



# **Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems**

**(Criminal, family, child  
protection)**

**A Family Law, Domestic  
Violence Perspective  
2013 Edition**

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**A Family Law, Domestic Violence Perspective**

**2<sup>nd</sup> Edition, 2013**

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**Presented to:**

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## Executive Summary

The purpose of this report is to document, from a family law perspective, best practice options when domestic violence cases are making their way through multiple proceedings (criminal, civil, family, and child protection). The intention is to identify practices that can promote the safety of family members, particularly children, while also ensuring fair, due process.

Research continues to document the legal system's failure to offer adequate support and protection to families, particularly to children, in domestic violence cases. Our legal systems were not designed with seamless, collaborative responses to domestic violence in mind. In fact, as a result of structural divisions that separate criminal, family and child protection matters, our legal systems sometimes work at cross purposes, wasting scarce therapeutic and community resources. Numerous researchers have cited court-system fragmentation as one of the leading causes of failure to protect adults and children. The result has been an undermining of public confidence in the administration of justice.

The author, Dr. Linda C. Neilson, a lawyer and socio-legal academic, has been conducting socio-legal research in the domestic violence and family law field for three decades, during the last ten years much of it in association with the National Judicial Institute.

Preparing materials for use in the legal system presents two major challenges. The first is the cross disciplinary challenge of translating comprehensive analysis of socio-legal and social-science domestic violence research into tools and principles that can be used fairly and equitably in a legal context, without creating bias. The second is systemic: the need to understand and address in a practical manner the complexities of a legal system that operates as an organic, evolving system composed of multiple, interlocking parts.

This report was written with educational and practical purposes in mind. Part 1 identifies the nature of the problem. Part 2 discusses terms. Part 3 offers law practitioners a quick reference overview of matters to consider when accepting a domestic violence case. Part 4 provides information and solutions relating to the collection and exchange of information across legal sectors. Part 5 explores problems occurring as a result of differing understandings of domestic violence among the legal sectors and explains how these differences affect the use and application of evidence. Part 6 introduces the reader to indicators of risk that domestic violence will continue, followed by Part 7 which focuses on indicators of the potential for lethal outcome; both explore how this information should be collected and shared across legal sectors. Part 8 examines evidence issues and procedural matters in interim proceedings at the intersection of criminal, family law, and child protection law. Part 9 focuses on cross-sector evidence issues during hearings, particularly the interpretation of evidence from the criminal law sector in a family law or child protection context, while Part 10 presents socio-legal information pertinent to best practices in the use of court-connected services. Part 11 offers concluding comments.

The manual is intended to support the work of practitioners in building professional networks across legal systems in order to promote the safety and welfare of Canadian families and children.



## PART 1: THE NATURE OF THE PROBLEM

### 1.1 Introduction

Socio-legal research demonstrates clearly the need to attend to systemic problems occurring within and between the legal systems. This report focuses on the intersection of criminal, family and child protection systems. Consequently, the report does not include discussion of: problems created by jurisdictional divisions in court authority over family law matters within provinces and territories;<sup>1</sup> the internal mechanics of family law and child protection processes; or best practice responses within family law and child protection systems *per se*. And notwithstanding the importance of the issues, the report does not focus on the assessment of child best interests in domestic violence family law contexts and excludes discussion of other important domestic violence issues such as: connections between domestic violence and international human rights; connections between domestic violence and immigration systems; connections between domestic violence and youth criminal justice. Although some of these issues may be mentioned in passing, the central focus of this report is a response to problems occurring at the intersection of criminal, child protection, and family law in a domestic violence context.

### 1.2 Social context

Gender-based violence against women is identified worldwide as one of the world's most pressing social and human rights challenges.<sup>2</sup> The economic costs, estimated at between 1.5 and 15 billion in Canada, 5.8 to 8.1 billion dollars in the United States, between 9.9 and 15.6 billion dollars in Australia and 23 billion pounds annually in the United Kingdom,<sup>3</sup> are staggering. Yet even these figures do not tell the whole story. The figures do not reflect the cumulative, compounding, long-term institutional costs – educational;

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<sup>1</sup> For example: *Ballinger v. Ballinger*, 2012 BCCA 205.

<sup>2</sup> See for example, United Nations “Women and Violence” on line at <http://www.un.org/rights/dpi1772e.htm>; UNFPA “Gender Equality” on line at <http://unfpa.org/gender/violence.htm>; United Nations *World Report on Violence Against Children*; Unicef *Behind Closed Doors the Impact of Domestic Violence on Children* <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>; World Health Organization “Violence Against Women” <http://www.who.int/mediacentre/factsheets/fs239/en/>

<sup>3</sup> Ting Zhang et al. (2012) *An Estimation of the Economic Impact of Spousal Violence in Canada, 2009* (Ottawa: Department of Justice, Canada); Colleen Varcoe et al. (2011) “Attributing Selected Costs to Intimate Partner Violence in a Sample of Women Who Have Left Abusive Partners: A Social Determinants of Health Approach” 37(3) *Canadian Public Policy*; Statistics Canada (2006) *Measuring Violence Against Women* Cat. 85-570-XIE at pages 35-45. National Centre for Injury Prevention and Control (2003) *Cost of Intimate Partner Violence Against Women in the United States*(Atlanta: National Centre of Injury Prevention and Control); National Council to Reduce Violence Against Women and Children (2009) *The Cost of Violence against women and their children* (Commonwealth of Australia); Australian Domestic & Family Violence Clearinghouse (2011) “Fast Facts the financial cost of domestic and family violence” Winter 2011 Newsletter 45 at page 9 citing numerous sources, and Rosa Campbell “Fast Facts: The Financial Cost of Domestic and Family Violence” in [Newsletter 45](#) (Australian Domestic & Family Violence Clearinghouse); Home Office (UK) *Domestic Violence A National Report* (Home Office).

work-place related; medical and mental health, drug and alcohol therapeutic; legal (juvenile, criminal, child protection, courts and court-connected services) – when we fail to intervene early and effectively in domestic violence cases. Neurological and medical scientific research is now verifying decades of social science research. The findings are demonstrating that high levels of toxic stress in the home - for example resulting from domestic violence - can negatively affect a child's neurological development. These actual physical changes can affect not only the one child's life but the lives of the child's children and beyond.<sup>4</sup> The social costs are multiplying. We can ill afford not to take effective action.

### *1.3 Locating the legal systems problem*

On the one hand, Canada has improved its responses to domestic-violence in the criminal sector, for example in the creation of specialized domestic violence courts, in improvements to *Criminal Code* protections for children, and in enhancements to judicial authority in connection with monitoring and imposed therapy. On the other hand, Canada - with the exceptions in British Columbia<sup>5</sup> – which has implemented new family law legislation – and Ontario – which has recently implemented legislation to offer protection to domestic violence ‘victims’ in the workplace<sup>6</sup> – is lagging behind other countries in the domestic violence field. The United States, the United Kingdom, Australia and New Zealand have all undertaken significant reforms in the domestic violence field regarding child-centered, research-evidence-informed family law policy and legal system reforms.<sup>7</sup>

Yet, while research-informed expertise on domestic violence has been available to policy makers, service providers, judges and lawyers, for decades, the expertise has not resulted in significant change in the legal system. The same recurring problems have been

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<sup>4</sup> Family violence is intergenerational. When children are harmed by exposure to intimate partner violence and or child abuse in the home, the effects can be long-term, even permanent. Medical child development experts are documenting the effects of high levels of stress in the home on child brain development. One of the best sources of dependable, public information on this issue is the National Scientific Council on the Developing Child at Harvard University, online at: <http://developingchild.harvard.edu/index.php/activities/council/>.

<sup>5</sup> British Columbia's Bill C -16, *Family Law Act* (2011) in force since March 2013, currently on line at [http://www.leg.bc.ca/39th4th/3rd\\_read/gov16-3.htm](http://www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm) is a step in the right direction. For further information refer to Ministry of Justice website: <http://www.ag.gov.bc.ca/legislation/family-law/index.htm>

<sup>6</sup> *Family Law Act*, S.B.C. 2011, c 25. Ontario has recently passed legislation designed to protect employees from domestic violence and other forms of violence in the workplace. The Centre for Research & Education on Violence Against Women and Children in Ontario has been granted funding to develop and implement threat assessment/risk management training for use in the workplace in cases of domestic violence.

<sup>7</sup> The Australian Commonwealth Government in particular directed considerable time and resources toward domestic violence research and policy development. This concentrated focus on evidence generated best-practices policy development to enhance family safety in domestic violence cases has led to family law legislation reforms as well as to new, proposed policy initiatives in connection with housing, economic security, workplace safety, and immigration. See, for example: Australia Law Reform Commission (2012) *Family Violence and Commonwealth Laws - Improving Legal Frameworks* (ALRC Report 117).

documented consistently and repeatedly in research studies across western legal jurisdictions (including Canada) for more than three decades.<sup>8</sup> The failure to act is rooted in two interlocking challenges: one disciplinary, the other systemic.

#### ***1.4 Confronting the disciplinary and systemic challenges***

Law and social sciences are distinct disciplines, in theory and in practice. While law is vested with responsibility to deliver justice in each and every individual case, social scientists and socio-legal researchers study and document social trends and human tendencies. As a result social science knowledge cannot be applied directly in a legal context. For example, social-science research demonstrates clearly that the majority of adults targeted by coercive domestic violence (see Part 5 for discussion of this term) are women. Nonetheless it is possible for men to be subjected to coercive domestic violence, in same sex relationships, and in, albeit less often, opposite sex relationships. If lawyers, judges and service providers were simply to apply social science research on gender and coercive domestic violence, the result would be injustice to individual men targeted by coercive violence. In the absence of disciplinary transformation from social science into law (legal principles and procedural tools), scientific information *per se* can do harm in individual cases. Lawyers and judges do not always make use of social science information, not because they are not aware of it but because they cannot simply apply it in legal negotiations or in court without risk of injustice. If scientific knowledge is to be made useful in a legal context, it must be translated into legal tools and practice principles. This constitutes a major challenge when writing best practice materials for the legal system in a domestic violence context.

The second challenge is systemic: the need to understand the legal system as it operates in practice. Legal systems - criminal, family, child protection - are composed of multiple, interlocking parts. Empirical research demonstrates domestic violence cases failing at the weakest links in legal systems - at the connections between court systems (civil, criminal, family, child protection) and within court systems at the connections among parts of court systems (for example at the connections among lawyers, experts, judges, mediators, assessors, and court-connected services). One of the reasons that legal responses to domestic violence cases fail<sup>9</sup> is because our systems (criminal, family, civil, child protection, immigration) operate separately in pursuit of differing goals.

Despite that the legal system was not designed with seamless, coordinated responses to domestic violence in mind, it is not unusual for one particular family to be involved

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<sup>8</sup> Socio-legal, court-system research throughout Canada, the United States, Australia and New Zealand has documented, consistently and repeatedly, over decades, how the persistence of deficits in specialized knowledge about domestic violence results in insufficient attention to child and adult safety in family violence family law, child protection, and criminal cases. References are available from the author on request.

<sup>9</sup> Although the vast majority of cases (80 to 95 %) are settled in negotiation or mediation processes, lawyers, mediators, and service providers who assist families in these cases tend to operate within legal system frameworks (criminal, family or child protection). The end result is that settlements tend to reflect the priorities of each system rather than a coordinated settlement response across legal systems. Indeed coordinating legal systems so that they operate in a seamless coordinated fashion is the ultimate goal of this report.

sequentially or simultaneously in two or more court systems (criminal, child protection, and family). Yet in a domestic violence context the priorities of criminal justice (due process, preservation of evidence, accountability, and public safety) do not always align well with either the welfare and safety priorities of the child protection system or with the family law system's focus on the best interests of the child, for example, maximizing contact with both parents. From the perspective of the particular family, the legal presumptions of innocence, of concern for child safety, of attempts to promote family reunification, and of maximizing the child's contact with both parents, as they operate in separate legal systems, may appear unintelligible and inconsistent.<sup>10</sup> Families are not only confronted with inconsistencies among legal systems, they must also grapple with a complex array of appointments with different sets of assessors, different sets of experts, and different sets of lawyers attached to the separate legal systems. Moreover, those various officials often have little understanding of how various parts of the legal system affect each other.

It is understandable that judges, lawyers, and other professionals who work in one legal system do not fully understand the operation of other legal systems. Yet, in the midst of this systemic complexity, how are families to know where to turn for help?<sup>11</sup> When legal systems and the services associated with them (mental health, drug and alcohol, domestic violence intervention, parenting and counseling programs) fail to operate in a coordinated fashion, safety nets fail and the risk of harm increases. Numerous reports cite court-system fragmentation as one of the primary causes of the failure of the legal system to protect targeted adults and children in domestic violence cases.<sup>12</sup>

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<sup>10</sup> Child welfare authorities, police and criminal courts, and family courts (custody and access) do not always operate in a consistent manner in domestic violence cases. For additional discussion, see P. Jaffe and C. Crooks (2005) "Understanding Women's Experiences Parenting in the Context of Domestic Violence: Implications for Community and Court-Related Service Providers" in *Violence Against Women Online*; C. Bourassa, C. Lavergne, D. Damant, G. Lessard & P. Turcotte (2008) "Child Welfare Workers' Practice in Cases Involving Domestic Violence" in *Child Abuse Review* 17(3): 174 to 190; E. Pence & T. Taylor (2005) [Building Safety for Battered Women and their children into the Child Protection System: A Summary of Three Consultations](#) (Greenbook Information).

<sup>11</sup> New court models are being proposed to deal with this issue: F. Levy, T. Ross and P. Guthrie (2008) *Enhancing Safety and Justice for Victims of Domestic Violence Voices of Women in the Queens Integrated Domestic Violence Court* (Vera Institute of Justice); B. Uekert et al. (2002) *Integrating Criminal and Civil Matters in Family Courts Performance Areas and Recommendations* (National Center for State Courts); L. Bartels (2009) "Challenges in mainstreaming specialty courts" in *Trends & Issues in crime and criminal justice* No. 383 October 2009 (Australian Institute of Criminology); National Council to Reduce Violence against Women and Their Children (2009) *Time For Action: The National Council's Plan for Australia to Reduce Violence Against Women and Children 2009-2021 A Snapshot* (Commonwealth of Australia).

<sup>12</sup> Mary Ellen Turpel-Lafond (2009) *Honouring Christine Lee - No Private Matter: Protecting Children Living With Domestic Violence* (Legislative Assembly British Columbia); Office of the Chief Coroner Province of Ontario (2010) *Eighth Annual Report of the Domestic Violence Death Review Committee*; [Law Reform Commission of Nova Scotia \(1997\) From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia](#) (Law Reform Commission); Linda C. Neilson (2002) "A Comparative Analysis of Law in Theory and Law in Action in Partner Abuse Cases: What Do the Data Tell Us?" *Studies in Law, Politics and Society* 26: 141-87; Deputy Ministers' Leadership Committee on Family Violence (2009) *Report of the Domestic Violence Prevention Committee*; E. Pence & M. McMahon (2003) "Working from Inside Outside Institutions: How Safety Audits Can Help Courts' Decision Making Around Domestic Violence and Child Maltreatment" in *Juvenile and Family Court Journal* 54(4): 133-47;

Thus if we are to address problems across court systems, we must employ a systems-based theoretical and methodological approach. In practical terms this requires an empirically informed understanding of how each component of the legal system - the judges, lawyers, the Crown, witnesses, children, mediators, intervention services - operate in practice in domestic violence cases. Then, in turn, we must explore how the components of each system affect the components of the other legal systems and how the connections (or lack thereof) among them affect process and outcome.

### *1.5 Outline of problems across legal systems*

In order to overcome the problems occurring at the intersection of family, child protection, and criminal systems, there are some system-wide challenges, well-documented in the socio-legal research, that we must respond to, such as:

- The non-disclosure of domestic and family violence
- Inconsistent understandings of the nature of domestic violence across legal systems
- Differences in the particulars of risk pertinent to each legal system and limited cross-sector understanding of those differences in each legal system
- Differences in the application of legal rules relating to disclosure, privilege, privacy and confidentiality and how those differences affect the use of information in other legal contexts
- Limited understandings of documented connections between coercive domestic violence and direct forms of child abuse as well as detrimental parenting practices
- Distracting litigation tactics employed by perpetrators (dominant aggressors) such as excessive use of litigation to harass, or the filing multiple claims in various court systems (also termed 'procedural stalking' or 'paper abuse'<sup>13</sup>)
- Differences in legal onus, timelines, and evidence rules among the various systems
- Limited understanding of the effects of decisions in one legal context on other legal proceedings
- Limited coordination of court processes and court-connected services, resulting in duplication and inconsistent use of community services across systems

In addition to such system-wide challenges is the need to attend to overlapping family and criminal issues, such as:

- Cultural 'blind spots' within and across legal and service sectors (for example, policies and practices that ignore forms of domestic violence associated with culture)
- Complex family needs associated with domestic violence, such as drug and

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Judicial Council of California, Administrative Office of the Courts, Centre for Families, Children and the Courts Unified Courts for Families *Improving Coordination of Cases Involving Families and Children*, online at: <http://www.courts.ca.gov/documents/ImprovingCoordination.pdf>

<sup>13</sup> S. L. Miller and N.L. Smolter (2011) "Paper abuse": when all else fails, batterers use procedural stalking" 17(5) *Violence Against Women* 637-650.

- alcohol abuse and mental health issues
- Settlement patterns in one legal context that affect other legal contexts
- Connections between civil and criminal child abduction
- ‘Victim’<sup>14</sup> ‘recant’ (Note: the terms ‘victim’, ‘targeted parent’, and ‘survivor of domestic violence’ are used interchangeably in this report. For discussion of controversies surrounding the term ‘victim’ see footnote 14.)
- Orders and agreements made in different legal systems that are not complementary and that fail to serve a common purpose

While time and resource constraints may not allow comprehensive discussion of each and every one of these issues, the author hopes that this document will, at the very least, shed light on these matters.

## **PART 2: TERMS**

The terms “domestic violence” and “family violence” refer to a range of extremely complex phenomena. Creating a common understanding across legal sectors is challenging because of differences in terminology; differences in types of violence, particularly in connection to distinguishing dominant aggressor from ‘victim’<sup>15</sup> violence; and differences in priority in connection with harm and safety.

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<sup>14</sup> The term ‘victim’ is not without controversy. Many experts prefer the term survivor because the term better reflects the fact that people targeted by domestic violence are not and should not be viewed as helpless or powerless. Many, perhaps most, people targeted by domestic violence engage in considerable effort, requiring considerable courage, to leave these relationships. J. Moldon’s article “Rewriting Stories: Women’s Responses to the Safe Journey Group” in L. Tutty, C. Goard (eds.) *Reclaiming Self issues and resources for women abused by intimate partners* (Halifax: Fernwood, 2002) demonstrates the therapeutic advantages of abandoning the term ‘victim’. As women heal, they stop identifying themselves as abused women and begin identifying themselves as women who have been abused. These are important concerns and, from a domestic violence research point of view, valid arguments. Nonetheless the term ‘victim’ will commonly be used interchangeably with the term person targeted by domestic violence in these materials, for a number of conceptual and practical reasons. One difficulty with the term survivor of domestic violence is that it creates its own exclusions. While many women, children, and men subjected to domestic violence do survive, many do not. Many carry and continue to react to emotional scars from domestic violence indefinitely. Others die. The term survivor excludes those who have not survived. The alternative term ‘women who have been abused’ creates a gender-based exclusion. Although the majority of those targeted by coercive domestic violence are women, the term woman abuse excludes men and children who require legal assistance. The term ‘victim’, while imperfect, has the advantage of being inclusive as to gender. The term is also helpful when distinguishing (without resorting to considerable explanation) those who are at the receiving end of domestic violence from those who perpetrate domestic violence. Finally, the legal system, particularly the family law system, responds to perpetrators and ‘victims’ of domestic violence at a time when the parties have decided not to continue the intimate relationship and the effects of domestic violence are at their height (at separation or when criminal acts of violence are continuing). In such circumstance, while the term is imperfect, the term ‘victim’ does bring to mind vulnerabilities associated with separation processes.

<sup>15</sup> In connection with the term ‘victim’ see note 14 above.

The term 'family violence' is broader than and includes 'domestic violence' (also called 'intimate partner violence'). Family violence also includes 'sibling violence', 'parent-child violence', 'child-parent violence' and violence among members of extended families. Domestic violence cannot be separated entirely from other forms of 'family violence' for three reasons: 1) the empirically verified overlap between intimate-partner violence and other forms of violence within families, 2) the preferences for the term 'family violence' among many aboriginal peoples, and 3) the importance of responding to evolving, gendered forms of family violence associated with culture in complex, extended family structures. In the latter context, family members, such as sons, second spouses, brothers, or sisters, may act on behalf of the intimate partner or spouse in targeting and seeking to control the other intimate partner or spouse. Given that the third form of family violence resembles 'domestic violence', in pattern and in profile, it is included, for the purposes of this report, in the term 'domestic violence'. Other forms of family violence, such as sibling abuse and child abuse, are not included in the term 'domestic violence' as used in this report unless it is linked to abuse or violence directed against an intimate (or former intimate) partner.

Thus, while the term “domestic violence” normally refers to abuse and violence between current and former intimate partners, for the purposes of this report, the term will also include abuse and violence within the family by other family members when it targets or seeks to control an intimate partner on behalf of another intimate partner.

Basically, one can identify three broad categories of domestic violence: minor, isolated violence not associated with a pattern of coercion and control; resistance violence; and 'coercive', controlling, patterned violence. These categories are explained in part 5 below. The distinctions are important, because they have differing implications in the three legal systems.

The terms 'domestic violator' and 'perpetrator' are used interchangeably in this report as are the terms 'victim', 'targeted party' and 'survivor'. The first set of terms refers to the dominant intimate partner who had primary responsibility for the onset and pattern of domestic violence; the second set of terms refers to the intimate partner subjected to domestic violence.

## **PART 3: ACCEPTING A FAMILY-VIOLENCE CASE: OVERVIEW**

### ***3.1 Obtaining and assessing information about domestic violence***

“Screening” refers to processes used to detect and identify the presence, type, frequency, pattern, timing, and severity of domestic and family violence. The ultimate purpose of screening is to match appropriate services, processes, and interventions to the type and level of abuse and violence.

“Risk assessment” (discussed in more detail in parts 6 and 7) refers to the collection and assessment of information pertinent to determining the level of risk that domestic and family violence will continue in the future.

Upon acceptance of a family law case: Given the high rates of domestic and family violence documented among those who separate and divorce, as well as problems associated with the transmission of information to lawyers and courts (discussed in Part 4), the use of tools to screen for the presence and particulars of domestic violence is recommended in all family law, including child protection, matters.

Detailed collection of information and analysis of the whole pattern of abuse and violence (rather than analysis of incidents) in the context of coercion, power and control is required for:

- Accurate assessment of responsibility (in order to distinguish resistance violence from dominant aggressor violence)
- Accurate assessment of the type of domestic violence
- Accurate assessment of risk (child and adult)

For particulars, see:

- Part 4 (on patterns of revealing and not revealing information in a domestic violence context)
- Part 5 (on the need, in a family law context, to distinguish types of domestic violence; also the need to keep in mind differences in interpretation of domestic violence in the family and the criminal law systems)
- Part 6 (on risk assessment and the exchange of information pertinent to risk)
- Part 7 (on the potential for lethal outcome)

In connection with assessment of domestic violence, the best practice is for family lawyers to work together with domestic violence and cultural experts in each jurisdiction to collectively design and coordinate screening tools tailored for each social and cultural context. A number of domestic violence screening tools are identified here for preliminary reference:

- Connie Beck and Chitra Raghavan (2010) “Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control” in 48(3) *Family Court Review* 555-565; Robin Ballard, Amy Holzworth-Munroe, Amy Applegate and Connie Beck (2011) “Detecting intimate partner violence in family and divorce mediation: A randomized trial of intimate partner violence screening” 17(4) *Psychology, Public Policy and Law* 241-263. This domestic violence screening tool has been piloted and evaluated in the United States and Australia.
- Michigan Supreme Court (2005) *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation* (Office of Dispute Resolution, State Court Administration Office)
- Elizabeth Jollimore “Checklists: Best Practices for Representing Clients in Family Violence Cases” (Department of Justice) <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/viol3.html>
- American Bar Association Commission on Domestic Violence “Tool for Attorneys to Screen for Domestic Violence” on line at <http://www.americanbar.org/content/dam/aba/migrated/domviol/screeningtoolcdv.authcheckdam.pdf>



- D. Ellis & N. Stuckless (2006) “Domestic Violence, Dove, and Divorce Mediation” in *Family Court Review* 44(4): 658-671
- Child Abuse Solutions Inc. *Domestic violence Screening Tool for Mediators* online at [http://www.childabusesolutions.com/page\\_10.html](http://www.childabusesolutions.com/page_10.html).<sup>16</sup>

As discussed in Part 4 below, screening tools should be administered repeatedly in light of documented non-disclosure of domestic violence information and changing circumstances.

### ***3.2 Considering Risk:***

If coercive domestic violence is identified (see 5.4.3 for discussion of this term), consider the level of risk (see Parts 6 and 7 below) and take action to ensure client and child safety.

It is important to take into account the effects of domestic violence on the ways in which information is revealed or concealed (see Part 4 below). Family and child protection lawyers should screen repeatedly throughout the litigation process for the presence of domestic violence and other forms of family violence, as well as for changes in risk. Separation, for example, is a well-documented time of elevated risk and danger. Risk can change rapidly in a domestic violence context (see Parts 6 and 7 below).

### ***3.3 Possession of the family home and personal belongings:***

Is the client living separate and apart from the alleged perpetrator? Take into account status quo considerations as outlined in part 8.3 below, and discuss whether or not moving from the home is required in order to ensure safety. Has a restraining order (or in jurisdictions that have domestic violence prevention statutes, an order for civil protection) (see Part 8.2 below) been obtained? Is a civil protection order needed (see 8.2)? Consider the level of risk outlined in Parts 6 and 7. Is an order for exclusive possession of the marital home advisable? Can safety provisions offer adequate protection? Alternatively, direct the client to emergency housing; ensure access to safe forms of transportation.

When warranted, arrange for police to accompany the client to the home to remove personal belongings, paying particular attention, depending on the context, to passports, birth and marriage certificates, immigration papers, health and insurance cards, social insurance cards, legal documents, prescriptions and medications, devices to assist with disability, electronic sources of evidence (personal computers, cell phones), special toys and items of comfort for the children, pets that may be in danger (see part 5.8). Note that, in many jurisdictions, organizations that prevent cruelty to animals will house pets on an emergency basis in domestic violence cases.

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<sup>16</sup> The Child Abuse Solutions tool is a reasonably comprehensive tool designed for mediators to use in California when dealing with domestic violence or child abuse cases. Although the statutory references in the document are specific to California, the domestic violence content is helpful. Note: inclusion in the list does not constitute complete endorsement. Materials are offered as a starting point for screening development purposes.

### ***3.4 Child Safety:***

Does the client (or domestic violence screening) indicate potential harm or danger to a child? Are protections needed? In a child protection context, consult with child protection authorities in order to consider whether or not a protection order (see part 8.1) would offer sufficient protection to enable the targeted adult and the child to remain in the family home.

Are the child protection authorities involved in the case? If so, obtain particulars and seek permission to remain in contact with child protection authorities in order to be kept informed of and to support the client's participation in child protection meetings and proceedings.

Consider an application for interim custody - with protective provisions to allow, when warranted, safe contact between the perpetrating parent and child(ren) pursuant to family law legislation (see part 8.3) or domestic violence prevention statutes (see part 8.2).

### ***3.5 Referrals to other agencies and services:***

- Has the client claiming to have been subjected to domestic violence had an opportunity to consult a domestic violence expert or advocate and, in jurisdictions where such services are available, victim witness services? If possible, consider a referral to such services for adult and child safety planning.
- Does the targeted adult qualify for victim compensation? If so, provide information and refer the client. For particulars of programs across Canada, readers may wish to refer to the Criminal Injuries Compensation in Canada website:  
[http://www.victimsofviolence.on.ca/rev2/index.php?option=com\\_content&task=view&id=333&Itemid=23](http://www.victimsofviolence.on.ca/rev2/index.php?option=com_content&task=view&id=333&Itemid=23).
- Is the client in need of domestic violence counseling (for targeted parents) or domestic violence intervention (for perpetrators)? (The names of domestic violence intervention programs for perpetrators, also called behaviour change programs, vary by jurisdiction.) Active participation and completion of such programs is often viewed favorably by courts and by child protection authorities. If the client is willing to participate, attempt to address with the client (and with child protection authorities if child protection is involved) practical problems such as the potential effects of participation on legal proceedings (criminal, family child protection), cost, accessibility, child-care, relief from work, and transportation; make the appropriate referral.
- See Part 10 below regarding domestic violence intervention services for perpetrators. As a general rule, anger management and joint counseling are not recommended early in separation and litigation processes, at least until specialized domestic violence intervention and parenting programs are completed and the perpetrator has demonstrated behavioral change. One should obtain information about the reputation and evaluations of domestic violence services in the community. It is important to refer the client to a specialized domestic violence program, preferably one that addresses special parenting problems

associated with domestic violence. Follow up to ensure attendance. If one's client is the alleged perpetrator, ensure that he or she is informed that in many jurisdictions best practice standards for domestic violence intervention programs require, as a condition of service, participant consent to the release of information about attendance and information relating to victim and child safety. One should discuss the implications, positive and negative, in connection with the family law proceeding, the child protection proceeding, and the criminal law proceeding. If in doubt, family lawyers representing alleged perpetrators can seek guidance from the client's criminal defense lawyer and or child protection lawyer.

### ***3.6 Use of modern technology for harassment and surveillance:***

This issue should be addressed with all clients subjected to domestic violence. Provide information on how to protect against the use of technology for surveillance, stalking and harassment purposes (see part 5.8 below).

### ***3.7 Engagement with the Criminal Law system:***

If the client has made a domestic violence complaint to the police, seek permission to contact police and Crown in order to be advised and kept informed of particulars - dates, times, and particulars - of criminal proceedings.

If criminal domestic violence matters are revealed in discussions with the targeted client, strongly advise the client subjected to violence to contact the police. Offer to assist in helping the client make the contact, explaining that police officers have investigative capacities not generally available to lawyers in family law matters, and that criminal courts can offer remedies that can ensure swift enforcement and that can supplement family law remedies. (See part 8.2.9 below in connection with parallel criminal and civil protection orders).

Encourage the targeted client to reveal full, detailed information about patterns of abuse and violence to the Crown and police as well as to victim services in order to ensure accurate screening and assessment of risk (see Part 6). Note, however, the importance of taking into account any concerns the client has about initiating criminal proceedings as well as safety and legal issues associated with disclosure.

When representing a family law client who has been charged with a criminal domestic violence offence who has also been subjected to a pattern of domestic violence in the past by the criminal complainant, strongly encourage the client to disclose complete information about the past pattern of domestic violence to his or her criminal defense lawyer. In addition to the importance of the information for criminal defense purposes, if the client pleads guilty or is convicted, the information can also help to ensure appropriate Crown submissions on sentence in connection with resistance violence (see part 5.4.2 below).

Discuss any safety concerns relating to revealing information, and work with the client to ensure these can be addressed safely. The client should understand police and Crown disclosure requirements in the criminal law context (see Parts 8 and 9 below). When the

targeted parent is concerned about risks associated with revealing information, it may be appropriate to encourage the client to discuss safety issues with agencies and experts that do not have a duty to disclose particulars to the perpetrator in the criminal law case.<sup>17</sup>

One should be aware, however, that persons subjected to domestic violence are not always aware of the risk to themselves or their children (see Parts 6 and 7). A recommendation to the client to engage in a preliminary self-assessment of the level of danger, using, for example, the tool that Dr. Jacqueline Campbell makes available to the public online at <http://www.dangerassessment.org/about.aspx> could encourage the client at risk to seek professional help in assessing the level of risk more fully, in engaging in safety planning, and in cooperating with the criminal process.

Remember too, however, that people subjected to domestic violence can have good reasons for not wanting to engage in the criminal process (for example, a principal wage earner's potential loss of employment, the impact of a criminal conviction on the children and the family, a belief that the violence was not characteristic and will not recur, a belief that the perpetrator's willingness to engage in intervention or other therapeutic services promises a better solution than a criminal conviction, or a fear of retaliation). Since domestic violence research indicates that one of the most effective, long-term solutions to domestic violence is empowerment of victims and families, it is important to consider and respect the targeted party's views on the benefits and drawbacks of engaging with criminal processes. Keep in mind, however, that it is a common pattern in these cases for many instances of violence and abuse to occur before a single incident of domestic violence is reported to anyone. Knowing this, lawyers representing those targeted by domestic violence should ensure their own access to complete information and consider the factors outlined in Sections 6 and 7 in connection with risk and the level of danger.

If criminal charges are dropped by the Crown, the perpetrator may seek disclosures of information from the police about the domestic violence investigation pursuant to rights to information in Freedom of Information Acts. Lawyers working for the client targeted by domestic violence in the family law case will wish to maintain a solid working relationship with police in order to be aware of such applications. If an application for disclosure of police domestic violence information is made, consider whether or not the information could negatively affect 'victim' or witness safety. If so, inform the police and refer the client for safety planning. See part 8.9 in connection with applications by

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<sup>17</sup> For example, the targeted parent may be concerned about retaliation against a child if the targeted parent reveals information about abuse or violence that the accused believes is known only to the child. Other circumstances can include plans to relocate with the children, the existence of a new intimate relationship, seeking help for a drug or alcohol problem, or a plan to implement safety locks or special safety and security devices, a new work or residential address. When revealing particular types of information could increase risk, the best option can be a referral to services (such as domestic violence advocacy services, transition houses, domestic violence counselors), who are arms-length from police and Crown, for safety planning, risk and danger assessment, information and advice. In some jurisdictions, victim service units are arms-length from policing services; in other jurisdictions victim service divisions are part of policing services. Family lawyers will wish to consider professional disclosure obligations in a criminal context when referring clients to appropriate services.

alleged perpetrators for their own police files pursuant to *Freedom of Information Acts*.

### ***3.8 Immigration***

If the client subjected to domestic violence or the client accused of domestic violence is in the process of immigrating to Canada, the client should be informed of the potential implications of a criminal conviction on the immigration process. If warranted, consider consulting or referring the client to an immigration law specialist.

### ***3.9 Translators and Interpreters***

Consider the potential need to arrange for interpretation and or translation, taking into account *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.) 1982, c. 11*, (the *Canadian Charter of Rights and Freedoms*), section 14: “A party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.” Although the case law is not settled on responsibility for payment when neither party can afford to pay for translation or interpretation, courts are required to provide these services whether the matter is a family law, criminal law, or child protection proceeding.

Explore options for the sharing of translation or interpretation costs across family, criminal, and child protection proceedings.

