Spousal Violence and Child-Related Cases: Challenging Cases Requiring Differentiated Responses

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1. INTRODUCTION - SPOUSAL VIOLENCE AS A FAMILY LAW ISSUE

Over the past twenty years, the criminal justice system in Canada has come to recognize that spousal violence is not a "private matter," and there have been many changes that have resulted in the police and criminal justice system responding more effectively to spousal violence. The family justice system, however, has been slower to respond, even though spousal violence issues are present in roughly one quarter of all separations and divorces in Canada, and spousal violence is fastest growing category of cases reported to child welfare agencies. Despite the slow pace of change in the family justice system, there is a growing awareness of the harmful effect of spousal violence, not only for direct victims, but also for children who live in families where there is spousal violence. There is also a growing recognition that the types of non-adversarial dispute resolution approaches that are increasingly being used to help separated parents may not be appropriate if there are ongoing spousal abuse issues.

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Cases involving spousal violence present complex, challenging issues for judges, lawyers, child welfare workers, assessors, mediators, police officers and other professionals in the family justice system. Some situations involve a high potential for violence, where failure to take an appropriate protective response may place children and adults at grave risk. There are, however, also situations where there may have been violence, but the future risks are minimal and an inappropriately aggressive response can needlessly heighten tension and exacerbate relationships. Justice system professionals must have a sophisticated knowledge of issues related to domestic violence, and an ability to respond in a "differentiated fashion" that recognizes the dynamics and issues of each individual case.

Spousal violence poses many sensitive, complex and contentious issues for society as a whole, as well as those involved in specific cases. These cases are often emotionally charged and it can be difficult for professionals to maintain an appropriate perspective. One dimension of the challenge arises out of the potentially tragic, life threatening dangers that are posed by some cases. Another dimension of challenge relates to the "gender politics" now associated with spousal abuse issues. The rates of male and female violence in intimate relationships are roughly equal, but women are much more likely to be seriously injured or killed, and to fear for their lives. In this article we argue that the analysis of spousal abuse offered by some feminists — one that emphasizes that women are victims and that gender inequality lies at the root of wife abuse[4] — is important, and provides the best guide to the appropriate handling of some cases, but in many cases, an exclusively gendered analysis is not appropriate.

Authors, judges, lawyers and individuals involved in the justice system are not always consistent in their use of the terms "spousal violence" and "spousal abuse". In this article, the concept of "spousal violence" is restricted to acts towards a spouse that involve the application of force or the threat of force, and include forcing a partner to engage in sexual relations through force or threats. These are all criminal

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[4] See e.g. Hon. Bertha Wilson, "Family Violence" (1992) 5 C. J.W.L. 137 at 140: "Violence against women in the home is an expression and manifestation of power and is perpetuated by the fact that men do and women do not have power in our society." See also, Kersti Yllo & Michele Bograd eds., *Feminist Perspectives on Wife Abuse* (Beverley Hills: Sage, 1988). For a critique of the feminist perspective, see e.g. Donald G. Dutton, *Rethinking Domestic Violence* (Vancouver: University of British Columbia Press, 2006).

acts, though frequently they are not dealt with in the criminal courts. Post-separation stalking behavior is a criminal offence in Canada, and is also treated as a form of spousal violence in this article. The concept of "spousal abuse" is broader and includes violence towards a spouse, but also includes emotional abuse and denigration, financial abuse and social isolation, as well as some acts of sexual abuse that may not be criminal but involve coercion.

2. THE CHALLENGES OF SPOUSAL VIOLENCE CASES

One of the challenges that arise in family law cases with spousal violence and abuse issues, is that these cases often have fault or blame orientation that runs counter to the broad trend in family law towards disregarding marital misconduct and emphasizing non-adversarial dispute resolution, joint custody and other measures to continue to involve both parents in the lives of their children. While the movement away from a fault orientation and towards non-adversarial dispute resolution is generally to be welcomed in family law cases, it is inappropriate for many cases that involve domestic violence issues. This article offers a differentiated model of how to respond to spouse violence in child-related disputes. Although there may be cases for which some forms of non-adversarial dispute resolution are appropriate despite incidents of spousal violence, if there has been spousal violence, there must be real caution in considering non-adversarial dispute resolution. There are clearly cases involving domestic violence that require judicial suspension or termination of the involvement of parents in the lives of their children.

Credibility assessment is one of the greatest challenges facing judges in dealing with spousal violence cases. In the context of private family law cases, spouses often present very different evidence about the nature and extent of any abuse, or even whether abuse has occurred. While some people consciously lie about their experiences, more often they have distorted or limited memories. Although exaggeration and lying by (alleged) victims are legitimate concerns for those in the justice system, there is social science research which suggests that women and men may experience, perceive and remember violence in different ways.[5] It is clear that false denials by abusers are more common than

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[5] Russel P. Dobash & R. Emerson Dobash, "Women's Violence to Men in Intimate Relationships" (2004) 44 Brit. J. Crim. 324.

false allegations by alleged victims. Abusers, and in some cases their victims, have a strong tendency to deny or minimize spousal abuse; issues of recantation and minimization are most common in the context of child protection and criminal proceedings.

There is a need for all professionals who work in child welfare system or with families experiencing separation to develop knowledge, understanding and sensitivity about issues of spousal abuse. There must be awareness of the different forms, nature and effects of spousal abuse, and an ability to help develop appropriate, differentiated responses, in particular in regard to children. As observed by Janet Johnston, a mental health professional with extensive experience with divorcing families:[6]

> All violence is unacceptable...however...not all violence is the same...domestic violence families need to be considered on an individual basis when helping them to develop post divorce plans.

This article begins with a discussion of the historical, political and social context for understanding spousal violence, and then considers the effects of spousal violence on children. While the primary focus of the paper is on the issues facing judges in family law and child welfare proceedings involving allegations of spousal violence, there is also some consideration of the issues that arise in other related criminal and civil proceedings that deal with spousal abuse cases. The paper provides an analytical framework that recognizes the need for differentiated responses that meet the circumstances of the different situations, and considers the extent to which Canadian courts have adopted the approaches advocated. Many Canadian judges now have a better understanding of issues of spousal violence in the context of disputes related to children, and many of them deal with cases of domestic abuse in a relatively sophisticated fashion. However, many lawyers, judges and other justice system professionals continue to display insensitivity or a lack of understanding of the dynamics and nature of spouse abuse.

3. THE HISTORY & POLITICS OF SPOUSAL VIOLENCE

Until the 1970s spousal abuse was largely ignored as a social and legal problem.[7] Justice system professionals such as judges, lawyers and

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[6] Janet Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995) 9 Austl. J. Fam. L.12.

[7] For a history of the treatment of wife abuse in Canada, see N. Zoe Hilton, "One in Ten: The Struggle and Disempowerment of the Battered Women's Movement" (1989) 7 Can. J. Fam. L. 313.

police, were virtually all men, and displayed little sensitivity or understanding for a range of forms of abuse in familial relationships contexts, such as spousal violence, marital rape and child abuse. There was a clear tendency to view cases of "domestic" violence that came to the attention of the police as "private" matters. Except in the most serious cases of wife assault, the police were unlikely to lay charges, and spousal violence was only to be a factor in family law cases if it was "excessive." Until 1982, a husband in Canada could not be legally convicted of the rape of his wife, even if this act occurred after separation.

The late 1960s marked the beginnings of the modern feminist movement and the growth of awareness regarding the serious and extensive nature of abuse of women in intimate relationships. In 1968, as part of Canada's divorce law reform, physical and mental cruelty became grounds for dissolution of marriage. In the 1970s, advocates for women and various professionals began to demand government action to respond to the problem of spousal abuse and the first shelters for battered women were established.[8]

By the early 1980s, there was a growing concern about the inadequacy of the legal responses to spousal violence. In particular, the police practice of expecting abused wives to bring their own "private prosecutions" in criminal court was criticized. Abused women generally lacked the psychological and financial resources to carry forward their cases and were easily intimidated or pressured by their abusers into withdrawing charges. There was also a growing awareness of the "cycle of wife abuse," an emotionally destructive and physically dangerous pattern common to abusive relationships of abuse, reconciliation between partners and then further abuse. In the early 1980s, many governments and police forces responded by increasing training for their officers and introducing policies requiring mandatory police charging in response to all cases of spousal violence.[9]

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[8] Shelters are an extremely important resource for abused women and the professionals who assist them, though only 11% of female victims of spousal violence reported receiving service from a shelter or transition house and 15% contacted a crisis line or centre; see Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* by Holly Johnson (Ottawa: Ministry of Industry, 2006) at 59. For a description of shelters for abused women and their children in Canada, see Statistics Canada , *Canada's Shelters for Abused Women, 2003-2004* (Report) by Andrea Taylor-Butts, Juristat vol. 25, no. 3 (Ottawa; Ministry of Industry, 2005).

[9] See Roy McMurtry, "Crown's crackdown on family violence" *Lawyers Weekly* (20 May 1983).

There continued to be many examples of judicial "insensitivity" to spousal violence in Canada's criminal justice system in the 1980s.[10] By the early 1990s, education programs for judges and lawyers were starting to deal with domestic violence, including presentations by advocates for battered women, and the civil and criminal courts were starting to display more understanding of the problems of domestic violence and wife battering. In the 1990 case of *R. v. Lavallee,* [11] the Supreme Court of Canada ruled that when a woman is charged with murdering her abusive partner, the court could take account of the "battered woman syndrome."[12] Her act might be considered "self-defence" even though at the time she faced no immediate threat to her physical safety, if taking

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[10] "Slapping of women justified sometimes, judge suggests" *Canadian Press* (5 April 1989); see generally Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence - Achieving Equality* (1993, Ottawa, Ministry of Supply and Services Canada); and Linda MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada* (1987, Canadian Advisory Council on the Status of Women).

[11] [1990] 1 S.C.R 852, 55 C.C.C. (3d) 97, 1990 CarswellMan 198, 1990 CarswellMan 377 (S.C.C.). In coming to this conclusion, the Supreme Court relied heavily on the work of the American psychologist Lenore Walker, which is discussed below. These developments in the courts coincided with the appointment of more women judges, with *Lavallee* written by Bertha Wilson, the first woman appointed to the Supreme Court of Canada. In *R. v. M (M.A.)*, [1998] S.C.J. No. 12, 1998 CarswellOnt 419, 1998 CarswellOnt 420 (S.C.C.), the Supreme Court reaffirmed that the fact that a woman has been battered does not mean that she has a defence to a charge of murdering her partner. Rather, the jury could receive expert evidence to explain why an abused woman might stay in an abusive relationship and regarding the effect that being in such a relationship might have on her perception of danger from her abuser. Ultimately, the issue is whether, given the history of abuse, she reasonably believed that her acts were necessary to protect herself from death or grievous bodily harm.

[12] Some critics have argued that being a victim of "battered woman" syndrome should mitigate a sentence, but should not result in an acquittal. Not only does this defence pose special tactical problems for the Crown after the death of the (alleged) abuser, but the fact that the vast majority of victims of spousal battering do not kill their assailants raises moral and policy questions about whether those who respond most violently should have a full defence. See Alan Dershowitz, *The Abuse Excuse* (New York: Little Brown, 1994). See also *R. v. McDow* (1996), [1996] N.S.J. No. 52, 1996 CarswellNS 60 (N.S. C.A.) where the Court did not accept that the woman had been assaulted by the male partner she killed, though it accepted the fact that she had been abused by previous male partners as a mitigating factor for sentencing her to only five years imprisonment for manslaughter.

account of her mental state as an abused woman, she had a "reasonable apprehension of death or grievous bodily harm." This meant that the jury could hear expert evidence about the mental state of an abused woman to determine whether this particular victim of battering was acting reasonably, taking account of all of her circumstances and the context of the abusive relationship.

In 1998, the Supreme Court of Canada recognized the importance of a swift police response to spousal violence in *R. v. Godoy*.[13] The Supreme Court of Canada accepted that there is "unquestionably a recognized privacy right that residents have in the sanctity of the home," but that this must give way to interest of police in protecting "life or safety." A disconnected 911 telephone call from a distraught woman gives the police the right to enter premises to search for her and ensure that she is safe, and the police cannot be denied entry by the man who happens to answer the door. Chief Justice Lamer wrote:[14]

> [. . .] the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the hallmarks of this crime is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response. The 911 system

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[13] (1998), [1999] 1 S.C.R. 311, 1998 CarswellOnt 5224, 1998 CarswellOnt 5223 (S.C.C.) [*Godoy*]. See also *R. v. Sanderson* (2003), 64 O.R. (3d) 257, 2003 CarswellOnt 1496 (Ont. C.A.) where the Ontario Court of Appeal held that the police were lawfully entitled to enter premises at the invitation of a woman who had lived their with her abusive boyfriend and assist her in removing her property. Justice MacPherson wrote (at para. 45):

> > There have been significant and commendable changes in recent years in the response of Canadian police to domestic violence situations. There is now a much greater recognition by the police of both the extent and the seriousness of the problem and the consequences for victims in the community, when the police fail to respond. Police officers are often the first persons called to respond in situations of domestic violence. In my view, it is very much in the public interest that the police, in the discharge of their public duties be willing and able to assist victims of domestic violence with leaving their relationships and their residences safely and with their belongings. That is precisely what the police did in the present case.

[14] *R. v. Godoy* (1998), [1999] 1 S.C.R. 311, 1998 CarswellOnt 5224, 1998 CarswellOnt 5223 (S.C.C.), at para. 21.

> provides such a response. Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation [...] it takes only a modicum of common sense to realize that if a person is unable to speak to a 911 dispatcher when making a call [...] she may likewise be unable to answer the door when help arrives. Should the police then take the word of the person who does answer the door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not.

By the mid 1990s, there was a growing awareness among criminal justice system professionals about spousal violence and police were responding to these cases by arresting suspected abusers and laying charges. It is important to recognize that increased public awareness and systemic changes are having an effect on rates of spousal violence in Canada. While there has been an *increase in reports* of spousal abuse to the police and an increase in charges, the actual *incidence of spousal abuse* in Canada (as revealed by victimization surveys and spousal homicide data) has slowly declined over the past quarter century.[15] Although it is difficult to accurately determine the causes of this long term decline, better responses by police, the courts and social services have doubtless played a role. Demographic changes may also have played a role, with fewer individuals in the younger age groups that are prone to violence.

Popular culture (especially television), and the media now regularly report on abuse issues, though there is clearly still a need for more and better public and professional education about spousal abuse. This has helped victims to feel that they can come forward to get assistance, and has led to a larger proportion of victims reporting abuse to the police or other agencies. However, *some* of the public advocacy and *some* of the feminist analysis of spousal abuse may be misleading and ultimately counter-productive because it exaggerates or distorts the issues. For example, a few years ago some advocates for women warned that Super Bowl Sunday is "the biggest day of the year for violence against women," and the television sponsors of the game responded by broadcasting advertisements warning about wife battering. While public education campaigns about domestic violence directed primarily at men are un-

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[15] Statistics Canada, *Family Violence in Canada: a Statistical Profile 2006* (Ottawa: Canadian Centre for Justice Statistics, 2006) [*Family Violence in Canada 2006*] online: Statistics Canada <http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=85-224-XIE2006000>

doubtedly valuable, the "Super Bowl Sunday woman abuse fact" has been exposed as a myth.[16]

Gender based research and advocacy is becoming a "two way street." By the mid 1990's, "fathers' rights" groups began to form in Canada. During the 1998 hearings of the Parliamentary Committee studying reforms to Canada's custody and access laws, some men argued that most allegations of domestic violence and child sexual abuse made in the context of custody or access disputes are false. The hearings became a "gender war zone" with men heckling while women testified about issues of domestic violence.[17] Some fathers' rights advocates charge that "women's shelters have become bunkers in a war against men,"[18] but it is clear that some of the men's groups also engage in hyperbolic, distorted advocacy. While false and exaggerated allegations of spousal abuse are a legitimate and important concern, as discussed below, it is clear that there are more cases of false denials of spousal violence by genuine abusers than cases of false allegations by these who are not genuine victims.

There is also now an ongoing and sometimes acrimonious debate[19] in the social science literature about the nature and extent of domestic violence, with some, like Canadian psychologist Donald Dutton, challenging the "Feminist Paradigm" and arguing that male and female perpetrated domestic violence are equally frequent and serious.[20] These

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16 See Neil Boyd, *Big Sister: How Extreme Feminism Has Betrayed the Fight for Sexual Equality* (Vancouver: Greystone Press, 2004).

17 Nicholas Bala, "A Report from Canada's Gender War Zone: Reforming the Child Related Provisions of the Divorce Act" (1999) 16 Can. J. Fam. L. 163.

18 See e.g. online; <http://www.fathers.ca/shelter_abuse_3.htm>

19 See e.g. the debate in articles by Donald Dutton and Michael P. Johnson: Michael P. Johnson, "Apples and Oranges in Child Custody Disputes Intimate Terrorism vs. Situational Violence" (2005) 2 Journal of Child Custody 43 and Donald Dutton "On Comparing Apples with Apples Deemed Nonexistant A Reply to Johnson" (2005) 2 Journal of Child Custody 53; Dutton, *Rethinking Domestic Violence* (2006, University of British Columbia Press). See also R. J. Gelles, "The Politics of Research: The Use, Abuse and Misuse of Social Science Data – The Cases of Intimate Partner Violence" (2007), 45 Fam. Ct. Rev. 42-51.

20 See Don Dutton, *Rethinking Domestic Violence* (2006, University of British Columbia Press); and Eugene Lupri & Elaine Grandin, *Intimate Partner Violence Against Men* (2004, Ottawa: Health Canada). For a feminist analysis of advocates of "gender equality" in family violence, see Joanne Minaker & Laureen Snider, "Husband Abuse: Equality with a Vengeance" (2006) 48 Can J. Crim & Crim. Just. 753-780.

critics of the feminist perspective raise important concerns. There is a need to recognize the nature and extent of female perpetrated domestic violence and to recognize that domestic violence often has an interactional or mutual component. Women can be and often are perpetrators of domestic violence, as demonstrated by abuse in lesbian relationships. However, gender remains an important dimension for understanding spousal abuse, especially for the most serious cases that pose the gravest risks of injury or death to women and children.

4. THE NATURE & INCIDENCE OF SPOUSAL ABUSE

Professionals need a sophisticated understanding of the incidence and nature of spousal violence and abuse. There is not a single type of behaviour that constitutes spousal abuse, but rather there is a spectrum of behaviour that is abusive, and appropriate responses to abuse must take account of the nature of the abuse, and its effect. The most serious cases of spousal violence typically have a strongly gendered nature, with women most often being the victims of serious abuse by their partners. However, many cases of spousal violence, especially in the context of high conflict separations, involve two violent partners, and there are cases where the female partner is the primary or sole instigator of violence.

While much is known about spousal violence and abuse, every study and source of data has limitations. There are many aspects of spousal violence that are not fully understood and that require further research. Initial research on spousal violence understandably focused on the problem of abuse of women, who are most frequently the victims of serious domestic violence, though more recently there has been more research on male victims, abuse in same-sex relationships, and mutual abuse. Many studies on family violence are based on relatively small numbers of subjects, and may not reflect what is occurring in a larger population. For example, studies based on subjects drawn from a particular group, such as women in shelters, who are typically victims of more serious abuse, may not reflect patterns in the broader population. Conversely, studies based on surveys of large populations, for example by means of a telephone survey, may not reflect what occurs in the more serious cases of abuse, as individuals in those relationships may be less inclined to participate in these surveys.[21] Even in anonymous telephone surveys,

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[21] On the limitations of research in this area, see e.g. Michael Johnson, "Apples

spousal abuse is a subject that is difficult to research because of the tendency of victims and abusers to deny or minimize the extent of the abuse.

Another cautionary comment about social science research in this area: the use of terms like "spousal abuse" and "spousal violence" is not consistent. Different researchers and studies have different definitions, with some studies having much broader definitions than others. Some studies are quite vague in their use of these terms. Further, studies rely on different data sources to establish the existence of abuse, ranging from the response of an anonymous subject to a phone interview to requiring proof beyond a reasonable doubt. Accordingly, some of the discrepancies between studies can be explained by differences in definitions and data sources.

(a) The Frequency and Nature of Spousal Violence in Canada

Some of the most recent Statistics Canada reports on family violence[22] include the results of a telephone survey of 26,000 Canadians in 2004. This study and other research reveals a very broad spectrum of abusive conduct, ranging from a substantial number of cases where there was only one—relatively minor—assault over the course of a relationship, to situations where there was a pattern of serious repeated physical violence and emotional abuse. According to this 2004 study, 7% of women and 6% of men were assaulted by a present or former intimate partner in the previous five years, with 2% of men and women reporting an assault in the past year. For a significant number of victims, 48% of men and 40% of women, there was only a single assault in the previous five years.

Only 36% of the female victims and 17% of male victims reported to the police, with reports more likely if incidents of violence were more frequent, more serious or witnessed by children. The rates of reporting an assault to the police were higher among those victims who separated than those who stayed with their spouses (45% of separated female victims versus only 22% of female victims who remained with their abusive partners).

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and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence" (2005), 2 Journal of Child Custody 43-51.

22 *Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile* (Ottawa, 2006) and Canadian Centre for Justice Statistics, *Measuring Violence Against Women* (Ottawa, 2006).

For less serious forms of spousal violence, based on self-reports by victims to Statistics Canada, rates of perpetration were roughly equal by gender. For example 44% of female victims had something thrown at them by a partner, while 49% of male victims reported something was thrown at them, and 57% of male victims were slapped while only 36% of female victims reported being slapped. However, women were much more likely to be victims of serious assaults, with 19% of female victims reporting being choked, and only 5% of males reporting being choked; 13% of female victims received medical attention for injuries resulting from spousal violence, but only 2% of male victims received medical attention. Among female victims, 34% reported that they feared for their lives as a result of an assault by an intimate partner and 21% reported 10 or more assaults, while among male victims only 10% reported that they feared for their lives and 11% reported being victimized by 10 or more assaults.

For many victims of spousal violence, especially female victims, the psychological effects of abuse are very destructive. According to the 2004 Statistics Canada telephone survey report study, 94% of female victims and 70% of male victims reported psychological effects from the violence. The most common reactions were relatively mild and experienced roughly equally by men and women, including anger (37% of women and 25% of men) and upset or confusion (37% of women and 28% of men). The more serious effects were much more likely to be experienced by women, including:

- fear for self (30% of women and 5% of men);
- fear for children's safety (9% of women and 2% of men);
- depression or anxiety attacks (21% of women and 9% of men);
- lowered self-esteem (17% of women and 4% of men); and
- sleeping problems (15% of women and 4% of men).

The more serious psychological effects generally occur in cases where there is both physical and emotional abuse, or if the physical abuse is repeated and more severe. However, for some women even a single act of physical abuse, especially when combined with emotionally abusive or degrading conduct, can create a very intimidating, psychologically destructive environment.

Almost one half of women who had separated and been physically abused in a prior relationship also reported serious emotional abuse in

that relationship (e.g. denial of access to information about family finances, verbal denigration, or an excessively controlling husband). Emotional abuse is an important concept, and is appropriately used by clinicians and by judges dealing with family law disputes. However, it can be difficult to precisely define, and in contrast to physical or sexual abuse, it is not a criminal offence (unless it involves post—separation harassment or stalking).[23] Further, almost an equal number of men and women in violent relationships reported emotional abuse, such as verbal denigration, by their partners.

The spousal homicide rate in North America has been slowly but steadily declining since the mid 1970's, and in 2005 there were 74 spousal homicides in Canada.[24] The rate of women being killed (.71 per 100,000) was more than five times greater than for male victims of spousal homicide (.14 per 100,000). Some of these cases involved women being killed by their husbands in the presence of their children, and in a number of cases the man killed his female partner and their children, and then committed suicide himself.[25] In over 60% of the

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[23] *Criminal Code*, R.S.C. 1985, c. C-46, s. 264 (criminal harassment) and s. 372(3) (harassing phone calls).

[24] Statistics Canada, *Homicide in Canada, 2005* by Mia Dauvergne & Geoffrey Li, *Juristat* vol. 26, no. 5 (Ottawa: Juristat, 2006) online: Statistics Canada < http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=85-002-XIE2006006>; see also Statistics Canada, *Family Violence in Canada: A Statistical Profile:2006* (Ottawa 2006).

[25] See also Statistics Canada, "Spousal Violence After Marital Separation" by Tina Hotton, *Juristat* vol. 21, no. 7 (Ottawa: Juristat, 2001) online: Statistics Canada <http://www.statcan.ca/bsolc/english/bsolc?catno=85-002-X20010078393>. In at least 17% of the cases one or more children was present at the death of a parent by spousal homicide, including 3% of cases in which the children were killed and 1% in which there was an attempt to kill the child.

Between 1991 and 2003, almost all of the victims of spousal homicide-suicide were female (97%). One-quarter of the homicide-suicides involved children or youth aged 18 and under. The vast majority of these were family-related. The killer involved in family-related homicide-suicides against a child or youth was most often a parent of the victim. In 66% of cases, the killer was the father, in 27% the mother and in 2% a step-father. Mothers killing their children and then committing suicide are a serious concern, but few of these cases arise in the context of litigation or conflict between separated parents, though many involve single mothers. The vast majority of fathers who kill their children and then commit suicide are involved in some type of separation related dispute or litigation.

See Cheryl L. Meyer, Michelle Oberman, White Kelly & Michelle Rone, *Mothers Who Kill Their Children : Understanding the Acts of Moms from*

homicides there was a prior police report of spousal violence. In 2005, the homicide rate of people living in common—law relationships was nearly five times higher than for those living in legal marriages, with the highest rates for women who had separated from their partners.

While spousal abuse occurs in all income and age groups, the incidence of spousal violence is higher:

- among younger couples;
- in common-law relationships as opposed to legal marriages;
- in lower income groups;
- and, among Aboriginal Canadians.[26]

Women who were separated or divorced reported much higher rates of spousal abuse from a former partner than the rates in intact relationships. Among those who *separated,* 21% of women reported that they had been assaulted by a prior partner in the previous five years, while the overall rate for all women was only 7%. In 2004, half of the women who reported experiencing spousal assault by a past partner indicated

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Susan Smith to the "Prom Mom"(New York : New York University Press, 2001); and Kelly Patrick, "Mothers who kill 'are just like you and me': Toronto case caps series of murders" *National Post* (5 December 2006).

[26] Research indicates that Aboriginal women suffer a significantly higher rate of partner abuse than non-Aboriginal Canadians, even taking account of such risk factors as low income, age, education levels, and alcohol abuse. Researchers have suggested that intergenerational effects of residential school experiences and the effects of colonization may explain these differences: see Douglas A. Brownridge, "Male Partner Violence Against Aboriginal Women" (2003) 18 Journal of Interpersonal Violence 65.

While spousal violence can be found in all cultural and racial groups, it may be more prevalent in some communities. Data from Statistics Canada (*Family Violence in Canada: Statistical Profile 2001)* suggests that Aboriginal women are three times as likely to be assaulted by a current or former partner than a non-Aboriginal woman, though this data does not attempt to take account of differences in the age and socioeconomic composition of the respective populations. While Aboriginal peoples express higher levels of dissatisfaction with police performance in response to domestic violence, approximately 50% of female Aboriginal victims of domestic violence reported to the police compared to 35% of non-Aboriginal victims. The greater use of police services by Aboriginal victims may in part be attributed to the greater severity of the injuries or more frequent occurrence of domestic violence among them.

Based on the 2004 Statistics Canada telephone survey, rates on spousal violence for visible minority women in Canada were lower than for non-visible minority women.

that the violence occurred after the separation, and in one third of the post-separation assaults the violence began or became more severe after separation. Women who are separated constitute just 4% of adult women, but 26% of women who were victims of spousal homicide.

Thus, while in most cases in which there has been violence during cohabitation, conflict and violence decrease after separation, for a significant minority, the violence and lethality (risk of homicide) increase after separation.

(b) Types of Abusive Relationships

Social scientists have proposed typologies of spousal violence that are useful for practitioners and researchers who are trying to understand family violence. While each relationship is unique, and some relationships do not fit neatly into any category, these typologies establish common characteristics of relationships, and can be helpful for understanding past behaviour and predicting future behaviour.

One of the most influential early scholars to analyze patterns of domestic violence was the American psychologist Lenore Walker, who developed a descriptive model of the "cycle of violence",[27] as well as of the concept of the "battered woman syndrome."[28] The "cycle of violence" describes a repeated pattern of wife abuse with three phases: (1) tension building; (2) acute battering incident; and (3) loving contrition by the abuser. In the first phase there is increasing tension and verbal abuse, with the woman attempting to placate her partner. The tension builds until there is a battering incident, involving verbal, physical and possibly sexual abuse; the woman may leave or call the police at this stage. In the contrition phase, the batterer is remorseful, apologizes and may send flowers or gifts and "court" his partner. In this phase, she may persuade herself that he will not abuse her again and resume the relationship, though without intervention it is virtually inevitable that the pattern will reoccur, sometimes with violence increasing. Understanding this cycle of abuse is very important for professionals who work with abuse victims, since they are often called upon immediately after the abusive incident, but then find themselves working in the "contrition" phase. Helping victims and abusers to understand this cycle can be a part of a successful intervention strategy.

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[27] Lenore Walker, *The Battered Woman* (New York: Harper & Row, 1979).

[28] Lenore Walker, *The Battered Woman Syndrome* (New York: Springer Publishing, 1984).

Walker also developed the concept of the "battered woman syndrome," to refer to the state of mind of a woman who has repeatedly been through cycles of violence and is suffering from lowered self-esteem and "learned helplessness." The female victim may not have disclosed the abuse to anyone and feels unable to leave the relationship, perhaps because of threats from the abuser (which may have been acted on in the past) that he will pursue her or harm the children if she leaves. She is acutely sensitive to her partner's control and tendency to violence, and can sense his building anger. In this mental state, she may come to "reasonably" believe that the only way to escape from the relationship is to kill her partner.

