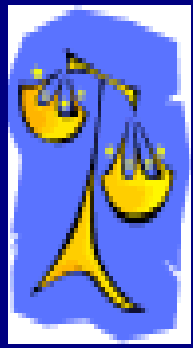


Linking Criminal and Family Law Issues in Woman Abuse: Justice Options for Women - Phase Three

Final Report



Kirstin Lund and Julie Devon Dodd
Sponsored by the Justice Options Steering Committee
With funding from Status of Women Canada
July, 2003

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Kirstin Lund and Julie Devon Dodd

Sponsored by the Justice Options Steering Committee
With funding from Status of Women Canada, May, 2003

Summary Report and Recommendations

When woman abuse happens in relationships there are often two areas of law involved: criminal and family. And, when children are affected by the abuse Child Protection law may also be involved. While these are distinct areas with distinct purposes and processes, there is often confusion and implications for the participants. The fact that these are distinct processes sometimes means that information from one process is not available to the other process. For example, information about abuse that resulted in criminal charges is often not considered in custody decisions in family law. This lack of relationship between the different courts may mean a “no-contact” order in criminal court, and “shared custody” in family court at the same time. This situation could mean further abuse suffered by a woman and her children.

As the Justice Options Steering Committee summarized in a recent meeting: Women don’t make the distinction (between criminal and family), and the system doesn’t make the connection (between criminal and family). During this project, opportunities were created for women, victim advocates and the system to evaluate and dialogue about potential models for use in cases of woman abuse for both criminal and family law.

Issues Identified

To develop a list of issues that arise when parties are involved in both systems due to violence in a relationship, we spoke with women who have experienced violence, as well as those working in the family and criminal law systems and victim support organizations. The issues identified include:

- Education about the various systems and about the dynamics of family violence is necessary for women, offenders, support workers and justice system personnel.
- The overwhelming feeling of dealing with many people in many systems may cause a woman to “give in” and go back to the relationship which is, at least, familiar.
- The family law system provides an additional way for the abuser to be in contact with, control and continue to abuse his victim.
- Access to legal aid is very limited.
- The disconnected time lines of the different systems and the length of time each process takes may increase the danger women face in cases of violence.
- Some women will not pursue family law options for fear this will increase the violence.
- Children need protection from emotional and other abuses during ordered access with the abuser.

- The lack of a protocol for sharing information between courts systems and with some relevant service providers can result in inconsistent orders and confusion for the parties and those working in the system.
- Lack of safe and appropriate supervised access in cases of family violence can increase direct contact between the parties and ignite a recurrence of violence.
- The impact of court outcomes on families experiencing violence needs to be recognized and lessened.
- Currently available remedies in criminal law do not deal with the root causes of family violence and can lead to re-offences and breaches of orders and undertakings.
- Family violence is not often taken into consideration by courts when deciding custody and access.
- Civil court orders are not easily enforced and woman are often left with the choice of paying more money to have the order enforced or forgetting about it.

Recommendations

For the Justice Options for Women Project:

- That the Justice Options for Women Steering Committee bring together criminal and family law system working groups to develop options for criminal and family law in cases of family violence. The groups should focus on either family or criminal law systems as well as ensure that links are made between the two systems and that an agreed upon set of values will guide the work of both.
 - The first working group will develop options for a Domestic Violence Court in PEI for recommendation to the province. This piece should be Phase 4 of the project, commencing in the Fall of 2003.
 - The second working group will develop family law options in cases of Family Violence for recommendation to the province. This will be Phase 5 of the project.

For the Office of the Attorney General and the Province of Prince Edward Island:

Family Law System

- That the Province expedite the process of creating the Family Law Section.
- That the Office of the Attorney General participate in subsequent phases of the Justice Options for Women Project by naming representatives of the Family Law Section to participate in the working groups.
- That the Province develop alternative dispute resolution models, in collaboration with community, and support the use of approaches such as mediation and collaborative law for disputes not involving violence against women. This will remove non-violent parties from the adversarial system and focus family litigation resources where there is violence.
- That the Province work with the Canadian Bar Association, PEI Branch and the PEI Law Society to

find ways to increase the numbers of lawyers willing to do family law legal aid, including Victim Assistance orders.