### ***3.10 Delayed disclosures***

Anticipate delayed disclosure of documentary and other evidence from the criminal and the child protection authorities. The best course of action is to engage in a preliminary discussion as soon as possible with the Crown and child protection authorities regarding information that can be disclosed and shared across sectors by consent, as opposed to information that can only be disclosed pursuant to court order. Given that disclosure proceedings can cause considerable delay, early identification and action to obtain disclosure is advisable, particularly in a child protection context, where provision of services to families and placements of children are subject to strict time limits.

### ***3.11 Recent injuries***

If injuries are recent, refer the client to medical assistance. It can be helpful, for court purposes, to provide information to the client and to health professionals relating to documentation of defensive and offensive injuries. Keep in mind the need for time-sequenced photographs of injuries, given that bruising can take days to appear. If recent attempted strangulation is alleged, refer to part 9.12 below.

## **PART 4: COLLECTION & EXCHANGE OF INFORMATION**

### ***4.1 Patterns of revealing particulars of violence***

The failure to document and to present evidence of domestic violence during mediation,

hearings and trials in family law cases is reported repeatedly in empirical studies from all western common law jurisdictions.<sup>18</sup> The reasons, include: claims of domestic and other forms of family violence<sup>19</sup> being ‘negotiated’ out of the litigation process in return for concessions from the other party (such as agreements to pay child support or to abandon joint custody claims); non-perpetrating parents succumbing to settlement pressure from professionals who do not understand the significance of domestic violence in connection with harm to children; failure to present evidence when judges have demonstrated a resistance to considering such evidence or have a record of penalizing parents who seek restrictions on access to children; lack of specialized understanding of the dynamics and implications of domestic violence among those who work in the family and child protection systems. For further particulars, see the footnote<sup>20</sup> and part 8.6 in connection with the impact of domestic violence on settlement patterns.

Other exclusionary factors include: lack of financial and psychological resources required to pursue litigation or to hire domestic violence experts, fear of retaliation,

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<sup>18</sup> Linda C. Neilson et al. (2001) *Spousal Abuse, Children and the Legal System Final Report (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research)*; Hon. D. Hitchens and P. Van Horn (2005) “The Court’s Role in Supporting and Protecting Children Exposed to Domestic Violence” in *Journal of the Centre for Families, Children and the Courts* 31-52; M. Kernic, D. Monary-Ernsdorff et al. (2005) “Children in the Crossfire Child Custody Determinations Among Couples With History of Intimate Partner Violence” in *Violence Against Women* Vol. 11(8): 991-1021; Hon. J. Bowles, Hon. Kaye Christian, Margaret Drew and Kathryn Yetter (2009) *A Judicial Guide to Child Safety in Custody Cases (National Council of Juvenile and Family Court Judges)* at 7.3.

<sup>19</sup> Here the term ‘family violence’ refers to all forms of violence and abuse within families.

<sup>20</sup> Within the family law context, some of the other reasons that domestic violence is not documented have included lawyers adopting a practice of not seeking divorce on grounds of mental or physical cruelty when the divorce can be obtained on the basis of one year’s separation. In such cases evidence of domestic violence and other forms of family violence may never be presented to the court, particularly if lawyers handling the case do not understand the relevance of domestic violence to parenting and to child safety. While dedicated attention to educational initiatives can improve practice, other reasons evidence of family violence is not always presented to courts, documented repeatedly in the research literature include: concerns that allegations of domestic violence could inflame the conflict between parents; concerns that revealing domestic violence could result in a child protection investigation and potential risk of loss of the children; limited resources and the cost of proving claims; lawyers and other professionals advising against claiming domestic violence out of a (not totally unfounded) concern that raising concerns about child safety and about domestic violence could result in adverse findings in connection with that parent’s willingness to maximize the child’s contact with the other parent; fears about the impact of domestic violence claims on criminal, immigration, or child protection proceedings; professional failure to ask specialized questions designed to elicit complete information about domestic and family violence (empirical research has documented repeatedly that mediators, therapists, evaluators, mental, medical health professionals as well as lawyers tend both to underestimate and to under-document domestic violence. L. Neilson (2002), *supra* note 12; J. Meier (2003) “Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions” *Journal of Gender, Social Policy and the Law* 11(2) 657-731; P. Jaffe, M. Zerwer, S. Poisson (2003) *Access Denied: The Barriers of Violence and Poverty for Abused Women and their Children’s Search For Justice and for Community Services after Separation* (London, Ontario: Centre for Children and Families in the Legal System); J. Rivers, C. Maze, S. Hannay and C. Lederman (2007) “Domestic Violence Screening and Service Acceptance Among Adult Victims in a Dependency Court Setting” in *Child Welfare* Vol. 86(1): 123-145; L. Bancroft, J. Silverman and D. Ritchie (2012) 2<sup>nd</sup> edition *The Batterer as Parent. Addressing the impact of Domestic Violence on Family Dynamics* (Thousand Oaks: Sage) p. 118-122.

embarrassment, protection of family or cultural 'honour', emotional inability to offer coherent testimony as a consequence of damage caused by domestic violence, and concerns about child safety (such as the potential for perpetrator retaliation against children). The failure to present full information of domestic violence during hearings is being reported regularly across western legal jurisdictions.

In the criminal context, Statistics Canada informs us that the vast majority of criminal acts of domestic violence are not reported to police – much less prosecuted and tried in criminal court. People targeted by criminal acts of domestic violence can have numerous valid reasons for not cooperating in criminal proceedings, some of them associated with family safety.<sup>21</sup> Research studies document that those who have negative experiences in the criminal justice system (e.g. they were subjected to violent retaliation, they were not protected because criminal sentences offered limited safety and protection, or they experienced perpetrator rage and increased abuse and violence following a criminal conviction) may not call the police on the next occasions.<sup>22</sup> If family lawyers and courts ignore or discount patterns and incidents of domestic violence that do not result in a criminal charge, the vast majority of the criminal acts of domestic violence will not be considered in family and child protection litigation.

People who have been threatened, or have been taught to fear the involvement of police or child protection authorities (for example those new to Canada from oppressive countries), and those who fear negative implications of a criminal conviction such as deportation or perpetrator retaliation, may avoid the criminal system altogether but may initiate family law proceedings in an effort to protect the children. Family law cases involving domestic violence are not necessarily less serious or less dangerous than criminal cases. Indeed some are more dangerous.

In short, police and court records, while important as sources of information, are unlikely to document fully the particulars of domestic violence and other forms of family violence.

Implications for family lawyers:

- Resist assumptions that clients will volunteer full information about domestic violence
- Make use of domestic violence information gathering tools endorsed by experts
- Encourage and support targeted clients to reveal all forms of family violence, including domestic violence

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<sup>21</sup> S. Paterson (2010) “Resistors”, “helpless victims” and “willing participants”: the construction of women's resistance in Canadian anti-violence policy” 17(2) *Social Politics: International Studies in Gender State and Society* 159-184; J. Davies (2011) *Advocacy beyond leaving helping battered women in contact with current or former partners: a guide for domestic violence advocates* (Greater Hartford Legal Aid, National Resources Center on Domestic Violence & Family Violence Prevention Fund); C. Akers and C. Kaukinen (2009) “Police Reporting Behavior of Intimate Partner Violence Victims” in *Journal of Family Violence* 24(3): 159-171; A. Klein (2009) *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (U.S. Department of Justice, Office of Justice Programs, National Institute of Justice).

<sup>22</sup> National Institute of Justice (2006) “[Victim Satisfaction with the Criminal Justice System](#)” *NIJ Journal* 253 (January 2006).

- If acting for the targeted party seek permission to document particulars
- Resist the notion that lack of prior criminal charge indicates safety or reduced reason for concern

#### *4.2 Patterns of revealing domestic violence: survivors*

People who are targeted by domestic violence exhibit responses that can easily create confusion among law professionals – such as protecting perpetrators, recanting claims of violence, limiting early disclosure followed by increasing disclosures of the most severe forms of domestic violence over an extended period of time, engaging in resistance violence, presenting aggressive demeanours, self-medicating with alcohol and drugs, overreacting to stress, and returning repeatedly to violent homes. Yet all of these responses are common by-products of domestic violence. Domestic violence can produce scientifically verifiable mental health reactions, including post-traumatic stress, depression, anxiety and panic disorder, hyper-vigilance as well as a host of short- and long-term physical medical conditions. These psychological responses are a means used to psychologically withstand abuse and violence; they often can be managed or stopped once abuse and violence stop, particularly if help is provided. Such survival responses do not necessarily affect the capacity to parent.<sup>23</sup>

The link between being subjected to violence and Post-traumatic stress (PTS) is now firmly established. PTS and its associated diagnostic mental health condition, Post-Traumatic Stress Disorder (PTSD)<sup>24</sup> is a well-documented psychological condition that is a reaction to exposure in violence. PTSD is not specific to gender. Anyone subjected to severe or patterned violence (in the home, in the community, or during war) can develop the disorder. The cause is exposure to severe or repeated violence.

Post-traumatic stress disorder can affect ‘victim’ witness disclosure patterns and testimony by causing: difficulty giving testimony in a linear, time-ordered sequence; difficulty recalling collateral details surrounding the violence; emotional detachment (e.g.

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<sup>23</sup> [D. Markham \(2003\) “Mental Illness and Domestic Violence: Implications for Family Law Litigation” \*Journal of Poverty Law and Policy\* 23-35; J. L. Edleson, L. F. Mbilinyi, S. Sheety \(2003\) \*Parenting in the Context of Domestic Violence\* \(Judicial Council of California\).](#)

<sup>24</sup> The terminology associated with this condition is unfortunate. As C. Warshaw points out in C. Warshaw (2007) [“Toward Better Practice: Enhancing Collaboration Between Mental Health Services & Women's Domestic Violence Services”](#), Power Point, Australian Domestic & Family Violence Clearinghouse Forum, Leichhardt Town Hall April 2, 2007. There is nothing ‘post’ about PTSD. Inclusion of the term ‘post’ focuses attention on the fact that the incidents that gave rise to the reaction occurred in the past. This is unfortunate for three reasons: 1) it places the responsibility for ‘getting over it’ and ‘putting the past behind’ on the person targeted rather than placing responsibility on the violator; 2) it implies a lingering, present and thus irrational response to incidents that occurred in the past thus ignoring lingering long-term consequences of domestic violence as well as continuing relationship dynamics and the fact that everyone interprets current experience on the basis of past experience; and 3) the term “post” discounts the current nature of psychological and medical harm from past domestic violence. In addition, the term disorder implies irrationality, yet traumatic stress is a perfectly normal reaction to being targeted repeatedly by abuse and violence. Although the term “trauma response to abuse and violence” is better, the term ‘post-traumatic stress disorder’ is used in these materials because, until the name is changed, it is the name currently used in diagnostic literature to describe this normal human reaction to domestic violence.



testimony may be given in an unemotional, flat, detached manner); inability or difficulty offering complete information about abuse and violence (thanks to the protective response of minimizing and avoiding such memories); and exaggerated startle and defense responses resembling anger, hostility and aggression. When witnesses have been subjected to severe domestic violence, such patterns in testimony and demeanour should be expected.<sup>25</sup> Demeanour is, therefore, unreliable in a domestic violence context, where harm can result in exaggerated defence reactions resembling hostility or aggression.

Delays in disclosure can be expected as a by-product of the minimization and avoidance patterns associated with post-traumatic stress, particularly when the targeted party has not been asked specific, specialized questions. The fact that few incidents of violence are disclosed initially and that details of violence only emerge later as the case proceeds is not a dependable indicator that subsequent disclosures are unreliable.

When a person who has been subjected to domestic or family violence offers few details of violence at first, discloses more and more details over time, provides information in an emotionally detached manner, is unable to present information in a linear fashion, leaves out pertinent information, presents with an aggressive or angry demeanour, consider the need for a PTS assessment, preferably by someone who is also a domestic violence expert.

Implications for family lawyers:

- Anticipate the likelihood of delayed disclosure
- Assess the misuse of alcohol and drugs in the context of power and control patterns associated with the domestic violence
- Consider, when indicators associated with PTS are present, referring the client to a specialist for PTS assessment
- Resist assumptions that delayed disclosure patterns, detachment, and inability to relay information in linear sequence indicate lack of credibility and reliability; consider the possibility that such disclosure patterns can be evidence of harm from domestic violence
- Ensure that child protection authorities and the Crown are aware of 'normal' trauma-related disclosure patterns in a domestic violence context
- Keep in mind the well documented litigation tactic of perpetrators attempting to introduce evidence of psychological harm from domestic violence as evidence of unfitness to parent. Given that this report focuses on issues at the intersection of family and criminal law and not on family law cases *per se*, discussion of evidence issues within family law litigation is beyond the scope of this report. Nonetheless citations to literature that may offer assistance to family lawyers on

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<sup>25</sup> For example: Hon. Jerry Bowles et al., *supra* note 18 at page 10; Mary Ann Dutton “[Pathways Linking Intimate Partner Violence and Posttraumatic Disorder](#)” (2009) 10(3) *Trauma, Violence & Abuse* 211-224; Michelle Dennis, Amanda Flood et al. “Posttraumatic Stress Disorder or Major Depressive Disorder” (2009) 15(5) *Violence Against Women* 618-627.

- this issue are provided in the footnote<sup>26</sup>
- Anticipate the need to continuously document and reassess risk as new information is disclosed and as circumstances change
  - Anticipate the potential need to call upon a domestic violence expert to explain disclosure patterns to assessors, Crown, or the court
  - Anticipate the likelihood that patterns of domestic violence will be disclosed over the course of the family law process and that these patterns will not always be known to police or to child protection authorities

### ***4.3 Patterns of (not) revealing domestic violence: perpetrators***

People who engage in coercive forms of domestic violence (see part 5.4.3 below) tend to deny and minimize their own violence – to themselves as well as to therapists, researchers, lawyers and judges. More serious violence is often denied at the same time minor, isolated incidents of violence are admitted, in order to bolster credibility.<sup>27</sup>

In fact, it is likely that many perpetrators truly believe the other partner is lying about the extent of violence since, from the perpetrator’s point of view, abuse and violence are episodic in otherwise good behaviour. Those who are targeted, however, experience domestic violence – both in terms of perception and damage – cumulatively, whereby each incident adds psychologically to the damage of previous incidents.

Another common perpetrator trait affecting whether or not perpetrators will reveal domestic violence is projection of responsibility. Examples include: claiming the violence was in self-defence or was the product of the other’s bad behaviour; claiming the abuse and violence was mutual; claiming that the targeted party is overly sensitive as a result of having been abused as a child or by a former intimate partner; and claiming or implying that perceptions of domestic violence are the result of mental instability or illness. When the targeted person is physically harmed, injuries may be attributed to the other’s susceptibility (e.g., "she bruises easily") or self-harm (e.g. “she slammed herself in the face with the kitchen cupboard”).

Implications for family lawyers representing parties who are alleged to have engaged in domestic violence:

- Anticipate the likelihood of denial, minimization and deflection of responsibility
- Anticipate acknowledgement of minor acts of violence along with denial of more serious allegations
- Check for additional information

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<sup>26</sup> Warshaw, *supra* note 24; Dutton, *ibid*; Markham, *supra* note 23; Jane Murphy and Jane Aiken (2002) “Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench” 39 *Court Review* 12-22; Jennifer Long for American Prosecutors Research Institute (2007) *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* (American Prosecutors Research Institute). [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf)

<sup>27</sup> K. Cavanaugh *et al.* (2001) “Remedial work: Men’s strategic responses to their violence against intimate female partners” *Sociology* 35 (3) 695-714; Bancroft *et al.*, *supra* note 20.

#### *4.4 Obtaining particulars*

Experts, including a number of judicial associations such as the National Council of Juvenile and Family Court Judges in the United States, have repeatedly recommended comprehensive screening for domestic violence in all family law and child protection cases. Numerous specialized information gathering tools have been developed in various jurisdictions.

Examples are offered in Part 3.1 above. Some domestic violence screening tools are better than others.

All screenings for domestic violence should elicit information about:

- Sexual abuse (psychological and demeaning commentary as well as physical sexual abuse). Many domestic violence researchers claim that most cases of coercive domestic violence also include sexual abuse. Lawyers, mediators, and service providers will not always be aware of this because the failure to report sexual abuse in the absence of specialized questioning is well known. It is important, therefore, to include questions to elicit information about sexual abuse (emotional as well as physical) when obtaining information from family law clients. Lawyers and service providers may refer to the American National Judicial Education Program of Legal Momentum's *Intimate Partner Sexual Abuse* educational web course available on line at <http://www.njep-ipsacourse.org/> for additional information as well as access to a list of pertinent questions
- The social and cultural context
- The pattern of the abuse and violence throughout the relationship
- Criminal behaviour (particularly violent criminal behaviour)
- Violence toward intimate partners and or children in former or collateral relationships
- Violence directed at pets and other animals
- Drug and alcohol misuse
- Mental health problems
- Abuse and violence against or on behalf of third parties, such as friends, gang members, and/or members of the intimate partner's extended family
- Information about abuse and domestic violence in each person's family of origin and prior relationships since the latter can result in minimization or acceptance of abuse and violence as 'normal' and acceptable

Particularly important, in a family law context in connection with the type of violence and risk, is collection of complete information about the pattern of violence and abuse of each party and the pattern of coercion, power and control in the relationship (not limited by a particular time frame). See parts 6 and 7 in connection with information associated with risk.

In addition, specialized information-gathering questions are recommended for cases involving First Nations and other aboriginal peoples, those with disabilities, those immigrating to Canada, persons in same-sex or bi-sexual intimate relationships, and

members of minority populations. Culture, age, gender, sexual orientation, ethnicity and immigration status are all associated with particular forms of domestic violence and with obstacles to obtaining services and support. Ideally, domestic violence and cultural specialists in each jurisdiction should be enlisted to assist with the design screening tools specific to the cultural and legal composition of each jurisdiction.

Implications for family lawyers:

- Consider initiating the formation of committees composed of domestic violence, cultural and family law experts, to design specialized domestic violence information gathering instruments for use in each jurisdiction as suggested in Part 3. Also consider inclusion of representatives from the criminal and child protection sectors on such committees in order to attend to cross legal sector information needs.

#### ***4.5 Gathering evidence: where to look***

In a criminal context, given the high rates at which ‘victims’ recant, (discussed in more detail in part 9.5 below) experts recommend the use of specialized evidence collection methods that do not depend on ‘victim’ cooperation. In the criminal law context, the 2013 *Domestic Violence Handbook For Police and Crown Prosecutors in Alberta* online at:

[http://justice.alberta.ca/programs\\_services/families/Publications\\_Library\\_Families/DomesticViolenceHandbookforPoliceandCrownProsecutorsinAlberta.aspx](http://justice.alberta.ca/programs_services/families/Publications_Library_Families/DomesticViolenceHandbookforPoliceandCrownProsecutorsinAlberta.aspx) offers useful information on this issue as does the Michigan Judicial Institute (2013) *Domestic Violence: A Guide to Civil & Criminal Proceedings – Third Edition* on line at: <http://courts.mi.gov/education/mji/Publications/Documents/Domestic-Violence.pdf>

In connection with family law matters, Elizabeth Jollimore offers a helpful list of pertinent evidence in "Checklists: Best Practice for Representing Clients in Family Violence Cases" (Department of Justice). More particularly, she recommends that family lawyers representing those targeted by domestic violence obtain:

- Verbally abusive phone messages, letters, cards or other communications, including apologies for past abuse
- Medical reports, police incidents reports, and mental health counseling records (in connection with medical and counseling records, see part 8.11 below)
- Transcripts of prior family, child protection or criminal trials (to ensure that previous events or convictions are not minimized or misrepresented)
- Copies of tapes of 911 calls and calls to domestic violence intervention services
- Information from school teachers, activity leaders, parents of children's friends - people a child may have confided in
- Certificates of criminal conviction relating to the current and former intimate relationships
- Prison, parole and corrections records, including records relating to substance abuse and the success or failure of engagement in prior counseling or treatment programs
- Information about prior domestic violence from former spouses and intimate

- partners
- Corroborating statements from individuals to whom abuse was disclosed
  - Information from relatives, friends, doctors, or co-workers who may have observed injuries (anticipating that ‘victims’ often offer health professionals false explanations of the cause of domestic violence injuries)
  - A client record, in as much detail as possible of the pattern of abuse and violence, including dates, times, places, type of violence, words spoken and threats uttered; also any treatment or medical attention received, and information about whether or not the children witnessed the abuse or the injuries
  - An ongoing record, from the client, of any ongoing contacts and communications with the perpetrating party
  - Retention of a domestic violence expert to testify about risks and potential harm to children, after conducting research to see how the expert's evidence has been received in other cases
  - A record of all prior court orders, recognizances and peace bonds, including a record of breaches
  - Consideration of whether a custody or access assessment will be needed. (Note the need, if representing the targeted party, to ensure that the assessor is a domestic violence expert.)
  - A check for evidence of parenting practices that are often associated with coercive domestic violence (see 5.9 below)
  - A record of whether the domestic violence occurred in the presence of the child, whether the child ever attempted to intervene to protect a parent, and a record of any act of abuse or violence against the child, including information about any child injuries

Additional sources of evidence, when representing ‘victims’ of domestic violence, can include:

- Documented workplace observations, risk assessments, accommodations completed in Ontario pursuant to the duty imposed on employers pursuant to amendments to the *Occupational Health and Safety Act* to respond to risks associated with domestic violence. For additional information about this initiative and particularly the development of education materials in connection with risk assessment, contact Dr. Peter Jaffe at the *Centre for Research and Education on Violence Against Women and Children*
- Information from witnesses, neighbours, family, and friends who may have witnessed the abuse and violence
- Records from veterinarians of injuries to livestock and pets (see part 5.8 below),
- Surveillance records from security cameras in public areas and or common areas in apartment buildings that may have captured incidents of abuse and violence
- Court records documenting the targeted parent's recanting of earlier complaints
- Dental records
- Computer files, programs, and hard drives, cell phone records, and e-mails documenting or corroborating stalking, monitoring, abuse and or violence (for further information, see part 5.8 below)

- Police risk assessment conclusions
- Copies of current and former child protection agreements and orders
- A record of compliance or non-compliance with prior court orders, agreements or undertakings
- School attendance and educational records - in connection, for example, with children missing time at school as a result of child abuse or caring for a parent subjected to violence
- Court findings and orders from other legal proceedings (criminal, family, child protection, civil domestic violence prevention proceedings) involving the same parties, similar issues, and/or findings relevant to parenting and child best interests (see, for example *British Columbia (Attorney General) v. Malik*, 2011 SCC 18; *Delichte v. Rogers*, 2011 MBCA 50; *Wong v. Giannacopoulos*, 2011 ABCA 277; *J.F. c. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 27; *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 55; *BL v. Saskatchewan (Social Services)*, 2012 SKCA 38
- Information about parenting practices in current and former intimate relationships

In Ontario, pursuant to section 21 of the *Children's Law Reform Act*, applications for custody or access to a child must be accompanied by an affidavit setting out the person's current or previous involvement in a family proceeding, including child protection proceedings or any criminal proceedings. While the duty to report in Ontario should help to reduce the risk of family courts and family lawyers not being aware of other court proceedings affecting the family, researchers warn that parties will not always provide complete information.<sup>28</sup> This is most likely to be the case in connection with collateral child protection proceedings (for example when findings associated with child safety reflect poorly on both parents). Limited information can cause child and adult safety problems. Carefully constructed information exchange protocols between child protection authorities and family courts (and judges and justices of the peace who make orders pursuant to domestic violence prevention legislation) could help to reduce child risk as well as the danger of conflicting orders.<sup>29</sup> Family lawyers can help to reduce risk by forming close working relationships with child protection authorities in domestic violence cases.

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<sup>28</sup> See for example: Fiona Kelly and Belinda Fehlberg "Australia's fragmented family law system: jurisdictional overlap in the area of child protection" (2002) 26 *International Journal of Law, Policy and the Family* 38 -54. Although Kelly and Fehlberg are reporting on Australia research, Canada and Australia share common problems in domestic violence cases, particularly in connection with information sharing problems across court systems and problems associated with divisions in jurisdiction.

<sup>29</sup> These types of information exchange protocols have been implemented in some areas of Australia in order to protect children. See, for example: Family Law Council (2009) *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (Attorney General: Government of Australia) Chapter 9 online at: [http://www.ag.gov.au/Documents/Family\\_Violence\\_Report.pdf](http://www.ag.gov.au/Documents/Family_Violence_Report.pdf)

#### *4.6 Eliciting information from children*

Proceed with caution when deciding whether or not to obtain information about domestic and other forms of family violence or information about parenting from a child.

Generally, Canadian courts have tended to endorse the notion that children's best interests are *seldom* served by direct testimony on behalf of one parent against the other in a custody and access cases, for example: *Woodhouse v. Woodhouse*, 1996 CanLII 902 (ON C.A.).

In a domestic violence context, the risk of harm to a child being asked to give direct testimony against one or both parents is elevated in the form of:

- violent or psychological parental retaliation
- parental manipulation, and
- parental estrangement

Other considerations relate to research findings that children suffer from being asked to convey information about child abuse and domestic violence more than once in multiple proceedings.<sup>30</sup> Furthermore, questioning techniques should be appropriate to the child's age and stage of development since inappropriate interviewing techniques (particularly the use of leading questions) could contaminate use of the child's evidence in criminal and child protection proceedings.

In addition is the need for specialization such that the perspectives and information from children is properly interpreted in an appropriate domestic violence and child development framework.

While there may be cases in which older children benefit from being able to offer direct information about violence, custody preferences, or parenting practices, the more prudent course of action, in a family law context, will often be to have an expert (or at least a neutral third party or representative of the child) elicit and introduce evidence from children.

When a child is simultaneously involved in criminal, child protection, and family law proceedings, consider calling a meeting with the Crown and child protection authorities

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<sup>30</sup> Sarah Krahenbuhl and Mark Blades (2009) "Does the Form of Question Repetition have an Effect on Children's Recall Accuracy and Consistency?" 11(4) *International Journal of Police Science & Management* 460-475; National Institute of Justice and American Bar Association's 1998 publication, *Legal Interventions In Family Violence: Research Findings and Policy Implications* (Washington: US Department of Justice) particularly the Chapter by Whitcomb, Goodman, Runyan, and Hoak. AIJA Committee 'Children Giving Evidence' (2009) *Bench Book For Children Giving Evidence in Australian Courts* (Australian Institute of Judicial Administration) on line; Center for Children and Families in the Legal System (2002) *Child Witnesses in Canada: Where We've Been, Where We're Going*: [http://www.lfcc.on.ca/CW\\_in\\_Canada.html](http://www.lfcc.on.ca/CW_in_Canada.html); Louise Sas (2002) *The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency* (Ottawa: Department of Justice) : [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02\\_6/rr02\\_6.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_6/rr02_6.pdf); Nova Scotia Department of Justice, Victim Services Division (2001) "Child Victims and the Criminal Justice System" *Viva Voce* 4(1): [http://www.lfcc.on.ca/vivavoce\\_winter\\_01.pdf](http://www.lfcc.on.ca/vivavoce_winter_01.pdf)

to reach an agreement on how evidence from the child will be collected and introduced in order to prevent the potential for contamination and to reduce exposing the child to the stress of having to provide information, give evidence, and or testify more than once.

If the child must offer direct testimony in a family law case, seek input from a domestic violence expert, insist on age appropriate questioning, and consider testimonial protections (see part 9.9 below).

#### ***4.7 Exchanging information across legal systems***

Keeping in mind patterns of revealing or failing to reveal information about domestic violence identified above, the sharing of information pertinent to risk across legal systems is critically important for family and child safety. Information sharing can enable accurate and consistent assessment of risk and the potential for lethal outcome (discussed in parts 6 and 7 below) as well as seamless, co-ordinated, and consistent use of community services and therapeutic resources. In addition, sharing of information across legal sectors discourages litigation harassment such as the filing of frivolous claims in multiple courts. It also prevents inconsistent orders and agreements. The failure to identify and share information across legal systems has been credited repeatedly by Canadian commentators with the failure to offer adequate protection in domestic violence cases, sometimes resulting in death.<sup>31</sup>

*Looking at Family Court-Involved Domestic Violence and Child Abuse Fatality Cases Through a Lens of Prevention*, online at:

<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/193> (Institute for Court Management, Florida) is one of the few studies to examine domestic violence homicides connected to family courts. The study documents, albeit in an American context, child and parent deaths in domestic violence cases, despite family court involvement. The failure to take into account the involvement of the same families in other court systems was associated with the failure to respond to clear indicators of risk and to offer adequate protection. Three quarters of the families had prior involvement with child protection authorities. In half of the homicide cases, the children heard or witnessed the fatal outcome. Similar concerns are reported by Mary Ellen Turpel-Lafond in Canada in her (2012) report *Honouring Kaitlynn, Max and Cordon: Make Their Voices Heard Now*.<sup>32</sup> These reports present a sobering wake up call for family lawyers and family courts everywhere, demonstrating clearly the critical importance of obtaining and sharing information across court systems.

Make note, however, of the limitations on information sharing outlined in Part 8 below,

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<sup>31</sup> Mary Ellen Turpel-Lafond (2012) *Honouring Kaitlynn, Max and Cordon: Make Their Voices Heard Now* (British Columbia Committee for Children and Youth); Turpel-Lafond, *supra* note 12; K. Abshoff and S. Lanthier (2008) "Family Action Court Team (F.A.C.T.) Court Watch Project 2008 Background Paper" (Women Abuse Council of Toronto) report limited dialogue between criminal and family courts resulting in missing evidence of criminal charges and criminal court proceedings in family court cases. See also: Report to the Chief Coroner of British Columbia (2010) *Findings and Recommendations of the Domestic Violence Death Review Panel* (Government of British Columbia).

<sup>32</sup> Turpel-Lafond (2012), *ibid.*



particularly the need to inform family law clients that information disclosed to police, Crown, and in some jurisdictions, depending on connections to police services, victim-services, must be made available to the defence (and thus to the alleged offender) to enable full answer and defence, pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and subsequent criminal cases. Family lawyers will wish, therefore, to discuss with their clients the implications of such disclosures and to ensure that safety plans are updated in accordance with any increasing risk associated with disclosure. Subject to the comments in Part 6 below, regarding risk, and in Part 7 regarding the potential for lethal outcome, people who are targeted by domestic violence are usually in the best position to assess whether or not revealing particular information will increase or decrease risk. The best course of action is to obtain the consent of the survivor of violence to the release of information and to work with the client to alleviate any safety concerns.

Lawyers and service providers should attempt to ensure that targeted parents have access to domestic violence advocacy and victim support services separate and apart from police and Crown so that confidentiality can be preserved when disclosures could compromise safety. Clients targeted by a pattern of domestic violence require continuous access to safety planning.

People subjected to domestic violence do not always understand the level of risk to themselves or to their children. Those representing parties targeted by domestic violence will wish to keep in mind the risk criteria outlined in parts 6 and 7 below, particularly when risk levels are high or the safety of a child is a concern. In cases of high risk and or a potential for lethal outcome, concerns about personal safety may dictate the disclosure of information to enable protection and support without consent. For particulars, see parts 6 and 7.

Perpetrators of domestic violence, on the other hand, are unlikely to consent to the obtaining or release of information. This puts service providers and lawyers in a difficult situation when disclosures are pertinent to risk of continuing violence or to the potential for lethal outcome. Many intervention programs, particularly those that follow recommended standards for domestic violence intervention programs,<sup>33</sup> require consent to the release of information pertinent to risk as a condition of participation in the service. Family lawyers representing alleged perpetrators of domestic violence will wish to inform clients and discuss the potential implications of signing such consent forms. See Part 10 below in connection with evaluations of domestic violence intervention programs

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<sup>33</sup> For information about domestic violence intervention standards, see for example: National Institute of Justice (2010) *Batterer Intervention: Doing the Work and Measuring the Progress* (Family Violence Prevention Fund) and Batterer Intervention Services Coalition Michigan which provides access to 43 sets of state standards on domestic violence intervention. Best practices dictate a 'victim' safety focus with perpetrator consent to the release of information, such as record of attendance, to 'victims'. This is because non-attendance is associated in research with enhanced risk. See also Attorney General & Justice New South Wales (2012) *Minimum Standards for Men's Domestic Violence Behaviour Change Programs* on line at [http://www.domesticviolence.lawlink.nsw.gov.au/agdbasev7wr/assets/domesticviolence/m42200112/df\\_v\\_behaviour\\_change\\_program\\_standards\\_april\\_2012.pdf](http://www.domesticviolence.lawlink.nsw.gov.au/agdbasev7wr/assets/domesticviolence/m42200112/df_v_behaviour_change_program_standards_april_2012.pdf)

and parts 6.5 and 7.4 in connection with information sharing.

#### ***4.8 Disclosure requirements: Child protection legislation***

Family lawyers should also remind clients that police officers and service providers who offer domestic violence intervention services, drug and alcohol services or mental health services, will often have a legal duty to report disclosures of domestic violence affecting children, as well as child abuse, to child protection authorities, pursuant to provincial and territorial child protection legislation.

Domestic violence is specified as a criteria when deciding whether or not a child is in need of protection in the following jurisdictions: Alberta: *Child, Youth and Family Enhancement Act*, Chapter C-12 section 1(3) (c); New Brunswick: *Family Services Act*, Chapter F-2.21983, c.16, s.1 section 31(1); Newfoundland/Labrador: *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2 section 10 - this statute refers to violence; Northwest Territories: *Child and Family Services Act*, S.N.W.T. 1997, c. 13 section 7(3)(j); Nova Scotia: *Children and Family Services Act*, S.N.S. 1990, c. 5 section 22(i); Quebec: *Youth Protection Act*, R.S.Q. c.P-34.1. - domestic violence is included in section 38 in a list of “psychological ill-treatment” criteria; Prince Edward Island: *Child Protection Act*, c.5.1 section 9(m)(n); Saskatchewan: *Child and Family Services Act*, S.S. 1989-90, c.C-7.2 section 11(a)(vi). The Yukon’s *Child and Family Services Act*, S.Y. 2008, c. 1, section 4(1)(j) includes family violence, and the effects on the child, as a best interest of the child criterion when choosing a potential caregiver rather than as an indicator of the need for state intervention. CanLII, managed by the Federation of Law Societies of Canada, provides public access to federal, provincial and territorial statutes on line at: <http://www.canlii.org/en/index.html>.

Note also, however, that most statutes require circumstances in addition to domestic violence in order to find a child in need of protection - for example that the child is negatively affected. The particulars vary by statute; one must check the wording of the applicable statute.

Although domestic violence is not a specified criterion in Ontario's *Child and Family Services Act*, R.S.O. 1990, c. 11, the child welfare manual currently in use in Ontario includes domestic violence as an indicator of child risk. While child protection statutes in some Canadian jurisdictions do not expressly include domestic violence as an indicator that a child is in need of protection, all statutes throughout Canada, authorize protective intervention when a child is at risk of or is being emotionally harmed, by domestic violence or otherwise.

In sum, service providers in most jurisdictions will have a duty to report information relating to domestic violence adversely affecting a child; clients should be advised accordingly.

