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“THIS ISN’T JUSTICE”: ABUSED WOMEN NAVIGATE FAMILY LAW IN GREATER VANCOUVER

Wendy Chan & Rebecca Lennox^{* **}

With the implementation of the Family Law Act in 2013, the family legal system in British Columbia saw a series of progressive reforms. These include the recognition of emotional, psychological, and financial control as family violence, a new protection order process to replace the limited restraining orders formerly available to abuse victims, a mandate that courts consider how exposure to family violence impacts children, and minimum mandatory training standards for family dispute resolution professionals. While there has been a great deal of legal commentary on these new provisions, there is a paucity of scholarly research documenting the experiences of frontline workers who support abused women. We address this lacuna, drawing on in-depth interviews with family lawyers and frontline advocates who assist women exiting violent relationships in greater Vancouver. Our findings highlight the many challenges facing women in the family law system and suggest that the perceived unfairness many women experience is neither accidental nor uncommon.

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Rather, structural barriers to getting into the courtroom, in addition to widespread judicial ignorance about family law and family violence disadvantage women seeking just separations from abusive partners. To better meet the needs of abused women in greater Vancouver, increased funding for legal aid and support services, mandatory family violence training for judges making decisions on family files, and the transformation of victim-blaming attitudes within and beyond the courtroom are needed.

INTRODUCTION

The impact of domestic violence on families in Canada is far-reaching and devastating. While the legal system in Canada has undergone many reforms to better recognize the dynamics of domestic violence in legal disputes, many critics wonder why it has taken so long. For example, only after years of lobbying and advocacy did Canada’s *Divorce Act* finally mandate that courts must consider the impact of family violence when families separate.¹ This welcomed change to the *Divorce Act* not only acknowledges the impact of family violence, but also recognizes different forms of non-physical violence such as psychological abuse, emotional abuse, and coercive and controlling behaviour.² Yet this significant change for victims of domestic violence is tempered by the recognition that changes to the law alone are not sufficient to ensure women’s safety. Often, as women seek to negotiate separation and custody arrangements with their abusive partners, they find themselves in front of judges who are reluctant or refuse to believe them, are accused of parental alienation if their partner’s abusive behaviour is mentioned, and are re-traumatized when they are required

¹ See *Divorce Act*, RSC 1985, c 3 (2nd Supp), as amended by An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, SC 2019, c 16.

² See Canada, Department of Justice, *Divorce and Family Violence* (Fact Sheet) (Ottawa: DJ, 7 March 202).

to conduct face-to-face negotiations with their abuser.³

Family law in Canada has been slow to acknowledge the role of domestic violence in protecting families during difficult times. Some scholars point out that even in family courts, a specialized system for dealing with family conflict, there is hostility and a “dynamic of resistance” towards any mention of abuse and violence in the family.⁴ In BC, the new *Family Law Act* (FLA) that took effect in March 2013 included requirements that family violence—which includes emotional, psychological, physical, and sexual abuse—be considered a factor in resolving family conflicts. Many were optimistic that this would protect women and their children, since courts would be required to recognize the impact of family violence and thus prioritize women and children’s safety in negotiations over property, spousal support, and parenting arrangements.⁵ However, the optimism of these early days has been tempered by evidence that judges continue to make problematic assumptions about family violence by

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- ³ See Linda C Neilson, “Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?” (2018), online (pdf): *The FREDA Centre* <www.fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf>; Elizabeth Sheehy & Susan B Boyd, “Penalizing Women’s Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases” (2020) 42:1 JSWFL 80.
- ⁴ Joan Meier, “Victims of Domestic Abuse Find No Haven in Family Courts,” *The Conversation* (2 December 2021), online: *The Conversation* <theconversation.com/victims-of-domestic-abuse-find-no-haven-in-family-courts-159192>.
- ⁵ See John-Paul Boyd, “Easter Eggs and Bad Eggs: Surprises in the Drafting and Subsequent Interpretation of the Family Law Act” (May 2015), online (pdf): *Canadian Research Institute for Law and the Family* <prism.ucalgary.ca/handle/1880/107224>.

underestimating women’s violence concerns or pursuing the goal of shared parenting, despite knowing one parent has been abusive towards the other parent.⁶

This paper explores the challenges women experience when they separate from their abusive partners. While there has been much legal commentary about the *FLA* in BC, there is a paucity of scholarly research documenting the experiences of frontline workers supporting women and their children attempting to leave abusive relationships. Our discussions with family lawyers and advocates in the greater Vancouver region are an effort to fill that void. Data from our in-depth interviews highlight the many challenges facing women in BC’s family law system and suggest that the perceived unfairness many women experience is neither accidental nor uncommon. Rather, inadequate legal aid and unaffordable lawyers’ fees prevent most women from getting their day in court. Women who do access the courtroom navigate widespread judicial ignorance about family law, and as a result, routinely receive judicial decisions predicated on misunderstandings about the dynamics of domestic violence.

This paper proceeds in four main sections. In the first section, we contextualize our research findings by providing an overview of the history of the *FLA* in British Columbia. In the second section, we detail our data collection and analysis methods. The third section presents our key research findings. We begin the Findings section by reviewing the challenges abused women encounter in

⁶ See Susan B Boyd & Ruben Lindy, “Violence Against Women and the BC Family Law Act: Early Jurisprudence” (2016) 35:2 CFLQ 101.

getting into the courtroom, and we conclude the section by addressing the issues abused women face once they are in the courtroom. We conclude our paper by identifying that increased funding for legal aid, mandatory family violence training for judges, and the transformation of victim-blaming attitudes within and beyond the courtroom are necessary changes for improving abused women's access to justice and family court outcomes.

DOMESTIC VIOLENCE AND THE *FAMILY* *LAW ACT* IN BC

When the *FLA* in BC came into effect in 2013, many were hopeful that the new provisions would make it less challenging for families to resolve their conflicts and to ensure that all parties involved in family cases would be treated fairly. Among the many notable changes to the *FLA* was a definition of family violence which encapsulates physical and sexual abuse, as well as non-physical forms of abuse, such as coercive and controlling behaviour.⁷ In addition, family violence was defined as including exposing children, either directly or indirectly, to violence.⁸ Since the implementation of these changes, judges must consider whether non-physical family violence is at issue before making decisions on family files.⁹ This is an important development, given that non-

⁷ See *Family Law Act*, SBC 2011, c 25, s 38 [*FLA*].

⁸ *Ibid.*

⁹ See Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11 at 17; SB Boyd & Lindy, *supra* note 6.

physical forms of abuse can have more damaging consequences on women and children than physical violence.¹⁰ Courts are now more willing to recognize the gendered context in which violence occurs, but there remains significant judicial discretion when it comes to deciding what counts as abusive behaviour.¹¹ Although judges, lawyers, and police officers may recognize the presence of non-physical violence, they still do not understand the safety risks women face, and as a result, women are not given the protections they need.¹² Thus, while the more expansive definition of family violence in the *FLA* attempts to address non-physical abuse, Linda Neilson points out that if judges and other legal actors are to ensure just outcomes for women, they need to accurately assess the presence of family violence and its impact on their decision making.¹³ Haya Sakakini concurs, noting that judges and lawyers need to have a multidimensional understanding of family violence in all its forms, which includes ensuring that they are consistently screening for violence to effectively meet the needs of women and children.¹⁴

¹⁰ See Silvia Straka & Lyse Montminy, “Family Violence: Through the Lens of Power and Control” (2008) 8:3 JEA at 255.

¹¹ See Martinson & Jackson, *supra* note 9 at 11.

¹² See Haley Hrymak & Kim Hawkins, “Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger” (January 2021) at 25, online (pdf): *Rise Women’s Legal Centre* <womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf>.

¹³ See Linda C Neilson, “At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases” (2014) 52:3 FCR 529 at 540.