- That the Province increase funding for family law legal aid, including alternative dispute resolution options.
- That the Province increase the number of family court counsellors in sites across the Province.
- That the Province work with community organizations to develop safe supervised access for child visitation in appropriate locations across the Province.

Criminal Law System

- That the Province participate in subsequent phases of the Justice Options for Women Project by naming representatives of the criminal law system and Child and Family Services to participate in the working groups.
- That the Province implement a Domestic Violence Court which includes treatment options for offenders and victims.
- That the Province develop alternative dispute resolution models, in collaboration with community, and support the use of approaches such as victim offender mediation and other restorative processes for disputes not involving violence against women. This will remove non-violent parties from the adversarial system and focus criminal law resources where there is violence.

Linking Systems

- That the Province, through its participation in subsequent phases of the Justice Options for Women Project, work with community to facilitate communication and links between the family and criminal law systems in PEI.
- That the Province work with victim advocates, children's support services and others to design programs specific to family violence for parents, children, youth and extended families building on the Positive Parenting from Two Homes Program.
- That the Province bring together the Children's Secretariat, the Premier's Action Committee on Family Violence Prevention, the Child Protection system, those working on the implementation of the Youth Criminal Justice Act and the Provincial Treasury to commission and steer a study modelled on the Genuine Progress Index¹ on the real costs of family violence in PEI.

¹The Genuine Progress Index (GPI) is an index of well-being that goes beyond economic growth measures to include social and environmental components. Genuine Progress Indicators include crime and family breakdown which impose large economic costs on individuals and society, in the form of legal fees, medical expenses, and lost productivity.

For the Canadian Bar Association, PEI Branch and the PEI Law Society:

- That the Canadian Bar Association, PEI Branch and the PEI Law Society work with the Province to find ways to increase the numbers of lawyers willing to do family law legal aid, including Victim Assistance orders.
- That the Canadian Bar Association, PEI Branch and the PEI Law Society participate in subsequent phases of the Justice Options for Women Project by naming representatives to participate in the working groups.
- That the Canadian Bar Association, PEI Branch and the PEI Law Society find ways to recognize and promote pro bono work to assist victims of family violence.

About the Project Partners

This is a project of the Justice Options for Women who are Victims of Violence Steering Committee, with representatives from the PEI Advisory Council on the Status of Women, Individual Survivors of Abuse, Transition House Association, Victim Services, PEI Rape/Sexual Assault Crisis Centre, Community Legal Information Association, Interministerial Women's Secretariat, Restorative Justice Network, Office of the Attorney General, Child and Family Services and Family Law Branch, Canadian Bar Association.

Introduction

Justice Options for Women Who Are Victims of Violence Projects started in 1999 when some community members and organizations were concerned that restorative justice approaches would be used in cases where women had been victims of violence without consideration of the needs of women and consultation with the community. The Steering Committee for the project said at that time - we need to work on ensuring justice options for women and children before focussing specifically on restorative justice; and that restorative justice options should not detract from the continuing efforts needed in the justice system. The Phases of the Justice Options for Women Who Are Victims of Violence Projects were built on these concerns.

The Projects

Justice Options for Women, Phase One asked women who were victims of violence about their perspectives, needs and issues in relation to justice. Many of the concerns identified by the women interviewed were also shared by community advocates, police and justice staff. Women and justice system representatives acknowledged that there is no one answer to understanding and preventing woman abuse and the system alone cannot keep women safe.

The Phase One study made four recommendations:

- Ongoing support for women to access justice and other services
- Communities and families to take violence against women seriously
- Mechanisms to deal with the total justice system and hold the system accountable
- Financial support for victims to leave and start over.

With a clearer understanding of the needs and concerns, Justice Options Phase Two, Restorative Justice and Women Who Are Victims of Violence, set out to better understand the problems and benefits of restorative justice approaches for women. The purposes of the Phase Two Project were to:

- Ensure that violence against women continues to be a criminal matter seriously addressed by the justice system
- Ensure that the needs of women who are victims of violence are addressed in any activities about restorative justice

Phase Two identified the common goals of justice and restorative processes: to end abuse, keep women safe, and hold offenders accountable; and the additional goals of restorative processes: to aid victims in healing, offenders in habilitation, and communities in restoring balance.

