

Bridging the gap between the needs of survivors of family violence and the realities of family court

A webinar for CREVAWC's Supporting the Health of Survivors of Family Violence in Family Law Proceedings Project

Responses to unanswered questions

Please note: where answers refer to provincial legislation, this is for Ontario. Each province and territory has its own system of family laws. While they are quite similar in most jurisdictions, they are not identical. The Divorce Act is a federal law that applies to people everywhere in Canada.

1. How does the court define abuse?

Both the Divorce Act and Ontario's Children's Law Reform Act define family violence for the purposes of making parenting decisions as follows:

"any conduct by a family member towards another family member, that is violent or threatening, that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person – and in the case of a child, the direct or indirect exposure to such conduct"

Both laws are explicit that this conduct constitutes family violence, for the purposes of family law, whether or not it constitutes a criminal offence.

The definition also includes a list of common tactics of abuse as follows:

- Physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person
- Sexual abuse
- Threats to kill or cause bodily harm to any person
- Harassment, including stalking
- The failure to provide the necessities of life
- Psychological abuse
- Financial abuse
- Threats to kill or harm an animal or damage property, and
- The killing or harming of an animal or the damaging of property

This definition, including the list of common tactics, is very important because it will make it easier for people who have not reported family violence to the police or who have been subjected to non-physical behaviours such as sexual, financial or psychological abuse, stalking and/or threats to themselves, their children, animals or others to have their evidence of family violence taken seriously and given the appropriate weight when courts are determined the appropriate arrangements for children.

2. What are the differences between being married and common-law?

There are a number of differences between being married and living in a common-law relationship. Here is a summary of some of the key similarities and differences, followed by a link to a resource with more detailed information:

- Whether or not the parents of a child are married to one another, live together in a common-law relationship or have never lived together, decisions about parenting arrangements for the child are made using the best interests of the child test. Married parents have no more or fewer parental rights and responsibilities than parents who are not married to one another. The focus of the law is on what is best for the children
- Whether or not parents are married to one another, they both have a responsibility to provide financial support to their children. If someone is not married to (or even has never lived with) the other parent of their child, they will still have an obligation to pay child support if the child lives primarily or entirely with the other parent
- In Ontario (and the law is similar in other provinces), people are considered spouses for the purpose of spousal support if they are married, have lived together for at least three years or have a relationship of some permanence and have a child together
- Division of property is very different for married people and people living in a common-law relationship. Both the Divorce Act and provincial family laws (in Ontario, the Family Law Act) view marriage as a partnership and, with some exceptions, the value of property accumulated over the years of marriage is to be shared equally between the spouses, regardless of who paid for it or whose name it is registered in. Common-law relationships have no such protection in most (but not all) provincial family laws.
- Only married people can get a divorce.

<https://familycourtandbeyond.ca/family-law-court/family-law-issues/>

3. What are some of the challenges in raising the issue of DV in family court case?

While decisions made in family court, of course, are framed by the relevant law, they are also very fact specific.

For example, the best interests of the child test, which includes a number of very similar criteria in the Divorce Act, Ontario's Children's Law Reform Act, and other provincial and territorial legislation, sets out the factors judges are required to consider when making parenting orders. However, the legislation does not assign a weight or value to each factor because that is up to the judge to do based on the evidence that the two parties present.

While judges are required to consider the views of the children in every case, for instance, the weight given to the views of the child will depend on the age of the child.

Family violence is a factor that must be considered, but how much it affects the outcome of the case will depend in large measure on the kind of evidence the parties present.

Historically, there have been a number of challenges when a woman raises this issue, many stemming from a lack of judicial education on family violence, others arising because not all lawyers are well informed about the issue of family violence, still others because many people who go to family court do not have a lawyer and don't know how to present effective and relevant evidence.

Further to this, because much family violence happens in private, there are often no witnesses other than the two people. Very few women report family violence to the police (only about 25%) and, if there are no serious physical injuries, the woman does not go to the hospital.

It is not uncommon for an abuser to deny his behaviour or to tell the court that it was a response to something the woman did or even that she is the abuser. This leaves judges facing a “he said/she said” dilemma, often with little independent evidence to support either party’s contention.

Some abusers respond to their partner’s evidence about family violence with a parental alienation claim, and the attention of the court then turns to this allegation, ignoring the prior claim of family violence.

The recent changes to the Divorce Act and, in Ontario, the Children’s Law Reform Act, with the detailed and broad definition of family violence, the criteria for the best interests of the child test and the factors the court must consider when applying the test will all reduce the challenges for someone who raised the issue of family violence in a family law case. However, without appropriate education for everyone in the family court system and without universal screening for family violence, challenges will remain.

It will still be important for anyone making a claim of family violence in a family law case to provide good evidence. Luke’s Place has developed two webinars on this subject – one focused on collecting evidence and the other on presenting it – which you can find at the following link: <https://lukesplace.ca/?s=evidence+webinar>

4. How can mediation be made safe in cases involving family violence?

There are safety issues for a woman leaving an abusive relationship whether they use mediation or litigation to resolve their family law issues. Now that more and more court hearings are taking place via video conference and/or teleconference, there are safety issues related to those kinds of proceedings as well.

A safety plan – whether for mediation or court (in person or remote) – must take into account both physical and emotional safety concerns.

With respect to mediation, it is important for people to use a reputable mediator who has had training in family violence and who uses a recognized tool to screen for it. Anyone looking for a mediator should ask these questions before selecting one.

Most mediators who do proper screening are well equipped to manage many of the safety issues that might arise. Some offer shuttle mediation, so the clients are not in the same room. It is important for anyone who has been subjected to family violence to be open with the mediator and provide details about the abuse as well as their concerns about the abuser’s possible behaviour during the mediation process.

It is also really helpful if the survivor has the support of an advocate. Ontario’s Family Court Support Workers are skilled at assisting women to make safety plans and can also accompany them to legal appointments and court. Other provinces may have similar programs.

For more information about safety planning, including specific suggestions for court, please see the Luke’s Place resource, FamilyCourtanyBeyond.ca: <https://familycourtnbeyond.ca/keep-safe/>

5. What questions should a woman ask when hiring a lawyer?

Different situations will require different kinds of questions. For instance, a woman hiring a lawyer to prepare a divorce application will not need to ask the lawyer as many questions about the lawyer’s experience handling family violence cases as a woman who needs a lawyer to help her get a restraining order to apply for a parenting order for her children.

You will find some good information about what to look for in a lawyer, how lawyers are paid and what questions to ask when hiring a lawyer at: <https://familycourtandbeyond.ca/who-can-help/lawyers/>