If there is a pattern of abuse and control while the couple is living together, the abuser may resort to threats to seek custody of the children in the event of separation, either to keep his partner in the relationship, or to extract a favourable financial settlement.[29] Even if such an abusive person may in fact be unlikely to succeed in legally obtaining custody, the threat of obtaining custody may seem very credible to a spouse who has been constantly intimidated and denigrated by her partner, or who believes that the abuser may be able to "con" the court into believing that she is fabricating the allegations. Further, the threat of prolonged litigation, which may be very credible, can be a very worrying prospect. Many abused women are pressured by these types of threats into settling cases with their abusive partners, often on terms which are disadvantageous or even dangerous. These women may lack the emotional and financial resources to litigate, and may feel pressured by their own lawyers, mediators, or judges during pre-trial proceedings, into agreeing

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[29] See e.g. *Fowler v. Fowler* (1992), 331 A.P.R. 172, 1992 CarswellNfld 135 (Nfld. U.F.C.) where the parties lived together for ten years, during which time there were incidents of verbal and physical abuse by the man, though only one assault in the last two years of cohabitation. Shortly after the husband found out his wife had committed adultery, he told her that if she would not sign a separation agreement waiving her right to claim support or seek a share of marital property, he would prevent her from seeing their daughter again. She signed the agreement and left the home with her daughter. The court ruled that the separation agreement was obtained under duress and invalid. Chief Justice Hickman concluded that the woman had a reasonable apprehension of violence when she signed the agreement, considering the entire history of abuse in the marriage. Further, while the man's threat to obtain custody, let alone deny access, was legally untenable, given her "emotional trauma", the woman was not in a position where she could "be expected to rationally decide [...] her rights [...] with respect to custody" at the time of separation.

to ongoing access by the abuser to the children that may pose a continuing risk to the victims and their children.[30]

In some situations, the implicit or explicit threat of an abusive husband may be that if the victim attempts to leave with the children, the abuser will abduct them. In some cases the abuser may threaten to kill a partner if she leaves, or may threaten suicide. Of particular concern, it is clear that the risk of a woman being killed by her abusive partner is significantly elevated in the period following separation, as the abuser may realize he is "losing control" of her.[31]

After Walker's seminal work, a number of researchers developed "profiles" of different types of relationships involving interspousal abuse, also recognizing that parent-child relationships also differ in each of these situations. This range of profiles provides a richer picture than Walker, though it builds on her work. These classification schemes are useful for professionals, though some cases do not fit perfectly into any category:[32]

- *Coercive Controlling Violence (or Intimate Terrorism or Episodic Male Battering)*: This type of case closely resembles Walker's "battered wife," with repeated cycles of physical violence and ongoing emotional abuse used by the perpetrator to control and dominate the victim. Perpetrators are almost all men (one study reports that in

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30 Linda C. Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" (2004) 42 Fam. Ct. Rev. 411.

31 Hotton, "*Spousal Violence After Separation" (2001) Juristat 21:7.* The rate of homicide for separated women in Canada is 38.7 per million, while for those who are married the rate is 4.5 per million (i.e. about one tenth as high). There is no Canadian data on the *length of separation* before a homicide occurs, but American and Australian research indicates that among homicides of separated spouses, about 50% are killed in the first two months after separation and 87% are killed within a year.

32 The categories set out here are based on the authors' combination of two overlapping schemes: Michael Johnson & Kathleen Ferraro, "Research on Domestic Violence in the 1990s: Making Distinctions" (2000) 62 J. Marriage & Family 948; and Janet Johnston & Linda Campbell, "Parent Child Relationships in Domestic Violence Families Disputing Custody" (1993) 31(3) Fam. & Con. Cts. Rev. 282. See also Michael Johnson, "Domestic Violence: It's Not About Gender - Or Is It?" (2005) 67 J. Marriage & Family 1126; and Nancy Ver Steegh, "Differentiating Types of Domestic Violence: Implications for Child Custody" (2005) 65 Louisiana L. Rev. 6379.

this category 97% of perpetrators are male[33]). Although only 10% to 20% of all cases of family violence involve this type of case, it is most likely to result in the police being involved and criminal charges being laid, and at least half of the cases in most criminal courts are of this type. In these cases the violence is a result of the abuser's character and personality; he often demonstrates low tolerance for frustration and poor impulse control, at least in the context of the spousal relationship, and is possessive, domineering and jealous about his partner. Most of these abusers have a personality disorder, and some are psychopaths. Physical abuse usually develops early in the relationship and can be ongoing or intermittent.

Even within this population there is a range of cases, with some involving men who are violent only with their spouses or other family members, and others who are generally violent and may have lengthy criminal records involving violence in a range of settings. The victims in this type of case are likely to have been raised in homes where there was significant abuse, and, without appropriate therapeutic intervention, these women may have great difficulty in giving up the relationship with the abusive partner, or may leave one abusive relationship and enter another. These cases raise serious child protection issues.[34]

The potential for violence is high and may escalate after separation, often with harassment and threats alternated with pleas for return.

Many of these men will also physically and emotionally abuse their children. These fathers often have a low tolerance for stress, tend to be very demanding of their children and their children tend to be afraid of them. Some of these men, however, have superficially good relationships with their children; girls may be treated in a "princess-like" fashion by the father, while boys may identify with their fathers as the dominant figure in the family, and may even start to abuse the mother as they reach adolescence. Johnson and Campbell recommend that in these types of cases visitation should be supervised or suspended if the threat of violence continues after separation or if the children are afraid of their father. However, in

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[33] Michael Johnson, "Domestic Violence: It's Not About Gender - Or Is It?" (2005), 67 J. Marriage & Family 1126.. See also Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Y.B. Access Just. 115 at 124-132.

[34] See e.g. *Re T.I.G.*, [2006] A.J. No. 611 (Prov. Ct.).

some cases the children will have positive feelings towards their father, will want to see him and may even express a preference for living with him, in which case contact may be appropriate if safety issues can be adequately addressed.

- *Female Initiated Violence*: There are cases of spousal violence in which the female partner uses violence against a passive or non-reactive male partner. The female partner initiates repetitive physical attacks. The woman is generally erratic, emotional and demanding, but she does not exercise the degree of control or intimidation that characterizes intimate terrorism, and the violence does not escalate after separation. The male partner generally reacts passively, and is reluctant to report to police or others; he may try to avoid his partner or defensively control when she is violent. He may start to reciprocate in the violence, which may be coincident with separation.

  As parents, these women also tend to be erratic, unpredictable, and emotionally if not physically abusive to their children. They are often angry with their children, who may be emotionally paralyzed by their outbursts. Young girls of these women tend to be timid and withdrawn, while older girls may have demanding temper outbursts (like their mothers). Young boys tend to be emotionally needy and have difficulty in separating from their mothers, while older boys may be passive-aggressive and inhibited. The fathers may covertly indulge and idealize their daughters, while during cohabitation they are unable to protect or rescue their sons

  This category consists of a relatively small portion of all cases, with most studies suggesting in the range of 4% - 15% of cases in which there is spousal violence, though in a significant portion of mutual violence cases the female may commonly initiate violence but the male then responds with force, sometimes with significantly more force than the woman applied.[35]

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[35] Johnston & Campbell , "Parent Child Relationships in Domestic Violence Families Disputing Custody" (1993), 31(3) Fam. & Con. Cts. Rev. 282 found that in 10% to 15% of the cases in their study, the female partner initiated the violence against a relatively passive male partner. For a critique of the Johnston & Campbell's work, see Clare Dalton, "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System" (1999) 37 Fam. Ct. Rev. 273; and a response Janet Johnston, "Response to Clare Dalton's 'When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System' (1999) 37 Fam. Ct. Rev. 422. A Canadian study by Jaffe and Austin, however, found that in only 4% of a sample of contested

It should be appreciated that while violence by women towards their male partners is a serious concern, it is *in general,* a less serious concern than abuse by males. Women are more likely to be injured and intimidated by their partners' violence, and to have the abuse affect their self-image and ability to effectively protect their interests and their children. Abuse by men is more likely to continue or even escalate after the cohabitation ends. Some research indicates that there are more likely to be post-separation disputes about visitation and other issues related to the children for abused women than non-abused women, with abusive men using the legal system or the opportunities for contact with his former partner afforded by access to continue to harass or control their former partners.[36]

- *Violent Resistance*: Michael Johnson characterizes some cases as involving "violent resistance." In these cases there is one partner, almost always the male, who initiates the violence, but the other partner will respond, sometimes using more force than the initial attack. Legally some of these situations may be characterized as self-defence, but not always.

- *Mutual Violence (or Situational Couple Violence or Common Couple Violence):* These cases involve both partners resorting to vio-

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custody and access cases involving domestic violence was there spousal abuse by the wife alone, and 9 % involved mutual abuse. Peter Jaffe & Gary Austin, "The Impact of Witnessing Violence on Children in Custody and Visitation Disputes" presented at the International Family Violence Research Conference, Durham, New Hampshire, July 1995. Birnbaum reports on a study of high conflict Ontario cases in which the office of the children's lawyer was involved. In 428, mothers alleged that their partner was physically violent towards them, while fathers made this claim in 244 of cases: R. Birnbaum, "Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations." (2005) 24 Can. Fam. L.Q. 167.

Dobash & Dobash, "Women's Violence to Men in Intimate Relationships" (2004), 44 Brit. J. Criminol. 324, at 324 observe: "women's violence does not equate to men's in terms of frequency, severity, consequences and [effect] on the victim's sense of safety and well-being." See Linda C. Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" (2004) 42 Fam. Ct. Rev. 411, who argues that it is necessary to consider social context, patterns of domination and power and control issues when assessing the significance of violence in mutual abuse cases.

[36] Lisa C. Newmark, Adele V. Harrell, & Peter Salam, "Domestic Violence and Empowerment in Custody and Visitation Cases" (1995) 33 Fam. Ct. Rev. 30 at 32; and Julie Kunce Field, "Visiting Danger: Keeping Battered Women and Their Children Safe" (1996) 30(3) Clearinghouse Review 295.

lence during arguments. The acts of violence are of relatively low intensity, and do not have a pattern of escalation. A distinguishing feature of this type of violence is that the resort to physical violence is not part of a pattern of psychological dominance and control by one partner. This is one of the most common types of violence among couples, many of whom do not separate.

With some mutual violence couples, different partners will initiate the use of force on different occasions. With other couples, one partner will typically be the protagonist for the use of physical force, but the other will regularly respond. Some research suggests that in cases of mutual violence, the female partner may initiate the use of force almost as often as the male, and some studies suggest that women may initiate the use of force more than male partners.[37] It must, however, be appreciated that even if both partners are prone to using physical violence, the relative strength of men will usually mean that they are likely to cause greater injury and fear than their female partners.

Children in these relationships are likely to witness or hear the arguments and may benefit from therapy to deal with the emotional effects of living in a household with relatively high intensity marital strife.

In some mutual violence cases, the incidents are relatively infrequent, there are no injuries, and there may be no police or court involvement. At the other end of a spectrum, there may be "battling couples" in which violence is relatively frequent and serious; in some of these relationships the partners, both male and female, are violent towards each other as well as towards other adults and it may not be appropriate to identify one partner as "the victim." In these cases, there are likely to be significant child welfare concerns.[38]

If a mutual violence couple is separating, the incidents of violence may increase in frequency or intensity during the separation process, but the violence is likely to decrease after separation. However, there may be arguments and possibly violence when children

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[37] See John Archer, "Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review" (2000) 126 Psychological Bulletin 651; M.A. Straus & R.J. Gelles, "Has family violence decreased? A reassessment of the Straus and Gelles data" (1988) 50 J. Mar. & Fam. 28.

[38] See e.g. *Prince Edward Island (Director of Child Welfare) v. O. (M.)* (2006), 254 Nfld. & P.E.I.R. 147, 2006 CarswellPEI 12 (P.E.I. C.A.).

are being exchanged and there may be a need for supervision or structuring of the exchange.

- *Separation-Instigated violence*: In these cases violence is notably absent during most of the relationship, but one or more acts of violence occur around the time of separation, perhaps associated with the humiliating discovery of a lover. Because the violence is uncharacteristic of the relationship, the assault may cast a shadow of fear and distrust over the victim, but there is generally a good prognosis for a positive relationship between the parent and the abusive partner. After the incidents at the time of separation, there is likely to be a violence-free relationship between the parents. As many as one quarter of separated spouses who reported violence during their relationship may have been in this situation.

- *Mental Illness*: Some cases of spousal abuse are the result of the paranoid or psychotic state of the violent spouse; in some cases depression is a major contributor to family violence. These cases involve often unpredictable attacks by one spouse as a result of disordered thinking, and often leave the victims feeling traumatized, intimidated and fearful. Some cases of parental killing of children and suicide involve severe depression; these may be perpetrated by mothers or fathers. A relatively small percentage of spousal violence cases are in this category. Some of the children in this situation are badly traumatized, while others may identify with the psychotic parent and are themselves psychotic. If the parents are separated, visitation between the abusive spouse and children should be supervised or suspended in these situations, at least until the abuser's mental state has stabilized. If properly diagnosed and treated, however, the risk of future violence can be substantially reduced or eliminated, and the formerly violent parent may resume contact with the child or may even gain custody.

An awareness of this type of taxonomy of spousal abuse is useful for judges, lawyers and clinicians, and can be helpful for understanding individual cases. It is also consistent with the Statistics Canada surveys that reveal a broad range of situations of abusive conduct, from those cases where there is just one assault reported (over a third of the cases) to those were there is a repeated cycle of violence with the potential for escalating risk after separation (about one quarter of the cases).[39] It

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[39] See H. Johnson, "The Cessation of Assaults on Wives" (2003) 34 Journal of

should, however, be appreciated that these categories of spousal abuse do not capture the complexities of all relationships.

(c) Research on Reliability of Reports of Spousal Abuse

In a significant proportion of cases, allegations of violence are accurately reported by victims, while those who are guilty of abusing their intimate partners will often deny their abusive acts or minimize their conduct and its effects on the victim. It is, however, also not uncommon for spouses in high conflict separations to make false or exaggerated allegations of abuse, as in these cases individuals may have "extremely negative views [of their former spouse] that can be exaggerated and emanate from the humiliation of rejection inherent in the divorce itself."[40]

The validity of each allegation and denial must be assessed on its own merits, and there are legitimate concerns about both exaggerated allegations and false denials. There is some interesting research which suggests that female victims, in general, are more accurate in reporting on abuse than are men who deny having abused their female intimate partners, though it must be recognized that there are substantial conceptual problems in trying to do research about false claims (or false denials) of abuse. One interesting study by Janet Johnston found substantial disparities in descriptions by divorced partners about the extent and initiation of verbal and physical aggression during their relationship, with men and women most commonly each reporting that their partner was the aggressor and minimizing their own role. She concluded that it is in general more likely that men are refusing to acknowledge their violence, since women were offering "more detailed and highly specific accounts, whereas men tended to be vague or dismissive of the event."[41]

Comparative Family Studies 75, for an analysis of the factors associated with relationships where domestic violence is likely to cease as opposed to those for which it is likely to continue or escalate.

[40] Janet R. Johnston, "A Child-centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Interventions" (2006) 12 Journal of Family Studies 15 at 16.

[41] Janet R. Johnston, Domestic Violence and Parent-Child Relationships in Families Disputing Custody (1995) 9 Austl. J. Fam. L. 12, at 16.

The incidence of false allegations probably varies over time (and perhaps locality). Johnston and Campbell compared two samples of divorcing parents who were contesting custody or visitation:[42]

> With respect to exaggeration and elaboration of incidents...in the first sample studied during the years 1982-84, only two women clearly did this. In the second sample [reported in 1995] .... by which time some spouses and their attorneys had become very familiar with the feminist sociopolitical position with respect to domestic violence and the battered women's syndrome — through television, the press and women's shelters — seven women and one man (13%) were judged to have exaggerated the issue of violence as a ploy in the custody dispute.

With more awareness about spousal abuse among the public and a much higher degree of psychological validation and support,[43] there may well be more false or exaggerated claims of spousal abuse now than in the past, as well as more genuine victims of spousal abuse coming forward.

In a 2005 study of 120 high conflict parental separation cases sent for custody evaluations in California, Janet Johnston and her colleagues concluded that 26% of the allegations of spousal violence against women perpetrated by their male partners were considered unfounded, but 50% of the allegations made by men of abuse perpetrated by their female partners were considered unfounded.[44] This suggests that women are generally more reliable than men in their reports about spousal violence. However, in the same study the researchers concluded that in regards to allegations of parental abuse or neglect of children, mothers were significantly *more likely* to make unsubstantiated allegations against fathers (only 26% of allegations against fathers were considered founded), than were fathers against mothers (46% of the allegations against mothers were considered founded.)

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42 Johnston & Campbell, "Parent Child Relationships in Domestic Violence Families Disputing Custody" (1993) 31(3) Fam. & Con. Cts. Rev. 282 at 286.

43 *Smith v. Smith* (1997), [1997] S.J. No. 765, 1997 CarswellSask 735 (Sask. Q.B.) is an especially complex case where the judge concluded that the woman's allegations of spousal abuse were greatly exaggerated, as her "views" about what happened during the marriage were "nurtured" by counselling and support groups after separation. She gave lectures and wrote articles about her experiences and an "abused wife". While the judge accepted that the man assaulted her "several" times during the first year of the marriage, which he admitted, the court rejected other allegations and found that by the time of separation there were no "safety concerns" for the women or children.

44 Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters., "Allegations and Substantiations of Abuse in Custody Disputing Families" (2005) 43 Fam. Ct. Rev. 283.

In all of the studies about exaggeration or lying about abuse allegations conducted by Johnston and her colleagues, it was mental health professionals who made the determination of the veracity of the allegations. Interestingly, a study by Shaffer and Bala of reported Canadian family law judgments in which spousal violence was alleged, with judges making the determination of the veracity of an allegation or denial, found essentially identical results to the work by Johnston;[45] judges in 74% of a total of 40 cases of allegations by women against men concluded that the allegations were substantially true and the denials false, but only one of the two cases in which men made domestic violence allegations against their female partners were considered founded by the judges.

5. EFFECTS OF SPOUSAL VIOLENCE ON CHILDREN

There is often a relationship between spousal violence and maltreatment of children. However, until relatively recently[46] in the absence of evidence of child abuse, it was common for lawyers, judges and assessors dealing with parental separation to ignore spousal violence when dealing with issues related to children, reasoning that "abusive husbands are necessarily abusive parents." There is a growing body of research and case law about the need to consider the effects of spousal abuse on children, but even today many professionals who work in the justice system do not fully appreciate the direct and indirect trauma that children experience as a result of spousal abuse.

There is now a substantial body of research[47]on the negative effects on children of growing up in a home where there is spousal abuse, even

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45 Martha Shaffer & Nicholas Bala, "Wife Abuse, Child Custody & Access in Canada" (2003) 3 Journal of Emotional Abuse 253.

46 For one of the "older cases" that effectively ignored serious spousal abuse in dealing with custody, see *Peterson v. Peterson* (1988), 85 N.S.R. (2d) 107, 1988 CarswellNS 180 (N.S. Co. Ct.). For a more recent survey that raises concerns about the extent to which family lawyers and judges disregard issues of spousal violence, see Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Yearbook of Access to Justice 115, at 130-31.

47 See Peter Jaffe, Linda Baker & Allison Cunningham, *Protecting Children From Domestic Violence* (New York: Guilford Press, 2004) and Peter Jaffe, Claire V. Crooks & Samantha E. Poisson, "Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes" (2003) 54 Juvenile and Family Court Journal 57. Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: The Impact of Domestic Violence on Family Dynamics* (Thou-

if the children are not directly abused and do not observe the incidents of violence. There is also a relatively high co-occurrence of spousal violence and child abuse, especially if the spousal violence is "intimate terrorism." Children are most likely to suffer if they both witness spousal violence and are victims of direct abuse, but children cope with exposure to violence in a range of different ways. While some of these children are quite resilient, most children who live in homes where there is spousal abuse suffer short and long-term negative effects.

(a) Direct effects—Potential for Child Abuse

Research studies of mothers in shelters for abused women indicate that 30% - 60% of the men who have assaulted their female partners also physically abuse their children; in these studies men who physically abuse their female partners are also substantially more likely than other men to sexually abuse their children or stepchildren.[48] However, in community-based samples of spousal violence, in which the majority are cases of relatively low intensity mutual violence, the co-occurrence of spousal violence and direct abuse of children is much lower, in some studies under 10% of cases.[49]

Even when children are not the direct targets of abuse, they may be injured by spousal abuse. Men who abuse their partners, especially those who engage in coercive controlling violence, are often not good parents; they are poor role models for their children, especially their sons, and are often emotionally abusive of their children. Young infants caught in situations of spousal abuse or conflict may be dropped or accidentally injured. Older children may be injured trying to protect an abused mother. However, a woman who is a victim of spousal abuse is less likely to leave a partner if her children are not being directly victimized

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sand Oaks, CA: Sage Publications, 2002); C.K. Moffatt and S.L. Smith, "Childhood Exposure to Conjugal Violence: Consequences for Behavioral and Neural Development" (2007) 56 De Paul L. Rev. 879.

[48] An American study based on a large population survey reveals that the greater the use of violence by a spouse against a partner, the more likely that person will also physically abuse children; the correlation was especially strong for male abusers: Ross, "Risk of Physical Abuse to Children of Spouse Abusing Parents" (1996) 26 Ch. Abuse & Neglect 589.

[49] See Donald Dutton, *Rethinking Domestic Violence* (Vancouver: U.B.C. Press, 2006) at 152.

as battered women are most motivated to change their circumstances when they conclude that doing so is necessary to protect their children.[50]

There is also the possibility of abduction by an abusing spouse. Sometimes the abusive spouse will threaten abduction to intimidate or control a partner, and if separation occurs, the abusive parent may abduct the child. If there is a reasonable possibility of abduction, this may be grounds for supervising or denying access.[51] In the most tragic cases, an abusive parent — invariably the father — may kill both his spouse and his children, or may kill his children and commit suicide; such multiple homicides are likely to occur in the context of marital breakdown or separation.[52]

(b) Effect of Spousal Abuse on Parenting Capacity

A victim of spousal abuse often suffers from lowered self-esteem, depression, drug or alcohol abuse, or may take out feelings of powerlessness by mistreating her children. A history of spousal violence in a family is "strongly associated with the mother's diminished parenting, in that mothers from violent relationships are less warm and more coercive with their children."[53] As a result of the feelings of inadequacy and depression caused by abuse, a woman who is a victim of spousal abuse may herself be more likely to neglect or physically abuse her children.

Violent spouses often denigrate their partners in the presence of their children. The children of abused women, especially boys, are more likely

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50 Barbara Hart, "Children of Domestic Violence: Risks and Remedies" (2000) online: Minnesota Centre Against Violence and Abuse <http://www.mincava.umn.edu>

51 See e.g. *Zahr v. Zahr* (1994), 24 Alta. L.R. (3d) 274, 1994 CarswellAlta 248 (Alta. Q.B.).

52 Fathers and mothers kill their children in roughly equal numbers, but generally in very different circumstances. Fathers most commonly kill children after separation; these men have often been very abusive and controlling husbands. Mothers who kill their children are often single mothers without much social support. For a description and analysis of a familicide arising out of an abusive marriage see R. Busch and N. Robertson, "I Didn't Know Just How Far I Could Fight: Contextualizing the Bristol Inquiry" (1994) 2 Waikato Law Review 41.

53 Janet Johnston, "High-Conflict Divorce" (1994) 4(1) The Future of Children 165 at 175.

to be disobedient or disrespectful of their mothers than other children and to verbally or even physically abuse their mothers.

(c) Effects of Spousal Abuse on Children

There is a substantial body of research on the negative effects on children of observing or hearing one parent being abused by another. Children who observe spousal abuse are often terrified by the experience and may not understand it. Children who witness a parent being assaulted will often feel confused or powerless. Some children feel guilty or responsible for the violence. Hearing a parent being verbally abused and denigrated, especially if it is a regular occurrence or accompanied by physical abuse of the child, can also be very disturbing for a child.[54] Even if children do not observe abuse occurring, there are negative effects to growing up in a household where spousal abuse occurs.

In a 2004 Statistics Canada study, 40% of female victims of spousal violence and 25% of male victims reported that their children saw or heard the violence.[55] Children were more likely to observe violence that resulted in injury or that caused parent to fear for their lives, *i.e. a child was more likely to witness more serious spousal violence*. Further, it is likely that parents underestimate the awareness that their children have of violence in the home. In some cases witnessing even a single serious incident of abuse can produce post-traumatic stress disorder in a child.[56] Even if a child does not directly observe spousal abuse, living in a home where there is spousal abuse can have serious negative effects. One American researcher observes:[57]

> Hiding in their bedrooms out of fear, the children may hear reported threats of injury, verbal assaults on their mother's character, objects hurled across the room, suicide attempts, beatings, and threats to kill. Such exposure will arouse a mixture of intense feelings in the children. These feelings include a fear that the mother will be killed, guilt that they did not stop the violence, divided loyalties, and anger to the mother for not leaving.

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54 See e.g. *Dhaliwal v. Dhaliwal* (1997), [1997] O.J. No. 5964, 1997 CarswellOnt 5774 (Ont. Gen. Div.), per Métivier J.

55 See Statistics Canada, *Measuring Violence Against Women* (2006) p. 34.

56 D.G. Saunders, "Child Custody Decisions in Families Experiencing Woman Abuse" (1994) 39 Social Work 51.

57 D.G. Saunders "Child Custody Decisions in Families Experiencing Woman Abuse" (1994) 39 Social Work 51, at 54.

The worst outcomes for children are associated with both observing spousal abuse and being directly abused.

There is now a substantial body of research from experts in child development that children from homes where there has been spousal abuse have:[58]

- more behavioural problems and lower social competence; boys tend to externalize and have school difficulties or be more aggressive, including the commission of offences for adolescents, while girls tend more towards depression;
- lower self-esteem and higher anxiety, as evidenced by sleep disturbance and nightmares;
- greater risk of abusing drugs or alcohol;
- among infants there may be developmental delays, attachment problems and 'failure to thrive;' and
- greater likelihood of being involved in abusive relationships as adults, boys as abusive partners and girls as abused women.

Fortunately, for many children there are likely to be substantial improvements in behaviour and emotional state if they cease to live with the abusive parent, especially if they have therapy or counselling.[59] There is a need for more research into the long-term effects of spousal abuse on children, as well as on the effects of different types of post-separation legal arrangements (e.g. no access vs. supervised access vs. open access). There is also a need to research the effect of different patterns and types of spousal abuse on children, since most of the research to date has been based on situations that are likely to involve more severe abuse and lower income families; where the abusive parent does not have contact, and where the women lived in a shelter for a period of time. Some children seem relatively immune to negative effects from growing up in a violent home, and there is also a need for research into this resilience, as well as the corresponding vulnerability of some children to the effects of spousal abuse.

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[58] Statistics Canada, "Childhood Aggression and Exposure to Violence in the Home" by Tina Hotton, (Ottawa: Ministry of Industry, 2003).

[59] Peter Mertin, "A Follow Up Study of Children From Domestic Violence" (1995) 9 Austl. J. Fam. L. 76.

(d) Reporting of Child Abuse Based on Spousal Violence: C.I.S. data

With the growing recognition among the public and professionals of the harmful effects of spousal violence on children has come a dramatic increase in the number of reports to child protection agencies of cases based on concerns about spousal violence. It is now a common police practice to report to child protection services any domestic violence case where children are present in the home. The 2003 *Canadian Incidence Study of Reported Child Abuse and Neglect (C.I.S. 2003)*[60] reported that over one third of cases of child abuse substantiated by child protection workers (34%) involved some form of exposure to spousal violence: 25% involved only exposure to spousal violence and 9% involved spousal violence plus other child abuse or neglect concerns.

Where spousal violence concerns were reported, the rate of substantiation was significantly higher than in most other types of cases, with 70% of reports considered substantiated by the investigating worker, 13% suspected and only 16% considered unsubstantiated. As a result of investigations where spousal violence was alleged, child protection workers considered that children had suffered physical abuse in 1% of cases, and emotional abuse in 14% of cases.

While child protection services frequently investigate cases involving spousal violence, their most common response is to make a voluntary referral for service, rather than keeping an open file. Cases remained open for ongoing service for only 36% of substantiated cases where spousal violence was the only concern, compared to 45% of all cases involving other types of child abuse or neglect, and 67% of cases involving co-occurrence of spousal violence and other abuse or neglect concerns. Apprehension and taking a child into care occurred within 3 months of the initial investigation in only 2% of cases where spousal violence was the only concern, with 3% of these cases resulting in a court application. However, there were apprehensions in 10% of cases if spousal violence was accompanied by other child abuse or neglect concerns.

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[60] Health Canada, *The Canadian Child Welfare Response to Domestic Violence Investigations* by Tara Black, NicoTrocmé, Barbara Fallon, & Bruce MacLaurin, (Ottawa: Centre of Excellence for Child Welfare, 2006) online: Centre of Excellence for Child Welfare < http://www.cecw-cepb.ca/DocsEng/Responsetodomviolence39E.pdf>

Although the most common response of child protection workers to spousal violence reports was to investigate, make a voluntary referral and close the file, among the files that were closed 55% were reopened for further investigation within a year if the initial substantiated concern was only spousal violence, and 68% were reopened if there were spousal violence and other child abuse or neglect concerns.

6. THE NEED FOR INDIVIDUALIZED ASSESSMENT

While gender is an important dimension for understanding issues of spousal abuse and violence, it is not the only dimension. This is, for example, illustrated by the fact that partner abuse is a serious problem in same-sex relationships,[61] and that many men who hold traditional patriarchal views of marriage do not abuse their wives. American sociologist Janet Johnston concludes:[62]

> both men *and* women...are perpetrating a considerable amount of physical and verbal aggression in ... separating/divorcing families. However ... the consequences of male aggression are ... more serious ... Most men are physically stronger than women and can protect themselves better against female aggression .... aggressive males ... are more likely to dominate, control, and physically injure their partners.

