the resolution of a custody and access dispute is rarely in a child's best interests. Attempts by a party to delay a trial and preserve an unjust status quo must be vigorously resisted by the courts.

⁴⁷ See Brodzinsky, *infra* note 48, and accompanying discussion of some of the problems with psychological testing in custody and access assessments.

Recommendations

- The BC government must fund family justice counsellors sufficiently to ensure that adequate staff and resources exist to prepare custody and access assessments in a timely way. Adequate legal aid and the needs of rural communities should be a priority.
- Courts should be cautious about accepting findings and recommendations made by an expert retained and paid for privately by only one of the parties, and should pay particular attention to the possibility of bias in the resulting report.

Validity of Psychological Tests

Psychologists are the only custody and access assessors who are qualified to administer psychological tests to the parents and children they are assessing. The psychological tests used in custody and access evaluations were developed primarily to address clinical, rather than forensic issues, and while they can contribute valuable information to custody and access assessments, there are significant limitations to the role they can play.⁴⁸ The tests used in custody and access evaluations were not developed for the purpose of assessing whether a child will adjust better to a sole or joint custody arrangement or how often the child should visit the non-custodial parent; their validity in addressing the issues that are of primary concern to the court has not been proven.⁴⁹ Indeed, researchers and clinicians have lamented the lack of empirical research on psychological assessments of parenting capacity, particularly in light of their impact on the lives of parents and children.⁵⁰ Unfortunately, psychologists routinely offer opinions about custody and access matters based to a great extent, and sometimes exclusively, on the results of psychological testing.⁵¹

The tests employed by psychologists may measure the family members' intelligence, academic functioning, personality, attitudes and behaviour. It would seem logical to assume that the psychologist's choice of assessment instruments in a child custody case would be determined by the specific issues raised in the case, but unfortunately this appears not to be the case.⁵² According to one commentator, psychologists sometimes appear to administer tests indiscriminately, without a clear sense of how the information gathered will address the substantive issues at play in the dispute.⁵³ This can result in additional costs and delays, as well as inappropriate mental health diagnoses made by psychologists on the basis of scant evidence.

⁴⁸ David M. Brodzinsky, "On the use and misuse of psychological testing in child custody evaluations" (1993), 24(2) Professional Psychology: Research and Practice 213.

⁴⁹ Barbara J. Tinsley and Elaine S. Rosen, "Issues in the use of psychological testing in custody evaluations" (2001) California Family Law Monthly 105.

⁵⁰ G.D. Carr, M.M. Moretti, and B.J.H. Cue, "Evaluating Parenting Capacity: Validity Problems with the MMPI-2, PAI, CAPI, and Ratings of Child Adjustment" (2005) 36(2) Professional Psychology: Research and Practice 188.

⁵¹ Brodzinsky, *supra* note 48.

⁵² *Ibid.*

Lawyers and judges may have an unrealistic view of what psychological testing can accomplish. There is an assumption that psychological testing allows the assessor to go beyond the subjective nature of a clinical impression or judgment, and allows the assessor to be truly objective and unbiased.⁵⁴ This assumption is tied to the

“In my private practice I have seen many abused women who have been wrongly diagnosed with mental health conditions and consequently lost custody of their children. In some cases, the abusive ex-spouse was seen as the “alienated” and more “stable” parent.”

– Dr. Allan Wade, Family Therapist and Researcher

mythology that surrounds testing: that testing somehow allows the evaluator to tap into hidden truths about the person that would not otherwise be discoverable. This illusion of objectivity may entice judges to give unwarranted credence to the psychologist’s report. While psychological testing may be helpful in revealing information about the skills, personality characteristics and unconscious dynamics of the individuals involved in the evaluation, such information is only indirectly related to the real issues the court must resolve.

“I am concerned about the use and misinterpretation of psychological tests in custody and access reports because some widely used tests are wrongly used to claim that the non-offending parent is mentally ill and therefore not a competent parent.”

– Dr. Allan Wade, Family Therapist and Researcher

Additionally, the effects of trauma, violence and abuse can have profound impacts on the results of these psychological tests. One abused woman West Coast LEAF spoke to felt that her section 15 report labeled symptoms attributable to her trauma as “paranoia.” She said: “It was heart-breaking that the judge took the psychological assessment as gospel and awarded my ex sole custody and ordered supervised access to me.”

Lawyers may place undue pressure on psychologists to incorporate psychological tests into their evaluations when they know the other side has also hired an expert to conduct such testing. Lawyers will also cross-examine psychologists on the testing they performed, and may seek to undermine the expert’s evaluation by claiming it was not sufficiently comprehensive or objective if it did not contain a battery of psychological tests.⁵⁵ This is often true even when there is little reason to believe that testing is warranted in the case. This legal maneuvering, designed to ensure that one’s own side’s evaluation is as “comprehensive” and “objective” as the other, can result in unnecessary testing, delays, and significant costs to the parties.

⁵⁴ Tinsley and Rosen, *supra* note 49.

⁵⁵ Brodzinsky, *supra* note 48 at 216.