## **PART 5: DIFFERING UNDERSTANDINGS OF THE NATURE OF DOMESTIC VIOLENCE**

### ***5.1 A brief comment on International Human Rights Frameworks***

Discussion of the intersection of international human rights law with Canadian family and criminal law in connection with domestic violence, while extremely important, is beyond the scope of this report. Nonetheless, the issue is likely to have ever increasing importance in both family and criminal law matters. Lawyers interested in pursuing this issue may wish to consult the materials in the footnote.<sup>34</sup>

### ***5.2 Understanding domestic violence in multiple legal contexts***

Lawyers working in the family law sector should appreciate that criminal, family and child protection systems define and understand domestic violence differently. This makes consistent collection and interpretation of information and coordinated action across legal systems a challenge. The criminal law system interprets domestic violence in terms of actions, emphasizing the physical. The family law and child protection systems must, however, consider patterns of behaviour and the implications of those patterns. The following discussion sets out the reasons for the distinctions.

### ***5.3 Why domestic violence is assessed differently from other forms of violence***

Assessments designed to determine responsibility for physical violence between strangers, such as those commonly employed in the criminal law system, will not produce accurate conclusions in a family law context relating to responsibility for domestic violence.<sup>35</sup> Stranger violence is an action or series of actions. Unlike domestic violence, stranger violence is not normally a cumulative process. One may determine responsibility for stranger violence by determining who initiated the violence, who acted to escalate the violent exchange, or who used the most force. Put differently, responsibility for stranger violence is assessed by determining the primary aggressor in a particular violent exchange. Yet, as research demonstrates, in a domestic violence context, the details of the most recent event are less important - when assessing responsibility, pattern, and effect - than complete information about the cumulative pattern and effects of verbal

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<sup>34</sup> Jennifer Koshan “State Responsibility for Protection Against Domestic Violence: The Inter-American Commission on Human Rights Decisions in *Lenahan (Gonzales)* and Its Application in Canada” 2012 20 *Windsor Y.B. Access Just.* 39; Columbia Law School (2010) *Human Rights & Domestic Violence An Advocacy Manual* on line at [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2010/march2010/Domestic-Violence-Manual](http://www.law.columbia.edu/media_inquiries/news_events/2010/march2010/Domestic-Violence-Manual); Ronagh McQuigg “Domestic Violence and the Inter-American Commission on Human Rights: *Jessica Lenahan (Gonzales) v. United States*” 2012 12 (1) *Human Rights Law Review* 122-134; K. Libal and S. Parekh (2009) “Reframing Violence Against Women as a Human Rights Violation: Evan Stark’s Coercive Control” in *Violence Against Women* 15(12): 1477 to 1489; S. Choudhry and J. Herring (2006) “Righting Domestic Violence” in 20 (1) *International Journal of Law and the Family* 95-119.

<sup>35</sup> Keep in mind that the term domestic violence as used in this report refers to violence and abuse in the family that is linked to abuse and violence directed against an adult intimate partner.

abuse, domination, coercive control, and violence over the course of the relationship.

By way of illustration, a simple isolated assessment of incidents of violence reported by the woman cited below might lead some to conclude that the mother and father were both responsible for the violence:

*I had my bags packed. I went and got supper. Then he started on me. But he was so drunk. He said he was going to call the police. I was scared of the police because he had brainwashed me over the years to think that it was all my fault. I told him he was not calling the police and slammed the phone down. He dialed again. I punched him in the head (and knocked him out.)<sup>36</sup>*

The mother reported that the father was so inebriated, he could hardly stand or defend himself. In this particular exchange the female partner had more power and control than the male partner did. Nonetheless consideration of the history and dynamics of power and control in this relationship changes one's perception of responsibility:

*He hit me once (before marriage) and I thought it was my fault. I apologized. As the years went on, he beat me up really bad about every six months. The night I left, he had been beating me up about once a week for a couple of years. He was good at it. He never hit me in the face, until the last few months. Then I got black eyes. He locked me out of the television room three years before I left. I was only allowed in if I was not arguing with him, if I cooked supper the way he wanted, if I had not talked back to him. I was not allowed to eat when he ate.<sup>37</sup>*

It becomes clear that, although this woman resisted the continuation of the violent relationship with her own violence, and exercised dominant control in the last violent exchange, the domination, control and timing of the onset of the pattern of violence in this relationship resided with the male partner. Unless such patterns and effects over time are considered, primary-aggressor determinations, based on analysis of the last incidents, can produce erroneous conclusions about responsibility. People targeted repeatedly by domestic violence can and do become violent as a result. The phenomenon of 'victim' resistance violence is explained in more detail in part 5.4.2 below.

In addition, some perpetrators are highly manipulative. They learn how to set up targeted partners to engage in violent action. Pertinent behaviours include: altering behaviour at separation or while being monitored (for example while being monitored by supervised access agencies), provoking a violent reaction from the targeted partner or former partner and then calling the police, making spurious complaints to social service and investigation agencies, and engaging in litigation tactics to deflect responsibility and

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<sup>36</sup> Female participant in Linda C. Neilson and Spousal Abuse research team (2001) *Spousal Abuse, Children and the Legal System* (Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick) funded by the Canadian Bar Association, Law for the Futures Fund on line at <http://www.unb.ca/fredericton/arts/centres/mmfc/resources/pdfs/team2001.pdf>.

<sup>37</sup> *Ibid.*

mislead.

The result is the well documented phenomenon of criminal convictions of those who have engaged in resistance violence (see part 5.4.2 below for further discussion).

#### ***5.4 Types of domestic violence of less concern, family law/child protection context***

While all types of domestic violence should be treated seriously, some types of intimate-partner violence that result in a criminal conviction are of less concern in a family law and child protection context.

Empirical research enables us to identify three primary categories or types of domestic violence: 1) minor, isolated violence - described below at part 5.4.1; 2) victim-resistance violence - described below at part 5.4.2; and 3) coercive (controlling, patterned) violence - described below at part 5.4.3. These categories are purposely less controversial and less complex than those proposed by some domestic violence commentators. The reasons for not endorsing other categories at this time are outlined in the footnote.<sup>38</sup>

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<sup>38</sup> The distinctions Johnston and others make between 'situational' or 'conflict' violence and 'coercive violence' are important and should be credited with providing a plausible explanation for some of the contradictions between quantitative and qualitative research in the domestic violence field in connection with controversies surrounding gender and violence. The categories also provide an important and worthwhile line of research inquiry. Nonetheless this report adopts a more cautious approach largely because the empirical support for distinguishing between 'situational violence' and 'coercive violence' in a legal (as opposed to a social science research) contexts is slim: L. Conradi and R. Geffner (2009) "Introduction to Part 1 of the Special Issue on Female Offenders of Intimate Partner Violence" in *Journal of Aggression, Maltreatment & Trauma* (2009) Vol. 18 (6) at page 548; R. Gilbert (2009) "[Review Michael P. Johnson 2008, A typology of domestic violence. Intimate terrorism, violent resistance, and situational couple violence, University Press of New England, USA](#)" in *Australian Domestic & Family Violence Clearinghouse Newsletter* 35 at page 12; Jane Wangmann (2011) "Different Types of Intimate Partner Violence - An Exploration of the Literature" *Issues Paper* 22 (Australian Domestic & Family Violence Clearinghouse); Bancroft et al., supra note 20 at pages 163-187. While minor isolated violence is indeed the most common form of violence in the general population, the latest research is indicating that the coercive domestic violence is the more common type of domestic violence among those who mediate and litigate: Connie Beck, Michele Walsh et al. (2011) *Intimate Partner Abuse in Divorce Mediation: Outcomes from a Long-Term Multi-cultural Study* (U.S Department of Justice, Document number 236868). Of particular concern to the author is the potential for scientifically premature application of categories of domestic violence in connection with best interest of the child determinations. In addition to the fact that it is likely that coercive violence is common among those who litigate and mediate, is the problem of classification. It is not yet possible to identify, scientifically, with confidence or with clarity, the boundaries between repetitive 'situational violence' on the one hand and coercive 'domestic violence' on the other: N. Graham-Kevan and J. Archer (2008) "Does Controlling Behavior Predict Physical Aggression and Violence to Partners?" in *Journal of Family Violence* 23(7): 539-548; Beck et al. above. While little doubt or controversy surrounds the differing implications, for children and adults, of minor isolated violence and resistance violence that is not part of a pattern (see note 39 below) on the one hand and repetitive coercive abuse/violence, on the other, additional distinctions in connection with children are not warranted at this time. Considerable empirical research supports the proposition that for children what matters is frequency, repetition, duration, and severity, of abuse and violence as well as the levels of child stress and parental conflict in the home, on the one hand, and resilience factors such as stable attachments and

Distinguishing among the three basic types of domestic violence has fundamental importance to decision-making in a family law and child protection context in connection with issues associated with parenting and family safety and to understanding differences in cross-legal-sector understandings.<sup>39</sup>

#### 5.4.1 Minor, isolated domestic violence

**Minor isolated and non-repetitive domestic violence** is common in the non-litigating, general population. This form of violence is not associated with an on-going pattern of physical or sexual violence or with a pattern of psychological coercion and control. Most intimate partners who report this form of domestic violence do not categorize their intimate partnership as abusive. The term refers to minor violence that is not repetitive, that is not characteristic of the person or the relationship, provided that it does not cause harm or lingering fear, and provided that it is not associated with a pattern of emotional abuse, domination, coercion or control. Violence that occurs only at the time of separation is often included in this category. An example of this type of violence is mutual shoving and pushing during a heated conflict, provided that the behaviour is not repeated, is not part of a pattern, and does not reflect or produce one partner's control over the other. Minor, isolated violence - the type of violence that predominates in large scale population studies - differs in quality and effect from coercive domestic violence outlined at part 5.4.3 below.

Caution: One should keep in mind two critical related issues: 1) the earlier caution that patterns of domestic violence are often well established before a single incident is reported and 2) that minor isolated violence is apt to be under represented while coercive, control violence is apt to be over represented in civil (family and child protection) litigation.<sup>40</sup> Consequently, before one can safely conclude that any act of violence is isolated and minor, detailed scrutiny of accurate and complete information is critical.

#### 5.4.2 Resistance violence

**Resistance violence:** Numerous empirical studies document the phenomenon of intimate

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support, on the other. These factors have been identified consistently in social science research on custody and access for over four decades and in medical child development research for more than a decade. Getting it right, for the sake of the children, is far too important to recommend additional theoretical distinctions until those distinctions are verified by a dependable collection of empirical longitudinal research on the effects of such distinctions on the well-being of children.

<sup>39</sup> **Qualification:** When a targeted intimate partner's resistance violence has become ingrained, repetitive, and part of a coercive pattern, it becomes necessary to respond to child safety and parenting issues in a manner similar to that advocated for coercive domestic violence, despite that the behaviors reflect harm from being subjected to domestic violence and originated as resistance violence. Legal remedies, intervention and treatment responses ought, however, to recognize the need to support healing from past harm in the eradication of violence.

<sup>40</sup> See, for example Beck, *supra* note 38. While it is reasonably clear that coercive domestic violence is over represented in family law and child protection cases, research is less clear in connection with criminal processes. It would be interesting to know, for example, whether or not the current focus on incidents of physical violence in the *Criminal Code* is producing appreciable numbers of convictions for incidents of minor, isolated violence along with the well-documented phenomenon of convictions for resistance violence.

partners, who have been targeted repeatedly by domestic violence, responding with violence. When this happens it can be very difficult to distinguish the dominant, primary aggressor from the targeted-adult. This is particularly the case in a legal system context, when manipulative perpetrators make use of litigation tactics to create confusion among police, assessors and lawyers.<sup>41</sup> Resistance violence, as the term is used here, can include:

- Violence used to respond to a perception of imminent threat (This form of resistance violence is often - though not always, depending on the circumstances of the case - recognized as a defence in criminal law cases wherein courts take into account the effects of domestic violence on the reasonableness of perceptions of necessity or the reasonableness of the perceived need to engage in self-defence.)
- Violence that is a response to psychological harm from having been subjected to domestic violence in the past (for example, violence that is caused by heightened states of emotional arousal associated with Post-Traumatic Stress Disorder, violence that is associated with the inability to withstand growing tension in the relationship - the desire to provoke anticipated violence in order to get it 'over with')
- Violence that is associated with resisting the continuance of violence, coercion and control in the relationship (for example the use of violence to 'stand up' to the dominant aggressor in the relationship)
- Violence that is associated with attempting to escape the relationship, for example, at separation

Note, however, that if resistance violence becomes repetitive and part of a coercive, controlling pattern, the necessary interventions may resemble those needed for coercive domestic violence. For an explanation refer to the footnote.<sup>42</sup>

Resistance violence can include initiating violence, including serious physical violence, particularly at separation. Many forms of 'victim' resistance violence will fall outside

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<sup>41</sup> Linda C. Neilson, L. (2004) "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases", *Family Court Review* 42 (3) 411-438; Bancroft et al., *supra* note 20; T. J. Sutherland (2004). "[High-conflict divorce or stalking by way of family court? The empowerment of a wealthy abuser in family court litigation. Linda v. Lyle – A case study](#)" in *Massachusetts Family Law Journal*, 22 (1&2) 4. Canadian judges who have access to the 2011 edition of the National Judicial Institute Bench Book *Domestic violence, Family Law* may wish to consult Chapter 6 in connection with litigation tactics.

<sup>42</sup> See footnote 39 on the issue of 'victim' resistance violence as well as Part 5.5 on Post-Traumatic Stress induced domestic violence. It is likely - though not yet firmly established in a dependable collection of research studies - that PTS may explain the phenomenon of former 'victims' of domestic violence becoming coercive and violent themselves. Note however that PTS induced coercive domestic violence seems to have a different dynamic from other forms of coercive domestic violence. The perpetrators (male and female) of violence resulting from mental health conditions are said to lack the minimization and deflection of responsibility patterns normally associated with coercive domestic violence; they are also said to be more inclined to seek help. Nonetheless, the author is not aware of a reliable body of research demonstrating, from a child perspective, that the effects on the child of exposure to PTS induced violence differ from exposure to other forms of coercive violence. Until such research is conducted and confirmed, safety concerns would suggest erring on the side of caution and of child safety.

*Criminal Code* definitions of self-defence.<sup>43</sup>

### 5.4.3 Coercive, controlling domestic violence

Unlike minor isolated and resistance violence, “**Coercive domestic violence**” (also called coercive intimate partner violence) is normally<sup>44</sup> a cumulative, patterned process that occurs when an adult intimate or former intimate partner attempts by emotional/psychological, physical, economic or sexual means to coerce, dominate, monitor, intimidate or otherwise control the other. The two concepts 'cumulative' and 'pattern' are central to understanding. The terms refer to the fact that each incident of violence adds to the harm produced by the earlier incidents of violence in an ever, increasing, multiple, and accumulating way. Each additional incident reopens, adds to and magnifies earlier harm. Although primarily a gendered phenomenon targeting women,<sup>45</sup> coercive domestic violence can be directed against intimate-partners of any

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<sup>43</sup> Most legal definitions of self-defense consider violent conduct on an incident by incident basis. This is a problem in a domestic violence context since domestic violence operates, in pattern and effect, in a cumulative fashion. When people, who have been targeted repeatedly by abuse and violence, ultimately respond themselves with violence, that violence is commonly a reaction to the cumulative effects of prior patterns of abuse and violence in the relationship rather than a response to an immediate, imminent threat. This type of violence will seldom be classified, in law, as self-defense. The problem is compounded by criminal definitions that define crimes of violence as incidents rather than as a pattern of behavior. The end result is criminalization of those who engage in violence in order to resist continuing abuse and violence. Some of the reasons people targeted by patterned coercive violence give for engaging in resistance violence are, in addition to self-defense: not being psychologically able to stand the abuse and violence any longer; initiating violence to get the intimate partner's violence over with before the tension and violence escalate further; 'snapping' and 'loosing' it; deciding to separate and using any and all methods in order to escape; deciding, finally, to 'stand up' for themselves against their abuser; discovering that responding aggressively helps to stop the other partner's continuing use of violence and abuse; not caring about the relationship or their own safety anymore; protecting the children. While no one condones violence, it is important to recognize, realistically, the complexity of the use of violence in these cases. Until we can distinguish accurately violence that is a reflection of harm caused by domestic violence from coercive, controlling domestic violence, we shall continue to do families, men, women and children a disservice.

<sup>44</sup> A single act of violence or emotional intimidation should be classified as a pattern of domestic violence if it causes lingering fear and/or is associated with a pattern of coercive control in the relationship.

<sup>45</sup> The United Nations Special Rapporteur on Violence Against Women (2009) [\*15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences\*](#) (Office of the United Nations High Commissioner for Human Rights): R. P. Dobash and R. E. Dobash (2004) “Women’s Violence to Men in Intimate Relationships Working on a Puzzle” in *British Journal of Criminology* 44: 324-329; Elizabeth Reed, Anita Raj, Elizabeth Miller and Jay Silverman (2010) “Losing the “Gender” in Gender-based Violence: the Missteps of Research on Dating and Intimate Partner Violence” (2010) 16 *Violence Against Women* 348-354; A. Holzworth-Munroe (2005) “Male versus Female Intimate Partner Violence: Putting Controversial Findings Into Context” in *Journal of Marriage and Family* 67:1120-1125; W. De Keseredy and M. Dragiewicz (2007) “Understanding the Complexities of Feminist Perspectives on Woman Abuse A Commentary on Donald G. Dutton’s Rethinking Domestic Violence” in *Violence Against Women* (2007) 13: 874-884; M. P. Johnson (2005) “[Domestic Violence: It's Not About Gender - Or Is It?](#)” 67 *Journal of Marriage and Family* 1126-1130; Holly Johnson, Natalia Ollus and Sami Nevada *Violence Against Women An International Perspective* (Springer: 2008); S. Dasgupta (2003) [A Framework for Understanding Women's Use of Non Lethal Violence in Intimate Heterosexual Relationships](#) (Sage Publication). **Qualifying comment:** Some of the recent studies of domestic violence in dating relationships and young couples are reporting relatively high rates of violence by young women against male partners. It is not clear at this time



gender, in same-sex relationships as well as in opposite-sex relationships. It can only be understood and properly interpreted by examining patterns over time in social and interpersonal context. For discussion of empirical connections between coercive domestic violence and child abuse, see 5.9.

Coercive domestic violence can involve a pattern of emotional, financial or psychological monitoring, domination, degradation, intimidation, coercion, or control without physical or sexual violence. Violent, coercive, isolating and controlling behaviours directed at the targeted family member sometimes alternate with similar behaviours against others who support the targeted person, serving to isolate family members from sources of support, extending the effects of domination and control. Many (a number of researchers assert most) adult relationships characterized by coercive domestic violence also involve sexual abuse.<sup>46</sup>

Violent action is but one dimension of domestic violence; psychological or physical coercive control, surveillance, and emotional/psychological abuse are others. Domestic violence in intimate partnerships has a complex, reciprocal dynamic not found in violence between strangers. It is distinct from stranger violence in that separation, the time during which legal systems are commonly involved, is known to be a time of heightened danger for women. Indeed risk is enhanced by the perpetrator's knowledge of the targeted person's lifestyle and potential sources of support. Moreover, domestic violence differs from other forms of violence in its pattern: it is periodic yet operates in a cumulative fashion. The violence is not necessarily or even usually a daily or even a regular occurrence. Violence and abuse operate together in an interactive manner such that violence is used only when the other forms of abuse, coercive control and intimidation do not suffice. Periods of apparent calm and harmony between episodes of

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whether or not this is a new pattern or the result of failure to distinguish among the various forms of intimate partner violence. For a critical discussion and review of this issue, see Elizabeth Reed, Anita Raj, Elizabeth Miller and Jay Silverman cited earlier.

<sup>46</sup> Klein, *supra* note 21 at page 2; L. R. Taylor and N. Gaskin-Laniyan (2007) "[Sexual Assault in Abusive Relationships](#)" on line in *National Institute of Justice Journal Issue 256* at 12-14 (Washington: US Department of Justice); J. McFarlane and A. Malecha (2005) [Sexual Assault Among Intimates: Frequency, Consequences, and Treatments, final report to the National Institute of Justice](#), 2005 (NCJ 211678); Jill Duncan and Deborah Western (2011) Addressing 'The Ultimate Insult': responding to women experiencing intimate partner sexual violence. Stakeholder papers (Australian Domestic & Family Violence Clearinghouse) on line: [http://www.austdvclearinghotimeuse.unsw.edu.au/stakeholder\\_papers.htm](http://www.austdvclearinghotimeuse.unsw.edu.au/stakeholder_papers.htm). C. Block and W. DeKeseredy (2007) "Forced Sex and Leaving Intimate Relationships Results of the Chicago Women's Health Risk Study" (University of Toronto) online at [https://tspace.library.utoronto.ca/bitstream/1807/9750/1/Block\\_DeKeseredy.pdf](https://tspace.library.utoronto.ca/bitstream/1807/9750/1/Block_DeKeseredy.pdf); Evan Stark (2007) *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press). In recognition of this problem the National Judicial Education Program of Legal Momentum created an on-line web course on this issue: Legal Momentum (2008) [Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence](#) National Judicial Education Program, Modules II and IV, available online at: <http://www.legalmomentum.org/intimate-partner-sexual-abuse-adjudicating-hidden-dimension-domestic-violence-cases>. . Nonetheless, in the absence of appropriate screening questions, rates at which such information is revealed are known to be low: J. McFarlane and A. Malecha (2005); Jill Duncan and Deborah Western (2011); and C. Block and W. DeKeseredy (2007) cited above.

abuse and violence are to be expected. These periods do not negate, however, the danger, the harm, or the cumulative and compounding impact of new incidents which reopen and compound the effects of earlier behaviours. Coercive domestic violence is understandable only as a cumulative pattern in social context and in the context of the evolving power and control dynamics of an intimate relationship over time. Indeed Canadian courts recognize this complexity.

Thus Wilson J., writing for the majority of the Supreme Court of Canada in *R. v. Lavallée*, [1990] 1 S.C.R. 852 (CanLII) recognized the following as central elements of domestic violence in a criminal law context: the imbalance of power “wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other”; the dependency and lowered self-esteem of the less powerful person; the periodic, intermittent nature of the associated abuse; the clear power differential between battered women and batterers that combine with the intermittent nature of physical and psychological abuse to produce cumulative consequences.

Those who grapple with domestic violence rely on lawyers and courts to interpret coping strategies and behaviours in accordance with the realities of social life associated with domestic violence, including: vulnerabilities associated with gender and culture, socio-economic status, sexual orientation, disability, legal position such as immigration status, degree of access to support networks and to social, economic, and legal resources. For example, in *R. v. Lavallée*, [1990] 1 S.C.R. 852, Wilson J. took judicial notice of the influence on perception and action, in a domestic violence context, of vulnerabilities produced by gender disparity in Canadian society.

### ***5.5 Post-Traumatic Stress induced domestic violence***

If the client engaging in domestic violence has been subjected to or exposed to severe or patterned violence in the home, in the community, or in war, consider the possibility of PTS induced violence. Refer the client for a professional assessment. These cases require special analysis, risk assessment, and therapeutic intervention. The client, along with any children in the home, should be assessed for trauma-related harm and treated. Special interventions may be needed to enable the family to heal.<sup>47</sup> In these cases, it is important for criminal, family and child protection lawyers to integrate referrals for PTSD assessment and intervention into criminal sentences, child protection interventions, and family law custody and access parenting plans.

Although mental illness is not normally a cause of domestic violence, PTSD may be an exception. Certainly researchers are documenting a strong link between the disorder and domestic violence, particularly among returning combat veterans as well as among women who have been targeted by severe or patterned violence in the home.<sup>48</sup> Indeed, although more research on the issue is needed, it seems likely that stress-induced violence

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<sup>47</sup> See, for example: Evan Seamone (2012) “Improved Assessment of Child Custody Cases Involving Combat Veterans with Post Traumatic Stress Disorder” 50(2) *Family Courts Review* 310-343.

<sup>48</sup> For example, see Bancroft et al., *supra* note 20.

may explain the phenomenon of women subjected to severe or repetitive patterns of domestic violence becoming violent themselves. Given that the condition is said to be treatable in the majority of cases, specialized therapeutic intervention (in addition to domestic violence intervention) will often be warranted.

### ***5.6 Concluding comments on the need to distinguish types of domestic violence***

While no one condones violence in any of its forms, it is important to recognize, realistically, the complexities associated with domestic violence. Until we can distinguish accurately, across legal systems, acts of violence that are a reflection of harm caused by domestic violence from coercive, controlling domestic violence, we shall continue to do families, men, women and children a disservice.

In a criminal context, determinations of responsibility for violence are made on the basis of analysis of responsibility for the criminal act or acts of violence. Yet when assessments of domestic violence are limited to analysis of singular or recent incidents, acts of resistance violence can appear to be mutual violence or even coercive violence, when the same violence, more thoroughly assessed in social context and in the context of the pattern of power and control over the course of relationship, is clearly a form of resistance violence.

This is problematic since it results in a failure to distinguish between a dominant aggressor and a victim; it has potential to criminalize people for attempting to escape violent relationships; and it has potential to cause serious confusion and procedural difficulties in a family law and child protection context. Current research indicates that the failure to distinguish dominant aggressor from resistance violence is still a problem, even in specialized domestic violence courts.<sup>49</sup> Moreover, coercive domestic violence has central importance in family law and child protection contexts because, unlike minor, isolated violence and many forms of resistance violence, it is the form of domestic violence that is linked empirically with child abuse and with negative parenting. For further discussion of this issue, see part 5.10 below.

### ***5.7 Questions that can help to distinguish coercive from resistance violence***

Expert assessment is advisable, particularly when intimate partners claim to have been subjected to violence by each other. Nonetheless the answers to a number of questions can help lawyers, police officers, and service providers distinguish the violence of 'victims' from the violence of dominant aggressors:

- What has been the pattern of abuse and violence in the family throughout the relationship?
- Was the act of violence committed by the person who holds the balance of power in the family? Who is in control of financial decisions? Who has dominated the

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<sup>49</sup> Leslie Tutty, Jennifer Koshan et al. (2011) *Evaluation of the Calgary Specialized Domestic Violence Trial Court & Monitoring the First Appearance Court: Final Report* (Resolve).

- relationship?
- Which person initiated abuse and violence at the outset; which party tried (at first) to appease or respond to the demands of the other? Which party's violence and abuse occurred only after the establishment of a pattern of past abuse, violence, domination and control by the other?
  - Is there evidence of coercion and control in the relationship (such as setting up or softening the other to ensure compliance with demands, surveillance or enforcement of demands)? What is the pattern, if any, of either party intimidating the other by instilling fear or by destroying self-esteem through patterned degradation?
  - Which party controlled decision making, for example dictated: choice of friends; decisions about clothing and appearance; decisions about the type and frequency of sexual expression; or choice of food, purchases, and social activities?
  - Who, if anyone, manipulated others (children, relatives, associates, and friends) to turn against the other partner?
  - Which party was in charge of rule-making and enforcement?
  - Which party sought to socially isolate the other?
  - Which party exhibited self-entitlement and expected the other to satisfy them (for example, to engage in sex or provide favourite meals on demand, or subservience and control of the family's economic resources)?
  - Which family member has engaged in the most severe acts of abuse and violence in the relationship?
  - Which family member has been the most affected by the pattern of abuse and violence in the relationship?
  - Which family member was harmed, frightened or intimidated by the abuse or violence? Which family member fears the other?
  - Which party's violence or abuse produced lingering fear or caused psychological, physical or sexual distress or harm in the other?
  - Which family member, if any, has been violent in other contexts (e.g., violent with strangers or friends, violent with other intimate partners or family members)?
  - Was the violence part of a pattern of abuse, violence, domination and control, on the one hand, or was it a response to being targeted by abuse, violence, domination and control in the past ("resistance violence") on the other?

When both parties are abusive and violent, the targeted person's violence will not usually be associated with a prior history of being abusive and violent or with efforts to terrorize, to subordinate, to dominate or to control others.

It is particularly important, when assessing responsibility for the pattern of domestic violence, to assess for coercion and control. See Hon. Jerry Bowles, Hon. Kaye Christian et al. (2008) *A Judicial Guide to Child Safety in Custody Cases* (National Council of Juvenile and Family Court Judges) online at: <http://www.ncjfcj.org/resource-library/publications/judicial-guide-child-safety-custody-cases>, Card 2 for a checklist of emotional, financial, physical, and sexual control patterns and a reminder to collect information on pattern, dynamics and relationship history. For an informed judicial analysis of this issue in a family law context, see: *T.H. v. R.H.*, 2011 ONSC 6411.

In addition to coercion and control, one should pay particular attention to client fear. Fear has been verified repeatedly in evaluation research as one of the most dependable predictors of continuing risk of physical violence. (Note, however, that absence of fear is not a reliable indicator of safety.)<sup>50</sup>

### ***5.8 Special forms of domestic violence: culture, technology, and animals***

Many forms of coercive domestic violence are specific to cultural context. Examples include the withholding or destruction of mobility or communication devices from those who are disabled, the destruction of immigration papers or withdrawal of sponsorship or threatened deportation of intimate partners involved in the immigration process, the social isolation and exclusion of those who are elderly or disabled, distinct forms of gender-related violence associated with collectivist family and community structures, threats to expose sexual orientation, and the misappropriation of control over financial resources from the elderly. Ideally, lawyers and service providers should consult with cultural experts in each community to ensure inclusion of questions to elicit information about domestic violence pertinent to the cultural makeup of each community.

Stalking and monitoring using modern technology (computers, cell and smart telephones, geo positioning equipment attached to vehicles, audio enhancement tools and tracking systems) are a growing concern. Indeed stalking via modern technologies is now such a regular occurrence as to be characteristic of many coercive domestic violence cases.<sup>51</sup>

Cruelty to animals is also associated with coercive, controlling domestic violence. Animal cruelty is used in some cases to terrorize intimate partners, to coerce a return to the relationship, or to punish, control, or silence children.<sup>52</sup>

While lawyers in a family law context should be attentive to gathering information on such issues, because these forms of coercive domestic violence are pertinent to accurate assessment of pattern, nature and severity, remain aware that information will not always be collected in a criminal context since not all of such behaviours are criminal in nature. In addition, not all police officers have specialized training in the collection of various forms of evidence pertinent to a coercive domestic violence context.

Implications for family lawyers:

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<sup>50</sup> For a nuanced discussion, see note 71.

<sup>51</sup> See, for example: John Ashcroft (Attorney General, US) [\*Stalking and Domestic Violence Report to Congress\*](#) (U.S. Department of Justice, 2001). See also footnote 53.

<sup>52</sup> For example: A. Volant, J. Johnson et al. (2008) "The relationship between domestic violence and animal abuse: an Australian study" in *Journal of Interpersonal Violence* 23(9): 1277-1295; S. McPhedran (2009) "Animal Abuse, Family Violence, and Child Wellbeing: A review" in *J. Fam. Viol.* 24:41-52; F. Ascione and P. Arkow (1999) *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (West Lafayette, Indiana: Perdue University Press); Michael Roguski (2012) [\*Pets as Pawns: the co-existence of animal cruelty and family violence\*](#) (Royal New Zealand Society for the Prevention of Cruelty to Animals and the National Collective of Independent Women's Refuges).

- Check for particular forms of domestic violence specific to each client's culture
- Ask questions about abuse and/or cruelty to pets and livestock, obtaining if possible veterinary records
- Consider the need to have an expert check for monitoring devices on the family car and on other sources of transportation
- Ask questions about both parties' familiarity with and use of modern technologies; provide information on how to avoid being monitored/stalked via modern technology. Clients targeted by domestic violence should be advised to replace cell and smart phones as well as computers. If a client insists on retaining an existing cell or smart phone or computer, he or she should be instructed on methods to prevent harassment and stalking (e.g. keeping the phone turned off except when in secure surroundings;<sup>53</sup> obtaining a new email address; using a friend or colleague's computer until the computer or phone has been checked for 'malware', tracking and monitoring devices; installing anti-spyware and anti-virus programs.
- Clients can also be taught how to collect and convey detailed records of incidents of suspected digital stalking or digital harassment.<sup>54</sup> The [2013 \*Domestic Violence Handbook for Police and Crown Prosecutors in Alberta\*](http://justice.alberta.ca/programs_services/families/Publications_Library_Families/DomesticViolenceHandbookforPoliceandCrownProsecutorsinAlberta.aspx), online at: [http://justice.alberta.ca/programs\\_services/families/Publications\\_Library\\_Families/DomesticViolenceHandbookforPoliceandCrownProsecutorsinAlberta.aspx](http://justice.alberta.ca/programs_services/families/Publications_Library_Families/DomesticViolenceHandbookforPoliceandCrownProsecutorsinAlberta.aspx)) includes helpful suggestions.
- If monitoring/stalking/harassment devices or evidence are found, consult the client about turning the information over to police in connection with the possible laying of criminal charges for criminal harassment (section 264) or a privacy offence (Part VI) of the *Criminal Code*, RSC 1985, c C-46) and/or, when applicable, violation of an existing no-contact order. Consider also the potential for a civil action based on invasion of privacy.
- Consider providing information and resources to help clients protect themselves from digital harassment and stalking, and to enable collection of evidence. Resources are identified in the footnote.<sup>55</sup> See particularly:

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<sup>53</sup> Many cell and smart phones include programs or allow installation of programs that enable remote monitoring of geographic location, call history, emails, and text messages. Surveillance/spy programs are readily available to the general public. Domestic violence protection agencies are in the process of developing educational manuals to help 'victims' prevent electronic stalking. The following manual offers detailed information on risks, steps that can be taken to reduce risk, and on collection of evidence of digital stalking: Jennifer Perry (2012) *Digital stalking: A guide to technology risks for victims* (Bristol: Network for Surviving Stalking and Women's Aid Federation of England) on line at [http://www.domesticviolence.co.uk/wp-content/uploads/2012/05/Digital\\_stalking\\_A\\_guide\\_to\\_technology\\_risks\\_for\\_victims\\_2012.pdf](http://www.domesticviolence.co.uk/wp-content/uploads/2012/05/Digital_stalking_A_guide_to_technology_risks_for_victims_2012.pdf); Ashcroft, *supra* note 51.

<sup>54</sup> For additional information, see note 53.

