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BRIEF

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Family Law, Family Violence and Restorative Justice



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RESOLVE Manitoba is based at the University of Manitoba, Winnipeg, Manitoba, Canada, on original lands of Anishinaabeg, Cree, Oji-Cree, Dakota, and Dene peoples, and on the homeland of the Métis Nation.

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This brief is based on the presentation of Tod Augusta-Scott and Lisa Teryl “Family Law, Family Violence and Restorative Justice” held on June 28, 2023, hosted by RESOLVE Manitoba. The webinar can be retrieved from: <https://youtu.be/ghFFkQL1w4Y>



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Family Law, Family Violence and Restorative Justice

INTRODUCTION

Restorative justice (RJ) as a movement that emerged in the 1970s. It was inspired by the critiques of the criminal legal system, the juvenile justice system, and the work done in post-conflict contexts (Umbreit et al., 2005). Restorative justice practices are also found in the Indigenous practices of conflict resolution and transformation (Umbreit et al., 2005). Restorative justice is often juxtaposed with retributive justice. While retributive justice aims to punish offenders, restorative justice aims to repair harm. Often, victims and their families, victimized communities, offenders, and their families are involved in a process of restorative justice (Umbreit et al., 2005). Restorative justice processes can involve such processes as mediation, victim impact panels, sharing circles, victim-offender dialogue, community reparation boards, circles of support, conferencing, or sentencing circles (Taylor, 2018).

RJ is used in cases of gender-based violence (GBV), including intimate partner violence (IPV), mostly within the criminal court (Coker, 2021; Kim, 2021). There has been much debate about the applicability of RJ in situations that involve GBV (Augusta-Scott et al., 2017). However, more recently, there is interest in restorative and transformative justice due to the critiques of carceral approaches to crime considering the role of systemic racism within the justice system and the anti-mass incarceration movement mainly in the United States (Coker, 2021; Kim, 2021).

Within family law, RJ approaches, such as mediation, can be used in low-conflict cases that do not involve IPV (Teryl & Augusta-Scott, 2023). For example, the recent *Family Law Modernization Act* that was passed by the Government of Manitoba in 2019, aims to offer several alternative out-of-court dispute resolution services to couples that separate or divorce, such as mediation (Government of Manitoba, n.d.). However, in high-conflict situations, this approach may be more challenging and can even be opposed (Teryl & Augusta-Scott, 2023). Teryl and Augusta-Scott

ABOUT THIS BRIEF

In this brief, we discuss the practice of restorative justice as it relates to family violence and family law. The information in this brief is based on the webinar: *Family Law, Family Violence and Restorative Justice* that featured Tod Augusta-Scott, an expert in the fields of family violence, restorative approaches, trauma, and narrative therapy; and Lisa Teryl, a senior lawyer who brings a wealth of legal expertise, having served as the senior legal counsel utilizing a restorative approach at the Nova Scotia Human Rights Commission for six years (June 28, 2023). The current brief provides information about restorative justice, its use in cases of intimate partner violence (IPV), and the innovative approach to family

have developed an innovative approach to applying RJ practice in situations that involve IPV. This brief explains the approach.

We first explain the general principles of RJ and then focus on RJ in cases of IPV. Following this, we discuss the use of RJ in the family court. Finally, the innovative approach to RJ within family court, Divorce Legal Communications Services, is described.

PRINCIPLES OF RJ

Several principles are fundamental to RJ initiatives. These are (Umbreit et al., 2005, pp. 258-259; Taylor, 2018, pp. 221-222):

1. Concern for and commitment to victims and offenders. Show respect to all parties (victims, offenders, justice workers, etc.).
2. Restoring and empowering victims and responding to their needs. Restoring the emotional and material losses of victims when possible. Focusing on the harm done to victim.
3. Supporting offenders in realizing their responsibilities and obligations; holding them accountable to the individual victims and their communities.
4. Prepare the ground for a dialogue between victims and offenders.
5. Involve the community and encourage community collaboration and reintegration.
6. Increase safety in the community.

While the RJ initiatives follow these principles, the approach is responsive to the unique circumstances of each individual case (Augusta-Scott, in press; 2017). In the context IPV and family violence (FV), the principles of collaboration and communication come to the forefront. The main objective of the RJ process in these situations is learning about the harms of abuse and the best ways to address these harms. To this end, RJ practice can involve working with victims/survivors and those who behaved abusively. The work with those who used abuse aims to restore safety and respect for victims/survivors (Augusta-Scott, 2017). The RJ process can involve family and community members who provide support to the victims/survivors and those who have been abusive. Government programs or services involved in the case due to child protection issues, for example, can also be included in this process (Augusta-Scott, 2017).

