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Judging Family Violence: Recommendations for Judicial Practices and Guidelines in Family Violence Cases

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There have been some recent legal developments that compel us to consider the role and responsibilities of judges in cases involving family violence. First, amendments to the *Divorce Act*, RSC 1985, c 3 (2nd Supp), came into effect in March 2021 and the Act now stipulates that family violence is a factor relevant to the best interests of the child. Family violence is finally recognized federally as germane to judicial decisions on parenting, though it is not explicitly recognized as relevant to whether negotiated settlements are an appropriate expectation, which has important implications for the judge's role in this area. Second, there has been heightened attention to judicial education in the context of gender-based violence, most directly through Bill C-3 (Second Session, Forty-third Parliament). This Bill received Royal Assent in May 2021 and revised the *Judges Act*, RSC 1985, c J-1, such that in order to be eligible for appointment to superior courts, prospective judges undertake to participate in continuing education on sexual assault law and social context (s 3(b)). While limited to sexual violence, these amendments raise issues about judicial education that are relevant in the family violence context as well. Third, the Canadian Judicial Council (CJC) released its newly revised Ethical Principles for Judges (EPJ) in June 2021. The EPJ do not explicitly reference family violence, which is a concern, but there are also opportunities to interpret the EPJ to ensure that family violence considerations are front of mind for judges hearing cases or conducting judicial mediation. In this post, we consider these developments and make recommendations for judicial practices and guidelines that better reflect the gravity and context of family violence.

The *Divorce Act* and Dispute Resolution

As amended, the *Divorce Act* provides that "in determining the best interests of the child, the court shall consider all factors related to the circumstances of the child" (s 16(3)). This now includes whether there was any family violence, as well as its impact on matters such as "the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and … the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child" (ss 16(3)(i) and (j)). The *Divorce Act* defines family violence broadly and sets out a number of other factors that courts must consider regarding its impact, including the presence of coercive and controlling behaviour and whether the child was exposed to family violence directly or indirectly (ss 16(4)(b) and (c)). In addition, family violence is relevant to applications for change of residence or relocation (ss 16.8, 16.9 and 16.96). These provisions require judges to understand, identify, and weigh family violence when making parenting decisions.

However, the recognition of family violence in the *Divorce Act* was not comprehensive, despite the submissions of anti-violence and equality advocates when the proposed reforms were before Parliament in Bill C-78. Notably, the Act imposes a duty on the parties to try to resolve their matters through a family dispute resolution process "to the extent that it is appropriate to do so" (s 7.3). Family violence is not an explicit exception to this duty, even though some family dispute resolution processes may reproduce a power imbalance between the parties making participation inappropriate, as recognized in the Legislative Background to Bill C-78 (see here for further discussion). Lawyers also have a duty to "encourage" their clients to attempt to resolve their matters through a family dispute resolution process, "unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so" (s 7.7(2)(a)). Again, there is no explicit exemption for family violence here.

The parties' duty to attempt to resolve matters consensually is operationalized through the rules of court in each province and territory. For example, in Alberta, the *Rules of Court*, Alta Reg 124/2010, specify that parties requesting a trial date must provide certification that they participated in a specified dispute resolution process, unless they have an order waiving this requirement (see rules 4.16(1) and (2), 8.4(3), 8.5(1)(a), and 12.34). Similar to the *Divorce Act*, rule 4.16(2)(c) provides that "On application, the Court may waive the responsibility of the parties under this rule, but only if … there is a compelling reason why a dispute resolution process should not be attempted by the parties." Family violence is again absent as an explicit factor. Some judges might think to ask about family violence when ruling on exemptions for mandatory dispute resolution, or lawyers might put this context forward if the parties are represented, but we can't take for granted that this type of information will be sought, provided, or considered appropriately.

The changes to the *Divorce Act* and the related rules about dispute resolution raise issues about the scope of judicial education on family violence in family law proceedings. Research shows that legislative change in itself is often insufficient in producing the intended changes in the norms surrounding family law (see a discussion here). Anti-violence and equality advocates recommended that the amended *Divorce Act* include obligations on legal advisers and decision makers to obtain education on "the complexities of family violence" and "how to use appropriate family violence screening tools", but this recommendation was not implemented.

