

Introduction

Thank you for allowing us to make a brief submission to the committee regarding Bill 207 on Monday, October 12, 2020. We wish to expand further in writing regarding some of our concerns with Bill 207, and especially the critical need for training within the judicial system. My name is Dr. Jennifer Kagan, and I am first and foremost, Keira Kagan's mom and I am also a family physician. My husband is Philip Viater, who was an amazing step-father to my daughter Keira. Philip is a practicing family law lawyer with 12 years of experience in Ontario courts.

We came before the committee, because of the preventable tragedy that occurred in February 2020 when our beautiful four-year-old daughter Keira was found dead at the base of a cliff in Milton, Ontario, along with her biological father in a murder-suicide. This tragedy took place on the eve of returning to court to suspend or supervise her biological father's access following a protracted court battle that contained many court orders with negative findings and warnings against Keira's biological father. At the last court appearance, we sought an emergency order to suspend or supervise his access due to further escalation of conduct by the biological father, and it was adjourned by the judge who gave us a speech about everyone being at fault. This judge did not understand the situation in the face of insurmountable evidence, as our worst fears came true: Keira's father killed her.

We are writing today because many red flags and warning signs were ignored by the family courts, and we do not want to see this happen to any other child or family. We want to see a judicial system that recognizes and understands all aspects of Family Violence and truly puts the needs of vulnerable children first and protects them from all forms of family-based violence. I need to stress for you, that while what happened to Keira is the absolute most tragic way to lose a child, many more children are suffering in this province because of prolonged Family Violence that can carry on for years following a separation, and as I will explain in more detail, can have life-long devastating effects on all aspects of a child's life.

What is Family Violence?

I am cognisant that many reading these submissions will immediately claim that the new proposed legislation covers exactly what I am about to say. I will explain in the next section why the legislation is deficient.

Family Violence does not refer exclusively to physical violence. It also includes psychological abuse, financial abuse, and coercive control, which is defined as an on-going pattern of domination using strategies that include irrational demands, surveillance, isolation, and the realistic threat of punishment and negative consequences. The spectrum of tactics used include threats, intimidation, emotional abuse, isolation, and denial of harm.

A common strategy used by perpetrators of violence is "DARVO" – they deflect, attack the victim for attempting to hold them accountable, and then will lie and make false allegations

against the victim, thus reversing the role of victim and offender. Violence often continues post separation as the child is used as a tool by the perpetrator to continue to exert power and control over the victim. The perpetrator is not motivated by the child's best interest, but rather a desire to maintain power and control over the victim. These tactics can even be used for years, and in some cases for decades after a separation.

Domestic violence cases differ from 'high conflict' cases, in which there is no power imbalance between the parties and where both parties perpetuate the conflict. The family court system seems to look at all cases through a lens of "conflict," which is inaccurate and harmful in cases of Family Violence, which are distinctly different. Many cases of Family Violence are incorrectly classified as 'high conflict' and blame is placed on both parties without an examination as to who is actually acting inappropriately. This only further the abuse as the perpetrator continues his/her conduct knowing that there are no repercussions.

Family violence is more than an issue between two adults. Family Violence goes to the heart of the perpetrator's parenting and affects the child, as well as the victim's parenting. Children cannot be safe if their primary parent is not safe or is in a constant state of stress and unrest knowing that the perpetrator of continued violence has access to them directly or through the children. This is true not only for physical violence, but also for psychological abuse and coercive control, which have equally grave impacts on vulnerable children. With Family Violence, not only is there an increased risk of physical harm to the child, but also an abusive parent is likely to use the child to further their abuse of the victim parent.

Significant emotional abuse of the child may be an even more damaging form of maltreatment than physical abuse. This is likely to have serious life-long ramifications for the child including increased risk of adverse health consequences later in life, such as cardiac problems and obesity, and mental health issues, such as addiction, depression and suicide. We know this from the well documented medical research on Adverse Childhood Experiences (ACEs). A child has the right to emotional stability and security. It is too simplistic to suggest that children are "exposed" to Domestic Violence, including coercive control – they experience it.

There is also a risk for exposure to severe trauma, including losing both parents, homicide or homicide-suicide, and there is a risk of children being killed. 10% of domestic homicides are children -- 80% are women, 10% men, 10% children. Rates of deliberate killing of a child by a parent in the context of a separation/divorce are increasing.