RJ AND INTIMATE PARTNER VIOLENCE

The use of RJ in cases of IPV is contentious because RJ is perceived as emphasizing forgiveness, thus diminishing the seriousness of the harm caused by IPV (Taylor, 2018). Many also argue that facilitators need relevant expertise gained through years of work. In addition, the power dynamics between the offender and the victim/survivor may be challenging in RJ processes because of the role that coercive control plays in relationships as well as the damage that abuse causes. Finally, RJ is a holistic process that can involve others (not only offenders and victims/survivors); however, it is unclear how roles and responsibilities are defined and what

effect this involvement of other members of the community has on those involved in the process (Coker, 2021; Taylor, 2018).

Yet, RJ proponents argue that victims/survivors often need more than just putting a stop to violence they experience from their intimate partners. Some survivors would like the abuse and its impact to be acknowledged by the person who did the harm. RJ in this case does not aim to restore the intimate relationship, rather it aims to “restore [survivors’] respect, equality, and safety,” although there might be cases where couples would like to see the relationship restored (Augusta-Scott, 2017, p. 192). At times, ex-partners may share a child or live in the same community, and in this case, RJ can ensure the safety of the survivor by working with those who abuse to take responsibility and accountability (Augusta-Scott, 2017, 2022, 2023, in press).

RJ WITHIN THE FAMILY COURT

An interest in RJ as an alternative way of addressing harm comes from the disadvantages arising from the adversarial nature of the current justice system. Often, survivors want support and do not want to “drag” themselves and their families through the courts. The adversarial justice system is expensive for families, can be prolonged, and defines justice differently than many survivors who experience violence in their lives (Augusta-Scott et al., 2017). These challenges are found both in criminal and family courts (Augusta-Scott et al., 2017; Teryl and Augusta-Scott, 2023).

The challenges of the dominant adversarial justice system led to the rise of collaborative law in the United States (Daicoff, 2009). Following this development, the Canadian legal system adopted more alternative dispute resolution processes (Cameron, 2011). It is under this framework of collaborative law that RJ can be introduced into the family court (Teryl & Augusta-Scott, 2023). The main objectives of the use of RJ within the family court are to achieve fair and reasonable outcomes, prevent or minimize the harms of the adversarial process, and lower the financial costs of the adversarial court process (Teryl & Augusta-Scott, 2023). While mediation can be suitable for low-conflict divorces (for example, to agree on spousal support, pension division, and other issues), a specialized RJ program can be appropriate for high-conflict relationships that may involve the history of IPV. The practice of RJ in these cases, however, requires a neutral legal facilitator with deep knowledge, comprehensive training, and a high level of skill, especially to balance out the extreme power imbalances, to ensure safety, and to work towards achieving meaningful justice. It also requires the legal facilitator to work with the couple separately, be trained in working in trauma-informed facilitation, and involve an experienced therapist who understands IPV and its dynamics (Teryl & Augusta-Scott, 2023). Each of the parties also require their own independent legal advice, which greatly assists in maintaining a proper power balance. Teryl and Augusta-Scott developed an innovative approach that addresses the challenges of high-conflict relationships (Teryl & Augusta-Scott, 2023). The next section describes the principles and the process involved in working with relationships where family violence is present.

INNOVATIVE APPROACH: DIVORCE LEGAL COMMUNICATION SERVICES

When RJ is done poorly, it can be harmful. However, when RJ is done well the process can help stop the abuse, build safety, repair the harm, and create fair and reasonable separation agreements. A significant part of the programme is the awareness the facilitator has about the dynamics of IPV and in addition to this, the facilitator may engage two restorative IPV therapists, one for each party. Both parties work with their therapist throughout the process to create safety, stop the abuse, and repair harm. The therapists can continue to work with one or both people even after a separation agreement is made. It is also important to note that the lawyers and therapists are aware of the gendered dynamics of abuse, i.e. men tend to be the perpetrators of abuse and women tend to be victims/survivors.

The Divorce Legal Communication Services programme provides a five-week process that aims to create a separation agreement. The facilitator works separately with both parties for up to two hours per person per week. Each of the parties has independent legal advice throughout the process. In Week One the facilitator prepares the court documents required for the parties to attend a binding settlement judge conference. This level of support is needed if the parties are unable to come to agreement on all the outstanding issues during the first four weeks. In Week Two the facilitator begins to draft a consent agreement/order which captures all the areas agreement. In Week Three, the facilitator drafts the areas of disagreement that are captured in two draft orders, one that reflects each party's position of the areas of disagreement.

