PATHS
The Provincial Association of Transition Houses and Services of Saskatchewan

Position Paper

"In an ideal world…": How Bill C-422 ignores the realities of many Canadian families and puts women and children at risk

PATHS Official Position: PATHS strongly opposes Bill C-422, *An Act to amend the Divorce Act (equal parenting).* We do not believe that legal presumptions are appropriate or fair in the area of family law. Instructing judges to presume 'equal' or 'shared parenting' responsibilities will put the safety, security, and well-being of women and children exiting abusive situations at continued and unnecessary risk.

"The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding."

-Former Australian Family Court Judge, Richard Chisholm

The stories are almost identical. From shelter to shelter and support group to support group, countless women share countless stories describing the struggles, frustrations, and injustices they face in the family court system. These women are trying desperately to first and foremost, protect their children from continued violence and abuse, but also fight for what is just and fair. As professionals who work on the front-line of intimate partner abuse and family violence, we struggle to assist women in breaking free from the cycle of violence and abuse. Too often the courts demand that these women place themselves back in harm's way to facilitate a continued relationship between the abuser and her children. Many times she must sit on the sidelines all the while knowing that violence and abuse are continuing to affect her and her children. Changes are long overdue and must be made within family law and the family court system however the changes proposed in Bill C-422 are a definite step in the wrong direction.

Bill C-422, *An Act to amend the Divorce Act (equal parenting) and to make consequential amendments to other Acts,* was introduced to the House of Commons on June 16, 2009 by Conservative Party MP Maurice Vellacott. This Bill is a continuation of efforts strongly influenced by father's rights lobbyists who are gaining increasing power and influence in both government and media. Among other things, Mr. Vellacott's bill attempts to replace the concepts of 'custody and access' by introducing a presumption of 'equal' or 'shared parenting'.

In an ideal world, parents would partake equally in the caring for, nurturing and rearing of their children. However, we do not live in an ideal world. Although it may be hard to believe, the reality is that we live in a country where half of all women over the age of 16 report being the victims violence at least once in their lives, oftentimes at the hands of a current or former intimate partner (Johnson, 2005). In our world, many women are physically, sexually, emotionally, verbally, spiritually, and/or financially abused by their current or former partners with whom they share children. In Canada, women are five times more likely to be murdered by their husbands, common-law partners, boyfriends, and ex-partners than men (Statistics Canada, 2008). The children who must endure these realities do so without choice. We do not live in an ideal world. Legislation must not ignore the realities of our world, our society, our country, and our women and children, to do so would not only be naïve and misguided, but incredibly dangerous.

Bill C-422: A Closer Look

Simply stated, the aim of Bill C-422 is to instruct judges to automatically presume 'equal parenting' when faced with custody decisions in the event of a divorce or separation. According to Mr. Vellacott, this concept was brought forward on the basis of extensive research in the areas of child development outcomes. Indeed, it has been clearly established in the literature that children show better outcomes in many aspects of their development when both their mother and father are present and play active roles in their lives. In this case, the courts presumption that equal parenting is in line with the best interests of the child would be indisputably correct. What Mr. Vellacott and other advocates of equal parenting fail to recognize or acknowledge is that 'better outcomes' are based only on situations where both the mother and father are ***positive*** presences in the child's life. When one parent has a negative impact on the family dynamic, as is seen in the case of violence and abuse in the household, the outcomes are much different. Bill C-422 neglects to take the issues of violence and abuse into serious consideration and does not provide clear or concise guidance as to how to identify and treat these instances. This omission in and of itself places children and women at risk and calls for opposition to this bill.

According to the *Backgrounder for Equal Parenting Private Member's Bill C-422* (2009) presented by Mr. Vellacott, Bill C-422 claims to do the following:

- To clarify that Parliament recognizes that society has an interest in ensuring that children not lose either parent unnecessarily, and to move away from the model of "custody" to the model of "parenting time"
- To define "best interests of the child" as served by maximal ongoing involvement by both parents with the child, to be implemented in the Divorce Act as the rebuttable presumption of equal parenting as the starting point for judicial deliberations

- To clarify relocation determinations as recognizing the right of the child to continuity of relationships with both parents and placing the onus on the parent moving to justify a change to a parenting time agreement
- To require systematic collection of consistent court statistics

The Dangers of Bill C-422: Lessons learned from Australia and other jurisdictions

