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Reducing Harm to Children and Averting Homicide – Judicial Accountability in Domestic Violence Cases

CANADIAN DOMESTIC VIOLENCE HOMICIDE PREVENTION
CONFERENCE
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Martinson and Jackson article and reports:

Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases
Canadian Journal of Family Law, Volume 30, No. 1, 2017, at p. 11.

Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts, Final Research Report, January 14, 2016
<http://www.fredcentre.ca/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>

National Judicial Institute Community Consultation on Family Violence Report
<http://www.fredcentre.ca/wp-content/uploads/2012/10/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-3-C-Community-Consultations-on-Family-Violence-Report.pdf>

Siloes, Multiple Proceedings and Rights: Justice Reforms Needed Now in Domestic Violence Cases
End Violence Association of BC, Newsletter, Issue 2017 – 1.
http://endingviolence.org/wp-content/uploads/2017/10/EVABC_NL_Spring2017_v2-LowRes.pdf

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Setting the Stage – 2012-2013 Family Law Access to Justice (A2J) Reports

- ▶ National Action Committee on Access to Justice reports say:
 - ▶ There is a family law access to justice crisis
 - ▶ The Goal of reform is justice, not just access – fair and just **outcomes** are required
 - ▶ There is a need for a cultural shift in the legal profession – a fresh approach, a new way of thinking

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Setting the Stage – 2012-2013 A2J Reports: Use of Non-specialized Judges

- ▶ In many places in Canada judges are “generalists”:
 - ▶ They decide all cases, from business law to personal injury cases
 - ▶ They come from all different legal backgrounds
- ▶ Therefore a new judge specializing in corporate mergers can hear a family law case right away
- ▶ The A2J reports commend that judges in family law case should be specialized, with family law and family violence knowledge and skill

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Setting the Stage – 2012-2013 The BC Family Law Act

- ▶ British Columbia Family Law Act (FLA) was created
 - ▶ Has a real focus on domestic (family) violence
 - ▶ Judges **must** consider specific risk factors
- ▶ National Judicial Institute Community Consultation
 - ▶ Raised many justice system concerns

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Setting the Stage – 2012-2013 Community Consultation

- ▶ National Judicial Institute Community Consultation on Domestic Violence and the Courts
 - ▶ Raised many justice system concerns
- ▶ Most participants thought the FLA would be a big help.

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Setting the Stage – 2012-2013
Risk of Future Harm Study

- ▶ To check we did an exploratory, qualitative follow-up up study, which raised concerns about:
 - ▶ Whether judges were getting the relevant information they needed, and
 - ▶ Whether judges had the specialized knowledge and skill needed.

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Workshop Outline

Part I: Justice System Challenges

- ▶ Study 1: Community Consultation Study:
 - ▶ Challenges and Issues Identified
- ▶ The BC Family Law Act
- ▶ Study 2: RISK of Future Harm Study
 - ▶ Challenges and Issues Identified

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Outline, cont'd.

- ▶ **Part II: Judicial Accountability – Judges as Equality Guardians**
- ▶ Changing Roles and Responsibilities of Judges Over 50 Years
- ▶ Substantive Equality as a Fundamental Constitutional Value
- ▶ Judicial Independence and Informed impartiality

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Outline, cont'd.

- ▶ Part III: Conclusions: A Cultural Shift: A Fresh Approach and a New Way of Thinking

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Part I: Justice System Challenges
Study 1

- ▶ National Judicial Institute B.C. Community Consultation
 - ▶ Purpose: to obtain information from people and organizations who deal with issues of violence against women in their daily work as well as those specifically impacted by DV policies.
 - ▶ Methodology: Focus groups and interviews with 42 community participants.

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Court Challenges Identified in
Community Study

- ▶ Limited or no information provided to judges about the nature and extent of domestic violence
- ▶ Limited or no assessment of the risk of future harm
- ▶ Problems are exacerbated when several judges deal with one case
- ▶ When there are family, criminal and child protection proceedings, they operate in siloes, creating a dangerous disconnect

Challenges in Judicial Dispute Resolution Conferences

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- ▶ Many women:
 - ▶ go through the process because they have no other options
 - ▶ don't understand the process and agree because of intimidation
- ▶ There is often a starting presumption that joint parenting is best, with no information about:
 - ▶ the specific family and its dynamics generally, and
 - ▶ domestic violence in particular.

Challenges in Judicial Dispute Resolution Conferences

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- ▶ There is often no screening for domestic violence at all
- ▶ Translation can be inadequate
- ▶ Many women feel isolated and can't bring in a support person
- ▶ Most judges should know more about risk considerations at a judicial meeting

Challenges – Knowledge about Domestic Violence

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- ▶ Broad consensus that judges would benefit from more knowledge about:
 - ▶ the dynamics of domestic violence, including knowledge about why, when, where and how DV occurs;
 - ▶ the impact on victims, including children; the critical link between DV and the ability to parent;
 - ▶ legitimate reasons why abuse may be reported after separation but not before;

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Challenges- Specialized Knowledge about Domestic Violence

- ▶ information suggesting a man is more likely to falsely deny abuse than a woman will falsely report it, and,
- ▶ cultural considerations and their impact.
- ▶ the nature of and continued existence of gender inequality.