¹⁴ See Haya Sakakini, “Psychological Abuse Claims in Family Law Courts in BC: Legal Applications and Gaps” (2021) 34:1 Can J Fam L

The *FLA* encourages couples to settle disputes out of court through a variety of approaches, including mediation and lawyer-assisted negotiations. These out-of-court proceedings are an effort to avoid adversarial forms of dispute resolution that would be drawn out, costly, and more emotionally harmful.¹⁵ Alternative dispute resolutions have been shown to be cheaper and faster, and many family lawyers point out that children also benefit since they do not have to witness their parents battling it out in court.¹⁶ In order to increase the effectiveness of out-of-court approaches, *FLA* regulations require dispute resolution professionals are required to undergo family violence training.¹⁷ However, Rise Women’s Legal Centre argues that the *FLA* does not go far enough in prioritizing women’s safety.¹⁸ Although new training and practice

1 at 9; Pamela C Cross et al, “What You Don’t Know *Can* Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners” (February 2018) at 16, online (pdf): *Department of Justice Canada* <justice.gc.ca/eng/rp-pr/jr/can-peut/can-peut.pdf>.

- ¹⁵ See Rachel Treloar & Susan B Boyd, “Family Law Reform in (NeoLiberal) Context: British Columbia’s New Family Law Act” (2014) 28:1 *IJLPF* 77 at 82.
- ¹⁶ See Joanne J Paetsch, Lorne D Bertrand, & John-Paul E Boyd, “An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods” (December 2017), online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcjc.org/sites/default/files/docs/Cost-Implication-of-Family-Law-Disputes.pdf>.
- ¹⁷ See *FLA supra* note 7 at s 8. Note that s 8 of the *FLA* requires lawyers to assess their clients for family violence but does not require lawyers to have any family violence training.
- ¹⁸ See Zara Suleman, Haley Hrymak & Kim Hawkins, “Are We Ready to Change? A Lawyer’s Guide to Keeping Women and Children Safe in BC’s Family Law System” (May 2021) at 7, online (pdf): *Rise Women’s Legal Centre* <womenslegalcentre.ca/wp-content/uploads/

standards in the *FLA* mandate family dispute resolution professionals to screen for family violence and relationship power imbalances, dispute resolution professionals are not required to put a safety plan in place for women if violence is disclosed, nor are they required to raise the issue of family violence and its impact once it has been disclosed.¹⁹ Failing to ensure women and children’s safety will undermine the goals of the *FLA* and lead to inconsistent outcomes.

A key notable change in the *FLA* is the requirement to consider the presence and impact of family violence when making a “best interests of child” assessment. Children who are exposed to violence in the family are often forgotten victims, and courts have historically imposed shared parenting and custody arrangements with abusive fathers.²⁰ The prevailing belief was that children should have maximum access to both parents. Thus, judges ignored the presence of violence in the family, expecting abused women to make things work with their abusive spouses for the sake of the children.²¹ This problematic approach is acknowledged in the *FLA*. The Act explicitly states that it must not be presumed “that parenting time

2021/07/Are-We-Ready-to-Change-Rise-Womens-Legal-May-2021.pdf>.

¹⁹ *Ibid* at 23.

²⁰ See Jane EM Callaghan, Joanne H Alexander, Judith Sixsmith & Lisa Chiara Fellin, “Beyond ‘Witnessing’: Children’s Experiences of Coercive Control in Domestic Violence and Abuse” (2018) 33:10 JIV 1551; Sheehy & SB Boyd *supra* note 3.

²¹ Sheehy & SB Boyd *supra* note 3.

should be shared equally among guardians.”²² By requiring courts to consider violence when assessing the best interests of the child, and emphasizing the safety, security and well-being of the child, courts are recognizing that children who witness violence can be harmed by a relationship with a parent who is abusive towards the other parent. Yet, as Rachel Treloar and Susan Boyd note, the “default” is still that even upon separation, each parent is the child’s guardian and has full parenting responsibilities.²³ In the *FLA*, shared parenting remains a goal that is prioritized over safety issues, a contradiction that has left many critics wondering if the courts are giving proper consideration to the impact of violence on children.

Protection orders are an important tool for helping to keep women and children safe. Under the previous *Family Relations Act* (FRA), restraining orders were provided, but some critics opined that they were unsatisfactory due to limited availability and ineffective enforcement.²⁴ Protection orders under s. 183(2) of the *FLA* have replaced restraining orders, and they seek to address the shortcomings of restraining orders by being available to a broader range of family members and available to be applied for at any time.²⁵ Protection orders are made by a judge to protect one or more persons, in some

²² See *FLA* s 40(4)(b).

²³ Treloar & SB Boyd, *supra* note 15 at 78.

²⁴ See British Columbia Ministry of Justice, “Factsheet: Protection Orders Under the Family Law Act” (revised April 2016), online (pdf): *British Columbia Ministry of Justice* <gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/protection_orders.pdf>.

²⁵ *Ibid.*

iterations by requiring the named individual to have limited or no contact with the person(s) being protected.²⁶ The *FLA* provides for the availability of protection orders for up to one year, and gives the police the ability to use reasonable force to reinforce orders when protection orders are breached.²⁷ Although research on protection orders is limited, anecdotal evidence suggests that judges have been reluctant to issue year-long protection orders and are more inclined to grant short-term orders, thus requiring women to go to court continually to renew the order and worry about whether they will be at risk if the order is not renewed.²⁸ In addition, there appears to be some resistance from the court to grant women protection orders *ex parte*; that is, without notifying the party against whom the order is sought, even though such applications are permitted in the *FLA*.²⁹ Even when protection orders are granted, preliminary accounts suggest that when they are breached, police do not always respond.³⁰ Obstacles to accessing and enforcing protection orders undermine women and children’s safety. Given ongoing issues, protection orders arguably provide only limited improvements over restraining orders.

While the 2013 *FLA* is a significant improvement over previous legislation, many challenges remain for

²⁶ See Government of British Columbia, “Information on Protection Orders” (2022), online: *Government of British Columbia* < gov.bc.ca /gov/content/safety/crime-prevention/protection-order-registry/qa>.

²⁷ See *FLA* at s 183, 186, and 188.

²⁸ Suleman, Hrymak & Hawkins, *supra* note 18 at 30.

²⁹ *Ibid.*

³⁰ Suleman, Hrymak & Hawkins, *supra* note 18 at 33.

abused women navigating the family law system. Myths and stereotypes about domestic violence continue to exert significant influence over the attitudes and assumptions held by legal professionals. The secondary literature highlights how cases involving family violence continue to be viewed as an exception, rather than being recognized as a widespread reason many women separate from their spouse.³¹ It has also been recognized that courts find it difficult to determine if claims of family violence are truthful, since the dynamics of family violence are complex. Grasping the many forms of violence along with the subtle nuances of how these dynamics manifest during separation is no easy task. This has led Martinson and Jackson to argue that judges need to have specialized knowledge and skill to adjudicate cases involving family violence.³² For example, in order to better recognize the dynamics of coercive control, courts must not ask abused women to negotiate or continually interact with their abusers over parenting arrangements. The legal system also needs to be more attuned to the safety risks associated with their decision-making. These risks are highest in situations involving non-physical violence, where the use of coercive or controlling behaviour by the abuser can put women and

³¹ See Amanda Dale, Krysa Maki & Rotbah Nitia, “A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence” (30 April 2021), online (pdf): *Roadmap for the National Action Plan on Violence Against Women and Gender-Based Violence* < nationalactionplan.ca/wp-content/uploads/2021/06/NAP-Final-Report.pdf>; Martinson & Jackson, *supra* note 9; SB Boyd & Lindy, *supra* note 6; Janet Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners” (2015) 32:2 WYAJ 149 at 149.

³² Martinson & Jackson, *supra* note 9 at 16.

children at risk.³³ Finally, family law courts have failed to fully appreciate how some abusers use the legal system as a form of abuse by engaging in endless legal processes that drain the funds of their abused spouse and force her to self-represent.³⁴ Abusers have shown that the family law system is vulnerable to manipulation and misuse. While the family law system may not have been designed to deal with ongoing violence within families, it should avoid stigmatizing, stereotyping, and indirectly punishing women who find themselves in abusive situations by failing to acknowledge and support their predicament.