Phase Two resulted in the following conclusions and recommendations:

Conclusions

- The principles of restorative justice have value and can contribute to healing the harm to victims, rehabilitation of offenders, and community safety
- As with the justice system, women's needs and safety must always be the top priority for any restorative processes

- For women who have been abused in a significant relationship, a face-to-face meeting with the offender is likely not advisable, unless initiated by the victim and with a highly skilled facilitator trained in the dynamics of woman abuse
- When women are victims of violence and their self-worth may be jeopardized, as in woman abuse and sexual assault, restorative processes must be victim-initiated.
- For women who are victims of sexual assault by strangers or acquaintances, the option of victim-offender mediation should be available for those who request it
- Women need justice options which have restorative values, but do not require a face-to-face meeting with the offender

Recommendations

- Develop policy that in situations of domestic violence, any alternative to the justice system, including Restorative Justice or Alternative Measures, be post-charge only. This policy would be consistent with current police policy of laying charges in domestic violence cases when reasonable and probable grounds exist
- Make available victim/offender mediation with clear policy guidelines and highly skilled mediators when women victims of sexual abuse request a face-to-face meeting with the offender
- Review and consider the adaptation of the Yukon Domestic Violence Treatment Option for woman abuse in relationships
- As the Family Law Section develops and mediation approaches are expanded, policies which address woman abuse be implemented
- Continuing dialogue on restorative justice and women who are victims of violence for the purposes of:
 - clarifying how to appropriately involve family and community members in resolution of situations of woman abuse and sexual assault; and
 - developing clear guidelines for a facilitated approach for those situations where the victim requests a face-to-face meeting with the abuser.

Phase Three: Linking Criminal and Family Law Issues

During Phases One and Two of Justice Options, the difficulties that occur for women when they are involved in both criminal and family law processes arose. This issue was highlighted in the findings and subsequent recommendations of the Premier's Action Committee Consultation Report (2002), and in the work of other groups in PEI for the past ten years. The Justice Options Steering Committee summarized: Women don't make the distinction (between criminal and family), and the system doesn't make the connection (between criminal and family).

When woman abuse happens in relationships there are often two areas of law involved: criminal and family. When children are affected by the abuse, Child Protection law becomes involved. While these are distinct areas with distinct purposes and processes, there is usually confusion for the participants. The distinct processes sometimes mean that information from one process is not available to or considered by the other.

Phase Two identified the need for a new model for addressing abuse and assault between family members in the criminal law area, and suggested examination of the Yukon Domestic Violence Treatment Option Program (DVTO). In the family law area, the provincial government is establishing a Family Law Section that would consolidate existing services, and eventually include a family legal aid program and the possible relocation of the Community Legal Information Association as a neighbour to the new family law section.²

Phase Three provided opportunities for women survivors of abuse, community advocates and organizations, and government departments to consider potential models and make recommendations about ways to address woman abuse in the family and criminal law areas which make the links and reduce the potential for further abuse to women and their children.

Issues Identified by Women, Family and Criminal Law Systems and Victim Support Organizations

Issues that arise when parties are involved in both systems due to violence in the relationship were identified through focus groups with women held in Phase One and informal interviews with people from components of both the family, criminal law, and child protection systems, and victim support organizations in Phase Three.

Education

There is an issue of education for women, offenders, support workers and justice system personnel when parties are involved in both the family and criminal law systems as a result of family violence.

Many women do not understand the difference between family and criminal court systems. For example:

- women often think that the Crown is acting on their behalf in criminal as well as family matters and will expect that the Crown will enforce or facilitate non-criminal orders involving the dividing of family assets or access arrangements.
- Victim Impact Statements can only deal with the specific incident that the abuser is being charged with. Women sometimes find it difficult to understand why the years of abuse that they have suffered is not considered relevant.

Support workers may not be able to provide the information that women are requesting because they are not as familiar with the family system.

Non-custodial parents who are ordered to pay support are sometimes under the wrong impression that support is linked to access and that if access is being denied, either because of a no contact order or because the children are in the care of the Director of Child Welfare, he may refuse to pay support.

² Patsy MacLean, Assistant Deputy Attorney General, presentation to Planning Workshop - Legal Aid and Social Justice for Women and Children on PEI, held at the Dutch Inn, October 23, 2001

Justice System personnel need education about woman abuse and the cycle of violence to have a better understanding of the issues and to alleviate frustration that they may feel when women return to the relationship and/or ask to have orders they have requested set aside. In addition, it was noted that Judges are sometimes not kept informed about information they need to order treatment of abuser. Judges need to know what programs are available if they are expected to order treatment for abusers.