For the system to suggest that a victim of abuse simply "cooperate" or "sit down and talk" with a perpetrator is unreasonable and highly harmful. A perpetrator, by nature, does not want to end the conflict. S/he does not enter the litigation or other types of dispute resolution in good faith. Their goal is to continue harassing and intimidating the victim, often using the children in order to do so. S/he thrives on any opportunity to further harass, manipulate and torment the victim. It was with these facts in mind that we expressed some serious concerns over Bill 207 to the committee.

I am of the firm view that we need to put the physical and psychological safety of children first. To ensure that, we must never have a presumption that 50/50 decision making and access, is what's best for a child. It means that both parents' histories, including but not limited to any form of Family Violence, relationship building with the child etc. need to be considered and understood by a judge when making these life changing decisions. To accomplish this, there must be some changes to Bill 207, and the Province must ensure that all Family Court judges and anyone who works in the family court system (Office of the Children's Lawyer/Lawyers etc.) need to have on-going, mandatory training on understanding all forms of Family Violence and how to recognize it.

The Over-Arching Issues with Bill 207

A) Mandatory Education

This section only comments on the Family Violence/Best Interest of the Child portion of the Bill. Bill 207 is well written and seems to be well thought out. It makes logical sense to align the changes with those in the Federal Divorce Act. I will address later some language concerns that I have with Bill 207.

The major, over-arching problem with Bill 207 is that it will have no real-world impact on the way decisions are made by judges. If you ask any judge in this Province whether s/he had considered Family Violence in their judgment, they will all say they consider these factors already. The current test of Best Interest of the Child is broad. Every skilled lawyer brings up the factors listed in Bill 207.

Bill 207 is not a change to the law itself. It simply codifies what judges basically already do and consider.

Philip and I assume that Bill 207 is drafted, in part, to recognize the crisis in this province regarding Family Violence and the impact on the children and other victims. We assume that the drafters intend for this legislation to actually make a difference in real-world decisions from judges. However, the legislation will make little, if any, impact on decisions from judges.

The real issue is that many, if not most, judges do not have the training and expertise to know what to do with the information. Bill 207 speaks of abstract concepts such as 'coercive control', 'age and stage of development' and 'best interest of the child'. The issue is that the judges need to interpret these words.

Currently in this Province, judges receive no mandatory training in Family Violence or even on issues related to a child's age and stage of development. This is one major reason why Bill 207 will fail to make an impact. You are asking a judge, who has no training, to interpret what 'Coercive Control' means. You are asking a judge, who has no training, to make orders and

parenting schedules based on 'age and stage of development'. They simply do not understand these issues.

We need to examine who a judge is. A judge is a person who was called to the bar and has at least 10 years' experience and is of good character. When becoming a judge, s/he does not develop a superpower to suddenly know everything. S/he needs training. Lawyers have no mandatory training in Family Violence or child related issues. In our view, most lawyers do not know the first thing about these issues, other than what they imagine from watching TV.

Most judges today dismiss tactics of "Coercive Control" because they do not recognize the tactic due to a lack of training. From families in Ontario, this is what they're saying "Coercive Control" looks like in modern times:

1. I was deprived of receiving information about Keira. When she went into his care for the weekend, I would be lied to about what had occurred. One time, she came home clearly sick, and told me she was sick all weekend. I ask her father, who denied this. When I took her to the doctor, who asked me questions about when the illness had started, I was unable to give a definitive answer. Luckily, I caught a serious case of strep throat, which if I had listened to her father's claims, that she was not sick all weekend, then a serious problem could have occurred.
2. Court ordered phone calls did not go smoothly. Keira's father would hang up the phone mid-sentence. He would call when she was not there and then say that he would get her. I would wait on hold for a few minutes and then he would hang up on me. I then could not reach him. He would then show the court a call log that a call took place. Or, he would call and place Keira on mute so I could not hear our daughter. He would claim to have "technical difficulties". Again, a call log was shown in court that he complied. Many more examples exist of how perpetrators do not cooperate, but claim they do.
3. Court orders are "misinterpreted". Father claimed Good Friday started on Thursday evening, so he refused to return her. My calls and text messages and e-mails went unanswered and I did not know where our daughter was.
4. The child constantly hears denigration about the other parent.
5. We have heard from many families regarding concerns about coercive control. For example, in another family, the abuser will repeatedly harass a child via text messages, sometimes for hours, after the child has stated in numerous messages that they don't wish to have a phone call with that parent that day. That same parent will then try and tell the child that they must talk to them and when the child expresses anger and that they want to be left alone, the abusive parent will then tell the child that it is "un-natural" to be angry at them, because they are their parent. This same parent will then call and send text messages to the child in the middle of the night. All of this causes extreme distress to everyone who is in the safe home with this child.