Given that there may be benefits to psychological testing in some custody and access cases, the question to ask is not *whether* testing in custody evaluations is appropriate, but *when* it is appropriate. One obvious caveat for evaluators and the judges who rely on their reports is to carefully consider the links between the population for whom the test was developed and the exact question being asked about the parent or child.⁵⁶ For example, personality tests designed to measure hostility in psychiatric patients might not be the proper test to measure parental hostility in the context of a high conflict custody dispute.⁵⁷

Recommendations

- The problem is not that psychological tests are used in custody and access evaluations, but rather, how they are used. Judges should think critically about the real issues before the court in each case and, if psychological testing is deemed necessary, direct the assessor as to what those outstanding issues are, so that only appropriate testing that sheds light on the relevant issues is conducted.
- Psychologists should only use psychological tests in conjunction with other standard data-gathering techniques, such as interviews and observation. Psychological tests should not be used to diagnose mental health issues without any further inquiry.⁵⁸
- Lawyers should seek out information and training on the validity of the psychological tests used in custody and access evaluations in order to utilize the results of the tests effectively.

⁵⁶ Tinsley and Rosen, *supra* note 49.

⁵⁷ *Ibid.*

⁵⁸ Brodzinsky, *supra* note 48.

Sherry's Story

Sherry went through two custody and access assessments during a long fight with her ex-spouse, Aaron, over custody of their four year-old daughter. Aaron had been abusive towards Sherry, and she eventually left the relationship due to the abuse. Prior to the first assessment, Aaron was permitted supervised visits with the little girl; later, the court granted him unsupervised visits twice a week.

The first assessment did not reflect the abuse Sherry alleged she had suffered at the hands of Aaron, and the psychologist made no mention of numerous police visits to the home in response to 911 calls Sherry made regarding threats and violence by her husband. The psychologist conducting the assessment recommended that Sherry and Aaron have joint custody of their daughter, and this was accepted by the court.

Sherry had serious concerns about her daughter's safety when she was visiting her father. A second assessment was ordered, and a battery of psychological tests was administered to both parents and their daughter. Sherry reported feeling intimidated and overwhelmed by the length of the tests and the complexity of the questions. She was also experiencing a disability preventing her from fully using one of her arms, and she asked if she could respond to the test questions orally, rather than in writing. This was refused.

As a result of the psychological testing, Sherry was labeled by the psychologist as having a number of mental disorders. Although the second assessor acknowledged the record of police responses to calls about domestic violence in the home and recognized that Aaron was "somewhat inclined to anger," the psychologist concluded that there were "no concerns regarding his ability to care for the child," minimizing any impact of the alleged abuse and ignoring Sherry's concerns about her daughter's safety. In fact, Sherry's concerns regarding her daughter's safety were used against her and labeled a product of her "mental disorder." The psychologist issued a number of very strong and specific recommendations, including that Sherry's access to her daughter be severely restricted and that communications between them be limited. The judge acceded to these recommendations, and sole custody of the child was transferred to the father.

Confidentiality and Informed Consent

Psychologists, counsellors, and other professionals preparing custody and access assessments for the courts do not have a therapeutic relationship with the parents or children they are assessing; they are not there to provide the parent with counselling, emotional support or advice. Thus, the regular rules of privacy, confidentiality and privilege that govern a therapeutic relationship between professionals and clients do not apply to professionals conducting custody and access assessments.

Any information that is provided to the assessor by the parents, children, other family member members, and anyone else the assessor contacts may be used in the report, or later told to the court if the assessor is required to answer questions about the report during a court hearing. All information is to be used and protected in accordance with the *BC Freedom of Information and Protection of Privacy Act*⁵⁹ and judicial discretion, meaning that the court may determine what can or cannot be disclosed. A section 15 report becomes a part of the parents' court file. Both parties have full access to their court file, and either party can provide written authorization to any other person allowing them access to the file as well.⁶⁰



There are no legislative restrictions on the disclosure of section 15 reports. However, a parent can apply for an order sealing all or part of their court file.⁶¹ An application for a sealing order must be made in a very specific way, and the application must be heard by a judge.

⁵⁹ R.S.B.C. 1996, c. 165.

⁶⁰ Supreme Court Family Rules, B.C. Reg. 169/2009 Rule 22-8.

⁶¹ See Practice Direction: Sealing Orders in Civil and Family Proceedings, No. PD-35, effective 1 June 2012.

In addition, the parties to a lawsuit and their lawyers are all under an obligation to keep information received in the litigation private and to not use the information except for the purposes of the litigation.⁶²

It was not always clear to the women West Coast LEAF spoke with that the counsellor or psychologist conducting the assessment was not there to listen and assist them. It was also not clear to all women that the report would be filed in court, thus becoming a public document. One mother withdrew her consent to undergoing an assessment upon discovering that it would not be kept private; this was viewed unfavourably by the judge in her case.

West Coast LEAF heard from women that in some cases, clinicians who had done the reports recommended sharing their psychological assessments with anyone who had contact with the child. Women reported that their ex-spouses were often eager to share reports that were damaging to the mother.

One woman who contacted West Coast LEAF to discuss her section 15 report told us that the report that the psychologist prepared exhibited bias and gave a very negative perception of her. It also contained a controversial mental health diagnosis. The judge relied on the report's findings and awarded sole custody of the children to the mother's ex-husband. Her ex-husband and his family disseminated the report to a number of people in her small community, which caused her great shame and embarrassment. Another caller's section 15 report was reproduced verbatim by her ex-husband on his internet blog.

Recommendations

- Assessors must clearly explain to parents the limits of confidentiality between the parent and assessor before they undergo a custody and access assessment. Assessors should continue to remind parents about the limits of their confidentiality and the fact that they are not the parent's therapist or counsellor, if they perceive that the parent may be regarding them as such.
- The BC Government should amend the Supreme Court Family Rules to provide that section 15 reports be automatically sealed by the courts. Their unlawful disclosure by either party should be sanctioned through contempt of court proceedings.