Engaging with the legal system is a difficult process, and people without the necessary financial, linguistic, social, and emotional resources find it even more challenging. Legal aid is one of the few supports available for women who lack the financial resources to hire legal representation. Yet, it is well documented that the legal aid program in BC is poorly resourced. In the context of widespread financial constraint and fewer government resources across Canada, the BC Liberal government slashed legal aid funding during their time in office in the early 2000s, leaving individuals, primarily women, on their own to manage family law issues.³⁵ Within family law, BC residents qualify for legal aid in a very limited number of situations, such as if they are extremely low income and are enduring a “serious family situation,” the latter of which is defined as situations that require an immediate court order to ensure women’s and children’s safety and situations

³³ Sakakini, *supra* note 14.

³⁴ *Supra* note 12 at 33–34.

³⁵ *Supra* note 12 at 22.

involving a spouse that is consistently denying women parenting time or has removed children from the province without consent.³⁶ Women who are eligible for legal aid under these limited criteria frequently have to choose which legal issues they want to address, since the number of legal aid hours granted are rarely enough to complete all the necessary legal processes.³⁷

In their report, *Agenda for Justice*, the Canadian Bar Association note that four of every ten family law litigants are unrepresented.³⁸ Findings of the National Self-Represented Litigants Project reveal that the most frequently cited reason for being unrepresented is an inability to afford counsel. Unrepresented or “self-represented” litigants’ cases tend to move through the court system slowly because litigants need extra time to prepare and court officials are often pressed into service to help them, raising the question of whether any real savings are achieved by limiting legal aid funding for family law matters.³⁹ As Jaime Sarophim observes, the impact of legal

³⁶ See Legal Aid British Columbia, “Serious Family Problems” (2022), online: *Legal Aid British Columbia* <legalaid.bc.ca/legal_aid/family Issues>.

³⁷ See West Coast Women’s Legal Education and Action Fund, “Media Backgrounder: Single Mothers’ Alliance v BC” (27 April 2017), online (pdf): *West Coast Women’s Legal Education and Action Fund* <westcoastleaf.org/wp-content/uploads/2017/04/Media-Backgrounder-SMA-v-BC.pdf>.

³⁸ See Canadian Bar Association—British Columbia Branch, “Agenda for Justice” (2021) at 6, online (pdf): *Canadian Bar Association—British Columbia Branch* <cbabc.org/Our-Work/Agenda-for-Justice>.

³⁹ *Ibid*; See Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (May 2013) online (pdf): *Representing*

aid cuts in BC disproportionately affects women since they are the applicants for family law legal aid over three-quarters of the time.⁴⁰ Not only does self-representation impact the family court system, but women who self-represent become impoverished, are more likely to experience on-going violence and abuse from their ex-spouses, are forced to give up child and/or spousal supports, and are at risk of receiving an unfavorable parenting arrangement.⁴¹

It has been almost ten years since the *FLA* came into effect, and one of the key concerns emerging from family legal proceedings in BC is the issue of spousal violence and allegations of parental alienation. Parental alienation involves “a parent [being] perceived as colluding with the child in order to exclude the other parent,” such that the child may refuse to visit the other parent.⁴² Existing research suggests that women seeking separation from abusers are vulnerable to high rates of post-separation violence when abusive men use parenting arrangements to exert psychological violence and control, or when they undermine mother-child relationships, mothers’ parenting, and their identities as mothers through

Yourself Canada, <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

⁴⁰ See Jaime Sarophim, “Access Barred: The Effects of the Cuts and Restructuring of Legal Aid in B.C. on Women Attempting to Navigate the Provincial Family Court System” (2010) 26:2 Can J Fam L 451 at 452.

⁴¹ *Ibid* at 451.

⁴² Simon Lapierre & Isabelle Côté, “Abused Women and the Threat of Parental Alienation: Shelter Workers’ Perspectives” (2016) 65 CYS 120 at 120.

non-violent coercion strategies.⁴³ Women often limit their child's contact with the abusive parent under these circumstances to protect themselves and their children, but when they do, they are accused of parental alienation. Sheehy and Boyd's research found that mothers were two times more likely than fathers to be accused of parental alienation.⁴⁴ Allegations of parental alienation are most common when women oppose father-child contact, when they raise concerns about the child's safety, or when they request supervision for father-child contacts.⁴⁵ Compounding these challenges is the difficulty of having disclosures of partner violence taken seriously in parenting and separation agreements. When abusers accuse their ex-partners of parental alienation, not only are abused women's claims of violence and credibility questioned, but they are also seen as unable to protect their children.⁴⁶ Many women separating from abusive spouses will limit what they say about their experiences of domestic violence in court over concerns that speaking about violence will lead to accusations of parental alienation.⁴⁷ Neilson's research confirms that women who raise the issue of

⁴³ See Vivienne Elizabeth, "Separating from Violent Male Partners: A Resistant Act in the Midst of Power Relations" (2003) 4:3 *JIWS* 62 at 71; Sheehy & SB Boyd, *supra* note 3 at 81.

⁴⁴ Sheehy & SB Boyd, *ibid* at 82.

⁴⁵ See *supra* note 12 at 45-46; Neilson, *supra* note 3 at 34-35; Sheehy & SB Boyd, *supra* note 3 at 88-89.

⁴⁶ See Julia Krane, Susan Strega & Rosemary Carlton, "God Couldn't Be Everywhere So He Created Mothers: The Impossible Mandate of Maternal Protection in Child Welfare" in Strega et al, eds, *Failure to Protect: Moving Beyond Gendered Responses* (Nova Scotia: Fernwood Publishing, 2013) at 11.

⁴⁷ See *supra* note 12 at 45.

domestic violence receive harsher treatment by the courts than men, and that judges perceive women to be overly protective of their children’s safety if domestic violence is raised.⁴⁸ In this context, accusations of parental alienation operate as an effective defense insofar as judges regard allegations of domestic violence as the mother’s attempt to alienate the children from their father.⁴⁹ A broad range of professionals including child protection and family court officers can level accusations of parental alienation against abused women. This highlights the treacherous legal terrain abused women navigate, which entails risks of being revictimized, discredited, and blamed for not protecting their children, and being accused of being bad mothers when they raise violence concerns.⁵⁰

Women litigants with a history of domestic violence in the family law system in BC continue to encounter numerous obstacles in their legal proceedings. The changes to the FLA have been significant, but the application of the legislation has arguably not resulted in better access to justice or greater gender equality. As Jennifer Koshan, Janet Mosher and Wanda Wieggers aptly point out, engaging with the legal system is often less about accessing justice and more likely to result in greater inequalities between abused women and their abusive spouses.⁵¹ Many researchers and domestic violence

⁴⁸ See Neilson, *supra* note 3 at 34.

⁴⁹ See *ibid* at 34.

⁵⁰ See Sheehy & SB Boyd, *supra* note 3 at 88–89.

⁵¹ See Jennifer Koshan, Janet Mosher & Wanda Wieggers, “The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy” in Trevor Farrow & Lesley Jacobs, eds, *The Justice Crisis: The*

advocates concur, citing their dismay with how the legal system is unable to adequately respond to this longstanding social problem and keep women and children safe.⁵²

METHODS AND DATA

The fieldwork for our research study took place in 2018–2019. We interviewed a broad range of legal and non-legal service providers who help abused women navigate the legal system. We conducted semi-structured interviews to solicit information about the many legal problems abused women experience and seek to resolve. Our initial participants were recruited by identifying lawyers through a publicly available provincial legal database of family cases (CANLii). Cases involving domestic violence were chosen from the search conducted, and the legal counsel in these cases were identified as potential participants. From these initial contacts, a combination of snowball sampling and referrals resulted in seventeen participants. Each interview lasted approximately seventy-five minutes in length and was digitally recorded, transcribed, and coded thematically in *NVivo*, a qualitative software package. We descriptively coded transcripts to capture recurring themes amongst the interviews.