In every case where there is spousal abuse, there is a need to consider the specific nature and context of the abuse. As Johnston points out:[63]

> domestic violence is not a unitary syndrome with a single underlying cause but rather a set of behaviours arising from multiple sources, which may follow different patterns for different individuals and families.

In order to assess what is the best response to spousal abuse, it is necessary to consider a range of questions. Who is the primary aggressor? What is the nature and intensity of the abuse? How frequent is it? Is the abuse perpetrated only by one spouse, or is it mutual? What is the effect of the abuse, since the same acts will affect different individuals

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61 See e.g. L.K. Burke & D.R. Follingstad, "Violence in Lesbian and Gay Relationships: Theory, Prevalence, and Co-relational Factors" (1999) 19 Clinical Psychology Review 487; this review of nineteen studies concludes that prevalence rates of same-sex partner abuse are high and its correlates show many similarities to those identified in incidents of heterosexual partner abuse.

62 Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995) 9 Aust. J. Fam. L 12, at 16.

63 Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995) 9 Aust. J. Fam. L 12, at 24.

in different ways? What is the prognosis for recurrence of abuse, given different possible interventions? And, is there evidence about the effects of the above on the children? What resources are available to intervene and reduce risk?

(a) Risk Assessment

One of the issues that police, advocates for women and ultimately judges must consider in deciding how to respond to spousal violence is a consideration of the risk to victims and children, both the recurrence of violence and of an increase in severity of violence. There is a growing body of research about risk of recurrence of spousal violence and a number of different screening tools that are used by police, Crown prosecutors, victim services and shelter workers to undertake risk assessment.[64] All risk assessments involve an assessment of multiple factors; the more factors that are present, the greater the risk of recurrence. Some of the most common risk factors include:

- violence against spouse that is escalating in frequency or severity;
- a history of violence against spouse during pregnancy;
- a history of violence against prior partners;
- forced confinement of spouse;
- violence against non-family members;
- violation of restraining orders or other court orders;
- threats of violence, homicide, suicide or abduction of children;
- post-separation staking behavior (surveillance of spouse/children, monitoring of mail etc.);
- abuser is unemployed;
- abuser has alcohol or drug dependency problems;
- abuser is suffering from depression;
- victim expressing fears of repetition of violence;
- abuser is in step-father role in this relationship;

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[64] Zoe Hilton & Grant Harris, "Predicting Wife Assault: Critical Implications for Policy and Practice" (2005) 6 Trauma, Violence & Abuse 3.

- abuser is under 35 years of age.

There are a number of different risk assessment instruments. Some are quite easy to use, such as the O.D.A.R.A. instrument (Ontario Domestic Assault Risk Assessment) that is commonly used by police forces in Ontario and has 13 questions that are simply answered yes, no or unknown. Some police forces in Canada use the 20 item tool, S.A.R.A. (Spouse Abuse Risk Assessment.) Some instruments that are used by non-police agencies, for example to screen for suitability for mediation are more complex, with more questions and sliding scales of responses (e.g. D.O.V.E. – the Domestic Violence Evaluation instrument.[65])

These instruments are useful, especially for police and service providers. In some cases courts have admitted evidence about the scores of a perpetrator, for example for such purposes as sentencing in criminal court.[66] However, if the admissibility of this type of risk assessment evidence is contested, especially at trial, there may need to be a qualified expert to explain its reliability and significance.

Risk assessment clearly has limitations. For one thing, the scoring on any evaluation is only as good as the information that is available, and in some cases the information about certain aspects of the abuser's history may be unavailable or inaccurate. Further, some items on risk assessment inventories involve some degree of subjectivity and the scoring could be challenged. Most fundamentally, it must be appreciated that assessment of the risk of future violence is not an exact science; individuals with low scores may re-offend, while those with higher scores are not certain to re-offend.

In addition, risk assessment instruments measure the risk of future incidents of spousal violence, not the likely lethality of any future acts of violence. Factors such as access to firearms will affect "lethality assessments" (attempting to predict the likelihood of a serious or fatal attack), that may be part of safety planning by police and other agencies to help protect victims of spousal violence from danger.

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[65] Desmond Ellis & Noreen Stuckless, "Domestic Violence, DOVE and Divorce Mediation" (2006) 44 Fam. Ct. Rev. 658.

[66] *R. v. Robertson* (2006), [2006] A.J. 456, 2006 CarswellAlta 517 (Alta. Prov. Ct.), per Wilkins Prov. Ct. J.; *R. v. Hanson* (2006), 2006 CarswellYukon 58, 2006 YKTC 43 (Y.T. Terr. Ct.), per Ruddy Terr. Ct. J.; and *R. v. Bryshun* (2006), 2006 BCPC 34, 2006 CarswellBC 235 (B.C. Prov. Ct.), per Sundhu Prov. Ct. J.

7. THE LEGAL CONTEXT: CRIMINAL & CIVIL RESPONSES TO SPOUSAL ABUSE

Before considering in detail the issues that arise in cases that deal directly with spousal violence in the context of child-related cases, it is worth considering the broader legal context that includes other legal proceedings that respond to spousal violence: criminal proceedings and civil proceedings to obtain orders for exclusive possession of the home or restrain contact with the victim. These other proceedings may have a direct effect on the child-related proceeding. There needs to be co-ordination and communication "between systems," so that orders made in one court do not have unintended effects on other proceedings. In particular, the police and criminal justice system are often "first responders," and there needs to be consideration of the effects of their actions and other, usually subsequent proceedings.

(a) Criminal Proceedings

The initial societal and legal response to cases of spousal abuse is often through the police and the criminal justice system, though for a variety of reasons many victims of spousal violence do not call the police, especially if the acts of violence do not result in serious physical injury or create a fear of immediate injury or death. However, even those professionals whose main concerns relate to the children and civil cases must understand the effects of the criminal justice process on family and child proceedings.

Starting in the 1980s, police forces in North America began to adopt more aggressive charging policies in domestic abuse cases, no longer asking women who have been assaulted by their partners if they "want" to lay charges, but rather introducing mandatory police charging and prosecution. These policies have resulted in very substantial increases in the number of spousal assault cases where charges are laid. Canadian research indicates that in most cases in an intact family the effect of police arrest and charging, and a later court appearance is to decrease the likelihood of recurrence of spousal abuse but in a minority of cases violence will escalate after police are involved as the abuser retaliates against the victim for including the legal authorities.[67] A majority of

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[67] See L. Dugan & R. Rosenfeld, "Exposure Reduction or Retaliation: The Effects of Domestic Violence Resources on Intimate Partner Homicide" (2003) 37

offenders are deterred from re-offending by a police and criminal justice response. However, there is a minority of violent spouses for whom police involvement may increase levels of anger and result in "retribution" against a partner who has called the police. In some of these cases, the victim may feel too intimated to report any further incidents of abuse.[68]

As a matter of law, it is more difficult to prove abuse in a criminal proceeding than in a civil context. For a criminal conviction, there must be proof beyond a reasonable doubt while a civil case only requires proof on the balance of probabilities. Further, the criminal rules of evidence and the *Charter of Rights* may exclude evidence in the criminal proceeding that is admissible in civil child protection or family law proceedings. However, if criminal proceedings are commenced, this will usually facilitate proof of abuse in any later civil proceeding. Criminal proceedings are usually commenced because police have been called to the scene of a domestic violence assault, and have obtained sufficient evidence to justify the laying of charges. In some cases the police actually witness an assault and in others the police may be able to obtain evidence, such as photographs of injuries or witness statements that will make it relatively easy to prove that abuse has occurred.

A major problem for the prosecution in many domestic violence cases is that by the time of trial, the victim may be uncooperative or even "recanting", testifying that the abuse did not occur and that, for example, any injuries were a result of an accident. The victim may be uncooperative or recanting because of feelings of guilt about the prosecution, threats from the abusive partner, concern about the consequences of prosecution for the family or because of pressure from relatives.[69] Some American researchers suggest that as many as 80% of

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Law & Soc'y Rev. 169. A 2004 Statistics Canada survey indicated that only 37% of women assaulted in intimate relationships reported to the police; reporting to the police was more likely if the violence was more serious, more frequent, or witnessed by children. Of those women who reported to police, in 57% of cases the women reported that the violence stopped or decreased after the police were involved, in 30% they reported that it remained the same, and in 11% the victims reported that the level of violence increased. See Statistics Canada, *Family Violence in Canada* 18.

[68] See Dutton, *Rethinking Domestic Violence* (Vancouver: UBC Press, 2006), Chapter 12.

[69] M. Bell, L. Goodman & M. Dutton, "Understanding Domestic Violence Victims' Decision-Making in the Justice System: Predicting Desire for a Criminal Prosecution" (Summer 2003), 19 FVSAB 6. This report showed that in about

female victims of spousal violence recant or refuse to cooperate with the prosecution by the time a criminal case is concluded.[70]

Recently, in some cases in which a victim recanted in court, Canadian prosecutors have been able to introduce evidence of a victim's videotaped out-of-court statements to police investigators or transcripts of 911 calls to convince a court that the offence occurred.[71] This has resulted in more convictions in domestic violence cases, despite the fact that it can be difficult to obtain a conviction if the victim recants or claims that she does not accurately remember the incidents in question.[72]

Judges in criminal proceedings in Canada are prepared to take judicial notice of the problem of the recanting victim. For example, in the 2006 Saskatchewan case of *R. v. McLeod,* the court refused to allow a man who had pled guilty to assaulting his wife to later withdraw the plea on the basis that his wife was asserting that her written statement about the assault was incorrect. Judge Meekma wrote:[73]

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one half of criminal domestic abuse cases the female victim wants the prosecution discontinued; women are more likely to want the prosecution to continue if they did not plan to continue the relationship, did not rely on the abuser economically, or perceived a high risk of future violence.

70 Tom Lininger, "Bearing the Cross" (2005) 74 Fordham L. Rev. 1353, at 1363-64.

71 These out-of-court statements are only admissible to obtain a conviction there must be "an indicia of reliability," as established in the Supreme Court of Canada decision in *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257, 1993 CarswellOnt 76, 1993 CarswellOnt 975 (S.C.C.); see *also R. v. Senoski*, [2003] O.J. No. 3237 (C.A.) These are called "*K.G.B.* statements." See e.g. *R. v. Mohamed*, [1997] O.J. No. 1287, [1997] O.J. No. 1536 (Ont. Prov. Div.) (videotape of victim's recanting statement to police admissible and used as basis for a conviction); *R. v. Balaram* (unreported ruling, July 4, 2000, Ont. Ct. J., per Dobney J.) (911 tape admissible).

72 See e.g. *R. v. Malouf* (2006), [2006] O.J. No. 3342, 2006 CarswellOnt 5028 (Ont. S.C.J.), per D.J. Power J., acquittal because victim said that she "did not remember if she told the police the truth" about assault.

73 (2006), [2006] S.J. No. 318, 2006 CarswellSask 298, 2006 SKPC 47 (Sask. Prov. Ct.), at para. 45; see contra *R. v. Abraham* (2006), [2006] O.J. No. 4139, 2006 CarswellOnt 6269 (Ont. S.C.J.), per D.C. Shaw J., appeal court allows withdrawal of guilty plea after victim recants. See also e.g. *R. v. B.(M.A.)* (2006), 2006 ABQB 578, 2006 CarswellAlta 989 (Alta. Q.B.), per Lee J. In *Joudrey v. Joudrey,* [2006] N.S.J. 349, 247 N.S.R. (2d) 273 (Prov. Ct.), an application by a mother with custody to permit her to relocate from Nova Scotia to Nebraska, a significant issue was the father's alleged history or spousal violence. Campbell Prov. Ct. J. wrote [at paras. 77-78]:

Mr. Joudrey was charged with assaulting Marisa Joudrey. Those charges

> Courts must be cognizant of the high incidence of recanting complainants in domestic violence cases and that contact between accused and complainant often continues following the incident, even when the accused is in fact guilty and is convicted. While guarding against wrongful convictions and a miscarriage of justice, we must also take care not to encourage a process which could lead to pressure on victims to recant following a conviction.

Despite the possibility of obtaining a conviction based on a videotaped statement from a victim or other evidence, even if she recants at trial, in most cases, prosecutors continue to rely on a degree of victim cooperation to prove that an assault occurred, and generally do not proceed to trial if the victim does not appear in court or refuses to testify. This results in charges being withdrawn as women are intimidated or persuaded into not cooperating by the time a case goes to court. A study in Toronto's specialized domestic violence court indicates that victim cooperation and a successful prosecution is much more likely if there has been a videotaped statement and if the victim has the assistance of a victim services worker. [74] If the victim is prepared to co-operate and testify what occurred during the relationship, Canadian courts are often prepared to admit evidence about the entire history of abuse during the relationship so that acts of violence can be seen in the appropriate context, and to allow an explanation of a delay in disclosure.[75]

In many locales in Canada, including centres in Alberta, Manitoba, Saskatchewan, Ontario, New Brunswick and the Yukon, special domestic violence courts have been established to deal with criminal prosecutions for spousal abuse. Although the specialized courts vary in organization and approach, a common feature is that the prosecutors, police and victim-support workers at the domestic violence courts have more

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were dropped by the Crown in December 2003, after receipt of a letter from Marisa Joudrey recanting the statement she gave to police on February 10, 2003. Marisa Joudrey maintained at trial that the statement given to the police was true and that she had been coerced into signing the letter recanting it. Mr. Joudrey adamantly denies any coercion.

Abused spouses often resile from their statements made to police. That happens for a number of reasons, including fear of the consequences of a conviction, the economic and social uncertainty, forgiveness and reconsideration in calmer circumstances. . .

The court accepted that there was "pressure" on the woman to write the letter, and ultimately allowed her to move with the child.

[74] Dawson & Dinoviter, "Victim Co-operation and the Prosecution of Domestic Violence in a Specialized Court" (2001) 18 Justice Quarterly 593.

[75] See e.g. *R v. R. (B.S.)* (2006), 81 O.R. (3d) 641, 2006 CarswellOnt 5120 (Ont. C.A.).

training in dealing with domestic violence cases. Typically judges rotate through the domestic violence courts to ensure that they retain independence and are not seen as part of the "special team." These courts have had some success in expediting domestic violence cases, supporting victims and ensuring that fewer charges are withdrawn. There also tend to be more guilty pleas in domestic violence cases in the specialized courts than in the ordinary courts.[76]

A major aim of domestic violence courts is to immediately remove violent abusers from situations where they are posing a risk to their families and to get them into counselling more quickly than is possible under normal proceedings. One of the prosecutors involved in the Toronto domestic violence court, Donna Armstrong, remarked on the distinctive nature of spousal assault:[77]

> ...it is a crime. But you can't tell me a stranger hitting you is the same as your husband hitting you. There are just not as many factors involved. A stranger doesn't pay the mortgage, he isn't the father of your children and he's sure not someone, rightly or wrongly, that you love.

Canadian judges have said that a jail sentence is "normal" for a spousal assault,[78] as this offence involves a breach of trust and this type of sentence will serve to deter and recognize the social importance of the problem of spousal abuse. Abuse of a spouse in the presence of a child or an assault after the termination of cohabitation (e.g. during

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[76] Statistics Canada, *Measuring Violence Against Women: Statistical Trends* (2006), at 45-48.

[77] "Court to target spousal abuse" *Toronto Star* (26 May 1996) A1.

[78] *R. v. Inwood* (1989), 48 C.C.C. (3d) 173, 69 C.R. (3d) 181, 1989 CarswellOnt 79 (Ont. C.A.); see also *R. v. Bates* (2000), [2000] O.J. No. 2558, 2000 CarswellOnt 2360 (Ont. C.A.); *R. v. Pitkeathly* (1994), [1994] O.J. No. 546, 1994 CarswellOnt 64 (Ont. C.A.).

Despite these general statements, a jail sentence is not the typical sentence for a first time domestic offender if there is no serious injury to the victim. Even in very serious spousal violence cases courts may impose less severe sentences than in cases involving strangers. In *R. v. Edwards* (1996), 28 O.R. (3d) 54, 1996 CarswellOnt 481 (Ont. C.A.), leave to appeal refused (1996), 108 C.C.C. (3d) vi (S.C.C.) the Ontario Court of Appeal dismissed Crown appeals in two spousal violence cases where the husband pled guilty to the attempted murder of an estranged spouse and trial judges imposed sentences of nine and ten years imprisonment. Finlayson J.A. wrote (at 66):

> While I acknowledge that the principle of general deterrence is of paramount importance in determining appropriate sentences for crimes of domestic violence [...] it is simplistic to assume that the problems of domestic violence can be successfully attacked by increasing the sentencing tariffs.

access visits) are aggravating factors that make a jail sentence more likely.[79] However, in the absence of serious injury, for first offenders who are willing to undertake counselling, the usual sentence is non-custodial, typically a probation sentence involving attendance at a program for abusive partners.[80]

An important aspect of the domestic violence courts are group counselling programs for abusers, such as Ontario's Partner Abuse Response (P.A.R.) programs. These programs may also be used as part of sentencing in non-specialized criminal courts and are typically used as part of the sentence for first time and less serious spousal violence offenders. In some locales, an abuser may attend one of these programs even before sentencing, with completion affecting the sentence imposed.

It is understandable that there is an interest in getting those found guilty of spousal violence into counselling programs that are intended stop further abuse, by helping abusers understand their abusive conduct and its effects on their spouses and children. However, there is research that questions the effectiveness of the court-mandated group counselling programs for abusive spouses that courts typically use as part of sentencing (usually 8 to 26 weeks).

A number of large scale American studies that (with judicial support) have carefully randomized male abusers into sentences with a group counselling component and without, while under probation. These studies found no difference between the two groups in terms of re-offend-

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79 *R. v. Hartle*, [1995] O.J. 1100 (Prov. Ct.), per Renaud Prov. J. In the U.S. there is also a tendency to seek more severe sentences if a child observes spousal abuse or even to charge with an endangerment offence like the Canadian *Criminal Code* s. 172, which prohibits conduct that endangers morals of the child or renders the home an unfit place to be in".

80 Statistics Canada reports that of men convicted in spousal violence cases in the 1997-2002, only 20% received a prison sentence, while 72% received a probation sentence, and of the women convicted of spousal violence offences, only 7% received a prison sentence, while 77% received a probation sentence: Statistics Canada, *Measuring Violence Against Women: Statistical Trends* (2006),p. 51. However, if a man commits a serious domestic assault and there is evidence that this is an "abusive relationship," a penitentiary sentence (two years or more) is very likely to be imposed, even if the man does not have a prior criminal record: see e.g. *R v. R. (B.S.)* (2006), 81 O.R. (3d) 641, 2006 CarswellOnt 5120 (Ont. C.A.); and *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664, 2006 CarswellOnt 5038 (Ont. C.A.), leave to appeal refused (2007), 2007 CarswellOnt 3063, 2007 CarswellOnt 3064 (S.C.C.).

ing.[81] Significantly, however, the researchers found that men who are older and employed are more likely to complete court-mandated counselling and are less likely to recidivate, while those who are younger and unemployed are less likely to complete even court-mandated counselling and more likely to re-abuse female partners. While there is controversy about whether counselling programs for batterers have an effect on men with partner abuse problems, men who receive a sentence requiring participation in such a program and who *actually complete* the court-mandated program are less likely to re-offend than men who do not complete the program. Similarly, abusive men who are placed on probation without any abuse counselling, but who comply with all of the terms of their probation are also less likely to re-offend. In other words, although it would seem that the programs themselves do not have an effect on behavior, *compliance with a court order to attend such a program is a positive sign.* Further, men who complete such programs generally report that the programs help them understand and control their anger and their female partners report greater satisfaction with the sentence than women whose male partner did not receive sentences with a counselling component.

(b) Criminal Charges and the Family Court Process

When the police are contacted by a victim (or alleged victim) of spousal violence and come to the home, some immediate protection will generally be afforded. Provided the police have reasonable grounds to believe a criminal offence involving an assault or threats has occurred, they will arrest and remove the suspected offender from the home. In some cases the police may arrest both partners if satisfied that this was a situation of mutual violence and not a situation where one spouse was

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[81] Centre for Court Innovation, Testing the Effectiveness of Batterer Programs and Judicial Monitoring: Results from a Randomized Trial at the Bronx Misdemeanor Domestic Violence Court by Melissa Labriola, Michael Rempel & Robert C. Davis (New York: National Institute for Justice 2005) online: The Centre for Court Innovation <http://www.courtinnovation.org/_uploads/documents/battererprogramseffectiveness.pdf.> See also L. Feder & L. Dugan, "A Test of the Efficacy of Court-Mandated Counselling For Domestic Violence Offenders" (2002) 19 Justice Quarterly 342; L.E. Tower, "Attendance and Absenteeism: Key Variables in Predicting Re-Arrest in Batterers' Rehabilitation" (2003) 19 FVSAB 6; and C. Nadine Walthen & Harriet L. McMillan *et al.*, "Prevention of Violence Against Women" (2003) 169(6) Canadian Medical Association Journal 582.

abusive and the other a victim or acting in self-defence. An abusive spouse (or allegedly abusive spouse) will generally only be released after arrest on conditions, such as staying out of the home and not contacting the victim.

If there are criminal charges there may be a possibility of simultaneous family law and criminal proceedings, which adds to the complexity of a case. There is the potential for inconsistent orders being made, with for example the family proceedings allowing for contact between a parent and child, but the criminal proceedings effectively preventing the allegedly abusive parent from making contact or having visits with the children.

If criminal charges are laid, they will tend to "dominate" the resolution of any family law proceedings, at least until the criminal charges are resolved. A common condition of release of the accused on bail pending a criminal trial or of a probation sentence, is a prohibition of contact with the victim and perhaps a restriction on contact with the children. Although it is the role of the Crown prosecutor to suggest and the judge to decide the terms of bail and the sentence, increasingly judges in the criminal courts are making "no contact" orders as conditions of bail release or probationary sentences in domestic violence cases. "No contact" orders can offer victims and their children some protection. These orders supersede any civil custody or access orders under family legislation.

It is preferable if orders that are issued in criminal court are made with an awareness of any existing family court orders or in contemplation of orders that may later be made in family proceedings. In some cases it may be necessary for criminal court orders to be reviewed to take account of subsequent family court orders.

If there is a significant risk of re-offending and safety concerns, it may be appropriate for the criminal court order to specify that there should be "no contact" with either the alleged victim or the children during the time that the criminal proceedings continue, and such a term may later be incorporated as a term of probation or as part of a s. 810 of the *Criminal Code* (recognizance). In many cases, however, there will be more limited concerns, and it may, for example, be appropriate to specify that contact with the other parent may occur only through a named third party and solely for the purpose of arranging visits with the children at specified times. In some cases the criminal court judge will release the accused on bail with a condition that there be no contact with

the child unless that contact is permitted by the order of a family court judge.

The *Charter of Rights* guarantees that a criminal trial will be held within a "reasonable time." This means that a criminal trial will often be held before civil proceedings are fully resolved.[82]

If there are simultaneous criminal and family law proceedings, the person accused of abuse may have different lawyers for each proceeding, though it is obviously desirable for these two lawyers to communicate and coordinate their efforts.[83] Defence counsel in the criminal case will generally be reluctant to allow a person charged with a criminal offence testify in a civil case that deals with the same issues, and will want any civil proceedings adjourned until after the criminal case is resolved. If the accused files an affidavit or testifies in the civil case, for example for an interim access application, the Crown prosecutor may use any inconsistencies between that affidavit and testimony in a later criminal trial to impeach the credibility of the accused.[84] Similarly, if the accusing parent testifies in the criminal trial, any inconsistencies between that

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[82] If the civil case comes to trial before the criminal case, it is possible for the accused to seek a stay of the civil trial. However, judges are reluctant to grant a stay, especially if this would delay the making of a decision about the best interests of the child.

[83] There may be a narrow set of circumstances in which counsel for an alleged abuser may try to get access to the file of the lawyer for the accusing spouse in the family law case to assist in preparation of the criminal defence. Before allowing production, the court would also have to decide whether the accused's right to disclosure and a fair trial should take precedence over the right of the accusing parent to solicitor-client privilege in the civil case; this is a "stringent" test that requires the defence counsel to establish that the information is not available from any other source and is needed to establish a reasonable doubt of guilt; see *R. v. Brown* (2002), 2002 SCC 32, 2002 CarswellOnt 916, 2002 CarswellOnt 917 (S.C.C.).

[84] Section 13 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act* 1982 (U.K.), 1982, c. 11 [*Charter*] creates a right against self-incrimination so that prior affidavits or testimony of an accused in other cases cannot be used *if* the accused fails to testify. However, if the accused does testify in the criminal trial, the prior statements from the family law proceedings can be used to impeach his credibility; see e.g. *R. v. B.(W.D.)* (1987), 38 C.C.C. (3d) 12, 1987 CarswellSask 538 (Sask. C.A.); and *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385, 1990 CarswellOnt 62, 1990 CarswellOnt 1010 (S.C.C.). Counsel in the civil case may try to get an order to seal the civil trial record until after the criminal case is over; this would prevent any use of the material in the criminal case; see e.g. *Forbes v. Thurlow* (1993), 23 C.P.C. (3d) 107, 1993 CarswellOnt 484 (Ont. Gen. Div.) where such an order was made.

testimony and evidence in a later family law trial may be used to impeach their credibility in the civil case.

If the accused is convicted of abuse in the criminal trial, the judge in a later family law trial is generally obliged to take the criminal conviction as conclusive evidence that the abuse in question occurred.[85] It is not uncommon, however, in a subsequent family law case for there to be allegations of other abusive incidents that did not result in a criminal conviction, and the family law judge will have to determine, on the civil standard, whether those acts occurred. The fact that an alleged abuser is not charged or is tried and acquitted in criminal court is clearly not binding on a judge in a later civil proceeding. Further, even if there is no judicial finding of abuse in either the criminal or the family law proceeding, there may be other concerns about parenting capacity that lead to a denial of custody. [86]

Some degree of coordination and communication between professionals involved in criminal justice and family proceedings that deal with the same family is desirable, while recognizing that the distinctive nature of the two processes and different professional roles must be respected. Some information clearly cannot be shared between professionals or systems; however, there are cases in which the lack of coordination or sharing of relevant information is due to inadvertence rather than legal constraints. Clearly the primary responsibility for coordination and information sharing rests with counsel, police and victim support services. Judges, however, may also have an important role in questioning counsel about whether appropriate consideration has been given to these issues.

Since the introduction of "mandatory charging" policies for police called to domestic violence incidents, there has been a dramatic increase in the number of criminal prosecutions for spousal violence, and an increased likelihood of simultaneous criminal and family proceedings. Although the mandatory charging policies have clearly increased protection for victims of spousal violence, these policies are also subject to manipulation or misuse and have also resulted in charges being laid

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[85] See *City of Toronto v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; and *Hanna v. Abbott* (2006), 82 O.R. (3d) 215, 2006 CarswellOnt 4937 (Ont. C.A.) for the narrow circumstances in which the factual determination based on a previous conviction can be challenged in a later civil proceeding.

[86] *S. (S.) v. S. (P.)* (1994), [1994] O.J. No. 995, 1994 CarswellOnt 2178 (Ont. Prov. Div.), additional reasons at (1994), 1994 CarswellOnt 4303 (Ont. Prov. Div.), Main J.

against spouses, especially men, involved in high conflict separations, but clearly not guilty of spousal assault.

(c) Civil Restraining Orders

If there is a risk of post-separation harassment or violence, and criminal proceedings have not been commenced, an alleged victim may to seek a civil restraining or protective order to prohibit an abuser from contacting or harassing a spouse or child. In most provinces family law legislation allows for a court to issue a civil restraining order to prevent one spouse from "molesting, annoying or harassing" the other spouse, creating a provincial offence for a spouse who violates the order.[87] In jurisdictions without emergency domestic violence legislation (discussed below), the process for obtaining a restraining order can be relatively slow.

If a civil restraining order is obtained, in some jurisdictions, the court will send a copy to the police. In many places, however, it is up to an advocate, counsel for the victim, or the victim herself, to send the police a copy of any order and set out any special concerns to ensure that it is enforced; otherwise, the police will only be aware of the order if informed about by the victim, at which time they will likely ask to see a certified copy. While there are sometimes difficulties in getting the police to enforce a civil order,[88] as their training about domestic violence issues increases, the police are becoming more responsive to their enforcement. The applicant should be advised to contact the police if there is a breach and be given a certified copy of the order to show the police.

(d) Emergency Civil Orders and Recogizances

In the past few years legislation has been enacted in Alberta, Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island, the Northwest Territories and the Yukon which greatly facilitates access to the civil justice system for victims of spousal abuse who are seeking emergency protection through a civil court order.[89] This type of civil remedy

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87 See e.g. *Ontario Family Law Act*, R.S.O. 1990, c. F-3, s.45.

88 Department of Justice, *Review of the Use and Effectiveness of Judicial Recognizance Orders and Civil Restraining Orders* by Colin Meredith (Ottawa: Department of Justice Research Directorate, 1995).

89 Canada, Department of Justice: *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spouse Abuse Policies and Legis-*

may be useful for victims who distrust the police and the criminal justice system, or who are reluctant to have a criminal prosecution. For some victims there may be hope of reconciliation or concern about the economic effects on the family, which makes this type of civil remedy preferable to criminal prosecution. Further, there are cases in which there is no basis for the police to arrest and charge an abusive spouse, but there may be grounds for obtaining an emergency civil order.