PROCESS GOAL

The process aims to build collaborative separation agreements, expedite the divorce process, and create separations without creating further harm. Through this process, the restorative legal facilitator needs to be transparent with both parties on what a judge would consider fair and reasonable terms in the separation agreement.

Between the third and fourth week, the parties consult with their independent lawyers. In the fourth week, the parties return to the facilitator with notes taken from the meeting with the lawyers. The lawyers provide them with feedback on the separation agreement that was drafted by the facilitator. If at this stage the parties cannot agree on the terms of the separation agreements after the changes have been made by the facilitator, the facilitator arranges a binding settlement conference with the judge at the family court, which is the fifth session of the program. The charges are flat for each of the parties. The parties understand the process from the start and sign an agreement that outlines these steps, including the binding settlement conference.

The therapists involved use the *Safety and Repair* approach. The approach involves three phases:

1. creating safety;
2. preparing both people to repair harm; and
3. practicing repairing harm.

During the first and second phases, the parties are separated, each having their own therapist. During the third phase, the parties can communicate in person, over the phone, emails, video calls, or other ways. The main principle of the process is on repairing harm without creating more harm. Again, the focus is on repairing harm and not on restoring intimate relationships.



First Phase

The first phase is focused on establishing safety for both parties. For women who have been abused, this process often involves drawing on resources such as women shelters. In Phase 1, therapists invite both people to establish their values in relationships. They both consider what is important to them in terms of how they want to express their anger, what is important for them in their relationships, and what they want their children to learn about resolving conflicts, for example. The main task of the therapists is to ensure that the person who uses abuse takes responsibility for their actions and grounds the conversation in their own values. Attending to physical safety means separating the parties, and attending to social determinants of health, housing, poverty, trauma, and other aspects that play an important role in violence. Both parties define what abuse is with the help of the therapists and start thinking about what repair means for both parties. While the approach recognizes men's choices to use abuse are influenced by unhelpful ideas about masculinity (The Duluth Model, 2016),¹ therapists also acknowledge that men's choices are also influenced by their own experiences of trauma. These ideas all need to be confronted for men to take greater responsibility to stop the abuse and repair the harm they caused.

¹ The Duluth Model's Power and Control Wheel explains that intimate partner violence is caused by the abusive individual's intent to control and dominate their intimate partner (The Duluth Model, 2016).

Second Phase

The second phase aims to prepare both people to repair harm in the relationship without creating further harm to either party.

The therapists help prepare people to engage in four components of repair:

1. acknowledging the abuse rather than minimizing the seriousness of it;
2. ensuring there is a plan to stop the abuse;
3. acknowledging the impacts of abuse,
4. creating an accountability plan to repair these effects.

Third Phase

The third and last phase involves therapists helping people practice repairing harm in their relationship without creating more harm. The communication may be facilitated through the therapists, through video, letters, emails or in person - whichever method will not create more harm. The process focuses on the four components of repair that people were prepared to share through Phase 2. For many women who have been abused, hearing their partners or ex-partners take full responsibility can be powerful. Repair may involve managing social situations, ensuring the woman feels safe, addressing the harm done to the children.

Victims/survivors often experience legal and financial abuse in family court (Mazzuocco, 2017). The approach aims to address and mitigate all forms of abuse, including legal and financial abuse. To this end, both parties have to contribute equally to the associated costs. Should the abusive partner express a willingness to cover the expenses of the abused partner as part of the repair process, this is considered an acceptable option. Facilitation also addresses abusive behaviour through a range of methods, including pausing the mediation, suggesting the involvement of the individual's legal representatives, and other means of communicating potential harms to themselves and the process.

As mentioned before, the programme requires a five-week commitment from all parties involved. Mid-way through the process, some parties, typically the ones engaging in abusive behaviour, may want to quit the process. However, the process is governed by a binding contract that all parties, including the facilitator, have entered into. This obligates all parties to remain involved in the process. For low-income families, the cost of this process can be expensive. Low-conflict separation facilitation can be more affordable. Unfortunately, Legal Aid does not currently provide support for this process in either low- or high-conflict situations.

CONCLUSION

In this brief, we discussed the innovative approach that Lisa Teryl and Tod Augusta-Scott developed called Divorce Legal Communications Services. The approach applies the principles of restorative justice and combines both legal and therapeutic approaches. In addition, the approach is also informed by the gendered dynamics of IPV and the power imbalances that can affect family court disputes. This practice of restorative justice can become a promising alternative model for family court disputes in the case of IPV.

MORE INFORMATION

- The webinar is available on the Family Violence/Family Law website [here](#).
- August-Scott and Teryl's presentation slides are available at [this link](#).
- Divorce Legal Communication Program is available at: <https://todascott.com/legal-communication-for-divorce/>

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