Overwhelming System

Dealing with many people in many systems can be overwhelming for women leaving an abusive relationship. This overwhelming feeling may cause a woman to “give in” and go back to the relationship which is, at least, familiar.

Legal Aid

Access to legal aid is limited. The aid that is available to women who have been abused by their partners is not reasonable in terms of the time that it will take to decide the issues in a case involving a family in high conflict. In small communities where there are a limited number of lawyers, women may have to go to another community, and bear that travel expense, to find a lawyer that her spouse has not dealt with.

When parties representing themselves don't know the law or their rights well enough to articulate the issues, it can create a problem for judges as it makes it more difficult for the judge to remain impartial.

Timeliness of Proceedings

Because family court has a different time line than criminal court, women are often left feeling frustrated by being in limbo even after the criminal court issues have been dealt with. In other cases, the criminal disposition can take longer if there is a request for an adjournment until custody and access issues are decided in Supreme Court.

The longer the system takes to settle a matter, the more danger women face. Women are statistically in greater physical danger when they leave abusive relationships, and the longer the family court system takes to sort out separation issues, the greater the danger for women. In some cases, the length of time that it takes to receive a decision from Family Court can give rise to further abuse as some women are forced to go back to the abusive relationship due to financial constraints.

Avenue for Further Abuse

The family law system provides an additional way for the abuser to be in contact with and control his victim. The abuser can use the system to continue financial and emotional abuse by filing motion after motion and prolong of proceedings. When children are involved, the abuser can use the system to be a presence in the woman's life for years due to constant “changes in circumstances”.

Other ways that the abuser can use the system to further abuse and control his victim are through his right to cross-examine his victim, even when there is a no contact order in place. This can happen if he is representing himself or through cross-examination techniques used by some lawyers either in a family

court proceeding, a criminal court hearing or an application for a Victim Assistance Order.

Court rooms are not safe for many women if they are required to sit in the same room or take breaks in the same hallways with the abuser. Similarly, if women are requested to meet with their abusers for a home study or mediation when there is a no contact order in place, women's safety can be jeopardized.

Contradicting Orders

There does not appear to be protocol for sharing information between courts systems and with relevant service providers. This can result in orders for the same people saying different things. It is not unusual for people in high risk situations to be involved with Child Protection, Police, Family Court and Probation at the same time. In addition, some may also be receiving orders under the Victims of Family Violence Act. Without mechanisms to automatically share information among courts and service providers, there can be contradicting orders. There are examples where a no contact order is in place in the criminal system at the same time that an access order requires contact between the parties by the family court system.

As well, confusion is created for the parties and for those working in the system when orders differ slightly or use different language, particularly when that language is not plain language and not easily understood. This can cause confusion for the parties when they are not sure what orders mean and which order takes precedence.

Supervised Access

Difficulties arise when supervised visits are ordered and there are no resources to ensure properly supervised visits. When supervised visitation is ordered, the parties are sometimes left to figure out how to arrange it, giving rise to a potential for contact between the parties and further violence. Lack of safe and appropriate supervised access is a serious issue in cases of family violence. Very often direct contact between the parties to arrange access can ignite a recurrence of violence.

Protection of Children

Access with the abuser is sometimes ordered when the children have been exposed to family violence. Women have noted that children need protection from emotional and other abuses during ordered access with the abuser. The Director of Child Welfare does not have any long term jurisdiction to put any conditions on the access by the abusive former partner. The Director can instruct the custodial parent that if they have "knowledge or reasonable and probable cause to suspect that a child has been abandoned, deserted or abused" they must protect their children by denying access and applying for a variation of the access order. The Director can then intervene to support the custodial parent. This creates issues with regard to lack of legal aid to apply for variation of the access order.

Women have also noted that the views of children are not sought when issues of custody and access are being decided.

Family Support

Both women and those working in the justice system have noted that there is a lack of support for families when there are issues of family violence. Families are impacted when parents separate as a result of violence and when decisions are made in either the family or criminal law systems. The justice system needs to recognize and help to lessen the impact of court outcomes on families when there is violence. Recognizing the different circumstances may allow for solutions that meet the needs of each family. For example, in some cases, a victim's safety may not require that the offender be in jail and may actually have negative consequences for her. The financial or emotional well-being of the family, or the emotional well-being of the children, may be improved by contact with the offender.