Although there is some variation in the details of these emergency civil domestic violence schemes, all of the statutes establish a procedure for obtaining emergency protection orders from a justice of the peace without notice to the alleged perpetrator where such a measure is believed to be necessary to protect a spouse or children. These emergency orders can generally be obtained by a telephone hearing or by faxing an affidavit and supporting documents to a justice. Justices of the peace are the lowest level of judicial officer (in most jurisdictions they are not required to have legal education), and at least in theory are available 24 hours a day, seven days a week. Thus, this type of legislation is intended to provide faster relief for victims of family violence. In the Yukon, for example, the emergency intervention order may be obtained with the assistance of a designated Victim Services worker or an R.C.M.P. officer, with the application made by telephone and fax.

The emergency intervention order will typically require that the respondent refrain from contacting the applicant and may restrain contact with the children and hence, on a temporary basis, affect custody and access rights. This type of order may also deal with exclusive possession of the home. This type of order may also require the police to seize firearms in the possession of an abuser, and to accompany the victim to the family home to recover personal property.

Since an emergency order is generally made without notice to the respondent, the legislation requires that the justice of the peace must be satisfied that the situation is "serious or urgent." If the emergency order is obtained without notice to the alleged abuser, it will be served on the

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lation (April 2003), 48-55 online: <http://canada.justice.gc.ca/en/ps/fm/reports/spousal.html >; Alberta, *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2; P.E.I. *Victims of Family Violence Act*, R.S.P.E.I. 1988, c V-3.2; Manitoba, *The Victims of Domestic Violence Act*, R.S.S. 1994, c. V-6.02.; Yukon, *Family Violence Prevention Act*, S.Y. 1997, c. 12; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24. A similar statute has been enacted in Ontario, but it has not been proclaimed in force: *Domestic Violence Protection Act*, S.O. 2000, c. 33.

alleged abuser by the police.[90] All jurisdictions with this type of legislation allow for the respondent (alleged perpetrator) to give notice and seek a contested hearing before a judge.[91] Emergency orders are generally limited in duration.

The Yukon, Alberta, Prince Edward Island and Saskatchewan statutes specify that the court should consider the best interests of the child along with other factors in making a domestic violence order. This implies that an order under those domestic violence statutes take precedence over custody or access orders.

Before an emergency order is made, a court should consider any history of violence in the relationship and, the nature of the most recent incidents, including any threats and the degree of present danger. Courts will generally expect some evidence of recent threats, violence or harassment before granting such an order. For example, a single incident of assault two years prior to the application may not be sufficient to obtain such an order.[92] However, it is not necessary for there to have actually been an assault for an emergency order to be obtained; it is sufficient for it to be established that there is a "reasonable fear of bodily harm."[93] For *some* abusers, the mere fact that a civil court order has been made will be a significant constraint on their behavior. In some cases, it may be preferable that an abuser is actually personally served with notice of any application for a restraining order before any court order is made; appearing in court and hearing directly from a judge or justice of the peace about the court's expectations may have an effect on the abuser's behavior.

In jurisdictions without civil domestic violence legislation in force (the present situation in Ontario), a victim must commence a family law

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90 *P. (D.K.) v. D. (P.J.)* (2003), 2003 CarswellAlta 1590, [2003] A.J. No. 1380 (Alta. Q.B.) held that the police could serve notice of the order on the respondent by phone.

91 *Baril v. Obelnicki* (2004), [2004] M.J. 134, 2004 CarswellMan 146 (Man. Q.B.), rev'd (2007), 2007 CarswellMan 132 (Man. C.A.) upheld the constitutional validity of a provincial statute giving power to justices of the peace to make this type of interim *ex parte* order. Steel J.A. in the Manitoba Court of Appeal invoked s. 7 of the *Charter* to "read in" provisions in the Manitoba statute to make it consistent with the "principles of fundamental justice."

92 *MacNeil v. MacNeil* (2000), 2000 CarswellYukon 3, 2000 YTTC 504 (Y.T. Terr. Ct.) (per Lilles Terr. J.); *F. (S.) v. S. (C.)* (2004), [2004] A.J. No. 432, 2004 CarswellAlta 451 (Alta. Q.B.).

93 *A. (M.L.) v. S. (R.)* (2000), [2000] Y.J. No. 127, 2000 CarswellYukon 115 (Y.T. S.C.), per Veale J.

proceeding to obtain a civil restraining order for exclusive possession of the home or to restrain the alleged abuser. While interim orders can be obtained, there must generally be prior service of the alleged abuser with notice of the court application. In practice it is likely to take days or even weeks to obtain such an order.

If there is a concern about police reluctance to enforce a civil order, it may be useful to obtain a recognizance under s. 810 of the *Criminal Code*, which only requires an applicant to establish "reasonable grounds" for a fear of injury to herself or her children. Some police officers are more willing to enforce such *Criminal Code* orders than "mere" civil orders.

While emergency civil legislation is useful, without adequate resources for implementation, such statutes have limited value. In most jurisdictions there has only been limited use of these statutes, perhaps because women lack access to advocacy or legal services on an emergency basis. Although a lawyer is not needed for an application, most victims of abuse are unlikely to seek such an order without legal counsel or appropriate support services.[94] In some jurisdictions like the Yukon, Victim Services and the R.C.M.P. may assist victims of violence in seeking these emergency civil orders. Perhaps as a result, the rate of use of the *Family Violence Prevention Act* appears to be higher in the Yukon than in other jurisdictions.[95]

Ultimately, court orders (whether civil or criminal) only provide protection if the abusive spouse has a basic respect for the legal system, which is often not the case, or if he has a realistic fear of a quick police response if there is a breach of the order.

Many American states have a longer history of experience with civil domestic violence statutes. American studies have found that 25% to 50% of women who receive a protective order are revictimized, though only a minority of women report their revictimization to the police or courts. Revictimization is more likely for women of lower socio-economic status and racial minority group membership; revictimization is also more likely if the perpetrator has a previous arrest history and shares biological children with the victim. One U.S. study investigated factors

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94 See e.g. "Ontario bill toughens restraining orders; Women need more shelters critics say" *National Post* (28 October 2000); and "Men don't matter" *The Report Magazine [Alberta]*, (16 April 2001).

95 Nicholas Bala & Erica L. Ringseis, "Review of the Yukon *Family Violence Prevention Act*" (for Yukon Territorial government on contract with Canadian Research Institute for Law & the Family) (July 2002).

reducing time to domestic violence revictimization, and did *not* find a difference between re-offending rates based on whether there was an arrest and criminal charges versus only a civil protective order.[96] However, the researchers note that civil intervention may result in greater feelings of empowerment for certain women, which may result in reduced revictimization. These researchers also suggest that other variables may affect reoffending rates such as initial police response, past court experiences and socio-economic status.

No legal response to domestic violence is appropriate for all victims at all times. Rather, it is important to have a variety of responses available so that a particular victim in a particular situation may choose an option that is most likely to assist in the recovery and empowerment process.

(e) Family Law Orders: Exclusive Possession of the Home

For victims of abuse and their children, obtaining an order for exclusive possession of the home and excluding the abuser is less disruptive than having to move out to have their safety assured. However, in jurisdictions like Ontario, without emergency civil legislation, it takes time to obtain such an order and, in some cases, the actual enforcement of such an order may be problematic. Further, an exclusive possession order for a rented "family home" will do little for a woman who cannot afford to pay the rent. As a result, many female victims of domestic violence are forced to leave their spouses and seek accommodation in a women's shelter or with relatives. Although disruptive, taking this step has the advantage for women of obtaining moral and other types of support, as well as accommodation in a safe place.

All provinces and territories have legislation which allows for exclusive possession orders, generally with a specific reference to the "best interests of children" and domestic violence as factors for a court to consider, as well as permitting that orders be made on an interim basis.[97] It may, however, be difficult to obtain an interim order without clear evidence of abusive conduct. It is necessary to have sufficient evidence to persuade a judge that continued cohabitation is no longer appropriate,

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[96] D.P. Mears, M. J. Carlson, G. W. Holden & S.D. Harris "Reducing Domestic Violence Revictimization: The Effects of Individual and Contextual Factors and Type of Legal Intervention," (2001) 16 Journal of Interpersonal Violence 1260 at 1263.

[97] See e.g. *Ontario Family Law Act*, R.S.O. 1990, c. F-3, s.24(3) & (4).

and that the other parent is at fault and should be excluded from the home.

Some decisions indicate that the mere fact that there has been an assault may not be sufficient to obtain a civil exclusive possession order;[98] there must be some indication that there is a possibility that violence will reoccur.[99] However, it is submitted that the better view is that the fact that there has been a recent assault creates an environment in which it is psychologically unfair to expect a victim to remain, and that even significant emotional abuse should be a basis for obtaining exclusive possession.[100] It must be appreciated by counsel for a victim that there may be difficulties in proving abuse or violence, especially at the interim stage, in the face of what will often be the emphatic denials of the other party; evidence from independent sources will always be helpful.[101]

In practical terms, if a criminal prosecution has been commenced as a result of an incident of domestic abuse, it will almost always be a "term of release" in the bail order that the accused is to refrain from residing with the alleged victim. Thus, if a criminal proceeding is commenced it may be easier for the victim or her counsel to contact the police or prosecutor to ensure that a condition requiring that the accused stay away from the family home, and avoid contact with the victim and children is included, rather than obtaining a civil exclusive possession order.

With some abusive spouses, an order or recognizance will not afford protection to a victim. With some abusers, these are "mere pieces of paper" and the abuser will disregard the order until the police arrive to

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98 See e.g. *Perrier v. Perrier* (1989), 20 R.F.L. (3d) 388, 1989 CarswellOnt 248 (Ont. H.C.) (Query whether the court was dismissive of the allegations in this case because they were made by a man?); and *Dolgopol v. Dolgopol* (1995), 10 R.F.L. (4th) 368, 1995 CarswellSask 9 (Sask. Q.B.).

99 *Skrak v. Skrak* (1993), [1993] O.J. No. 2642, 1993 CarswellOnt 1751 (Ont. Gen. Div.) per O'Connor J.

100 *Hill v. Hill* (1987), 10 R.F.L. (3d) 225, 1987 CarswellOnt 238 (Ont. Dist. Ct.).

101 See e.g. *Pifer v. Pifer* (1986), 3 R.F.L. (3d) 167, 1986 CarswellOnt 289 (Ont. Dist. Ct.) (per Salhany J.), where the mother had independent evidence from the babysitter to corroborate her allegations of spousal abuse and its effect on the children and obtained an interim order for exclusive possession.

By way of contrast in *Charry v. Charry* (1998), [1998] O.J. No. 3262, 1998 CarswellOnt 3295 (Ont. Gen. Div) at para. 17 Kozak J. refused an interim exclusive possession order where the "wife's fears of physical harm [...] have not been substantiated."

arrest him. In these cases, the victim will only be safe if more secure accommodation is found, usually in a shelter for abused women.

8. PROVING ABUSE IN CHILD-RELATED PROCEEDINGS

In all litigation there are problems of proof associated with witnesses having selective memories, interpreting events to cast themselves, their friends or relatives in the most favourable light, or deliberately falsifying testimony. Problems of proof are a particular problem in spousal abuse cases, as the abusive conduct usually occurs in private and the perpetrator will often have a psychological tendency to deny or minimize his conduct, as well as a tactical motivation for dishonesty. Further, in many cases, at least at some points in time, the victim of spousal abuse may also minimize, deny or retract her allegations of abuse.

Judges in family law proceedings are most likely to face these difficult credibility assessment issues. Cases with strong evidence of serious spousal abuse are likely to be the subject of criminal proceedings, while cases with very weak evidence or without serious abuse are likely to be settled. It is the high conflict cases with conflicting evidence that are most likely to be litigated.

Although there is some overlap in the issues that arise in litigation between separated spouses and child protection cases, different issues arise in terms of proof. In family cases, at least by the time of trial, both spouses will be witnesses willing to testify about the allegations, though often with quite different versions of the events. In child protection cases, the typical trial dynamic is very different, with both spouses typically denying or minimizing the allegations of abuse put forward by the agency.

(a) Family Cases (Separated Spouses)

In cases between separated spouses, the affidavits and testimony of the victim lay an essential foundation for proving abuse. The victim should be carefully prepared and encouraged to be candid and detailed, and to not spare the feelings of the perpetrator or succumb to threats. She should also be cautioned by counsel not to embellish as this may undermine her credibility.

When there are conflicting claims or denials of abuse, as is often the case, it is useful for counsel to try to obtain corroborative evidence. It can be difficult to obtain corroborative evidence since abuse usually

occurs in private and, at the time that it occurs, the victim may be trying to hide this conduct from friends and relatives. Lawyers representing abuse victims should aggressively seek evidence to support the allegations of abuse, though in some cases counsel may have to rely exclusively on the evidence of the victim. Counsel seeking to prove abuse may submit such evidence as letters admitting abuse or photographs that depict it. In some cases there will be evidence from relatives, neighbors or professionals such as doctors,[102] police or social service workers who can testify that they observed the abusive conduct or saw injuries or other evidence of abuse. The police should be contacted for tapes of 911 calls or police reports of visits to the home.

One of the difficulties in proving abuse is that at the time it occurs victims often hide or deny their abuse. The 2004 Statistics Canada study of crime victims reported that only 37% of the women who said that that they had been assaulted by a male intimate partner called the police, but most told a friend or relative; only about one quarter told a doctor or nurse, and about a fifth told no one.[103] In some cases, the abusive partner may argue that failure to report the alleged violent assault to the police undermines the victim's credibility, but non-reporting during cohabitation is common in spousal abuse situations due to feelings of fear of the abuser, misgivings about involving the police and concerns about the punishment of the abuser.[104]

Family lawyers often encourage clients to record post-separation abusive or threatening phone calls and judges may place considerable weight on graphic recordings of unprovoked abuse or threats. [105] While

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[102] Although spousal abuse is under-diagnosed, physicians are increasingly receiving education and training about the need to suspect spousal abuse and ask questions, as well as providing treatment to victims and abusers; e.g. Ferris, McMain-Klein, & Silver "Documenting wife abuse: a guide for physicians" (1997) 156 Canadian Medical Association Journal 1015.

[103] Statistics Canada, *Measuring Violence Against Women, 2006;* see also Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2002* (Ottawa: Centre for Justice Statistics, 2002) for a report on a similar 1999 study.

[104] See e.g. *R. v. Brame* (2003), [2003] Y.J. 119, 2003 CarswellYukon 115 (Y.T. Terr Ct.), affirmed (2004), 2004 CarswellYukon 92 (Y.T. C.A.) where the complainant's credibility was attacked by the accused because she did not report several serious assaults until after separation, though Lilles C.J. Terr. Ct. rejected the argument of fabrication and convicted the accused, accepting that the non-reporting was consistent with domestic violence.

[105] See e.g. *Reddick v. Reddick* (1997), [1997] O.J. No. 2497, 1997 CarswellOnt 3477 (Ont. Gen. Div.); and *S. (J.A.) v. W. (E.E.)* (2002), [2002] B.C.J. No. 2069, 2002 CarswellBC 2137 (B.C. Prov. Ct.)

it is not illegal for one party to tape a call without the consent of the other party, if the call is not truly threatening, a judge in a family law case is likely to be suspicious of any "admissions" or other statements obtained by a party surreptitiously recording calls. There is a real concern that the recording party is "playing to the tape" and family court judges who admit such tapes tend to discount them.[106]

Sometimes children can testify about spousal abuse, though it may be distressing for them to be embroiled in litigation and they should only be called as witnesses or asked to supply affidavits if this appears necessary to obtain protection for themselves, a parent or a sibling.[107] In family law cases, judges are usually quite flexible about the admission of children's hearsay statements of spousal abuse and, as such, it is generally preferable for it to be part of the testimony or report of a court-appointed social worker.[108] While such statements are technically hearsay, in family proceedings judges generally consider it necessary to admit such statements to avoid emotionally traumatizing the child by having them testify, as long as there sufficient assurance of "reliability." Statements made by a child to a social worker or teacher are generally considered to be "reliable."[109] Often, however, children are very frightened in abusive families, and they may be unwilling to disclose spousal abuse to social workers or other professionals, especially in the context of ongoing litigation.[110]

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106 See e.g. *Visneskie v. Visneskie* (2003), 2003 CarswellOnt 1336 (Ont. S.C.J.), per Glithero J, additional reasons at (2003), 2003 CarswellOnt 1335, [2003] O.J. No. 1554 (Ont. S.C.J.), affirmed (2004), [2004] O.J. No. 3451, 2004 CarswellOnt 3381 (Ont. C.A.), leave to appeal refused (2004), 2004 CarswellOnt 5275, 2004 CarswellOnt 5276 (S.C.C.).

107 See e.g. *O'Brien v. O'Brien* (2001), [2001] Y.J. 127, 2001 CarswellYukon 134 (Y.T. S.C.) where affidavit of 14 year old daughter supported mother's allegations of spousal abuse.

108 See e.g. *Aguilera v. Reid* (2006), 2006 CarswellOnt 1227, (sub nom. *R.A. v. J.R.*) [2006] O.J. No. 810 (Ont. S.C.J.), per Rogers J.

109 On the admissibility of children's hearsay statements of abuse, see e.g. *Catholic Children's Aid Society of Toronto v. L. (J.)* (2003), [2003] O.J. No. 838, 2003 CarswellOnt 699 (Ont. C.J.), per Jones J.; *S. (K.) v. S. (D.)* (2003), [2003] N.J. No. 203, 2003 CarswellNfld 200 (N.L. U.F.C.); and *M. (J.J.), Re* (1995), 11 R.F.L. (4th) 166, 1995 CarswellAlta 41 (Alta. C.A.); *G. (J.A.) v. R. (R.J.)* (1998), [1998] O.J. No. 1415, 1998 CarswellOnt 1487 (Ont. Gen. Div.), per Robertson J.; and Nicholas Bala, Victoria Talwar & Joanna Harris, "The Voice of Children in Canadian Family Law Cases" (2005) 24 *Can. Fam. L. Q.* 221 at 221- 279.

110 See e.g. *Allen v. Allen* (1995), [1995] S.J. No. 410, 1995 CarswellSask 880

In some cases, an abused mother will know of other women who have been involved in previous or subsequent relationships with their abusive partner; these women may also have been victimized and may be able to testify, helping to establish the pattern of abuse.[111] If they were involved in a relationship with the perpetrator after his separation from the mother, they may be able to testify about the father's abuse towards children during access visits. Courts in civil cases are prepared to admit such "character" or "similar fact" evidence as relevant to a custody or access dispute.[112]

(b) Family Cases: False or Exaggerated Allegations

Although minimization of domestic violence by abusers (and often by victims, while they are living with their abusive partners) is more common than exaggeration, judges and lawyers need to be aware of the possibility of false or exaggerated claims of spousal abuse. Exaggeration and distortion are common in high conflict family law cases, as noted by Justice P. Smith in *Colangelo v. Colangelo*, an Alberta decision dealing with domestic abuse allegations.[113]

> it is a rare matrimonial case where the points of view of the parties coincide. I expect some exaggeration and colouring of the evidence on both sides.

The judge in that case found each party "coloured" their evidence, but concluded that the woman's detailed allegations of abuse were more convincing that the man's inconsistent denials.

Ontario Superior Court Justice Mary Lou Benotto was even more pointed in comments which she made in a paper presented in 1995:[114]

(Sask. Q.B.), additional reasons at (1996), 1996 CarswellSask 36, [1996] S.J. No. 26 (Sask. Q.B.); and *L. (C.R.) v. L. (R.E.)* (1998), [1998] S.J. No. 20, 1998 CarswellSask 42 (Sask. Q.B.).

111 F. Lehrman, "Factoring Domestic Violence into Custody Cases," (1996) *Trial*, 32 at 38.

112 See e.g. *M. (A.J.) v. M. (T.D.)*, [1996] O.J. No. 1342 (Gen Div.); *W. (K.H.) v. W. (S.M.)* (1995), 1995 CarswellNS 336, (sub nom. *K.H.W. v. S.M.W.*) [1995] N.S.J. No. 471 (N.S. Fam. Ct.); *Loughran v. Loughran* (2000), [2000] N.S.J. No. 41, 2000 CarswellNS 41 (N.S. S.C.), per Goodfellow J.; and *Nova Scotia (Minister of Community Services v. W.R.*, [2005] N.S.J. No. 372 (N.S. C.A.).

113 (1997), [1997] A.J. No. 432, 1997 CarswellAlta 350 (Alta. Q.B.).

114 Justice Mary Lou Benotto, "Ethics in Family Law: Is Family Law Advocacy A Contradiction in Terms?" presented at the Advocates Society Conference in Nassau, Bahamas, 2 December 1995, as quoted in G. Coleman, "Gender

> Domestic abuse is abhorrent. I have never found a judicial officer who treated physical cruelty with anything but the seriousness it deserves. *However, the term 'abuse' has been diluted beyond all proportion. There is scarcely a separated spouse who does not believe that he or she was in abusive relationship.* Abuse is a powerful term. But it is routinely used to describe shouting, badgering, voice raising, walking away when angry. Think for a minute about your private relationship. So as not to raise a bald allegation, the particulars of the given marital discord become very detailed.

This judicial comment reflects the frustration that judges may feel in dealing with the common problem of conflicting allegations and demonstrates how important it is that counsel bring forward clear evidence that abuse has occurred, if at all possible with support for the victim's evidence from other sources.

The fact that access to or priority for some services, such as legal aid or shelters, is given to women who identify themselves as battered or abused may also result in some exaggerated or fabricated claims.

In the Ontario case of *Brigante v. Brigante,* the parties separated after six years of marriage. The mother received interim custody of their son, then three years of age, and the father obtained extensive access. The mother then met another man and became pregnant by him; she planned to marry the man and move with him from Hamilton to Ottawa. The litigation arose about a year after the initial separation, as the mother wanted to restrict the father's access and move to Ottawa with the child. After the litigation commenced, the mother began to allege that the father was physically abusing the child during access visits, and had been physically and verbally abusive of her during their cohabitation. The mother reported her concerns to the child protection authorities, who conducted an investigation of the father's alleged child abuse without contacting him. Eventually a court ordered assessment was carried out; the assessor observed that the father and son interacted in a "normal" fashion, while the boy was "abnormally aggressive" with the mother; however, the assessor relied on the child protection agency's conclusion that the father was abusive and recommended restricted access. Beckett U.F.C.J. ultimately concluded that the father had not abused his son and awarded generous access, while preventing the mother's relocation with the child. In rejecting the mother's claims of spousal abuse, the judge

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Bias: Where Are We", National Family Law Program, St. John's Newfoundland, July 2000, Vol. 2, p. 34-18. Emphasis added.

noted that she had made no complaints to a doctor, the police or a family member during the period of cohabitation. The judge commented:[115]

> The allegations of severe abuse appear to have arisen during the course of this litigation and since she decided to move to Ottawa with her new partner. The only reason she gave for not reporting the abuse to somebody was that she thought that it had been "her fault." This Court is well aware that it is not unusual for the "battered wife" not to report to the authorities, but in the circumstances here, I have a great deal of difficulty in accepting her evidence with respect to the alleged violence.....I have come to the conclusion that the applicant [mother] was not severely and frequently assaulted ... as she alleges, although she may have suffered some infrequent and less serious assaultive behaviour.

While the decision in *Brigante* has been criticized by some commentators,[116] the judge was aware of the fact that abused women often do not report their victimization to the police or other authorities and that the absence of corroboration should not be fatal to such an allegation. Nevertheless, he concluded that these particular allegations were unfounded or substantially exaggerated and were advanced for strategic reasons — to permit her to move with her child

In the 1995 Ontario case of *K.A.S. v. D.W.R.*[117] the parents separated when the child was less than a year old; the father was seeking access more than a year later, while the mother sought to deny access. There was evidence that the father had been controlling and on occasion abusive of the mother; he pled guilty to criminal harassment of her as a consequence of post-separation phone calls, and was convicted of offences relating to assaults of previous partners. However, Katarynych

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115 (1991), 32 R.F.L. (3d) 299, 1991 CarswellOnt 265 (Ont. U.F.C.).

116 *Brigante* was criticized by Schnall J. as a decision that "ignore[s] the reality of the abusive relationship;" Justice Eleanor Schnall, "Custody and Access and the Impact of Domestic Violence" (2000) 18 Can. Fam. L. Q. 99 at 123.

For a case where a woman admitted to making false allegations in an affidavit that her former husband had threatened to kill her and her children, see *Steinebach v. Strobel* (2002), 2002 BCSC 440, 2002 CarswellBC 693 (B.C. S.C.), additional reasons at (2003), 2003 CarswellBC 2179 (B.C. S.C.), affirmed (2004), 2004 CarswellBC 2744 (B.C. C.A.).

117 [1995] O.J. 1711 (Prov. Div.). For a similar cases, see *Sekhri v. Mahli* (1993), 112 Sask. R. 253, 1993 CarswellSask 368 (Sask. Q.B.); and *M.B. v. Y.M.*, [1996] Q.J. 1276 (Que. S.C.) where the mother made allegations of spousal abuse in affidavits filed before trial but retracted the allegations when testifying. See also *Blackwell v. Burden* (1996), [1996] O.J. No. 472, 1996 CarswellOnt 362 (Ont. Gen. Div.).

Prov. J. concluded that much of the mother's testimony had exaggerated incidents of abuse. She observed:

> according to her evidence, she was regularly assaulted by him in the course of their altercations....Over the course of my deliberations, I remained wary, but not entirely disbelieving, of Ms. S's assertions that she was a typical battered woman. Conclusions drawn from stereotypes are...highly suspect and I felt that at times she was constructing her testimony to fit carefully the profile advanced by the literature. She was embellishing parts of her evidence on the issue of his assaultive behaviours towards her.... Her professed "fear" of contacting the police appeared contrived and significantly inconsistent with the evidence showing that she was quite prepared to contact the police when it suited her purposes....Overall, it was not fear ... that I detected in her testimony. It was disdain, tinged with a few vindictive touches as it became important to excise him from her life.

The judge also considered the expert evidence of a "feminist marriage and family therapist" about the effect of spousal violence, but gave it little weight. There was also substantial evidence from other individuals that the father had positive involvement with other children, including a child from a previous relationship. The judge ordered supervised access and counselling for both parents, with an indication that unsupervised access should begin when the father demonstrated that he was ready.

Some lawyers may advise some clients who claim to have been victims of spousal abuse not to raise the issue in their court documents or in court, for fear that if they are not believed, their claims for custody or other matrimonial relief will be denied.[118] While a judge's assessment of the honesty and reliability of each parent is undoubtedly related to the outcome of a case, there is little evidence that judges "punish" parents merely for making claims about abuse that the court does not accept, on the balance of probabilities, as proven true. Judges recognize that it is common for separated spouses to have different perceptions and recollections of reality, and that it is not uncommon for witnesses to emphasize the aspects of their testimony that support their present position. Most judges are also aware that it is often difficult for a victim of abuse to provide definitive proof of events that may have occurred in private.

However, in some cases the judge will conclude that a party making an allegation of abuse is fabricating (or significantly exaggerating), and that this is directly affecting the child. In such cases, the court's decision

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[118] Linda Neilson, "Spousal Abuse, Children and the Legal System" (March 2001, funded by Canadian Bar Association, Law for the Futures Foundation). The full text is available online: University of New Brunswick <http://www.unb.ca/arts/CFVR/spousal_abuse.pdf

may be affected by the judge's conclusion that an unfounded allegation of abuse was made. In some cases a custodial parent, usually the mother, will make unfounded allegations *and* alienate the children from the other parent by inducing unfounded fears in the child's mind. This has been referred to by some mental health professionals and lawyers as "parental alienation," though this is not a clinical "diagnoses" that a mental health professional can make, but rather, a conclusion about a particular set of facts.[119]

In another Ontario case, *S. (D.A.) v. S. (S.T.)*,[120] the mother alleged that her former husband had physically abused her during the marriage and sexually abused their young children during access visits. The children, who were 5 and 10 years old at the time of the trial, made some vague statements to investigators that appeared to support some of these allegations, but ultimately several independent mental health professionals and a child protection investigation concluded that the incidents did not occur, and that the mother had "alienated" the children from their father. The experts, including an access supervisor, concluded that the allegations were unfounded and that the woman's "anger and point of view" were "transmitted" to her children, including their stated reluctance to visit their father. The court concluded that there was a need to "reverse the process of alienation" while keeping the children in the care of the mother who was the primary caregiver and ordered structured access, as well as counselling for the parents and children; the father

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[119] For reviews of social science literature on issues related to access, high-conflict separations and alienation, see Nicholas Bala & Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" (2004) 23 Can. Fam. L. Q. 1 at 1-61; Department of Justice, *Managing Contact Difficulties: A Child-Centered Approach* by Rhonda Freeman & Gary Freeman, (Ottawa: Department of Justice Canada, 2003); Department of Justice, *Child Access in Canada: Legal Approaches and Program Supports* by Pauline O'Connor, (Ottawa: Department of Justice, 2002); and Department of Justice, *High-conflict Separation and Divorce: Options for Consideration* by Glenn A. Gilmour, (Ottawa: Department of Justice Canada, 2004), available online: Department of justice <http://canada.justice.gc.ca/en/ps/pad/reports/index.html>

[120] (1997), [1997] O.J. No. 4061, 1997 CarswellOnt 3973 (Ont. Gen. Div.), per Whalen J.; see also *Morrison v. Senko* (1997), [1997] S.J. No. 113, 1997 CarswellSask 129 (Sask. Q.B.); *J.M.W. v. K.L.W.*, [2004] N.S.J. No. 167 (Fam. Ct.); and *A. (D.H.) v. M. (K.E.)* (2004), [2004] Y.J. No. 21, 2004 CarswellYukon 10 (Y.T. S.C.), per Veale J. (concern about alienating conduct by "embittered" mother who had been victim of one assault).

was awarded joint legal custody to ensure his right to access to information about the children.

It should be emphasized that the most common "defence" of genuinely abusive men is to dismiss the allegations of abuse made by their partners (or former partners) as the product of "emotional instability" or deliberate fabrication. Abusive men now also regularly assert that their children's expressed fears about contact are due to their mothers' "alienating" attitudes. From a societal perspective, the problem of male abusers denying or minimizing their abusive acts is a more pervasive and serious problem than the problem of women exaggerating or falsifying claims of abuse, or "alienating" children from their fathers.[121] However, justice system professionals must approach each case on its own merits, and must be prepared to deal with both exaggeration of claims of abuse and false denials, distinguishing the two situations.