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Judges' Responsibilities under BC's *Family Law Act*

- ▶ The B.C. *Family Law Act* has a very broad definition of domestic (family) violence
- ▶ Requires judges (and parents), using the word "must", to consider specific domestic (family) violence factors including:
 - ▶ the impact of family violence on the child's safety, security or well-being, s. 37(2)(g).
 - ▶ whether the actions of the person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs: s. 37(2)(h).
 - ▶ other civil or criminal proceedings relevant to a **child's best interests**, 37(2)(j).

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BC *Family Law Act*: The Legal Framework

- ▶ The Act has a comprehensive Protection from Family Violence part (Part 9), with its own specific risk factors that must be considered:
 - ▶ If a child is involved the court *must* also consider: whether the child may be exposed to family violence and
 - ▶ whether there should be a specific Protection Order protecting the child.
- ▶ The Orders are enforced under s. 127 of the *Criminal Code*, not under the FLA or the *Offence Act*.

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BC Family Law Act, cont.

In looking at impact and impaired parenting ability, section 38 requires a court must consider all of the following:

- (a) the **nature of and seriousness** of the family violence;
- (b) how **recently** the family violence occurred;
- (c) the **frequency** of the family violence;
- (d) whether any **psychological or emotional abuse** constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

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BC Family Law Act, cont.

- (e) whether family violence was **directed toward the child**;
- (f) whether the **child was exposed to family violence** that was not directed toward the child;
- (g) the **harm to the child**'s physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring; and
- (i) any other relevant matter.

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Study 2: RISK of Future Harm Report

- ▶ Methodology
- ▶ Individual interviews with or written submissions from:
 - ▶ Family lawyers
 - ▶ Defense counsel
 - ▶ Crown counsel
- ▶ Round table discussion with
 - ▶ Nine judges – both men and women
 - ▶ Representing both the B.C. Provincial Court and Supreme Court
 - ▶ With varied family and criminal experience with DV cases

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Challenges Identified by Lawyers and Judges – Strikingly Similar Results

- ▶ Judges, to make fair and just decisions, should have all relevant information
 - ▶ about the nature of family violence and
 - ▶ the risk of future harm in order to make fair and just decisions.
- ▶ But it is **not** common for judges to get such relevant information, including information about other court proceedings, from lawyers

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Challenges Identified by Lawyers and Judges

- ▶ If risk of future harm is raised, it is usually in the argument stage, not by the use of expert evidence
- ▶ One judge said that rarely, if ever, is accurate information provided about the risk of harm - lawyers stay away from this topic and provide a sanitized version.

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Challenges Identified by Lawyers and Judges

- ▶ And when judges do not get information about domestic violence, they are not asking for it because:
 - ▶ They are "neutral arbiters".
 - ▶ In their view their role is to make decisions based on the evidence given to them, not to obtain evidence; they have to "put blinders on"
 - ▶ Judicial independence means that they should not be "be descending into the fray"

Challenges Identified by Lawyers and Judges

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- ▶ One judge, though, said judges should ask about other court proceedings and court orders:

"The fact that there have not been more cases of serious injury or death as a result of conflicting court orders is due more to good luck than good management"

Challenges Identified by Lawyers and Judges, cont'd.

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- ▶ The judges raised as a "significant concern" the fact that lawyers who act in family law cases are not well informed about other criminal proceedings and what orders might say.
- ▶ The judges thought family lawyers should be in a position to provide information about other proceedings.

Challenges Identified by Lawyers and Judges, cont'd.

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- ▶ **Lack of Specialized knowledge and skill** – The family law lawyers said that some lawyers and judges are not well-informed:
 - ▶ about family violence and its impact generally, or
 - ▶ about "red flags" for future risk.
- ▶ **Over emphasis on keeping families together** - there can be an overemphasis on the importance of keeping families together at the expense of the safety and security of women and children.

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Challenges Identified by Lawyers and Judges, cont'd.

- ▶ **Minimizing the impact of domestic violence** - the family law lawyers said that even when family violence is considered:
 - ▶ it can be set aside as not being relevant to the children's safety, security and wellbeing;
 - ▶ when that happens there is usually not an analysis of the factors in the FLA relevant to whether family violence exists and if it does, whether there is a risk of future harm.

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Legal Representation/Legal Aid

The Judges and lawyers said that:

- People need legal representation to obtain relevant information about risk and to share it when appropriate
- Legal aid should be
 - more widely available, and
 - provide adequate time for the work needed

The Judges recommended they should be able to have appoint a lawyer when a person is not represented and needs one.