Root Causes of Violence

While jail sentences, undertakings and other remedies available in criminal law are necessary for the protection of victims and the community, they do not address the root causes of family violence. These remedies do little to prevent further violence and may lead to re-offences and breaches of orders and undertakings. There is no quick, easy answer to family violence and we need to spend the time to deal with the underlying issues.

Enforcement of Orders

Civil court orders are not easily enforced and women are often left with the choice of paying more money to have the order enforced or forgetting about it.

Taking Family Violence into Consideration

Women have noted that family violence is not often taken into consideration when deciding custody and access. Courts have noted that the case law does not appear to regard inter-spousal violence as relevant to access, unless there is a direct threat to the children. There are current and pending legislative changes that may address this issue. See the section on Legislation, page 10.

Women Giving Up Options

Sometimes a woman who has left a violent relationship is fearful that enforcing an order for support or applying for a division of assets will increase the violence, and she will not pursue family law options.

Highlights of Innovative Programs, Practices and Approaches

The following highlights are examples of innovative practices, programs and approaches being used in other jurisdictions either to increase safety and satisfactory outcomes for women and families or to better make the connections between family and criminal law systems.

Domestic Violence Treatment Option

The Yukon's *Domestic Violence Treatment Option* (DVTO) is a court-based alternative that encourages the offender to take responsibility for his behaviour. The accused person is eligible for this therapeutic option only after the facts have been accepted and an early guilty plea has been entered. Prior to making this application, the accused person is dealt with in accordance with the provisions of the *Criminal Code*. This includes arrest by the police if necessary, the laying of a charge, and release on bail conditions if appropriate. The police and the court make these decisions independently, with the safety of the victim and the risk of re-offending as paramount considerations. Sentencing usually occurs after the defendant has successfully completed the Assaultive Husband Program and after other programming such as alcohol or drug counselling has been initiated or completed to the satisfaction of the court. The court has a direct role in monitoring offender progress. The sentence imposed will normally include a further period of court supervision. The DVTO is not a form of diversion. It does result in a criminal record. The DVTO sentence is enforceable by the court in that breaches of the order can result in re-sentencing of the defendant on the original charge and/or sentencing for the breach.

Premises of the domestic violence treatment option -

- Domestic violence usually occurs as repeat and escalating behaviour
- Domestic violence is learned behaviour that can be unlearned
- Victims and offenders will be more willing to participate in the justice system if the response is therapeutic rather than punitive
- Accountability is not undermined by imposing a restorative, community-based disposition provided the offender enters a guilty plea, successfully completes therapeutic programming and a period of supervision by the court and treatment providers
- Therapeutic sentencing alternatives provide opportunities to support and educate victims
- Early intervention increases the effectiveness of counselling and treatment and increases victim safety
- Successful domestic violence programs require a coordinated and integrated interagency delivery of services

Supervised Access/Parenting

A Visitation Center in Maine is operated by community volunteers who *supervise visits* between children and parents with a history of violence in a safe, fun atmosphere which provides separate entrances for custodial and visiting parents as well as *parenting programs for visiting parents to assist them to break the cycle of violence* that may have begun when they themselves were children. In some jurisdictions, a fee is paid by the visiting parent.

Legal Services

- A Shelter-Based Legal Program in Michigan provides seven legal advocates, one legal advocacy coordinator, and one legal advocacy director to support shelter residents. The Project assists battered women in obtaining legal counsel and *advocates on behalf of battered women in the courts* and with prosecutors, police, attorneys, probation officers, and child protective services. The legal department also provides information to survivors about how the criminal and civil legal systems work but does not provide direct legal representation.
- A *pro bono panel of attorneys with specialized training in domestic violence issues* and the law related to battered women in new Hampshire provides immediate access to an attorney for civil protection order hearings for low-income women.
- A program in Florida establishes an attorney trained in family violence issues as a part-time or full time *attorney in the shelter to provide residents with representation* and advice about protection orders, custody, visitation, and other legal issues. The range of experience varies from very experienced domestic relations attorneys who have a background in domestic violence issues to new attorneys recently out of law school with little law practice experience.
- Various U.S. law schools have created volunteer *student-operated domestic violence advocacy programs* which provide legal services for battered women. Students acting under the supervision of a practicing attorney or law school faculty member can represent clients in court or administrative agencies.