Expert evidence may have an important role in assisting a judge in making the distinction, but it should be recognized that some litigants may put forward "experts" who lack the education, experience or professional objectivity to assist the court in making a sound determination, or they may become involved in the case so long after the time of the incidents in question that their evidence is of little help to the court.[122]

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121 See discussion above about research on reliability of women's reports of abuse and J. Johnston, "A Child-centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Interventions" (2006) 12 Journal of Family Studies 15: See also e.g. *A. (J.I.) v. K. (A.I.)* (1997), 33 R.F.L. (4th) 438, 1997 CarswellOnt 3700 (Ont. Gen. Div.) where the mother and child both reported abuse by the father following separation. The father viewed "the allegations as an attempt by [the mother] "to get him in trouble". Relying on expert testimony Benotto J. rejected his claims and denied him access.

122 See *A. (J.) v. A. (D.)* (2002), [2002] O.J. No. 2315, 2002 CarswellOnt 1911 (Ont. S.C.J.) where in the context of a custody dispute Nelson J. rejected a woman's claims that she had been a victim of physical and sexual abuse, noting that she had failed to disclose the abuse when it occurred to the police (who attended the couple's premises on several occasions) or two psychiatrists. The court also rejected the expert evidence of a psychologist, Dr. Jaffe, who assessed the mother over a year after the separation and concluded that she was a victim of spousal abuse and that the father should not have custody of the children. The court noted that the expert's conclusions were based on "self-reporting" by the mother.

(c) Issues of Proof in Child Protection Cases (Recanting)

The issues in child protection cases that are based on concerns about spousal abuse and its effects on children are typically very different from those which arise in custody and access disputes between parents. In child protection cases it is common for both parents to deny or minimize any history of domestic violence and not uncommon for a victim who has reported abuse to the police or welfare workers to recant, denying the validity of her prior allegations.

Any statements made by a parent about abuse to a child protection worker or any other person are admissible as "admissions of a party" in child protection proceedings, even without the elaborate warnings that are required in a criminal proceeding (for example for a *K.G.B.* statement for the statement of a recanting victim in a criminal case). Evidence from neighbors and prior partners of the parents about domestic violence will be admissible in these proceedings.[123]

The attitude and understanding of the parents towards spousal violence will also be very significant in child protection proceedings. If, for example, a husband has been directed by a judge at a prior hearing to attend a program for abusive husbands, but he fails to follow through with this direction, this may weaken the case of the parents.[124] The fact that children have reported to child care workers that they have witnessed "numerous incidents" of violence between their parents may be significant.[125] It is often very significant if a victim of spousal abuse has failed to follow through on a commitment to the agency to cease their relationship with an abuser and is reluctant to cooperate with the agency workers to take steps to get help and ensure that her children are safe.[126]

9. INTERIM FAMILY LAW ORDERS

In family law cases involving allegations of spousal abuse, especially if there is a threat of the recurrence of violence, there is often a

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123 See e.g. *Nova Scotia (Minister of Community Services) v. W. R.*, [2005] N.S.J. 372 (N.S. C.A.).

124 See e.g. *K. (R.) v. Family & Children's Services of Cumberland (County)* (2006), [2006] N.S.J. No. 50, 2006 CarswellNS 50 (N.S. C.A.).

125 See e.g. *Children's Aid Society of Halifax v. W. (T.)* (2006), [2006] N.S.J. No. 44, 2006 CarswellNS 47 (N.S. C.A.).

126 See e.g. *Children's Aid Society of Thunder Bay (District) v. K. (K.).* (2006), [2006] O.J. No. 1786, 2006 CarswellOnt 2771 (Ont. C.J.); and *C.C.A.S. of Toronto v. S. Ro.*, [2006] O.J. 2283 (Ont. Ct. J.), per R.J. Spence J.

need for quick action to protect the victim of abuse. It is especially important that a victim is not driven out of the home without her children, setting up a possible *de facto*-continuity argument for custody of the children by the abuser.

Judges dealing with interim family applications for relief where there are domestic violence allegations face a real dilemma, trying to make an interim decision, often based only on affidavits that contain conflicting claims and counter allegations.[127] Counsel can greatly assist the court by submitting affidavits from such independent individuals as doctors, police officers, or even a nanny or neighbors to support their clients' claims. While it is preferable for this material to be presented to the court in the form of an affidavit, it is submitted that judges have some flexibility in receiving this type of material in the form of a letter or as oral evidence, especially if the matter is urgent and the allegations appear to pose a risk of serious harm to a spouse or child.

A judge at an interim application may be forced to make a decision that could affect the safety and well being of parents and children, based on limited and conflicting evidence. Judges are aware of the importance of interim orders, both because they can provide immediate protection but also because they can have a significant impact on the outcome of a later trial. A parent with interim custody of children may have a stronger claim for custody at a later trial, based on the court's preference not to disrupt the child's stability. Indeed, frequently the interim order establishes such a strong "status quo" that a custody case never proceeds to trial.

In the Ontario case of *Vollmer v. Vollmer* each spouse alleged repeated physical assaults by the other, and each had called the police about the other once.[128] The judge acknowledged the judicial reluctance to make an *interim* exclusive possession order in the absence of clear evidence of abuse, where that order has the effect of excluding one spouse from the home, especially if this will give the other spouse an "inappropriate advantage in terms of a claim for custody, access" or a permanent order for exclusive possession. However, in this case it was clear that the mother had been much more involved in the care of the

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127 Interim family law applications in many places in Canada are generally resolved on the basis of affidavit and documentary evidence; while there may be cross-examination of the affidavits before an examiner, the judge will generally not have an opportunity to hear the parties testify. In some places, however, judges will hear the parties testify at interim hearings.

128 (1998), [1998] O.J. No. 1771, 1998 CarswellOnt 1819 (Ont. Gen. Div.).

children and would retain custody and, further, that the couple planned to sell the matrimonial home. Accordingly, there was no prejudice to the long term interests of the husband from making an interim order. Justice Aiken recognized that the children were being negatively effected by the environment of "anger, stress and possible violence" and gave the mother interim exclusive possession.

There are, however, cases in which a judge is not satisfied that there is a genuine risk to the children and may award a father interim custody, despite serious concerns about spousal abuse. In *J.M.W. v. K.L.W.*, four days after the husband allegedly assaulted his wife, she left the home taking the two children of the marriage (first to a shelter and then to live with relatives), without informing the father. The judge conducted an interim hearing over three days, including hearing testimony from the parents. In regard to the abuse allegations, Smith J. wrote:[129]

> There are few allegations more serious in a child custody case than abuse....I have carefully considered the evidence presented concerning the allegations of abuse. The evidence does not satisfy me, on the balance of probabilities, that [the husband] has been abusive to either [the wife] or children. I conclude that the evidence of abuse is exaggerated ... or incomplete ("I don't remember").
>
> In this case [the mother's] memory concerning a number of events that she now classifies as abusive is poor. Her conduct after the abuse is alleged to have occurred (including her willingness to leave the children in the care of [the father] despite the suggestion that he is an abuser) calls her allegations of abuse into question.
>
> Whether someone has been verbally or emotionally abusive towards another is open to subjective interpretation....Controlling or jealous behaviour may be considered to be emotionally abusive by some and inappropriate behaviour by others.

The court's decision to award the father interim custody was based on a number of factors; including the mother's unilateral removal of the children from the home without informing the father where she was taking them[130] and the fact that in the six months prior to her departure she was absent from the home ("socializing"), for several overnight stays, leaving the children with their father. The judge also considered that the father, who was a teacher, appeared to be very involved in the

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129 [2004] N.S.J. 167 (N.S. S.C.), at para 24 - 28.

130 Justice Smith acknowledged (at para. 56): "While there are occasions when a parent must take such action for the safety of ...herself and/or children, I am not satisfied that such circumstances exist on the facts of this case."

care of the children and was more willing than the mother to facilitate access with the other parent.

It is submitted that if there is evidence that there is a real risk of further violence, the court should, at this interim stage, err on the side of physical safety. Children should not be left in the care of a parent who may harm them. Further, if there are concerns that the parents may engage in verbal (or physical) altercations when care of the child is being exchanged, then supervision of the exchange of the child by a neutral party should be ordered, at least on an interim basis. In some cases a period of supervised exchange may be needed to allow tensions to diffuse, though in other cases supervision may continue for a longer period.[131]

If access to a child is being curtailed because of allegations of abuse that are seriously contested, adjournments should be relatively short and there should be an expedited trial date. And even on an interim application, judges must scrutinize the evidence of allegations.

If there are allegations of significant abuse, it may be appropriate for the judge at an interim application to make an order for representation or assessment of the child, so that a clear picture of their needs and interests can be brought before the court.[132]

In a situation where there is potential for *serious harm* to a child by an abusive spouse, the other parent should take immediate steps to protect a child, while making a timely application to a court for relief and protection. As stated by L'Heureux-Dubé J. in the Supreme Court of Canada in *Young v. Young*:[133] "a custodial parent aware of sexual or other abuse by the noncustodial parent would be remiss in his or her duty to the child not to cut off access by the abuser immediately, with or without a court order." The same principle should apply if the parents are residing together and one parent believes that it is necessary to leave in order to protect the children. This view is reinforced by *Criminal Code* s.285, which creates a defence to a prosecution for parental child

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131 In some communities, supervision of the exchange of access is provided by community agencies. Exchange of supervision is more fully discussed below. See *D. (R.) v. D. (U.S.)* (2001), 22 R.F.L. (5th) 269, 2001 CarswellYukon 130 (Y.T. S.C.), at 273-74 [R.F.L.], where a violent husband's right to unsupervised access was suspended at an interim hearing.

132 *B. (F.) v. B. (L.)* (2000), [2000] O.J. No. 3833, 2000 CarswellOnt 3689 (Ont. S.C.J.), per Rogin J.

133 (1993), 49 R.F.L. (3d) 117, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.), at 184 [R.F.L.].

abduction if action is taken to protect a child from danger of "imminent harm."

10. SPOUSE ABUSE & CUSTODY

(a) First Cases Recognizing Spousal Abuse and the Role of Judicial Notice

Until the late 1980s the Canadian justice system, including its judges, gave relatively little attention to domestic violence in a range of legal contexts, including custody and access proceedings.[134] Since then, however, Canadian judges have recognized that spousal violence should be a significant factor in making decisions about children. Although there is variation in the extent to which judges consider spousal abuse in making decisions about children, in recent years, *if* the judge is satisfied that a man has assaulted his wife, the man is unlikely to obtain custody of the children.[135] In many of the "early" reported decisions — only from the late 1980s — expert testimony was essential to establish the effects of spousal abuse on children. While expert evidence can still be very valuable for these types of cases, it is no longer essential in every case.

One of the first reported Canadian cases dealing with the effects of spousal violence on children, *Young v. Young,* was decided in 1989. The parties separated after about 15 years of marriage. While the children, aged 11 and 13, expressed a wish to live with their father, Bolan L.J.S.C.

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134 See e.g. *Peterson v. Peterson* (1988), 85 N.S.R. (2d) 107, 1988 CarswellNS 180 (N.S. Co. Ct.) and more generally Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence - Achieving Equality* (Ottawa: Ministry of Supply and Services Canada, 1993) at 229-231; and L. Neilson, "Spousal Abuse, Children and the Courts: The Case for Social Rather than Legal Change" (1997) 12 C.J.L.S. 101.

135 M. Shaffer, "The Impact of Wife Abuse on Custody and Access Decisions" (2004) 22 Can. Fam. L.Q. 85 studied all reported Canadian family law cases involving children from 1997-2000 that had spousal abuse issues (n=45). Judges very rarely granted custody to a man who abused his partner *if* the judge accepted the validity of the woman's claims of abuse, though routinely granting abusive men access to their children on an unsupervised basis. Of the 42 cases in which women raised allegations of spousal abuse, the allegations were considered by the judge to be exaggerated or unfounded in 11 cases. Of the 31 cases in which the judge accepted the allegations or made no finding, the mother received custody in 28, the father in 1, and joint custody was ordered in 2 cases.

was concerned that the father was trying to manipulate the children by lavishing them with presents and treats during visits. There was significant emotional abuse of the wife by the husband throughout the marriage, several incidents of sexual abuse in the last two years of cohabitation and two physical assaults after the separation. There was expert testimony from three mental health professionals about the effect of the abuse on the mother and children. The judge remarked that the "relevancy of this finding of abuse is that it goes to [the father's] ability to parent the children on a full time basis." She accepted the expert testimony based on the literature on the effect of spousal abuse on children, namely that:[136]

1. An abuser who goes without therapy will continue to abuse in another relationship;

2. Children who witness abuse can become abused even though the abuse is not intentionally directed at them;

3. Abused male children often become abusers and abused female children may become compliant to abusers.

The judge awarded custody to the mother with liberal, but structured access to the father.

After *Young* there were many reported Canadian cases in which mothers who were victims of emotional and physical abuse perpetrated by their husbands called expert witnesses to testify about the negative effects of this abuse on the children in order to explain why the father should not get custody.[137] More recently there have been a few cases in which expert evidence has been called by a father to explain the significance of abuse of the custodial mother by her new partner and secure a variation in custody.[138] These experts can explain how the abuse has

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136 (1989), 19 R.F.L (3d) 227, 1989 CarswellOnt 225 (Ont. H.C.); additional reasons at (1989), 1989 CarswellOnt 2650, 19 R.F.L. (3d) 227 at 238 (Ont. H.C.) [*Young*]. See also *Renaud v. Renaud* (1989), 22 R.F.L. (3d) 366, 1989 CarswellOnt 292 (Ont. Dist Ct.) decided by the same judge as *Young*, Bolan Dist. Ct. J., and having a similar outcome. She was one of Canada's first women judges.

137 See e.g. *Thind v. Thind* (1994), [1994] B.C.J. No. 1131, 1994 CarswellBC 1429 (B.C. S.C.), per Meredith J.; and *Blackburn v. Blackburn* (1995), [1995] O.J. No. 2321, 1995 CarswellOnt 2047 (Ont. Prov. Div.), per Dunbar J.

138 *W. (D.J.A.) v. T. (G.D.)* (2000), [2000] S.J. No. 594, 2000 CarswellSask 578 (Sask. Q.B.), per Kraus J.; custody varied from mother to joint custody with primary residence with the father as mother's "rationalization" of the abusive

affected the victim, for example causing loss of self-esteem and depression, and how counselling can (or has) helped the victim to recover and be an effective parent. Expert witnesses can also help assess the likelihood of change in an abuser's behavior, and can describe the effects of direct and indirect abuse on children.

In some more recent cases, abused women have been able to obtain custody without calling expert evidence, sometimes even in the face of an assessor's report favorable to the father. While it is certainly preferable to have an appropriate assessment and expert evidence, it is important for victims of violence to be able to obtain custody and restrict access to children by abusive spouses without having to rely on experts, as there is a shortage of qualified experts and victims often lack the resources to retain them.

At least some judges are now prepared to take "judicial notice" of the harmful effects of spousal abuse on children, without requiring a victim of abuse to call expert evidence. For example, in the 1995 British Columbia case of *Stewart v. Mix*[139] the parties cohabited for seven years, during which the man attempted to constantly control the woman, verbally abused her daily and displayed a temper that could quickly be inflamed to violence, including assaulting his partner. The last assault before the trial occurred in the presence of their then two year old son at the start of an access visit and was the only occasion on which charges were laid. An assessor recommended that the father should have custody, in large part because the mother had moved and formed a new relationship and had a young baby with her new partner. The assessor felt that the older boy had bonded to the father's extended family. The judge rejected the assessor's recommendation, as the judge observed:

> [the] father has a history of a violent temper, was consistently jealous of his common law wife, used violence when aroused....It is difficult to see how he can be considered a good role model.

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behaviour of her new partner "gives no comfort that she will be able to extricate the children from risk of harm."

139 (1995), [1995] B.C.J. No. 2414, 1995 CarswellBC 2715 (B.C. S.C.). For a similar decision, see *Pare v. Pare* (1993), [1993] S.J. No. 511, 1993 CarswellSask 648 (Sask. Q.B.) where there was some physical and even more mental abuse by the husband during the course of eight years of marriage; Lawton J. awarded the mother sole custody of the three children with reasonable access to the father, and a judicial admonition that the father must not "upset [...] the routine into which their mother [...] settles the children."

The judge awarded custody to the mother, with specified access to the father, including a provision for supervision of the exchange of the child.

In some cases judges have recognized that it may be inappropriate to award custody to a parent with a history of spousal abuse and control on account of concern that the parent is likely to undermine access and a meaningful relationship with the other parent (contrary to the *Divorce Act* s. 16(10), which is discussed below.) In the 1995 Ontario case of *Blackburn v. Blackburn*,[140] the parents separated after 9 years of marriage. At the custody trial, the mother testified about incidents in which the father threatened her and occasions on which he assaulted her or forced her to have sex; she clearly felt "dominated by him." The father denied most of the abusive behaviour and dismissed one assault as an "accident". Without resolving all the factual disputes between the parties, Dunbar Prov. J. accepted that the father could be "aggressive" and that the mother "clearly sees herself as having no power in relation to the [father] ... both historically within the marriage and since separation." In particular, since the separation it was apparent that, although there had been no physical abuse and the father had a new partner, the father has "simply done what he wished" in regard to the child. The judge concluded that the father demonstrated "little respect for the [mother]...her ability as a caregiver and her importance in [the child's]... life" and that there was "little prospect" that the father would promote access of the child to the mother if awarded custody. Accordingly, the mother was awarded sole custody, with specified access to the father.

Some judges appeared to give spousal abuse less weight than others in dealing with custody issues. For example, in the 1995 Saskatchewan case of *Allen v. Allen*[141] the parties separated after about two years of marriage. The husband physically assaulted the wife (on at least two occasions in the presence of the children) and verbally abused her regularly; the police were called on one occasion and the husband pled guilty to an assault charge. In the custody trial, the only significant issue related to the four year old daughter of the father from a previous relationship, as it was conceded that the mother should have custody of

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140 (1995), [1995] O.J. No. 2321, 1995 CarswellOnt 2047 (Ont. Prov. Ct.).

141 (1995), [1995] S.J. No. 410, 1995 CarswellSask 880 (Sask. Q.B.), additional reasons at (1996), 1996 CarswellSask 36, [1996] S.J. No. 26 (Sask. Q.B.), per Armstrong J. For other judgments that do not appear fully sensitive to issues of domestic violence, see *Tittemore v. Tittemore* (1996), [1996] B.C.J. No. 238, 1996 CarswellBC 261 (B.C. S.C.); *Williams v. Williams*, [1996] B.C.J. No. 712 (S.C.).

the couple's one year old son. The judge recognized that the father had a "serious anger management problem," and a need to "control" and "demean" the women with whom he was in a relationship. Although the father was taking an anger management course as a condition of his criminal conviction, the judge observed that "his problem is more serious than he has as yet admitted." There was expert testimony provided by a court appointed assessor on the negative effects on children of witnessing spousal abuse. Nevertheless, Armstrong J. concluded:

> I am not satisfied that the parties separated finally because of the violence but if they did, the question is what relation might there be between the violence and the capacity to be a custodial parent. Custody is not a means of punishing a perpetrator.

The judge also opined that some men are abusive in some relationships but with a change of partner may not be abusive in subsequent relationships ("Possibly being together had something to do with Rich's behavior") and awarded custody of the child to the father.[142] Some of the judge's rhetoric and analysis is controversial, as it tends to discount the effects on a child of living with a parent with a "serious anger management problem." The comments suggesting that the father's abusive behavior "had something to do" with a particular partner was also problematic. However, the decision might be justified by the fact that the father was the biological parent and he was living with his own mother, who had a better relationship with the girl than either parent; custody of that child was awarded to the father only on condition that he continued to reside with his mother and was in effect a decision to give the grandmother custody.

(b) Canadian Legislation: Ontario, Alberta and Newfoundland

There is now a significant body of Canadian case law in which judges have held that spousal violence is a relevant factor in making

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[142] Other decisions where abusive husbands received custody include *Mbaruk v. Mbaruk* (1997), 27 R.F.L. (4th) 146, 1997 CarswellBC 362 (B.C. S.C.) and *Hague v. Storzuk* (1997), [1997] B.C.J. No. 1995, 1997 CarswellBC 1966 (B.C. Master). The decision in *Hague* may be justified on the ground that the mother was a drug addict and incapable of properly caring for their child. However Chamberlist M. made a controversial comment: "the spousal assault charge really has *no* impact ... as there is *no* nexus between the charge and the ability of the plaintiff [father] to care and nourish Isaiah [the son]." [Emphasis added].

custody and access decisions. There are also now three provinces which have legislation which explicitly recognizes the importance of spousal abuse in disputes between parents. Newfoundland's *Children's Law Act,*[143] enacted in 1988, was the first Canadian statute to recognize spousal violence as a factor in child-related disputes between parents. In 2005, Alberta's *Family Law Act*[144] introduced a similar provision, and in February 2006, amendments to Ontario's *Children's Law Reform Act* came into force to make clear that spousal violence is to be considered in making any decision about the "best interests of a child." The Ontario statute, which is similar to the others, now provides:[145]

> 24 (3) [For the purposes of determining a child's best interests and making decisions about custody or access] a person's past conduct shall be considered only,
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> (a) in accordance with subsection (4); or
>
> (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.
>
> (4) In assessing a person's ability to act as a parent, the court shall consider whether the person has *at any time* committed violence or abuse against,
>
> (a) his or her spouse;
>
> (b) a parent of the child to whom the application relates;
>
> (c) a member of the person's household; or
>
> (d) any child.
>
> (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

Although these statutory provisions reflect earlier case law, having legislation enacted to specifically recognize the significance of spousal violence in dealing with custody and access issues is valuable. The legislation not only helps to ensure that all judges will take account of this factor, but also serves an educational function, not only for judges, but for lawyers, assessors and mediators, as well as for parents, many of whom are unrepresented. [146]

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143 S.N. 1 1988 c. 61, s.31; see also Northwest Territories, *Children's Law Act,* S.N.W.T. 1997, c. 14., s. 17(3).

144 R.S.A. c. F-4.5, s.17, in force October 1, 2005.

145 R.S.O. 1990, Chap.C-12, as amended S.O. 2006, c. 1, s. 3 (1) [Emphasis added].

146 In 2002, as part of a broad proposed package of reforms, amendments were proposed for the *Divorce Act* that would have included a requirement that

(c) Making an Individualized Assessment

Whether as a result of precedent or legislation, it is now clear that judges in Canada should consider the effects of spousal violence when making decisions about custody, access or other parenting arrangements between separated spouses. Implementing this general legal principle, however, requires a sophisticated, individualized determination. Judges should consider the nature and effect of the spousal abuse on the children, as well as the threat to the safety of the primary victim of the abuse and to the children in making a determination. Spousal abuse is clearly an important factor in making decisions about children, but it is not the only factor.

(d) Children's Wishes if a Parent is an Abusive Spouse

Children's wishes can be problematic in spousal abuse situations. In some cases the abusive parent may coerce or intimidate the children to express views favorable to himself.[147] In others cases the child may view the abused parent as weak or "ineffectual" and may align themselves with the "stronger," more powerful, abusive parent. An abusive spouse can be very manipulative and the denigration of the other parent may influence a child's relationship with a victim of abuse. In some cases, a man who is an abusive spouse will have a superficially good relationship with a child. Boys may identify with their abusive father, while a daughter may be treated in a "princess-like" fashion and favoured over the mother. Perhaps the most infamous Canadian example of children expressing a desire to live with an abusive man was the *Thatcher*[148]

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courts consider spousal violence in making decisions about parenting arrangements under that Act; those amendments were not enacted: Bill C-22, 2nd Sess., 37th Parl., First reading December 10, 2002, not enacted.

147 See e.g. *Kennedy v. Sinclair* (2001), 18 R.F.L. (5th) 91, 2001 CarswellOnt 1634 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 2507, 42 R.F.L. (5th) 46 (Ont. C.A.).

148 See e.g. (1980), 16 R.F.L. (2d) 263, 1980 CarswellSask 37 (Sask. Q.B.) & *Thatcher v. Thatcher* (1980), 1980 CarswellSask 59, 20 R.F.L. (2d) 75 (Sask. Q.B.). At least initially, the court dealing with custody did not give effect to the children's expressed wishes, though eventually it did. See M. Siggins, *A Canadian Tragedy: JoAnn and Colin Thatcher: A Story of Love and Hate* (Toronto: MacMillan, 1985). The Thatcher children, now adults, continue to stand by their father, who was recently released from prison on parole; see "Children to talk about burden of a father in jail," *National Post* (25 October

tragedy, where the father was a prominent politician; as his relationship to his wife began to deteriorate he became increasingly demeaning, controlling and violent towards her. His sons and eventually his daughter indicated a strong desire to live with him and continued to express support for him even after he was convicted of the murder of their mother, which occurred after she had remarried.

Sometimes individuals who are abusive of partners present very well. In such cases the abuser is highly manipulative and able to "con" assessors, especially those who may not be familiar with patterns of abuse, or who are impressed by children's wishes and their apparently close link to the abuser. This may be challenging for counsel of an abused spouse to counteract, but it is possible to do so, in particular by introducing independent evidence of abuse as well as testimony of other mental health professionals on the effect of spousal abuse on children. Further, courts have stated that they are not bound by a child's wishes, especially in situations of spousal abuse.[149]

In cases where there has been a high conflict separation and a history of spousal violence, a custodial mother may have significant, reasonably founded fear of the father. Even if there is no present threat to the child's safety from the abusive spouse, the child may have very negative feelings towards that parent. As recognized by Sachs J. in *Roda v. Roda*:[150]

> In such cases, children can feel the need to ally with one parent at the expense of the other for two reasons - a desire to emotionally support the chosen parent and an inability to see any other way to end the intense conflict between both parents.

In *Roda,* the father's access to the child was terminated, based in large part on the child's fears and negative feelings, even though the fears reflected the mother's feelings rather than the child's own experiences.

On the other hand, a child's wishes can be an important factor favouring a parent who abused a partner but who appears to pose no risk of direct abuse to a child.[151] It is submitted that while a child's views should always be considered by a court, a child's stated desire to live

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2001); see also "Thatcher granted parole after 22 years in prison" *Globe & Mail* (1 December, 2006).

149 See e.g. *Young v. Young* (1989), 19 R.F.L. (3d) 227, 1989 CarswellOnt 225 (Ont. H.C.), additional reasons at (1989), 1989 CarswellOnt 2650, 19 R.F.L. (3d) 227 at 238 (Ont. H.C.), discussed above; and *A.J.M. v. T.D.M.*, [1996] O.J. 1342 (Gen Div.), per Killeen J.

150 (2000), [2000] O.J. No. 3786, 2000 CarswellOnt 3558 (Ont. S.C.J.).

151 See e.g. *S.P. c. J.M.*, [1994] A.Q. 1119 (Super. Ct.).

with an abusive spouse should have less weight in cases where there has been spousal abuse than in other contexts, though in some cases it may be determinative.

In *Worden v. Worden*[152] the husband had a drinking problem and a history of violence towards his wife, though there was no evidence that he had abused the children. The woman left her husband after 17 years in the abusive relationship, taking the children with her to a shelter. While the 14 year old son did not get along with his father, the 10 year daughter continued to express a desire to live with the father in the familiar home surroundings. Arguably the "familiar surroundings" and proximity of friends were critically important to the outcome in *Worden* and the decision might well have been different if the mother had initially secured exclusive possession of the family home. The judge observed that given the age of the children, they would be likely to "resist and perhaps resent situations that are thrust upon them," and ordered that the father was to have custody of the daughter on condition that he refrain from drinking in her presence and enter counselling for his alcohol and anger management problems.

(e) Mutual Spousal Abuse

As discussed above, many high conflict separations can be characterized as cases of "mutual abuse," "interactive violence," or "common couple violence," where on different occasions either party can initiate physical aggression as part of a struggle for control, with mutual blaming and anger.[153] In general, these cases seem to have a relatively good prognosis for elimination of violence after separation. Some reported Canadian cases clearly fit this scenario.

In *Derow v. Derow*[154] Archambault J. concluded that both parents had been abusive towards one another in presence of their children,

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152 (1994), 154 N.B.R. (2d) 60, 1994 CarswellNB 380 (N.B. Q.B.). For a similar case, see *Pearce v. Pearce* (1996), [1996] O.J. No. 207, 1996 CarswellOnt 217 (Ont. Gen. Div.), affirmed (1997), 1997 CarswellOnt 4740 (Ont. C.A.).

153 See e.g. *Stackhoose v. Stackhoose*, [1997] B.C.J. No. 425 (S.C.) where Boyd J. referred to the "marriage as a classic power struggle" with "pushing, shoving and insulting behaviour on both parts."

154 (1996), [1996] S.J. No. 207, 1996 CarswellSask 162 (Sask. Q.B.). See also *G.(D.) v. Z. (G.D.)*, (1997), 30 R.F.L. (4th) 458, 1997 CarswellBC 1106 (B.C. Master); and *Simpson v. Simpson*, [1996] B.C.J. 1067 (S.C.) where the judge found that "both spouses were violent towards the other during the marriage" although the man was the greater offender and made less of an effort to deal

though the husband had the more serious anger problem and a greater tendency to initiate violence. The court awarded the mother custody, but the father was to have "liberal access;" in view of conflict between the parents, at least initially access was not to be overnight and the judge indicated that the father would be "well advised to seek counselling" for his lack of anger management. It is generally not appropriate to have "liberal" or "reasonable access" in high conflict situations. It is preferable to specify the terms of access in such cases, to avoid the possibility of altercations or exploitation around the arranging of access.[155]

In *Loughran v. Loughran* Goodfellow J. concluded:[156]

> Both parents are lacking in objectivity in their assessment of the other and of the flare-ups that have taken place between them since separation. Mr. Loughran has on occasion allowed his frustration, the departure of his wife and her relationship with Mr. Davis, to get to him and it did not take very much for Mrs. Loughran to join in, so that there were a number of instances of pushing and shoving and each contributed. Both parties, and Mr. Loughan perhaps more so, must learn to control themselves as these flare ups are totally inappropriate and have an impact on the welfare of their children. How can these children learn to respect others, if they constantly see a lack of respect by their parents to each other?

