

# Spouse Abuse & Family Courts:

## The Need for Individualized Assessment & Response

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# Today's Presentation

- Nature & extent of spousal abuse
- Effect of spousal abuse on children
- Legal issues, especially as they affect children in Family Court proceedings
  - High Conflict Context
  - Proof

# Themes

- Spousal abuse is a differentiated phenomenon. To determine appropriate response, assess :
  - nature, dynamics and risk of recurrence
  - effects on children
- The dominant approach in Family Courts of non-adversarial dispute resolution & shared parenting is not appropriate if there are spouse abuse issues

# Nature of Spouse Abuse: A differentiated phenomenon

# NATURE & EXTENT OF SPOUSAL ABUSE

- **Spousal abuse is a differentiated phenomenon** with different dynamics and effects in different relationships.
- Legal & social responses also need to be differentiated & reflect effects on spouse and children and likelihood of recurrence
- Abuse can include elements of physical, sexual, financial and emotional abuse.
- Emotional spousal abuse (e.g. insults, social isolation) is not a crime, but often exacerbates physical abuse. Some forms post-separation emotional abuse is criminal (e.g stalking)
  - criminal harassment (s. 264),or
  - basis for a recognizance (s. 810)

# Spouse Abuse & Separation (Stats Canada, 2005)

- ***Among those who separated***, at least 1 assault in past 5 years
  - 21% of women
  - 16% of men
- spousal violence affects **all income & ethnic** groups, but **more likely if:**
  - younger
  - lower income
  - living common law
  - Aboriginal

# Among female victims of spousal abuse

- **Variation in frequency/recurrence**
  - 40% of women report only 1 assault in previous 5 years;
  - 36% of women victims report 2 to 10 assaults
  - 21% of women reported 10+ assaults in previous 5 yrs
- in many abusive relationships, **cycle of woman leaving after abuse and return** due to guilt, economic necessity, perception of needs of children, family & community pressure, immigrant status etc.
- cycles of abuse-separation-resumption of relationship can be very frustrating for professionals
- in *most* relationships violence ends after separation, but in a significant minority, violence *increases* after separation.
- risk of homicide greatest after separation
- post-separation violence by male perpetrator is often attempt to control and pressure return

# Disclosure of Abuse

- Most victims are ashamed, frightened, guilty & do not disclose/report spouse abuse
- More likely to report to police if more serious/repeated
- Lawyers should screen all clients for abuse issues, may not be initially disclosed & have to repeat as trust develops

# Spousal Abuse - taxonomy

Janet Johnston, Michael Johnson

- ***Intimate Terrorism or Episodic Male Battering*** - repeated abuse by domineering man
  - repetitive
  - high risk of escalation after separation:
- ***Separation-engendered Violence***
  - 1 or more incidents only around time of separation (eg discovery of adultery).
  - Violence is uncharacteristic and unlikely to reoccur after separation
- ***Interactive or Mutual Abuse Violence*** - use of violence during arguments with significant mutual responsibility
  - Quite common
  - Good prognosis for end of violence **after** separation, but both parents & kids likely need counselling:

- ***Female initiated violence***  
Histrionic, emotionally labile women. Men may be depressed or passive. If situations not interactive, mother may also be abusing children.
  - Johnston found 10% in this category.
  - Other studies find female initiated violence as low as 4% (Jaffe), or as high as 38%
- ***Violent Resistance***
  - many killings of husbands involve self-defence of repeatedly abused women
- ***Psychotic and paranoid reactions***
  - violence is true mental health issue. Not common.  
May be controllable by drugs

# False & exaggerated claims by women

- Although **false or exaggerated allegations of spousal abuse** by women are a concern, **relatively rare** (under 10% ?)
  - Access to services (eg legal aid)
  - Tactical gain
  - Psychological needs/perceptions/social supports
- **More false denials/minimization by abusers than false claims/exaggeration by spouse abuse victims**

# Effects of spousal abuse on victims

- Female victims of spousal abuse have:
  - heightened depression, fear, drug & alcohol abuse
  - lowered self-esteem
  - more likely to abuse or neglect children
- Spousal assault is often related to control & power in relationship
- Extent & frequency of physical violence is important, but not always determinative of degree of control or emotional harm. Repeated abuse -> greater effects, but even single incident can be emotionally destructive.