Court Programs

- A Louisville, Kentucky project, designed to address the fragmentation, lack of coordination, and duplication of efforts in the county's district and circuit courts, employs the principal of "*one judge, one staff, one family*", by assigning the same judge to hear all matters involving a particular family including domestic violence cases, emergency protective orders, divorce, child abuse, dependency and neglect cases, parental rights termination, and adoption. Each judge is assigned a Support Worker trained in social work who arranges for services with various agencies and coordinates hearings and services for victims of domestic violence.
- A Louisville, Kentucky court has created a *children's waiting room* used for emergency protective orders, dependency, and neglect and abuse dockets which is run by volunteers.
- A specialized *Family Violence Court* in Manitoba deals exclusively with cases of spousal, child and elder abuse. Early results indicate that it has achieved two of its original goals: expeditious court processing and more appropriate sentencing. Some progress has been made toward its third goal of reducing case attrition prior to sentencing. An evaluation of the specialized court has found that the court plays an important role in providing the victim/witness with more say in proceedings.

- A community-based Custody and Access Project in London, Ontario is regularly called upon to act as *expert witnesses in criminal court, family court and civil litigation about family violence*, about the incidence and dynamics of woman abuse and characteristics of survivors and abusers.
- A specialized *Family Violence Unit within the Prosecutions Branch* in Manitoba prosecute domestic violence cases in Family Violence Court as well as at the Queen's Bench level. The Crown Attorney's office provides educational seminars/lectures to police officers on a regular basis to update them on changing laws.

Child Protection

- A restorative process called *Family Unity Meetings* is used in California to help families of children in need of protection to produce together a written plan or agreement that will bind the parents and all other participants, and ensure a "safety net around the children". One component of the process which is different from the Family Group Conferencing model is the use of a "Strengths Identification" process, where the facilitator asks all participants to identify what is right and good about the parents and what their strengths and virtues are. The process emphasizes that the parents are not all bad and this helps the parents to deal with their own sense of failure, shame and self-loathing, which helps them to see that they can move beyond their troubled past.

Alternatives to Court

- A community-based Custody and Access Project in London, Ontario offers *arbitration* to assist parents to resolve their disputes and put their spousal issues aside to focus on the children's best needs.

System Accountability

- A project in Massachusetts is collecting the testimony of mothers who have been abused by their partners to *identify human rights violations* inflicted by state actors in the family court system on battered mothers and their children through child custody and visitation recommendations and decisions. The project's aim is to ensure that battered mothers and their children are not denied their rights to bodily integrity, security of person, an adequate standard of living, the highest attainable standard of physical and mental health, freedom from torture, equal protection of the law, non-discrimination, and other rights as guaranteed under international human rights law.

Interpreters

- *Interpreters for women* are being trained in Ontario to take statements, provide accurate interpretation, accept a clearly defined role and understand the laws related to domestic violence in order to assist women who do not speak the language officially spoken by those in the justice system.

- Immigrant women in PEI were trained in issues of violence against women to act as *community support workers for other immigrant women*.

New Legislation

There are some recent and proposed legislative changes in the family and child protection areas that will impact on women who have experienced violence. At an April 4, 2003 workshop, presentations on these legislative changes were made by Loretta Coady-MacAulay, Legal Services, Province of PEI; Barry Chandler, Child and Family Services; and Chief Justice Armand DesRoches, Trial Division of the Supreme Court of PEI. A summary of those changes follows.

Family Law Act

On the provincial level, during the fall 2002 session of the Legislature, amendments were introduced to the Family Law Act that extended the right to claim spousal support to same sex common law couples. Prior to these amendments, same sex couples did not have a statutory right in Prince Edward Island to claim spousal support upon the breakdown of a relationship. The amendments state that every spouse or common law partner has an obligation to provide support for himself or herself and for the other spouse or common law partner in accordance with need, to the extent that he or she is capable of doing so. The definition of “common law partner” means either of two persons who have cohabited outside marriage (i) continuously for a period of not less than three years; or (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

There were also amendments to the Family Law Act authorizing the Lieutenant Governor in Council to make regulations respecting the establishment of a child support service for the administrative recalculation of child support. This project is currently underway in PEI. Presently, when parties either enter into a separation agreement or obtain a court order regarding child support, the amount of child support is determined based upon the economic circumstances of the parties at the date of the agreement or order. Although the Child Support Guidelines provide that the recipient is entitled to receive child support on the basis of updated financial information, practically speaking, the parties either have to agree to a new amount on a yearly basis, forego this right, or go back to court.