The court decided that the child should continue to reside with the father, with joint legal custody shared with the mother. The decision in favor of the children remaining in the father's day-to-day care appeared to be based on the fact that he had done more parenting, especially in the period since separation.

When considering a situation that appears to be one of "mutual abuse" — that is where each spouse has physically assaulted the other — it is important for the court to assess whether one spouse is usually the aggressor, as well as assessing the effects of abuse on each party and the children. It is also important to distinguish between situations which are truly ones of interactive violence, and those in which the man is the stronger and more aggressive partner, with the woman's reactions being acts of self-defence.[157]

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with violent tendencies through counselling; the mother was granted custody, with specified access to the father.

155 Janet Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995) 9 Austl. J. Fam. L.12.

156 (2000), [2000] N.S.J. No. 41, 2000 CarswellNS 41 (N.S. S.C.).

157 See e.g. *Pavao v. Pavao* (2000), [2000] O.J. No. 1010, 2000 CarswellOnt 1002 (Ont. C.J.), per Dunn, where the court concluded that the woman may have struck her husband on occasion but "her degree of violence was less

(f) Separation-Instigated Violence

In some cases of spousal violence, the abusive conduct has not been a constant feature of the relationship, but rather is confined to one or more incidents around the time of separation, perhaps associated with the discovery of infidelity.[158] Such situations often have a better prognosis for future non-violent relations than cases where violence has been more pervasive.

In *Hallett v. Hallett*[159] the parents cohabited for 12 years in a relationship that was apparently free of abuse. During the process of separation, which lasted several months, the man assaulted the woman on three occasions, in incidents involving shoving and some hitting; one of the two children saw one of these incidents and later told an assessor that he was frightened by it. The police were called and charges were laid after the third assault and the woman and her children went to live in a battered woman's shelter. While the man questioned whether the woman should have had the advantage of a support network and long term housing for "battered women," a worker from the shelter testified on behalf of the mother at the custody trial. Schnall Prov. J. observed that the limited extent of his abuse:

> does not justify his conduct by any means, but it does reflect that physical violence ... was not the usual characteristic of the parties' 14 year relationship...these three incidents were apparently out of character for [the man].

The custody assessor did not consider the spousal abuse to be an important factor, and did not question the children about this issue to any extent. The judge concluded that the assaults were "not relevant" to issues of custody and access, though she criticized the assessor for not exploring the issue more fully. She awarded sole custody to the mother,

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than his against her, and it was likely that [the husband]... provoked her to retaliate." The court awarded custody to the mother and denied access to the father. See also *Fontaine v. Boyce* (2004), [2004] B.C.J. No. 746, 2004 CarswellBC 803 (B.C. S.C.).

158 Janet Johnston & Linda Campbell, "Parent Child Relationships in Domestic Violence Families Disputing Custody" (1993) 31(3) Fam. Ct. Rev. 282

159 [1993] O.J. No. 3382 (Prov. Ct.) per Schnall J. As noted above, Justice Eleanor Schnall has written extensively on the effects of spousal violence on children, and this judgment cannot be dismissed as an example of judicial insensitivity. See also *L. (S.J.) v. L. (R.W. G.)* (1998), [1998] B.C.J. No. 191, 1998 CarswellBC 178 (B.C. S.C.), additional reasons at (1998), 1998 CarswellBC 886 (B.C. S.C.), per Errico J.

with specified access to the father on alternate weekends and vacation periods.

In *Atkinson v. Atkinson*,[160] a 1993 Ontario appellate decision, the lower court had established a regime of access by the father that was significantly dependent on the mother's discretion. This was in large part due to the fact that there had been altercations between the parents during access exchange, including an incident when the father assaulted the mother. In reversing the lower court and ordering access on alternate weekends, Platana J. observed that there was significant evidence that the child enjoyed visits with the father. While there had been difficulties in exercising access, the judge felt that there was fault on both sides and the evidence disclosed "not a history of violence but one incident ....it is a misapprehension of the evidence to categorize one incident as a history of violence." Although the appeal court may have been correct in its assessment of the violence in this case, this was a situation in which "exchange supervision," more fully discussed below, would have been appropriate, to minimize the threat of violence, or even verbal altercation, when parents are meeting to exchange custody of the child.

(g) Abusive Women

As discussed above, women are most commonly the victims of spousal abuse, and are more likely to be emotionally and physically injured if there is a mutually abusive relationship, but in a relatively small minority of cases the woman is clearly the initiator of spousal violence. Some of these women suffer from emotional problems or mental illness. Even if the woman has initiated spousal violence, if she is not suffering from an emotional or mental disturbance, there may be a mitigating factor which result in her being awarded custody. For example, the mother may clearly be the child's primary caregiver, which would support her custody claim. Thus, abusive spousal behavior by a wife may be less decisive than abuse by a husband.[161]

There are reported Canadian family law cases where the woman has clearly been the aggressor.[162] While these cases are relatively rare, there

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[160] (1993), [1993] O.J. No. 3307, 1993 CarswellOnt 1810 (Ont. Gen. Div.)

[161] See e.g. *Jacob v. Jacob* (1994), Can. Law Book 94 -152-014 (Sask. U.F.C.) per Carter J. 23/3/94. As discussed above, women who initiate spousal abuse are considerably less likely to directly abuse their children than men who abuse their partners.

[162] See *Stead v. Huard* (1995), 13 R.F.L. (4th) 369, 1995 CarswellOnt 99 (Ont.

is a need to take violence against men by their partners seriously,[163] and to recognize that for many of these men a feeling of humiliation may make disclosure more difficult. However, it is also important to recognize that in general abuse of husbands has less serious consequences than abuse of wives, because of differences in social and economic power, as well as in physical strength. While women who are violent towards their partners have anger management problems, it would appear that they are less likely to be abusive towards their children than men who are abusive spouses. Further, a male's control and abuse of his partners is more likely to continue and even escalate after cohabitation ceases, than when women are abusive during a relationship; research suggests that there are more likely to be post-separation disputes about visitation and other issues if the male is the primary abuser, with an abusive man using the legal system or the opportunities for contact with his former partner afforded by access to continue to harass or control her.[164]

In the 1993 Ontario case of *McNichols v. McNichols,*[165] the court accepted that during the marriage the mother had behaved in an erratic and violent fashion towards the father, had deliberately damaged some of the contents of the house, and that the "child [had] been exposed to these outbursts in a totally unacceptable way". The mother had interim custody. A court appointed assessor recommended that the father should have custody. However, the judge chose to rely on the opinion of the mother's doctor, that after the assessment the mother's emotional condition substantially improved and her condition was under control by drug treatment. The court ordered joint custody in which the children

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Prov. Div.) where following separation the mother arranged for various men to assault her former partner, and she herself assaulted his new partner.

163 "Save us from our wives, say battered men" *Kingston Whig Standard* (30 May 1992) ; and "Women's violence against men is our last taboo, Peter Raeside says" *Globe & Mail* (10 November 1993) A22; and "Abuse at the hands of a once loving wife" *Toronto Star* (19 October 1997) A1.

164 L. Newmark *et al.*, "Domestic Violence and Empowerment in Custody and Visitation Cases" (1995) 33 Fam. Ct. Rev. 30 at 32; and Julie Kunce Field, "Visiting Danger: Keeping Battered Women and Their Children Safe" (1996) Clearinghouse Review 295.

165 (1993), [1993] O.J. No. 1973, 1993 CarswellOnt 1607 (Ont. Prov. Div.), per Pedlar Prov. J. See also *McGrath v. Thomsen* (2000), 11 R.F.L. (5th) 174, 2000 CarswellBC 2383 (B.C. C.A.). In *Nichols v. Hayward,* (2004), [2004] B.C.J. No. 1001, 2004 CarswellBC 1103 (B.C. S.C.) custody was awarded to the father; the mother was violent and suffered from mental health problems.

were to principally reside with the mother with extensive access to the father.

In the 1995 New Brunswick case of *MacKay v. MacKay*,[166] there was evidence that the parties had a "stormy relationship," with the woman being physically aggressive towards her husband. At the time of initial separation, the mother obtained custody on consent, but then entered a relationship with a new man;[167] both she and the new partner were verbally abusive of the boy and used corporal punishment extensively. The court varied the original arrangement and gave the father custody, without any comment on the spousal conduct, and focusing on the inappropriate treatment of the child by the mother and her new partner.

(h) Joint Custody

The term "joint custody" has a range of meanings, but most commonly in Canada it refers to situations in which one parent (usually the mother) maintains the child's "primary residence" and the primary responsibility for the care of the child, but the child spends significant time with the other parent. Further, the parents remain joint legal guardians and are expected to agree about decisions the child. While in many cases where abuse is not a concern it may be useful to consider joint custody, joint custody is not appropriate if there has been a history of spousal abuse and the abused parent is unable to effectively negotiate issues without the involvement of an advocate. Indeed since joint custody requires parental cooperation, it is not appropriate if there is a high level of parental conflict or serious power imbalances even without physical abuse;[168] there is all the more concern about joint custody if there is a history of spousal violence.

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166 [1995] N.B.J. 565 (Q.B. Fam. Div.).

167 See also *Simpson v. Simpson* (1995), [1995] B.C.J. No. 2100, 1995 CarswellBC 1603 (B.C. S.C.) where the mother with joint custody entered a new relationship after separation with a man who was physically and verbally abusive of the mother; Cooper J. concluded that the new relationship was not in the best interests of the children and gave the father sole custody, with the mother only to exercise access in the absence of her new partner.

168 See e.g. J. Johnston "High-Conflict Divorce" (1994) 4(1) The Future of Children 165.

There are many Canadian judgments which recognize that where there is a history of significant disagreement and argument,[169] let alone abuse, joint custody is not likely to be appropriate.[170] However, there are also Canadian cases in which judges have imposed joint custody despite a history of spousal abuse or a high conflict relationship.[171] Further, it is apparent that many custodial mothers feel pressured by mediators or their lawyers to settle cases on the basis of some form of "joint custody" despite ongoing issues of spousal abuse.[172] Accordingly, it would be preferable to follow the example of several American States and have a statutory prohibition against joint custody if there is a significant history of domestic violence.[173]

11. ACCESS

(a) Access and Spousal Violence

Disputes about access occur more frequently than genuine disputes over custody, and problems with access can continue for many years,

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169 See e.g. Lawson v. Lawson (2006), [2006] O.J. No. 3179, 2006 CarswellOnt 4789 (Ont. C.A.).

170 See e.g. *Hallett v. Hallett*, [1993] O.J. 3382 (Prov. Ct.); *G. (D.E.) v. G. (D.T.)* (1997), [1997] O.J. No. 1976, 1997 CarswellOnt 1951 (Ont. Gen. Div.); *L. (T.N.) v. M. (B.C.)* (1996), [1996] B.C.J. No. 2743 (B.C. Prov. Ct.); and *Kennedy v. Sinclair* (2001), 18 R.F.L. (5th) 91, 2001 CarswellOnt 1634 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 2507, 42 R.F.L. (5th) 46 (Ont. C.A.).

171 See e.g. *Boothby v. Boothby* (1996), [1996] O.J. No. 4346, 1996 CarswellOnt 4734 (Ont. Prov. Div.) where the mother testified that the father was "controlling, demanding and [...] emotionally abusive" towards her during the period that the parties cohabited. He had interim custody after separation, and on occasion thwarted the mother's access visits; the court awarded joint custody, with primary residence to the mother. See also *Smith v. Smith* (1997), [1997] S.J. No. 765, 1997 CarswellSask 735 (Sask. Q.B.) and *Anderson v. Anderson* (2003), [2003] B.C.J. No. 1505, 2003 CarswellBC 475 (B.C. S.C.).

172 Linda Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) *18 Windsor Yearbook of Access to Justice 115*, with a complete version at Linda Neilson, "Spousal Abuse, Children and the Legal System" (March 2001, funded by Canadian Bar Association, *Law for the Futures Foundation*). The report is posted full text at: http://www.unb.ca/arts/CFVR/spousal_abuse.pdf

173 Family Violence Project of the National Council of Juvenile and Family Court Judges, "Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice" (1995) 29 Fam. L. Q. 197, at 200.

whereas disputes over custody are usually resolved "once and for all." Access can be very problematic for victims of abuse and their children, as it is difficult to have it terminated. The continuing contact with an abusive spouse that results from access can be stressful and create risks for abused spouses and their children. Abusive spouses may use access visits to try to denigrate, and undermine children's respect for, the custodial parent, encouraging the children to behave in destructive or defiant ways when they return home. It must, however, also be appreciated that many children want to see their access parents, even if these parents have abused their partners and that in many cases children "may benefit from such contact, as long as safety measures are provided, the contact is not overly extensive, and the abuser is not permitted to cause setbacks in the child's healing process."[174]

The so called "friendly parent" provision of the federal *Divorce Act* s. 16(10) provides that:

> 16 (10) ...the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

In practice, s. 16(10) creates a presumption that access with the non-custodial parent is in the best interests of a child.[175] This provision is sometimes regarded by judges and lawyers as giving the non-custodial parent a presumptive "right" to access. Section 16(10) may make a parent seeking custody reluctant to put forward a claim to restrict access for fear of appearing "unfriendly;" this is unfortunate where spousal abuse is a concern, as access can be very problematic in a relationship where there is an abusive spouse.

While research indicates that, in general, continued and regular contact with both parents following separation minimizes the negative effects of parental separation, in high conflict parental separations continued contact with both parents can be stressful for children. Further, continued access and the contact between hostile parents that it usually requires can undermine the capacity of the primary custodial parent to

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174 Lundy Bancroft, "The Parenting of Men Who Batter" (Summer 2002) Court Review 44 at 48.

175 *Young v. Young*, [1993] 4 S.C.R. 3, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.).

care for a child, especially if there are concerns about the parenting conduct of an abusive parent.[176]

Post-separation access can be used by an abuser to maintain control over, or cause emotional or physical injury to, a former partner. During access visits an abusive spouse may question the children about what the custodial parent has been doing and try to turn the child into a "spy", causing loyalty conflicts. In some cases men have told their children during access visits that they will kill their mothers, causing intense anguish among the children.[177] It is also not uncommon for abusive spouses to berate or assault their former partners when picking up or leaving their children. Such abusive post-separation conduct should be given very significant weight in an application to terminate access.

Despite the fact that the *Divorce Act* (and provincial legislation) makes clear that the actual test for determining whether there is to be access is the "*best interests* of the child" and that there are real concerns about access in cases where there are serious spousal abuse concerns, some judges, lawyers and mediators continue to operate on the presumption that spouses, even abusive spouses, will have access.[178] Some judges base this presumption on the notion that there is a "right" to access, but most judges consider that this presumption promotes the "best interests of children." In the absence of clear evidence of child abuse, many lawyers (in negotiations), judges (in pre-hearing settlement conferences) and mediators (in mediation) tend to pressure victims of spousal abuse into agreeing to ongoing access to a child. As a result of financial and psychological pressures to settle cases, spouse abuse victims may feel pressure to settle even if they have ongoing concerns about inadequate care, possible child abuse or high risk behavior by the non-custodial parent during access visit.[179]

The case law continues to reflect conflicting judicial attitudes towards access in cases where there are spousal abuse concerns, as illus-

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176 Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Yearbook of Access to Justice 115, at 122-24.

177 See e.g. *L.A.M. v. K.M.*, [1998] O.J. 1424, 55 O.T.C. 245 (Gen. Div.) per Granger J. where the father's threats to the child about the mother and abusive conduct during access visits caused the court to terminate access.

178 See e.g. *Fullarton v. Fullarton* (1994), 7 R.F.L. (4th) 272, 1994 CarswellNB 278 (N.B. Q.B.);

179 Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Yearbook of Access to Justice 115, at 139-150.

trated by the contrasting approaches taken in two 2001 decisions dealing with interim relief concerning access.

In *Harari v. Harari*[180] the judge accepted that the father had "difficulty controlling his temper," and had abused and threatened his wife. He was facing criminal charges as a result of an incident that occurred after separation and had breached an undertaking given as a condition of release in the criminal proceeding, that he would have no contact with his wife or child. The wife left British Columbia, where the couple had resided together, and went to Ontario with their eighteen month old child to get the support of her family. The judge acknowledged that she "fled" because as she was "terrified" of her husband, finding that there was "ample evidence to support her feelings." Nevertheless, Vickers J. felt that he could not "ignore the principle that the child should have as much contact with each parent as is consistent with the child's best interests." The judge ordered that the mother was to return with the child from Ontario to British Columbia. The judge was "not persuaded that there is a need for supervised access," and allowed the father unsupervised access every second weekend, though making a restraining order against the father and requiring him to arrange access through a third party.

By way of contrast to the approach of Justice Vickers in *Harari* is the decision of Justice Veale of the Yukon Supreme Court in *D. (R.) v. D. (U.S.),* also a case dealing with an interim relief application by a woman who had been abused by her husband. She had been assaulted by her husband several times in the course of her nine year marriage, some of the assaults in the presence of their young daughter. The husband also subjected her to controlling behavior, such as disconnecting the phone to isolate his wife. The police were called on a couple of occasions, though charges were withdrawn when the woman recanted and resumed cohabitation. Ultimately, the woman and her five year old daughter fled

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[180] (2001), 20 R.F.L. (5th) 59, 2001 CarswellBC 1645 (B.C. S.C [In Chambers]). See also *H. (H.) v. C. (H.)* (2002), 27 R.F.L. (5th) 63, 2002 CarswellAlta 530 (Alta. Q.B.), per Lee J. where a judge awarded supervised access to a father who was convicted of assaulting his wife and father-in-law with a hammer and who had previously been subject to an anger management course as a condition of a s. 810 recognizance, but still awarded supervised access. For other examples of cases where fathers with histories of spousal abuse were awarded unsupervised access, see e.g. *K.E. v. D.E.*, [2003] N.S.J. 495 per Wright J.; *S.G.S. v. C.L.S.*, [2004] O.J. 2177 (Sup. Ct.) per Pierce J., and *Kuzmicz v. Kuzmicz* (2004), [2004] O.J. No. 2061, 2004 CarswellOnt 1991 (Ont. S.C.J.).

to a shelter. In opposing the woman's application for interim relief, the man denied that there had been any assaults, but the judge accepted the woman's "version of the events because it was supported by RCMP involvement and medical records." Although expressing a concern about the lack of expert evidence to assist the court in understanding the effect of the abuse on the child, Justice Veale observed:[181]

> when physical or psychological abuse exists between the parents, or between a parent and child, access is not routinely granted and may be denied if it is not considered to be in the best interests of the child.... the onus is on the parent seeking access to establish ...that the access is in the child's best interests...I am of the view that any spousal abuse, physical or psychological, that has an impact on the spouse or child, is of concern.

The court ordered supervised access only, stipulating that the supervision was not to be provided by a member of the husband's family, but only by a "trusted non-family member."

It is submitted that the approach of Justice Veale in *D. v. D.* is preferable; the court in that case recognizes the harm of spousal abuse to children, and places an onus on the abusive spouse to show that access would be beneficial to the child and to devise a plan that would ensure the safety of the child. In contrast, Vickers J. in *Harari* appears to operate on the basis of an assumption that is not consistent with social science research in this field, namely that access of a child to a parent is beneficial to a child, even if there is a recent history of significant spousal abuse.

(b) Denial of Access to Abusive Spouses

Although the legislation and case law effectively create a presumption that continued contact between a non-custodial parent and child is in the child's best interests, a significant number of recently reported Canadian decisions have accepted that in situations where there has been a history of serious spousal abuse or violence, access may not be in the child's best interests and should not be permitted. As stated by Pugsley J.A. of the Nova Scotia Court of Appeal in *Abdo v. Abdo,* where an abusive husband and father was denied even supervised access to his three children:[182]

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[181] (2001), 22 R.F.L. (5th) 269, 2001 CarswellYukon 130 (Y. Sup. Ct.), at 273-74 [R.F.L.].

[182] (1993), 50 R.F.L. (3d) 171, 1993 CarswellNS 52 (N.S. C.A.), at 181-183 [R.F.L.] [Emphasis of Court]; see also *H. (E.A.) v. G. (T.D.)* (1995), 18 R.F.L. (4th) 21, 1995 CarswellNS 264 (N.S. C.A.).

> While contact with each parent will usually promote the balanced development of the child, it is a consideration that must be subordinate to the best interests of the child ...while ...the burden rested on Mrs. Abdo that it was in the best interests of the children to eliminate supervised access ... the use of the word *may* in the phrase "supervised access ... may be harmful..." [in the trial judgment] suggests that Mrs. Abdo may not have established that supervised access *would* be harmful....it [is] not...necessary to establish that supervised access would be harmful.

There are a growing number of cases in which access has been denied to an abusive spouse. Almost all of these are cases that fit in the category of "coercive controlling violence."[183] They are situations of repeated physical violence and emotional abuse by a man, directed at his female partner and sometimes his children, most of which involve some form of post-separation spousal abuse. Although in the majority of these cases the custodial mother relied on expert testimony to support the application to deny access, there are some cases in which access has been denied without such testimony.[184]

One of the first appellate judgments to deny access based on spousal abuse concerns was the 1992 Ontario Court of Appeal decision in *M. (B.P.) v. M. (B.L.D.E.)*. The woman had a son from a previous relationship; the parties were married for two years, during which time the wife gave birth to a daughter. The father began to be abusive during the pregnancy, undermining the woman's relationship with her family and having "violent rages;" after the birth, he became increasingly violent and threatened to kill her. In 1985, the woman left out of concern for the safety of herself and the children. After the separation, the father had access to his daughter, while his harassment and threats against the mother escalated. The man often followed the woman around, left her harassing notes, and was verbally abusive to her at the time of access.

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183 For a case where a mother with a history of drug use and threatening behaviour was given access only with the permission of the custodial parent, see *McGrath v. Thomsen* (2000), 11 R.F.L. (5th) 174, 2000 CarswellBC 2383 (B.C. C.A.).

184 *Rasalingam v. Rasalingam* (1991), [1991] O.J. No. 1241, 1991 CarswellOnt 1456 (Ont. Prov. Ct.); *D. (C.) v. B. (J.)* (1996), [1996] A.Q. No. 181 (Que. S.C.); *Parker v. Hall* (1996), [1996] O.J. No. 756, 1996 CarswellOnt 742 (Ont. Prov. Div.) and *Alexander v. Creary* (1995), 14 R.F.L. (4th) 311, 1995 CarswellOnt 434 (Ont. Prov. Div.) and; see also *Matheson v. Sabourin* (1994), [1994] O.J. No. 991, 1994 CarswellOnt 4692 (Ont. Prov. Div.) where Hardman Prov. J. cited literature on the effects of having witnessed spousal violence on children, apparently without this literature having been introduced by a witness.

He sometimes threatened not to return the child after access. Despite this type of conduct, judges in 1986, 1988 and 1989 permitted unsupervised access; during this time the woman moved from Alberta, where the parties were married, to Ontario, to be near her parents. The daughter found the visits with her father stressful. Supervised access was ordered, but the child continued to experience stress related to the visits. Eventually in 1991, access rights were terminated; the decision was affirmed by the Ontario Court of Appeal in 1992. The Court of Appeal characterized the man's post separation conduct as "incessant and obsessive," creating stress on both the child and mother.[185] While the child continued to tell an assessor that she was not averse to seeing her father, as long as it was infrequent and supervised, Abella J.A. observed that a court should also consider the effects of continued access on the custodial parent, especially when she has been the victim of continued harassment by the father:[186]

> The needs of children and their parents are obviously inextricable, particularly between children and the parent on whom they depend for their day-to-day care....But the central figure in the assessment is the dependent child....There is no evidence of any bond whatsoever between this child and her father. On the contrary, there is evidence that she was hostile towards him during supervised access visits, withdrawn before and after the visits, had nightmares and some bed wetting.

Justice Abella rejected the father's application for supervised access. Although Finlayson J.A. dissented and would have permitted supervised access, the majority position of Abella J.A. must be regarded as the dominant judicial view. The courts are now more willing to terminate access and one would hope that a mother and child would not now be expected to live through years of unsupervised access with such an abusive man, as occurred in the late 1980's in *B.P.M. v. B.L.D.E.M.* Although the situations will be "rare," there have been cases involving abusive spouses where the courts have refused access to an abusive spouse without any attempt to try access, even on a supervised basis.[187]

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185 Counsel may face a real dilemma in deciding how much to emphasize the negative effects of the stress and abuse on parenting capacity. This type of evidence may be important to terminate access, but it may also invite a claim for custody from the abuser based on the "incapacity" of the victim of abuse.

186 (1992), 42 R.F.L. (3d) 349, 1992 CarswellOnt 295 (Ont. C.A.), at 359-60 [R.F.L.], leave to appeal refused (1993), 48 R.F.L. (3d) 232 (note) (S.C.C.).

187 *Pereira v. Pereira* (1995), [1995] B.C.J. No. 2151, 1995 CarswellBC 1593 (B.C. S.C.) in which husband was violent towards wife during marriage, and after separation even attempted to arrange for her murder.

If a court has initial concerns about access and orders supervised access, the court may consider abusive conduct or a failure to regularly visit as a reason for terminating supervised access.[188] Similarly if it is acknowledged at the time of the original access order that the man has an anger problem and must take part in a counselling, the failure to complete a program[189] or the completion of a program but the continuation of harassment and threats against the mother, will justify termination of all access.[190]

The unhappiness of a custodial parent about access, or her sense of anger or hatred towards the non-custodial parent, do not in themselves justify a termination of access. However, where there is a history of abuse of the custodial parent during, and especially after the end of the period of cohabitation, the fear of the custodial parent may legitimately be an important factor in terminating access. Consideration of threats to the safety of the custodial parent is important in any decision about access; no parent should be placed in a position of danger to facilitate access for an abusive parent.

In *Matheson v. Sabourin*,[191] the parties cohabited for one and a half years during which they had a son. The father physically and verbally abused the mother during the period of cohabitation, and continued to harass and assault her after the separation. In terminating all access Hardman Prov. J. wrote:

> There can be no question that it is dangerous to state as a principle of law that if access causes stress for the custodial parent then it should be terminated. However, it is clear that there are circumstances where the impact on the custodial parent is such that extinguishing access must be considered.....No one could put it more clearly than the [mother]...did in her evidence: "I'm trying to raise him and you're trying to destroy me and that affects him."

It may be argued that even in this 1994 decision in *Matheson v. Sabourin,* the woman and child were subjected to abuse for far too long before

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188 *Lacaille v. Manger* (1994), [1994] O.J. No. 2880, 1994 CarswellOnt 2089 (Ont. Prov. Div.).

189 *Ibid.*

190 See e.g. *DeSilva v. Giggey* (1996), [1996] N.B.J. No. 133, 1996 CarswellNB 118 (N.B. Q.B.); *Drummond v. Drummond* (1995), [1995] B.C.J. 1560, 1995 CarswellBC 2830 (B.C. Master).

191 (1994), [1994] O.J. No. 991, 1994 CarswellOnt 4692 (Ont. Prov. Div.). See also e.g. *M. (Z.) v. M. (S.)* (1997), [1997] O.J. No. 1423, 1997 CarswellOnt 807 (Ont. Gen. Div.), per Ferrier J. where access was terminated because of verbal abuse of the child, including prying information from the child, during visits.

access was terminated. In those situations where spousal abuse continues after separation, access should be terminated, or at the very least the exchange of the child should be supervised. A parent with primary responsibility for the care of a child should not be subjected to abuse so that her former partner can continue to enjoy a relationship with the child.

While the wishes of a child are not determinative, they are an important consideration in dealing with access issues, especially in those cases involving a battering husband. When there has been a significant history of spousal abuse and the children have become fearful of their father, expressing a desire not to see him, this should be a very persuasive factor in denying access.[192]

In some recent cases, judges have recognized that if there is significant history of spousal violence that causes a mother and child to fear the non-custodial father, this may justify terminating access, even if there is no clear evidence that the abuse will reoccur in the future.[193] In some measure, the fear of the children may reflect the fears of the mother or may be a form of "alliance" of the child with the custodial parent to avoid a "loyalty conflict". When a child is without affection for the non-custodial parent and has legitimate fears, it would be very upsetting to a child and undermine the child's sense of trust to order access. However,

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[192] See e.g. *DiMeco v. DiMeco* (1995), [1995] O.J. No. 3650, 1995 CarswellOnt 2199 (Ont. Gen. Div.) where father was violent and abusive to mother, including a threat made in the presence of the children to kill her; the children told an assessor that they feared him; access was denied. *Rasalingam v. Rasalingam* (1991), [1991] O.J. No. 1241, 1991 CarswellOnt 1456 (Ont. Prov. Div.) access denied to father with history of violence towards mother, until children and their mother consent. See also e.g. *Roach v. Kelly* (2003), [2003] O.J. No. 5081, 2003 CarswellOnt 5037 (Ont. S.C.J.) where Steinberg J. denied access to an abusive husband, writing:

> Parents [...] have a duty to their children to treat each other with courtesy, respect and to the best of their ability, work towards developing a consistent, positive, secure, nurturing lifestyle for their charges. Where one parent has the major custodial responsibilities, the non-custodial parent has the difficult tasks of supporting the custodial parent and to work with [...] her so that the child is not put in the position of being caught in the middle of physical arguments or other disputes, being forced to chose between parents, or having to adjust to radically different approaches to parenting.