Unfortunately, many times it is only in hindsight that concerns are revealed and dangers highlighted with regards to laws and legislation. When tragedy strikes, as it did in Melbourne Australia when an innocent four-year-old girl was thrown off a bridge to her death by her father who was given shared parenting responsibilities as a result of the shared parenting law enacted in 2006, interests were sparked and legislation was revisited and re-evaluated. It was reported that the mother of this child was inclined not to disclose instances of violence and abuse because she was afraid she would be deemed as an 'unfriendly parent' by the courts. Since that time, family court judges, lawyers, and child psychologists have come forward openly stating that the laws have been damaging to children. In his report, Family Courts Violence Review commissioned by the Australian government, Professor and former family court judge Richard Chisholm recommended **major** changes to the family law system in Australia. He also reported that the shared parenting law has undoubtedly placed women and children at risk. Chisholm (2009) also identified a key theme in his report that the family court system should not only allow for but encourage the disclosure of any and all instances of past or present violence or abuse and that these disclosures should be examined closely to safeguard women and children against future tragedy, violence, and abuse. Similar reports have been made in England and select American states that have in the past decade enacted this type of legislation.

Equating the 'best interests of a child' to equal time spent between both parents is dangerous. When considering what is in the best interests of a child Bill C-422 proposes a two-tiered evaluation system:

Primary Considerations:

- The benefit to the child of having a meaningful relationship and as much contact as is practicable with each of his or her parents
- The continuity of relationships with relatives
- The willingness, and the effectiveness of the efforts, of each spouse to facilitate, encourage and support the child's continuing parent-child relationship with the other spouse
- The protection of the child from physical and psychological harm through abuse, neglect or alienation of parental affection

Additional Considerations:

- Any views that are voluntarily expressed by the child free from influence by either spouse or by any other person, with due weight to be given by the court to these views in accordance with the maturity and comprehension level of the child

- The benefits associated with maintaining a continuity of the culture and traditions of the child
- Family violence committed in the presence of the child
- Any event or circumstance since separation that indicates that the behaviour of either spouse is not compatible with the primary considerations

The four considerations stated in the primary category are without a doubt positive and forward-thinking. The dangers of the Bill C-422 are not so much seen in what is proposed but rather what is missing. The issues of violence and abuse are hardly taken into consideration. This leaves room for enormous judicial discretion and makes it possible for many families to slip through the cracks. Further, Bill C-422 proposes to ignore past parental conduct.

Past conduct:

- In making an order under this section, the court shall not take into consideration the past conduct of a spouse unless the conduct is relevant to the ability of that spouse to act as a parent of a child of the marriage

Ignoring a parent's history of violent tendencies and abusive behaviours seems not only counter-intuitive but extremely dangerous. In abusive situations, the best predictor of future behaviour and outcomes is past behaviour. The courts should not only be fully aware of past abusive and violent behaviours but should take these histories into serious consideration when deciding what is in the best interests of the children of the marriage. The physical and emotional well-being of a child should always be the courts number one priority.

Family Violence in Canada: The reality of the situation

Prevalence, Severity, & Consequences

Intimate partner abuse and family violence is a concerning issue and social problem in Canada and around the word. Intimate partner abuse and family violence transcends boundaries and stereotypes, leaving women and children from all backgrounds vulnerable. Unfortunately, the reality of the prevalence, consequences and extent of this abuse will never be fully revealed or even known. Statistical reports, victim's use of support services, and police reported incidents represent only a fraction of what really happens in Canadian households. According to the 2004 General Social Survey (GSS) on Victimization less than 28% of spousal assaults were reported to police. Many victims of violence and abuse suffer in silence for many different reasons. Some fear the retaliation of their abusers, others fear having their children apprehended. Some do not even recognize that what is happening to them and their children is actually abuse. Many are embarrassed and feel as though the abuse they and their children endure is somehow their fault. However, the data concerning family violence and intimate partner abuse that is known is nevertheless startling. In 2007 more than 101,000 women and children were

admitted to shelters across Canada (Statistics Canada, Sauve & Burns, 2008) and according to the 2004 GSS more than 653,000 women reported being physically or sexually assaulted by an intimate partner.