- In cases of repeated abuse of female victim, she often has great fear of the abuser and has been intimidated.
- A male abuser may threaten various things if she leaves
  - “I will get the kids.”
  - “I will kill you.”
  - “The police (courts) won’t protect you.”)
- She may fear
  - leaving him - his threats
  - retaliation if she tries to enforce rights
  - she will not be protected by police & courts

# Effects of Spouse Abuse on Children

# Children Exposed to Spouse abuse

- **Between 30% - 60% of males who abuse spouses directly abuse their children.**
- Children may fear abusive partner, but also possible for boys to identify with abusive husband and girls to have “princess-like” relationship with abusive husband
- **Children often witness or hear spouse abuse:**
  - 47% of female victims report that child saw or heard spousal abuse; **more likely if more serious & repeated.**
  - Victims not always aware of kids knowledge

# Effect of Spousal Abuse on Child

- Effect of spousal abuse on child depends on:
  - frequency & nature of spousal abuse
  - child's awareness/exposure to spousal abuse
  - capacities of abused parent
  - child's access to counselling services
  - **direct child abuse or neglect**
- Even if no direct abuse of children, spouse abuse has indirect effects on children, including
  - lowered self esteem, greater risk of drug abuse
  - more aggression in boys
  - more depression in girls
  - in infants developmental delays & attachment difficulties
  - more likely to enter abusive relationships as adults (boys as abusers, girls as victims)
- Individual child's vulnerability or resilience

# Spouse Abuse & Children: After Separation

- manipulative conduct by abuser may increase after separation, ranging from inappropriate requests for “spying” to using children to convey threats
- abuser may intimidate or pressure child into expressing wish to live with him & even into writing to the judge
- access exchange may be especially problematic, with potential for interactive violence or harassment
- abusive spouse may use the court system to attempt to maintain contact with partner & exert control over her

# Legal Responses: The Family Law Context

# Determining an Appropriate Response

To assess the best legal and social response for an individual case, consider a range of questions:

- Who is the primary aggressor?
- What is the frequency, nature, and intensity of the abuse? Is there a high degree of interactive violence?
- Is there a history of violence outside family?
- What is the effect of the abuse, on spouse and children, as the same acts will affect different individuals in different ways?
- And what is the prognosis for recurrence of abuse, given different possible interventions?
- What is the attitude of the abuser?
- What resources are available to prevent further abuse or support victim & children?
- **What are the instructions of the victim?**

# Legal issues

- **Legal significance of abuse depends on:**
  - legal context (criminal, civil, child protection)
  - seriousness & frequency of abuse
  - likelihood of recurrence
  - effect of abuse on victim & children
  - client instructions
- PROOF of abuse
- Usually, abuse is by woman & proven, but issues of:
  - false or exaggerated allegations (false denials by abusers are much more common)
  - recantations & false recantations by victims due to pressure, intimidation & guilt, economic pressure, love

# Limits of legal responses

- Court system tends to move slowly
- Courts are blunt instruments for controlling or affecting human behaviour
- Police, prosecutors & judges are receiving education on domestic violence, but some are still not sensitive to spouse abuse
- Victims & supporting professionals do not control the court process, especially the criminal process
- Court proceedings are :
  - **adversarial**
  - **formal**
  - **depend of proof**

# Proving Abuse

- **proving abuse is always a potential issue**
- beyond testimony of victim -> independent evidence very helpful
  - observations of police
  - 911 tapes
  - confession of abuser to police
  - statements of child, including disclosure to child protection worker (likely admissible hearsay in Family Court)
  - diaries of victim
  - letters & cards from abuser
  - previous or subsequent partners (civil cases only)
  - health care provider may observe injuries

# Legal Contexts

- CRIMINAL PROSECUTION
- RESTRAINING ORDERS &  
RECOGNIZANCES
- FAMILY LAW : POSSESSION OF HOME
- **FAMILY LAW: CUSTODY & ACCESS**
- CHILD PROTECTION
- TORT LAW - CLAIM FOR DAMAGES
- REFUGEE LAW

## Research on Victims & Criminal Justice

- Prosecution most likely to result in conviction if victim cooperates
- Victims may mistrust police & courts, and find the criminal process frustrating.
- Victim may want to withdraw charges, or be uncooperative or “recant” due to
  - economic pressure
  - guilt
  - family or community pressure
  - concern that offender will go to jail
  - intimidation & fear
  - concern for children

# Criminal Prosecutions

- Conviction in criminal court is admissible in Family Court and is very persuasive evidence of abuse
- Breach of recognizance/restraining order can be helpful in establishing need for strict conditions in custody case

# Family Law

- Growing trend towards resolution of family law cases by mediation & collaborative family law
- Growing use of joint custody, shared parenting etc.
- Amicable resolution best for children, only if no unresolved abuse issues

# High Conflict Separations

- 30% are “high conflict” at separation
- 10% are high conflict after 3 years
- High conflict reflects unresolved feelings:
  - Anger at rejection
  - Mistrust
  - Distorted memories of the relationship
- 2/3 of cases are “bi-lateral” (both warring)  
1/3 unilateral (1 is instigator, other is reasonable)
- Children distressed
- 50% + of high conflict have spouse abuse issues