Cost and Value of Accessing Law (Vancouver: UBC Press, 2020) 149 at 164.

⁵² See Women’s Shelters Canada, “A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence” (April 2021) at 63, online (pdf): *Women’s Shelters Canada* <nationalactionplan.ca/wp-content/uploads/2021/06/NAP-Final-Report.pdf>; Cary Ryan et al, “A Review of Pro-Arrest, Pro-Charge, and Pro-Prosecution Policies as a Response to Domestic Violence” (2022) 22:1 JSW 211.

Our discussion in this paper emerges from a SSHRC-funded project examining access to justice issues in domestic violence cases in British Columbia, Alberta, Saskatchewan, and Ontario. The project focused on the issues abused women encounter when they navigate multiple legal systems and sought to uncover specific barriers to justice encountered by multiply marginalized women. As findings about specific access to justice barriers encountered by multiply marginalized women are beyond the scope of this paper, we refer readers to Wendy Chan’s *Hiding in Plain Sight: Immigrant Women and Domestic Violence* for an intersectional analysis of issues encountered by abused immigrant women in BC.⁵³

In this paper, we confine our discussion to legal issues abuse survivors seek to address in family court. Our data is not restricted to family lawyers and family advocates. Rather, we draw on all data that speaks to issues of family law, regardless of who is speaking. This reflects the nature of the support provided to abused women. For example, many of the lawyers we interviewed specialized in family and immigration law, and many participants working in the non-profit sector managed a variety of family law, immigration, and criminal justice issues.

Our participants come from diverse backgrounds, with nine actively working as lawyers in private practice or as in-house lawyers for a community organization at the time of interviewing. Five participants worked in the non-profit sector as family therapists, community and support workers, and transition housing staff, and three participants

⁵³ Wendy Chan, *Hiding in Plain Sight: Immigrant Women and Domestic Violence* (Halifax: Fernwood Publishing, 2020).

provided private non-legal services as therapists and financial advisors. Eight participants, all of whom worked in the non-profit sector, served female clients only. The remaining nine participants served both male and female clients. Amongst the participants in private legal or professional practice, almost all reported taking on legal aid cases or *pro bono* files. Most participants in private practice acknowledged that domestic violence is common in many of their files, but that they had not received any formal training to manage domestic violence issues in their work since many started working at a time when formal training was not available yet. The clients our participants support are equally as diverse and represent a range of racial and ethnic backgrounds, socio-economic statuses, education levels, and occupational backgrounds. As required by the FLA, our participants screen their clients for family violence, but many reported that standard screening tools—such as explicitly questioning clients about current and previous family violence victimization—were ineffective in uncovering violence. Thus, follow-up probing questions and building close relationships with clients to establish trust were required to uncover the violence in their clients' lives.

CASH, KIDS, AND PROTECTION: FAMILY LAW ISSUES IN GREATER VANCOUVER

Abused women navigate a variety of legal issues when they seek separation from their spouse, including: dividing property, debt, and assets with former spouses; negotiating the guardianship of children and parental responsibilities post-separation; and securing protection orders to minimize the risk of further violence. Our research findings

demonstrate that these core issues are rarely resolved to the satisfaction of the abused women for whom our interviewees advocate. We identify two key barriers to justice in greater Vancouver’s family law system. The first barrier women encounter is getting into the courtroom. Given severe funding cuts to Legal Aid BC and the unaffordability of private practice lawyers, many women simply do not have the resources to get their day in court. The second barrier women encounter is judicial ignorance in the courtroom. Judges’ lack of competency in family law and family violence produces judicial decisions predicated on misunderstandings about the dynamics of domestic violence, which negatively impact abused women both in the short and long term. We address these barriers in turn.

GETTING INTO THE COURTROOM: ACCESSING LEGAL REPRESENTATION

The cost of legal services was identified in our data as a significant barrier for abused women. Our participants stated that lawyers’ fees in greater Vancouver place access to personalized legal service out of reach for most women. Participant #3 stated, “I’m \$575 an hour, [and] juniors in downtown [Vancouver] are starting at \$375 an hour.” Since “market rates are so high...\$15,000 might last [an abused woman] a month” (Participant #15). These hourly rates mean that even women with a healthy disposable income struggle to manage the costs of retaining a lawyer for the duration of their needs. Another family lawyer (Participant #8) explained: “[Lawyers are] absurdly out of reach of not just lower-income, but middle-class [women]. Anyone who makes less than \$100,000 a year is going to be emptying their savings, maxing their lines of credit, and

still not finishing their file.” In 2015, the median after-tax income for women in Vancouver was under \$26,000.⁵⁴ This means that most women entering the family law system will not have the assistance of a private lawyer to represent their interests.

Women who cannot afford to retain a lawyer turn to legal aid for support. However, the stringent eligibility criteria for accessing legal aid, as noted earlier, leave many women without legal support. Our participants stated that their clients are approved for legal aid only if they are at immediate, severe risk of physical harm, and that risk assessments continue to center on evidence of physical abuse. While reducing family violence to physical harm runs counter to the expanded definition of family violence in the 2013 *FLA*, many of our participants stated that legal aid lawyers’ understandings of violence are limited to evidence of “a punch, or blood, or broken bones” (Participant #17). Thus, women who are undergoing financial, emotional, or psychological abuse are frequently denied legal aid. As Participant #15 stated, “unless the violence is such that [women] need a protection order, then they’re not going to get legal aid.” This leaves women enduring non-life-threatening violence with limited options.

⁵⁴ See Statistics Canada, “Census Profile, 2016 Census: Vancouver [Census Metropolitan Area], British Columbia and British Columbia [Province]” (2016), online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CMACA&Code1=933&Geo2=PR&Code2=59&Data=Count&SearchText=vancouver&SearchType=Begins&SearchPR=01&B1=All&TABID=1>. For more on the cost of legal services in Canada, see Noel Semple, “The Cost of Seeking Civil Justice in Canada” (2016) 93:3 CBR 639.

For women who do have access to legal aid, the current cap of thirty-five hours for family files is not sufficient to address all their needs. In practice, a cap of thirty-five preparation hours for family contracts means that women are “cut...in the middle” (Participant #13) by the lawyers selected to assist them. As Participant #11 explained, Legal Aid BC “provide[s] thirty-five hours...and they allow you to leave the file...as long as you get [an] interim order.” Although participants reported that some legal aid lawyers “are very good about saying, ‘we’re almost there...we’ll see this through,’” others “stop in the middle of proceedings” (Participant #14). Stopping in the middle of proceedings is not considered a violation of professional ethics under the current administration of legal aid. Whether or not a family file is complete is deemed irrelevant; instead, interim orders are prioritized. As Participant #9 explained, “as long as there are interim orders that [family court] considers safe...then [legal aid] will stop funding.”

Adding to these challenges are new reporting and control requirements associated with legal aid, which can result in women not accessing the best expertise. As a senior family lawyer explained, “the administration of legal aid is more taxing and expensive than me doing a *pro bono* file” (Participant #6). In addition, legal aid lawyers are paid a fraction of the current market rate, and as such, “no senior counsel who is charging \$400 an hour is going to take a [legal aid] case” (Participant #11). The lack of incentive for senior counsel to accept legal aid contracts may translate into suboptimal representation for abuse survivors. Participant #15 observes, “a lot of legal aid lawyers...don’t have a feminist approach to law, or don’t understand family violence.” At the same time, the limited

number of hours apportioned to legal aid contracts forces pragmatic solutions to women's needs, and "rather than going after what a woman could get, [legal aid lawyers] try to talk [women] into settling things" (Participant #16).

Given the pervasive challenges and limitations associated with legal aid, it is not uncommon for women who start cases through legal aid to not finish their files. This research finding illuminates the fact that legal aid, as the Public Commission on Legal Aid has recognized, is an "essential public service".⁵⁵ In the absence of adequate support from the provincial government, abused women are failing to get their day in court. Moreover, substantial cuts to legal aid, particularly in the area of family-related aid, mean that a two-tiered system of justice persists in BC, with one set of options for women who can access a lawyer, and quite another for those who cannot. Women who cannot afford a private practice lawyer, and whose needs are unmet by limited legal aid, are left accessing duty counsel or self-representing. Notably, family duty counsel is available only to women who meet a stringent low-income threshold and is intended to offer interim or piecemeal advice. While duty counsel can provide advice about family law matters, assist women in preparing documents for court, and speak on simple matters in court, duty counsel cannot provide written advice or represent women in court.

