



POSITION ON LEGISLATIVE REFORM REGARDING CUSTODY AND ACCESS

ACWS supports changes to the custody and access provisions in both federal and provincial legislation that will:

- Acknowledge and recognize the significance of domestic violence
- Give priority to the protection and safety of women and children in cases of violence in families when separation and divorce occur
- Require the implementation of comprehensive risk assessments
- Include a statutory presumption that it is not in the best interests of a child to be placed in the custody or have unsupervised visits with a parent who has perpetrated acts of violence against the child, the child's siblings or parent
- Require perpetrator accountability
- Require mandatory training in the dynamics of violence for all lawyers, judges and family court personnel
- Include a requirement of supervised access and monitored exchange in cases where there has been a finding of violence in the family

Currently, domestic violence is not clearly defined in federal legislation nor does this legislation specifically acknowledge the significance of domestic violence to custody and access issues.

Decision makers and service providers in the area of custody and access do not have the knowledge and understanding of the complex nature of family violence to make informed decisions that give consideration to the safety of the child and the parent who has been abused. The current legislation, combined with the lack of knowledge and resources, results in arbitrary, inconsistent and sometimes harmful decisions regarding custody and access of children involved in separation and divorce settlements where domestic violence is involved.

For example:

- Court decisions have included provisions for 'maximum contact' or 'shared parenting', which can undermine the best interest of the child and expose women and children to ongoing violence and harassment.
- Child welfare workers are taught not to become involved in custody and access disputes.
- Visitations that have been court-ordered without the appropriate domestic violence screening and risk assessments have resulted continued harassment and intimidation of the abused parent – and in some cases, the deaths of women and children.

While most conflicts around custody and access are resolved by parents outside of court, the cases that end up in the court system involve higher levels of violence compared to the general population of divorcing adults. It is also known that the incidence of violence often escalates after separation. Therefore, it is imperative that legislation recognizes this reality and reform existing and develop new legislation that will result in the maximum protection of children and women.

ACWS has responded to various opportunities to address the need for legislative reform, particularly in relation to custody and access where there is family violence. Some of the recommendations that have been put forward by ACWS include:

- A clear definition of domestic violence to be used by both federal and provincial legislation
 - Acknowledgment in legislation of the significance of domestic violence to custody and access issues
 - Consideration given to the safety of the abused parent and the children
 - A presumption to be built into the legislation that custody (including joint custody) not be awarded to the perpetrators of domestic violence
 - Legislation that makes an explicit provision for supervised access and exchange in accredited safe visitation centers staffed by persons who have family violence training
 - Courts be allowed to require perpetrators of domestic violence to complete counseling or treatment as a condition of custody and access
 - Legislation that allows for the non-disclosure of the abused spouse's residence
 - Domestic violence be considered sufficient grounds to vary a custody or access order
 - Cases involving domestic violence be given priority for legal aid representation and that there be expeditious and inexpensive access to the courts
 - Flight from the home for fear of safety should not be viewed as abandonment and used against a woman in custody and access disputes
 - Legislation mandate publicly funded resources to enable professionals trained in family violence to conduct mandatory risk assessments.
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- Shared parenting not be legislated.
 - Cultural diversity and sensitivity be included among the factors to be considered in custody and access decisions

Information Sheet 1: Summary of Recommendations

(Submission to the Standing Committee regarding Bill C-22: Amendments to the Divorce Act)

1. Include a Preamble to the Divorce Act that specifically acknowledges the prevalence of violence against women and children within families and is often present in those families appearing in court regarding custody and access issues.
2. Clearly define abuse to include verbal, psychological, emotional, physical, financial, sexual, cultural and spiritual.
3. Keep the language of Custody and Access rather than moving to “shared parenting”, and use terms such as “parental responsibility” and “parenting time”.
4. Best Interests of the child must include the safety and well-being of the primary caregiver, usually the mother.
5. Establish clear guidelines and standards for defining the “best interests of the child” and include these in the “best interests test”.
6. Include a presumption against custody of or unsupervised access to the child by the perpetrator.
7. Include a presumption that custody should be with the primary caregiver of the child.
8. Include a requirement of routine screening for woman abuse in all custody and access cases.
9. Include a requirement that risk assessment be conducted by experts trained in domestic violence in cases where there are allegations of abuse or where signs of abuse are present.
10. Include a presumption against shared parenting and joint custody.
11. Include a requirement for supervised access and exchange in cases of violence in families.
12. Include a statutory presumption that courts not change a supervised order to an unsupervised order without just cause.
13. Require mandatory training in the dynamics of violence in families for all lawyers, judges and family court personnel.
14. Expand the definition of expert witness.
15. Legal aid services must be made available to all women who require them.
16. All courts must hold perpetrators of abuse accountable.
17. Mediation must never be mandated
18. Abused women have the right to request and to be granted non-disclosure of her address.