# Alienation of Children

- Many high conflict parents engage in “alienating behaviors” (eg denigration of other parent)
- But many children are resistant & remain “neutral” despite denigration etc.
- Some children are vulnerable due to guilt, fear or very high-conflict & ally with 1 parent
- Under ½ of children become alienated in high conflict cases
- Need to distinguish the “alienated child” (unreasonable rejection) from the “estranged child” (understandable fear or rejection)

# Family Law (divorce & separation)

- Abuse cases have priority for legal aid, but still problems with getting effective legal services for abuse victims, who are often without \$
- increasingly, but not uniformly, judges & assessors consider spousal abuse as a factor in custody & access disputes
- **biggest issue is often proof of violence, especially if no criminal prosecution**

# Concerns in Family Court

- Abusive spouse may use Family Court process to attempt to maintain control (often self-represented)
- While “the law” (statutes & precedents) recognizes spouse abuse as factor in Family Court, in practice often settle in a way that may not adequately protect
  - Pressure on victims to settle from judges, lawyers & mediators
  - Financial & psychological pressure to settle
  - Difficulty of proof may lead to settlement
- If trial, judge may discount allegations of abuse
  - Not enough evidence of abuse
  - Victimized Mom may present poorly
  - Some judges give little weight if not child abuse

# Simultaneous family & criminal proceedings

- Need for coordination between court proceedings
- Criminal court orders (bail, probation and jail) which restrict conduct of abuser may affect family law proceedings
- Often defence counsel want criminal trial first, as statement or affidavit from civil case could be used to impeach credibility in criminal trial
- Should child's welfare have to wait for resolution of criminal trial?

- In practice, involvement of police at arrest often facilitates proof of abuse
- In theory, standard of proof is higher in criminal court & rules of evidence more restrictive & Charter of Rights may give defences -> **criminal acquittal should not be proof in civil case that abuse did *not* occur**
- But criminal conviction is generally accepted as proof of abuse in civil case

# The Challenge of Interim Orders

- Evidence based on affidavits, untested & often conflicting.
- False & exaggerated allegations vs. false denials
  - Justice Mary Lou Benotto (Ontario, 1995) :  
“Domestic abuse is abhorrent. I have never found a judicial officer who treated physical cruelty with anything but the seriousness it deserves. *However, the term ‘abuse’ has been diluted beyond all proportion.* There is scarcely a separated spouse who does not believe that he or she was in abusive relationship. *Abuse is a powerful term. But it is routinely used to describe shouting, badgering, voice raising, walking away when angry.* Think for a minute about your private relationship. ***So as not to raise a bald allegation, the particulars of the given marital discord become very detailed.***”

# Interim Family Law orders

- exclusive possession and custody linked, both at interim & trial stage
- affidavit evidence from independent witnesses very helpful to corroborate abuse and effect on children (eg. Police, MD, nurse, babysitter, )
- Judges reluctant to make an interim order that will be influential at trial, especially about custody. Judicial reluctance is understandable, but if clear evidence of abuse or high risk -> judge should decide interim custody with protection of safety as priority & order exclusive possession

# Dilemma of whether to raise abuse

- If violence not raised at interim stage, only raising later may not seem credible
- BUT difficult to prove at interim stage
- Concerns of victim about child welfare involvement

# *Dhillon v Dhillon* (Nov. 2001)

Interim order- Veale J. Yuk. S.C.

- threats, controlling behaviour & previous assaults, but charges withdrawn due to woman recanting
- peace bond in 1997 & resume cohabitation
- further assaults with child seeing abuse of mom
- July 2001, further assault with charges laid -> Ms. D. & child (5yrs) in shelter
- Father denies all spousal abuse
- Interim ex parte custody order to mother & restraining Mr. D.

## Justice Veale

- For purposes of interim motion accepts version of events of Ms. D “because it is **supported by RCMP involvement and medical records**” based on prior incidents
- **“when physical or psychological abuse exists between the parents or between a parent and a child, access is not routinely granted.”**
- Even though no expert evidence, accepts psychological harm to child may occur
- Access to father only if supervised by non-family member.