6. In other situations this same parent will put pressure on the child via emails and text messages saying that they need them to come and see them right away (when it is not their parenting time), when the abusive parent knows that there isn't a third party available to do the drop off. It then causes distress to the entire household. This abusive parent will also tell the child during the other parent's time, that they need help at their house with chores that aren't age appropriate. This then puts stress on the child who thinks they must go to the other parents' house immediately to help for fear of being in trouble and for "disappointing" the abusive parent. The child also stresses about the looming chore demand, because it is too challenging for the child, thus causing problems for the child during the safe parent's time and increasing tension when the parent tries to get the child to go for access with the demanding parent.

7. A parent is asking to have their daughter for a few hours on the other parent's time to attend a special birthday party. They are then told by the other parent that their daughter can only attend, if they agree to deregister her from the current school she is in because they do not like it. The two are entirely unrelated.

8. Any time there is a special event a simple switch of days or getting the child for a few hours becomes an invitation for the abusive/coercive parent to engage in arguments. What should have taken 2-3 messages to resolve, have now turned into over 100 messages. The parent cannot then RSVP for events with their child because they can never get a straight answer. Then even when the parent finally says yes, they refuse to drop the child off anyway. People stop inviting the parent/child to events because they cannot rely on their attendance, including to birthday parties from other kids in the child's class.

9. It's a parent's vacation time and they are going on a flight. It's important that they get their child on time. They arrive at the other parent's home early just to be sure. They are then kept waiting 20 minutes passed when they were to be picked up, because the abusive parent alleges that the child slept in. Afterwards, the child says they didn't sleep-in and they actually got up early to watch TV and the parent told the child it was the other parent who was running late for the pick-up.

10. The other parent, a father, asks for something unreasonable, such as wanting a 4-year-old daughter for an entire month, even though it's not appropriate based on her age. The mom says no. On the next access visit the daughter comes home in distress because her father forced her to cut her hair short against her will and without the mother's consent. He is sending a message that if the mother disobeys him, he can do whatever he wants to the daughter.

11. One parent receives countless and repeated messages while at work asking for immediate answers to questions that were not urgent. When they respond after work, they are lambasted for refusing to respond. However, whenever that parent sends a message, the abuser conveniently "didn't have his phone", even when it is documented that he is glued to his phone all day. That abusive parent will claim that the other parent's emails "go into junk", but somehow it's only those e-mails that the abuser does not want to respond to. All other e-mails seem

to reach the parent just fine. The abuser thus continues to use communication as a form of harassment and coercive control over their former partner.

12. In one family, the controlling and abusive parent argues that they need more time with their child, as the child is mostly with their safe parent. When the parent agrees and attempts to arrange visits and places when they can meet for extra time, the other parent is continually late, sometimes by hours and will then blame the other parent saying they didn't know the timing, even though they had sent confirmation. They will also not show up for visits even when they have confirmed and blame the other parent saying it was their fault (either a timing mix-up or that they never actually agreed). This causes extreme stress on the child and the other parent and are ways of controlling the situation and this is a form of Family Violence.

The above are just some examples. If you go and tell a judge most of these, they will dismiss them as you "nit picking", or "gatekeeping" or some other generic words that are used in court. Often a court does not understand that they have to look at the situation as a whole, the overall pattern. Instead, they focus on one or two items. Do you think a judge would have taken me seriously when I complained that the father gave our daughter a haircut? Of course not. The issue was never the actual haircut. It was the message and intention behind it.

What "Coercive Control" means to me, and experts, may be far different than what a judge thinks it means. As a family law lawyer, Philip is sometimes faced with questions from judges hearing a motion such as, "who says that is coercive control?", "who says that is a red flag?". Meanwhile, most cases are decided on motions as very few people can afford a trial. They are based on paper evidence. Judges do not know what to look for.

Worse still, a judge or an Office of the Children's Lawyer report may excuse behaviour, that is clear-cut Coercive Control, simply because the investigator or judge did not have knowledge that the behaviour falls under that category. This results in situations where the perpetrator of the violence will continue his/her behaviour and refer to the prior decision and reports where the behaviour was excused. This only escalates the Family Violence.