Self-representation is the least desirable option and poses significant challenges for women. They must navigate arcane family law on their own, as well as face the trauma of cross-examining their abuser, which one

⁵⁵ See Treloar & SB Boyd, *supra* note 15 at 94.

participant described as “pretty much the most traumatic thing you could do to a woman” (Participant #8). One experienced family lawyer explained:

[W]omen will...self-represent and it’s a nightmare. [...] The judges are impatient. [...] There are days where I’m like, oh my God, I feel like *I’ve* been beaten to a pulp. But this woman has to get up in front of a senior lawyer and a team of opposing counsel herself. It’s just a nightmare. (Participant #11, emphasis added)

Even when self-represented women are being assisted piecemeal by lawyers, the trauma of facing their abusers prevents women from striking just agreements. Participant #8 described how creating a prefabricated agreement for a self-represented litigant to present to a judge unfolded:

[W]e drew out these beautiful family case conference briefs and told the client, just show this to the judge. She would get there; she would not show it to the judge. She would agree to everything that her ex wanted because just a look [from him] was triggering for her. And she would come in [to our office] and be like, I don’t know what happened.

With limited options available to abused women, it’s not surprising that many of our participants reported a “fantastic rise in the number of self-represented litigants” (Participant #7). The major cuts in legal aid have disproportionately impacted family law services where self-represented cases move slowly through the courts and

court workers are required to help redraw poorly negotiated agreements such that there are little cost savings to be had for the provincial government.⁵⁶

In 2018, as we completed interviews with our participants, the Law Society of BC proposed addressing the problem of self-represented litigants by licensing non-lawyers to practice family law. The Law Society's proposal was intended to meet the needs of the sizable population of BC women unable to pay market rates for lawyers and who were ineligible for legal aid. It suggested licensing "alternate legal service providers," who would complete required family violence training, to service family law files at a lower hourly rate than that of family lawyers.⁵⁷ Our participants' attitudes toward the credentialing of non-lawyers mirror those of the many lawyers and advocacy groups who voiced serious concerns about the Law Society's proposal in 2018.⁵⁸ As one participant (#2)

⁵⁶ *Supra* note 37.

⁵⁷ See Alternate Legal Service Provider Working Group, "Family Law Legal Service Providers: Consultation Paper" (2018), online (pdf): *Law Society of British Columbia* <lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2018AltLegalServiceProviders-Consultation.pdf> [perma.cc/H64Y-TMWV].

⁵⁸ See CBABC Family Law Working Group, "Submissions Of The Canadian Bar Association (British Columbia Branch) Family Law Working Group To The Law Society Of BC Regarding The Family Law Legal Service Providers: Consultation Paper" (2018), online (pdf): *CBABC* <cbabc.org/CMSPages/GetFile.aspx?guid=fa599a35-1a1b-416e-afdb-6d8b42c86b90> [perma.cc/723B-JEV3]; See Law Society of British Columbia, "Consultation Feedback" (2018), online (pdf): *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-12-31.pdf>.

stated:

[T]his...move by the Law Society to licence non-professionals to practice family law will put women and children at huge risk in this province. [...] [Family law] is one of the most important practice areas out there. [...] We have to know about property. We have to know about companies. We have to know about land transactions. We have to know about criminal law. We have to know about taxes. [...] And [the government is] going to turn that over to somebody with a six-month college course.

Participant #3 similarly voiced dissatisfaction with the Law Society’s proposed solution to the rising number of self-represented litigants, observing that: “The answer [to increasing numbers of self-represented litigants] isn’t to say to poor people, well, you get [the equivalent of] a med student who’s been in med school for two years [rather than a doctor]”. While our participants stressed the need for a return to a fully funded legal aid program as the best solution, this recommendation has yet to be taken seriously by the provincial government. Although the 2018 proposal for alternate legal service providers was not approved, the Law Society’s 2020 proposal to allow “licensed paralegals” to provide reduced-cost family legal services reinforces lawyers’ grave concerns about turning a complex, multi-issue practice area over to non-lawyers and thus creating a lesser standard of service provision in family law.⁵⁹

⁵⁹ Licensed Paralegal Task Force, “Licensed Paralegal Task Force Report” (2020), online (pdf): *Law Society of British Columbia* <lawsociety.

These findings demonstrate how the cost of legal representation remains a critical barrier to justice for women in greater Vancouver, and that the absence of adequately funded legal aid leaves women with a variety of untenable options. Yet access to justice issues do not end once women enter the courtroom.

INSIDE THE COURTROOM: BARRIERS TO JUSTICE FOR ABUSED WOMEN

The family law landscape that abused women navigate reveals how widespread judicial ignorance about family violence, combined with long, drawn-out proceedings, results in many women choosing to walk away from their entitlements to financial support, equitable parenting decisions, and measures to protect their safety. Our participants stated that judicial ignorance abounds, given that “the government is appointing legal practitioners to the Supreme Court bench that have no experience or sensitivity in [family law]” (Participant #5). They associate “judicial ignorance” with judges who rule on family files but have limited or no experience practicing family law and limited or no training on family violence. As a whole, our findings show that, in the absence of specialized expertise and training, judges’ preconceived notions about family violence shape judicial decisions, standing in for considerable knowledge gaps.

Other researchers have documented the impacts of

[bc.ca/Website/media/Shared/docs/Initiatives/2020LicensedParalegalTaskForceReport.pdf](https://www.bc.ca/Website/media/Shared/docs/Initiatives/2020LicensedParalegalTaskForceReport.pdf)> [perma.cc/DJ5M-GMQD].

gendered myths and stereotypes on judges’ family law decisions, noting that normative ideas about gender are particularly salient in family law.⁶⁰ For example, the western norm that mothers should assume primary responsibility for children has been shown to inform “best interests of the child” assessments that minimize abusers’ behaviour and blame mothers for not leaving sooner to protect their children.⁶¹ Relatedly, the restrictive stereotype of the “credible victim,” which idealizes women’s passivity and dependence, casts women who assertively advocate for protection orders as exaggerating violence claims, as malevolently seeking revenge against former spouses, and as fabricating abuse to impede fathers’ access to their children.⁶² Our research participants discussed how these stereotypes of women as revengeful and mendacious shape judicial decisions on family files in BC. We summarize the myths and stereotypes identified by participants in Table 1.

⁶⁰ See Jennifer Koshan, “Challenging Myths and Stereotypes in Domestic Violence Cases” (2023) 35:1 *Can J Fam L* 33 (in this issue); Christine Harrison, “Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence” (2008) 14:4 *Violence Against Women* 381; Catherine M Naughton et al, “‘Ordinary decent domestic violence’: A discursive analysis of family law judges’ interviews” (2015) 26:3 *Discourse & Society* 349.

⁶¹ See Lesley Laing, “Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System” (2017) 23:11 *Violence Against Women* 1314.

⁶² See Dana Harrington Conner, “Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women” (2009) 17:2 *Am UJ Gender Soc Pol’y & L* 163; Rachael Pond & Mandy Morgan, “Protection, manipulation, or interference with relationships? Discourse analysis of New Zealand lawyers’ talk about supervised access and partner violence” (2008) 18:5 *J Community & Applied Soc Psychology* 458.

Table 1. Myths and stereotypes informing family judicial decisions in greater Vancouver.