<sup>55</sup> The sources cited in note 53 include useful information on preventing stalking via computer, geo positioning equipment, phones, and social networking sites. See also National Criminal Justice Reference Service, Special Feature "[Internet Safety](#)". This website is not limited to domestic violence. It also includes considerable information on cyber-crime, internet safety, identity theft, safety for children,

Jennifer Perry (2012) *Digital stalking: A guide to technology risks for victims* (Bristol: Network for Surviving Stalking and Women's Aid Federation of England) on line at [http://www.domesticviolence.co.uk/wp-content/uploads/2012/05/Digital\\_stalking\\_A\\_guide\\_to\\_technology\\_risks\\_for\\_victims\\_2012.pdf](http://www.domesticviolence.co.uk/wp-content/uploads/2012/05/Digital_stalking_A_guide_to_technology_risks_for_victims_2012.pdf)

- Additional remedies are now available to ‘victims’ of digital harassment in Nova Scotia pursuant to the *Cyber-Safety Act*, S,N.S. 2013, c 2
- Note the need:
  - To retain evidence of digital stalking for presentation in the family law and or child protection proceeding (as well as in the criminal proceeding), and
  - To consider any evidence of monitoring or stalking in connection with assessment of risk and danger (see parts 6 and 7 below) and provisions enabling contact with children

Caution is warranted, however, in connection with a client gathering information from another party’s cell phone or computer. Two Supreme Court of Canada decisions, *R. v. Cole*, 2012 SCC 53 and *R. v. TELUS Communications Co.*, 2013 SCC 16, and a Court of Appeal decision in Québec, *Droit de la famille – 131908*, 2013 QCCA 1206, identify privacy interests associated with cell phone ‘texting’, emails, and the contents of computers. Cell phone ‘texting’ is identified as private communication requiring police wiretap authorization for interception in *R. v. TELUS Communications Co.* While the two Supreme Court of Canada decisions focus on police powers in a criminal context, and privacy rights are apt to be less onerous in a family context, the rulings may have other implications. For example, if a person, who is not a party to the communication, intercepts another person’s texting messages without colour of right or permission, the interception could be found to be illegal. In addition, taken together, the cases suggest the need for a nuanced analysis and admission process to weigh privacy interests in cell phone and computer records against the right to introduce relevant evidence in family and child protection cases. For example the Cour D’Appel (Québec) endorses a balancing of rights to information and duties relating to disclosure, in a family law *Divorce Act* case, against privacy interests in emails and sets out a process to resolve these issues in *Droit de la famille – 131908*, 2013 QCCA 1206.

### ***5.9 Implications of differences in Criminal and Family Law understandings of domestic violence***

When lawyers and other professionals in the criminal law system on the one hand, and domestic violence experts, lawyers and other professionals in the family law system on the other, talk of ‘domestic violence’ they are not always talking about the same thing. Many legal definitions of ‘domestic violence’ do not reflect social and cultural realities of patterned coercive domestic violence as outlined here. The *Criminal Code* of Canada prohibits particular types of action. Some of those prohibited actions (for example, assault) can be associated with a pattern of coercive domestic violence. Yet definitions

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and cyber bullying and stalking.

that focus on incidents or distinct actions are problematic because they can produce erroneous conclusions about responsibility and level of risk. More particularly, the definitions can result in the criminalization of those who engage in resistance violence as well as in the criminalization of men and women who engage in minor, isolated acts of violence at separation.<sup>56</sup> The practical result (from a domestic violence evidence-informed family law perspective) is a criminal system that overreacts to minor, isolated acts of violence and to resistance violence, on the one hand, and that (as a result of the focus on incidents rather than patterns) under reacts to the pattern and severity of coercive domestic violence, on the other.

These over and under reactions can have serious implications in a family law and child protection context, particularly when an accused, who engaged in resistance violence, has been the primary caregiver of the children. In such cases, routine criminal provisions such as no contact and exclusion from the marital home will have serious implications for children and for family courts seeking to provide for children's best interests. For an illustration and judicial comments on this issue, see *Shaw v. Shaw*, 62 RFL (6<sup>th</sup>) 110, 2008 ONCJ 130.

See also parts 9.2 through 9.6 below on interpreting criminal convictions in a family law context.

### ***5.10 Connecting the focus on pattern and type of violence to children***

In criminal cases, acts of domestic violence matter only to the extent such acts are prohibited and defined in the *Criminal Code*. In family law cases, lawyers, assessors, service providers and judges have more latitude. In part, this is because the evidence of violence serves a different purpose. Punishment has little relevance. Instead the goals are safety (family and procedural) and the best interests of the child. While any violence between intimate partners is serious and relevant to assessing safety, violence that occurs as part of a pattern of domination, coercion and control is: more dangerous, more persistent and more likely to be associated with negative or even abusive parenting.

Violence that is a response to past domestic violence in the family, on the other hand, will often stop once assistance is provided, and safety and security are assured.

Detailed contextual analysis does not exclude men who are victims of coercive, controlling domestic violence. It does help us, however, distinguish those who require protection from those who claim to have been subjected to violence or abuse in order to excuse or rationalize their own violence.

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<sup>56</sup> C. Hanna, "Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women" (2009) 15(12) *Violence Against Women* 1458-1476. Researchers are seeing similar problems in connection with child safety in the child protection field where the professional tendency is to investigate and respond to child safety issues on an incident by incident basis - despite current knowledge that exposure to multiple successive adversities creates cumulative and compounding child psychological and neurological harm. See, for example: Leah Bromfield (2009) *Cumulative Harm: The effects of chronic child maltreatment* (Australian government, Australian Institute of Family Studies).



Moreover, in a family law context, complete information is needed to ensure that parenting issues affecting the safety and well-being of children are taken into account and to ensure due process in connection with mediation and settlement. Coercive forms of domestic violence are linked empirically both with negative parenting practices<sup>57</sup> and with direct forms of child abuse. Indeed research reports from western legal jurisdictions are reporting appreciable overlap between engaging in domestic violence and engaging in child abuse. The most commonly cited statistic is that between 30% and 70% of children exposed to domestic violence are also subjected to child abuse. The variation across studies depends in large part on whether or not research evaluations include emotional and psychological as well as physical and sexual child abuse.<sup>58</sup>

Children need not directly witness domestic violence in the home to be adversely affected. The operative factor, identified by medical child development experts, is the level and effects of stress in the home.<sup>59</sup> Failure to respond appropriately can have life long and even generational implications.

In addition to correlations with child abuse, researchers are documenting negative parenting patterns among parents who engage in coercive domestic violence. Not surprisingly, in addition to high correlations between physical domestic violence and physical child abuse, these negative parenting patterns tend to mirror the particulars of the psychological, coercive elements of the domestic violence. Detailed discussion of this issue lies beyond the scope of this report, yet some examples include:

- the likelihood of high levels of perpetrator coercion and control of children in cases involving high levels of coercion and control of intimate partners
- the likelihood of the use of excessive physical, disciplinary force against children in cases involving patterns of physical violence against intimate partners
- the likelihood of contact with children being used to monitor the whereabouts and activities of the other parent in cases involving stalking, monitoring, and coercive control of intimate partners
- the likelihood of sexual denigration of children in cases involving sexual denigration of intimate partners
- the likelihood of the use of contact with the children to undermine or to psychologically denigrate the child and/or the child's relationship with the other

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<sup>57</sup> Bancroft et al., *supra* note 20; Bancroft, L. and Silverman, J. (2006) "Assessing Risk to Children From Batters" Quarterly E Newsletter Commission on Domestic Violence, American Bar Association on line at: [http://www.americanbar.org/content/dam/aba/publishing/cdv\\_enevletter/assessingrisktochildren.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/cdv_enevletter/assessingrisktochildren.authcheckdam.pdf); C. Humphreys, C. Houghton and J. Ellis (2008) *Review of literature on domestic abuse and its effects on children and young people* (Scottish Government) on line at: <http://www.scotland.gov.uk/Publications/2008/08/04112614/0>; A. Cunningham and L. Baker (2004) *What About Me? Seeking to Understand a Child's View of Violence in the Family* (London, Ontario: Family Court Clinic) on line at: [http://www.lfcc.on.ca/what\\_about\\_me.pdf](http://www.lfcc.on.ca/what_about_me.pdf); Neilson (2001) note 18.

<sup>58</sup> References available on request.

<sup>59</sup> For particulars, refer to the National Scientific Council on the Developing Child at Harvard University's continuing research on child brain development, particularly Working Paper [9 Persistent Fear and Anxiety Can Affect Young Children's Learning and Development](#) (2010) [Working Paper 9].

parent in cases where denigration patters are associated with the coercive domestic violence

While not all parents who engage in coercive domestic violence will engage in the negative parenting patterns identified here and in empirical research, the failure to check for and to respond to their presence in parent-child access provisions can seriously undermine a child's well-being. Family lawyers may wish to consult Lundy Bancroft, Jay Silverman and Daniel Ritchie (2012) *The Batterer as Parent Addressing the Impact of Domestic Violence on Family Dynamics* (2<sup>nd</sup> edition, Shaw) for additional information.

Nonetheless the risks of contact for children, it goes without saying, must be balanced with consideration of the protections against harm offered by secure, child-parent attachments.<sup>60</sup> Children may have strong emotional attachments with the violating parent, despite the domestic violence. Strong attachments with both the targeted parent and with the perpetrating parent can, in some cases, enhance the child's resilience to harm from exposure to violence (provided that the relationship does not cause continuing stress, does not undermine the child's relationship with the non-abusing parent, does not undermine therapeutic assistance to the child, and can be made positive and safe). Consequently, domestic violence experts seldom recommend severing children from contact with violating parents entirely unless such contact:

- offers no benefit to the child
- is resisted by the child (subject to considerations associated with parental manipulation, a complex issue, beyond the scope of this report)
- is not and cannot be made emotionally and physically safe for both the custodial parent and the child.

If the relationship with the violator offers positive benefits, the goal is to make contact safe. The following child-centered principles and priorities are proposed for domestic violence custody and access cases:

- Priority 1: Provide safety and protection for children.
- Priority 2: Protect safety and well-being for the victim parent.
- Priority 3: Respect the right of adult victims to direct their own lives.
- Priority 4: Hold perpetrators accountable for abusive behaviour.
- Priority 5: Allow children access to both parents.

While the preferred option is attainment of all five priorities in this model, priority five (maximizing contact) is conditional on satisfaction of priorities 1 through 4.<sup>61</sup> See also Justice E. Murray's analysis of these issues in *Naylor v. Malcolm*, 2011 ONCJ 629

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<sup>60</sup> See 2011 Volume 49(3) of *Family Court Review*, a special issue devoted to attachment theory, separation and divorce.

<sup>61</sup> Janet Johnston et al (2009) *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (New York: Springer); P. Jaffe, J. Johnston, C. Crooks, N. Bala (2008) "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans" *Family Court Review* 46(3): 500-522.

(CanLII).

With these priorities in mind, the custody and access order recommended by domestic violence experts in coercive domestic violence cases most often is the granting of sole physical and legal custody to the targeted parent with supervised access granted to the domestic violator, until safety and the benefits of unsupervised access can be assessed and assured. As a general rule, domestic violence experts recommend against awarding custody (including shared, joint or parallel custody) to parents who engage in coercive domestic violence. In the absence of coercion, pattern and control, however, for example in cases of minor, isolated minor violence or resistance only violence, the choice of custody and access remedy - from full and joint custody to specified access - will depend on case particulars, including the level of parental conflict and the level of stress contact creates for the child.

Note, however, that these results are not necessarily assured in practice in family law cases, partly as a result of documented settlement patterns in these cases. For further discussion of settlement issues, see part 8.6 below.

### ***5.11 Connecting family law's focus on pattern and type of domestic violence to procedural justice***

Coercive domestic violence can have a profound effect on a person's ability to participate equitably in settlement processes. More particularly, domestic violence can cause long-term heightened apprehension, lingering fear, as well as long-term psychological harm resulting in a loss of self-esteem, a reduced ability to respond assertively or to withstand settlement pressure, as well as a number of psychological conditions that can only be diagnosed by a mental health professional. Medical health and psychology experts tell us that trauma-induced harm does not end simply because the trauma ends; trauma-induced harm must be remedied therapeutically in safe, supportive surroundings.<sup>62</sup> In addition to the continuing effects of harm, a related concern, documented in empirical research, is the tendency of coercive domestic violence to create heightened vulnerability to settlement suggestion.<sup>63</sup>

Consequently, in addition to child safety and welfare, the pattern and type of domestic violence matters when assessing procedural matters such as the suitability of settlement

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<sup>62</sup> E.g.: John J. Medina (2008) "[Neurobiology of PTSD](#)" February 2008 *Psychiatric Times* 18-21; Michael Craig Miller, M.D. (2010) "Overcoming Scary Memories" in *Healthy Lifestyle* (medical content reviewed by Harvard Medical School); American Psychiatric Association *DSM-5 Development* 309.81 *Posttraumatic Stress Disorder*.

<sup>63</sup> See the discussion of settlement pressure and case management issues associated with domestic violence cases in Chapter 10 of the Michigan Judicial Institute (2013) *Domestic Violence: A Guide to Civil & Criminal Proceedings – Third Edition* online at: <http://courts.mi.gov/education/mji/Publications/Documents/Domestic-Violence.pdf> . Canadian Judges interested in a discussion of judicial dispute resolution in a domestic violence context may wish to refer to Chapter 15 of the National Judicial Institute's bench book on Domestic Violence: Linda C. Neilson (2011 and forthcoming 2013 edition) *Domestic Violence and Family Law in Canada: A Handbook for Judges* (Ottawa: National Judicial Institute) with Introductory Comments by Justice John F. McGarry, Superior Court, Ontario, published in electronic bench book format as *Domestic Violence*.

processes. See part 8.6 for additional discussion of settlement issues.<sup>64</sup>

### ***5.12 Reconciling definitions across systems***

Many Canadian and foreign jurisdictions are responding to definitional problems at the intersection of criminal and family law by adopting a number of policies and practises namely: ensuring that police officers and Crown prosecutors receive specialized domestic violence training; discouraging dual charging; and replacing primary aggressor with dominant aggressor charging policies. While the distinct evidence requirements of the separate legal systems make it difficult, if not impossible, to implement common definitions and risk assessments across legal systems, these types of initiatives can help to move our legal systems toward a common conceptual framework.

*Dominant* aggressor charging policies take into account patterns of coercion and control associated with the abuse and violence throughout the relationship (factors such as those identified at parts 5.3 through 5.7 above). Such policies can help police and Crown distinguish perpetrator from targeted adult behaviour. *Primary* aggressor policies, on the other hand, tend to focus on responsibility for singular or the most recent incidents of domestic violence. As we have seen, the result can be criminalization of resistance violence.

## **PART 6: RISK ASSESSMENT, CONTINUING DOMESTIC VIOLENCE**

### ***6.1 Introduction***

After determining the type of domestic violence, the next step is assessment of risk. This requires, in addition to ascertaining the type of domestic violence, detailed scrutiny of patterns of behaviour. When deciding what information can, should, and must be shared across court systems, one of the most important factors is level of risk, including potential for lethal outcome.

- 'Risk' refers to the likelihood domestic violence will continue if measures are not taken to enhance safety
- 'Potential for lethality' or 'potential for lethal outcome' refers to the risk someone will die if preventative safety measures and services are not put in place

In the following discussion, the terms 'potential for lethal outcome' and 'potential for lethality' are used interchangeably. A number of domestic violence researchers use the term 'danger' to describe the same phenomenon.

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<sup>64</sup> Because the report is focused on the intersection of family and criminal law, discussion of domestic violence considerations associated with determining the suitability of settlement processes is beyond the scope of this report. For detailed information on domestic violence and settlement processes, Canadian judges may wish to refer to the National Judicial Institute bench book cited in note 63.

While many of the indicators of potential for lethal outcome are the same as those for risk of continuing domestic violence, others are unique to lethality. In other words, domestic violence perpetrators who kill have at least some characteristics that distinguish them (as a group) from perpetrators of repeat but non-lethal violence. Therefore, in this manual, we consider risk and the potential for lethality separately.

Violence and abuse in the home harm not only the person targeted, but also any children who reside there. In a small but significant number of cases, perpetrators kill former intimate partners, or the children, and then themselves by committing suicide.<sup>65</sup> Safety measures should be specifically designed to address the case-specific particulars of the risk of continuing violence and of the potential for lethal outcome.

## ***6.2 Information sources***

Domestic violence advocates, transition house workers, victim services professionals, as well as domestic violence academic and professional experts in the community can offer invaluable knowledge and or experiential insight and assistance pertinent to risk.

In addition to consulting such experts, lawyers representing clients in domestic violence cases will also want to take the time and initiative to become knowledgeable about the particulars of police, Crown, and victim policies and services; transition house and longer term safe housing; domestic violence intervention and parenting programs for perpetrators; supervised child access programs; alcohol and drug and mental health treatment programs; services relating to culture and disability; as well as victim, child, and family domestic violence support services in the community.

Finally, one should keep in mind that persons targeted by domestic violence are often themselves the best source of information relating to risk and potential for lethal outcome.

## ***6.3 Risk and lethality: similarities and differences***

To reiterate: it is important to distinguish facts and characteristics associated with the onset of domestic violence, from facts that indicate the likelihood domestic violence will continue, from facts associated with the potential for lethal outcome. While some facts - such as the pattern of abusive and violent conduct - are relevant to more than one category, others relate to only one.

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<sup>65</sup> For example: Office of the Chief Coroner Province of Ontario (2010), *supra* note 12; Jan Breckenridge and Kerrie James (2010) "Thinking about Homicide Risk: A Practice Framework for Counselling" Stakeholder Paper 9 (Australia Domestic & Family Violence Clearinghouse); Canadian Centre for Justice Statistics (2007) *Family Violence in Canada: A Statistical Profile* (Ottawa: Statistics Canada Cat. 85-224-XIE, (2009) *Family Violence in Canada: A Statistical Profile* 85-224-x; P. Jaffe, P. and M. Juodis (2006) "Children as Victims and Witnesses of Domestic Homicide: Lessons Learned from Domestic Violence Death Review Committees" *Juvenile and Family Court Journal Summer* 2006 13-28.

For example, research<sup>66</sup> has revealed that depression and suicidal thoughts are associated with a potential for a lethal outcome but not necessarily with the likelihood of repetitive domestic violence; witnessing domestic violence as a child is associated with the likelihood a person will engage in at least one incident of domestic violence as an adult, but has not been identified as a good predictor of whether or not a particular person will continue to engage in domestic violence. Access to guns is empirically linked to potential for lethal outcome but has not been considered an accurate predictor that a person will continue to engage in repetitive non-lethal domestic violence.<sup>67</sup> Therefore, Part 6 discusses continuing risk, while Part 7 discusses potential for lethal outcome.

#### ***6.4 Indicators of risk of continuing violence***

A systematic review of the research reveals that the following facts are associated repeatedly with continuing domestic violence:

- A pattern of past emotional, financial, physical or sexual violence and abuse against family members
- Sexual abuse
- Financial control with abuse
- Emotional and psychological abuse associated with coercion or control
- Prior criminal conviction for violence (keeping in mind that the fact that domestic violence is raised for the first time is not a reliable indicator that the domestic violence was a first-time occurrence. The normal tendency is for domestic violence to occur many times before it is disclosed to police or to lawyers.)
- The degree to which the violence is recent. While, subject to the cautionary comments in the footnote, the degree to which domestic violence is recent can be an important risk factor,<sup>68</sup> the research is indicating that the pattern of past

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<sup>66</sup> The risk and lethality indicators outlined in this report are drawn from two decade's scrutiny of domestic violence risk and lethality assessment research drawn from throughout Canada, the United States, Australia, and to a lesser extent England and New Zealand. The list represents analysis and comparison of hundreds of studies. Consequently, the references are far too numerous to include in this report. The following publications offer useful guidance and overview information on domestic violence risk and danger assessment: Marcie Campbell (edited by Pam Cross, Peter Jaffe and Barb MacQuarrie) (2010) *Threat Assessment and Risk Management in Domestic Violence Cases: An Overview of Ontario Justice and Community Collaboration for 2010 and Future Directions* (Center for Research & Education on Violence against Women and Children); M. Bell, L. Cattaneo, L. Goodman, M. A. Dutton (2008) "Assessing the Risk of Future psychological Abuse: Predicting the Accuracy of Battered Women's Predictions" *Journal of Family Violence* 23(2): 69-80; J. Roehl, C. O'Sullivan, D. Webster, J. Campbell (2005) *Intimate Partner Violence Risk Assessment Validation Study Final Report* (NCJRS 209731); R. Karl Hanson, Leslie Helmus and Guy Bourgon (2008) *The Validity of Risk Assessments for Intimate Partner Violence: A Meta-Analysis 2007-07* (Ottawa: Public Safety Canada); Melanie Brown (2011) *Family Violence Risk Assessment Review of International Research* (New Zealand government).

<sup>67</sup> N. Z. Hilton and G. T. Harris (2005) "Predicting Wife Assault: A Critical Review and Implications for Policy and Practice" in *Trauma, Violence and Abuse* 6(1) 3 to 23.

<sup>68</sup> When violence is recent, risk is high: C. R. Block (2003) "How Can Practitioners Help an Abused Women Lower her Risk of Death?" *National Institute of Justice Journal* (U.S. Department of Justice). The length of time since the last incident of violence is not, however, a reliable indicator of reduced risk, particularly if the violator has not had opportunities to engage in domestic violence against the intimate partner. For example, if the violator has been in jail or in another jurisdiction, a period without violence may have little to do with safety. In addition, domestic violence can resurface when circumstances

- domestic violence conduct is as important as the particulars of the latest incident.
- Abuse and violence toward other family members, former intimate partners, and members of the public
  - Escalation of frequency or severity of abuse and violence<sup>69</sup>
  - Patterns of generalized violence against non-family members
  - Controlling and obsessive forms of emotional or psychological bond (e.g., monitoring, stalking, high levels of possessiveness, jealousy)
  - Failure to comply with restraining or no-contact orders, support and other court orders, and dropping out of domestic violence intervention programs.<sup>70</sup> All are documented indicators of heightened risk. (Note: This is why maintaining a continuing record of compliance with court orders and treatment programs is extremely important as is requiring domestic violence intervention programs to release information regarding participation. When a party drops out of a program, risk increases and clients should take preventative action.)
  - Victim fear of the perpetrator. Targeted persons' fear of perpetrators has been empirically verified as a reliable predictor of continuing domestic violence (although the absence of fear is not a reliable indicator of safety). People who are targeted by domestic violence are often unaware of their own danger. For an explanation, refer to footnote<sup>71</sup>

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change such as when the violator's relationship with a new intimate partner ends.

<sup>69</sup> Interagency Council on Intermediate Sanctions (2011) *Hawaii State Validation Report on the Domestic Violence Screening Instrument (DVSI) and Spousal Assault Risk Assessment (SARA)*. This on-line evaluation report endorses connections between data relating to escalation of frequency or severity and domestic violence recidivism.

<sup>70</sup> For example: Alana Kindness, Hans Kim et al. (2009) "Court Compliance as a Predictor of Post adjudication recidivism for Domestic Violence Offenders" 24(7) *Journal of Interpersonal Violence* 1222-1238; Klein, *supra* note 21. See Interagency Council, *ibid*, in connection with connections between violations of domestic violence restraining orders and recidivism.

<sup>71</sup> J. Campbell et al. found that close to 50% of women failed to appreciate their own risk in cases of attempted homicide. See, for example: Jacqueline Campbell, Daniel Webster, Nancy Glass (2009) "The Danger Assessment Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide" 24(4) *Journal of Interpersonal Violence* 653-674 at page 670; Roehl et al., *supra* note 66; N. Dietz and P. Y. Martin (2007) "Women Who Are Stalked: Questioning the Fear Standard" in *Violence Against Women* 13(7): 750-776. At first glance the fact that 'victim' fear is an accurate predictor of risk of continuing domestic violence, while the absence of fear is not a reliable indicator of safety may seem counter intuitive, yet people who have been targeted repeatedly by severe sexual or physical violence who have survived repeatedly may come to believe in their own ability to "survive" the violence. They also come to believe in the domestic violator's ability to control the violence so that it will not result in lethal outcome. In connection with stalking, N. Dietz and P. Y. Martin examined data from a national, representative sample of women in the United States. They found that one quarter of stalked women reported no fear in connection with being stalked. The authors express concern about the potential for wrongful denial of protection if absence of fear is used as an assessment criterion. Other issues affecting the accuracy of 'victim' fear are reported in L. B. Cattaneo, M. E. Bell, L. Goodman and M. A. Dutton (2007) "Intimate Partner Violence Victims: Accuracy in Assessing their Risk of Re-abuse" in *J. Fam. Viol.* (2007) 22: 420-440. 'Victims' of domestic violence were asked by the researchers to assess their own risk of re-abuse. They were monitored by the researchers for 18 months to assess the accuracy of their predictions. The findings suggested the empirical predictive reliability of 'victim' fear without pessimistic or optimistic bias. In other words, 'victims' were no more apt to falsely predict risk than to falsely predict absence of risk. Those who reported high levels of stalking were likely to classify themselves as high risk and to be accurate in that prediction.

- Unstable lifestyle (for example erratic employment, refusal to assume family responsibilities)
- Substance abuse (alcohol or drug)
- Separation, which is known to be a period of enhanced risk, particularly for women<sup>72</sup>

Family lawyers should consider as well indicators of risk outlined in part 6.4.1 below.

#### **6.4.1 Risk factors identified in some studies, not in others**

Facts that have been associated with enhanced risk of continuing domestic violence in many studies but not in others are outlined below. One should consider these facts when considering risk and the need to implement safety measures, particularly if the facts identified in part 6.4 are present.

- Mental health problems. Generally, with the possible exception of post-traumatic stress, mental health problems have not been shown to cause domestic violence. Experts agree, however, that the presence of mental health problems increases the risk of serious harm. Thus, when mental health and domestic violence are present, it is important to address both
- Insecure attachments in family of origin and in intimate partnerships<sup>73</sup>
- A new partner in the targeted person's life
- Prior arrest. Some studies have found that prior arrests are associated with continuing violence; others dispute the connection. While prior arrests for crime should be considered in connection with risk, it goes without saying that absence of prior arrest does not indicate reduced risk or seriousness
- Assault during pregnancy. Assault during pregnancy has been linked to risk of continuing violence in some studies; it is also linked to the potential for lethal outcome (see Part 7)
- Continuing conflicts relating to children. The presence of children increases opportunities for contact. Increased contact increases opportunities to harm

When a collection of facts associated with risk appear in evidence, one should weigh carefully whether or not information with respect to risk should be reported to police, victim services and/or to child protection authorities.

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<sup>72</sup> Separation is a time of heightened risk and danger for women. Statistics Canada (2009), *supra* note 65; Jennifer Martin and Rhonda Pritchard (2010) *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (New Zealand, Ministry of Social Development); D. A. Brownridge (2006) "Violence Against Women post-separation" in *Aggression and Violence Behaviour* 11 (2006) 514-530; Block and DeKeseredy, *supra* note 46. Enhanced risk associated with separation applies more to female than to male 'victims'. Note however: statistical discussions relating to domestic violence and gender do not always distinguish patterns associated with opposite sex- relationships from patterns associated with same sex relationships. It is likely that intimate male or female partners targeted by coercive same sex domestic violators also experience enhanced risk of violence at separation in association with violator perceptions of loss of control.

<sup>73</sup> D. M. Lawson (2008) "Attachment, Interpersonal Problems, and Family of Origin Functioning: Differences Between Partner Violence and Nonpartner Violent Men" 9 *Psychology & Men and Masculinity* 90-105; Donald Dutton (2007) (2nd ed.) *The Abusive Personality* (Westport, Conn: Praeger.



For additional information on risk: See Praxis International *Blueprint for Safety* [http://www.praxisinternational.org/praxis\\_blue\\_print\\_for\\_safety.aspx](http://www.praxisinternational.org/praxis_blue_print_for_safety.aspx), particularly “Practitioners' Guide to Risk and Danger in Domestic Violence Cases” at page 14.

### ***6.5 Sharing information relating to risk***

While the best option for sharing information pertinent to risk is with client consent, in its absence, service providers and lawyers will want to weigh carefully client concerns relating to safety, privacy and liability associated with revealing information, on the one hand, and child and adult safety concerns associated with failure to divulge, on the other. Most Professional *Codes of Professional Conduct*, including those for lawyers authorize the revelation of confidential information in the face of imminent risk of harm to identifiable persons. See, for example, Chapter IV, Rule 2 'Public Safety Exception' p. 17 of Canadian Bar Association (2009) *Code of Professional Conduct*. See also Rule 3.3, and 3.3.3 of the Federation of Law Societies of Canada (2012) *Model Code of Professional Conduct*, approved December 2012, which states that a lawyer may disclose confidential information, limited to what is required, on “reasonable grounds that there is an imminent risk of death or serious bodily harm.” The Code advises consideration of likelihood, imminence, absence of alternative means to prevent injury, and the circumstances under which the information was acquired. Consider also the factors to be taken into account, when assessing whether public safety outweighs solicitor-client privilege, identified in *Smith v. Jones*, [1999] 1 S.C.R. 455; 169 D.L.R. (4<sup>th</sup>) 385.

Government officials and service providers (and lawyers) will want to consider provisions relating to freedom of information, privacy and public safety in pertinent privacy and personal information protection legislation.<sup>74</sup>

Note that many Access to Information and Privacy statutes authorize the release of information without consent in specified circumstances in order to protect health or safety of an individual. See, for example section 42 (h) of *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, Chapter F.31. Note also, however, the qualification in a number of these statutes such as “compelling” and the duty to give notice.

Best Practice from a domestic violence safety perspective: British Columbia's *Freedom of Information and Protection of Privacy Act* [R.S.B.C. 1996] Chapter 165. This statute authorizes the release of personal information relating to risk of domestic violence. Section 33.1 subsection (m.1) states expressly that personal information may be released for “the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is likely to occur”. Note, however, that while the provision

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<sup>74</sup> The Office of the Privacy Commission of Canada provides access to pertinent legislation and helpful guidance: [http://www.priv.gc.ca/fs-fi/02\\_05\\_d\\_15\\_e.cfm](http://www.priv.gc.ca/fs-fi/02_05_d_15_e.cfm). Lawyers may wish to consult, in particular, the Office of the Privacy Commissioner of Canada's (2011) publication *PIPEDA and Your Practice A Privacy Handbook for Lawyers* on line at [http://www.priv.gc.ca/information/pub/gd\\_phl\\_201106\\_e.asp](http://www.priv.gc.ca/information/pub/gd_phl_201106_e.asp)

authorizes release of information by service providers and other officials, lawyers are additionally bound by solicitor-client professional privilege and codes of professional conduct.

In connection with limitations on capacity to disclose information obtained during discovery processes, see 8.7.

### ***6.6 Culture, age and social status can increase risk***

The following situational and cultural factors are commonly associated with increased risk: being Aboriginal/First Nations, Métis, Inuit; being young (18-25); having a physical or mental disability; being a member of a disadvantaged cultural group; being isolated from sources of help as a result of religious belief, culture, or as a result of rural location; being poor; being in a same sex-relationship; living common law or in an unmarried intimate relationship; being pregnant; experiencing mental health or substance abuse problems or being involved (or formerly involved) with a violent intimate partner who has such problems. In addition, rates of domestic violence are known to increase in times of emergency, social upheaval and stress. Such circumstances can increase risk either directly or indirectly by limiting access to support services. In these circumstances, one should pay special attention to safety measures and attend to any obstacles that limit access to support services specific to the cultural or social context.

### ***6.7 Targeted party fear***

Reminder: victim fear has been documented empirically as one of the most accurate predictors of future domestic violence. When victims are frightened, lawyers and service providers should take note and check for the presence of other risk indicators - matching safety provisions to level of fear.

### ***6.8 Concluding comments on indicators of risk***

If a collection of indicators suggests heightened risk of physical domestic violence, one should undertake protective measures, considering carefully the need to exchange information about risk with service providers and professionals who can provide protection and support in other court sectors.

### ***6.9 Information Exchange Protocols***

Given the confusion surrounding the circumstances in which information on risk can be disclosed in the absence of consent, consider engaging the community in the development of information-sharing protocols across legal systems. The purpose should be to identify the circumstances in which service providers, victim services, police, child protection authorities, court coordinators, lawyers, and other professionals may share information in connection with high risk and particularly changing risk (such as when an alleged perpetrator has dropped out of mandated programmes, has breached a no contact order, or has dropped out of therapy). Clear information exchange rules can reduce delays, help to promote safety, save professional time, and avoid cumbersome applications to courts.

Note the importance of ensuring protection of confidential information from victims that might adversely affect safety, and the duty not to share more confidential information than is necessary to prevent harm.

A number of jurisdictions, for example Alberta, Nova Scotia, and parts of Ontario and British Columbia, have implemented cross sector committees to advise on and respond to the need for collaboration and the swift information exchanges in high risk domestic violence cases.<sup>75</sup>

## ***6.10 Risk Assessment Tools***

### **6.10.1 Introduction**

The list of indicators of risk identified above is drawn from ten years' scrutiny and analysis of risk assessment research conducted in Canada, the United States, Australia, England and New Zealand.<sup>76</sup> The indicators listed emerge consistently across studies and jurisdictions. They are presented here for the use of lawyers and other professionals to enable a matching of services and safety measures to level of risk.

Nonetheless the indicators listed are not weighted for predictability, meaning that while they are useful in ensuring that appropriate safety measures are put in place matched to level of risk, the lists do not constitute a predictive risk-assessment tool.

The term 'risk assessment tool' refers to actuarial and other professional assessment tools designed to help police and other professionals assess and predict the risk that domestic violence will occur in the future. Two of the most researched domestic violence risk assessment tools in use in Canada today are the Spousal Assault Risk Assessment (SARA) and Ontario Domestic Assault Risk Assessment (ODARA). Both have some degree of research verification although controversies relating to predictive validity remain.<sup>77</sup>

In connection with potential for lethal outcome, see Part 7 below.

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<sup>75</sup> Examples include: the High Risk Management Initiative (HRMI) in Calgary Alberta; the Hamilton High Risk Domestic Violence Community Advisory Committee; the Langley Domestic Violence Pilot Project and Vancouver Police Domestic Violence and Criminal Harassment Unit. See also: Victims Services and Crime Prevention Division (2010) *Domestic Violence Response A Community Framework for Maximizing Women's Safety*.

<sup>76</sup> Firm conclusions about indicators of risk or potential for lethal outcome should not be based on scrutiny of a limited number of studies or on research exclusive to a particular jurisdiction. Patterns of human domestic violence related behavior do not depend on jurisdiction. Moreover, drawing conclusions from scrutiny of a limited number of reports presents a very real danger that pertinent indicators and qualifications will be missed. The research in this field changes weekly if not daily. Continuous consultation with domestic violence experts is advisable.

<sup>77</sup> See, for example: Interagency Council, *supra* note 69; Elly Robinson and Lawrie Moloney (2010) "Family Violence: Towards a holistic approach to screening and risk assessment in family support services" *AFRC Briefing* No.17; Brown (2011), *supra* note 66.

### 6.10.2 Strengths and Limitations

All domestic violence risk prediction tools have limitations. Research indicates that such tools, in 20 to 30 % of cases fail to predict continuing physical domestic violence. Furthermore, in about 20 % of cases, the tools identify as high risk perpetrators who fail to engage in further domestic violence.<sup>78</sup> Nonetheless, research is also indicating that risk assessment tools can accurately predict between 66% and 77% of continuing violent domestic violence, depending on the tool used, and that the use of tools is an improvement over professional judgement alone.

