The tragic deaths of Chloe and Aubrey Berry were entirely predictable and preventable. Their young lives were marked by the violence repeatedly perpetrated by their father on their mother and on them. Their deaths serve to remind us once again, that violence against women cannot be separated from violence against the children.

The objective of this forum is not to discuss the specifics of the case of the Berry sisters. Rather, it is to bring the conversation back to the fundamental flaws in the legal system that allows such tragedies to happen again and again. Our aim is not to question the actions of any specific individual, but rather to address the systemic barriers that jeopardize the lives of women and children.

As a bright-eyed and hopeful law student, I learned about the numerous pieces of legislation aimed at safeguarding women and children's right to a life free from violence. As a lawyer, I am regrettably coming to terms with the grim reality that this right often is only extended on paper, and not in practise.

In my practise as a lawyer at BWSS, I have learned that the various arms of the legal system often revictimize survivors of violence, by requiring repeated disclosure of their most traumatic memories to various participants of the system, including police officers, social workers, lawyers, and judges. Such disclosure is often met with disbelief, and if believed, women's concerns are often dismissed or minimized. Nowhere is this more evident than in the family court system where women are continually forced to confront their abusers in court and comply with co-parenting orders that allow their abusive partners to spend time with their children. Women face the impossible choice of either following the court order and placing their children in jeopardy or being held in breach of the court order and be threatened with fines and other consequences.

At least once a week, I meet with a woman who is apprehensive about letting her children spend time with their father because she is concerned about the children's safety and well-being while they are with their father. Often, these are fathers who were seldom involved in the day-to-day care of their children during the relationship but have co-parenting orders once the relationship has ended; fathers whose violence was witnessed by and often directed at the children.

How do these orders come to be? Basically, because there is a presumption in the system that a man can be an abusive partner and yet a good father. This is NOT true.

1. There is trend in family law for disputes to be resolved outside of court, with an overemphasis on mediation and other forms of alternative dispute resolution. These forms of ADR is entirely too inappropriate for abusive relationships because of the obvious and gross imbalance of power between the abuser and the survivor.
2. This is compounded by the fact that many women do not have access to timely legal advice and representation, and must represent themselves in these processes. They are less likely to be informed about their options, their rights, and the ways in which they can protect themselves and their children. For more about why ADR is inappropriate when family violence is involved, please refer to BWSS' open letter to B.C. Minster of Justice, David Eby on the Provincial Court Family Rules Project.
    a. This is important to keep in mind when considering that many women fleeing abusive relationships DO choose ADR for numerous reasons – to avoid the expense and time involved in court proceedings, to try to keep the process as amicable as possible, and often just to be FREE from the violence and the abuser. This in no ways speaks to the seriousness of the violence or the level of fear the woman experiences in regard to the abuser.
    b. There needs to be a way more comprehensive analysis and understanding on the part of FJCs, mediators, and judges of the impact of family violence on the ability of women to negotiate fair agreements.
3. Women face multiple hurdles on their way to reach the courts to ask for assistance in keeping themselves and their children safe. They are required to go through multiple rounds of ADR, with family justice counsellors, and even with judges, with little to no screening for family violence, which in theory is intended to create an exemption from these processes.
4. The few women who do manage to get to court still suffer as a result of not having counsel. Abusers often HAVE access to counsel who are able to better advocate for them. Women are then forced to confront their abusers in court, testify about the violence in their relationship, cross-examine (and be cross-examined by) their abusers, and in the end face an order that does not meaningfully account for the impact of the abuse on them and their children.
    a. Oak Bay case

i. There were multiple incidents of physical violence during and after the relationship.
ii. The mother testified about numerous incidents of neglect and explicitly violent threats.
iii. There was involvement by the police, the MCFD

5. There are a number of gaps in the system that lead to such orders:
    a. Lack of access to counsel = women being unable to tell their story in ways acceptable in the courts; women being unable to produce evidence or use evidence in the ways required to express the very real abuse and its impacts; judges unable to obtain ALL the relevant information when making decisions; abusers using litigation harassment to exhaust women of their legal, financial, and emotional resources
    b. Judges who do not always have adequate knowledge about family violence and its effects, and thus being unable to accurately assess the risk of future harm to women and their children; multiple judges hearing different applications in the same case
    c. Myths about family violence, including the idea that it ends when she leaves – this is one of the most vulnerable times, and the violence continues in other ways such as litigation harassment, breaches of court orders, manipulation of children, abuse directed towards children
    d. Limited training of professionals in the system, including police officers, social workers, FJCs, and judges - learning about family violence, the various and insidious forms it can take, and the widespread impacts it can have on women and children is not a one-time deal – it must be an on-going process undertaken form a trauma-informed perspective – new forms of violence surface over time (e.g. revenge porn, social media stalking, tracking devices)
    e. Lack of communication between the various arms of the system
    f. Lack of trauma-informed practises – insufficient understanding about how trauma affects memory, recall, and how a woman will tell her story

The *Family Law Act*, with its comprehensive definition of "family violence" and the inclusion of its effects of in the "best interests of the child" test, theoretically provides women with recourse in the form of s. 62, which provides a non-exhaustive list of circumstances in which women may withhold parenting time from the abuser, for e.g. if the child would be exposed to family violence or if the father is under the influence of

alcohol or drugs. However, the onus is on the woman to “defend” her actions and prove that she had a reasonable reason to believe the child would be placed in a harmful situation. This places women and children in a precarious position, especially given that so many women do not have access to legal resources which would inform them of their rights and allow them to have representation in a legal proceeding.

Preventing such a tragedy from happening again requires significant changes to the system, including extensive training for judges and police officers, free access to legal representation for women fleeing violence: the majority of people who require legal aid for family law services are women and many women who are fleeing violent partner. This means that women have been directly affected to the progressive cuts to Legal Aid since 2002. Women and children cannot access justice if their voices are heard but not believed.

FAMILY VIOLENCE AND EVOLVING JUDICIAL ROLES: JUDGES AS EQUALITY GUARDIANS IN FAMILY LAW CASES

The Honourable Donna Martinson *
and Professor Emerita Margaret Jackson**