While we can expect that judges have access to judicial education programs on the new *Divorce Act*, including the significance and impact of family violence on parenting arrangements and dispute resolution duties, we do not know what this programming specifically entails. The National Judicial Institute (NJI) is the body that partners with the CJC to develop and deliver judicial education programs in Canada, and their materials and information about judicial education sessions are confidential because of concerns about judicial independence. The NJI notes that its curriculum encompasses "substantive law, judicial skills development and social context awareness", and the CJC Professional Development Policies and Guidelines (PD Policies) also state that judges' professional development should include attention to "social context". Moreover, "judges must ensure that personal or societal biases, myths and stereotypes do not influence their decision-making" (B.2). This should include education on the prevalence of myths and stereotypes in family law cases involving family violence. It is instructive to look at a recent debate on the scope of judicial education for further guidance on this issue.

Judicial Education on Gender-Based Violence

As noted above, the federal *Judges Act* now requires that in order to be eligible for appointment to superior courts, prospective judges undertake to participate in continuing education on sexual assault law and social context, which includes the context of systemic racism and systemic discrimination (s 3(b)). The CJC is empowered by the Act to establish education seminars on these matters (s 60(2)(b)), and "should ensure" that these seminars:

> are developed after consultation with persons, groups or organizations the Council considers appropriate, such as sexual assault survivors and persons, groups and organizations that support them, including Indigenous leaders and representatives of Indigenous communities; and … include, where the Council finds appropriate, instruction in … the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants. (s 60(3), emphasis added)

The CJC "should" also report to the Justice Minister annually on the description, content, duration and dates of each seminar, and the number of judges who attended, with the report to be tabled in Parliament (s 62.1).

Bill C-3 and its predecessors Bill C-5 and Bill C-337 (which both died on the order paper) were considered by the Standing Committee on Justice and Human Rights and the Standing Committee on the Status of Women, which heard submissions from anti-violence and equality advocates (see e.g. here) as well as the CJC and NJI. The former emphasized the myths and stereotypes that continue to permeate sexual assault proceedings, as well as the need to include systemic racism and systemic discrimination in the scope of social context education and to consult broadly on the content and delivery of education materials. The latter focused on the importance of judicial independence. The final version of Bill C-3 struck a balance, seen in the language of "undertake" and "should" quoted above, rather than the mandatory language in earlier versions of Bill C-3. This is regrettable, as mandatory judicial education better acknowledges the ongoing influence of sexual assault myths and stereotypes despite reforms to sexual assault law and earlier judicial education efforts (see e.g. the work of Elaine Craig). Courts have also recognized that reasoning based on myths and stereotypes can constitute an error of law and compromise judicial (and jury) impartiality (see e.g. *R v Barton*, 2019 SCC 33). Nevertheless, the amendments still make important inroads in recognizing the role, scope, and need for accountability regarding judicial education in sexual assault matters.

Like sexual assault, understandings of family violence are also replete with myths and stereotypes (see e.g. this 2021 report from Rise Women's Centre at 46-47). However, courts have made less progress in recognizing problematic assumptions about family violence as compared to the progress made in sexual assault law. For example, the idea that women make allegations of family violence to gain an upper hand in family law proceedings, or that they are alienating their children from their former partner out of vengeance or spite rather than concern for their or their children's safety, can be based on myths and stereotypes similar to those that are now recognized to improperly taint the credibility of sexual assault complainants. This is not to say that these things never happen, but that judges should not readily accept accusations that allegations of family

violence are false without impartial fact-finding and attention to context. This context includes the reality that women are the primary victims of family violence and that women are more likely to be accused of falsely claiming family violence even though under-reporting of family violence is known to be widespread (see e.g. here).

Currently, the only myth that has been explicitly recognized by the Supreme Court of Canada concerning family violence is that if a woman was abused as badly as she alleged, she would have left her partner (see *R v Lavallee,* [1990] 1 SCR 852). The Court has acknowledged that family violence is gendered (see *Michel v. Graydon*, 2020 SCC 24, discussed further below), and recently allowed an appeal (with reasons to follow) in another family law case involving family violence where it was explicitly called upon by interveners to recognize the myths and stereotypes that can infect these cases (see *Barendregt v. Grebliunas*, 2021 BCCA 11). While we await further acknowledgement by the Court of myths and stereotypes related to family violence, judicial education should include exploration of these issues and their systemic context, as it does for sexual assault matters. We also advocate that, like sexual assault training, the CJC should consult and report on the scope of judicial education on family violence. These practices are necessary to maintain public confidence in the judiciary's ability to adjudicate and engage in family dispute resolution processes free of myths and stereotypes about family violence.