Consequently, information from risk assessment tools can be particularly helpful in a criminal police context IF considered along with careful scrutiny and analysis of detailed evidence of domestic violence and the individual circumstances of each case.<sup>79</sup>

In the family law and child protection context, however, the usefulness of these tools is rather limited since they focus on the risk of continuing physical violent action (for example assault) to the exclusion of other forms of domestic violence that can be equally damaging to families and to children (such as continuing harassment, economic and psychological abuse, child abuse, and forms of manipulation, coercion and negative parenting).

Nonetheless, given that risk assessment can help lawyers anticipate (and respond to) the level of risk of continuing physical violence, family lawyers representing survivors of domestic violence may wish, particularly when the risk of continuing violence is thought to be moderate or high, to seek risk assessment conclusions from the police. This information can be taken into account during settlement discussions in order to ensure that adequate attention is paid to preventing risk of future continuing physical violence. It can also be presented, along with other factors applicable to risk, to family or child protection courts.

Similarly, family law lawyers representing perpetrators of domestic violence may wish to seek risk assessment information from police to present to the family court if it is thought that the assessment indicates low risk.

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<sup>78</sup> The rates of false negative and false positive being reported in the research vary by assessment tool. Some tools (such as Campbell's Dangerousness Assessment and ODARA) are reported to have better predictive capacity than others but all tools result in false negatives and false positives: Roehl et al., *supra* note 66. Of particular concern is Roehl et al.'s finding of 16 to 33% false negatives (failure to predict violence) depending on the assessment tool. See also: D. A. Heckert and E. W. Gondolf (2004) "Predicting Levels of Abuse and Reassault Among Batterer Program Participants" (NCJRS). They report that even the best tools result in approximately 20% false negatives (failure to predict domestic violence). This is one of the reasons that risk assessment tools should not be used to delay or deny protection when safety measures appear to be warranted. False positives at rates in excess of 20% are also a concern. See also: Brown, *supra* note 66.

<sup>79</sup> Refer also to risk assessment information made available to the public on line by the *Centre for Research and Education on Violence Against Women*, University of Western Ontario: <http://www.crvawc.ca/index.htm> .

Anticipate the potential for delay and difficulty in gaining access to information, however. Refer to Part 8 below for potential options when the police are unable to consent to release of information.

### ***6.11 Changing circumstances***

One must keep in mind that risk is situational and changes with circumstances. It can increase (for example when the perpetrator is no longer employed, during times of stress and emergency, or when the targeted party seeks to relocate). It can also decrease (for example following intervention programs, following acceptance of separation, following treatment for mental health problems, or when the targeted party is well-protected by community services). Consequently, in addition to considering information, if any, from risk assessment tools, one should continuously monitor facts associated with risk (outlined above), taking into account the support networks available to the parties. Safety plans should be revised accordingly.

### ***6.12 Risk assessment in family and child protection cases, admissibility and use***

Generally, in family law cases, the relevance and probative value of safety and risk assessment tool evidence is likely to outweigh potential prejudice because of the way the evidence is used. Concerns about potential prejudice from false positives, while important, will be of less concern in family than in criminal cases where a false positive could affect personal liberty and freedom. In family law cases, the evidence is considered and used for a different purpose; it is used preventively to identify the need for protective measures, to identify service needs, and to respond to the best interests of children.

Consider as well that domestic violence risk assessment evidence should not be considered conclusive, particularly if other evidence indicates the need for safety precautions. See, for example: *Roach v. Kelly*, 2003 CanLII 1991 (ON S.C.) (CanLII).

Finally, one should keep in mind that domestic violence risk assessment tools tend to measure the continuing risk of merely some forms of physical domestic violence. Thus they can be useful as a reminder that safety measures are needed but should not be used to discount the need for protective measures, particularly the need for protection from other forms of domestic violence in a family law context. This issue is discussed more thoroughly in part 6.14.

### ***6.13 Caution: meaning of a "low risk of domestic violence" assessment***

What does it mean when a witness testifies that a violator has scored 'low risk' on a recognized domestic violence risk assessment tool (such as SARA or ODARA)? It means only that other people who have committed violent acts of domestic violence, who have similar attributes and who have faced similar circumstances, have tended not to engage in repetitive domestic violence. It also means that most people who engage in repetitive domestic violence have different attributes and circumstances. It is thus not an absolute finding. And, since risk is situational, it can change rapidly as circumstances change. In addition, a low score does not rule out the possibility that a particular

domestic violator has an unusual set of circumstances that are not measured by risk assessment tools. Risk and safety assessment should be periodic, not a one-time occurrence.

Moreover, in a family law context, since the risk assessment tools tend to focus on violent physical acts, as opposed to other forms of domestic violence, a low risk assessment may not offer much reassurance with respect to other forms of domestic violence, including forms of coercion associated with child abuse and poor parenting.

#### ***6.14 Safety for children: current risk assessments tool limitations***

Given that domestic violence risk assessment tools relate primarily to physical violence between adult intimate partners or former intimate partners and are not designed to assess risk to children, they should not be used in a family law context to assess the safety of children, or to justify denial, reduction or delayed access to assistance or as a replacement for detailed consideration of factual evidence. For example, in *Roach v. Kelly*, 2003 CanLII 1991 (ON S.C.) (CanLII) cited earlier, despite expert assertions of a low risk of domestic violence but moderate risk of violence, the trial judge relied on evidence of past conduct and denied reinstatement of supervised access on the basis that the mother's terror would have a negative impact on her parenting and the family should not have to live in constant fear. (The father had used supervised access to question the child about the mother and child's whereabouts.)

Reminder: the operative factor for children is the level and effect of stress, including the level of continuing conflict between the parents; continuing trauma-related harm from past domestic and family violence in the home; the effects of contact on the child and on the care giving parent; the presence or absence of parenting practices that mirror the coercive elements of the domestic violence; and the presence or absence of child abuse. The psychological elements and effects of coercive domestic violence have as much, perhaps more, long-term impact on children. Nonetheless when risk of physical DV is high for a parent or a parent is in danger, children are in danger too. Thus, while risk assessments should not be used to assess children, when risk assessments indicate high risk and particularly the potential for lethal outcome for a parent, children require safety and security measures. For further discussion, see Part 7.

#### ***6.15 When should a domestic violence expert be called in?***

The Supreme Court of Canada recognizes, in *R. v. Lavallée*, [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1, (1990), 55 C.C.C. (3d) 97, (1990), 76 C.R. (3d) 329, (1990), 67 Man. R. (2d) 1, (1990), 67 Man. R. (2e) 1, 1990 CanLII 95 (S.C.C.) (CanLII), that domestic violence is a complex phenomenon lying outside the experience and understanding of most Canadian judges and lawyers. Misconceptions in the domestic violence field are common. Consequently, expert evidence will often be helpful particularly when issues associated with potential risk and safety are unclear; when additional information is needed to assess whether or not safety measures are needed; when each partner has been violent and is making allegations of domestic violence against the other; when it is necessary to understand the psychological impact of domestic violence on a child or on a targeted parent; when it would be helpful to the court to understand connections between

perpetration of domestic violence and perpetration of child abuse; when evidence is insufficient to enable the court to conclude whether or not the targeted person (adult or child) requires protection from future domestic violence, child abuse, or destructive and manipulative parenting.

Basic domestic violence training seldom qualifies an evaluator an expert. Many 'experts' who conduct parent-child evaluations (assessments) for courts lack specialized knowledge of domestic violence. Assessing the needs or interests of children in a domestic violence context requires considerable knowledge not only of the complexities of domestic violence but also of the developmental and social needs of children. While Canada lacks national standards defining a 'domestic violence expert', there are a number of questions one can ask in order to help to identify an expert:

- Has the person been professionally certified by a reputable educational or professional body as a domestic violence expert? What requirements were required for certification?
- Does the person teach domestic violence educational courses to professionals or academic students? Is he or she a tenured or tenure-stream professor in an academically accredited university?
- Has the person conducted research in the domestic violence field? If so, in what areas?
- Has the person published articles or books on domestic violence? Were they refereed publications?
- What specific courses or programs has the person taken or taught relating to domestic violence? When and over what period of time?
- How many years has the person been working or conducting research in the domestic violence field? During that time has his or her work or research focused primarily on domestic violence?
- If the individual's expertise is based on experience rather than academic or research expertise, how many cases involving domestic violence has the expert assessed, counselled, treated or evaluated? In what social and cultural context or contexts?
- Is the person a recognized authority on domestic violence issues in the community? Is he or she consulted in connection with the development of domestic violence policies?
- Has any court qualified the person as a domestic violence expert?

In the absence of domestic violence expertise, assessments of parents and children in a domestic violence context can be misleading. One should try to ensure that evaluators who assess parents and children in domestic violence cases are recognized domestic violence experts or, if that is not possible, that the evaluators consult with a domestic violence expert.

One of the problems at the intersection of criminal, child protection, and family law proceedings is that experts, who regularly conduct assessments in legal proceedings, possess different types and levels of expertise. For example, professionals who evaluate child best interests in a child protection context or in a family law context may have

appreciable expertise in connection with child development but may have limited understanding of how domestic violence affects adult parenting or children. Police in the criminal sector may have received specialized training in the assessment of risk of continuing domestic violence in a criminal law context but may lack understanding of pertinent child development and child safety issues.<sup>80</sup> Moreover, few assessors have an adequate understanding of how an evaluation in one sector can affect the family in another legal context.

In order to maximize resources, consider arranging, in consultation with a domestic violence expert, joint consultations among experts across legal sectors to coordinate and consolidate pertinent information and to reach agreement on how the information will be used in the various legal systems.

### ***6.16 When a domestic violence expert may not be needed***

Expert assistance and evidence can be time-consuming and expensive. Many families experiencing domestic violence have limited financial resources and thus limited ability to hire experts. Expert information may not be needed if the evidence is clear and the parties agree that the domestic violence was clearly minor and isolated. Expert information may also not be necessary when the level of risk is clear and safety measures have been carefully considered and put in place to protect the targeted parent and children.

When specialized domestic violence expertise has not been considered or is not available, the best course of action is to err on the side of caution and safety.

## **PART 7: POTENTIAL FOR LETHAL OUTCOME**

### ***7.1 Introduction***

Screening for facts indicating the potential for lethal outcome is critically important in family and child protection cases, yet reporting rates to police are low.<sup>81</sup> Domestic violence research as a whole documents the existence of prior intimate partner violence in the majority intimate partner homicide cases (albeit not always known to police or recorded in arrest records).<sup>82</sup> While, in 2010, Statistics Canada<sup>83</sup> reported the existence

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<sup>80</sup> Police in New Zealand are making use of a check list to assess the risk a perpetrator poses to children. While police consideration of the risk perpetrators pose to children is a very important step in the right direction, it is also important to note that verification research on the validity of tools to ascertain child risk is ongoing and also that risk assessment tools are designed for the criminal context. They provide limited information about child safety in a family law context because they are not designed to assess parenting and non-criminal forms of parental conduct that can have serious and long term psychological implications for children.

<sup>81</sup> Canadian Centre for Justice Statistics, *supra* note 65.

<sup>82</sup> Campbell et al., *supra* note 71; Bernie Auchter “Men Who Murder Their Families: What the Research Tells Us” 2010 NJI Journal No. 266; Office of the Chief Coroner Ontario (2010) *supra* note 12; AIC Reports, Research and Public Policy Series 104 (2009) Domestic-related homicide: keynote papers from the 2008 international conference on homicide (Australian Government).



of records of prior family violence in the majority of cases in which spouses were accused of killing intimate partners, numerous studies and reports document the absence of prior police involvement and records in many lethality cases.<sup>84</sup> Moreover, since some of the indicators of potential for lethal outcome are non-criminal, in the absence of use of lethality indicators, police will not necessarily collect information relating to known indicators of potential for lethal outcome.<sup>85</sup> Family lawyers and service providers should keep in mind that the best source of information relating to risk of potential for lethal outcome is the person subjected to domestic violence.

## ***7.2 Facts associated with potential for lethal outcome***

Jacqueline Campbell has reported that approximately 15% of cases of homicidal domestic violence are not predictable using any current indicators or assessment tools.<sup>86</sup> Nonetheless, in the majority of homicide reviews the following facts, associated with domestic violence homicide, are remarkably consistent across death reviews and lethal outcome research studies, from jurisdiction to jurisdiction:<sup>87</sup>

- Access to weapons, particularly to guns. Removal of access to guns is critically important in domestic violence cases
- Unemployment. Perpetrator unemployment is identified regularly and appears to be a strong predictor (when associated with other indicators). This is perhaps, in part, because avoidance of support obligations is a form of continuing harassment and control as well as a form of economic child abuse. It may reflect some of the behaviours characteristic of many domestic violence perpetrators such as self-indulgence, entitlement, and non-acceptance of responsibility. Alternatively, social circumstances that produce stress are known to increase danger
- Pending or actual separation (for female victims)
- Prior domestic violence, escalating in severity or frequency. Not all cases will

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<sup>83</sup> Maire Sinha (2012) "[Family Violence in Canada: A statistical profile, 2010](#)" *Juristat* catalogue no. 85-022-X (Ottawa: Statistics Canada)

<sup>84</sup> Office of the Chief Coroner, Province of Ontario, *2011 Annual Report, Domestic Violence Death Review Committee*. In 2007 Statistics Canada, *supra* note 65, reported that the majority of actual and attempted spousal domestic violence homicide cases in Canada disclosed no documented police record of arrest for prior domestic violence crimes. See also Campbell et al., *supra* note 71 and Auchter *supra* note 82. While additional research is warranted, the studies and death review reports are indicating that murder/suicide cases, which not uncommonly involve children as victims, may be less likely than other DV homicide cases to involve prior police involvement or records.

<sup>85</sup> Office of the Chief Coroner *ibid.*; Carrie LeFevre Sillito and Sonia Salari (2011) "Child Outcomes and Risk Factors in U.S. Homicide-Suicide cases 1999-2004" 26 *J Fam Viol* 285-297; Leslie Hamilton, Peter Jaffe, Marcie Campbell (2013) "Assessing Children's Risk for Homicide in the Context of Domestic Violence" 28 *J Fam Viol* 179-189; Auchter, *supra* note 82.

<sup>86</sup> For example: J. Campbell and A. Wolf (2006) *Intimate Partner Violence Risk Assessment Implications for Women's Safety* (Power Point: Oregon Health & Science University).

<sup>87</sup> In connection with domestic violence homicide studies it is important to make note of the fact that many of the death review and homicide studies are small. For the most part, death review studies identify facts associated with lethal outcome after the death occurred. Consequently, researchers grapple with missing information (for example, they cannot ask the deceased whether or not there was a death or suicide threat). With the exception of Jacqueline Campbell's research, experimental controls are, for the most part, lacking.

- include documented incidents of prior domestic violence known to the police. The absence of a record of police involvement does not indicate safety
- The presence of children in the home, particularly children not biologically related to the perpetrator
  - Death threats. (The absence of a death threat may not indicate safety when other facts are present.)
  - Attempted strangulation (choking). Prior non-lethal strangulation is strongly associated with homicidal domestic violence. For additional information on evidence issues associated with strangulation, see part 9.12 below
  - Suicidal tendencies and attempts to commit suicide. Perpetrator threat of, consideration of, or attempted suicide should be taken very seriously since suicidal tendencies are strongly associated with domestic violence homicide followed by suicide in the domestic violence literature
  - Stalking, monitoring
  - Forced sexual acts and sexual abuse.<sup>88</sup> Keep in mind that both victims and violators are known to underreport sexual abuse
  - Victim fear of being killed
  - Controlling, obsessive forms of psychological bond. For example a pattern of coercive domestic violence and inability to contemplate the possibility of life without the other; high levels of possessive jealousy
  - Threat(s) with weapons
  - Violence during pregnancy
  - Significant perpetrator life changes

Particularly worrying are cases involving a collection of these indicators. A pattern or combination of such facts is known to compound the risk of lethality.<sup>89</sup>

See the web link for access to and information about one of the most widely researched and respected risk assessment tools for assessing the potential for lethal outcome, constructed by Jacqueline Campbell and colleagues in the United States:  
<http://www.dangerassessment.org/>

When a collection of facts associated with the potential for lethal outcome is present, lawyers should also consider facts, if any, outlined in 7.3 below.

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<sup>88</sup> Lynn H. Schafran (2010) “Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence” 93(4) *Judicare* 161-163. Sexual coercion is associated with victims killing perpetrators as well as the murder of victims by perpetrators.

<sup>89</sup> For example, J. Campbell and colleagues found that pending or actual separation plus controlling behaviours increased risk of lethal outcome nine times. See: Campbell and Wolf, *supra* note 86. See also: Campbell et al., *supra* note 71. Note, however, the cut off points and danger points associated with this instrument have yet to be firmly established. The comment, in Campbell et al., that false positives can be reduced to less than 5 % using the extreme danger category of “Campbell’s Danger Assessment Tool” is speculative. Moreover, reducing false positives statistically comes at a human cost: increased exclusion of cases involving high levels of danger to ‘victims’ and children. The extreme danger category is less useful in a family than in a criminal context in any event, given that the purpose in family law cases is preventative action to ensure safety rather than punishment or prediction.

### ***7.3 Additional facts associated with lethality***

Identified here are additional facts that are commonly, but not consistently, identified in homicide and Death Review studies. Other indicators of danger commonly identified in studies of lethal domestic violence outcome, include:

- Hostage taking (child abduction)
- Threats to harm children
- Prior police involvement or arrest (some studies have documented an association with lethal outcome; others have not)
- Violation of protection orders
- Age disparity (large differences in age between intimate partners)
- Common law relationship and young age of the targeted adult (under 25)
- Anti-social personality disorder
- Depression
- Child custody and access dispute<sup>90</sup>
- Relocation of the targeted parent with children across jurisdictional lines
- Violent criminal behaviour other than domestic violence
- Animal cruelty (See for example, *C.S.N. v. A.L.C.*, 2011 ABQB 370 (CanLII) wherein the respondent killed the children's grandparents' two cats, then left a photo album of the mother and children next to the cat's bodies. Justice Donald Lee extended the emergency protection order indefinitely.)
- Alcohol and drug abuse

The facts outlined here contribute to risk of potential lethal outcome, particularly when associated with facts outlined in 7.2 above.

### ***7.4 Mandatory information exchange: potential for lethal outcome***

When indicators of continuing physical risk are present (see Part 6 above), service providers, professionals, and lawyers, subject to professional rules associated with solicitor-client privilege and confidentiality, should be authorized and encouraged to share information pertinent to risk and safety across legal systems in order to enhance safety.

When a collection of indicators of the potential for lethal outcome are present, lawyers, including lawyers representing perpetrators, will wish to consider carefully the *Code of Professional Conduct* test of imminent harm. Swift exchanges of information across court sectors may be necessary in order to protect the lives of victims of domestic violence and their children.<sup>91</sup>

In a family law or child protection context, consider special measures to enhance safety including: a civil protection order, immediate referral to mental health (for depression, suicidal thoughts) and substance abuse service providers; implementation of methods to

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<sup>90</sup> When children are involved, perpetrators have increased opportunities for contact; contact increases risk.

<sup>91</sup> See, for example Report to the Chief Coroner of British Columbia, *supra* note 31; Turpel-Lafond, *supra* note 12.

monitor compliance as well as supervised or suspended access to children until safety can be assessed and assured. Follow up to ensure active participation in services.

Dr. Peter Jaffe, academic director of the Canadian Centre of Research & Education on Violence Against Women and Children, reports that an analysis of factors associated with the potential for lethal outcome in domestic violence death reviews has found no difference between the facts associated with lethal outcome for children and facts associated with lethal outcome for targeted adults.<sup>92</sup> The finding is consistent with observations of lethality literature. When indicators of the potential for lethal outcome are present, children as well as adults are in danger. Suspension of access until risk and safety can be assessed and assured is the safest course of action. Alternatively, if supervised access is contemplated, ensure that the supervised access centre has: complete knowledge of the continuing risk and the potential for lethal outcome; copies of protection orders and judicial findings, if any, relating to risk; specialized safety measures in place; a clear understanding of the type of supervision required; policies in place to prevent child abduction; and specialized training in the domestic violence field in connection with both parenting and indicators of potential lethal outcome. In addition, the supervisors should be culturally appropriate and should speak the language spoken by the perpetrator with the child.<sup>93</sup> Research studies of supervised access are indicating serious safety concerns in coercive domestic violence cases.<sup>94</sup>

While the best option, even when indicators of danger are present, is the client's consent to the release of information, in the absence of client consent, lawyers will want to weigh carefully potential responsibility for serious, even lethal, harm to adults and children in the event of failure to reveal information relating to danger. As stated earlier, in connection with risk (see part 6.5 above), most Professional *Codes of Professional Conduct* authorize lawyers to reveal confidential information in the face of imminent risk of harm. That said, Rule 3.3.3 of the Federation of Law Societies of Canada (2012) *Model Code of Professional Conduct*, approved December 2012, allows (but does not mandate) release of confidential information (limited to that required) when the lawyer believes on reasonable grounds that “there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent death or harm”.

The advice in the commentary associated with Rule 3.3.3 of the 2012 *Model Code* may make it difficult for lawyers to respond in a timely fashion. The commentary suggests that such disclosures will be limited to “very exceptional circumstances.” And, while

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<sup>92</sup> Hamilton, Jaffe, Campbell (2013) supra note 85; Peter Jaffe, Marcie Campbell, Leslie Hamilton, Marcus Juodis (2012) “Children in danger of domestic homicide” 36 *Child Abuse and Neglect* 71-4.

<sup>93</sup> Supervised access research in the domestic-violence field is documenting instances of the use of supervised contact with children to convey threats, to ascertain information about whereabouts, and to undermine the other parent when supervisors of access are not familiar with the language spoken by the perpetrator with the child.

<sup>94</sup> For pertinent information on supervised access in a domestic violence context, see the Florida State University Institute for Family Violence Studies, Clearinghouse on Supervised Visitation at: <http://familyvio.csw.fsu.edu/clearinghouse/> particularly the 2008 Recommendations of the Supervised Visitation Standards Committee and the Training Manual for Supervised Visitation Programs.

the commentary tells lawyers to keep in mind that *Smith v. Jones*, [1999] 1 S.C.R. 455; 169 D.L.R. (4<sup>th</sup>) 385 states that serious psychological harm may constitute serious bodily harm if it interferes with health or well-being, it also advises lawyers to:

- Consider, when assessing whether public safety outweighs solicitor-client privilege:
  - the likelihood that the potential injury will occur and its imminence
  - the apparent absence of any other feasible way to prevent the potential injury
  - the circumstances under which the lawyer acquired the information about the client's intent or future course of action
- Contact the local law society for ethical advice, and, when practical,
- Seek a judicial order for release of information
- Record particulars in writing (such as time and date, grounds for release, extent of the client's consent to release, particulars surrounding the decision to release such as the circumstances in support of the reasonableness of the belief in imminent harm)

Although preservation of solicitor-client privilege is extremely important, from a domestic-violence safety perspective, a rule expressly enabling lawyers to convey information relating to the known indicators of potential for lethal outcome in domestic violence cases could help to save Canadian lives.

### ***7.5 False positives: Facts may not result in death***

The facts outlined above are associated with cases that have resulted in lethal outcome. The research does not prove that every domestic violator whose case includes a combination of these factors will kill. Nonetheless such factors indicate that the intimate partner and the child are in serious potential danger such that immediate preventative action to ensure safety is warranted.

### ***7.6 Does preventative action violate rights?***

In a family law context, consideration of the potential for lethal outcome operates in a preventative manner. The goal is to enhance safety, not to predict or to punish a domestic violator for something he or she might do.

In connection with family law matters: adults do not have a right to contact or to control former intimate-partners; access is a right of the child, not of parents. Provisions that limit a perpetrator's contact with a former partner or with a child until safety can be assured do not, therefore, violate rights. Instead such provisions can save lives -- including the lives of perpetrators.

### ***7.7 Facts that should not be taken into consideration***

Facts that should *not* be taken into consideration when deciding whether or not to take preventative action to reduce the potential for lethal outcome include: socio-economic status, professional status, age, gender, culture, and ethnicity.

It is true that:

- domestic violence victim homicide rates are higher for female victims than for male victims
- Child homicide followed by suicide by a family member is more often perpetrated by men, and
- Domestic violence homicide rates are higher for young couples, and among some cultures, and among the poor

Nonetheless it is also true that domestic violence homicide with suicide crosses all genders, ages, socio-economic, professional and cultural boundaries.

### ***7.8 Best practices: managing risk and danger***

A number of jurisdictions have established cross- sector, integrated, community domestic violence oversight committees to coordinate services and to ensure the seamless exchange of information relating to danger in high risk cases.<sup>95</sup> In addition to participating on information exchange committees, family lawyers may wish to consider designing and implementing client consent forms authorizing the release of specified types of information relating to increasing risk and to a potential for lethal outcome in domestic violence cases.

## **PART 8: INTERIM PROCEEDINGS**

### ***8.1 Child protection: preventive protective orders***

Sometimes all a child needs to be safe is removal of the violator and his or her ability to abuse or control the targeted parent. In many jurisdictions orders prohibiting contact with the child (and in Ontario prohibiting contact with the person who has lawful custody of the child) may be granted preventively, pursuant to child protection statutes. Such orders can reduce or prevent the need for additional state action to protect the child.

Child protection statutes in a number of jurisdictions restrict, however, the circumstances in which such orders can be issued or the terms that can be imposed. In some jurisdiction such orders may only be granted in association with apprehension of the child or in connection with a supervision, custody or guardianship order. For example, section 30 of Alberta's *Child, Youth and Family Enhancement Act*, Chapter C-12 states that the 'director' may apply for a restraining order when the child has been apprehended or is the subject of a supervision or guardianship order. See also section 44 of Prince Edward Island's *Child Protection Act*, C. 5.1.

Statutes in some jurisdictions (for example, Alberta, British Columbia, Newfoundland & Labrador, and Nova Scotia) specify terms that may be included in such orders. Statutes in other jurisdictions, such as Ontario, Saskatchewan and New Brunswick, authorize provisions to secure the "best interests" or, in the case of Ontario, "the protection" of the child.

Alberta: *Child, Youth and Family Enhancement Act*, Chapter C-12 section 30

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<sup>95</sup> See *supra* note 75.

British Columbia: *Child, Family and Community Service Act* [RSBC 1996] Chapter 46 sections 28, 98 and 99

Manitoba: *Child and Family Services Act*, C.C.S.M. c. C80 section 20

New Brunswick: *Family Services Act*, Chapter F-2.21983, c.16, s.1 section 58

Newfoundland/Labrador: *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2, section 18

Nova Scotia: *Children and Family Services Act*, S.N.S. 1990, c. 5 section 30

Nunavut: *Child and Family Services Act* (Nunavut), R.S.N.W.T. 1997, c.13

Northwest Territories: *Child and Family Services Act*, S.N.W.T. 1997, c. 13

Ontario: *Child and Family Services Act*, R.S.O. 1990, c. 11 sections 57.1 (3) and 80

Quebec: *Youth Protection Act*, R.S.Q. c. P-34.1 section 91:

Prince Edward Island: *Child Protection Act*, C. 5.1 section 44

Saskatchewan: *Child and Family Services Act*, S.S. 1989-90, c. C-7.2 section 16

Yukon: *Child and Family Services Act*, S.Y. 2008, c.1, section 32

For public access to the statutes listed above, see CanLII:

<http://www.canlii.org/en/index.html>

When preventative authority is limited, it may be possible for the child welfare authority to apply for a civil no-contact order pursuant to domestic violence prevention legislation (in jurisdictions where such legislation exists). Some prevention statutes authorize third party intervention as well as a range of remedies that can enhance safety and support the well-being of children (such as measures to prevent or to resolve domestic violence, to provide economic support, to secure personal property or to obtain exclusive possession of housing). In *Re D.B.*, 2007 ABPC 318 (CanLII), a provincial court in Alberta allowed the child welfare authority to make application for an Emergency Protection Order pursuant to Alberta's *Protection Against Family Violence Act*, R.S.A., 2000, c. P-27. The goal was to enable the child welfare authority to take action to protect the child by removing the violator from the family unit without the need for a finding of the need for protection against the targeted parent. A complicating factor in the case was that the targeted parent refused to initiate and to consent to the application. (The court concluded that the targeted parent's failure to consent was likely the result of intimidation or fear.)

Other alternatives that child protection authorities can use to bind perpetrators, to ensure exclusion from the home, or to protect children, when child safety is a concern, include:

- terms and conditions in agreements on consent
- terms and conditions imposed in connection with access to the child

In the absence of information exchange protocols or legislation requiring disclosure, there is still a potential for problems, however, at the intersection of family law and child protection proceedings should the person subject to the prevention agreement or order pursuant to the child protection statute make an application for access to the child in a family court.<sup>96</sup> In such circumstances, family lawyers should ensure that the family

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<sup>96</sup> Targeted parents may not alert the family court, for example, if the perpetrator is threatening, intimidating, manipulating or has regained control of the family unit. For example, a targeted parent may have allowed the perpetrator to move back into the home in breach of the no-contact order and may

court is made aware of the existence of the protection order or agreement. If a criminal proceeding is on-going, lawyers representing the targeted adult should ensure that the Crown attorney is alerted to the existence and terms of the order or agreement in order to enable the Crown resist the issuance of an inconsistent order in the criminal proceeding.

Family lawyers in all jurisdictions will want to check for past and current protection agreements and orders pursuant to child protection legislation.

## ***8.2 Restraining orders and orders for civil protection***

### **8.2.1 Introduction**

A family lawyer seeking civil protection for a client who has survived domestic violence has a number of options. Superior courts have inherent jurisdiction to grant injunctions to protect litigants from intimidation, harassment and injury during litigation processes. Non-molestation orders can also be obtained pursuant to powers associated with the *Divorce Act*, R.S.C. 1985, c.3 (2<sup>nd</sup> Supp) and statutes in all provinces and territories authorize civil protection orders in family law cases.

Restraining orders in Alberta can be granted to protect a broad range of persons, while restraining orders granted pursuant to family legislation in New Brunswick and in Ontario are limited to applicants and children: see 128 of the *Family Services Act* S.N.B. 1980, c. F-2.2, section 46 of Ontario's *Family Law Act* R.S.O. 1990, c. F.3 and section 35 of *Children's Law Reform Act*, R.S.O. 1990, c. C.12. Protections pursuant to Part 9 "Protection from Family Violence" of British Columbia's *Family Law Act*, SBC 2011, c 25, , protect "at risk family members".

Civil protection orders are also available pursuant to domestic violence protection statutes in many Canadian jurisdictions.

- Alberta: *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27
- Manitoba: *The Domestic Violence and Stalking Act*, C.C.S.M. c. D93
- Newfoundland/Labrador: *Family Violence Protection Act*, S.N.L, 2005, c. F-3.1
- North West Territories: *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24
- Nova Scotia: *Domestic Violence Intervention Act* (2001) S.N.S. Chapter 29
- Nunavut: *Family Abuse Intervention Act*, S. Nu., 2006, c.18
- Prince Edward Island: *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2
- Saskatchewan: *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02
- Yukon: *Family Violence Prevention Act* R.S.Y. 2002, c.84

For web access to the statutes, see CanLII <http://www.canlii.org/en/index.html>

### **8.2.2 Effective civil protection orders: domestic violence context**

In coercive domestic violence situations (see Part 5 for discussion of features that

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fear acknowledging that fact could result in loss of the children to child protection authorities.



distinguish coercive from minor-isolated and resistance violence), effective civil protection and restraining orders should (to the extent permitted by statute) include provisions to ensure that perpetrators attend and complete specialized domestic violence intervention and specialized parenting programs and, if warranted, addiction, mental health, and other treatment programs. To the extent permitted by statute, such orders should also include compensation for expenses and damages associated with domestic violence, provisions for support, division and access to property, custody of children, and exclusive possession of the home. Orders that provide broad protection can enable a victim and child to find stability and safety, preventing a return to a place of violence and abuse.

Given the increasing importance of evidence to be found in computers and communication devices (see part 4.5 and part 5.8 on evidence and privacy matters), consider seeking explicit provisions to obtain immediate possession of such items or to prevent destruction of evidence. Given the speed at which data can be removed from computers, *ex parte* orders may be necessary.

In the family law, coercive domestic violence context, if statutory authority to obtain an order for the violator to attend domestic violence intervention is lacking, consider seeking a provision specifying voluntary completion of domestic violence intervention with specialized parenting content as a condition of supervised or unsupervised access to children. See, for example: *P.P. c. R.C.*, 2006 QCCA 445; *Weiten v. Adair*, 2001 MBCA 128; *Merkand v. Merkand*, 2006 CanLII 3888 (ON C.A.), application for leave to appeal to Supreme Court of Canada dismissed; *Irshad Merkand v. Tallat Merkand*, 2006 CanLII 18512 (S.C.C.); *TLMM v. CAM*, 2011 SKQB 326.

### **8.2.3 Enforcement:**

When seeking civil protection orders, family lawyers may wish to consider inclusion of a “no need for service clause” (for example, when both parties were present in court when the order was made), such that further proof of service is not necessary. Another option is to have the respondent acknowledge notice of the civil protection by signing the order. This enables police to enforce the order without having first to locate and then prove service.

See *Partridge v. Partridge* (2007), 213 Man. R. (2d) 305, 2007 MBQB 80 in connection with contempt for breach of conditions known to the violator, despite that the acts were committed prior to judicial signature and formal entry of the signed order.

It is important to set out clearly the applicable enforcement processes and specify the circumstances in which police may arrest in order to encourage swift enforcement and allay police confusion. The applicable civil order enforcement processes vary by Canadian jurisdiction. A notice relating to potential criminal liability pursuant to section 127 of the *Criminal Code* is appropriate in some jurisdictions but not in others. In jurisdictions that do not include enforcement mechanisms in the legislation, failure to adhere to a civil protection order (other than orders for payment of money) can trigger a charge under section 127 of the *Criminal Code*.

A former lack of appellate court consensus on this issue has now been resolved. The majority ruling in *R. v. Gibbons*, 2012 SCC 28 (CanLII) makes it clear that the exception to criminal enforcement in section 127 will only be triggered when the Parliament or the Legislature intended to limit the application of s. 127 and created an express, alternative statutory response to failure to obey civil court orders. “The fact that rules of court provide for punishment or a mode of proceeding is also not sufficient to trigger the exception if the order was issued pursuant to the court's inherent common law power... procedure alone is insufficient to trigger the exception...”

Thus, when a provincial domestic violence or family law statute sets out explicitly the applicable offence, process, enforcement, and specific penalties for failure to obey a court order granted pursuant to the statute, enforcement will be in accordance with the statute (with the possible exception of criminal contempt). When the applicable domestic violence or family law statute does not set out specific offence and penalty provisions, section 127 of the *Criminal Code* can be applied: *R. v. Gibbons*, 2012 SCC 28; *R. v. Fairchuk*, 2003 MBCA 59.