⁶² *Svorinic v. Svorinic*, 2012 BCSC 826. See also JP Boyd's BC Family Law Resource Blog, "Removing counsel and the possibility of mischief" (9 June 2012) online: <http://bcfamilylawresource.blogspot.ca/2012_06_01_archive.html>.

Screening for Violence

Violence against women in Canada is a serious and significant problem, with Aboriginal women particularly affected.⁶³ Women are considerably more vulnerable to abuse than men, with a rate of intimate partner violence nearly four times higher than that for men; women account for 81% of all victims of spousal violence.⁶⁴ Violence is a factor in many contested custody cases; in a review of parents referred for child custody evaluations by the court, domestic violence was raised in 75% of the cases.⁶⁵

A woman's attempt to leave a violent partner with her children is one of the most significant factors associated with severe domestic violence and death.⁶⁶ National research in Canada has suggested that for approximately one-quarter of abuse victims, the violence becomes even more severe compared to pre-separation violence,⁶⁷ and the rate of spousal homicide for separated women is over 25 times higher compared to married women.⁶⁸ Separation is a dangerous time for women, and negotiating custody and access arrangements with an abuser or attending court to resolve these issues can leave women even more vulnerable.⁶⁹ Abused women separating from a batterer have difficulty accessing safety and support from the courts, especially if they face additional barriers such as poverty, isolation, or immigrant status.⁷⁰

“Before deciding on the nature of children’s access to parents with a history of domestic violence, family court judges need comprehensive assessments prepared by qualified assessors with domestic violence training. These assessments need to provide a risk assessment and risk management plan that promotes safety, accountability and healing for victims and their children.”

– Dr. Peter Jaffe, University of Western Ontario Professor and Academic Director of the Centre for Research & Education on Violence against Women and Children

⁶³ Statistics Canada, The Daily, “Study: Violent victimization of Aboriginal women” 17 May 2011, online: <<http://www.statcan.gc.ca/daily-quotidien/110517/dq110517b-eng.htm>>.

⁶⁴ Statistics Canada, “Family violence in Canada: A statistical profile, 2010” Catalogue No. 85-001-X.

⁶⁵ P.G. Jaffe and G. Austin, “The impact of witnessing violence on children in custody and visitation disputes” (1995), cited in P. Jaffe, M. Zerwer and S. Poisson, “Access Denied: The barriers of violence and poverty for abused women and their children after separation” (2002), A summary report prepared for the Atkinson Charitable Foundation.

⁶⁶ N. Websdale, *Understanding Domestic Homicide* (Boston, MA: University Press, 1999).

⁶⁷ Statistics Canada, “Family Violence in Canada: A statistical profile, 2001” cited in Jaffe et al., *supra* note 64.

⁶⁸ H. Johnson and V.P. Bunge, “Prevalence and consequences of spousal assault in Canada” (2001) 43(1) *Canadian Journal of Criminology* 27.

⁶⁹ Andrea Vollans, “Court-related abuse and harassment: Leaving an abuser can be harder than staying” (YWCA Vancouver, 2010).

⁷⁰ C. Vascoe, F. Jaffer and L. Irwin, “Abuse through child custody and access: A critical site of women’s work” (Vancouver, BC: British Columbia Health Research Foundation (2002) cited in Jaffe et al., *supra* note 64.

Threats to seek custody are commonly used by abusers against women to enhance the abuser's power and control in the relationship post-separation.⁷¹ Research has shown that batterers are more likely to apply for custody, and are equally likely to have it granted in comparison with non-violent fathers.⁷²

Domestic violence is a complex issue, and when it exists in high conflict child custody cases it is crucial to identify and address the abuse when considering the best interests of the child. Being exposed to violence in the home, either directly as a victim or indirectly as a witness, is never in a child's best interests.⁷³ Batterers are

“There appears to be a lack of understanding among some assessors around issues of exposure of children to dynamics of control, abuse and alienation by abusive spouses. There is a very real fear for children to disclose witnessing on their own.”

– Tracy Young, Social Worker

poor role models for children in how to moderate their emotions, control anger, and engage in healthy and nurturing relationships.⁷⁴ Perpetrators of domestic violence may also undermine the non-abusive parent by blaming them for the break-up or otherwise alienating them from the child, compromising the child's ability to cope with the separation.⁷⁵ Violent spouses may also continue their pattern of domination and control in subsequent intimate relationships, thereby continuing to traumatize their children.⁷⁶

Children who witness violence committed by one parent against the other become indirect victims of the abuse, even if they themselves do not directly experience violence committed against them. In some U.S. jurisdictions, exposing children to domestic violence is considered a separate criminal offence,⁷⁷ and approximately one-third of states have created a rebuttable presumption in their family laws that an abusive spouse shall not be granted sole or joint custody of their children because of the harm, both direct and indirect, this would cause to the children.⁷⁸

⁷¹ P. Jaffe, M. Zerwer and S. Poisson, “Access Denied: The barriers of violence and poverty for abused women and their children after separation” (2002), A summary report prepared for the Atkinson Charitable Foundation.

⁷² J. Zorza, “How abused women can use the law to help protect their children” in E. Peled, P.G. Jaffe & J.L. Edleson (eds.) *Ending the cycle of violence: Community responses to children of battered women* (Thousand Oaks, CA: Sage Publications, 1995).