It must also be noted that in situations of domestic violence, the victim parent may appear to be "unwilling" to facilitate a relationship with the other parent out of serious concerns over the physical and psychological safety of the children. The victim parent must not be punished or seen as "alienating" in such instances. We believe this should be directly incorporated into the Bill such that a protective parent is not seen to be in contravention of the "friendly parent" principle.

We next run into issues of 'age and stage of development'. Without mandatory training, judgements are all over the place. I have a 17-month-old son with my new husband. There are some judges that would say that it's appropriate that a 17-month-old should have a shared parenting schedule. However, other judges will scoff at such a suggestion and say it's not

appropriate until the child is at least 6 years old. Other judges still will reach different conclusions.

The main difference between the decisions, rests on a judge's training and knowledge of what 'age and stage of development' actually means. Many judges have no training and just make it up.

I have made inquiries with The National Judicial Institute and Canadian Judicial Council regarding judicial education. It has firmly been stated to me that judges receive no such mandatory training and that they independently decide what they want to learn themselves. I am also told that Family Violence courses for judges are only offered once every three years.

Are you aware that if you wanted to become an arbitrator in this Province, you have to undergo a mandatory 21 hours training course in Domestic Violence? Yet, we have no such requirement for our judges.

A topic that has come up is whether it is over-reach to force judges what to learn. We say no. Children's lives are at stake. Given that judges are not otherwise getting the training, it is up to the government to ensure that decisions are truly being made in the best interests of the child, otherwise I circle back to my first comment being that Bill 207 is very well written but won't have any real world impact on outcomes.

There have been bills submitted to force criminal judges to get mandatory training related to sexual assaults. If we are prepared and recognize the need for criminal judges to understand that sensitive topic, then surely the public agrees that it is even more important that judges deciding the fate of young children have the necessary knowledge at their disposal.

B) Specialized Judges

Our trial was decided by a judge who was a labour lawyer. When I tell people this, they are in shock. In many jurisdictions you can appear before a judge who has no training or expertise in family law. We get judges who are former criminal lawyers, labour lawyers, personal injury lawyers, etc. Those same people are now deciding the fate of a young child. This is inappropriate.

This Bill does not assist in addressing that major concern either. In many cases, not only is a child's fate being decided by a judge with no mandatory education to identify the real issues at play, but the judge making the decision does not even have a background in the very area he/she needs to know.

To put it into perspective, when an accused person goes before a judge, they are placed before a specialized criminal judge. We literally treat accused persons better in this Province than our own future, our children.

Recommended Changes in the Wording of Bill 207:

I, myself am not a legal expert, but my husband, who is, and I, still struggled to get the courts to understand how serious Keira's situation was. I have reviewed the recommendations submitted to this committee from Pamela Cross of Luke's Place and listened to most of the evidence submitted before the committee this week. I would like members to know, that in addition to mandatory education for judges, I wholeheartedly believe that all of Ms. Cross' recommendations must be taken seriously by this committee if we are to truly protect vulnerable children, especially those outlined for you below.

As I have indicated, the goal of a perpetrator is not to cooperate in good faith. Instead, the perpetrator is motivated by a desire to exert power and control over the victim, rather than the best interest of the child. Any decisions the victim makes, with regard to education or health, for example, are likely to be purposefully challenged by the perpetrator, at the child's expense. Equal decision-making requires a high level of communication and cooperation between the parties. This is likely not feasible in a situation of domestic violence, where the perpetrator will continue to intimidate, harass and manipulate the victim. Any interactions with the abuser, whether in person or in writing will be fraught with this same dynamic. The victim is likely to be fearful for their safety in any interactions with the perpetrator and certainly is at risk of serious physical harm after separation.

In determining the best interests of the child, I agree with Ms. Cross' recommendation of adding:

The court shall not presume

(2.1) In determining the best interests of the child, the court shall not presume any particular arrangement to be in the best interests of the child and, without limiting this, it shall not be presumed that:

- (i) decision-making responsibilities should be allocated equally between parents;***
- (ii) parenting time should be shared equally between parents;***
- (iii) each parent should be allocated as much parenting time as possible;***
- (iv) decisions regarding the child should be made either by one parent or jointly***
- (v) there should be maximum contact between a child and parent***

And

Decision-making responsibility means the responsibility for making all significant decisions about a child's well-being, including decisions about:

(a) where the child will reside;

(b) with whom the child will live and associate;

(c) the child's education, including what school the child shall attend, and participation in extracurricular activities, including the nature, extent and location of such activities;

(d) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is Indigenous, the child's Indigenous identity;

(e) giving, refusing or withdrawing consent to medical, dental and other health-related treatments, including mental health treatments, such as counselling or therapy, for the child;

(f) applying for a passport, travel document, licence, permit, benefit, privilege or other government- issued documents for the child;

(g) giving, refusing or withdrawing consent for the child, if consent is required;

(h) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

(i) requesting and receiving health, education or other information respecting the child from third parties;

(j) starting, defending, compromising or settling any proceeding relating to the child, and

(k) identifying, advancing and protecting the child's legal and financial interests.