[193] *Roda v. Roda* (2000), [2000] O.J. No. 3786, 2000 CarswellOnt 3558 (Ont. S.C.J.), Sachs J.; *Pavao v. Pavao* (2000), [2000] O.J. No. 1010, 2000 CarswellOnt 1002 (Ont. C.J.) Dunn J.

orders terminating access are only appropriate where the woman has "legitimate fears" based on acts of violence, particularly where the abuser has not taken meaningful steps to acknowledge his abusive conduct and deal with it, for example by taking an anger management course or having counselling.

Conversely, if the court concludes that the mother's sentiments towards the father are based more on feelings of anger or resentment at the end of the relationship than on reasonable fears, denial of access based on a child's stated preferences may be less appropriate, and would encourage manipulative and alienating behavior in high emotional conflict divorces.[194]

A child's continued desire to have contact with a parent with a history of spousal abuse is likely to influence a court to permit access. While denial of access is sometimes necessary when a parent has been abusive, in particular toward the child, it should be appreciated that a child will often experience a sense of loss if access is denied or may come to inappropriately idealize the absent parent.[195] In some cases in which a child wishes to have contact with a parent with a history of spousal abuse, it may be appropriate to order supervision of the exchange of the child.

In *Brusselers v. Shirt*,[196] the parents did not cohabit after the child's birth, though they were married to each other. The father had been abusive of the child's mother during their cohabitation and there was

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194 See *Sekhri v. Mahli* (1993), 112 Sask. R. 253, 1993 CarswellSask 368 (Sask. Q.B.) where Klebuc J. accepted that there had been at least one assault by the father, but concluded that the mother "grossly exaggerated [...] in some instances, on the verge of being untruthful" allegations of physical and verbal abuse towards her by the father during their nine years of cohabitation in marriage. An assessor concluded that the father was "incapable of significant violence", but recognized that the daughter was fearful of her father due to the mother's influence over the six years since the parents separated. The daughter came to believe that the father would kill her, though there was no evidence to support this fear. Recognizing the fears of the mother and daughter, however unfounded, the court ordered a process of initially supervised access, with a psychiatric assessment of the father and counselling for the mother and daughter.

See also *Orszak v. Orszak* (2000), [2000] O.J. No. 1606, 2000 CarswellOnt 1574 (Ont. S.C.J.) per Himel J. (access not terminated, despite mother's anger).

195 Rhonda Freeman, "Parenting After Divorce: Using Research to Inform Decision-Making About Children" (1998) 15 Can. J. Fam. L. 79 at 100.

196 (1996), [1996] A.J. No. 333, 1996 CarswellAlta 275 (Alta. Q.B.).

conflict between them about access. He had been abusive of women in other relationships and the mother also had concerns about the father's parenting skills and wanted to deny him access. However, an assessor testified that the 8 year old girl expressed the wish to see her father, as she saw other children whose parents separated enjoying their relationships with their fathers. Justice Smith noted that the father was in counselling for his abuse problems and seemed to have good relations with a young son he had with another partner, and accordingly ordered unsupervised access. Given a history of spousal and child abuse, unsupervised access should only be permitted if the judge is satisfied that there is no risk to the safety of the child.

If access has been terminated due to significant concerns about spousal violence and its effect on a child, in order to resume access, the parent with a history of abuse should bear the onus of demonstrating that he recognizes the effect that his conduct had on the children, has taken significant steps to change his behavior and that it will be in the interests of his children to see him.[197] Evidence that it may help the father's psychological state or meet his needs should not be persuasive in any access application, especially an application to reinstate access terminated for abuse. Parents who have lost access rights for their abusive conduct (almost exclusively fathers) generally have very significant histories of abuse and it is thus not surprising that in practice these men have rarely succeeded in persuading a court to reinstate access.

(c) Supervised Access

Supervised access may be appropriate if there is a reasonable apprehension of a threat to the safety of a child during a visit, if there is a reasonable apprehension that the non-custodial parent will abduct the child or if the child is afraid of or refusing to visit the custodial parent.[198]

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[197] *J.L.A.B. v. M.L.Z.*, [2000] N.S.J. 383 (Fam. Ct.), per Daley Fam. Ct. J.; *G.A.W. v. E.L.G.W.*, [2000] O.J. 4348 (Ct. J.), per Dunn J; and *Weiten v. Adair* (2001), 21 R.F.L. (5th) 239, 2001 CarswellMan 386 (Man. C.A.) See also a very helpful paper on supervised access by Marie Gordon, "Supervised Access: Why, When and How Long?" (2004) 22 Can. Fam. L. Q. 185.

[198] See *Zahr v. Zahr* (1994), 24 Alta. L.R. (3d) 274, 1994 CarswellAlta 248 (Alta. Q.B.) per Hunt J. where the court ordered supervised access for a father's visits with his 13 year old son because of his past threats to take the boy to Lebanon and because the boy had witnessed acts of violence by the father against the mother. In addition the child had not seen the father for two years.

Some form of supervised access may be especially appropriate on an interim basis when there are serious allegations and a significant *risk* of harm to a child, but there is a real dispute about whether abuse occurred.

Supervision can also help reduce fears of a custodial parent if there has been a history of child or spousal abuse. Some supervisors will keep records and be able to testify about the quality of parent-child interaction during a visit. In some cases there will be sufficient evidence of hostility or stress on the part of the child during supervised access to obtain an order terminating all access. Although the *opinions* of an access supervisor will only be admissible if that person qualified as an expert to express an opinion about parent-child relationships,[199] *factual observations* about a child crying or appearing upset and about parental conduct may be admissible even if the supervisor is not qualified as an expert witness. Such evidence may play a significant role in the ultimate decision whether to terminate access.[200]

A supervisor can be a trained professional, a volunteer or a relative (e.g. member of father's family chosen by mother).[201] It is important that the supervisor not be an inappropriate person, in particular not someone who may be controlled by the abuser and who may not actually protect the child. In the absence of a suitable supervisor, access should be terminated if there is a risk to the safety of a child.[202] In a number of localities supervised access projects have been established to provide supervision by trained staff and these are valuable services for helping to maintain parent-child relationships, while protecting children and victims of spousal abuse. In Ontario, there has been a significant increase in government funding and availability of these access supervision programs; there are fees for use of these agencies, though subsidies are available for low income parents.

While the legal precedents indicate that access should only be ordered if it will actually benefit a child, there may be a tendency for some

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See also, however, *H (H.) v. C.(H.)* (2002), 27 R.F.L. (5th) 63, 2002 CarswellAlta 530 (Alta. Q.B.) per Lee J.

199 *M. (B.P.) v. M. (B.L. D.E.).*(1992), 42 R.F.L. (3d) 349, 1992 CarswellOnt 295 (Ont. C.A.), at 360 [R.F.L.], leave to appeal refused (1993), 48 R.F.L. (3d) 232 (note) (S.C.C.); see also *Matthews v. Matthews* (1998), (*sub nom.* L.A.M. v. K.M.) [1998] O.J. No. 1424, 1998 CarswellOnt 1419 (Ont. Gen. Div.).

200 *Pavao v. Pavao* (2000), [2000] O.J. No. 1010, 2000 CarswellOnt 1002 (Ont. C.J.) logs of access supervisor admitted.

201 See e.g. *W. (K.H.) v. W. (S.M.)* (1995), [1995] N.S.J. No. 471, 1995 CarswellNS 336 (N.S. Fam. Ct.).

202 *J.L.A.B v. M.L.Z.*, [2000] N.S.J. 383 (Fam. Ct.), per Daley Fam. Ct. J.

judges to order supervised access as a "compromise" (or some might say a "cop out"), rather than take the hard decision of terminating all access. Given its intrusive, expensive and artificial nature, supervised access should not be seen as a permanent arrangement when it is risky to leave a parent alone with a child, but rather should be as a "temporary measure...to help resolve a parental impasse over access."[203] Preferably, during the period of supervised access, the abuser will be taking steps, such as participation in counselling, that will reduce the risk to the child and permit unsupervised access at some future time.[204]

Some parents have such a high potential for unpredictable or uncontrollable violence or abuse towards the children, that a court should not order supervised access. A judge should also be concerned about subtle non-physical threats or psychological abuse that can occur during even supervised access and be a basis for rejecting this option.[205] Ultimately, even if there is no immediate risk to the child, a court should deny any access if it is not satisfied that the child will receive some benefit from visits.

(d) Exchange Supervision

In some situations where the risk of direct harm to the children seems low though there is a concern about the potential for spousal violence (or at least verbal abuse) when the separated parents meet to allow access, it may be appropriate to have supervision of the process of exchanging care of the child for access visits. Even if it is the parent with the history of spousal abuse who is awarded custody, the exercise of access rights by the other parent may be an occasion for continuing the abuse, intimidation or control and a court order may be required to

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203 Judge Norris Weisman, "On Access After Parental Separation" (1992), 36 R.F.L. (3d) 35 at 74, quoted with approval by Abella J.A. in *M. (B.P.) v. M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349, 1992 CarswellOnt 295 (Ont. C.A.), at 360 [R.F.L.], leave to appeal refused (1993), 48 R.F.L. (3d) 232 (note) (S.C.C.).

204 See e.g. *W. (K.H.) v. W. (S.M.)* (1995), [1995] N.S.J. No. 471, 1995 CarswellNS 336 (N.S. Fam. Ct.) and *F. (E.) v. S. (J.S.)* (1995), 17 R.F.L. (4th) 283, 1995 CarswellAlta 426 (Alta. C.A.). The failure to comply with terms of supervised access, such as obtaining counselling for anger management, may result in the termination of even supervised access: *D. (C.) v. B. (J.)* (1996), [1996] A.Q. No. 181 (Que. S.C.).

205 *Abdo v. Abdo* (1993), 50 R.F.L. (3d) 171, 1993 CarswellNS 52 (N.S. C.A.).

supervise the exchange of the child or otherwise prevent harassment.[206] In high conflict situations, the process of exchange of the child has the potential for violence or at least verbal abuse and displays of parental anger. Even without the risk of violence, parental shouting matches at the time of exchange of the child can be very distressing to the child.

Supervision may be especially appropriate during an initial period after separation when the risk of violence may be higher. Exchange supervision is less costly, intrusive and restrictive than access supervision, but should only be contemplated if the there is no significant risk of direct harm to the children from the abusive spouse.

For example, in *Fullarton v. Fullarton*[207] the parents separated after five years of marriage, during which the husband had assaulted the wife many times, including breaking her jaw and holding a knife to her throat. The three children witnessed many of these assaults. After several years of access that apparently occurred without incident, the man assaulted the mother when she came to his residence to get the children at the end of an access visit. While even the father acknowledged that the violent nature of his relationship with his wife had an adverse effect on the children, the mother accepted that he did not pose a direct threat to the children when they were in his care. Citing the *Divorce Act* s.16(10) the judge felt that the children had a "right" to access to their father (though there was no evidence in the judgment about their views). The judge concluded that any "risk of harm to the children can...be substantially eliminated if the parties have no contact with each other." Accordingly, the court ordered that arrangements should be made that a third person acceptable to both parents pick up and return the children, with the judge to select someone if the parents could not agree.

The father was also to abstain from consuming drugs or alcohol during access and 24 hours prior, and to "refrain from any displays of anger, violence or threats thereof in the presence of the children." While this last condition might appear desirable, one may question how it can be enforced in a way that would not unfortunately involve the children in "reporting on" their father. If there had not been several years of access with only the one assaultive incident, termination of access would

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206 *Brown v. Brown* (1996), 23 R.F.L. (4th) 23, 1996 CarswellOnt 2288 (Ont. Gen. Div.).

207 (1994), 7 R.F.L. (4th) 272, 1994 CarswellNB 278 (N.B. Q.B.); see also e.g. *Hossack v. McNorgan* (2003), [2003] O.J. No. 1141, 2003 CarswellOnt 1151 (Ont. S.C.J.), per Aston J.

clearly have been more appropriate given the father's history of violence towards the mother and its negative effects on the children.

Having access begin and end at school or daycare may be an appropriate way, in some cases, to reduce the opportunity for argument or spousal abuse.[208] Some judges order that the access exchange should occur outside a police station, to limit any threat of violence or outbursts of anger at the time of exchange; while this may be a last resort, these locations may be frightening for a child as well as inconvenient.[209] A public place, like a fast food restaurant, is less intrusive though also less secure. Finding a suitable, willing exchange supervisor is preferable; in Ontario, recent increases in government funding have increased the resources available for supervision of access exchanges.

(e) Judicial Control Over High Conflict Couples—What are the Limits of the Law?

One of the challenges that judges face in dealing with high conflict cases is determining how much they should try to regulate the conduct of parents to promote the best interests of a child. The power to make an order regulating parental conduct derives from the responsibility for placing conditions on the exercise of custody or access. In cases where there are concerns about violence, an attempt to control spousal conduct can also be made as part of a restraining order.

In dealing with this challenge, there may be issues of judicial expertise; judicial knowledge about the individual parents and children before the court and the enforceability of any order made by the court. If there is a threat of further child or spousal abuse, there may also be safety issues.

Parents in high conflict cases need structure and direction from the court. In a high conflict situation, it is not appropriate for a court to simply make an order for "reasonable access", as the parents are unlikely to agree what this means. Even in high conflict cases it is often preferable for the parties to work out a clear, detailed arrangement for access and care of the children, with the assistance of lawyers or a mediator, rather than having an arrangement imposed by a judge. However, when this is

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208 See e.g. *Fang v. Fang* (2004), [2004] O.J. No. 839, 2004 CarswellOnt 896 (Ont. S.C.J.).

209 See *Orszak v. Orszak* (2000), [2000] O.J. No. 1606, 2000 CarswellOnt 1574 (Ont. S.C.J.). See also R.B. Straus, "Supervised Visitation and Family Violence" (1995) 29 Fam. L. Q. 229.

not possible (or suitable professionals are not involved), a judge may have to impose an arrangement, making a detailed order to govern visitation and communication between parents and child.[210] If there is a threat of future violence, it may be appropriate that there be no visitation.

Some judges will make very detailed orders about communications between parents concerning the child. For example, a judge may require that the parents only communicate about the child in a written notebook that is exchanged when access occurs, or by email. In some cases this can be a useful way of helping estranged parents to (re)learn how to communicate in a clear and non-abusive fashion, but in other cases the written communication can itself become abusive.

It is not uncommon for judges to order that a parent with a history of abusive conduct attend counselling or take an anger management course as a condition of exercising access. Imposing a requirement of counselling should not be seen as a solution to all problems of abuse, since individuals who participate in counselling or therapy may not fully engage (or may not participate at all) or may have deeply rooted problems that will not be resolved by participation in a relatively short course of treatment.[211] However, if suitable therapists or programs are available, this can be a useful condition for cases where there are anger management or communication problems, *provided* that there are not significant safety concerns and the abuser indicates a willingness to engage in counselling.

In *Aguilera v. Reid*, Rogers J. ordered that a violent husband would only have supervised access for two hours, twice a month, but offered some suggestions for the type of actions that he would have to undertake to get unsupervised access at some future time. Rogers J. suggested that the husband should undergo counselling for his drug and alcohol abuse, see a psychologist to deal with his issues of anger and violence and eventually obtain a report from that professional about his progress. The judge commented:[212]

> The court feels the respondent ought to have some guidance as to what would advance his claim. This judicial officer cannot predict the future but suggests

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210 See e.g. *Orszak v. Orszak* (2000), [2000] O.J. No. 1606, 2000 CarswellOnt 1574 (Ont. S.C.J.) per Himel J.

211 *W. (D.J.A.) v. T. (G.D.)* (2000), [2000] S.J. No. 594, 2000 CarswellSask 578 (Sask. Q.B.) per Kraus J; expert concludes that abusive conduct cannot be resolved in a one day or five day course.

212 (sub nom. *R.A. v. J.R.*) [2006] O.J. No. 810, 2006 CarswellOnt 1227 (Ont. S.C.J.), at para. 39.

> to the respondent that he ought to demonstrate he is capable of change. . .The court shall not make these suggestions terms of any order.

It is common for judges to make orders that a parent not consume drugs or alcohol during access visits. This type of order may well be appropriate. If the non-custodial parent appears for an access visit and is intoxicated, the custodial parent will then be justified in denying access. Indeed, even in the absence of such an explicit term, a custodial parent would have the right (and indeed the duty) to not give over the care of a child to the other parent if they appear intoxicated. The situation becomes much more problematic, however, if the use of drugs or alcohol occurs during the visit. Is the child to be expected to "report" on the non-custodial parent? How should the court assess the credibility of the custodial parent's statements about the child's report? Should the child be called as a witness on an application for contempt (by either parent), or on an application to terminate or suspend access?[213]

In *Dhaliwal v. Dhaliwal*[214] the husband was physically and verbally abusive to his wife, often in the presence of his children, and abusive of the eldest daughter. The family was a part of the Sikh community in Canada; the husband frequently used a Punjabi term to verbally abuse his wife which was "extremely offensive and degrading.... [and which had] serious repercussions on a woman's reputation, social status and acceptability in the Sikh community." The woman suffered depression and anxiety, exacerbated by her loss of status within the Sikh community. Justice Métivier awarded custody to the woman (calling the man's custody application "frivolous") and awarded her a $10,000 damage judgment in tort. As a condition of access the father was ordered to use his "best efforts to ensure that all people in contact with the children say nothing bad about their mother." This type of order may send a clear and appropriate message to the father, even though enforcement may be very problematic.

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213 Similar enforcement problems could arise out of a British Columbia case where Smith J. ordered that a non-custodial mother should not smoke during access visits with her seven-year-old son; see "Mom agrees to butt out on trip" *National Post* (15 December 2000), subject of a critical commentary by Donna LaFramboise, "Courts often encourage parents to keep bickering" *National Post* (19 December 2000).

214 (1997), [1997] O.J. No. 5964, 1997 CarswellOnt 5774 (Ont. Gen. Div.).

In *Pavao v. Pavao*,[215] the court imposed a restraining order and denied access to the father who had a history of abusing his former wife and children, though it also ordered that mother should give the children any presents or letters sent by the father and advise him "forthwith in writing if either child requests contact with him." This type of order provides immediate protection to the mother and children while giving an appropriate message to the mother that she should respect the wishes that the children may in the future express about their father. The order may also offer some solace to the father who is losing access.

In many cases of moderately high conflict, it may be useful for a judge to try to exhort parents towards "good behavior" and appeal to their "better natures," even though the judge is aware that the order is effectively unenforceable. The judge need not (and should not) tell the parties that the order is "effectively unenforceable," as the "magic" of such an order is that many parents will make good faith efforts to comply. This type of order may be especially appropriate if there is a lack of resources for mediation, but the parents seem like they will respond to judicial exhortations towards good behavior.

Ultimately, however, judges and parents need to recognize that the law is a blunt instrument and that judicial wisdom and social resources are limited. In very high conflict situations, and cases where there are significant issues of physical safety, it is submitted that judges should focus on making orders that are clear, can be enforced, and that reduce the risk of injury and opportunities for further argument. Even then, enforcement issues, whether by contempt application or variation of custody or access, can be highly problematic.

In some cases, even if access is terminated, an abusive parent will attempt to use the legal system to harass a former partner, bringing repeated applications to vary to allow access to resume. In such cases, it may be appropriate to impose cost sanctions, making any further applications conditional on the prior costs order being paid. It may also be appropriate to impose pre-conditions on any future applications of the abusive spouse, such as that he produce evidence about his criminal record and medical or psychological treatment. [216] If there are concerns about use of the justice system to harass a parent, every effort should be made to ensure that one judge will continue to handle the case at each

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215 (2000), [2000] O.J. No. 1010, 2000 CarswellOnt 1002 (Ont. C.J.), per Dunn J.

216 See e.g. *Roach v Kelly*, [2003] O.J. 5081 (Sup. Ct. - Fam. Ct.).

application or appearance, so that the court can be more fully aware of the manipulative and abusive aspects of the relationship.

(f) Spousal Violence & Relocation

Spousal violence may be a factor in a court allowing a custodial parent to relocate with a child. However, except where children are witnesses to the violence between the parents or have been directly abused, courts seem reluctant to acknowledge that domestic violence and high levels of conflict are also important factors in relocation decisions. The mere fact that there are allegations that there was spousal violence during the marriage may not be sufficient to justify a relocation order, but there are Canadian cases in which post-separation spousal violence is cited by the court as a reason for allowing the move, in the hope that this will afford the mother and children some protection.[217]

In deciding whether to allow relocation, the court will be concerned with the seriousness of the allegations, whether they are proven in court, and whether the violence has continued after separation. Thus, even if the court is satisfied that the husband forced his wife to have intercourse during the marriage, if the court is not satisfied that other acts of violence occurred, it may not grant her request to relocate with the children after separation.[218] If the court concludes that the person making the allegations, invariably the woman, has significantly exaggerated her concerns

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217 *Lawless v. Lawless* (2003), 2003 CarswellAlta 1409, 2003 ABQB 800 (Alta. Q.B.); the Court refused to order the return of the children because the mother had left to escape an abusive relationship. In the Manitoba case of *Cameron v. Cameron* (2003), [2003] M.J. No. 234, 41 R.F.L. (5th) 30, 2003 CarswellMan 268 (Man. Q.B.) the mother was permitted to move with the children from Manitoba to Alberta, though the father was granted significant periods of unsupervised access. The move was allowed in large measure because of the mother's "justified fears" of her former husband because of his history of assaultive behaviour toward her. See also *Guthro v. Guthro*, [1997] N.S.J. 91 (C.A.); *G. (H.) c. F. (J.)* (2003), [2003] M.J. No. 234, 2003 CarswellQue 14639 (Que. Q.B.); *Joudrey v. Joudrey* (2006), 2006 NSFC 34, 2006 CarswellNS 391 (N.S. Fam. Ct.); and Ikem, "You Can Run But Can You Hide: Relocation Rights and Domestic Violence" (1996) Clearinghouse Review 308.

218 *M. (T.K.) v. M. (P.S.)* (1999),[1999] A.J. No. 284, 1999 CarswellAlta 226 (Alta. Q.B.), per Lee J.

about spousal or child abuse and concludes that there are not serious safety concerns, it is likely to dismiss a request to move.[219]

It is undoubtedly necessary for courts to require that allegations of abuse are proven if they are to be taken into account in a relocation case. It is, however, submitted that the effects of high conflict and animosity between parents may justify a move to protect the well-being of a child, even if all of the allegations are not fully substantiated. Clearly, in a relocation case, abuse allegations do not have to be substantiated by a criminal conviction or on the criminal standard of proof, for the issue is not whether one parent is abusive and needs to be punished, but rather what childcare arrangements are in the best interests of the child.

In some cases, a significant geographical separation of the parents may be the best way to allow animosity to dissipate, or at least to reduce its effect on the children. In such cases, the court allows the primary caregiver to move with the children, even if the court concludes that the conflict is not wholly the fault of the non-custodial parent.[220] In *Elliott v. Elliott*,[221] the court allowed the mother to move with the child from Barrie to Toronto in the hope that this would help to reduce the level of conflict between the parents. The father had been seeing the six-year-old child daily, and at the exchange of the child there were frequently arguments, use of profane language, "and demonstrations of outright hatred which cannot but have had a devastating effect" on the child. Justice Wood observed that neither party was blameless, but that the father caused the majority of the difficulty that the parties experienced. The judge concluded that "the absence of daily contact between the child and [her father]. . .will actually benefit her by removing her from the conflict between the parties."

In cases where an important the reason for the move is the abusive behavior of the father, it is necessary for the woman to establish, on the balance or probabilities, that there has been abusive behavior and that it is likely to reoccur.

In cases where the main concern is the level of conflict between the parents rather than violence *per se,* there may be a greater reluctance to

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219 *Stead v. Stead* (2005), [2005] O.J. No. 5203, 2005 CarswellOnt 7064 (Ont. S.C.J.) per C.F. Graham J.

220 See e.g. *Noble v. Boutilier* (2005), [2005] O.J. No. 3825, 2005 CarswellOnt 4340 (Ont. C.J.) per McSorley J.; and *Laturnus v. Laturnus* (2004), [2004] S.J. No. 446, 2004 CarswellSask 485 (Sask. Q.B.) per Matheson J.

221 (1998), [1998] O.J. No. 4827, 1998 CarswellOnt 4470 (Ont. Gen. Div.) per Wood J.

allow a long distance move, especially one out of the province, as maintaining regular contact and enforcement of access may be a real concern. In these cases, allowing the parties to live an hour or two drive from each other with some form of supervision of the exchange of care for the child or with the access parent picking up and leaving the child at school at the start and end of the weekend to limit opportunities for direct contact between the parents, may be an appropriate way to reduce parental conflict. Such an arrangement allows the child to have significant time with both parents,

(g) Not Forcing Return to the Jurisdiction of Abusive Partners

In some cases of serious spousal violence, victims have felt that the best (or only) way to ensure the safety of themselves and their children is to leave the jurisdiction where they lived together with their abusive partner. These cases involve female victims who are threatened or assaulted after separation, as serious post-separation violence perpetrated by females against their male partners is very rare.

Ordinarily, the courts are very concerned about one parent unilaterally removing a couple's children from their jurisdiction of habitual residence. Canada is a signatory to the *Hague Convention on the Civil Aspects of Child Abduction,* which discourages unilateral removal of a child from the jurisdiction of habitual residence. The *Convention* generally requires the return of a child to the jurisdiction of habitual residence to allow the courts of that state to resolve any factual disputes, and make a determination on the basis of the best interests of the child. In some cases, however, the courts have accepted that if there has been serious domestic abuse, the most effective way for a woman to try to ensure the safety of herself and her children is to leave the jurisdiction where she lived with her abusive partner. There is an onus on the woman to adduce clear evidence of a "grave risk" of harm before the courts will endorse such conduct by a victim of abuse.

The *Hague Convention* Article 13 provides an exception to the requirement for return of a child to the jurisdiction of "habitual residence" when there is a "grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." This provision may be invoked in cases where a pattern of serious spousal abuse creates a "grave risk" to a child.

In *Pollastro v. Pollastro* the mother moved from California to Ontario, where her parents resided, fleeing her abusive husband with the

couple's six month old son after a particularly abusive incident. She obtained an interim *ex parte* order for custody in Ontario and the father then obtained an interim order in California for custody and the return of the child. The mother was not represented and did not appear in the California proceedings. The father then sought to invoke the *Hague Convention* in Ontario to have the child returned to California, where the child was born and had always resided.

In addition to her own testimony about many incidents of physical and verbal abuse by her husband, the mother adduced affidavit evidence from her co-workers and friends in California. There was also evidence from a doctor in Canada whom the mother and child saw soon after her arrival, documenting that the mother reported suffering abuse. The doctor also described the effect that the abuse seemed to have on the child, who was in an "agitated state" soon after his arrival in Canada, but seemed much calmer after several months away from his father. There were also extensive audiotapes of abusive and threatening phone calls that the mother and her relatives received from the father in California. The trial judge ordered that the mother return to California with the child, stating that the courts in that state could deal with the mother's "allegedly stormy relationship" as evidence of harm goes to the merits of a custody hearing. In reversing this decision and allowing the mother to stay in the Ontario, Abella J.A. of the Court of Appeal wrote:[222]

> Although . . .the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.
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> . . .the threatening phone calls reflect a *continuing inability on the father's part to control his temper or hostility*. This means that the mother, who would inevitably accompany the child if he is ordered to return to California, would be returning to a dangerous situation. *Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, Tyler's interests are inextricably tied to her psychological and physical security....*
>
> *There is also evidence that returning Tyler to California represents a grave risk of exposure to serious harm to him personally.* The father's hostility, irresponsibility and irrational behaviour are ongoing. Although John Pollastro

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222 (1999), 43 O.R. (3d) 485, 1999 CarswellOnt 848 (Ont. C.A.) per Catzman, Abella and Feldman JJ.A. Emphasis added. See also *Ndegwa v. Ndegwa* (2001), 20 R.F.L. (5th) 118, 2001 CarswellOnt 2528 (Ont. S.C.J.); *Rajani v. Rajani*, [2007] O.J. 3501 (Sup. Ct. J.); and Merle Weiner, "International Child Abduction and the Escape From Domestic Violence" (2000) 69 Fordham L. Rev. 593.

> has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child....
>
> Tyler is barely two years old. His safety is seriously at risk if he is forced to return to the very volatility which caused his mother to leave with him in the first place. He and his mother would be removed from the sanctuary of her family in Canada, and forced to return to California where the potential for violence is overwhelming. This exposes the child to the serious possibility of substantial psychological and/or physical harm and, in addition, creates a grave risk that he would be placed in an intolerable situation.

A few months after *Pollastro,* the Ontario Court of Appeal dealt with another case involving the *Hague Convention* and allegations of spousal abuse, *Finizio v. Scoppio-Finizio,* reaching a different conclusion in a quite different factual situation.[223] The spouses lived together in Italy and had two children. After the separation, there was one incident in which the husband came to where the wife was staying. An argument ensued, not in the presence of the children, and the husband allegedly punched the wife in the face. The mother testified that she sought medical attention, though no medical report was filed with the court. After the alleged assault, the husband continued to visit with the children without incident. Some six weeks after the alleged assault, the mother left Italy with the children, returning to Ontario, where she had lived prior to the marriage and where her parents lived. The Court of Appeal reversed the trial judge and ordered the children to be returned to Italy.

In *Finizio* there was a single assault, no escalating and continuing pattern of abuse, and a dispute on the facts about what had happened in that incident.[224] While recognizing that "in certain circumstances a phys-

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223 (1999), 46 O.R. (3d) 226, 1999 CarswellOnt 3018 (Ont. C.A.). See also *Toiber v. Toiber* (2005), [2005] O.J. No. 6139, 25 R.F.L. (6th) 28, 2005 CarswellOnt 8366 (Ont. S.C.J.), affirmed (2006), 2006 CarswellOnt 1833, 25 R.F.L. (6th) 44 (Ont. C.A.) where the court ordered the return of a mother and her two children to their habitual residence in Israel; Hoilett J. observed that there was a complete absence of any corroboration for any of the mother's allegations of spousal violence.