The Recalculation office will provide an automatic mechanism for the annual recalculation of child support by a court official on the basis of updated financial information. Prior to the anniversary date of the order/agreement, the Recalculation Officer will send out a notice to the parties to file financial information. Upon receiving this financial information, the recalculation officer will update the order if there is a change, on the basis of the updated financial information. There will also be a mechanism that if the payor does not provide the financial information, as required, that the payor’s income will be deemed to be 10% higher than at the date of the last order/agreement. This provides an incentive for the payor to be forthcoming with financial information. It puts the onus on the party that has the obligation to pay support to file updated financial information rather than on the recipient to proceed to court to request this information.

This will help reduce conflict between the parties by eliminating the need for the parties to deal with each other directly on financial matters after the original agreement/order is obtained and by putting the responsibility for updating the order on a court official as opposed to on the recipient. Proclamation for amendments to the Family Law Act is pending.

Inter-jurisdictional Support Orders Act (ISO)

The ISO Act, proclaimed in April, 2003, will replace the Reciprocal Enforcement of Maintenance Orders Act. The ISO Act will apply when an application for support, or a variation of support, is brought under provincial legislation and the other party lives outside P.E.I. in a reciprocating jurisdiction. (All of the Canadian jurisdictions, some of the US states, and some foreign countries are reciprocating jurisdictions).

Under the old procedure, there was a two staged court hearing which was often lengthy and expensive. At times it could take up to a year after the PEI order was made to receive confirmation from the other jurisdiction. Under the new process one court hearing will be held and the applicant will no longer be required to appear in court. Forms developed under the new Act are designed to be user friendly with plain language guides for self-represented parties.

Divorce Act

On the federal level, there are amendments being introduced to the Divorce Act in Bill C-22. The proposed amendments eliminate the terms 'custody' and 'access', terms long viewed as contributing to a winner-loser mentality. The new approach shifts the focus from parental rights to parental responsibilities and attempts to give some clarity to parents about their roles after separation and divorce and focus on the best interests of the child. The new terms are 'parenting order' and 'contact order'.

The court may make an order, allocating to either spouse or both spouses:

- a) parenting time, by way of a schedule unless a schedule is not necessary
- b) the responsibilities for making major decisions in respect of the child's health care, education and religious upbringing
- c) the responsibility for making decisions relating to a specific matter affecting the child, and
- d) the responsibility for making other decisions affecting the child.

In making a parenting order or a contact order, the court shall take into consideration only the best interests of the child.

Under the proposed legislative approach contained in Bill C-22, a list of best interest criteria has been developed for parents, legal professionals and the courts to consider in determining the best interests of the child in each case.

In determining what is in the best interests of the child, the court shall consider all the needs and circumstances of the child, including:

- a) the child's physical, emotional and psychological needs, including the child's need for stability, taking into account the child's age and stage of development
- b) the benefit to the child of developing and maintaining meaningful relationships with both spouses, and

each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse

c) the history of care of the child

d) any family violence, including its impact on -

i) the safety of the child and other family members

ii) the child's general well-being

iii) the ability of the person who engaged in family violence to care for and meet the needs of the child, and

iv) the appropriateness of making an order that would require the spouses to cooperate on issues affecting the child

e) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including aboriginal upbringing and heritage

f) the child's views and preferences, to the extent that those can be reasonably ascertained

g) any plans proposed for the child's care and upbringing

h) the nature, strength and stability of the relationship between the child and each spouse

i) the nature, strength and stability of the relationship between the child and each sibling, grandparent and any other significant person in the child's life

j) the ability of each person in respect of whom the order would apply to care for and meet the needs of the child

k) the ability of each person in respect to whom the order would apply to communicate and cooperate on issues affecting the child, and

l) any court order or criminal conviction that is relevant to the safety or well-being of the child.

The definition of "family violence" in the amendments includes behaviour by a family member causing or attempting to cause physical harm to the child or another family member, or causing the child or another family member to reasonably fear for his or her safety or that of another person, but does not include acts of self-protection or protection of another person. Family violence is established on a balance of probabilities.