The following domestic violence prevention statutes include explicit offense provisions relating to failure to obey court orders granted pursuant to the Acts:

- Alberta: Alberta: *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, section 13.1 (other than a provision pursuant to section 4(2)(d) - for reimbursement)
- Newfoundland/Labrador: *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1 section 18
- North West Territories: *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, section 18
- Nova Scotia: *Domestic Violence Intervention Act* (2001) S.N.S. Chapter 29 section 18
- Prince Edward Island: *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2 section 16 (failure to comply with the provisions of an emergency protection or a victim assistance order)
- Yukon: *Family Violence Prevention Act*, R.S.Y, 2002, c. 84, section 16 as amended by *Act to Amend the Family Violence Prevention Act*, SY 2005, c 7.

#### **8.2.4 Identification of agencies to be notified of the civil protection order:**

Enforcement and safety can be enhanced and conflicting orders can be avoided when key members of the community, as well as professionals in other court sectors, are notified of the terms of civil restraining or protection orders. It is important, however, to consult with the targeted adult as to the persons and agencies to receive copies of the civil protection order. Examples include:

- police and law enforcement agencies
- Canadian Police Information Centre (CPIC)
- probation and parole services
- victim services agencies

- the Crown prosecutor (if criminal proceedings are ongoing)
- civil protection order registries, if any
- landlords and other rental authorities
- security officials (residential & workplace)
- employers
- supervisors of access
- teachers, schools, day cares
- child care providers
- child protection authorities<sup>97</sup>
- grandparents<sup>98</sup>
- passport officials in cases of potential child abduction
- chief firearms officers pursuant to section 5 (2) (c) of the *Canadian Firearms Act*, 1995 c. 39 and section 16 of *Firearms Licences Regulations*, SOR/98-199<sup>99</sup>
- domestic violence intervention, parenting, mental health, drug and alcohol treatment & counseling agencies

Note: Ascertaining the targeted party's views on who should and should not be notified is critical. People who are targeted by domestic violence are best placed to ascertain their own specific risk and safety needs; they will know best whether or not such notifications will enhance safety or increase risk. Family lawyers will want to work closely with clients on this issue and on any adjustments that need to be made to the safety plan. In addition to working collaboratively with the 'victim', one should check the applicable statute since a number of the domestic violence prevention statutes impose obligations to notify and or to send copies of civil protection orders to police, victim services and/or child protection authorities.

### **8.2.5 Children:**

Protective measures may be required in civil protection orders in order to ensure that the contact between the child and the perpetrator is safe and beneficial. Protective measures need to be matched to the type (see Part 5) and level (see Parts 6 and 7) of domestic violence. Prohibiting or restricting the perpetrating parent's contact with children in a civil protection order can be warranted in coercive domestic violence cases when the

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<sup>97</sup> In many jurisdictions notification of child protection authorities is mandatory if children are involved in a domestic violence case, for example Prince Edward Island's *Victims of Family Violence Act*, R.S.P.E.I. 1988, c V-3.2. On the one hand, child protection authorities with specialized understandings of the family violence field can offer assistance, services and support. On the other hand, child protection agencies in some jurisdictions have been criticized in evaluation research for lack of understanding of domestic violence and related cultural and immigration issues. Research data continues to disclose the need for enhanced domestic violence education, policies and practices, when child protection and/or immigration proceedings involve domestic violence.

<sup>98</sup> Perpetrators of domestic violence commonly enlist grandparents in a 'crusade' against the targeted parent. In these cases express provisions on the face of the order that named grandparents are to be served with the civil protection order ensures that such grandparents receive notice. This may allow contempt proceedings if the grandparents participate in breaching the order.

<sup>99</sup> Sections of the Act and Regulations allowing revocation of licenses in cases of violence, domestic violence, and stalking.

facts indicate:

- continuing risk to the primary caregiver or the child
- a potential for lethal outcome (primary caregiver or child)
- the likelihood that the child will be exposed to additional domestic violence as a result of contact
- evidence of negative parenting practices associated (in research studies) with coercive domestic violence
- risk of child abduction (see part 8.5 below)

Such prohibitions should remain in place until the perpetrator has completed and has presented evidence of changed behaviour following completion of domestic violence intervention with specialized parenting content and/or until child safety has been assessed and can be assured and/or until the best interests of the child issues can be more fully explored and determined by a family court or child protection authorities.

If access to children is beneficial and is to be allowed in a civil protection order, the order should set out clearly what forms of communication and contact will and will not be allowed and how provisions governing access to children will and will not affect the other terms of the protection order. For an example, see the provisions relating to the children in *Partridge v Partridge*, 2009 MBQB 196, 242 Man. R. (2d) 249 and in *Naylor v. Malcolm*, 2011 ONCJ 629.

### **8.2.6 Criminal, child protection, & family law conditions allowing access to children**

It is important to ensure that all existing criminal, child protection, and family law orders and agreements affecting the same family are taken into account. For example, if the civil protection order will include provisions to enable contact for the purposes of access to children, the wording of the provisions should not be contrary to, and should preferably incorporate and clarify, the provisions in any existing criminal no-contact order or undertaking.

General provisions in criminal, civil, or family orders that prohibit contact between the parents 'except for contact with respect to the children' or 'except for contact necessary to make arrangements for access to the children' not only lack clarity, they also provide opportunities for continuing monitoring, harassment and intimidation on the one hand or for inadvertent breach, on the other, making such orders difficult, if not impossible, to enforce.

Instead, problems can be avoided by specifying exactly how contact to make arrangements for children may and may not take place (for example, through a specified third party, by leaving a message relating only to arranging contact with the children on a telephone answering machine or by email, subject to concerns if any about misuse of modern technology identified in 5.8 above). See, for example, *Naylor v. Malcolm* cited earlier. Any related safety concerns associated with communications identified by the targeted parent should be discussed and addressed.

Family lawyers will also want to consider the need to take into account the potential

impact of such orders on subsequent proceedings and thus the potential need to include provisions such as “subject to the provisions of any subsequent criminal court or civil protection order made in response to facts arising after the date of this order” or “subject to the provisions of any subsequent criminal order, after taking into account the particulars of this agreement or order”, “subject to arrangements for contact made after the date of this order by child protection authorities;” or “subject to contact arrangements in a family court order made after the date of this civil protection order”. Targeted adults should be urged to ensure that their family lawyer has access to information about all past and present civil protection orders as well as the other party's record of compliance.

The targeted party should be consulted in connection with any processes or procedures to ensure police (and, when applicable, probation, parole, firearm's officials, supervised access centres and domestic violence intervention services) are informed about the terms of current civil protection orders.

### **8.2.7 Weapons restrictions:**

Firearms and other weapons are used in Canadian homes to intimidate adults and children in many domestic violence cases. Many domestic homicides and suicides in Canada are committed with otherwise legally owned rifles and shotguns. Since weapons (particularly rifles, shotguns and other guns) are often used to intimidate and to control in domestic violence cases, swift removal is recommended, particularly in coercive domestic violence cases.

For judicial notice, albeit in a criminal context, of research demonstrating that timely removal of weapons can save lives in domestic violence cases, see *R. v. Hurrell* 2002 CanLII 45007 (ON C.A.) at paragraph 34.

Note that adults targeted by domestic violence will not always know if the other party has access to weapons. Furthermore, despite serious concerns about weapons, targeted persons may be reluctant to seek weapons-restricting orders for cultural reasons or out of fear of retaliation. Family lawyers and Crown prosecutors concerned about safety will want to make enquiries relating to access to weapons and will wish to consult the targeted client about the need for removal or restriction.

The overriding legal principle in Canada is that possession of firearms is a privilege, not a right. The Supreme Court of Canada per Charron J. sets out, in *R. v. Wiles*, 2005 SCC 84, statutory authority to restrict access to weapons in civil protection cases. See also: *R. v. Montague*, 2010 ONCA 141.

Family lawyers representing adults targeted by coercive domestic violence will wish to ensure that Crown and police are informed of concerns about potential access to guns and other weapons and, subject to the perspective of the client as well as the provisions of the *Criminal Code*, that action is taken in the criminal context, when authorized by the *Criminal Code* to surrender weapons and to prohibit the possession of weapons as a condition of interim release. For particulars as well as potential options, see the “Firearms” chapter of [2013 Domestic Violence Handbook for Police and Crown Prosecutors in](#)

## Alberta.

Note the importance of considering future as well as current possession of weapons as well as access to weapons owned by others who reside at the same residential location. Criminal defense lawyers are likely to advise clients charged with domestic violence to dispose of weapons.<sup>100</sup> Family lawyers representing 'victims' should anticipate that recipients of disposed weapons could be family members or friends of the accused. When safety is a concern, and parallel criminal proceedings are ongoing, family lawyers representing victims can take action to remind the Crown that the fact that an accused does not have access to or possession of a weapon at the time of an interim release hearing is not necessarily a dependable assurance that a weapons prohibition is unnecessary. Consider the need to make inquiries about the whereabouts of and potential access to disposed weapons. Alternatively, when safety and potential access to weapons are of concern, a criminal and or a civil time-limited prohibition on future possession or acquisition can offer needed protection.

In addition to criminal remedies, domestic violence prevention statutes in a number of jurisdictions explicitly authorize judicial orders to seize or to prohibit access to weapons.

- Alberta: *Protection Against Family Violence Act*, R.S.A. 2000, c. P-2.7, Section 2(3) pertaining to orders of justices of the peace and provincial court judges and Section 4(2) pertaining to orders of Queen's Bench justices.
- Manitoba: *Domestic Violence and Stalking Act*, C.C.S.M. c. D93, Section 7 (1) (g) (h) and 7 (2) with respect to orders of Justices of the Peace and Section 14 (1) (h) and (i) with respect to orders of Queen's Bench justices. *Domestic Violence and Stalking Regulation*, Man. Reg. 117/99
- Newfoundland: *Family Violence Protection Act*: Section 6(j)(k)
- Northwest Territories: *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, Sections 4(3) (g), 4 (4)(5)(6) with respect to emergency protection orders (limited to 90 days) and Section 7 (h) with respect to protection orders. See also s. 19(9).
- Nova Scotia: *Domestic Violence Intervention Act* (2001) S.N.S. Chapter 29: Section 8 (1) (j) with respect to orders of Justices of the Peace, and Sections 11 and 12 with respect to Supreme Court reviews
- Nunavut: *Family Abuse Intervention Act*, S. Nu., 2006, c.18 Emergency order (justice of the peace): s. 7 (4)(5)(6); Review of emergency order (judge): s. 16(3); Assistance orders (judge): s. 18
- Yukon: *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, section 4. Note: the provision relating to surrender of firearms has been expanded to weapons.
- British Columbia: *Family Law Act*, SBC 2011, c 25, Part 9

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<sup>100</sup> See, for example, Domestic Violence Practice and Procedure Task Force (2012) *Domestic Violence: Firearm Relinquishment in Criminal Domestic Violence Cases. Report to the Judicial Council of California*. While reputable criminal defense and family lawyers representing perpetrators are unlikely to resort to advising clients to dispose of weapons temporarily for the sole purposes of being able to claim weapons restrictions are unnecessary during interim release or civil protection hearings, some perpetrators may be reluctant to dispose of weapons on a more permanent basis.

Domestic violence statutes in Prince Edward Island (*Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2) and Saskatchewan (*Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02) do not include specific provisions relating to firearms or weapons but do authorize orders for immediate protection, including provisions relating to temporary possession of specified personal property.

Caution: Despite the fact that numerous family law cases involve domestic violence, and that family law cases involving domestic violence are no less dangerous than criminal domestic violence cases, many family law statutes governing private custody and access matters in Canada do not expressly authorize the seizure and prohibitions on access to weapons. Nonetheless, family lawyers will wish to keep in mind that criminal remedies, when they are available, do not preclude the parallel use of civil remedies. (See part 8.2.9 below.) Steps should be taken to ensure that weapons provisions in the family and criminal case are not contradictory.

When courts have authority to prohibit access to weapons in civil cases, consider whether or not the indicators of risk (see Part 6 above) or potential for lethal outcome (see Part 7 above) warrant the imposition of restrictions.

When facts indicate risk or danger and weapons are a concern, one should consider:

- The need for current information about recent acquisitions, access to and possession of and recent transfers of weapons (knives and other weapons as well as guns), including information about indirect access to weapons. For example, have weapons been transferred to the care or control of another person in the last six months? What were the particulars of the transfer? What is the relationship between the perpetrator and the transferee? How easy would it be for the domestic violator can regain access to such weapons?
- The need to remain current about any changes in access to weapons throughout the litigation process
- The need to obtain information, and copies of undertakings and orders relating to *Firearms Act* restrictions or criminal court orders prohibiting possession of weapons within and outside the jurisdiction, in order to avoid contradictory agreements and orders and when possible to incorporate similar provisions
- The need to include in agreements and orders, when appropriate in the circumstances of the case and when authorized by statute, prohibitions on the future possession of weapons, ammunition, weapons or acquisition documents for the duration of the protection order. Note the need to consider the terms of any criminal order to ensure that provisions relating to termination of the civil protection order do not contradict existing or future criminal orders. A provision in a civil protection order stating, for example, that a person is prohibited from possessing a firearm until a specified date could, potentially, result in confusion or in a civil protection order that is in conflict with ineligibility criteria in the *Firearms Act* or in a subsequent criminal order. Restrictions in the civil order could be made subject to any additional prohibitions imposed pursuant to the *Firearms Act* or the *Criminal Code*

- Restrictions on duration. The allowable durations of such orders vary. Careful attention to detail is important. A weapons order that is not immediately enforceable could result in retaliation rather than in protection
- The targeted parent will often be in the best position to know if such an order is necessary and advisable. Issuing an order against the perspective of a targeted adult could increase risk

Problems with tracking compliance and enforcement of orders related to the seizure and prohibition of weapons are being reported throughout North America. A known cause has been an absence of clear, detailed directions in court orders relating to surrender, seizure, and storage of weapons and the absence of timely court review processes to monitor compliance.

Reminder: Protection orders that are unclear or that are unenforceable increase risk.

As a result, if restrictions are necessary, one should ensure that detailed instructions are included in the order as to when and to what specific agency weapons are to be surrendered and stored. When risk is high, immediate removal and monitoring to ensure compliance will enhance safety. The targeted parent should be encouraged to have a safety plan in place for extra protection while weapons are being secured.

In connection with constitutionality of the *Firearms Act* and aboriginal peoples, see: *Bellegarde v. Canada (Attorney General)* (2004), 235 D.L.R. (4th) 763, [2004] 2 C.N.L.R. 312, (2004), 247 F.T.R. 314, 2004 FCA 34 (CanLII). Special provisions and limitations apply with respect to aboriginal peoples; see: *Firearms Act*, 1995 c. 39 section 2(3) and 117 and *Aboriginal Peoples of Canada Adaptations Regulations (Firearms)* S.O.R. 98/205. Note as well the restrictions on judicial authority to make civil orders relating to personal property on reserve land.

### **8.2.8 Mutual civil protection orders:**

Mutual protection orders should be avoided, if possible, in coercive domestic violence cases. Potential problems include:

- Enhancement of the domestic violator’s control and capacity to manipulate, to harass, to intimidate and to ‘set up’ the targeted person
- Absence of clear direction to the police should violence or abuse occur again
- Adverse impact on immigration processes

Attempting to determine responsibility for the onset and patterns of coercive domestic violence (identification of the dominant aggressor) is the best course of action.<sup>101</sup>

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<sup>101</sup> A number of jurisdictions in the United States and Australia have implemented legislation to limit the making of mutual protection orders on consent. For discussion see, for example, Michigan Judicial Institute (2013) *supra* note 63, Chapters 6 through 8. People who are targeted by domestic violence are commonly intimidated or pressured into agreeing to mutual orders. Mutual protection orders are not recommended: Michigan Judicial Institute *supra* note 63.; National Council of Juvenile and Family Court Judges (2006) *A Guide for Effective Issuance & Enforcement of Protection Orders* (NCJFCJ); J. Zorza “What is Wrong with Mutual Orders of Protection?” (U.S. National Crime Prevention Council).



### 8.2.9 What if other family or criminal remedies are available?

In some cases, restraining orders have been refused when:

- the parties have little reason for contact: *Ghoul v. Habhab*, 2011 ABQB 232 (CanLII); *Smith v. Smith*, 2005 ONCJ 474 (CanLII)
- a criminal remedy is in force: *Ghoul v. Habhab*, 2011 ABQB 232 ([CanLII](#)); *W. v. D.*, 2004 YKSC 50 (CanLII); *C.M.W. v. C.B.*, 2006 BCPC 129 (CanLII)

Criminal remedies, however, do not preclude a civil remedy: *Abe v. Abe*, 1995 CanLII 1844 (BC S.C.); *Lee v. Urban-Lee*, 2009 SKQB 325 at paragraphs 23 to 24. Indeed civil protection orders can offer additional protection after the termination of criminal no-contact orders. See for example: *Naylor v. Malcolm*, 2011 ONCJ 629.

Family law proceedings, priorities and evidential requirements differ from those in criminal cases. A protective remedy available in a civil case on proof of balance of probabilities may not be available in criminal court. Evidence problems can result in the Crown's inability to prove the criminal case leaving persons genuinely targeted by domestic violence without any protection. In coercive domestic violence cases multiple protection orders (civil and criminal) can enhance safety, provided that the terms are consistent and not contradictory. Moreover in many jurisdictions civil protection orders can include provisions for support, possession of property, and provisions for child safety extending beyond remedies contemplated in criminal proceedings. In addition, in many jurisdictions, civil restraining orders may be issued to prevent non-criminal as well as criminal actions and may be granted for extended periods of time, even permanently in exceptional cases, thus providing protection after criminal remedies expire. Refusal to grant an order solely because similar relief is available elsewhere can result in reduced protection or no protection at all. Some domestic violence prevention statutes state expressly that protective action should not be denied solely because criminal charges or orders are available. See for example Alberta: *Protection Against Family Violence Act*, R.S.A. 2000, C. p-27, s. 2.1.

Family lawyers who seek civil protection orders on behalf of clients will wish to obtain copies of all existing bail provisions and/or other criminal restrictions that apply to the family in order to ensure that the provisions of the civil protection order do not contradict criminal orders.

### 8.2.10 When targeted parties seek revocation of a protection order

Victim fear, as discussed earlier, has high predictive value, and victim empowerment is an important therapeutic goal in domestic violence cases. On the one hand, ignoring a targeted person's perspective on risk can result in harm and reduce empowerment, an important therapeutic objective. On the other hand, when service providers, professionals, lawyers and courts come across evidence that indicates a risk of harm not perceived by the targeted person, can risk and safety concerns be ignored? What happens to public confidence if indicators of risk are ignored and further domestic

violence or death ensues? There are no easy answers to such questions. People targeted by domestic violence are entitled to make decisions about their own lives. Nonetheless such decisions also affect the safety of children and decisions to revoke protective orders can be the result of financial pressure, intimidation, manipulation, or lack of information about risk and danger.

Consequently, Crown prosecutors and family lawyers representing targeted parents should explore the circumstances surrounding requests to revoke protection orders, at a time and place when the requesting party is not in the perpetrator's presence or influence. Steps can be taken to ensure that the request reflects a realistic assessment of safety and does not reflect manipulation, coercion or control. The targeted parent can be encouraged to consult a domestic violence expert, a domestic violence advocate, and a victim services professional before proceeding. If safety is a concern, domestic violence self-assessment tools can be made available to the targeted party to enable a preliminary self-assessment of the level of risk and the potential for lethal outcome (see Part 7 above).

If children are involved, and safety is a concern, consider involving child protection authorities and encourage the targeted party to consider carefully the implications of revoking the protection order

#### **8.2.10.1 Checklist: when the targeted party seeks revocation (criminal or civil)**

The 2012 Michigan *Domestic Violence Benchbook*, updated and now titled Michigan Judicial Institute (2013) *Domestic Violence: A Guide to Civil & Criminal Proceedings – Third Edition* online at:

<http://courts.mi.gov/education/mji/Publications/Documents/Domestic-Violence.pdf> in

2013, documented facts indicative of coercion warranting additional scrutiny when responding to a request to vacate a protection order (civil or criminal). Outlined here is the list, modified for a Canadian context:

- A lawyer appearing in court who has acted or is acting on behalf of both parties to a relationship
- Prior revocations of protection orders and or prior recanting of evidence of family violence in criminal proceedings
- Serious allegations of violence
- A criminal case pending against the respondent
- An overly brief period of time between the request for protection and the request for dismissal or termination
- Resumed communications and or contact between the parties (including indirect contact via the children)
- Lack of credible reasons for the requested dismissal or termination
- See also circumstances surrounding victim recant at part 9.5 below

Consider:

- Holding a meeting or scheduling a hearing to explore whether or not the application to revoke was truly voluntary and to ascertain whether or not the protection order should be dismissed
- Seeking a modification of the protective order rather than a termination so that some of the prohibitions against abuse and violence remain in place during

resumed cohabitation.

### **8.2.11 Protection orders after reconciliation**

People targeted by domestic violence have numerous reasons for resuming cohabitation with violent partners. Such reasons may have little to do with cessation of abuse or violence. In fact, repetitive reconciliation is an expected and 'normal' pattern in domestic violence cases. Sometimes the risks associated with separation (for example loss of housing, loss of income, loss of immigration status, loss of parenting, or loss of knowledge of the whereabouts of the perpetrator) can appear to outweigh the risks of resuming cohabitation, particularly if the potential for domestic violence can be reduced or removed.

When variation of an order to enable resumption of cohabitation is contemplated, while some provisions (such as no contact, no communication, and exclusive possession of the marital home) are obviously inappropriate, other provisions such as those set out below can offer some degree of continuing protection (when appropriate to the circumstances of the case and permitted by statute):

- completion of or continuing participation in a domestic violence intervention and parenting program (and if applicable substance abuse and mental health treatment) program
- prohibitions on alcohol or drug consumption, with specified monitoring and reporting provisions to enhance safety
- prohibitions on abuse, stalking, threats, violence or harassment, with the inclusion of explicit examples pertinent to the particulars of the case
- prohibitions (when safety is a concern) on access to or possession of ammunition, weapons and firearms
- prohibitions on contact at work, at places of worship or religious practice, and/or at other specified social or therapeutic functions

Provisions to enhance safety and protection during cohabitation can enable the targeted party to obtain help quickly (without additional applications to courts) if risk increases or violence resumes.

In appropriate circumstances, when such provisions are allowable by statute, consult the targeted adult to determine if (s)he would like any or all of such provisions to continue. Note, however, that civil restraining orders during cohabitation are not possible in every Canadian jurisdiction. For example, section 128 of the *Family Services Act*, S.N.B. 1980, c. F-2.2, makes separation a condition of making of an application for a restraining order.

Ensuring that such orders are clearly explained to each party helps to ensure that the perpetrating party knows his or her obligations and that the targeted person knows when to seek help.

Family and criminal defence lawyers ought, it goes without saying, to advise clients that they may not resume contact or cohabitation in breach of the terms of a court order; the order must be changed first.

### 8.2.12 *Ex parte* civil protection orders

Some of the case law is indicating reluctance to grant restraining orders on a without notice or *ex parte* basis unless:

- the circumstances are unusual
- the situation is urgent
- failure to grant the relief would result in injury.

Consider the terms of the applicable statute (for example in Ontario, *Courts of Justice Act*, R.S.O. 1990, c. C.43, *Family Law Rules*, O. Reg. 114/99, Rule 14, sub rules 12, 13, 14 and 15; and in New Brunswick, *Rules of Court*, N.B. Reg. 82-73, rule 37.04(2) and (3). In connection with protection orders pursuant to domestic violence prevention statutes, most provincial and territorial statutes authorize (and set out conditions for) without-notice claims for civil protection. The terms of some statutes are more restrictive than others.

In recognition of some of the dangers of granting orders without giving the other party notice or an opportunity to be heard, courts are imposing a duty to disclose full particulars, including information adverse to self-interest. See, for example: *J.E.B. v. G.B.*, 2007 BCSC 1819; *Rogers v. Rogers*, 2008 MBQB 131; *J.E.J. v. S.L.M.* 2007 NBCA 33; *D.B. v. H.M.*, 2011 CanLII 81900 (NL PC); *J.P. c. R.M.I.*, 2006 ONCJ 189; *Isakhani v. Al-Saggaf* 2007 ONCA 539 at paragraph 6.

Family lawyers will wish to advise clients of the importance of full disclosure when applying for protection on an interim *ex parte* basis as well as the potential implications of disclosures against interest in connection with any associated criminal and child protection proceedings, while keeping in mind professional duties in connection with ensuring the correctness of affidavit evidence. In addition, family lawyers will wish to ensure that the client understands the potential for criminal liability for providing false information in a sworn affidavit or in testimony. Indeed Breese Davies, Erin Dann and Joseph Di Luca, authors of a 2012 report to the Department of Justice, Canada titled [“Best Practices where there is Family Violence \(Criminal Law Perspective\)”](#) recommend that family lawyers representing alleged perpetrators seek permission to discuss the contents of affidavits with defence lawyers before filing affidavits with family courts, presumably both to ensure accuracy and to take into account the potential implications of the contents of the affidavit in the criminal proceeding.

In response to court reluctance to grant interim orders on an *ex parte* basis, family lawyers may wish to note the reasoning of the Court of Appeal of Manitoba in *Baril v. Obelnicki* 2007 MBCA 40 at paragraphs 88 to 98 and particularly at paragraphs 90 and 91: “the Supreme Court has said that departure from conventional judicial procedures is fully justified in a statute that focuses on alleviating harm to vulnerable persons”. See also the reasoning of the Court of Appeal for British Columbia in *Green v. Millar* (2004), 246 D.L.R. (4th) 334, (2004), 125 C.R.R. (2d) 153, 2004 BCCA 590. Note as well the comments in *Baril v. Obelnicki* (2007), 2007 MBCA 40 at paragraphs 91 to 98 wherein the appellate court notes that the Supreme Court of Canada has held that a without notice order is appropriate where “delay associated with notice would result in harm or where

there is a fear that the other party will act improperly or irrevocably if notice is given”.

In thinking about whether or not notice is likely to produce harm in a domestic violence context, consider the following:

- Separation is a time of heightened danger
- The type and pattern of domestic violence (see Parts 4 and 5)
- The level of risk (see Parts 6 and 7), including risk to children
- The targeted party’s level of fear
- The potential need for a risk assessment by a domestic violence expert
- The availability of safety planning
- The availability of timely access to safe, secure housing, transportation, and to community support
- The extent of timely access to security and to police resources
- Access to economic resources
- The perpetrator's potential for access and use of weapons
- The perpetrator's record with respect to adherence to court orders and agreements and overall respect for courts

### 8.3 *Interim custody*

#### 8.3.1 **Legislation**

Section 16(2) of the *Divorce Act*, R.S., 1985, c.3 authorizes interim custody and access orders. Section 16(8) states that the sole consideration is the best interests of the child.

Although the particulars of best interest factors that must be taken into account vary by province and territory, all family law statutes, set out below, require that family law decisions be made on the basis of the best interests of the child.

#### *Provincial and territorial legislation*

Alberta *Family Law Act*, S.A. 2003, c F-4.5, section 84(1)

British Columbia, *Family Relations Act*, [RSBC 1996] Chapter 128, section 9

Manitoba, *Family Maintenance Act*, R.S.M. 1987, c. F.20, sections 43 and 44

New Brunswick, *Family Services Act*, S.N.B. 1980, c. F-2.2, section 130.1(c)

Newfoundland/Labrador *Children’s Law Act*, R.S.N.L. 1990, c. C-13, sections 79, 80

Northwest Territory, *Children’s Law Act*, S.N.W.T. 1997, c. 14, section 81

Nova Scotia, *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160

Nunavut, *Children’s Law Act*, S.N.W.T. (Nu) 1997, c. 14, section 17

Ontario, *Children’s Law Reform Act*, R.S.O. 1990, c. C.12, sections 71 and 72

Prince Edward Island, *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33

Quebec *Code of Civil Procedure*, R.S.Q. c. C-25, sections 465, 813, 826.2

Saskatchewan, *Children's Law Act*, 1997, S.S. c. C-8.2, section 6(3)

Yukon, *Children's Act*, R.S.Y. 2002, c. 31. Statute title changed to *Children's Law Act*, April 30, 2010 pursuant to section 199 of the *Child and Family Services Act*, S.Y. 2008, c.1

### 8.3.2 Purpose of interim custody orders

Interim custody orders are intended to provide stability in the short-term care of the child until evidence can be assessed and a decision made. Consequently, the tendency in family law cases has been to decide these cases on the basis of status quo. As a result children are often left in the custody of the parent with whom they are living.

### 8.3.3 Interim custody: domestic violence context

Parents who flee from domestic violence are not always able to take the children with them when they leave. The reasons may include:

- intense fear for self or for the children
- lack of immediate access to the children
- lack of immediate access to safe and suitable housing,
- concerns about educational programs and opportunities
- lack of planning
- lack of access to the resources needed to provide for the children<sup>102</sup>

Removing children from home and school despite lack of resources for children can result in judicial criticism and in legal disadvantage. Yet targeted parents who wait to apply for custody until they have the resources to enable them to accommodate children can encounter difficulty obtaining interim custody as a consequence of the status quo best interests of the child presumption.

Once granted, such orders are difficult to change because:

- judges are understandably reluctant to move children back and forth between parents before trial
- appeal courts are reluctant to allow appeals from interim custody decisions, preferring that such matters proceed quickly to trial for a full hearing of evidence

While interim custody orders do not determine final custody and access outcomes, and interim orders can be changed without proof of material change in circumstances (e.g., *T.C.H. v. C.M.*, 2006 NSCA 111), in practice parents who obtain interim custody often have an advantage at trial.

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<sup>102</sup> See, for example, paragraphs 11 and 12 of *J.L. v. P.L.* 2010 NSSC 113 (CanLII) and *N.D.L. v. M.S.L.*, 2010 NSSC 68.

Implications for family lawyers representing clients targeted by coercive domestic violence:

- Weigh and discuss carefully with clients the implications of leaving the marital home with or without the children
- Consider an order for exclusive possession of the family home. When an application for exclusive possession of the home is contemplated, and a criminal case is on-going, act quickly to ensure that the Crown prosecutor is aware of the application and thus the need to resist criminal court provisions such as “house arrest” which can, in practical effect, give a violator exclusive possession of the family home
- Consider risk and the potential for lethal outcome if the parent and child remain in the home, bearing in mind, however, children's need for stability and that Australia and New Zealand are reporting considerable success in the use of safety measures (such as specialized locks, security devices, community support) to enable targeted parents and children exposed to domestic violence to remain safely in the family home<sup>103</sup>
- Consider seeking an agreement or order for payment for security devices as part of the application for exclusive possession of the family home when such devices could ensure adequate adult and child safety
- Prioritize safety while taking into account the importance to children, who have been exposed to domestic violence, of stability and a safe, secure, strong and stable residential relationship with the non-violating parent (or other adult when supporting the bond with the non-abusing parent is not an option) as well as the value to the child of safe and supportive relationships in the child's community

Criminal Crown prosecutors will also wish to keep in mind that, in a family law context, a criminal provision requiring a perpetrator to remain in the home could have the unintended effect of giving the offender an advantage with respect to interim custody on status quo grounds, particularly if the targeted parent has not been able to remove the children from the family home.

When making an application for interim custody, family lawyers may wish to bring to the attention of the court the parent-child considerations endorsed by Justice MacDonald in the domestic violence interim custody case *N.D.L. v. M.S.L.*, 2010 NSSC 68.

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<sup>103</sup> For an exploration of this issue see: R. Edwards (2004) *Staying Home Leaving Violence Promoting Choices for Women Leaving Abusive Partners* (Australia Domestic and Family Violence Clearinghouse). Recommended reforms in Australia include a presumption that the person targeted by domestic violence will remain in the home: Australian Domestic & Family Violence Clearinghouse (2007) “Review of the Victorian Crimes (Family Violence Act 1987)” *Newsletter 28* Autumn 2007 at p. 7; Australia Law Reform Commission (2010) ALRC Consultation Paper 1 (ALRC CP1) *Family Violence – Improving Legal Frameworks* on line at: <http://www.alrc.gov.au/family-violence-improving-legal-frameworks-cp-1> See also Clare Murphy and Janet Fanslow (2012) “Building collaborations to eliminate family violence: facilitators, barriers and good practice” *Issues Paper 1* New Zealand Family Violence Clearinghouse, p.15.

Consider also the factors outlined by the Family Court of Australia (2009) “Matters that may be considered in making interim parenting orders pending a full hearing” in *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged* (Family courts, Australia):

- likely risk of physical or emotional harm to the child
- whether the time should be supervised
- if so, whether or not the supervision should occur at a child contact centre
- if not, where the access should take place and who should supervise it
- times for the visit and places of exchange
- who should be permitted to attend the appointment with the parent
- who should bear the costs
- and particularly what other arrangements should be put in place to secure the safety of the child and the other parent

In addition to status quo, child safety and protection from harm are central best interests of the child interim custody considerations in domestic violence cases. See, for example: *F. (J.D.) v. F. (J.L.)*, 2009 PESC 28; *D.G. v. H.F.*, 2006 NBCA 36; *Dorval v. Dorval*, 2006 SKCA 21; *V.A.W. v. R.C.L.*, 2004 CanLII 7043 (ON S.C.) at para. 34; *E.A.G. v. D.L.G.*, 2010 YKSC 21; *Presley v. Presley*, 2009 SKQB 243.

When a status quo presumption would potentially harm the child, best interests considerations other than status quo can take priority. In *G.G. v. H.D.*, 2009 YKSC 5, for example, Justice Veale held it was premature to order interim supervised access until a custody and access report could be completed and evidence could be presented to the court relating to the impact of domestic violence on the child and on the child's best interests. In *Kozub v. Burgess*, 2013 MBCA 63 the Court of Appeal of Manitoba held that it was an error, on an interim motion, to make firm findings of fact on the basis of contradictory affidavit evidence and to order shared parenting, taking no “account of the serious allegations of abuse against the father” and the status quo of the mother having been the primary caregiver.

#### **8.3.4 Interim custody: status quo acquired by unlawful means**

When a parent acquires custody or primary care of the child by wrongful means (for example, by removing the child from the jurisdiction in a non-emergency case, not informing the other parent about the child's whereabouts, by absconding with the child, by making false *ex parte* claims for custody and civil protection, by setting up the other parent for criminal conviction in connection with resistance violence (see Part 5 above), by engaging in domestic violence and forcing the other parent out of the home) status quo may have limited weight. See, for example:

- *T.M.A.H. v. J.J.G.*, 2010 NBCA 4 (CanLII)
- *Pacheco v. Moodie*, 2010 ONCJ 228 (CanLII)
- *Jochems v. Jochems*, 2013 SKCA 53, *Jochems v. Jochems*, 2013 SKCA 81
- *Gurtins v. Goyert*, 2008 BCCA 196
- *Bader v. Styranka*, 2004 SKCA 55



While courts will sometimes intervene on an interim basis to restore the status quo as it was prior to a unilateral decision to relocate: *Droit de la famille – 114128*, 2011 QCCA 2403, note the qualifying comment at paragraph 35 of *Jochems v. Jochems*, 2013 SKCA 81 that the mother’s unilateral decision, in that case, had not been “to escape abuse or to seek out better opportunities for” the child.