⁷³ Jaffe, *supra* note 71.

⁷⁴ E.M. Cummings, R.J. Iannotti & C. Zahn-Waxler, “Influence of conflict between adults on the emotions and aggression of young children” (1985) 21 *Developmental Psychology* 495.

⁷⁵ L. Bancroft & J. Silverman, *The batterer as a parent: Addressing the impact of domestic violence on family dynamics* (Thousand Oaks: Sage Publications, 2002), cited in Jaffe et al., *supra* note 71.

⁷⁶ S. Woffordt, D.E. Mihalic & S. Menard, “Continuities in marital violence” (1994) 9 *Journal of Family Violence* 195.

⁷⁷ P.G. Jaffe, C.V. Crooks and S.E. Poisson, “Common misconceptions in addressing domestic violence in child custody disputes” (2003) 54 *Juvenile and Family Law Journal* 57.

⁷⁸ Jaffe, *supra* note 71.

“Abused women are often blamed for not leaving abusive relationships, yet when they do leave, there is very little understanding by the courts of their experiences with violence.”

– Dr. Allan Wade, Family Therapist and Researcher

The new *Family Law Act* places considerable emphasis on the problem of family violence. In determining the child’s best interests, which are the only relevant consideration in custody and access disputes,⁷⁹ all of the child’s needs and circumstances must be considered, including the child’s health and emotional well-

being, the history of the child’s care, and the impacts of any family violence on the child’s safety, security and well-being. Judges, mediators, and any other dispute resolution professionals involved with the family must take into account any issues of family violence and assess its impact on the best interests of the child. In doing so, courts must consider the following factors:

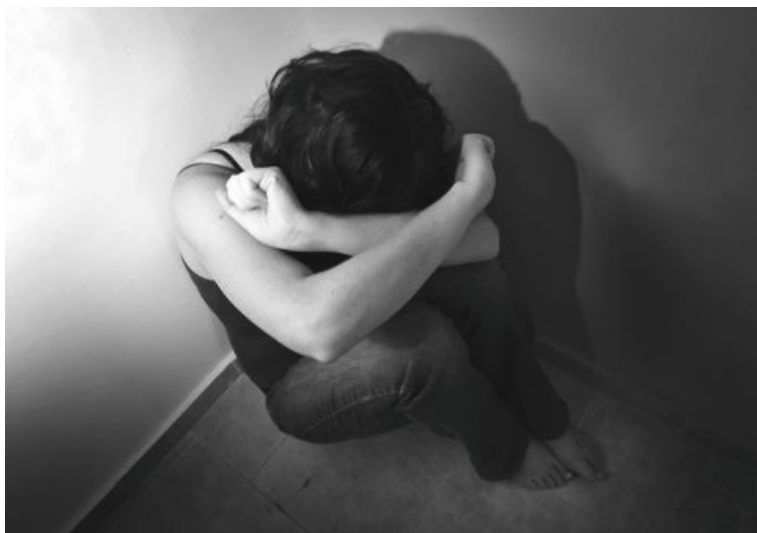
- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.⁸⁰

“The Section 15 custody report did not consider any of the abuse, even though I was abused in front of my son.”

– A focus group participant

⁷⁹ Section 37

⁸⁰ Section 38.



Unfortunately, the new *Family Law Act*'s emphasis on responding to situations of family violence does not extend to the provision of the Act dealing with custody and access assessments. The legislation does not specifically require assessors to undertake an inquiry into potential situations of violence in the home, and it

does not direct assessors to consider the impacts of family violence on the best interests of the child. The Act's general focus on family violence is a welcome and positive development in BC's family law legislation; however, it is essential that the emphasis on the need to consider issues of family violence be extended to all professionals working in the family law system, including the psychologists and other professionals conducting custody and access assessments.

One prevalent belief held by many judges, mediators and custody and access assessors is that it is in a child's best interests to have contact with both parents, even if one of them is abusive, particularly if the abuse is directed only at the mother and not at the child.⁸¹ Motivated by this belief, judges, mediators and assessors may tend to reward the parent who they see as most likely to promote contact and a positive relationship between the child and the other parent. A victim of domestic violence who attempts to limit contact between her abusive ex-spouse and her children, whether to protect her own safety or the safety of her children, may be deemed hostile, uncooperative, and acting contrary to the child's best interests, and may be punished for her unwillingness to facilitate the continued presence of her abuser in her children's lives.⁸²

⁸¹ Samantha Poisson, "Child Custody and Access Assessments" (19 May 2010), online: <<http://abusesanctuary.blogspot.ca/2006/04/custody-and-access-assessments-by.html>>.

⁸² For example, in *Naderi v. Naderi*, 2010 BCSC 1161, a husband who had been convicted for assaulting his wife and had a restraining order in place was granted generous access to the child, with the judge in the family law case stating that the acrimony and conflict between the parents was caused more by the mother than the father.

Contrary to popular assumptions that victims of domestic violence will necessarily attempt to prevent access between their batterer and their children, research has shown that most women want their children to have a positive relationship with their father, so long as the children's and mother's own safety needs are addressed.⁸³ Survivors of domestic violence can be re-victimized, and even

“Psychologists conducting section 15 reports are not sensitive to high risk situations where domestic violence is involved. Many women report that domestic violence is completely underplayed by assessors. These challenges multiply for women who are self-represented in court. Limited legal aid makes it difficult for lawyers to give quality time to their clients and obtain thorough information to make decisions. Often assessors are chosen by the father’s lawyer and women are left in compromising situations to accept their decision.”

