Violence against Women & Children and Child Custody Law: Between a Rock and a Hard Place

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I want to stress that our discussion today is partly prompted by what is almost an unspeakable tragedy. And we don't yet know all the details about what happened in the time leading up to the deaths of these two little girls.

Yet we need to talk about the fact that this heartbreaking tragedy makes visible systemic concerns that exist about our family justice system

- Specifically the ongoing failure to take proper account of the extent and impact of violence against women and children

I am going to focus on how child custody law – or the allocation of parenting time and responsibilities between parents after separation or divorce – too often fails to take account of violence against women.

That this failure continues is especially concerning given that BC's still quite new *Family Law Act* pays special attention to family violence.

Two and a half years ago, I was on a panel similar to this one, also organized by BWSS, discussing early cases under BC's new *Family Law Act* (in force in 2013).

I raised some serious concerns about whether judges were taking violence against women seriously when making decisions about allocating parenting.

Today, I unfortunately still have those concerns.

The FLA (http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01):
After more than a decade of consultation, BC introduced an overhaul to its family law in March 2013. Two fundamental changes were made that are relevant to us.

First, the old system of allocating "custody" and "access" to parents who separate was replaced.

A new parenting regime was introduced, which focuses on allocating **parenting time** and **parenting responsibilities**.
Some of us have argued that this system moves closer to a shared parenting system, but it is important to note that the FLA is clear that there should be **no presumption** of equal time, equal responsibilities, or joint decision-making. **S. 40(4)**

Second, a broad definition of "family violence" was introduced **[s. 1**], with the aim of bringing coercive and controlling behaviour, intimidation, harassment, threats to persons, pets and property within the definition, not only physical or sexual abuse.

In addition, the Act makes clear that abuse must be considered when addressing the best interests of a child in parenting decisions, notably "the impact of any family violence on the child's safety, security or well-being – no matter whether the violence is directed toward the child or another family member such as a mother. **S 37(2)(g)**

Also to be considered are:

- whether the actions of the perpetrator indicate that person may be impaired in their ability to care of the child. S **37(2)(h)**

- the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child – INCLUDING whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members. S **37(2)(i)**

- And any civil or criminal proceeding relevant to the child's safety, security or well-being. S **37(2)(j)**

Perhaps most importantly, the act states clearly that agreements and orders are not in a child's best interests unless they protect, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being. S **37(2)(3)**

[See also **s. 38: how to assess family violence** – (d) whether any psychological or emotional abuse constitutes or is evidence of a pattern of coercive and controlling behavior directed at a family member.**]**

These changes were **rightly heralded** as overdue and progressive, especially in contrast to much other family law legislation in Canada.
That is the GOOD NEWS.

Much hope was placed in their application and interpretation, not just by judges, but in the day to day negotiated agreements that settle most disputes. However, a 2015 study by Susan B. Boyd and Ruben Lindy (*Canadian Family Law Quarterly*) of the first two years of BC cases dealing with family violence and parenting highlights lingering concerns, some of which shed light on the trends that underlie parenting decisions made for Chloe and Aubrey.

The case law indicates **three troubling trends**.

First, while decision-makers are required to consider violence when addressing a child's best interests, they have considerable leeway about how that informs any resulting parenting plan.
Second, cases reveal faulty assumptions about the nature and impact of spousal violence. For example, notwithstanding clear statutory language, emotional and psychological violence are not considered to be as serious as physical violence.
T**hird**, normative assumptions about the value of shared parenting detract from the significance accorded to determinations of family violence.

E**videntiary issues** remain a challenge in what are primarily private interactions.

And even with the celebrated decision not to enshrine a "maximum contact" principle, like the one in our federal divorce law, decision-makers still demonstrate tremendous faith in, and optimism about, shared parenting.

SO: Despite its noble directives to take seriously the risks of family violence, the Act is still too often interpreted to emphasize the benefits of co-parenting while minimizing the risks of being in the care of a violent parent.
Judicial decisions still come close to adopting the assumption that shared parental responsibility and parenting time are appropriate goals even in the face of violence.

I'd like to now say a few words about the **Cotton v Berry case** – that's the family law case from May 2017 involving Chloe and Aubrey.

And I want to raise the question of **who we can or should blame** for their deaths.
I'm going to suggest that that is a very hard question. Perhaps all of us are to blame in a way.

Madame Justice Vicky Gray, who is known as a feminist, offered thorough and careful reasons in her decision in *Cotton v. Berry*.

She detailed the coercive and controlling behaviour of Andrew Berry, including threats of violence, inappropriate touching, unexplained injuries to his daughters, and negative discussions about their mother in front of them, amongst other concerns.

She referenced the language on family violence in the FLA.