FAMILY LAW ISSUE	MYTHS	STEREOTYPES
KIDS (i.e., parenting time and guardianship)	<p>Women exaggerate or fabricate family violence to alienate children from their fathers and deny fathers parenting time.</p> <p>Separating parents will end family violence, including safety risks to children.</p> <p>Fathers who abuse mothers (even in the presence of children) are good fathers and are a necessary influence in children's lives.</p>	<p>THE GOOD MOTHER</p> <p>The good mother devotes all her time and attention to her children, constantly putting their needs ahead of her own. She is selfless and her record of ensuring her children's health, welfare, and safety is unimpeachable.</p>
PROTECTION (i.e., protection and conduct orders)	<p>Women are hysterical and overly fearful, and they frequently request frivolous protection orders when there is no real danger.</p> <p>Women report violence with the goal of unjustly sanctioning men.</p> <p>Women are not at risk of violence once they have separated from abusers.</p>	<p>THE CREDIBLE VICTIM</p> <p>The credible victim is subject to serious physical injuries. She has corroborating evidence (e.g., medical reports) to support her claims. She reported violence early to the police, and her story remained consistent. She left her relationship promptly after experiencing violence and did not return.</p>

In the following sections, we highlight the considerable judicial knowledge gaps and the implicit reliance by judges on gendered myths and stereotypes. Our participants recount how women who enter family court to resolve issues related to children and protection frequently have their claims of family violence disbelieved, they are accused of using exaggerated violence claims to alienate children from their fathers and obtain frivolous protection orders, and they are measured against stereotypes of good motherhood and ideal victimhood.

Child Support, Spousal Support, and Property Division in Greater Vancouver

As women move through the legal system, they are confronted with less-than-optimal choices. In the long list of family legal issues that need resolution, many clients prioritize issues related to children and safety over financial support and asset division. This can occur for two reasons. First, since spousal support and property division are not covered by legal aid, many women have limited resources to address cash-related issues. Furthermore, since many women have serious concerns about their children’s safety post-separation, they often choose to prioritize child-related issues. Second, family court proceedings can take a very long time to move through the court system such that even women who can afford a private lawyer walk away from cash-related entitlements, choosing economic hardship over continued contact with their abusers. As one of the frontline activists we interviewed stated, “sometimes [survivors] say, I’m tired, I can’t take it anymore. [...] Whatever he wants, whatever he’s giving, I’m okay” (Participant #13). In a system where women have little control, the few choices they are able to

make for themselves, even when less than ideal, can seem empowering.

According to our participants, their clients will accept “whatever he’s giving” even though it is rarely a fair allocation of shared assets. Women are required to fight for their fair share of support, and many women will abandon legal proceedings before they are finalized rather than continuing to fight. Our participants’ clients routinely walk away from an unfinished file. Given how lengthy family legal processes can be, women’s need to disengage from negotiations and conflict in order to preserve their own well-being can become paramount. As one participant stated:

It’s hard [for abused women] to even get a few thousand dollars out of [spousal support and divorce], because the abuser hides their income. [...] [Some clients decide] this fight is not worth the hassle of me getting some money (Participant #9).

As a result, women typically get less than what they are entitled to, particularly in terms of financial support:

If I’m trying to get \$400 a month for child support and it’s taking me \$1,000 a month to try and get that, then I won’t do it. [...] [Clients] start to...walk away from entitlements. [...] They start to...negotiate...so that they don’t have to deal with their abusive spouse (Participant #6).

The long-term result of these decisions is often greater hardship for women trying to re-establish new lives for themselves.

Other women will choose to abandon their legal battles and return to the abusive family home over concerns about financial security and the safety of their children. Some women simply find it too hard to leave, and they lack the resources to survive on their own: There’s one population that...starts leaving and then runs into the barriers and then is, like, forget it I’m going back, and I’ll figure it out (Participant #14). The safety of their children was cited by several participants who noted that their clients simply could not take the risk of leaving their children unsupervised with the abusive spouse. As Participant #8 recounted:

[I had a client who] ended up leaving when the kid was old enough to be able to make a decision to be with her in a clearer way. But you know, she went back. I know so many women who have gone back.

It may take several attempts before women can finally leave their abusers. Along the way, women’s attempts to gain independence from their abusers are repeatedly foiled by a family law system that makes it too onerous to succeed in establishing autonomy. Even when women do break free, the costs of doing so remain unacceptably high.

Negotiating Parenting Decisions

Women seeking to address child-related matters in greater Vancouver encounter a set of myths that paint abused

women as exaggerating or fabricating violence to deny their ex-spouses parenting time and willfully alienate children from their fathers (see Table 1). The stereotype of the “good mother,” which stems from intensive mothering ideals, coalesces with myths of exaggerating, vindictive women to create disparate expectations for mothers and fathers in court.⁶³ While our participants observed that fathers are almost universally given a path to parenting time regardless of their history of absentee parenting and spousal abuse, mothers are held to quite a different standard. Measured against the selfless “good mother,” mothers are expected to be morally unimpeachable as parents.⁶⁴ Fathers’ abuse of mothers, on the other hand, is generally not considered relevant to assessments of the fathers’ parenting skills or children’s safety.⁶⁵

The myth that women exaggerate or falsify violence to alienate children from their fathers and unjustly obtain sole guardianship (see Table 1) was identified as a key barrier to justice by many of our participants. Women’s family violence claims in the context of parenting and guardianship are viewed by the court through “a lens of disbelief and incredulity.”⁶⁶ As a result, judges are more likely to focus on so-called “alienating behaviours” than family violence in their parenting and guardianship

⁶³ Susan Heward-Belle, “Exploiting the ‘good mother’ as a tactic of coercive control: Domestically violent men’s assaults on women as mothers” (2017) 32:3 *Affilia* 374.

⁶⁴ *Ibid.*

⁶⁵ Susan Boyd, “Joint Custody and Guardianship in the British Columbia Courts: Not a Cautious Approach” (2010) 29:3 *Can Fam LQ* 223.

⁶⁶ *Supra* note 12 at 40.

decisions.⁶⁷ One of the lawyers we interviewed stated that, rather than take women’s violence histories seriously—as the FLA mandates is in the best interests of the child—judges instead view claims of family violence as evidence of women’s selfishness:

I think [judges]...look at [family violence cases] as two people who just...won’t put their differences aside for what’s best for the children. [...] [I]t’s just seen as this conflict between two people rather than one person abusing another (Participant #16).

As this comment suggests, the “best interests of the child” is typically interpreted by courts as giving children time with both parents, rather than doing due diligence to ensure that children are not directly experiencing or being exposed to violence. These findings support past research in demonstrating that women’s violence concerns are often misconstrued as parental alienation in the family legal system.⁶⁸ As we discussed previously, accusations of parental alienation can result in women being deemed unfit parents, which puts children in grave danger.⁶⁹

For many judges, protecting the norm of shared parenting continues to trump all other concerns, despite the *FLA* distancing itself from assumptions about the ideal parenting arrangement. Judges’ protection of this norm is, according to our participants, shaped by the belief that men

⁶⁷ *Supra* note 43 at 88.

⁶⁸ *Supra* note 41; *supra* note 3.

⁶⁹ *Supra* note 45.

who abuse their spouses can still be good parents (see Table 1). This belief means that courts routinely fail to acknowledge that exposure to violence is defined as violence in the *FLA*. In cases in which women raise serious concerns about their children's safety due to a history of abuse, "there's still this presumption [in family court] that regardless of how abusive dad was to mum, dad can still be a safe parent for the children" (Participant #9). Our participants also observed that courts routinely grant fathers parenting time even when they have a history of absentee parenting. Often, the intentions of men who "don't pay child support [and are] not doing the parent teacher conferences or enrolling their kids in school or anything," but who request equal parenting time, are not questioned by the court (Participant #15).