Bill C-22 is now before the House of Commons Justice Committee. Although a time frame for implementation of amendments is difficult to predict, the fall of 2003 has been suggested.

Interprovincial Protection Orders

Some jurisdictions have encountered difficulty having certain types of orders recognized and enforced across provincial boundaries.

In response to a resolution tabled at their Sept 2001 meeting, the Federal/Provincial/Territorial ministers responsible for Justice agreed in principle that appropriate action should be taken to ensure that civil orders of protection pronounced in one province/territory would be recognized and enforceable in other provinces/territories.

The Federal/provincial/territorial standing committee of Senior family law officials (CCSO Family Justice

Committee) established a working group with representatives from the majority of provinces/territories as well as Justice Canada. The working group reviewed legislation and unproclaimed legislation relating to the enforcement and recognition of non-monetary judgments in Canada, the American Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, information regarding the American Federal Violence Against Women Act, which contains “full faith and credit” provisions for the interstate enforcement of protection orders, Article 3155 of the Civil Code of Quebec, the nature of civil protective relief available under provincial/territorial legislation, particularly in legislation aimed specifically at addressing domestic violence, and systems used to register civil orders of protection.

The working group submitted an interim report for discussion purposes to the CCSO Family Justice Committee in January 2003 with recommendations regarding addressing the issue of recognition and enforcement of civil orders of protection through implementation of the Uniform Enforcement of Canadian Judgments and Degrees Act by amending the Act to add a definition of “Canadian civil order of protection”, to recognize and make enforceable Canadian civil order of protection whether or not such orders are registered, revise the law enforcement civil immunity provision, make the Act applicable to Canadian civil orders of protection granted in proceedings commenced prior to proclamation of the Act, and possibly expressly providing that section 127 of the Criminal Code of Canada applies to breaches of Canadian civil orders of protection.

Child Welfare Legislation

The new Child Protection Act came into effect in April, 2003. The Act replaces the Family and Child Services Act and is the result of knowledge gained through research and child welfare practice, and community consultations. Some highlights of knowledge include:

- importance of attention to the early years and programs such as Best Start
- new knowledge about history of children abused while in government care
- understanding that children and youth in care did not do as well as children in the general population.

The new Act more clearly defines “where a child is in need of Protection”, and child protection services focus on children in need of protection. Previously “children in need” received intervention services and the intent of the new Act is to have mandated government intervention only in those cases where children are in need of protection. The responsibility for providing services to children in need is with broader government and community services.

Some highlights of the changes to the Child Protection Act from the Family and Child Services Act include:

- a narrower focus on the definition of a child in need of protection
- services directed to parents where a child is in need of protection, rather than assistance to parents where a child may be in need of protection
- focus on assessment and case planning and specific time-lines for agreements for children in care

- authority for the Director to apprehend a child without a warrant from judge, followed by application for an order to the court; previously a court warrant was required
- definition of “child” is children 0 to 16, or 16-18 with specific vulnerabilities (previously 0 to 18); and possibility of services directly to children 16 and over
- broader definition of “parent” and involvement of parent and extended family/community
- provision of alternative approach, including third party mediation
- definition where a child may be in need of protection as the result of family violence in the family changed to: child has suffered physical or emotional harm caused by being exposed to domestic violence by or towards a parent, and there is substantial risk of suffering harm; from: child living in a situation where there is severe domestic violence.

Conclusions

Justice Options Phase Three has contributed to better understanding the dynamics of woman abuse and issues for survivors of abuse in criminal and family law areas. The two workshops in criminal and family law areas highlighted issues and options for women’s safety. Participants in the workshops included woman abuse advocates, public health nurses, survivors of abuse, judges, police, Crown attorneys, probation officers, family court counsellors, victim service workers, victim advocates, family resource centre staff, and others.

The workshops demonstrated a high degree of collaboration with respect shown for the courage of survivors to tell their stories and to inform solutions, the value of public health nurses for front-line intervention, the strengths and limits of the justice system to mandate behaviour, the commitment of judges to work with others, and the sense of community that everyone’s efforts are needed to bring about change.

The recommendations noted in the beginning of this document build on this increased understanding of the interests of key stakeholders, including women who are experiencing violence and those who advocate for them , as well as those working in the justice system..

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