– Ram Sidhu, Legal Advocate

endangered, by child custody and visitation arrangements that provide abusive ex-spouses with regular opportunities to renew threats and maintain power and control. Too often, women's legitimate safety concerns are diminished or ignored by custody and access assessors, or even used against them as evidence of non-cooperation or hostility, rather than seen as important considerations in the determination of the most appropriate parenting arrangements.

In an Ontario study assessing the plight of abused women and their children following separation from a batterer, the researchers found that a history of domestic violence was minimized or ignored by the custody and access assessor in one-quarter of the cases.⁸⁴ In half of the cases where issues of domestic violence were clearly raised during interviews, the impact of this violence and its relevance for custody and access arrangements was not even mentioned in the assessor's report.

“There is a need for specialized training on abuse and violence for assessors, and more specifically for psychologists, as the effects of violence are not being used in these assessments for mothers or the children”

– Andrea Vollans

⁸³ P. Susan Penfold, “Questionable beliefs about child sexual abuse allegations during custody disputes” (1997) 14 Can. J. Fam. L. 11.

⁸⁴ Jaffe, *supra* note 71.

West Coast LEAF conducted a focus group with seven women who were past residents of a second stage transition house, and who had suffered abuse and violence by their male ex-spouses. Each woman had undergone a custody and access assessment conducted by a different psychologist. Four of the seven women had lost custody of their children, while three had joint parenting arrangements. It was the common experience of all the participants that their allegations of abuse were met with doubt or skepticism by the psychologist who assessed them. Several women shared that their experiences of abuse were in fact used against them, and it was suggested that they were making the allegations as a manipulative tool in order to “get back at” their ex-spouse.

Abused women often have difficulty proving their abuse in family court proceedings because of insufficient corroborating evidence; the abuse most often takes place in the home, where there are few if any witnesses, and many women do not have the benefit of legal advice or representation. Since the majority of abuse victims do not contact the police, the independent evidence required by the courts is often lacking.⁸⁵ Even when victims do contact police, the results can be equivocal. The abuser may point to scratch marks, self-inflicted or made in self-defence, and the police may arrest both parties, or decide that neither can be charged. Corroborating evidence is all the more crucial given the skepticism some judges and assessors show regarding the motivations of parents raising domestic violence allegations in the context of custody and access disputes.⁸⁶

“There is a complete absence of trauma-informed assessment by clinicians performing section 15 reports. Many survivors of abusive relationships are re-traumatized by reliving and recounting traumatic material during the process of the assessment.”

– Tracy Young, Social Worker

An additional barrier for abused women is that many victims suffer from a variety of trauma symptoms related to their abuse. Abuse survivors may present as angry, distrustful and suspicious of the professionals involved in their court proceedings. Their behaviour may result in judges and custody assessors drawing adverse inferences about their attitudes, parenting skills, and ability to promote a relationship between the child and the other parent.⁸⁷

⁸⁵ Jaffe, *supra* note 71.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 62.

Without a mandatory and comprehensive training regime for custody and access assessors to educate them on the dynamics and realities of violence against women, there is little reassurance for abused women that their experiences of abuse will be understood and taken seriously by assessors and, in turn, by the courts. In BC, Family Justice Counsellors do receive mandatory training on family violence issues before they may engage in custody and access assessments. However, there is no mandated training for psychologists or other professionals conducting assessments, and no set of guidelines requiring all assessors to screen for violence and undertake risk assessment on behalf of vulnerable mothers.

Recommendations

- The training and education for judges, lawyers, mediators and custody and access assessors recommended above must specifically focus on issues of domestic violence, and should be developed in consultation with experts on issues of violence against women. This focus is crucial to protecting women's rights to safety, security, and fairness in custody disputes with their abusive ex-spouses.
- The standardized guidelines for preparation of section 15 reports, recommended above, must direct that every custody and access evaluation begin with an initial screening and risk assessment for issues of family violence. The Family Justice Counsellors' Risk Assessment Tool could serve as a useful model for the development of this screening.
- The BC Government should amend section 211 of the *Family Law Act* (formerly section 15 of the *FRA*) to direct assessors to consider whether there may be issues of family violence in the cases they are evaluating. This would bring the section in line with the Act's directives to all other professionals involved in family law cases to consider issues of family violence, and entrench this requirement more firmly in the law.

Reena's Story

Reena had a very positive experience with her custody and access report, which was prepared by a court-appointed Family Justice Counsellor. After enduring physical and emotional abuse by her husband and his mother, Reena fled to a transition house. The Family Justice Counsellor appointed to prepare the section 15 report screened for violence by asking specific questions about Reena's experience of abuse. The Family Justice Counsellor took note of Reena's experience, and Reena felt heard and supported in disclosing her experience with abuse. Reena felt very comfortable with the assessor's understanding of the dynamics of violence. The Family Justice Counsellor also interviewed the transition house staff and reported on their comments in the report. Based on these interviews and the violence screening, the FJC recommended that Reena have sole custody of the children; the court agreed and granted her sole custody, and weekend visits to the father.