In cases where women have been denied protection orders by the court, judges may implement conduct orders. Unlike protection orders, which require abusers to refrain from communicating with and visiting the workplace or residence of a former spouse, conduct orders require abusers to abstain from behaviours that frustrate court processes or misuse the court's time (for example, litigation harassment). When conduct orders are violated and women fear for their safety as a result, many women feel pressured to undertake the labor of revisiting the courtroom to make their spouse's violation known.⁷⁰ Many of our participants stated that, even in cases where conduct orders are made to limit the nature of communication between ex-spouses, access to children is nevertheless used

⁷⁰ See *Family Law Act*, SBC 2011, c 25, s 221 [*FLA*].

by abusers to perpetuate control. Shared parenting agreements require women to continue interacting with their abusers and to worry about their children’s safety, in addition to exempting abusers from paying child support. Motivations of control and manipulation are rarely considered in judicial parenting time decisions. As a family lawyer reported:

“In the court’s eyes...fathers can do no wrong. If they say they love their child then the courts believe them. [...] But mothers need to come off as the good mother. [...] If they sidestep a little bit away from that, they could easily have their parenting time taken away.” (Participant #9).

Under pressure to embody unrealistic ideals of good motherhood such as being perpetually available to children and selflessly positioning children’s needs above their own,⁷¹ many women find themselves facilitating children’s visits with their former abusers. The courts’ use of conduct orders to regulate these interactions reflects an endorsement of the myth that violence ends post-separation, and that for the most part, a former abuser and victim can continue to interact cordially. When these perceptions are coupled with the belief that fathers should be included in children’s lives regardless of abuse allegations, many parenting arrangements in practice require substantial, unremunerated, retraumatizing labor from mothers. As Participant #17 explained:

[W]hen there’s a visitation, she [mother] has

⁷¹ See Heward-Belle, *supra* note 63.

to be in touch with the abuser and drop off the child and pick up the child. There's no provision or extra money in the system unless you can afford to hire a middle person.

These gendered realities of co-parenting reflect the courts' endorsement of contradictory ideals: on the one hand, courts find it important for fathers to be involved in children's lives; yet on the other, they assume that mothers are primarily responsible for children's health and welfare and will thus pick up the slack created by inadequate resources and supports for managing the day-to-day realities of co-parenting.⁷² Court decisions that prioritize equal parenting time for both parents in heterosexual couples fail to acknowledge the persistent gendered gaps in parenting in Canada, and fathers' substantially lesser involvement in childcare overall.⁷³

The risks to women and children that result from judges favouring shared parenting arrangements was made clear by our participants. Participant #11 noted that equal parenting time arrangements are often made unless there is physical evidence of child abuse to limit fathers' parenting time: "[I]f...there's no physical evidence [of abuse] on the doctor's report, he's a guardian, he's entitled to 50%." In addition, our research suggests that when women raise

⁷² See Treloar & SB Boyd, *supra* note 15.

⁷³ See Statistics Canada, "Average Time Spent Per Day on Childcare Activities, for the Population Aged 15 and Over with Children Aged 12 Years or Under, by Primary and Simultaneous Activities, Sex, Child's Age Group and Employment Status, Canada, 2010" (2016), online: *Statistics Canada* < www150.statcan.gc.ca/n1/pub/89-647-x/2011001/tbl/tbl2-eng.htm>.

concerns of violence without concrete evidence, they are cast as alienating children unjustly from their fathers. For example, Participant #3 stated that during out-of-court mediation, her client reiterated concerns about her child’s safety, given her ex-spouse’s history of abuse. During the mediation, “the mediator complained... ‘you’re putting so many obstacles in the way of access’” (Participant #3). This framing of legitimate concerns for children’s safety as “obstacles to access” highlights how women are constructed as the problem for men’s access to their children. This framing demonstrates clearly how concerns about safety are minimized in the family law system.

One of the frontline advocates we interviewed (Participant #16) provided an example of how prioritizing fathers’ access to children over concerns about children’s safety can result in devastating consequences. Participant #16 recounted how an abused woman reported being concerned by a court decision granting parenting time to her ex-husband, who had a long history of abusive behaviour. Despite her concerns, the courts facilitated the father’s parenting access. These visits continued for many years. In response to the mother’s repeated concerns, the court ordered a Section 211 report, which involved a psychologist interviewing the parents and children and reviewing the hospital’s inconclusive report after one of the children disclosed being assaulted after a visit with her father.⁷⁴ In this report:

⁷⁴ For more on Section 211 reports, see Rise Women's Legal Centre, "Understanding Section 211 Reports: A Guide for Women" (2021), online (pdf): *Women's Legal Centre* < womenslegalcentre.ca/wp-content/uploads/2021/05/Section-211-Report-Plain-Language-Guide-English-WEB.pdf >.

[The] psychologist...found the mother overly fearful, rather than the father abusive. And so every time [the mother] went to court, it was perceived as her being overly fearful and trying to alienate the children from the father.

After Participant #16 reported this case to the Ministry of Children and Family Development Services, one of the children disclosed to a social worker that she and her sibling were repeatedly assaulted by their father during their court-mandated access visits. While the fathers' access was removed, the children's trauma continues. This example reinforces the findings of extant research noting that judicial ignorance about the dynamics of domestic violence can and does have horrific, irreversible consequences.⁷⁵

Our findings illustrate that courts continue to make parenting time decisions based on an erroneous commitment to ensuring fathers' parenting time, and that legitimate concerns about children's safety factor inconsistently into judicial decisions. In addition, our research reveals that courts have been slow to adopt the FLA's mandate to broaden the definition of family violence beyond physical harm, especially as it pertains to the health and well-being of children.

⁷⁵ See Lori Chambers, Deb Zweep & Nadia Verrelli, "Paternal Filicide and Coercive Control: Reviewing the Evidence in *Cotton v. Berry*" (2018) 51:3 U.B.C.L.Rev at 671.

Accessing Protection Orders

When abused women seek protection orders, their violence claims are measured against the stereotype of the credible victim (see Table 1). This is a figure who has experienced life-threatening physical injuries, has evidence to corroborate their abuse, reported the abuse immediately to the police, and left the abusive relationship promptly after experiencing violence, never to return.⁷⁶ These characteristics of the so-called credible victim do not reflect the difficult choices many abused women must make, and thus this image of ideal victimhood is more myth than reality. Nevertheless, women continue to be denied safety when they do not conform to this stereotype.

Much in the same way that women’s violence claims in the context of child-related matters are viewed suspiciously as attempts to alienate children from their fathers, violence claims in the context of women’s own protection are often viewed as frivolous, vindictive attempts to unfairly sanction men. Thus, the inconveniences of a protection order in men’s lives may figure more prominently in judicial decisions than women’s safety. Participant #2, a family lawyer, recounted an example of how the myth that women’s violence claims are exaggerated informs judicial decision-making: “I’ve got this client and she’s very afraid. [...] We need an order that she have sole occupancy of the home, that the ex moves out. And the court is saying, well, you know, is it going to be inconvenient for him?” Participant #5 similarly discussed how a *de facto* presumption of requests for protection orders as frivolous results in abusers’ interests

⁷⁶ See *supra* note 12; see also Martinson & Jackson, *supra* note 9.

being prioritized: “[A client will say] I want a protection order, non-expiring, and my children ought to have a protection order, non-expiring. The [judge will] say...protection orders are a kind of a burden. It affects the person so badly in their life. I’ll give you a 30-day protection order.” Although the length for protection orders set out in the FLA is one year, judges’ decisions presume that long-term protection orders are unnecessary once women have separated from their abusers. This assumption reflects a lack of awareness of extant empirical research on family violence, which demonstrates that abuse often escalates post-separation, and that spousal homicides are most common during separation.⁷⁷

Counter to the progressive definition of violence in the FLA, which includes psychological and emotional abuse, judges continue to be reluctant to grant protection orders in cases where women do not have physical evidence of abuse. In family court, “evidence of abuse” typically refers to corroborating testimony from an independent witness or expert testimony from a police officer or medical professional.⁷⁸ Judges’ reliance on these forms of evidence for granting protection orders demonstrates a lack of understanding of family violence. Psychological abuse can be perpetrated without physical evidence, it is difficult to prove, and it is documented to be more predictive of intimate homicide than physical violence.⁷⁹ Moreover, the assumption that women can

⁷⁷ See Sarophim, *supra* note 40.

⁷⁸ See *supra* note 12.