Information Sheet 2: Summary of Recommendations

(Submission to the Minister of Children's Services
"Domestic Violence: Child Custody, Access and Recommendations for Reform")

In a submission to the Ministry of Children's Services, ACWS stated that the following points need to be reflected in provincial and federal legislation dealing with custody and access¹.

1. Domestic violence needs to be clearly defined in the Canadian Divorce Act and the Alberta Domestic Relations Act.
2. Legislation needs to specifically acknowledge the significance of domestic violence to custody and access issues. Federal and provincial law must consider the need to protect the child from harm that may be caused by being subjected to abuse or by being exposed to abuse towards another person. Legislation should include the provision that "A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of family violence can be made."
3. The safety of the abused parent and child should always be the paramount concern of the court in making an order for access. Canadian legislation should specifically set out the factors to consider when determining whether or not a child will be safe while a violent party has custody or access to the child.
4. An acknowledgment that maximum contact is NOT always in the best interest of the child and that "Shared Parenting must not be legislated".
5. There must be a statutory presumption that it is not in the best interests of a child to be placed in the custody of or have unsupervised visits with a parent who has perpetrated acts of family violence against the child, the child's siblings or parent. The court should be required to consider appropriate factors in determining whether the presumption has been overcome.
6. Canadian statutes should provide that an abused parent is able to request non-disclosure of her address if she is concerned about her safety or the safety of her children. Court documents can be served by a third party such as a lawyer.
7. Legislation should direct the courts not to hold flight from the family home due to a reasonable fear of family violence against the fleeing parent.
8. Requirement of Supervised Access and Monitored Exchange in cases where the court is satisfied that the parent has used violence against the child or the other parent of the child. The court should be granted broad authority to impose *whatever conditions* are deemed necessary for the purpose of protecting the safety of the child and the other parent while the right of access conferred by the order is being exercised. This would include pick up and return of the child to the custodial parent.

¹ These recommendations are drawn from a number of sources including:

- (a) Bain, P. (Summer 2000). *Family violence: an essential in factor in determining custody and access*. BC Institute Against Family Violence Newsletter: British Columbia.
- (b) Bala, N., Bertrand, L.D., Paetsch, J.J., Knopper, B.M., Hornick, J.P., Noel, J.F., Boudrea, L., Miklas, S.W. (1998). *Spousal violence in Custody and access disputes: Recommendations for reform*. Status of Women Canada, McLaughlin, A. (Ed), Ottawa.
- (c) 1994 National Council of Juvenile and Family Court Judges. *Model Code on Domestic and Family Violence*.

9. There must be a statutory presumption that courts will not change a supervised order to an unsupervised order until the court is satisfied beyond a reasonable doubt that the safety of the primary caregiver and the children is ensured.
10. There needs to be an investment in new technology that allows judges to have access to comprehensive information on all matters before the courts. This would allow a judge to make a custody or access order that is consistent with a criminal no contact or civil restraining order.
11. Both family court counselors and individuals contracted by the court to conduct custody and access assessments should be required by law to take family violence training.
12. Federal and provincial legislation should specifically authorize a judge to set aside an agreement made under the threat of violence.
13. Provincial and territorial legislation should provide for expeditious and inexpensive access to the courts in cases of domestic violence
14. Provincial and territorial legislation should provide for expeditious granting of interim custody and access orders in cases of domestic violence
15. Domestic violence risk assessors who are not from the same cultural background as the parents should be required to consult a cultural interpreter to explain standards of conduct that may be different from those in the assessor's culture.
16. ACWS supports recommendation #8 put forward by the Alberta Unified Family Court Task Force (2002) that family violence (adult criminal charges) should not be included in the jurisdiction of the unified family court. Domestic violence offences are crimes and must not be dealt with as private family matters.