Allegations of Sexual Abuse of Children

Similar to their own experiences of physical assault and abuse, when women allege that their ex-spouse has sexually abused their child, they are often viewed with suspicion and skepticism by assessors and judges. There appears to be a perception within the legal community that women frequently make up false allegations in order to gain a tactical advantage in court, or to get revenge on an ex-spouse. However, research suggests that child sexual abuse allegations are generally under-reported, and most child victims never report the abuse to authorities.⁸⁸ In fact, false allegations of sexual abuse are rare; it is much more common that actual victims of sexual abuse will deny their victimization out of fear and shame.⁸⁹

“I have been advised by my lawyer not to bring up sexual abuse allegations or else I may lose the custody of my child.”

– A mother and survivor of domestic violence

A report of the Law Society of BC’s Gender Bias Committee notes that, although statistics indicate that false accusations of sexual abuse during child custody disputes are not a common occurrence, lawyers tend to advise their female clients not to make accusations of sexual abuse because it will jeopardize their chances of getting custody.⁹⁰ Courts tend to disbelieve and act punitively towards mothers who

raise sexual abuse allegations in custody cases.⁹¹ This bias against women alleging abuse is not supported by evidence, and greatly undermines the legitimacy and fairness of the family court system for women and children.

Women are often blamed for not leaving abusive partners and failing to protect the children. Then when they do leave, and try to protect the children, they are called alienating mothers and said to have personality disorder.

– Dr. Allan Wade, Family Therapist and Researcher

⁸⁸ Merrilyn McDonald, “The Myths of Epidemic False Allegations of Sexual Abuse in Divorce Cases” (Spring 1998) Court Review 12.

⁸⁹ Penfold, *supra* note 83 at 22.

⁹⁰ Law Society of British Columbia Gender Bias Committee, “Gender Equality in the Justice System” (Law Society of BC: 1992).

⁹¹ P. Susan Penfold, “‘Mendacious Moms or Devious Dads?’ Some Perplexing Issues in Child Custody/Sexual Abuse Allegations Disputes” (1995) 40 Canadian Journal of Psychiatry 337.

The reality for many women is that the courts are not generally sympathetic to allegations of sexual abuse in custody and access disputes. Women who have contacted West Coast LEAF to share their experiences in trying to protect their children from ongoing abuse report that they have been treated by assessors and the courts as “hysterical” and “vindictive.” On the other hand, women who do not raise their knowledge of their child’s sexual abuse are deemed negligent and judged very harshly by child protection workers.



Considerable research suggests that myths and stereotypes about male and female behaviour may be contributing to unfounded beliefs among legal professionals regarding women’s propensity to falsely report abuse of their child.⁹² As noted in the BC Law Society Report on Gender Bias, family law presents “the most difficult and complex issues of gender bias ... All of us hold preconceived and possibly stereotypical notions about family law matters because of our personal life experiences.”⁹³ The compounding issues of poverty, racism, ableism, lack of access to educational resources, and cultural and linguistic differences exacerbate the impacts of sexism on vulnerable women and serve to heighten women’s disadvantage in difficult custody cases.⁹⁴

Courts and assessors may interpret a mother’s efforts to protect her child from abuse as an attempt to alienate the child from the father. Women who continue to make allegations of sexual abuse against the father despite a professional opinion or lower court finding that abuse has not occurred are often viewed by the courts as hostile, vindictive and manipulative. Women report that they are prevented from taking steps to protect themselves and their children from an abusive ex-spouse, and they are expected to cooperate with their abuser in order to be perceived favourably by the courts.

⁹² See Penfold, *supra* note 83 at 25.

⁹³ Law Society of British Columbia Gender Bias Committee, *supra* note 90.

⁹⁴ *Ibid.*

Advocates report that assessors often dismiss abuse allegations in their reports in an attempt to appear “neutral” to both the parties. Research shows that most women tend to minimize the violence they have experienced, and children are often coerced into silence by the abuser.⁹⁵ It takes much strength and courage for women and children to disclose violence to assessors. Women sharing their stories with West Coast LEAF have repeatedly stated that they expected that professionals such as psychologists, social workers, and family justice counsellors would be able to see and understand the truth about what they had experienced, but were disappointed with the assessor’s sympathies with the abuser.

A major shortcoming in BC’s family law system is the lack of a standardized screening method for issues of physical and sexual abuse. BC’s new *Family Law Act* contains very strong language directing family justice professionals to consider issues of family violence when making determinations about the best interests of the child. However, this directive is not extended to custody and access assessors. As recommended above, a standardized violence screening method that must be applied in all contexts would give more structure to the process and provide for a more formal and systematic approach, helping to alleviate some concerns about assessor bias.

Recommendations

- In addition to the recommendations made in the section above, training and education initiatives are needed for judges and lawyers that challenge the myth that women falsely allege sexual abuse of their children in order to gain an advantage in custody and access cases.

⁹⁵ Penfold, *supra* note 83.

Diversity of Cultural Norms

According to the advocates West Coast LEAF consulted for this project, the number one concern for their immigrant and refugee clients going through custody and access assessments is the language barrier. Women whose first language is not English face barriers in understanding and making themselves understood to assessors, and may also trigger biases or prejudices in their assessors. One woman reported feeling that her husband, whose English was stronger than hers, was able to present himself in a more favourable light to the assessor, and that her parenting was called into question because her English was weak.

“Language and cultural barriers are the most challenging aspects of section 15 reports for women in the Surrey area.”

– Ram Sidhu, Legal Advocate

“I do not speak or understand English very well. The psychologist doctor gave me a lot of forms to fill out. I didn’t understand them and I told him they were difficult for me. I got help from a work colleague who speaks English to fill the forms out. She helped me, but I am not sure what she said on the forms.”