Ethical Principles for Judges

The newly revised EPJ are silent in relation to family violence. Family violence concerns are, however, implicit in two sections, Diligence and Competence (III) and Equality (IV). But in the context of litigation abuse, judicial mediation, and when judges are working with self-represented litigants, an implicit understanding is not a sufficient reflection of the seriousness and prevalence of family violence. Implicit inclusion risks masking gender-based violence considerations. To be clear, the EPJ are "aspirational", not a binding code of conduct (Introduction 4). They express "a vision" of the "judiciary's highest ethical aspirations" (Introduction 1). In the sections that follow, we acknowledge the principles that make family violence implicit in the EPJ, and we make recommendations for some explicit recognition. (We also support recommendations that the EPJ should be a binding code of conduct, see here, here, and here.)

Family Violence Considerations are Implicit

As discussed above, the CJC and NJI deliver judicial education programs. The EPJ support professional development by suggesting that judges should "maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties" (EPJ III.C.). Social context "encompasses knowledge and understanding of the realities of the lives of those who appear in court" including "the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background" (3.C.4.). The PD Policies also enumerate circumstances related to social context, but they include "family violence", so it is not clear why family violence was omitted from the EPJ. Notwithstanding the omission, "matters of gender" presumably includes gender-based violence, suggesting that the EPJ encourage judges to participate in "formal and informal" training aimed at understanding gender-based violence such as family violence (3.C.4.). The EPJ

also require gender to be considered alongside intersecting inequalities based on other grounds, which is important in the family violence context.

Given that professional development is a broad category, understanding social context is not limited to the application of the law as it relates to gender-based violence; it seems to extend to the skills necessary to identify, screen, and manage risk. It would be nonsensical to understand gender-based violence yet not employ those skills to respond, particularly in judicial mediation.

Education ensures that judges do not further perpetuate a cycle of abuse by unknowingly missing the signs of violence, and unwittingly reinforcing oppressive gendered power structures through their actions. Avoidance of myths and stereotypes about family violence also ensures that judges do not make errors of law, as noted above. Indeed, the EPJ state that judges should be "sensitive to" and not be "influenced by attitudes based on stereotype, myth or prejudice" (IV.C.). Judges "should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted as showing insensitivity to or disrespect for anyone" including "stereotypes linked to gender" (4.B.1.; see also: 4.C.1., 4.C.2. and 4.C.3.). Presumably this includes stereotypes and myths about women who have experienced violence such as those discussed above.

Family Violence Considerations Need to be Explicit

Litigation Abuse

Litigation abuse occurs when an abusive spouse uses the justice system to control and punish a former spouse. For example, this may occur by refusing to file court documents, bringing vexatious or multiple claims, disobeying court orders, delaying, changing lawyers, bringing applications to review or vary, or refusing to pay support. This type of abuse is not limited to family law or litigation, and it can be overlooked because the claims may be wrongly justified as a legitimate exercise of legal rights, especially in the early stages of litigation (see here). Being drawn into abusive litigation can cause victims of IPV to feel revictimized (see here and here). The CJC has recognized litigation abuse in their Family Law Handbook for Self-Represented Litigants, but it was not included in the EPJ.

The EPJ suggest that judges sometimes need to "act with an appropriate measure of firmness" to prevent "abuse of process or improper treatment of participants in the adjudicative process" (2.C.3.). There are no examples provided, only that a judge's role is to maintain "civility and respect" and "balance" the right "to be heard" with "efficiency of the process" (2.C.3.). Litigation abuse involves a litigant improperly using the justice system, which judges cannot condone given their role in upholding the rule of law. And while "improper treatment of participants" could suggest litigation abuse, the EPJ should explicitly refer to litigation abuse to fulfill its mandate of describing "exemplary behaviour" and educating the "public" about the "judicial role" (Introduction 4). Being explicit about family violence further supports the federal initiative to address this violence.

Judges' Non-Adjudicative Role

In addition to ruling on exemptions from mandatory alternative dispute resolution, judges increasingly act as mediators themselves, sometimes referred to as judicial dispute resolution or a

settlement conference (5.A.10). Judges are free to determine their mediation style, whether it will be evaluative, facilitative, or a combination. Beyond the obvious implications for ongoing professional development in conflict management and mediation, there are two additional sections of the EPJ that are triggered by judges' working in a non-adjudicative capacity in relation to family violence: Confidentiality and Discretion (II.B.), and Judicial Duties (V.A.).