For Factors related to the circumstances of a child you must include more language in Bill 207 around Family Violence being considered including:

(j) any family violence, and in particular, but not limited to:

(i) its impact on the child;

(ii) its impact on the child's relationship with each parent;

(iii) its impact on 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;

(iv) the importance of protecting the physical, emotional and psychological safety, security and well-being of the parent not engaging in family violence (noting that self-defense does not constitute family violence);

(v) its association with negative parenting practices on the part of the person who engaged in a pattern of family violence;

(vi) the demonstrated capacity of any person who engaged in family violence to prioritize the best interests of the child and to meet the needs of the child.

In the section on past conduct you must re-phrase this. As it currently reads, judges are not to consider past conduct of a parent when determining a child's future. If judges could have understood better and considered Keira's father's history, it's possible she would still be alive today. I also whole-heartedly agree with Ms. Cross that Family Violence is always relevant no matter when it occurred:

Past conduct

(5) In determining what is in the best interests of the child, the court shall take into consideration all past conduct relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

(5.1) In applying section 24(5), courts shall always consider family violence relevant, regardless of when it occurred, its form, frequency, and pattern.

In determining the best interest of a child and day-to-day decisions, I also agree with Ms. Cross' recommendations that the bill be changed to:

(6) Day-to-day decisions

Unless the court orders otherwise, a person to whom the court allocates parenting time with respect to a child may, subject to compliance with best interests of the child principles set out in this Act, make, during that time, day-to-day decisions affecting the child.

(7) Day-to-day decisions shall not conflict

Notwithstanding section 28(6), a parent shall not, during allocated parenting time, make decisions that conflict with decisions made by the parent with primary decision-making responsibility, or that are contrary to the best interests of the child.

Bill 207 also puts families and children who are experiencing family violence at greater risk if they are forced to go to Alternative Dispute Resolution and I also fear that having a court-appointed parenting coordinator is not appropriate in cases involving Family Violence. The power imbalance between the parties will not allow a reasonable discussion. The family would wind up in the office of such an individual on an extremely frequent basis, at great emotional and financial cost to the victim. This "solution" would further the ability of the perpetrator to drive up the victim's costs as each and every decision would be challenged. This would be a venue for the perpetrator to continue bullying the victim. Many perpetrators present as charming, yet behind closed doors, they behave in a very different fashion towards a victim. They can often manipulate professionals involved in the case. Moreover, we have serious

concerns with regard to lack of training on domestic violence for all professionals in the system, including “parenting coordinators.”

Conclusion

Children are suffering at the hands of uninformed decisions from judges who mean well but really do not have the tools at their disposal to make the decisions they are making. Put bluntly, Bill 207 is full of wonderful words written on a piece of paper, however, until one gets to the people who are tasked with enforcing this piece of paper (the judges), Bill 207 will have little, if any, real world impact on outcomes.

How can I be so sure you may inquire? The answer is simple. I had a very extreme case. We had numerous court orders with concerning findings by numerous judges against Keira’s biological father. I kept returning to court and kept “winning” motions (in fact I never lost a single motion in the 4 years of litigation). I kept begging the judges to understand that Keira’s father was dangerous. Judges received extensive hard evidence to show the danger, including reports from her psychologist, concerns with her school about her father, tape recordings, etc. In the end, she was murdered anyway, and his access was never suspended or supervised, save for a one week punishment he received from a judge who promptly reinstated his access the next week with further warnings. Keira’s father continued to misbehave and subsequent judges did not protect her despite my pleas.

If the court had difficulty recognizing the serious impact of Family Violence in my extreme case, then how do you propose they are in a position to recognize Family Violence in less extreme cases? Children will continue to suffer. My case is an example of how ill equipped the judicial system currently is to recognize Family Violence. Simply putting the words on a piece of paper with Bill 207 will not alter any outcomes. We know this because even in my case we raised all of these issues time and again.

I compel the committee to put children like Keira first.

Sincerely,

Jennifer Laura Kagan, MD, CCFP(PC)

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