Surprisingly, the psychological tests administered to parents by some assessors are presented only in English, due to concerns about undermining the validity of the tests through translation. One psychologist West Coast LEAF consulted advised that translations and interpretations of psychological tests can skew the results, and are therefore not permitted in the testing environment. The fact that some women may not understand the questions they are being asked on the tests, and the impacts that this language barrier might have on the tests’ validity, was not mentioned as a concern.

Advocates reported that often assessments of their immigrant, refugee and Aboriginal clients lacked cultural awareness and sensitivity to cultural differences. Misunderstandings arising out of language barriers, diverse communication styles, and different cultural practices may shape the assessor’s opinions and recommendations, leading to unfair results for Aboriginal women and newcomers to Canada. Advocates expressed their concern that women from various ethnic backgrounds are assessed according to a standard defined by white, Western parenting practices. A woman who shared her experience with West Coast LEAF for this project described how the fact that she read stories to her child in Farsi was portrayed in a negative light in the assessment report, with the assessor suggesting it was the reason the little girl was behind in her reading.

“The number one concern for immigrant and refugee women is the language barrier and restrictions on having a translator with them through the testing process. The process is very intimidating for some women. There is no consideration given to cultural factors.”

– Ranjeet Kanda, Women’s Advocate

As a result of the history of oppression and state discrimination they have experienced, many Aboriginal women have a deep distrust of the court system, fed by their family’s and community’s experiences of residential schools, child apprehension practices, and discriminatory laws that have perpetuated their inequality. Carrie Humchitt, a family law lawyer working predominantly with First Nations women, reported that many of her clients have been misdiagnosed by custody and access assessors with mental health issues, when the reality is that they are responding to trauma. She told us:

“Many Aboriginal women going through the section 15 process exhibit trauma symptoms, but are instead labeled as bipolar, depressed or with borderline personality disorder. These diagnoses are then used against women.”

Styles of communication and rules of conversation vary from culture to culture, and assessors are not always sensitive to these differences. What some cultures may value as respectful communication may be perceived by dominant Canadian culture as evasive.⁹⁶ For example, some cultures expect that people will make eye contact when speaking to one another, while in others, averting one’s eyes when speaking is a sign of respect. Advocates expressed concern that these diverse communication styles sometimes play out negatively for their immigrant, refugee and Aboriginal clients.



⁹⁶ For a discussion of the significance of cultural factors in communication, see e.g. Antoinette Sedillo López, “Making and breaking habits: Teaching (and learning) cultural context, self-awareness, and intercultural communication through case supervision in a client-service legal clinic” (2008) 28 Wash. U.J.L. & Pol’y 37.

“A family from one culture may value interdependence and support, while a clinician of a different ethnicity (and most are Caucasian) may view this as a failure to be independent, thus pathologizing the parent who seeks emotional and material support and safety within their family of origin.”

– Tracy Young, Social Worker

One advocate shared a story that illustrates the ways in which the parenting models of the dominant culture may be used as standards to which all parents are held, despite their own cultural practices. The advocate’s client, a South Asian woman, could not afford to rent a two-bedroom home for

herself and her child after the breakdown of her relationship with the child’s father, and she therefore had to share a room with her young child. Although it is a South Asian cultural norm for a mother and young child to sleep in the same bed, the assessor painted this as abnormal behaviour in the custody and access report and appeared to hold it against the mother. The entirely normal cultural practice of mother and child sharing a bed, together with the mother’s economic limitations, were seen as factors weighing against her having custody of her child, while the father, who was able to secure a larger home with a separate bedroom for the child, was seen as enjoying a better position to support and care for the child.

Judges must be cautious about accepting assessments of immigrant and refugee families that do not exhibit the requisite cultural sensitivity, or which display preference or prejudice against a parent for reasons rooted in culture. In one case, a judge dismissed the evidence of an assessor that she found to be a non-objective and biased witness who relied on racial and cultural stereotypes in recommending that custody be awarded to the father, noting that the assessor “personally identified with [the father] and his parenting methods, based on stereotypes of cultural differences which in his view they shared,” and “made comments about [the mother’s] personal demeanour that were similarly based on racial and cultural stereotypes.”⁹⁷

“Section 15 Reports administer standardized psychological testing in English and based on dominant Western models of parenting and family dynamics. This presents significant barriers for women who are non-English speaking and who come from diverse cultural backgrounds. Mothers who have English as a second language and normally speak in their first language with their child, when required to be observed by a psychologist are placed in the position of communicating in English only. Often this does not reflect the true parenting dynamics between the parent and child.”

– Zara Suleman, Family Law Lawyer

⁹⁷ *Mbaruk v. Mbaruk*, [1997] B.C.J. No. 125 (S.C.) at para. 36.

It is essential that professionals conducting custody and access assessments receive structured training to inform them of cultural issues that may be at play within the families they are assessing. Women's substantive equality rights require that cultural differences be respected and accommodated; they must not lead to prejudicial reports that could result in adverse custody and access arrangements for immigrant, refugee and Aboriginal parents.

Recommendations

- Psychologists should not administer psychological tests that are available only in English to women who are not comfortable communicating in English.
- The standardized training for custody and access assessors, recommended above, should include modules on cultural sensitivity and awareness to help ensure that women's diversity and cultural norms are not perceived and reported negatively.