The EPJ state that "judges are entrusted with preserving confidentiality" and "should not use or reveal confidential information except where, in the performance of their judicial duties, such disclosure is necessary, or done in accordance with relevant rules" (2.B.1.). When a judge acts as a mediator, this may involve caucusing, whereby the mediator meets with each side separately to try to negotiate a resolution. Caucusing is common but controversial because it involves the mediator selecting the information that is relayed to the other side. Mediators often have their own style of approaching caucusing, sometimes explaining their rules in advance – for example, a policy not to disclose information they believe may increase risk. Some mediators are required by their governing organization to be trained in family violence and to screen for it (e.g.: Ontario Association for Family Mediation, Family Dispute Resolution Institute of Ontario.) To participate in a process that hinges on consent, both sides need to know the rules of disclosure, and whether safety concerns will be considered in the judge's decision-making. We recommend that the EPJ include a section on confidentiality when judges are working in a non-adjudicative capacity, particularly when caucusing, and that it be inclusive of screening requirements and safety considerations.

The EPJ provide "values and boundaries" to help guide judges in their non-adjudicative work (5.A.10.). Judges should ensure that the "process and outcomes are acceptable to the parties"; that the "outcomes are the subject of informed decision-making by the parties"; that the "process is transparent"; that "the outcomes are not coercive, unconscionable, or illegal"; and that the "legitimate interests of known non-involved third parties are considered" (5.A.10). While these considerations are all important, they overlook the impact of family violence, especially coercive control, on a victim's ability to participate in a consensual dispute resolution process. The EPJ emphasize a transparent process and a lawful outcome, without considering a process that might be lawful and transparent, but abusive.

An abusive relationship may cause the victim to become "afraid" of her abuser and suffer "significant psychological and emotional stress" (*R v Craig*, 2011 ONCA 142 at para 28). In *Michel v Graydon,* the Supreme Court of Canada recognized that "women in relationships are more likely to suffer intimate partner violence than their male counterparts" (at para 95). They will "often face financial, occupational, temporal, and emotional disadvantages" as a result (at para 96). Moreover, because of the "impact of a history of violence on a person's emotional health and their consequent potential fear" they may be unwilling "to engage with their past abuser" or be unable to do so (at para 95).

All types of mediation emphasize self-determination. As noted above, power imbalances can be replicated in consensual dispute resolution processes, such that the process itself causes revictimization. Family violence may render it impossible for a victim to have a voice, and worse, the process itself may feel traumatic. The EPJ do not reflect this reality. We recommend that the

EPJ indicate judges ought to screen and ensure they are not acting in a process that may replicate abusive power structures which further traumatize the victim.

Self-Represented Litigants (SRLs)

In 2019/20, 58% of family law litigants represented themselves. This statistic does not distinguish between those who wanted a lawyer but could not afford one, and those who chose to self-represent in order to have direct contact with their victim. Self-representation is a tactic used by some abusive spouses who see it as an "opportunity to personally question and intimidate their former partners in a public forum in which such aggression is sanctioned" (here at 683).

The EPJ include considerations specific to SRLs and fostering access to justice (2.D.1.). A primary concern seems to be avoiding bias and ensuring SRLs may participate in a "fair and impartial process" and do not suffer "unfair disadvantage" (5.A.8). The EPJ suggest that judges should provide "appropriate assistance" and "accommodations", but they should not "extend to the point where they become unfair to the other party" (5.A.9.; 2.D.2.). But nor should assistance mask abusive tactics or empower abusive conduct. Where an abuser self-represents, his pursuit of "justice" may be complicated by his intention to inflict harm on his former partner through the justice system. It is our recommendation that the EPJ' inclusion of SRLs extend to family violence considerations. Ensuring victims of family violence are not revictimized by accessing the justice system is consistent with the EPJ' requirement that judges "ensure" that the "court process is not abused" (5.A.7.).

Conclusion

Legal frameworks are starting to change in ways that require judges to better appreciate the harms of family violence and how those harms should influence the suitability of family dispute resolution processes and outcomes. We advocate for inclusion of these issues, as well as exploration of the myths and stereotypes that invade understandings of family violence, in judicial education programs and judicial practices. We recognize that the CJC focused on specific themes in their modernization of the EPJ, and that they were updated after years of consultations (in which we did not participate). In the process of writing this post we made inquiries and it appears that a list of the public interest groups who made submissions during the process is not publicly available and we have been unable to find any submissions that were made related to family violence. Although family violence was not one of the six "themes to consider", which is presumably why there were no specific submissions, family violence is most certainly raised by these themes, as discussed above. We hope that the EPJ will be interpreted with considerations relevant to family violence in mind until they are next revised, and that next time, family violence will be one of the highlighted themes.

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