Much has been made by advocates of equal parenting and Father's Rights groups that intimate partner abuse goes both ways, and that both men and women are at equal risk of experiencing violence and abuse in their relationships. This is a dangerous statement that is simply not true. In fact, according to the Family Violence in Canada: Statistical Profile of 2008 8 out of 10 victims of spousal violence were female. This was consistent across every province and territory in Canada. Further, when examining the findings of the 2006 Statistics Canada report on Measuring Violence Against Women, it is overwhelmingly apparent that the violence and abuse experienced by men and women in intimate relationships is neither similar nor equivalent. Women are generally subjected to more severe forms of violence than are men. More than twice as many women were beaten, choked, and sexually assaulted by their male partners. It was also shown that females were twice as likely to experience chronic, ongoing assaults.

The impact of intimate partner abuse is profound and its effects are not only felt by the victims themselves, but also by their children. It is now commonly accepted that children are no longer simply 'witnesses' of violence and abuse in the home, rather they are directly exposed to and affected by the actions and behaviours of an abusive parent. According to the GSS (2004), nearly 5% of children were threatened or harmed in incidents of spousal violence. Even when a child is not directly physically affected by violence in the home, it has been established that they can be profoundly traumatized by the experiences of being exposed to violence and abuse. The effects of children being exposed to violence and abuse are reflected in physical, developmental, behavioural, and psychological difficulties that can often last a life-time if the abusive situation does not stop and interventions are not in place (Cunningham, 2007).

Escalation of Violence after Separation

A common societal misconception when it comes to intimate partner abuse and family violence is that the nightmare ends when the relationship ends. In reality, violence after separation often increases in severity and changes in form. Abusers will often adopt new strategies to maintain power and control including stalking, criminal harassment, and legal bullying. Unfortunately, the family court system has been the arena for post-separation abuse and continued bullying. Bill C-422 increases the opportunities for abusive partners to continue their controlling, coercive, and abusive behaviours. In no way does this bill safe-guard women and children who are actively trying to exit abusive situations from future violence and abuse.

Other Realities of Families in Canada:

Women are increasingly holding positions in society that have been traditionally held by men. They are more likely than ever before to work full-time, set education as a priority,

and strive for financial independence. Men's roles in society are changing as well. Men are becoming much more likely to take an active role in the caring for and rearing of children and contributing to the general functioning of a household. Despite these incredibly positive changes towards increased equality between the sexes in terms of family and household responsibilities, in the majority of cases, women remain to be the primary caregivers of children. Bill C-422 proposes that family dynamics and responsibilities should automatically change as soon as a divorce or separation takes place. Is it appropriate or in the best interests of a child to change the distribution of responsibilities when one parent has little experience or history fulfilling these duties?

Case by Case Judgments

Families are complex systems. The experiences, circumstances, histories, and needs of families who end up relying on the court system for custody decisions are perhaps even more complex. Instructing judges to presume equal parenting in all cases is inappropriate as each family is unique. Deciding what is in the best interests of children should be dependent on the careful examination of the individual needs of each child while taking into consideration the uniqueness of each family and their circumstances. When faced with custody decisions, judges should not only have the right but the responsibility to carefully exam all of the facts and circumstances in each and every individual case. Blanket presumptions in this area are neither just nor fair.

Recommendations:

1. Review and amend the Divorce Act making the protection of women and children a priority
2. Consideration and examination of past parental violent, abusive, or coercive behaviour when making custody decisions
3. Maintain the concepts of access and custody
4. Collect statistical data from family courts about decisions and outcomes.

PATHS also supports the following recommendations proposed by NAWL with regards to family law legislation and the need to offer protections to women and children:

- Eliminating joint custody arrangements in cases of violence against women
- Requiring that violence and abuse against the mother be an important factor in the best interests of the child test
- Eliminating maximum contact provisions that do not take into account the safety of women
- Supporting access regimes that protect women from ongoing, unsupervised contact with their abuser at exchanges of the children

- Implementing measures to prevent abusers from using the family law and the family court process to continue to harass and abuse their former partner

Concluding Remarks:

Violence and abuse occur in many homes across Canada. This is the reality of our situation and we cannot ignore the real-life experiences of these families. The idea that both fathers and mothers should have the opportunity to contribute equally to the caring for and rearing of children even after divorce or separation is an incredibly positive one and should be something we as a society aspire to bring into reality. Unfortunately, at this time, the realities and real-life experiences of women, children, and families in this country do not reflect the kind of situation that would be appropriate for the implementation of this type of shared parenting practice. If this legislation is passed, the government will be sending a strong message that parental rights are more important than the well-being of children.

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