# Spouse Abuse as Family Court Factor: Legislation

- “Best Interests of Child” test
- Almost all USA jurisdictions have explicit provisions that spouse abuse is to be a factor in best interests decisions
- In Canada, only in Nfld. & Alberta
- In Canada, proposed for inclusion in *Divorce Act* (Bill C-22, not enacted)

# Spouse Abuse as Family Court Factor: Canadian Precedents

- *Young v Young* - 1989, Boland J. (one of Canada's first women judges) "relevancy" of spousal abuse to "ability to parent"
- Abuser is poor role model & has negative emotional effects on children
- Potential for direct abuse of children, especially if anger management issues, repeated or serious spousal abuse.
- Dilemma of abuse having undermined the psychological health and parenting capacity of victim

## Spouse Abuse & wishes of child

- Child (especially boys) may identify with the stronger abusive parent & join in degrading victim. Abusive father may have “princess-like” relationship to daughter - *Thatcher*
- Court should give limited weight to desire of child to live with parent with history of abusing spouse - *AJM v TDM* (Ont 1996)
- Fears of child are significant if there is history of spousal abuse & violence outside family, even if limited threat of recurrence (*Roda*, Ont 2000).
- But need to be aware of over-identification with exaggerating ‘victim.’ (*Sekhri v Mahli*, Sask 1997)

## **Spousal Abuse as a best interests factor: access (visitation)**

- Access often a greater concern than custody
- Access exchange may be time of argument with potential for violence.
- possible need for supervision of visitation or supervision of transition
- supervised access should usually not be seen as long term solution : expensive & strained
- wishes of child should not be determinative in high-conflict cases as potential for manipulation

- Appropriate to take account of effect of post separation abuse or emotional harassment accompanying access on mother's capacity to parent (*BPM v BLDEM*, Ont CA 1992)
- Appropriate to take account of "reasonable fears" of custodial parent and child (based on history of serious violence) as reflected in child's wishes. Fear affects well-being of child, even if child's fears are transferred from mother and threat of future violence seems low (*Roda v Roda*, 2000, Ont. Sachs J.)
- Even more important to take account of threat to physical safety of mother & child; threat of abduction

## For child-related civil cases: assessments & experts important

- assessment can be most effective way to provide certain types of information to court
- *qualified* expert can relate general literature to specific facts
- assessor can communicate wishes & fears of child to the court, and explain context
- assessor must have training in effects of domestic violence issues on spouses and children

# Experts & spousal abuse - assessments

- Need education, training and knowledge specifically about spousal abuse & effects on children or report should be disregarded if spousal abuse concerns: *Haider v Malach*, 1999 (Sask C.A.)
- Preferable to see children and all parties
- JA v DA (Ont 2002) court discounts expert (Dr. Jaffe):
  - comes to case long after separation;
  - relies on ‘victim’s’ self-reports of abuse;
  - never sees Dad or kids;
- therapist/doctor for one parent may have special insights, but support of patient/client is a problem, especially for “institutional expert” (e.g shelter worker) but may need to use

## Judicial control of parental conduct?

- How far should judges go in trying to control parental conduct in high conflict divorce?
- As a short term measure, detailed orders can provide structure & even facilitate communication (eg note books), especially if lack of mediation or counselling facilities
- May be desirable to appeal to “better nature” (no derogatory comments by parents)
- But courts always need to be aware of safety issues & risk

# Need to recognize limits of the law

- detailed orders may be invite return to court to enforce or vary
- Some orders leave child in position of having to “tell on” the parent -> not desirable in high conflict situations
- Detailed orders do not provide protection in situations where serious risk of future violence. High risk should be dealt with by supervision of access or exchange, or termination of access

# Child Protection

- Men who abuse their partners often abuse children (25% - 75%).
- Abused woman will feel victimized if the child welfare agency thinks she cannot protect her children and removes them from her care.
- In several provinces spousal violence may itself may be a basis for reporting obligation & agency involvement to protect children (eg Alta & Sask.)
- **Spousal abuse may contribute to situations of neglect or emotional abuse, and may also pose direct physical risk to child**
- Increasing number of child abuse & neglect reports to child welfare agencies in spouse abuse situations

# Child protection & spouse abuse factors

- Nature of abuse, likelihood of recurrence
- Effect of abuse on emotional state & parenting capacity of victim
- effect of abuse on child, wishes of child & age of child & strength of bonds to parent
- assessment may be important - try to have both parents assessed

- Other parenting factors that are often related to spousal abuse
  - e.g alcohol & drug abuse; depression
- If parents together, likelihood of recurrence of abuse? Likelihood that child will be protected?
- If parents separated, how confident is the court or agency that abuser will not return & victim will protect child?

# Learning More

## Recent Publications

- P. Jaffe, L. Baker & A. Cunningham, *Protecting Children From Domestic Violence* (Guilford Press: New York, 2004)

- Bala, *Spouse Abuse & Family Law* (2004)

[www.law.queensu.ca/faculty/bala/papers/spouseabuse&familylaw2004.htm](http://www.law.queensu.ca/faculty/bala/papers/spouseabuse&familylaw2004.htm)

- *Family Violence in Canada: A Statistical Profile 2005* (Statistics Canada, July 2005) [www.statscan.ca](http://www.statscan.ca)

## Forthcoming, 2005

- Jaffe, Crooks & Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Promising Practices* (Justice Canada)

- Contact your local shelter for abused women