⁷⁹ See Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014).

easily call upon independent witnesses overlooks the factors—such as shame, self-blame, and distrust of police and social workers—that prevent women from disclosing violence to outsiders. Despite this, many participants discussed how judges interpret women’s failure to contact authorities about family violence as evidence that women’s claims of harm in court are overblown. As Participant #2 stated:

It’s a high bar to establish that [women’s] physical safety is in jeopardy. A lot of these cases, you’ll have spouses that have [been] beaten [and] have never...called 911, and that goes on for years. So to then go in [to court] and say, there’s this fear. [...] Well, if she didn’t call 911 it couldn’t have been that bad.

The requirement for corroborating evidence paradoxically deters women from reporting.⁸⁰ As Participant #11 stated, “[W]omen have said, ‘I haven’t called the police because I didn’t have evidence. I didn’t think they would believe me.’” Women’s non-reporting is then used to discredit abused women. As one of the frontline advocates we interviewed suggested, “[A]fter [abuse] happens once, twice, over and over, the women...start to feel shame. People will say, why didn’t you just leave the first time?” (Participant #17).

In addition to shame and fear of being disbelieved, many women do not behave as a so-called credible victim

⁸⁰ Our participants did acknowledge that some judges understood the challenges women experienced. However, they were seen as the exception rather than the norm.

due to financial dependence, a lack of consistent supports in the aftermath of violence, and suboptimal experiences with frontline emergency responders. Participant #17, a frontline advocate, stated:

One of the reasons mothers do not call the police [to report abuse] is because anytime the police are involved in a domestic violence situation, they...make a report to...the Ministry of Children [and Family Development]. [...] MCFD...need to protect the children, but sometimes...it's put on the mother to leave.

When it is “put on the mother to leave,” women face impossible options. If they are financially dependent, isolated from friends, and unaware of services such as income assistance or emergency shelters, leaving appears untenable.

Many of the lawyers we interviewed discussed how courts continue to downplay the importance of emotional and psychological abuse, granting protection orders only when there is evidence of severe physical abuse. As Participant #1 observed, “if it's physical abuse, that's usually pretty straightforward to prove; you've got your medical reports. But for financial or emotional abuse...that is difficult to prove.” In these cases, women's testimony alone is deemed insufficient, and witnesses may be insufficient to secure a protection order. As Participant #11, a family lawyer reflected:

I had a protection order with a client's mom who was the witness, and the judge was like,

well, do you really expect me to take the mother’s word for it? She’s hardly an independent witness. [...] [H]ow do I find an independent witness? He didn’t beat her at *Tim Horton’s*. [...]

This requirement for “an independent witness” fails to account for the fact that social isolation is a crucial mechanism of control in abusive relationships, and that abuse persists precisely because it is hidden in plain sight.⁸¹ Although the FLA included the provision of protection orders, our data suggest that courts are reluctant to believe women and prioritize their safety.

TRANSFORMING FAMILY LAW OUTCOMES IN GREATER VANCOUVER

In ideal situations, abused women exit the family law system feeling satisfied with the division of assets, parenting arrangements, and spousal support they are granted by the court. These ideal situations are far from the norm, however. The majority of participants stated that their clients are dissatisfied with family court outcomes:

There’s no clear winner [in family law]. It’s a matter of striking the right, fair balance. Whatever issue it is, whether it’s a matter of money, or...co-parenting, or protection...

⁸¹ See Wendy Chan

, *Hiding in Plain Sight: Immigrant Women and Domestic Violence* (Halifax: Fernwood Publishing, 2020).

[t]he outcome is never ideal for either party.
(Participant #5)

Participant #8 described family law outcomes more bluntly, noting, “I don’t think anyone is ever really happy. They’re just like ugh, this really sucks.” One prominent reason why family law outcomes are regarded negatively is that abused women do not feel their experiences of abuse are acknowledged in the courtroom. Women may raise spousal abuse in court only to be told “it just doesn’t matter.” As Participant #4 described, “[t]hat’s very hard for clients to hear. [...] [I]t doesn’t matter what he did? It doesn’t matter he had an affair? It doesn’t matter that he’s a total dick? It doesn’t matter that he’s slagging me out in the world, on Facebook, making all these rude comments?” Not surprisingly, our participants reported that clients commonly tell them, “I feel like I didn’t get heard” (Participant #9). This finding mirrors the disillusioning family court experience other scholars have documented. In family law proceedings, if and when abuse is acknowledged, women are told that it is irrelevant to the issues that family court is destined to prioritize; namely, issues related to the children.⁸² In this process, women’s histories of spousal abuse are rendered invisible, and women are cast instead as selfish mothers who prioritize their own interests over the needs of children.

It is also not uncommon to find that many abused women enter family law proceedings with very little understanding of the emotional and financial costs involved and of the length of time required to resolve family files. Some participants make an effort to educate

⁸² See Martinson & Jackson, *supra* note 9.

their clients, with the goal of preparing them to lower their expectations. They found that when abused women enter the family law system with a clearer understanding of the process, they are more accepting of the outcomes. In contrast, clients “that...are less happy with the legal system [are] the ones that...[rely on] duty counsel, that don’t have a lawyer, that have to do it themselves” (Participant #1). The legal system revictimizes women because it is unable to adequately respond to the complex realities of domestic violence. Whether it is the onerous processes of negotiation and settlement, the failure of judges and mediators to adequately understand the dynamics of domestic violence, or the myths and stereotypes that persist around family violence, resolving family law issues is an uphill battle and positive experiences are few and far between. As Participant #6 observed, “It’s rare when I’ve had anyone go, ‘oh, the judge got it. The judge got it and we got everything that we wanted.’ [...] I’ve heard women say, ‘I feel like the law was like my abusive spouse.’” Other participants echo similar views, claiming that “the [family law] system re-victimizes...women and...makes them [think], maybe it’s just easier to go back [to the abuse]” (Participant #17), and that, “so many women...tell me that if they knew how bad [family court] was, they never would have left [their abuser]” (Participant #8). These findings highlight how the family law system is failing abused women and children. While participants try to act strategically and to give their clients the necessary supports to build a good life post-separation, representing women in the BC family court system is a challenging task.

CONCLUSION

Our research findings illustrate the considerable gaps that remain between the progressive aims of the 2013 FLA and the FLA as implemented in the family legal system in BC. By documenting the disconnect between what abused women need and what they obtain from the family law system, in addition to highlighting how knowledge gaps continue to shape family judicial decisions, we add to the body of scholarly and legal research calling urgently for systemic change.

As our research findings document, the family law system in greater Vancouver routinely produces outcomes that cause women to walk away from child and spousal support, to navigate unsafe equal parenting arrangements, and to live without the safety a long-term protection order could provide. The lawyers and frontline advocates we interviewed offered many suggestions for transforming these negative outcomes. They identified the provision of better legal aid support, including improved access and lower eligibility requirements, as crucial to meeting abused women's needs. However, they likewise recognized improved access to legal representation as insufficient on its own. There is also the need for reliable access to affordable childcare, victim-centered child and spousal support payments that do not require victims to interact with former abusers to survive, and affordable housing for women fleeing violence. Our participants also identified funding for supervised access visits where children's safety is a concern as a much-needed resource to protect the well-being of children and to minimize the use of parenting time as a means of perpetuating abuse. Providing this wider infrastructure of support for abused women is a crucial first

step in ensuring that women are better placed to reach fair separation terms.

Longer-term solutions include a coordinated community response for women so that they can have many of their needs met more efficiently, and the challenging task of changing the way we understand domestic violence. Abused women need to know that their fears are legitimate, and that their stories are real. Believing women involves not just acknowledging the veracity of their abuse claims but ensuring that they are protected from future violence. Better outcomes in the legal system involve mandatory, routine family violence training for judges, mediators, and legal aid counsel as well as acknowledging the importance of family law as an area of legal education and practice. Beyond the legal system, our participants said they would like to see broader social shifts where everyone is working together “in order to help women leave abusive relationships and help children, [because] it just can’t be just the legal system” (Participant #9). Doing so holds out the promise that women and children can live a life free of violence.