### **8.3.5 Interim custody and the criminal process**

Family lawyers will be attentive to the potential for manipulation of family law proceedings via the criminal court (for example the criminalization of resistance violence or minor, isolated acts of domestic violence).

*Shaw v. Shaw*, 2008 ONCJ 130 is a case on point. The mother in this case assaulted the father. The father waited a month to lay charges. Once the mother was in custody, the father made an application on an *ex parte* basis on a 'without prejudice' basis for interim custody. When the case came up for review, the father claimed interim custody by virtue of status quo. The mother, as a result of criminal proceeding had effectively been barred from the home and from custody of the children. Justice Pugsley comments on the effects of the criminal proceeding on the family law case:

*the way that the criminal justice system approaches the commencement of these matters, however, often wreaks family law havoc with the family unit of the defendant and the complainant, and in particular the children of those parties. Family courts decide custody and access issues on the basis of statute and case law defining the best interests of children. The criminal justice system pays no attention to such interests because it is not geared up to do so nor are the participants widely trained in how the actions of the system - from the officer who refused to release the defendant at the station, to the duty counsel who allows the defendant to agree to inappropriate conditions of release out of expediency - effect the lives of the members of the defendants' family.*

Justice Pugsley was critical, in this case, of routine bail provisions and particularly of orders that resulted in the exclusion of a primary care parent from the home thus placing the other parent in a position of superiority in the family law matter for as long as a year, while the criminal matter could be resolved. See also: *E.A.W. v. M.J.M.*, 2012 NSSC 216.

The roots of the problem are fourfold:

- Criminal law definitions of domestic violence that fail to take into account pattern and effect of domestic violence
- Standard criminal law responses that do not distinguish types of domestic violence (the distinctions between resistance and minor isolated violence on the one hand, and coercive domestic violence on the other - see Part 5 above)
- Standard criminal law responses that inadvertently fail to take into account the best interests of children
- Criminal proceedings that fail to consider the potential effect of criminal law matters on family law proceedings

See Part 8.5 below in connection with ways in which family and criminal lawyers can work together to prevent such occurrences by paying careful attention to bail conditions.

## ***8.4 Interim Release (Bail)***

### **8.4.1 Introduction<sup>104</sup>**

Family lawyers, representing survivors of domestic violence, will wish, subject to direction and consent from the client, to ensure, as soon as possible that police and Crown prosecutors are given complete information about the pattern of domestic violence as well as information about: the existence of guns or other weapons, the presence of mental health or substance abuse problems, and the record of the accused's compliance with court orders in the past. This information is centrally important to police decision-making and Crown submissions in connection with interim release. It helps the police and Crown to assess victim and witness safety, the likelihood of continuing violence, the need for weapons prohibitions and the need for provisions to respond to mental health and substance abuse problems in order to reduce the potential for future offending. In the absence of detailed information, the police and Crown will be unable to propose provisions specific to the particular safety needs of the victim, children and other family members.

In a coercive domestic violence context, when an accused is released by police or a court pending a criminal trial, the risk to victims and children can increase appreciably, particularly in jurisdictions that do not have programs in place to closely supervise bail conditions, and particularly if the survivor of domestic violence is not informed of and was not consulted about appropriate terms and conditions. Domestic violence crimes differ from other crimes. The degree of intimacy makes contact prior to the criminal trial far more likely in these cases than in other criminal matters. In cases involving continuing risk, the intimate knowledge of the social behavior of the complainant increases the potential for harm. Subject to the importance, discussed earlier, of distinguishing between victims of domestic violence and dominant aggressors, survivors of coercive domestic violence are best placed to know the dangers posed by interim release (or the benefits, such as for example, the ability to communicate about the care of children, or in order to continue employment). No-contact orders are not advisable in every domestic violence criminal case. Much depends on the type of violence, the level of risk, the case circumstances, the best interests of the children, and the perspective of the targeted adult.

Family lawyers representing the targeted parent, and child protection authorities, will wish to ensure that the police and the Crown have copies of all current civil protection orders, all restraining orders, and all agreements or orders affecting child custody and access or child protection proceedings. Police and Crown may wish to consider, as a condition of interim release, including a provision requiring the accused to comply with

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<sup>104</sup> This report, written from a family law perspective, is limited to matters at the intersection of family and criminal law. Discussion of criminal law matters *per se* is beyond the scope of the report.

all conditions pertinent to safety<sup>105</sup> in such orders and agreements. This could help to improve consistency and make provisions associated with safety across court sectors 'seamless'. It would also help to ensure that all court sectors are working toward a common purpose. Inconsistent provisions can result in confusion and inadvertent breaches of interim release, on the one hand, or in the perpetrator's abuse of inconsistencies, on the other. One must keep in mind, however, that these civil protection orders and/or child protection arrangements may have been granted or agreed prior to the criminal incident. In such cases, additional or alternative interim release provisions may be warranted to enhance safety.

The failure to convey detailed information to the police and Crown can also result in overly restrictive bail provisions. In the absence of complete information, police and Crown may seek standard restrictive provisions in domestic violence cases that are unnecessary given the individual circumstances of the case (for example in cases of a minor, isolated incident of violence associated with separation, or in cases of isolated resistance violence). Sometimes, albeit less often in coercive domestic violence cases, continuing contact may be safe and beneficial to both the victim and children. Overly restrictive provisions can result in confusion, in litigation tactics, such as setting up the party convicted of resistance violence to engage in technical breaches, or in the targeted adult encouraging a perpetrator's breaches of bail provisions. In these circumstances, safety is compromised.

Consequently, it is extremely important for family lawyers to ascertain the particulars and the surrounding circumstances of the domestic violence as well as the targeted adult's views on interim release and, subject to professional obligations relating to confidentiality and privilege, to ensure that police and the Crown are kept informed of these issues. Family lawyers can enhance everyone's safety by taking action to ensure that:

- Clients targeted by domestic violence are notified immediately of applications to apply for or to vary the terms of interim release and of the outcome of all interim release proceedings
- Clients, alleged perpetrators as well as those targeted by domestic violence, are made fully aware of terms and responsibilities associated with interim release
- Clients targeted by domestic violence (and the children) revisit and update safety plans, preferably in consultation with a domestic violence expert, when interim release is granted or release provisions are altered

Subject to cases in which a child is a complainant and or must testify as a witness in the criminal case, parent-survivors of coercive violence will also usually be best placed, in consultation with their family lawyers, to know and to be able to advise Crown prosecutors on the best interests of the children in connection with contact, if any, with the accused prior to trial. Many survivors of domestic violence encourage contact

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<sup>105</sup> Because the interim release provisions in the *Criminal Code* refer to provisions to enhance safety, it is questionable that provisions not connected to safety, such as, for example, payment of support, can be included.

between the other parent and the children, provided that provisions are put in place to ensure that the contact is beneficial and safe.

Crown prosecutors and police, as well as family lawyers, will also wish to consider the potential effect of interim release on the preservation of evidence as well as on survivor/victim cooperation. Victim (and child) recant rates are very high in criminal domestic violence cases. While victim recant is discussed in part 9.5, it is important, in connection with interim release, to note here the importance of police, Crown prosecutors, and family lawyers explaining to complainants the potential for manipulation or intimidation prior to the criminal trial. Victims of domestic violence can be taught how to document these matters and who to contact if such circumstances arise. For particulars, see part 9.5 below.

#### **8.4.2 Interim release: child protection perspective**

Katherine Kehoe, reports in her article “Intersection of criminal and family proceedings in domestic violence cases” that child protection authorities in Ontario are increasingly working with parents who, despite a history of domestic violence, seek to reconcile. She notes that interim release provisions preventing an accused's contact with the other parent and with the children until after the criminal hearing (which can be long delayed) can prevent the therapeutic work of child protection authorities, when reunification could be, from a child protection point of view, safe for the children and beneficial for the family. The problem is compounded by stringent time lines in child protection legislation. The inability to work with an accused parent and a child for an extended period of time by virtue of restrictive interim release provisions, could prevent a child's return to his or her family or loss of jurisdiction and in a child's return without therapeutic intervention. Kehoe reports: “In Ontario, children under the age of six who have been in foster care for a cumulative total of one year must be returned to the family or community or made a Crown ward.” Although specific timelines vary by jurisdiction, similar provisions (which are designed to respond to the developmental needs of children) appear in child protection legislation throughout Canada. Consequently, if the criminal case involving the family continues for time periods beyond those mandated in child protection legislation, no-contact provisions in criminal interim release provisions could prevent a child protection authority's therapeutic work with the family within the time limits prescribed by statute.

This procedural problem is compounded by child development considerations, pertinent to both family and child protection cases. More particularly, young children require frequent contact (daily or at least repetitive weekly contact for young children) in order to maintain attachment bonds. On the one hand, if contact with the accused parent offers a benefit to the young child (for example, when the accused parent is the primary caregiver and the charge relates to minor, isolated or resistance violence, or when the perpetrator is a positive influence in the child's life) and it is anticipated that, with the support, the family will be able to safely reconcile, frequent contact is critically important to enable the child to maintain his or her attachment bond. On the other hand, young children are particularly susceptible to stress and harm from exposure to domestic violence. All

children who have been harmed by coercive domestic violence require safety, security and stability; some will require a stress-free period in order to heal. When contact with the charged parent disrupts the child's attachment with the other parent or with foster parents, frequent contact with the disrupting parent can be counter-productive to the child's security.<sup>106</sup> Moreover, in a domestic violence context, the value of maintaining the strength of the child's relationship with each parent is considered in connection with other needs associated with the presence of domestic violence, particularly the need for safety and stability in the child's life. The younger the child, the greater the child's need for haste in ensuring stable secure adult attachments, either with the targeted parent or with another adult (for example foster parents) when the targeted parent is unlikely to be able to meet the child's needs within a reasonable time.

After taking into account the type of violence (minor, isolated; resistance; or coercive - see Part 5 above), the advantages of frequent contact with the criminally charged parent in order to preserve the parent-child relationship for the purposes of enabling a potential family reunification, should be balanced by child protection authorities against the impact of frequent contact on each of the following:

- the safety, security and stability of the targeted parent
- the safety, security and stability of the child's attachment bond with the targeted parent
- the safety, security and stability of the child's attachment bond with other adult caregivers (for example foster parents), and
- the benefits to the child of frequent contact with the accused, while also taking into account the existence, if any, of patterns of child abuse or of adverse parenting associated with coercive forms of domestic violence

Criminal courts do not normally have the expertise needed to assess such matters. Child protection authorities are vested with responsibility to safeguard children. Thus, Crown prosecutors will wish to check, in all domestic violence cases, to see if child protection authorities are involved with the family and if so will wish to consult with such authorities (and if the case is also a family law case, with the family lawyers) in connection with terms of interim release affecting children. Child protection authorities may be able to offer services, such as closely supervised access, access to domestic violence intervention and parenting programs, drug and alcohol and/or mental health treatment programs that could help the whole family heal, while also protecting the children.

Kehoe cautions against the following particular types of interim release provisions:

- Access only as directed by child protection authorities (since a court could decide that the authorities are not adhering to statutory responsibilities)
- Access supervised by child protection authorities (since they may subsequently decide that supervision is not necessary, or might not have the resources to offer

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<sup>106</sup> See, for example Charles Zeanah, Carole Shauffer and Mary Doiser (2011) "Foster Care for Young Children: Why it Must Be Developmentally Informed" 50 (12) *Journal of the American Academy of Child & Adolescent Psychiatry* 1199-1201.

supervisory services)

She recommends instead the following interim release provisions:

- Access only at the discretion of the named child protection authority and/or in accordance with a family court order granted after the date of this order. (Although this type of order imposes a potential obligation on the party seeking access to obtain a family court order, from a domestic violence research point of view, the onus is properly placed on the parent who allegedly engaged in domestic violence to provide assurances to a family court or the child protection authorities that the child will be safe and will benefit from contact.)
- Delegation of decisions about access to children to family courts or to child protection authorities, with a proviso that the child protection agency or the family court take into account the criminal charges. (While not 'fool proof' this type of provision helps to prevent 'slippage through the cracks' in that it provides a degree of assurance that the family court and child protection authorities will at least be made aware of the criminal proceeding.)

One of the difficulties in practice, however, is that, in the absence of statutory provisions (such as those in Ontario) that mandate disclosure of information about criminal and child protection proceedings, negotiations and settlement proceedings can result in particulars of criminal and child protection proceedings associated with the family not being discussed in mediation and/or not being presented to family court judges prior to the signing of consent orders. Refer to part 8.6 below for discussion of settlement proceedings and potential options.

A continuing problem, documented by researchers in many jurisdictions, is that child protection authorities are not always devoting sufficient attention in these cases to special child and adult safety issues associated with the domestic violence context. Reports continue to document child deaths in domestic violence cases despite the involvement of child protection authorities.<sup>107</sup> The best option, if at all possible, is to consult a domestic violence expert.

Given that it is not possible to anticipate the large variety of circumstances that could arise at the intersection of child protection and criminal law, most important is that police and Crown establish solid, effective working relationships with domestic violence experts and with child protection authorities in connection with the wording of interim release provisions affecting children. Similarly, child protection authorities will wish to immediately contact police and Crown should they become involved in a case involving ongoing criminal proceedings.

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<sup>107</sup> See, for example the Canadian sources listed in note 31, particularly Turpel-Lafond (2012), as well as the American report: *Looking at Family Court-Involved Domestic Violence and Child Abuse Fatality Cases Through a Lens of Prevention* (Institute for Court Management, Florida) on line at: <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/193>.

### 8.4.3 Interim release: family law perspective

Crown prosecutors will also wish to keep in mind that the family law context is different from the child protection context. In the family law context the parties are not seeking reunification. Instead, separation, a well-documented time of high risk, is occurring or is imminent. In addition, after separation, the targeted parent will no longer be present when the accused parent is exercising contact with the children. When the accused parent has engaged in coercive domestic violence, this can have negative implications for child wellbeing and safety.

Moreover, child protection authorities are not always involved when families are engaged in family law and criminal proceedings, even when the authority has lingering concerns relating to child safety. Examples include: when the non-accused parent has taken action in the family court, in accordance with child protection authority instructions, to seek an order to protect the children (such as for the perpetrator's access to be supervised); when the accused is no longer in the home, and the child protection authorities have no concerns about the targeted parent's parenting. In circumstances where it is believed that the family custody and access order, once granted, can provide adequate protection for the children, child protection authorities will often withdraw from active participation in the case. At this point, the case becomes a private custody and access matter. The practical problem, however, is that, as the socio-legal research has demonstrated, many (perhaps most) protective claims for children are abandoned during family law settlement and negotiation processes. In such circumstances the family court may never be made aware of the evidence in support of the abandoned claim and the protective provisions that caused the child protection authorities to withdraw from the case may never be implemented. (See Part 8.6 below for additional comments on settlement processes.) This is one of the reasons, subject to the targeted parent's views on the safety of the accused's parent's contact with children, that it is important, in coercive domestic violence cases (see Part 5 above), particularly when risk is high (see Parts 6 and 7 above) and there are concerns about the safety of children (see part 5.10 above), for child protection authorities to remain involved in the family law case until: 1) risk is assessed and a subsequent order is made by the family court that provides adequate protection for the children or 2) the child protection authorities are convinced that the perpetrator does not pose a threat to a child or the family.<sup>108</sup>

Nonetheless it is also important to keep in mind that when, on balance, the relationship with the perpetrator offers more benefit than emotional and physical risk to the child, reduced contact between the perpetrating parent and the child can be detrimental to the child and the family. Thus when parent-child contact offers benefits to the child, consideration should also be given to circumstances that favor encouraging frequent child contact with the accused such as:

- Low risk of continuing domestic violence
- Low risk to the child and his or her primary caregiver

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<sup>108</sup> Even this provision is not foolproof given that some judges do not engage in an extensive review of material in court files prior to signing consent orders.

- The absence of pattern, coercion or control (see Part 5)
- The fact that an older child who is seeking continuing contact is able to protect him- or herself
- Positive parenting practices, particularly the absence of negative parenting patterns associated with coercive domestic violence
- A strong, positive, reciprocal parent-child bond between the accused and the child
- The child's (non-coerced) wish to maintain contact with the accused
- The absence of a pattern of undermining the child's relationship with the other parent or undermining the child's participation in treatment
- Provisions, such as supervised or time-limited or structured access, that can be put in place to protect the children
- A record of adherence to court orders and agreements
- Factors that reduce risk such as active participation in mental health and/or drug and alcohol treatment programs
- Active participation in domestic violence intervention and parenting programs with demonstrated behavioral change
- A targeted parent who favors the accused parent's continuing contact with the child

In some cases - for example in non-coercive (minor isolated or resistance) violence cases, or in low risk PTS-induced domestic violence cases (depending on the level of risk and active participation in treatment), and in other low risk cases in which children benefit from or seek continuing contact with the accused - family lawyers may wish to advise Crown and police to exempt children from no-contact prohibitions and instead to set out clear provisions relating to methods and times of communication for the purposes of arranging parent-child contact, as well as the particulars of allowable parent-child contact.

When the child is a potential witness for the Crown in a related criminal case, police or Crown may wish to deny the accused's contact with the child entirely in the interim release provisions until trial. Nonetheless, even in these circumstances, if contact is beneficial to the child, consideration can be given to alternative provisions to enable preservation of the parent-child relationship, such as carefully supervised contact that ensures preservation of evidence, particularly if criminal proceedings are likely to be delayed.

As a general rule, family courts have more experience and capacity than criminal courts relating to the best interests of children, and to take into account the type and pattern of domestic violence. Consequently, it is important that criminal courts do not limit the ability of family courts to ascertain and respond to the best interests of children in these cases.

Keeping these issues in mind, many of the recommendations outlined in sections 8.4.1 and 8.4.2 will, depending on the circumstances of the case, continue to apply. For example:

- The exchange of information between the victim of domestic violence and police or Crown relating to the pattern and type of abuse and violence in the relationship,



- particularly information pertinent to risk and the potential for lethal outcome
- The exchange of information between the victim of domestic violence and police or Crown relating to the accused's record of compliance and non-compliance with court orders and agreements
  - The need for regular consultation between police or Crown and the victim of domestic violence, or his or her lawyer, relating to specific interim release provisions needed to ensure victim and child safety as well as the preservation of evidence
  - The need for consultations between the police or Crown and the family lawyers (for each parent) relating to interim release provisions affecting the children, in order to ensure that the benefits as well as risks of contact are considered, and in order to ensure that any contact during interim release will be safe and beneficial for the children, while also preserving criminal evidence
  - The need to take into account the terms relating to therapeutic intervention and safety in existing civil prevention orders, civil restraining orders, and child protection orders and agreements and to incorporate similar terms affecting safety as conditions of interim release (subject to the potential need for additional provisions if the criminal charge post-dates or was considered at the time of the civil orders and agreements)
  - The need to make provisions that deny contact with the child subject to future access arrangements made by child protection authorities or contact granted pursuant to a family court order, after considering the particulars of the criminal proceeding

In connection with interpreting criminal court evidence and decisions in a family law context, see Part 9 below.

#### **8.4.4 Interim release: weapons restrictions**

See part 8.2.7 above in connection with the importance of police, Crown, and family lawyer collaboration in connection with weapons restrictions.

#### **8.4.5 Protective provisions when an accused is not released**

Victim recant rates are high in criminal domestic violence cases. Research, discussed at part 9.5 below, documents the intimidation and manipulation of victims from jail. After consulting the 'victim' client, family lawyers, police and Crown may wish to consider the advisability of provisions set out at 515 (12) of the *Criminal Code*, directing the accused, detained in custody, to abstain from communicating with the victim or with other witnesses. If no-communication and no-contact provisions are to be included, copies should be provided to the facility where the accused is to be held.

If, despite the detention, contact is to be allowed between the accused and the complainant or to make arrangements to see the children, it is important to ensure that the allowable methods of communication and contact are clearly set out in the document. If communications to arrange contact with the children are to be routed through a third party (agreeable to both parents), it goes without saying that the third party should be contacted to ensure that he or she is in agreement with the provisions. Alternatively,

consideration can be given to making prohibitions on contact subject to any provisions relating to contact with children set out in a subsequent family court order or authorized by child protection authorities after the date of the criminal prohibition.

## ***8.5 Child abduction: family, criminal & international law***

### **8.5.1 Introduction**

Family lawyers should be aware of the potential for child abduction in domestic violence cases. Historically those who abducted children tended to be contact parents taking children away from primary-care parents. Increasingly, today many ‘child abductors’ are primary-care parents fleeing situations or communities where the abusive relationship occurred.<sup>109</sup> Indeed domestic violence is identified in empirical research as one of the indicators of the risk of child abduction (both by perpetrators and by targeted parents).<sup>110</sup>

While comprehensive discussion of this issue is beyond the scope of this report, the topic cannot be ignored entirely, given the empirical documentation of risk and connections between civil and criminal responses.

Both male and female children are abducted; many are of pre-school age.<sup>111</sup> Abduction may be by either parent. Increasingly abductors are custodial mothers<sup>112</sup> many of whom are fleeing domestic violence.<sup>113</sup> Perpetrating parents abduct in order to threaten, to ‘get

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<sup>109</sup> Nigel Lowe, (2007) *A statistical analysis of applications made in 2003 under the Hague Convention of 25 October, 1980 on the Civil Aspects of International Child Abduction* The Hague, The Netherlands: Hague Conference on Private International Law; Miranda Kaye (1999) “The Hague Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four” 13 *International Journal of Law Policy & Family* 191; Justice J. Chamberland, JA (2006) “Domestic Violence and International Child Abduction: Some Avenues of Reflection” *International Child Protection The Judge’s Newsletter* Autumn 2005 (Hague Conference on International Private Law); Royal Canadian Mounted Police 2008 *Missing Children Reference Report: National Missing Children Service* [RCMP].

<sup>110</sup> Abduction occurs in a small but sizable minority of domestic violence cases. Merle Weiner and Darren Mitchell (2009) “The Uniform Child Abduction Prevention Act: Understanding the Basics” in *NCJFCJ Synergy* 13(2); J. Johnson, I. Sangatun-Edwards, M. Blomquist, L. Girdner (2001) “Early Identification of Risk Factors for Parental Abduction” in *Juvenile Justice Bulletin* March 2001; S. Shetty & J. Edleson (2005) “Adult Domestic Violence and International Parental Abduction” *Violence Against Women* 11(1): 115-138; RCMP, *ibid.*

<sup>111</sup> The genders and ages of children change from year to year. In two Canadian RCMP reports (for the years 2008 and 2009) more male than female children were abducted by parents. Most children abducted by parents were under the age of 12. Royal Canadian Mounted Police 2009 *Missing Children Reference Report*. J. Kiedrowski & M. Dalley (2008) “Parental Abduction of Children: An Overview and Profile of the Abductor” (Government of Canada) see also Royal Canadian Mounted Police publications on missing children on line at <http://www.canadasmising.ca/index-eng.htm>.

<sup>112</sup> Canada was reporting more parental abductions by mothers than by fathers within Canada and from the United States to Canada. For example, Royal Canadian Mounted Police 2008 *Missing Children Reference Report: National Missing Children Service*. Similar profiles are being reported elsewhere. Judge Peter Boshier (2009) *The Strengths and Weaknesses of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - A New Zealand Perspective*. Equal numbers of parental abductions by gender are being reported from other countries to Canada.

<sup>113</sup> Justice J. Chamberland, *supra* note 109; Jeffrey Edleson et al. (2010) *Multiple perspectives on battered mothers and their children fleeing to the United States for Safety A Study of Hague Convention cases*

even with', to intimidate or to control children or the other parent; parents targeted by domestic violence abduct when they fear abduction is the only way to protect themselves and the children.<sup>114</sup> Risk is especially high in cases of parental mental health and personality problems.<sup>115</sup>

At the very least, family lawyers should discourage abduction and advise any clients considering fleeing the jurisdiction with a child of potential harm to the child and of potential criminal implications for themselves pursuant to sections 282(1) and 283 (1) of the *Criminal Code*. See, for example: *R. v. Melville*, 2011 ONSC 5697.) Clients should also be advised that fleeing a jurisdiction with a child without a court order can have a serious and negative impact on subsequent custody and access determinations.

If the domestic violence is so severe that the client is being advised by professionals or experts to flee the jurisdiction, the best option is to obtain a custody order allowing the move on an emergency, *ex parte* interim basis. In an extreme emergency, one should ensure that police and child protection authorities are involved and condone the decision to leave the jurisdiction with the children, and that those authorities are prepared to document their advice to flee as well as the level of danger involved.

### 8.5.2 Civil child abduction within Canada

When a parent removes a child from one Canadian jurisdiction in which the child is settled to another Canadian jurisdiction, without the consent of the other party and without a court order, the left-behind parent will often apply on an emergency *ex parte* basis for interim custody and the return of the child. In such circumstances, the order (commonly referred to as a chasing order) will often be granted. All Canadian jurisdictions<sup>116</sup> provide for non-enforcement and variation of custody orders from other provinces and territories when it is determined that “serious harm” would result to the child if the child were to be returned to the custody of the left-behind parent. These serious harm provisions are, however, generating two lines of authority in connection with whether or not domestic violence constitutes “serious harm”.

In connection with within-Canada abduction, some courts have ruled that domestic violence can constitute grave risk of harm to a child's primary caregiver and thus evidence of serious potential harm to the child, leading to non-enforcement. For

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*Final Report*. NIJ #2006-WG-BX-006.

<sup>114</sup> Commonly such abductions are associated with perceptions that the legal system is not attending to child safety issues or with a distrust of the legal system that is associated with lack of education, poverty or culture. When foreign courts do not take domestic violence seriously such perceptions may in fact be valid. In some cases, however, parents abduct children when spurious assertions do not produce desired results.

<sup>115</sup> Additional discussion of the types of parents who abduct: Johnson et al., *supra* note 110; Kiedrowski & Dalley, *supra* note 111.

<sup>116</sup> Quebec's Act respecting the civil aspects of international and inter-provincial child abduction authorizes refusal to return a child to a designated state on a finding of grave risk “that his or her return would expose the child to physical or psychological harm”.

example, the Nova Scotia Court of Appeal endorsed safety and best interests of the child considerations in upholding the trial judge's decision not to enforce an extra provincial custody order prior to holding a hearing to assess child safety in *R.K.G. v. M.A.G.*, 1997 CanLII 9857 (NS C.A.) (CanLII). See also *S. v. S.*, 2004 CanLII 1233 (ON S.C.) (CanLII) at paragraphs 23-24 for a discussion of connections between exposure to domestic violence and serious risk of psychological harm to the child<sup>117</sup> as well as *S.A.G. v. C.D.G.*, [2009] YKSC 21 at paragraphs 30 to 33; *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, (1999), 171 D.L.R. (4th) 32, (1999), 45 R.F.L. (4th) 404, (1999), 118 O.A.C. 169, 1999 CanLII 3702 (ON C.A.) (CanLII). Note that these cases tend to be severe, coercive domestic violence cases.

Nonetheless other courts are ruling that domestic violence (without direct child abuse) will not usually constitute evidence of serious harm to the child for the purposes of within Canada non-enforcement. See, for example: *Brooks v. Brooks* (1998), 41 O.R. (3d) 191, (1998), 163 D.L.R. (4th) 715, (1998), 39 R.F.L. (4th) 187, (1998), 111 O.A.C. 177, 1998 CanLII 7142 (ON C.A.) (CanLII); *Peinado v. Peinado*, 2004 ONCJ 36 [CanLII](#) and *Pelletier-Murphy v. Murphy*, 2006 ONCJ 190. In such cases the child may be ordered returned. If an interim custody (chasing) order has been granted, on return the child may be subject to an interim custody order in favour of the left-behind parent. In such circumstances, the abducting parent can have great difficulty, in the absence of clear evidence of severe coercive domestic violence or child abuse on the part of the other party, refuting a negative assumption that he or she was acting to prevent the child's contact with the other parent.

In short, fleeing a jurisdiction with a child in the absence of a court order can have serious negative implications for the fleeing parent even for a parent fleeing from domestic violence.

### 8.5.3 International Child Abduction

All Canadian provinces and territories adhere to the Hague *Convention on the Civil Aspects of International Child Abduction*.<sup>118</sup> For discussion of considerations in response to an application for return of a child to a non-Convention country in a domestic violence case, see: *Isakhani v. Al-Saggaf*, 2007 ONCA 539 (CanLII) and *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 (CanLII), leave to appeal dismissed with costs: *Theresa Shortridge-Tsuchiya v. Sakae Tsuchiya*, 2010 CanLII 37857 (S.C.C.) and *Droit de la famille – 131294*, 2013 QCCA 883.

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<sup>117</sup> Although not cited in the case, the reasoning in this decision is consistent with the reasoning in *Abdo v. Abdo*, 1993 CanLII 3124 (NS C.A.) (CanLII). Medical child brain development research is documenting serious health and development concerns relating to the impact of high levels of stress and fear on the developing child: *Working Paper 9*, *supra* note 59; The National Scientific Council on the Developing Child at Harvard University makes available easily understood literature on the impact of stress on child brain and medical development online at: <http://developingchild.harvard.edu/activities/council/>

<sup>118</sup> Justice Québec maintains a list of Convention reciprocating jurisdictions designated by Québec.

As of 2007, two thirds of abducting parents under the *Convention* were primary-care parents, many of them reportedly fleeing from domestic violence.<sup>119</sup> Although on the whole, the operation of the *Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)* is considered an international success, many academic and judicial commentators are alarmed at the operation of the *Convention* in domestic violence cases.

Article 3 of the *Hague Convention* does not expressly exempt relocating to escape domestic violence from its definition of wrongful removal or retention. Moreover, the fact that the fleeing parent had a custody order is not necessarily a defence. The meaning of custody under the *Hague Convention* is not the same as 'custody' as the term is used in Canadian family law cases. Custody under the *Hague Convention* is associated with care of the person of the child and particularly with the right to determine child residence. Such 'custody' rights are interpreted broadly. For example, a parent exercising limited supervised access may be deemed to have custody entitlements if that parent retains a right to deny, to consent to, to restrict, or to determine child residence. Similarly, courts retain custody rights for purposes of the *Hague Convention* pursuant to interim orders and other orders that reserve, to the court, decision-making with respect to a child's residence.<sup>120</sup> Thus agreements and orders that restrict a custodial parent's right to change a child's residence without notice and consent can create custodial entitlements for purposes of *Hague Convention* enforcement if the parent with custody relocates with the child without a court order authorizing the relocation.<sup>121</sup> Custody rights under the *Hague Convention* may arise by statute, by judicial or administrative decision, or by agreement having legal effect.<sup>122</sup>

Exceptions to the return of the child are outlined in Articles 13 and 20. The court is not bound to return a child, for example, if the party opposing return establishes non-exercise

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<sup>119</sup> Judge Fisher's (2007) article in *The Judges' Newsletter* Vol. XII/Spring – Summer 2007 at page 10. See also the Hague Domestic Violence project associated with the Universities of Minnesota and Washington: <http://www.haguedv.org/>

<sup>120</sup> *Johnson v. Jessel*, 2012 BCCA 393, leave to appeal dismissed with costs; *Behice Jessle v. Douglas Nelson Johnson*, 2013 CanLII 8398 (SCC). See also: *M.B.G.A. c. R.V.M.*, 2004 CanLII 20544 (QC C.A.) (CanLII). Note, however, in *Jackson v. Graczyk*, 2007 ONCA 388 (CanLII) the Court of Appeal for Ontario endorsed Justice Czutrín's finding that the father had been exercising visiting not custody rights. Consider also, however, *Abbott v Abbott*, No. 08-645, May, 2010, a United States Supreme Court decision which held that a right to prevent removal from a country constitutes a right of custody for the purposes of the *Convention*.

<sup>121</sup> *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 1994 CanLII 26 (S.C.C.) (CanLII) Caveat: The case suggests that a non-removal clause in a permanent custody order, to ensure access to the non-custodial parent, is not given the same level of protection as custody under the *Convention*. Yet many courts have ruled that a custodial parent's removal of a child from a jurisdiction in contravention of such a non-removal clause, or in contravention of a clause or a law requiring a subsequent court order or the other parent's consent, constitutes a breach of custody rights for the purposes of the *Convention*: *Johnson v. Jessel* *ibid.*; *Thorne v. Dryden-Hall*, 1997 CanLII 3236 (BC C.A.) (CanLII); *Toiber v. Toiber* (2006), 25 R.F.L. (6th) 44, (2006), 208 O.A.C. 391, 2006 CanLII 9407 (ON C.A.) (CanLII); *Finizio v. Scoppio-Finizio*, 1999 CanLII 1722 (ON C.A.) (CanLII); *M.B.G.A. c. R.V.M.*, *ibid.* See also: *Abbott*, *ibid.*

<sup>122</sup> Recent international case law indicates that custody rights may be acquired by operation of de facto care as well as by operation of law. See: Australian Government, Attorney General's Department *International Child Abduction News* No. 28 (September 2004).

of custody rights by the other party at the time of removal, consent or acquiescence to removal,<sup>123</sup> grave risk to child (e.g. “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”), or the child objects to his or her return and has attained sufficient age and maturity to make it appropriate to take into account those views.<sup>124</sup> Note the discretionary nature of these provisions as well as the importance of considering the degree to which the child has been influenced by the abducting parent. For example, see the Court of Appeal for British Columbia's endorsement of Justice Martinson's decision in *Beatty v. Schatz*, 2009 BCSC 706 (CanLII), 2009 BCSC 706 in *Beatty v. Schatz*, 309 D.L.R. (4th) 479, 69 R.F.L. (6th) 107, 2009 BCCA 310 (CanLII). Courts may also decline to return children when one full year has elapsed and the child has become well settled in the new environment. In *Kubera v Kubera*, 2010 BCCA 118 (CanLII) the Court of Appeal for British Columbia endorses Justice Donna Martinson's finding that the appropriate time to ascertain whether or not the child is 'well settled' is as of the date of hearing.