224 See also *Hawke v. Gamble* (1998), [1998] B.C.J. No. 2481, 1998 CarswellBC 2501 (B.C. S.C.) where the court ordered the mother to return with her two children to Texas, the children's "habitual residence." McKinnon J. concluded that the mother's evidence of abuse, in the face of the father's denials and evidence that the mother had exaggerated or fabricated the allegations, was not sufficient to establish "grave risk" to the children. Further the British Columbia Court refused to invoke Article 12 of the *Convention,* which provides that the courts may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of

ical attack on the mother could cause psychological harm" to the children, there was no evidence of such harm in this case. The Court of Appeal also noted that there was no evidence that the Italian courts and police could not adequately protect the mother. This distinction is not, however, very persuasive, since the reality is that the police and courts can never fully protect a woman from an abusive spouse. Rather, a better distinction is that the assault in *Finizio* could be characterized as a separation-instigated incident, with a good prognosis for not recurring, whereas the situation in *Pollastro* involved an abusive controlling man who was very likely to continue or escalate in this pattern of behavior, unless the man was actually in jail. The Court of Appeal appeared to recognize this distinction, with MacPherson J.A. distinguishing *Finizio* from the "terrifying situation" in *Pollastro.* Although not explicitly stated by the Court of Appeal, it does seem significant that in *Pollastro* the mother was clearly *fleeing* an abusive man, with genuine concerns about her physical safety. By contrast, in *Finizio* the mother seemed to be leaving a situation that might understandably have become psychologically difficult for her, but was not proven to pose a recurring risk to her safety. Justice MacPherson in *Finizio* concluded:[225]

> the risk [to the *child]* has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree ... that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words [in Art. 13 of the *Hague Convention*] 'or otherwise place the child in an intolerable situation'.

It is submitted that courts dealing with parental relocation and jurisdiction questions should not only consider risk to the child, but also consider the risk to the custodial parent from the abusive spouse.[226] If

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maturity at which it is appropriate to take account of its views. The judge was concerned that after several months in the mother's exclusive care, the stated wishes of the children were likely to be heavily influenced by her.

225 At para 28; see also *Katsigiannis v. Kottick-Katsigiannis* (2000), [2000] O.J. No. 4443, 2000 CarswellOnt 4469 (Ont. S.C.J.) per Seppi J., affirmed (2001), 2001 CarswellOnt 2909, [2001] O.J. No. 1598 (Ont. C.A.).

226 For a case where the court may not have given sufficient weight to the decision of an abused mother to relocate 1150 km to be closer to her family and be free of the domination of her abusive former husband, see *Filipe v. Filipe* (1995), 14 R.F.L. (4th) 378, 1995 CarswellBC 423 (B.C. S.C.). For a critique of some of the decided case law in a number of countries, see Miranda Kaye, "The Hague Convention and the Flight from Domestic Violence: How

the custodial parent is physically harmed or psychologically terrorized by the non-custodial parent, this also poses a grave risk to the child's welfare. However, as with other issues, there is a need for the court to assess the nature of prior abuse, its direct and indirect effects on the child, and the likelihood of its recurrence.

12. EXPERT EVIDENCE & ASSESSMENTS IN CASES OF SPOUSAL ABUSE

The information, opinions and recommendations of expert witnesses, such as psychologists, psychiatrists and social workers, especially when they are appointed as assessors by the court or with the agreement of both parties, are often determinative of a child-related dispute. Although the family law jurisprudence has repeatedly stated that judges are not bound by an assessor's opinion, in practice in most cases where there is a recommendation from a competent assessor, the assessment will form the basis of the court's decision. In many cases, parents will settle their dispute after the assessment process, feeling that they have at least had the opportunity of being heard by an "objective expert," or recognizing that they will be unlikely to persuade a judge to take a position different from that recommended by the assessor.

Despite the value of assessors' factual reports and recommendations, there are special concerns about assessments that may arise in cases involving allegations of domestic violence. Assessors dealing with cases where spousal abuse is a factor require an understanding of the dynamics of these cases and need to be able to deal with individuals who may be denying their conduct or who are manipulative or deceitful. If an assessor lacks the necessary knowledge and experience in dealing with cases where spousal abuse may be an issue, the opinion of the assessor should be heavily discounted in such cases.[227] Counsel and courts must ensure that assessors in these cases are unbiased, have the requisite knowledge and experience and that any assessment is conducted in a competent fashion.

It is preferable in a case involving allegations of domestic violence for an assessor providing a recommendation about a case to be able to assess all of the parties and meet with the children, though there may be

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Women and Children are Returned by Coach and Four" (1999) 13 Int'l J.L. Pol'y & Fam. 191.

227 *Haider v. Malach* (1999), [1999] S.J. No. 315, 1999 CarswellSask 310 (Sask. C.A.), leave to appeal refused (1999), [1999] S.C.C.A. No. 374 (S.C.C.).

cases in which an experienced assessor can provide valuable evidence without seeing all the parties involved.[228] Professionals who have therapeutic or a client relationship with one party may be seriously misled about the true dynamics of a case, though there can be a role in some cases for evidence from a doctor or other professional who has worked with only one parent, for example to provide evidence to corroborate allegations of abuse.

Judicial education programs in Canada now regularly deal with domestic violence issues, and judges are generally expected to have some appreciation of the "social context" of family law, even in the absence of an expert testifying.[229] However, an assessor appointed by the court may be in the best position to provide the court with information about the family in a relatively efficient and objective fashion. In particular, a competent assessor (or the lawyer appointed to represent the child) may be the person in the best position to meet and know the child, and bring forward the child's views, feelings and perceptions; this may be especially important where domestic violence may have caused a child to have continuing fears of a parent.[230] Where there has been a history of spousal abuse, a qualified expert witness may also be in a good position to help the court assess the likelihood of future risk of harm to the child and parent. On the other hand, if the assessor lacks training in dealing with abuse issues, fails to conduct a proper assessment or only meets with one of the parties, the opinion of the assessor may well be discounted by the court.[231]

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228 *W. (D.J.A.) v. T. (G.D.)* (2000), [2000] S.J. No. 594, 2000 CarswellSask 578 (Sask. Q.B.) per Kraus J [*D.J.A.W.*].

229 For a general discussion of the extent to which judges in family law proceedings should rely on judicial notice and not require expert testimony, see C. L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551; R.J. Williams, "Grasping a Thorny Baton...A Trial judge Looks at Judicial Notice and Courts' Acquisition of Social Science" (1997) 14 Can. Fam. L.Q. 179; and N. Bala & A. Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2003) 20 Can. Fam. L. Q. 277.

230 *Pavao v. Pavao* (2000), [2000] O.J. No. 1010, 2000 CarswellOnt 1002 (Ont. C.J.), per Dunn J.; *Roda v. Roda* (2000), [2000] O.J. No. 3786, 2000 CarswellOnt 3558 (Ont. S.C.J.) per Sachs J.; *W. (D.J.A.) v. T. (G.D.)* (2000), [2000] S.J. No. 594, 2000 CarswellSask 578 (Sask. Q.B.) per Kraus J.

231 See *A. (J.) v. A. (D.)* (2000), [2002] O.J. 2315, 2002 CarswellOnt 1911 (Ont. S.C.J.) where the court rejected the expert evidence of a psychologist, Dr. Jaffe, who assessed the mother over a year after the separation and concluded that she was a victim of spousal abuse and that the father should not have

While assessments and experts are important, there can be significant costs in retaining experts, and in many places in Canada many individuals involved in custody or access disputes will have to have their cases resolved without the involvement of a qualified expert or assessor.

13. MEDIATION IN CASES WITH SPOUSE ABUSE ISSUES

Some advocates for women have argued that if there is any history of spousal abuse, mediation is not appropriate because an abused woman cannot protect her interests. Prompted by criticism from advocates for abused women, mediators have begun to recognize the importance of issues of domestic abuse and power imbalances. Prominent Canadian mediators have articulated the principle that: "While we are neutral as to the particular agreement reached (provided it is reached voluntarily), we are not neutral about the safety of our clients and their children."[232]

The Ontario Association of Family Mediators has developed a *Policy on Abuse*, which recognizes that: "Abuse in intimate relationships poses serious safety risks and may significantly diminish a person's ability to mediate."[233] The *Policy* requires mediators to have training in dealing with situations where there has been abuse; to screen out inappropriate cases by having initial individual screening meetings with each party; and, to take steps to ensure safety of clients during the mediation process. The *Policy* also states that there should not be mediation about "the fact of abuse," though there can be mediation about the appropriate response. While the *Policy* does not explicitly direct how a mediator

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custody of the children. The court noted that the expert's conclusions were based on "self reporting" by the mother. On the limitations of one sided assessments when spousal abuse is at issue in a family law case, see *A.J.K. v. S.L.M.*, [2003] O.J. 2180 (Sup. Ct.) (Mother's assessor did not see father); and *Roach v. Kelly* (2003), [2003] O.J. No. 5081, 2003 CarswellOnt 5037 (Ont. S.C.J.) (Risk assessment of psychologist who examined father as part of parole application discounted).

232 Barbara Landau, "The Toronto Forum on Woman Abuse: The Process and the Outcome" (1995) 33 Fam. Ct. Rev. 63 at 71.

233 Barbara Landau, "The Toronto Forum on Woman Abuse: The Process and the Outcome" (1995) 33 Fam & Council. Cts. Rev. 63, at 76-78. See also Aimee Davis, "Mediating Cases Involving Domestic Violence: Solution or Setback?" (2006), 8 Cardozo J. Conflict Resolut. 253 advocating use of mediation in cases where there has been domestic violence, provided appropriate measures are taken to protect women and this is the form of dispute resolution a woman wishes to use.

should respond to the common scenario of a husband (or wife) denying or minimizing their abusive behavior, if one spouse is alleging abuse, the case is not appropriate for mediation, even if the other spouse is denying the allegation.

If these policies and principles are followed, a victim of abuse who has recovered her self-confidence and no longer fears her former partner, might be a suitable candidate for mediation, provided that she wishes to try this alternative to litigation or negotiation through counsel, and that she has independent legal advice before an agreement is concluded.

Mediation is not a regulated profession, and perhaps not surprisingly, research from the United States and England indicates that many mediators are still not adequately trained to recognize and deal with cases where there has been domestic violence.[234] There is a similar problem with lack of education, supervision and training for all mediators about abuse issues in Canada. A study of domestic violence cases in New Brunswick by Linda Neilson suggests that staff mediators with heavy caseloads often deal ineffectively with spousal abuse issues.[235] Judges and lawyers often refer disputes to mediation, especially those involving access disputes, despite the presence of allegations of spousal abuse. In addition, staff mediators often pressure abused women to accept generous access terms, without dealing adequately with the fears and safety concerns of the women and their children.

14. CHILD PROTECTION PROCEEDINGS

Spousal violence potentially endangers the physical and emotional well being of children and may be a factor in determining whether a child is in need of protection. It is now a common police policy for officers to be obliged to contact the local child protection agency whenever they answer a domestic violence call and find children in the home.

In New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, Manitoba, Saskatchewan and Alberta, child protection legislation

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234 N. Thoennes., P. Salem, & J. Pearson, "Mediation and Domestic Violence: Current Policies and Practices" (1995) 33 Fam. Ct. Rev. 6. David Greatbatch & Robert Dingwall, "The Marginalization of Domestic Violence in Divorce Mediation" (1999) 13 Int'l J.L. Pol'y & Fam. 174.

235 See Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" (2004), 42 Family Court Review 411-43. See also C. Chewter, "Violence Against Women and Children: Some Legal Issues" (2003) 20 Can. J. Fam. L. 99.

specifically refers to domestic violence as a factor in finding that a child is in need of protection. For example, the New Brunswick *Family Services Act* s. 31(1)(f) states that the "security or development of a child may be in danger when ... the child is living in a situation where there is severe domestic violence." The courts in other provinces have also demonstrated a willingness to take account of spousal violence as a factor in child protection proceedings.[236] While living in a home with spousal violence is often emotionally damaging, if this is the only child protection concern, there is a need to carefully weigh the risk of harm to the child from the violence against the emotional harm that may result from removal from the care of a non-abusive parent.[237] When protection proceedings are commenced, there are usually other child protection concerns beyond spousal violence; there may, for example, be a concern that the abusive partner is directly abusive of the children, or the parenting capacity of the abused parent may have been seriously compromised by the abuse.

In some cases where the father is abusive of his spouse and children, the child protection agency may become involved and the agency or courts may allow children to remain in the mother's care only on condition that the father has no contact, or that his contact is fully supervised.[238] In some abusive relationships, in the pattern of Lenore Walker's "cycle of violence," the abused woman may agree that her partner is to move out, but later allows the man to move back in during his next "contrition phase", again endangering children and provoking the

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236 See e.g. *Children's Aid Society of Sarnia (City) & Lambton (County) v. S. (D.R.)* (1995), [1995] O.J. No. 4127, 1995 CarswellOnt 672 (Ont. Prov. Div.). See L. Weithorn, "Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes" (2001) 53 Hastings L.J. 1; M. Nowling, "Protecting Children Who Witness Domestic Violence: Is *Nicholson v. Williams* An Adequate Response?" (2003) 41 Fam. Ct. Rev.517.

237 In the U.S.A., there has been litigation to restrict the removal of children from the care of mothers who are victims of spousal abuse when there are not other child protection concerns; *Nicholson v. Scoppetta*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); discussed in H. White, "Refusing to Blame the Victim for the Aftermath of Domestic Violence: *Nicholson v. Williams* is a Step in the Right Direction" (2003) 41 Fam. Ct. Rev. 527; and Amanda Jackson, "*Nicholson v. Scoppetta*: Providing a Conceptual Framework for the Non-Criminalization of the battered Mother and Alternatives to Removal of Their Children From the Home" (2005) 33 Cap. U. L. Rev. 821.

238 See e.g. *Children's Aid Society of Simcoe (County) v. M. (D.)* (2000), 9 R.F.L. (5th) 286, 2000 CarswellOnt 2059 (Ont. S.C.J.).

agency to apply to remove the children from mother's care.[239] In abusive relationships, the court may expect evidence that the mother understands the cycle of abuse and has broken the pattern, for example by seeking counselling, leaving the relationship and moving into a shelter. The mother's failure to terminate an abusive relationship can be a reason for making the child a permanent ward, though it is necessary for the agency to establish that the abuse is sufficiently serious to have an effect on the child's wellbeing.[240]

In *Children's Aid Society of Ottawa v. R.N.*[241] the agency had been involved for seven years with a mother who was a victim of spousal violence, and had closed its file six times, on each occasion believing that she had ended the abusive relationship. The mother was repeatedly assaulted by her son's father, and suffered from depression and various emotional problems. She had gone to a shelter and undertaken therapy and had been advised by shelter staff and therapists to end the abusive relationship for the sake of herself and her daughter. The mother repeatedly told agency staff and other professionals that the relationship was over, but she kept allowing the father to move back in with her, despite criminal court orders prohibiting this, and she was not honest with agency staff about her relationship with him. On the last occasion when the agency opened its file, the child was eight years old and displaying anger and violence towards her mother, having tantrums, and refusing to attend school. The girl's behavior improved in foster care. At trial several agency workers testified about the girl and her mother. There was no expert evidence about the child, but there was expert evidence from a domestic violence worker that the mother was unlikely to give up the relationship with the father, though at the time of the trial he was in jail for his assaultive behavior. The child was in foster care for a year and had expressed a desire to return to her mother's care. In

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239 *Children's Aid Society of Peel (Region) v. T. (P.)* (1995), [1995] O.J. No. 103, 1995 CarswellOnt 2162 (Ont. Prov. Div.); and *Children's Aid Society of Ottawa-Carleton v. R. (E.)* (2002), [2002] O.J. No. 751, 2002 CarswellOnt 774 (Ont. S.C.J.).

240 See e.g. *New Brunswick (Minister of Health & Community Services) v. L. (B.)* (2000), [2000] N.B.J. No. 67, 2000 CarswellNB 63 (N.B. Q.B.); *Nova Scotia (Minister of Community Services) v. Z.(S.)* (1999), 5 R.F.L. (5th) 435, 1999 CarswellNS 396 (N.S. C.A.); *Children's Aid Society of Ottawa-Carleton v. R. (E.)* (2002), [2002] O.J. No. 751, 2002 CarswellOnt 774 (Ont. S.C.J.).

241 *Children's Aid Society of Ottawa v. N. (R.)* (2002), [2002] O.J. No. 1562, 2002 CarswellOnt 1528 (Ont. S.C.J.) per Aitken J.

making the child a Crown ward with no access in the expectation that she would be adopted by the foster parents, Aitken J. wrote:[242]

> Like all children, [this child] needs a stable, secure environment free of violence and the threat of violence. . . .an adoptive family can provide that to her; R.N. [her mother] is not capable of providing that safety and security at this time. There is nothing in the evidence that leads me to conclude that [she] will be able to provide a stable, secure environment for M.R. in the foreseeable future.

As illustrated in the decision of Aitken J. in *R.N.*, in cases of serious and persistent spousal violence, judges in child protection proceedings are prepared to make children permanent wards, even in the absence of expert evidence about the effect of the violence on the children or legislation that explicitly specifies that spousal abuse is a basis for finding a child in need of protection. The foundation of judicial concern is the emotional harm that a child may suffer.

A similar approach to *R.N.* was taken by R. Spence J. in the recent Ontario case of *Catholic Children's Aid Society of Toronto v. R. (S.).*[243] The father committed frequent and often very serious acts of violence against the mother, including choking her and on one occasion firing a gun at her. Their three young children witnessed many of these abusive acts. There was an assessment of the mother and children; the mother was considered passive and lacking in parenting skills, and a psychologist who assessed the children testified that they had been traumatized by the spousal violence. The mother had an extensive history of involvement with workers from the child protection agency and with domestic violence workers. These workers encouraged her to end the relationship with the father and she repeatedly agreed to do this, but always resumed the relationship; in resuming the relationship she violated terms of child protection orders that the children were not to have contact with their father and was dishonest with the child protection agency staff. Justice Spence commented that the mother testified:

> that, if the children were permitted to live with her and the maternal grandparents, she would call the police if . . . [the father] were to show up on her doorstep. Her past conduct belies this promise. Her assertion that she has changed is, regrettably, without evidentiary foundation.

The court made an order for Crown wardship without access to allow the children to be adopted. In doing so, the judge rejected a plan that the

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242 *Children's Aid Society of Ottawa v. N. (R.)* (2002), [2002] O.J. No. 1562, 2002 CarswellOnt 1528 (Ont. S.C.J.) per Aitken J., at para. 96.

243 (2006), [2006] O.J. No. 2283, 2006 CarswellOnt 3487 (Ont. C.J.).

children would be placed under supervision with their paternal grandmother, commenting:[244]

> The paternal grandmother admitted that she has had great difficulty in managing [the father and his brother]. She acknowledged that they were abusive to each other and that the abuse even included the use of weapons. . ..It is revealing that the paternal grandmother, although acknowledging the constant fighting in her home, says that the younger children were not affected by it because they were not in the *physical* presence of the combatants at the time of the actual fighting. By this statement, she displays her lack of understanding of the impact of violence on children who live in a home where violence is a regular feature. The impact of violence on children goes beyond whether or not the children are physically present during all of the incidents. The immediate victims of violence live in the same home where the children live. The violence becomes a part of the lives of those victims. It becomes a part of how they act, how they conduct themselves, how they interact with others. And all the other persons who live in the home, the children included, cannot help but be affected by that violence-infused dynamic.

While permanent removal of children from the care of a custodial mother may be necessary if it is clear that she will not give up a relationship with an abusive partner, courts may be prepared to give an abused woman a "second chance" if satisfied that she will protect her children in the future. In *Children's Aid Society & Family Services of Colchester (County) v. M. (T.),* the mother had been repeatedly abused by the father of her youngest child, an infant, and had drug addiction problems. A temporary supervision order was made at an initial child protection hearing; the mother was ordered not to reside with the man and ensure that he had no contact with her eight year old son, who was still in her care; the mother also gave an undertaking that she would have no contact with the man, who was also prohibited from having contact with her under a criminal court order. A couple of weeks after the initial child protection order was made, agency workers and the police found the man in her home, hiding in a closet. The man was arrested for violating the terms of the criminal court order; although the boy was not present, the agency apprehended him. The mother testified at the interim care hearing, and the judge determined that the eight year old boy could be returned to her care under strict agency supervision with a clear condition that she was not to have contact with the man. The interim decision was upheld by the appeal court, which noted that

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[244] (2006), [2006] O.J. No. 2283 (Ont. C.J.), at para. 86.

the trial judge, who had the benefit of seeing the mother testify, had commented.[245]

> She has acknowledged that she has made a mistake. I think that's important. I think it's clear on cross-examination she didn't necessarily use all the options before her. ... I want to believe that these proceedings are a clear wake-up call to the mother as to how important continued communication and cooperation with the Agency is so those needs of [T.] can be met.

In some situations the concerns of the agency are not limited to abuse of the mother by the father, but rather it is a violent relationship involving mutual abuse, often combined with neglect or abuse of children.[246] If there is an ongoing pattern of spousal violence in these mutual abuse cases, the instability of both parents and the lack of protection for the child may make removal of the children more likely.

In some critical respects the issues that generally arise in child protection proceedings that involve spousal violence differ from those in private family litigation. The rules of evidence and standard for removal of a child from parental care is higher in a child protection proceeding, and typically the parents in a child welfare case are *both* denying or minimizing the allegations of violence. The levels and frequency of violence is generally higher in child protection cases and many of the cases are ones of "coercive controlling violence."

15. CONCLUSION: DEALING MORE EFFECTIVELY WITH SPOUSAL VIOLENCE

Until about two decades ago few professionals working in Canada's justice system were aware of the effects of spousal abuse on children who witnessed violence or lived in homes where it occurred. Over the past twenty years there has been a much research and professional education about spousal violence and its effect on children, and many

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245 (2006), [2006] N.S.J. No. 195, 2006 CarswellNS 197 (N.S. C.A. [In Chambers]) at para. 9.

246 See e.g. *Children's Aid Society of Ottawa-Carleton v. L. (R.)* (1996), [1996] O.J. No. 746, 1996 CarswellOnt 741 (Ont. Prov. Div.), affirmed (1997), 1997 CarswellOnt 2345 (Ont. Gen. Div.), affirmed (1998), 1998 CarswellOnt 1386, 38 R.F.L. (4th) 224 (Ont. C.A.), leave to appeal refused (1998), 231 N.R. 397 (note) (S.C.C.); see also Enos, "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children" (1996) 19 Harv. W.L.J. 229; and Daniel G. Atkins & John S. Whitelaw, "Turning the Tables on Women: Removal of Children from Victims of Domestic Violence" (1996) Clearinghouse Review 261.

professionals have gained an understanding of the dynamics of domestic violence, becoming skilled in intervention strategies. Legislation has been enacted in some Canadian jurisdictions that explicitly recognizes the significance of spousal abuse for judicial decisions about children and there is now a significant body of jurisprudence on the subject. It is, however, apparent that many lawyers, judges, mediators and assessors still do not appreciate the complex dynamics of spousal violence or respond adequately to the risks that it poses to children. There appears to be a significant *gap between theory and practice* in dealing with spousal violence in child-related cases; while legislation and reported cases are now recognizing the issues, knowledge is only being disseminated slowly and practices are even slower to change.

Studies from New Brunswick and Nova Scotia suggest that in the absence of clear evidence *of physical abuse of children*, mothers who are victims of spousal abuse are often pressured by mediators, lawyers, and judges at settlement conferences, to accept arrangements that give their abusive former partners significant contact with their children or to accept joint custody.[247] This research suggests that concerns about the safety of mothers are still often ignored in the systemic push towards "non-adversarial" resolution of family proceedings, even if there is a clear history of spousal abuse. Studies from the United States have found that when surveyed about their knowledge, most assessors are aware of the importance of spousal abuse issues,[248] but in practice assessors often overlook issues of spousal abuse when making recommendations about childcare arrangements.[249] Research into the practice of mediators in California raises similar concerns about inadequate screening for spousal abuse and suggests that abusive men may be more likely to obtain significant custodial rights in mediation than non-abusive men.[250]

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247 Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" (2004), 42 Family Court Review 411 -43, and C. Chewter, "Violence Against Women and Children: Some Legal Issues" (2003) 20 Can. J. Fam. L. 99.

248 J.N. Bow & P. Boxer, "Assessing Allegations of Domestic Violence in Child Custody Evaluations (2003) 18 Journal of Interpersonal Violence 1394-1410.

249 L.S. Horvath, T.K. Logan & R. Walker, "Child Custody Cases: A Content Analysis of Evaluations in Practice" (2003) 33 Professional Psychology: Research and Practice 557-565; and T.K. Logan, R. Walker, C.E. Jordan & L.S. Horvath, "Child Custody Evaluations and Domestic Violence: Case Comparisons (2002) 17 Violence and Victims 719.

250 Nancy E. Johnson, Dennis P. Saccuzzo & Wendy J. Koen, "Child Custody

While there has been a very significant increase in community and court-related resources in Canada for responding to spouse abuse, there is still a *lack of appropriate resources in many communities.* Although there are now parent education and supervised access programs as well as mediation services affiliated with many Family Courts in Canada, there is generally a lack of resources required to handle more complex family violence cases. Access to specially trained child custody and access assessors with expertise in domestic violence is limited as is appropriate treatment and intervention resources (including services for perpetrators, victims, and children). In many locales, there may be an absence of such basic services as parenting education, access supervision and mediation. Further, even where there is a spectrum of services available, the different services need to be better coordinated in order to monitor family members' progress and make revisions to parenting arrangements as needed.

Building systemic capacity also requires *education and training* for all professionals who work in the Family Court system including judges and lawyers. Education programs have to be available to help court-related professionals recognize domestic violence in all its forms and to assist them in developing the skills necessary to provide differential service responses to meet the level of need for separated spouses and their children. In some jurisdictions (e.g., California), mandatory training in domestic violence is a prerequisite for being a court-appointed child custody assessor and in many American states annual education about spousal violence is mandatory for all judges. In Canada, we have a long way to go in terms of ensuring all professionals have adequate education and training for these especially challenging cases.

Professionals, agencies and systems need to be able to *respond to spousal violence cases in an appropriate and differentiated fashion.* There must be a distinction made between cases where there have been minor, isolated violent acts and those where there has been a pattern of abuse that has traumatized victims and children. Issues of proof and credibility need to be better addressed. At present there are cases in which genuine victims are not getting the protection that they need because their claims have been inappropriately dismissed, perhaps because adequate evidence was not obtained. There also should be recognition that there are cases of false or exaggerated allegations of spousal

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Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect" (2005) 11 Violence Against Women 1022.

violence and that an erroneous determination is unfair to those falsely accused and harmful to children.

If the most intensive domestic violence interventions are misapplied to families who may be better characterized as experiencing transitory high conflict, there is the potential to harm parents' reputations, impede their problem-solving and communication abilities, and undermine parent-child relationships. Further, inappropriate intervention is an inefficient utilization of scarce resources. Conversely, an abusive spouse who engages community members and the court system in an unfounded diatribe about false allegations and parental alienation has to be identified and confronted early in the process. Failure to identify and differentiate cases at an early stage allows a manipulative parent to use the family justice to harass an ex-partner and may endanger the physical or emotional wellbeing of the children.

Special challenges for the justice system and community social services arise in cases where there are family law proceedings between separated parents at the same time as proceedings in the child protection or criminal courts. Specific protocols are required to guide practitioners in managing cases with domestic violence allegations that fall into the area between public safety for children (i.e., triggering criminal or child protection process) and private family law matters.

Although a number of provinces have enacted laws to better deal with spousal violence, there is a clear need for further *law reform in substantive laws and procedural rules* to better deal with these cases. Some Canadian jurisdictions have enacted emergency civil orders legislation, but a number of provinces including Ontario have not. A number of provinces now have child protection and private family laws that explicitly recognize that spousal violence affects the well-being of children, but most Canadian jurisdictions have not enacted such laws. While statutory reforms will only have a limited effect in the absence of education and appropriate services, such reforms would send an important signal to all in the justice system. [251] As in many American states, legislation in Canada should explicitly place an onus on a parent with a history of partner abuse to show that there is no risk to safety of the other parent or child from any parenting plan that is proposed. Procedural rules should ensure that there is judicial case management of high con-

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[251] See e.g. L. Neilson, "Putting Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, the Bad and the Ugly" (2003) 20 Can. J. Fam. L.11; and Susan Boyd, "Walking the Line: Canada's Response to Child Custody Law Reform Discourses" (2004) 21 Can J. Fam. L. 397.

flict cases, especially those where there are domestic violence concerns, so that one judge can become familiar with the particular dynamics of the case and reduce the likelihood of a spouse manipulating the justice system.

Finally, there are significant *gaps in the existing research* that limit our ability to understand cases and identify best practices. There is, for example, a lack of long-term follow-up studies to match children's adjustment with specific post-separation parenting arrangements in cases involving domestic violence. Most research has been conducted with families in the formal judicial system and less is known about the long-term experiences of those who choose not to engage this system. Research in the divorce and spousal violence fields has sometimes justifiably been criticized for using biased samples; for example many studies on joint custody may be skewed towards cooperative couples and give inadequate (or no) attention to spousal violence issues. Further, some research links outcomes to a single factor, when the reality is more complex; for example, negative outcomes associated with parental relocation may overlook the risk factors of domestic violence and poverty that triggered the move. There has also been little attention to understanding the process of perpetrators changing their behavior and appropriately healing the relationship with children in a respectful and safe manner. When it comes to individual cases, it is often hard to predict whether terminating contact promotes child healing or conversely, triggers idealization of the perpetrator and anger towards the victim parent. We know little about the restoration process and the circumstances under which healing the parent-child relationship is possible.

While there has been considerable progress in dealing with spousal violence in Canada, there is much still to be done.