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Part II – Judicial Accountability

- ▶ Two central themes emerge:
 - 1) Canadian judges may be assuming the passive role of neutral arbiter, even if evidence and arguments are deficient, causing important evidence and arguments to be missed.
 - 2) There is a concern about the competency of non-specialist judges.
- ▶ These concerns are also identified by other research and studies described in our article

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Part II – Judicial Accountability

The results show our judicial system may be

- ▶ applying **outdated traditional approaches** to roles and competency
- ▶ to modern justice system requirements, including upholding important equality guarantees imposed by
- ▶ the **Charter of Rights and Freedoms** and
- ▶ other human rights instruments protecting the rights of women and children

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Changing Role of Judges - 50 years ago and now

50 years ago:

Day to Day Work of Judges

- ▶ All judges heard all types of cases
- ▶ Only heard contested cases like trials in court within the **traditional adversary system**.
- ▶ Had a passive role, deciding cases based only on
 - ▶ the evidence presented by lawyers, and
 - ▶ legal arguments given to them by lawyers
- ▶ Never met with people informally before court to help them resolve their dispute

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Changing Role of Judges - 50 years ago and now

50 years ago:

Lawyers

- ▶ Almost every person (or company) had a lawyer

Qualifications of Judges

- ▶ A law degree and experience as a lawyer only
- ▶ No ongoing legal education was provided

Judicial Independence and Impartiality

- ▶ Viewed as the cornerstone of the justice system – a neutral arbiter, naturally capable of being impartial

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Changing Role of Judges - 50 years ago and now

Now:

Day to Day Work of Judges

- ▶ Many judges still hear all types of cases, but there are Unified Family Courts in some parts of the country
- ▶ Judges now have an active, not a passive role. They:
 - ▶ Meet with people in judicial case conference and help them resolve their dispute
 - ▶ Including giving them advice about what would be a fair just outcome
- ▶ Many people do not have a lawyer

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Changing Role of Judges - 50 years ago and now

Now:

Qualifications of Judges

- ▶ Still just need a law degree and experience as a lawyer
- ▶ There is significant legal education programming for judges, primarily through the National Judicial Institute
- ▶ The education time available is limited and non-specialist judges have to be educated in many legal areas

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Changing Role of Judges - 50 years ago and now

Now:

- ▶ And, it is **not mandatory**: judges do not have to take it at all
- ▶ And they can choose subjects other than family law

The Law

- ▶ There have been fundamental changes in the law that have a direct impact on the day to day work of judges.

The Legal Framework:
Substantive Equality as a Fundamental
Constitutional Value

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- ▶ The **Charter**, makes substantive equality a fundamental constitutional value, creating a "Constitutionally enhanced adversary system"
- ▶ Among those relevant to all women and children and domestic violence are:
 - ▶ The right to equal protection and benefit of the law without discrimination (section 15)
 - ▶ The right to life, liberty security of the person, including psychological security (section 7)
 - ▶ The guarantee of all rights to both males and females (section 28)

Contextual Analysis: Understanding People's
Lived Reality

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- ▶ Contextual analysis has evolved to accommodate the above legal changes.
- ▶ It is the way the judges must incorporate equality values relevant to women and children into decision making by:
 - ▶ Having in-depth knowledge of equality principles and using them
 - ▶ To understand the "lived reality" of the women and children being judged.

Contextual Analysis: Understanding People's
Lived Reality

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- ▶ For domestic violence this requires comprehensive, up to date knowledge about such discriminatory issues as:
 - ▶ economic disadvantages women experience
 - ▶ the nature, extent and impact of violence against women and children in relationships
 - ▶ myths and stereotypes about women's credibility
 - ▶ multiple disadvantages women can face

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Judicial Independence and Informed Impartiality

- ▶ Judicial independence is still important but is not an end in itself
- ▶ It facilitates judicial impartiality which must be informed by equality values.
- ▶ Chief Justice McLachlin calls this "informed impartiality" stating that it requires a recognition that there are subjective elements to judging
- ▶ Judges must therefore recognize and deal with their preferences, perspectives and biases.

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Part III: Conclusions: A Cultural shift: A fresh Approach and a New Way of Thinking

- ▶ We need **specialized judges** for family law cases
- ▶ They must engage in **ongoing, in-depth up-to-date judicial education** about all aspects of family law, including domestic violence
- ▶ Judges cannot make fair and just decisions on incomplete information; such education is needed to **identify what is in fact relevant, in an informed, unbiased way.**
- ▶ Judicial accountability requires that judges undertake a **judicial oversight role, in a manner fair to everyone**, to obtain information and legal arguments necessary to reach fair and just, equality based decisions.

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Part III: Conclusions: A Cultural shift: A fresh Approach and a New Way of Thinking

- ▶ National Action Committee on A2J: **Not words but Action** are required for meaningful change to occur.
- ▶ For Judicial Oversight and Competency we recommend that:
 - ▶ *Courts should collaborate with justice system partners to implement the National Action Committee recommendations on specialized judges and courts, asking the questions posed by the Committee?*
 - ▶ *Would the implementation of a Unified Family Court be desirable or feasible?*
 - ▶ *If not, why not? If not, how can the court take into account the hallmarks of unified family courts, which include specialization of the judges and institute them as far as appropriate and possible.?*

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► Discussion focused on other ideas and strategic implementation