Seema's Story

Seema and Ahmed immigrated to Canada from Iran. Seema speaks limited English, while her husband Ahmed speaks English fluently. When their relationship broke down, the court ordered a custody and access assessment in response to Seema's allegations that Ahmed was physically and sexually abusing their four year-old daughter. Seema had reported these concerns to the Ministry of Children and Families, but the file was closed when the little girl did not disclose any abuse.

Seema felt uncomfortable with the psychologist chosen by her ex-husband to conduct the assessment. She told us: "My ex chose the assessor. I was scared, as I had heard about the assessor's reputation for favouring men. The assessment report was everything my ex said."

Seema felt that the assessor disregarded her persistent allegations of abuse and failed to conduct any kind of risk assessment on the child's behalf. Seema's safety concerns were dismissed, and she was presented in the report as a paranoid and delusional person.

Seema also felt that her limited English skills worked against her in the assessment, and led the psychologist to conclude that she was immature. The psychologist also pointedly noted that Seema read stories to her daughter in Farsi, suggesting that this was linked to the little girl being behind in her reading skills. The psychologist recommended sole custody to the father, and the judge in the case agreed with this recommendation.

CONCLUSIONS

Custody and access reports are and will remain an important feature of BC's family justice system. When done well, they can provide useful information and insight to the judge in family law cases, can assist the parties to settle the issues between them, and can contribute to lasting solutions to custody and access disputes that are in the best interests of children and families.

However, given the costs and delays imposed by the courts' reliance on custody and access reports, British Columbians need to know that the reports are worth the time, expense and imposition that is created for parents when a stranger enters their home to assess their parenting capacity.

The concerns raised by the dozens of women and advocates West Coast LEAF spoke to in the course of preparing this report, as well as our review of academic literature and court cases, lead us to question whether custody and access reports are being prepared and utilized in a manner that is consistent with women's rights to safety, security and equality. The disregard paid by some assessors to women's experiences of violence and abuse by their husbands, and the lack of culturally sensitive procedures and language-appropriate testing point to systemic flaws in the current approach.

In particular, the lack of a common, mandatory training regime for all professionals involved in the preparation of custody and access reports is especially concerning. While some assessors receive comprehensive education on the dynamics of family violence, cultural considerations, and other important aspects of family life, this cannot be said of all the professionals who prepare these reports. Mandatory minimum standards of education and training, including ongoing refresher courses, are essential to ensuring that assessors can undertake these evaluations with a solid understanding of these important factors.

The failure to screen for and adequately respond to women's experiences of assault and abuse by their husbands was raised to us over and over by the women and advocates West Coast LEAF spoke to. A formal risk assessment should be a mandatory component of every custody and access evaluation. A directive to assessors to consider whether violence may be an issue within the family they're assessing should be entrenched in the law, bringing this section of the new *Family Law Act* in line with the rest of the legislation's emphasis on addressing family violence in BC.

West Coast LEAF believes that women's equality is not served by the regime governing custody and access reports as it currently stands. Nor is women's equality served by a justice system in crisis, with judges and lawyers alike decrying its under-resourced state.⁹⁸ The lack of legal aid available to low-income people going through family disputes in court, the majority of them women, is an untenable violation of women's equality and security rights, access to justice and the rule of law. Representation by a lawyer is especially necessary when custody and access reports are involved, given the additional layers of complexity they can add.

A rights-respecting system of family law – one that promotes best outcomes for children and families – must take steps to protect and promote women's equality. Addressing the concerns and implementing the reforms recommended in this report will bring us one step closer to this critical goal.

⁹⁸ See e.g. *De Kova v. De Kova*, 2011 BCSC 1271 at paras. 13-15; *Vilardell v. Durham*, 2012 BCSC 748; and the remarks of Chief Justice Bauman at the Canadian Bar Association BC Branch Meeting, 19 November 2011, online: <http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/speeches/Challenges%20to%20the%20Budget%20for%20Court%20Services%20Branch-%20CBA-BC%20Las%20Vegas%20meeting.pdf>.

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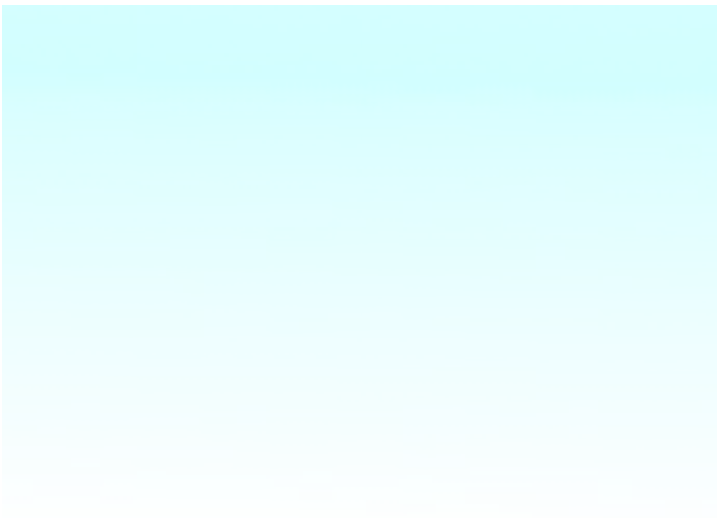
Notes



West Coast LEAF's mission is to achieve equality by changing historic patterns of systemic discrimination against women through BC based equality rights litigation, law reform and public legal education.

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