Nevertheless, her judgment embodied hope that, "at least in time, both parents can focus on what is best for the children" [para 163]. Described as a "loving father who has much to offer his daughters" she found that it was in the best interests of the girls to have significant parenting time with him [para. 178].

Berry's conduct was cast as "poor judgment" and family violence was not deemed to be a significant factor for determining parenting arrangements [para 168].

Despite arguably underplaying the manipulative conduct of this father, and failing to connect the dots between various things that he did, Justice Gray made an order that pretty much followed what the mother and her lawyer asked for, and not what the father asked for, which was equal time.

So lets talk about blame for a minute.

Should we blame the mother and her lawyer [and note, Sarah Cotton actually had a lawyer, which not all mothers are fortunate enough to have] for not asking for more – say, supervised access by the father, or no contact at all with the children? Or no overnight access?

I can completely see why the mother did not ask for these things.
We expect a lot of mothers these days.
Most are still expected to take a primary role in parenting their children.
But when parents separate, they are also expected to facilitate the children's relationship with the other parent, usually the father.
If they do not, they can be accused of '**parental alienation'** – alienating the children from the father. (PA)
New studies suggest that when PA is raised in cases where allegations of DV also exist, judges seem not to take the DV as seriously as they should. (Linda Neilson, Elizabeth Sheehy)
Or they are concerned that the mother is making up the allegations to cut the father out of the children's lives.

So, we expect mothers to accommodate problematic behavior by fathers, in the name of shared parenting – which is now considered to usually be in the child's best interests.

The evidence seems clear that Sarah Cotton tried her best to facilitate her daughters' relationship with their father, even when he refused to answer her emails or requests to adjust the parenting schedule, etc.

Like many mothers and many of us in society, she may have felt that it would be harmful for her kids not to have a relationship with their father – there are many messages in society that children can be damaged as a result.

Sarah Cotton was, then, a 'good mother', in the eyes of the legal system.

- She didn't alienate the children from their father, although he may have thought that she did.

-In fact, he arguably tried to poison the minds of the girls against the mother – he talked about her being 'selfish'.

And what about her lawyer? Why didn't the lawyer argue for more protections?

What to argue in these types of cases has become increasingly difficult – perhaps especially in cases like *Cotton v Berry*, where the more overt physical forms of DV did not seem to exist.

If a lawyer pushes too hard for what we used to call 'sole custody' of children for a mother; or asks for paternal access that is very limited or always supervised, it is very easy for this argument to be understood as excessive – as cutting the father out of his children's lives – as being selfish. As I mentioned before, it can be read as 'parental alienation'.

So I know that lawyers may tell their clients that there are risks to asking for more fulsome protection in their orders.

Also, it can infuriate fathers, which can lead to acts of violence against the children – in fact, I have heard it suggested that this father perhaps acted out violently because he perceived that he had lost to the mother (custody, property etc.) – even if we think that the order did not go far enough.

Who knows what conversations Sarah Cotton had with her lawyer? The lawyer may even have said she could ask for more and she said no, it would make things worse. She probably knew the father as well as anyone.

Probably Sarah Cotton and her lawyer were between the proverbial rock and a hard place.

And what about the judge? This judge has had plenty of criticism, which must be extremely difficult for her.
After all, she was just one actor in the system. And who, really, wants to or can predict that a father will kill his own daughters?

I do have a critique of her judgement – as I do of many custody decisions that I have read over the years. But in many ways, Vicky Gray's decision was better than most.

Also, there is a debate about whether judges are able to, or should, go beyond what parties and lawyers ask them to do. As I said, she more or less did what the mother asked for.
Retired judge Carol Baird has said this judge could do no more than what she did. (Vancouver Sun)

Donna Martinson, a retired judge who works on VAW and children and does a lot of judicial education, has, however, suggested that judges do have a greater responsibility to take account of all relevant information when deciding these cases about children

Because the Family Law Act states that agreements and orders are not in a child's best interests unless they protect, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

Given that the best interests of children are the ONLY consideration that is supposed to inform decision on parenting or contact, we can arguably ask our judges and other

decision makers to go beyond or outside what parents or lawyers ask them to do, especially in the DV context.

It is clear that judges are very hesitant to do so, and one can understand why
But in this field, the best interests of the child, including safety and security, are the only considerations. It is in the **PUBLIC INTEREST** to ensure that orders accomplish this, as best possible, taking into account all relevant information.

Not connecting the dots between the varied forms that family violence takes, and failing to take seriously the warning signs of controlling and manipulative behavior, and its potential risks, can have tragic consequences.

Possible Remedies?

- More judicial education? Lawyer education?
- Specialized judges or 'family courts'?
- Strengthen wording of Family Law Act?
- Quicker applications back to court? (there were some applications after the May 2017 decision, but we can't get access; possibly on the father's gambling, loss of job etc. but we don't know)
- Mandated 'check-ins' with court?