Exceptions to return have been construed narrowly: *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, (1996), 134 D.L.R. (4th) 481, (1996), 19 R.F.L. (4th) 341, 1996 CanLII 192 (S.C.C.) (CanLII) at paragraph 37. In domestic violence cases, opposition to return pursuant to the *Convention* is most likely to arise in connection with claims that the return would pose a grave risk of harm to the child. From a domestic violence evidence-based perspective, ordering the return of a child from the location in which a child is living with the targeted parent to the jurisdiction or custody of the domestic violator who engages in coercive domestic violence would seldom be in the best interests of a child. Nonetheless *Hague Convention* return cases are not decided solely on the basis of child best interests. Once wrongful removal or retention is established, the party opposing return must establish the return would expose the child to grave risk of harm pursuant to Article 13 (1)(b).<sup>125</sup>

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<sup>123</sup> Examples of Canadian cases on the issue of consent and acquiescence: *Jackson*, *supra* note 1200; *J.E.A. v. C.L.M.* (2002), 209 N.S.R. (2d) 248, (2002), 220 D.L.R. (4th) 577, (2002), 33 R.F.L. (5th) 1, 2002 NSCA 127 (CanLII); *Den Ouden v. Laframboise*, 2006 ABCA 403 (QL); *Katsigiannis v. Kottick-Katsigiannis*, 2001 CanLII 24075 (ON C.A.) (CanLII); *Rayo Jabbar v. Rolim Mouammar*, 2003 CanLII 37565 (ON C.A.) (CanLII); *F.(R.) v. G.(M.)*, 2002 CanLII 41087 (QC C.A.) (CanLII); *M.J.W. v. P.S.G.*, 2007 CanLII 13522 (ON S.C.) (CanLII); *Bedard v. Bedard*, 2004 SKCA 101 (CanLII).

<sup>124</sup> For Canadian cases on this issue see *Beatty v. Schatz*, 309 D.L.R. (4th) 479, 69 R.F.L. (6th) 107, 2009 BCCA 310 (CanLII); *Den Ouden v. Laframboise*, *ibid*; *Grymes v. Gaudreault* (2004), 34 B.C.L.R. (4th) 90, 2004 BCCA 495 (CanLII); *Lavitch v. Lavitch* (1985), 37 Man. R. (2d) 261 (MBCA) (CanLII); *J.E.A. v. C.L.M.*, *ibid*; *Toiber*, *supra* note 121. In *Garelli v. Rahma*, 2006 CanLII 13555 (ON S.C.) (CanLII) the court granted a 2-week delay to allow the appointment of an amicus curiae to determine the views of the children (after the office of the Children's Lawyer for Ontario failed to respond). See also: *Pitts v. De Silva*, 2008 ONCA 9 (CanLII) and *Den Ouden v. Laframboise*, *ibid* for different conclusions relating to the views of teenage children.

<sup>125</sup> For example: *Rayo Jabbar v. Rolim Mouammar*, *supra* note 123. From a child-oriented social science perspective, the single most important factor in a child's ability to overcome the negative effects of domestic violence in the home is safety and the stability with the targeted parent. Return orders that undermine that stability and that require the child and targeted parent to return to domestic violators are causing domestic violence and child experts considerable concern. One hopes this body of law will evolve and change as judges and legislators learn more about the impact of domestic violence on children.

*W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, (1996), 134 D.L.R. (4th) 481, (1996), 19 R.F.L. (4th) 341, 1996 CanLII 192 (S.C.C.) (CanLII) sets out Canadian criteria for 'grave risk of harm' at paragraph 37. The case states that the interests of children, who have been wrongfully removed, are ordinarily best served by returning them to their habitual residence jurisdiction for determination of the merits of custody.

The onus to prove grave risk to the child pursuant to Article 13 (1) (b) is on the party claiming the exception: *Thomson v. Thomson*, [1994] 3 S.C.R. 551, (1994), 119 D.L.R. (4th) 253, [1994] 10 W.W.R. 513, (1994), 6 R.F.L. (4th) 290, (1994), 97 Man. R. (2d) 81, 1994 CanLII 26 (S.C.C.); *Ellis v. Wentzell-Ellis*, 2010 ONCA 347 (CanLII). Appellate courts are endorsing the following criteria: Does the grave risk of psychological or physical harm to the child on return amount to more than normal psychological disruption associated with removal? Does it amount to an intolerable situation (*Thomson v. Thomson*)?<sup>126</sup> Is the evidence of domestic violence sufficiently weighty so as to exceed a 'best interests of the child' consideration? Best interests of the child determinations are thus left to the child's habitual residence unless a decision is made not to return the child (*Thomson v. Thomson*).

When domestic violence has been held to constitute grave risk, the facts have reflected a pattern of coercive domestic violence affecting safety. In such circumstances the risk of harm to a parent upon whom the child is dependent can be considered in connection with risk to the child. Thus *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, (1999), 171 D.L.R. (4th) 32, (1999), 45 R.F.L. (4th) 404, (1999), 118 O.A.C. 169, 1999 CanLII 3702 (ON C.A.) (CanLII) 128 states: "*In considering whether return would place the child in an intolerable position it is relevant "to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is dependent"*". See also: *Husid v. Daviau*, 2012 ONCA 655, application for leave to appeal dismissed with costs; *Uri Landman Husid v. Hélène Marie Thérèse Daviau*, 2013 CanLII 6706 (SCC); *Droit de la famille – 111062*, 2011 QCCA 729, application for leave to appeal dismissed without costs in *L.M. c. E.A.*, 2011 CanLII 82379. In *Achakzad v. Zemaryalai*, 2010 ONCJ 318 Justice Murray clearly states that grave risk of harm to the child's primary caregiver can constitute grave risk of harm to the child. In *Landman v. Daviau*, 2012 ONSC 547 (CanLII) Justice Perkins denied a request to return the child to Peru in a domestic violence case on the basis that the return would expose the child to an intolerable situation, and more particularly, "*being in constant fear of the mother's being accosted and publicly berated ... with the need to seek police intervention, or worse, of the being wrongfully taken or wrongfully overhauled by her father and his family with the use of physical force to achieve their goal*".

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<sup>126</sup> See also: *Husid v. Daviau*, 2012 ONCA 655, application for leave to appeal dismissed with costs; *Uri Landman Husid v. Hélène Marie Thérèse Daviau*, 2013 CanLII 6706 (SCC); *Droit de la famille – 111062*, 2011 QCCA 729, application for leave to appeal dismissed without costs in *L.M. c. E.A.*, 2011 CanLII 82379; *Hoskins v. Boyd*, 1997 CanLII 2840 (BC C.A.) (CanLII); *F.(R.) v. G.(M.)*, *supra* note 123; *M.J.W. v. P.S.G.*, *supra* note 123.

Often, however, domestic violence is considered a ‘best interests of the child’ issue rather than a grave risk to the child consideration: *Grymes v. Gaudreault* 2004 BCCA 495 (CanLII); *Mahler v. Mahler*, [1999] M.J. No. 580 (M.B.Q.B.), [2000] M.J. No. 46 (M.B.C.A.) (QL); *Ellis v. Wentzell-Ellis*, 2010 ONCA 347 (CanLII); *Finizio v. Scoppio-Finizio* 1999 CanLII 1722 (ON C.A.) (CanLII); *Cannock v. Fleguel*, 2008 ONCA 758 (CanLII); *T.B. c. M.T.*, [2004] R.D.F. 174 (S.C.), [2004] R.D.F. 28 (QCCA) (QL).<sup>127</sup> See also *Ireland v. Ireland*, 2011 ONCA 623.

Unless the evidence demonstrates serious concerns about safety (as in *Pollastro* or in *Achakzad v. Zetaryalai*), Canadian courts will often respond to the challenge of balancing the objectives of the *Hague Convention* with safety concerns in domestic violence cases by making use of undertakings and return provisions. Domestic violence research is indicating, however, a strong concern that undertakings and return provisions may not produce satisfactory results.

Considerable international attention is currently being devoted to this problem. Family lawyers may wish to consult the following sources for additional information: Hague Conference on Private International Law, *The Judges’ Newsletters* on line at [http://www.hcch.net/index\\_en.php?act=publications.listing&sub=5](http://www.hcch.net/index_en.php?act=publications.listing&sub=5) and *The Hague Domestic Violence Project* at: <http://gspp.berkeley.edu/global/the-hague-domestic-violence-project>

#### **8.5.4 Concluding comments on child abduction for family lawyers**

In short, discourage parents from leaving any Canadian jurisdictions with children without a court order, notice and clear consent from the other parent in writing, or clear evidence of dangerous circumstances supported, if at all possible, by documentation of risk by police and or child protection authorities.

### ***8.6 Settlement processes: criminal & family***

It is important that Crown prosecutors consider the implications of plea negotiations on family law and child protection proceedings. When a complainant's family lawyer is known to the Crown prosecutor, the Crown can consider discussing the implications of potential plea negotiation options with the complainant's family lawyer as well as, when relevant, with child protection authorities. For example, a decision to proceed with a peace bond rather than a criminal charge may be interpreted by a family or child protection court as indicative of limited seriousness. While this may be entirely appropriate in some cases, in others cases, when such decisions are based on criteria other than reduced concerns about safety, the decision can cause confusion in the family law context.

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<sup>127</sup> Quebec courts are said to be applying exceptions narrowly: Hague Conference on Private International Law (2006) *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1908 on the Civil Aspects of International Child Abduction* (Permanent Bureau) at page 310.



Moreover, peace bond evidence, while informative and relevant as to proof of the other party's fear, is not necessarily conclusive evidence of admission of criminal responsibility.

For similar reasons, Crown and child protection lawyers will wish to keep in mind the nature of settlement processes in the family law context. The vast majority of family law cases are settled in negotiation, mediation, or judicial dispute resolution processes. The fact that domestic violence has been documented and that claims for the civil protection and for protection of children (such as claims for supervised access ) have been made in preliminary family court documents is not an assurance that the evidence and claims will be presented to (much less endorsed by) a family court judge, a mediator or an arbitrator. In fact, the vast majority of family law cases do not result in contested hearings followed by judicial decision. People who engage in domestic violence often obtain unsupervised access and even custody of children in family domestic violence cases despite circumstances indicating risk of harm. This is often the product of settlement rather than a judicially imposed decision.<sup>128</sup> In some cases, parents may not be aware of the danger that some perpetrators pose to children.<sup>129</sup> Moreover, systemic analysis of domestic violence cases in family law systems reveals that the majority of protective claims are abandoned during negotiation and mediation processes prior to trials and hearings.<sup>130</sup> While in some of these cases this is entirely appropriate because concerns about safety no longer apply, empirical research is also disclosing a well-documented phenomenon of parents agreeing to post-separation parenting arrangements in domestic violence cases despite continuing, serious concerns about child safety.<sup>131</sup> The reasons may include, in addition to violator pressure and intimidation, lack of resources, domestic violence -induced susceptibility to settlement suggestion, as well as deficits in domestic violence screening tools and deficits in specialized domestic violence

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<sup>128</sup> Linda C. Neilson (2002) *supra* note 12; J. Hardesty and L. Ganogn (2006) “How Women Make Custody Decisions and Manage Co-parenting with Abusive Former Husbands” in *Journal of Social and Personal Relationships* 23(4): 543-563; L. Moloney, B. Smyth et. al. (2007) *Allegations of Family Violence, and Child Abuse in Family Law Children’s Proceedings A Pre-reform exploratory study* Research Report 15 (Australia Institute of Family Studies); Hon. Jerry Bowles et al, *supra* note 18; M. Kaye, J. Stubbs and J. Tolmie (2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (Sydney, Australia; Families, Law and Social Policy Research Unit) D. Saunders and K. Oehme (2007) *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors and Safety Concerns* (Revised 2007) (Violence Against Women on Line).

<sup>129</sup> For example, A. J. C. O’Marra, for the Office of the Chief Coroner, Province of Ontario, in *Domestic Violence Death Review Committee Annual Report to the Chief Coroner 2006* Domestic Violence Death Review Report; Turpel-Lafond, *supra* note 12; B. Ongay (2004) Power point presentation, Department of Defense Conference, Arlington, Virginia “Linking Adult and Child Domestic Violence Related Deaths”: <http://www.baylor.edu/content/services/document.php/29491.pdf>.

<sup>130</sup> See note 131 below.

<sup>131</sup> See note 1288, particularly Neilson; Hardesty and Ganogn; Moloney, et al.; Hon. Jerry Bowles et al., *supra* note 18; and D. Saunders with K. Oehme . See also Rae Kaspiew at al. (2009) *Evaluation of the 2006 family law reforms* (Melbourne: Australian Institute of Family Studies). Parental agreements in domestic violence cases do not necessarily indicate that the ‘consenting’ parents have put to rest concerns about children’s safety. See, for example: Rae Kaspiew et al. (2009), above and Dale Bagshaw and Thea Brown et al. (2010) *Family Violence and Family Law in Australia The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (Monash University for the Australian Attorney-General’s Department).

professional knowledge. For more detailed discussion, see the footnote.<sup>132</sup>

Child protection authorities should not assume that once a parent has made a protective claim in accordance with child protection authority instructions, the claim will be maintained throughout the family law process. Instead, the better response is for child protection authorities to stay informed of the progress of the family law case so that they can intervene, when necessary, to ensure adequate protections for children.

### **8.6.1 Settlement Discussion: Family to Criminal**

Normally communications and disclosures made during settlement processes such as mediation, judicial dispute resolution, and settlement negotiations are subject to evidence rules associated with settlement privilege. Full discussion is beyond the scope of this report, see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 and *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32 for a useful discussion of exceptions and pertinent case law.

In a high risk domestic-violence context, family lawyers and mediators may wish to note particularly the public safety exception set out in *Smith v. Jones*, [1999] 1 S.C.R. 455. In *Brown*, the Nova Scotia Court of Appeal comments specifically on the applicability of public safety exceptions to all forms of privilege, including settlement privilege. Thus, when disclosures are made during settlement discussions that indicate high levels of risk

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<sup>132</sup> Settlement pressures documented in research include: fear and anxiety about whether or not it will be possible finally to escape the abusive or violent relationship. People who have been targeted by domestic violence require the separation process to be over as quickly as possible. This is a perfectly rational response. Indeed it is a survival tactic, given that separation is a time of heightened danger for women who have been subjected to domestic violence. In such circumstances, the pressure to settle the case quickly is enormous. The result is that researchers report that ‘victims’ enter agreements without reflection or consideration of the consequences in order to escape these relationships as quickly as possible. In addition are pressures exerted by professionals - such as lawyers, mediators, therapists, and evaluators who do not have specialized domestic violence expertise and thus who do not understand connections between domestic violence and children. Targeted parents experience pressure to agree to standard or ‘normal’ unrestricted access. Limited access to domestic violence specialists as well as pressure from perpetrators who continue to manipulate, to harass, to demean, to intimidate and to control compounds the problem as does pressure from limited financial resources, commonly as a result of the failure of perpetrators to honour financial obligations; pressure from the stress of excessively high rates of litigation; pressure from declining emotional stamina; pressure from professionals and courts to ‘cooperate’ and drop claims for restrictions on access; pressure from discovering that civil protection orders are not always enforced and thus fail to offer safety or protection; lack of safe, secure, affordable housing; lack of economic resources necessary to meet basic needs (often as a consequence of the perpetrator’s failure to meet his obligations); lack of police protection; lack of access to employment (as a consequence of damage caused by domestic violence or as a result of the perpetrator’s continuing monitoring or harassment of employers); difficulty dealing with negative behaviours of the children (the result of damage caused by violence and abuse in the home or the result of the violator’s undermining of the other parent’s parental authority or the result of the children having been taught anti-woman and pro-violence attitudes). In the face of such obstacles, when perpetrators continue to engage in litigation over extended periods of time, some targeted parents simply give up. Canadian judges who would like access to a detailed discussion about settlement processes, including judicial dispute resolution, in a domestic violence context, may wish to read Chapter 15 of the National Judicial Institute’s bench book on *Domestic Violence*: Neilson, *supra* note 63.

and particularly a potential for lethal outcome, family lawyers may wish to consider the exceptions to privilege and confidentiality set out in *Brown* and in *Smith v. Jones*.

### ***8.7 Limitations on disclosure to criminal sector: discovery & mandatory disclosure***

Family law and child protection statutes in all provinces and territories mandate document disclosure and, in many circumstances, discovery of the parties prior to hearings and trials. Family lawyers, child protection lawyers, and clients who obtain information from the other party in mandatory disclosure processes prior to trial may not be at liberty to divulge such information to police in the absence of consent, express statutory authority, or a court order.

The Supreme Court of Canada states, in *Juman v. Doucette*, [2008] 1 S.C.R. 157 that, in the absence of exceptional circumstances, a party in a civil case is not at liberty to disclose evidence that was disclosed in discovery - including evidence of criminal conduct - to police or to outside parties to the litigation without a court order. The court held that parties who divulge information as a result of mandatory disclosure requirements in civil litigation do so in accordance with an implied undertaking and a measure of protection.

The court goes on to state that, while a court has discretionary power to grant exemptions and variations in connection with such undertakings, unless an express statutory exemption overrides the implied undertaking, the onus will be on the person seeking an exemption to the implied undertaking to demonstrate, on balance of probabilities, that the public interest has greater weight than the values implied undertakings are designed to protect.

Similar implied undertakings of confidentiality have been recognized in connection with documents disclosed by opposing parties in civil proceedings as a result of compulsory processes of production, see *Ring v. Canada (Attorney General)*, 2009 NLCA 45; *International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2009 BCCA 355.

One must keep in mind, however, the statutory exception qualification identified in *Juman v. Doucette*. The applicable Rules of Court and the relevant family law and child protection statutes should be checked for statutory authority to disclose. For example, as Davies, Dunn, Di Luca (2012) point out in a recent report prepared for the Department of Justice,<sup>133</sup> *Family Law Rules*, O Reg 114/99 for Ontario, Rule 20(25) on 'Questioning A Witness and Disclosure' provides, at Rule 20 (25), financial statements and documents disclosed during document discovery may be disclosed in limited circumstances. Rule 20(25) in Ontario, for example, states that such documents may be used for other purposes:

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<sup>133</sup> Breese Davies, Erin Dann and Joseph Di Luca (2012) report to the Department of Justice, Canada titled "Best Practices where there is Family Violence (Criminal Law Perspective)."

- (a) if the person who gave the evidence consents;
- (b) if the evidence is filed with the court, given at a hearing or referred to at a hearing;
- (d) in a later case between the same parties or their successors, if the case in which the evidence was obtained was withdrawn or dismissed.

When statutory exceptions apply, it may be possible to divulge such information without a court order provided that statutory criteria are met. Note as well, in connection specifically with domestic violence cases, the 'immediate and serious danger' qualification in *Juman v. Doucette*, namely: "in situations of immediate and serious danger, the applicant may be justified in going directly to the police without a court order." Note as well, however, the comment in the case that exemptions "not amounting to serious and immediate serious danger should be left with the courts."

*Juman v. Doucette* identifies factors that may be taken into account by courts in connection with the public interest when deciding whether or not to authorize disclosure:

- public safety concerns; and
- contradictory testimony about the same matters in different proceedings

The case states that the public interest in the prosecution of a crime will not necessarily trump a citizen's privacy interest in statutorily compelled information.

### **8.7.1 Limitations on use of mandatory civil disclosure in criminal proceedings**

The Supreme Court of Canada held, in *R. v. Nedelcu*, that compelled testimony provided in a civil proceeding is admissible against an accused person in a criminal trial, for the purpose of cross-examining an accused and challenging his or her credibility where the evidence is not "incriminating." *R v. Nedelcu* [2012] 3 S.C.R 311. (See also: *Juman v. Doucette* at paragraphs 56 and 57.)

In a domestic violence context, on the one hand are concerns, from a victim and child safety perspective, about pertinent evidence from the family law or child protection case not being admitted and considered in the criminal case. On the other hand, when accused in criminal cases are protected from self-incrimination such that evidence compelled in the family law or child protection case cannot be used against the accused in the criminal case (subject to "prosecution for perjury or the giving of contradictory evidence"), concerns about proceeding with the family law and child protection proceedings prior to the final decision in the criminal case, may be reduced. Reduced due process concerns might enable family and child protection cases to proceed more quickly while criminal cases are on-going.

### ***8.8 Privacy rules affecting disclosure: Relevance of PIPEDA to civil litigation***

Refer to the Office of the Privacy Commissioner of Canada's (2011) publication *PIPEDA and Your Practice A Privacy Handbook for Lawyers* (Ottawa: Government of Canada) for

guidance.<sup>134</sup>

### ***8.9 Applications by perpetrators for disclosure of files pursuant to freedom of information legislation***

Family lawyers representing victims of domestic violence will wish to maintain a good, solid working relationship with police, Crown, and, when relevant, child protection authorities throughout the family law process.

One can anticipate applications by perpetrators for access to the perpetrator's own police investigation files pursuant to *Freedom of Information Acts*, particularly when criminal charges are withdrawn or the accused is acquitted. The purposes can include efforts to obtain information about witnesses who made complaints to the police, a belief that the files may contain information that can be used to embarrass or impeach the credibility of witnesses or the targeted adult, a desire to call into question police procedures in domestic violence cases, or the belief that the files may contain exonerating information. From a targeted parent perspective, concerns about the release of such information relate to privacy, the potential for misuse of the information, the potential for retaliation against children and others who have provided information to police, potential harassment or intimidation of those who have provided assistance, as well as concerns about personal safety. Such applications are governed by different rules and principles from those governing disclosure in the civil case because, in these cases, perpetrators are applying for access to their own police files. Presumably, however, information once disclosed could be used for cross-examination and for other purposes in the family law or child protection case.

Family lawyers will wish to make note of the evolving case law on this issue, much of it from Ontario, wherein police have successfully resisted full disclosures of police files in domestic violence cases on the basis of privacy, law enforcement privilege, public safety, and or on the grounds that the disclosure would reveal police investigation tools used in domestic violence cases:

- *Hamilton Police Service (re)*, 2011 CanLII 29183 (ON IPC)
- *Durham Regional Police Services Board (Re)*, 2011 CanLII 53344 (ON IPC)
- *London Police Services Board (Re)*, 2012 CanLII 18237 (ON IPC)
- *Ontario (Community Safety and Correctional Services) (Re)*, 2011 CanLii 75973 (ON IPC).

See also *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815 in connection with exclusions from disclosure in the *Freedom of Information and Protection of Privacy Act*, R.S.A. 1990, c. F.31 on grounds of solicitor-client privilege and the right to exercise discretion to exclude disclosures relating to law enforcement.

In connection with alleged perpetrators seeking access, pursuant to 'Freedom of

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<sup>134</sup> Office of the Privacy Commissioner of Canada (2011) *PIPEDA and Your Practice A Privacy Handbook for Lawyers* (Government of Canada)

Information' legislation, to workplace records and risk assessments associated with new employer obligations in Ontario to protect employees from domestic violence, see: *Woodstock (City) (re)*, 2012 CanLII 10571 (ON IPC).<sup>135</sup>

## ***8.10 Disclosure and production of criminal conviction records for use in a family law or child protection context***

### **8.10.1 Introduction**

Although, for the reasons set out in footnote, particulars of Crown briefs and police files can be very helpful in family law and child protection cases,<sup>136</sup> in practice privacy concerns and limited resources can make these records difficult for civil litigants to obtain, particularly in custody and access cases. In the absence of consent, processes to ensure disclosure and to obtain production are often cumbersome, time consuming and expensive. Not uncommonly the cost is beyond the reach of many litigants, particularly in jurisdictions with limited legal aid programs. Given the legal complexities of the case law associated with the production of criminal records in a family and child protection context, the discussion here will merely provide a general overview of pertinent considerations. Detailed discussion is beyond the scope of this report.

### **8.10.2 Criminal convictions**

Some jurisdictions now require automatic disclosure of child protection and criminal conviction records in custody and access cases. This information can often be obtained on consent or pursuant to summons. Refer also to the *Canada Evidence Act*, sections 12 and 23. Most provincial and territorial *Evidence Acts* contain similar provisions. In

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<sup>135</sup> From a workplace safety for 'victims' of domestic violence perspective, some factual aspects of this case are troubling. Given that harassment and intimidation against those who offer assistance to 'victims' is common in coercive domestic violence cases, one concern is the potential for those who engage in domestic violence to use *Freedom of Information Acts* to gain information about workplace employees who have taken action to protect employees from domestic violence. Other concerns relate to the potential release of information about the steps taken in the workplace to reduce risk, thus reducing the targeted employee's safety; the potential for release of information about the targeted employee reducing safety; the potential release of information about children, given known, empirically documented, connections between coercive domestic violence and child abuse; as well as the potential for violent retaliation. On the one hand giving alleged perpetrators of domestic violence access to information collected in the workplace could help to prevent errors and injustice. On the other hand, if employers in Ontario are required to release to alleged perpetrators information collected pursuant to new duties, pursuant to the *Occupational Health and Safety Act*, this could limit the willingness of 'victims' and other employees to become involved in these processes. It could also affect the willingness of employers to maintain detailed records.

<sup>136</sup> For example, such records can provide valuable information about child safety, the reasons for not proceeding with a criminal charge (such as vulnerability of a child witness or circumstances surrounding a 'victim's' recant) as well as information about risk. The records may also provide valuable information about compliance with court orders and about circumstances surrounding the conviction of the targeted parent in connection with resistance violence.

connection with prior court findings, see Part 9 below.

### **8.10.3 Disclosure and production of police records in family and child protection case**

The best option, mentioned earlier, is for family lawyers and child protection lawyers to meet as soon as possible with Crown and police to discuss what information from the criminal investigation and from the criminal proceeding may be disclosed and shared on consent. Because rules relating to disclosure are broader than rules relating to admission, it may be helpful as well to explore and to seek to consolidate cross-sector understandings on subsequent admission and use of such information (subject, of course, to judicial evidence rulings in connection with admissibility in connection with issues such as relevance, reliability, hearsay, privacy and public interest).

The case law indicates that when the criminal investigation or proceeding is on-going the Crown and police may resist disclosure on the basis of public interest immunity in order to protect the investigation. In the absence of consent, a motion or application for production, on notice to the Attorney General, police and/or Crown, may be necessary.

#### **8.10.3.1 Production of police records to child protection authorities**

Child protection legislation in most Canadian jurisdictions authorizes production of third party records, including police records, to child protection authorities. Manitoba's *Child and Family Services Act*, C.C.S.M. c. C80, section 18.4(1.1) requires police disclosure. Generally, the threshold for production is relatively low.

For the most part, courts have been ruling in favour of disclosures of police records to child protection authorities. Pertinent cases include:

- *Children's Aid Society of Algoma v. P.(D.)* (2006), 28 R.F.L. (6th) 372, 2006 ONCJ 170 (CanLII); *Children's Aid Society of Algoma v. P.(D.)* (2006), 28 R.F.L. (6th) 410, 2006 ONCJ 330 (CanLII); *Children's Aid Society of Algoma v. D.P.* (2007), 42 R.F.L. (6th) 144, 2007 CanLII 39363 (ON S.C.) (CanLII)
- *Native Child and Family Services v. A.N. And others*, 2010 ONSC 4113 (CanLII), *Native Child and Family Services of Toronto v. P.(S.) et al*, 2009 ONCJ 473 (CanLII)
- *Catholic Children's Aid of Toronto v. D.(P.A.)*, 2008 ONCJ 728 (CanLII)
- *Peguis Child and Family Services v. S. (C.)* (2009) 73 R.F.L. (6<sup>th</sup>) 224 (Man. Q.B.)
- *Nova Scotia (Minister of Community Services v. B.L.C.)*, 2007 NSCA 45

*Children's Aid Society of Algoma v. P.(D.)* includes a qualification, however, with respect to disclosure. The case states that exceptionally sensitive records touching on private matters could be protected from disclosure and production, but that "in most cases production of relevant police records to a Children's Aid societies will not undermine reasonable expectations of privacy." Nonetheless, the qualification and associated vetting processes can create obstacles and delays in disclosure. Moreover, Breese

Davies, Erin Dunn and Joseph Di Luca (2012) report, in a paper written for the Department of Justice titled “[Best Practices where there is Family Violence \(Criminal Law Perspective\)](#)” that, in practice, child protection authorities are continuing to report problems obtaining timely, full disclosure from police in domestic violence related child protection cases. Thus attending to disclosure matters as soon as possible is imperative, particularly in a child protection context where mandatory deadlines apply.

#### **8.10.3.2 Production of police and Crown records to parties in family law cases other than child protection authorities**

In the absence of consent, the cases indicate that the onus to obtain documents is more onerous for parties in family law cases than for child protection authorities in child protection cases. Generally, in connection with third party production, statutory rules require proof that it would be unfair to proceed with the civil case without the documents and that the documents are not privileged. Refer to the applicable statute. See, for example, rule 19 (11) of Ontario's *Family Law Rules*, O Reg 114/99.

Nonetheless, orders for production of criminal records and Crown briefs are being made where criminal issues are connected to child best interests, for example: *Porter v Porter*, 2009 CanLII 18686 (ONSC); *Bellerive v. Hammond*, 2003 CanLII 68790 (ONCJ).

*P.(D.) v. Wagg*, (2004), 71 O.R. (3d) 229, (2004), 239 D.L.R. (4th) 501, (2004), 184 C.C.C. (3d) 321, (2004), 120 C.R.R. (2d) 52, (2004), 187 O.A.C. 26, 2004 CanLII 39048 (ON C.A.) sets out a governing test on disclosure and production of Crown briefs and police files. The case sets out an appropriate screening process for Crown vetting documents prior to production, for considering privacy interests, and for determining whether the public interest in non-disclosure and non-production overrides the social interest in “seeing that justice is done in civil cases as well as criminal cases”.

See also: *N.G. v. Upper Canada College*, 2004 CanLII 60016 (ONCA) in connection with production, resisted by the Crown, of a video tape of the plaintiff made by the police for use in the criminal case, to the defendant in the civil case. The case endorses the use of the screening and vetting mechanism set out in *Wagg*. *SW v. EB*, 2012 SKQB 108 (CanLII) extends the application of *Wagg* to Saskatchewan in connection with a father's claim, in a family law case, that he would only consent to a court ordered assessor of the child in the family law case being allowed to view police interview tapes relating to possible sexual abuse by the father, if he, the father, was provided with copies of the tapes. See also: *Wong v. Antunes*, 307 D.L.R. (4th) 385, 95 B.C.L.R. (4th) 73, 2009 BCCA 278 2009 BCCA 278; *College of Physicians and Surgeons of Ontario v. Metcalf* (2010), 98 O.R. (3d) 301.

Given the likelihood of delays associated with vetting processes prior to production (not to mention delays associated with complex issues relating to admissibility), initiate disclosure and production processes as early as possible in order to prevent delay.



### **8.10.3.3 Disclosure and production of police and Crown records: Alternatives**

Alternative options include:

- Court rules, protocols and forms requiring documentation of criminal convictions and particulars of past and present criminal proceedings in all family law and child protection cases
- Development of cross-sector information exchange protocols to govern the exchange of information among police, Crown, probation, child protection, and family litigants as well as family courts in domestic violence cases. Information exchange protocols can increase the speed of exchange of information across sectors while ensuring protection of confidential information and privacy and the protection of information that could compromise adult or child safety, while also promoting the swift exchange of information relating to child or adult risk and danger

## ***8.11 Responding to applications for medical and health records***

### **8.11.1 Medical and health records: domestic violence context**

Family lawyers will wish, in domestic violence cases, to be prepared to respond to applications for disclosure of medical and counseling records for use in the family, child protection, or criminal case. Clients subjected to domestic violence are likely to be concerned about the potential use of such information, particularly then the application for production is made on behalf of an alleged perpetrator of domestic violence.

Concerns relate to the potential use of the information:

- to attempt to discount the family member's assertions of abuse or domestic violence (for example, the violator claims the targeted adult or child must be lying because the abuse or domestic violence was not disclosed and another explanation, such as accidental injury, was offered to medical or mental health authorities)
- to control, coerce, embarrass, or intimidate (re-victimize)
- to attack credibility
- to obtain evidence of psychological or physical harm caused by domestic violence in order to present it as evidence of reduced capacity to parent.
- to prove a mental or medical health condition, or alcohol or drug misuse in order to discredit
- to ascertain the medical, mental health and social vulnerabilities of a parent or child

Concerns, from a domestic violence victim perspective, include:

- privacy
- abuser harassment, intimidation and control
- embarrassment (leading to withdrawal of claims)
- fairness, relevance and probative value
- the potential for lawyers, courts, and service providers to misinterpret the information in a domestic violence context

Socio-legal domestic violence research documents circumstances to consider when

thinking about relevance and probative value of such records, namely:

- Regarding the discounting of claims of domestic violence, most medical and therapeutic reports are prepared for treatment, not for documenting domestic violence or for trial. In connection specifically with domestic violence, adults and children often fail to disclose domestic violence as the cause of medical or mental health injuries. The Court of Appeal of Alberta recognized this issue in *L.M.B v. I.J.B*, 2005 ABCA 100. Thus, while medical and therapeutic reports can be useful to the Crown and to family lawyers in documenting harm from domestic violence, the fact that domestic violence is not identified as the cause of injury in medical or therapeutic records has little relevance or probative value in connection with discounting abuse and violence.<sup>137</sup> Indeed perpetrator actions to discourage disclosure of domestic violence as the cause of injury to doctors, nurses and therapists are well documented in the research<sup>138</sup>
- Regarding the relevance of medical and mental health records to parenting: Targeted family members' medical and mental health records are often sought in order to attempt to cast doubt on the reliability of the claims of domestic violence or to support claims that the other parent is 'too crazy' to parent the children. Is the information relevant for such purposes or does the existence of the medical record in fact indicate harm from domestic violence? Domestic and family violence can produce scientifically verifiable mental health reactions, including post-traumatic stress, depression, anxiety and panic disorders, hyper-vigilance as well as a host of short- and long-term physical medical conditions. Commonly, these psychological responses are a means used to psychologically withstand domestic violence such that the conditions can be managed, treated or stopped once safety is offered, particularly if help is provided.<sup>139</sup> Such survival responses do not necessarily affect capacity to parent.<sup>140</sup> The best option is to seek expert advice from a domestic violence and child parenting expert on potential connections, if any, between the medical and mental health records on the one hand and parenting capacity on the other (in connection with relevance)
- In connection with substance misuse, it is important to keep in mind that domestic

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<sup>137</sup> Medical records may, of course, be of considerable value with respect to documentation of injuries. In *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58 (CanLII), a criminal not a civil case, McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. commented that the fact the complainant's diary did not record the abuse would have probative value only if the accused were able to prove a reasonable expectation that the abuse would have been recorded had it occurred.

<sup>138</sup> L.A. McCloskey, C. M. Williams et al. (2007) "Abused Women Disclose Partner Interference with Health Care: An Unrecognized Form of Battering" in *Journal of General Internal Medicine* 22 (8): 1067-1072.

<sup>139</sup> Warshaw, *supra* note 24; Leslie Tower, Darcy Schiller and Maria Elena Fernandez "Women Court-Ordered for Domestic Violence: Improvements in Depression" (2008) 16(1) *Journal of Aggression and Maltreatment* 40 to 54. Few people are psychologically unaffected by exposure to abuse and violence, particularly repetitive or severe abuse and violence. Even judges, lawyers, and service providers indirectly exposed repeatedly to domestic violence can and do develop psychological reactions to such exposure. For example: Peter Jaffe, Claire Crooks, B. L. Dunford-Jackson, and Judge Michael Town, (Fall, 2003) "Vicarious trauma in judges: The personal challenge of dispensing justice" in *Juvenile and Family Court Journal*, 1-9.

<sup>140</sup> Markham, *supra* note 23; Edleson et al., *supra* note 23 ; C. Itzin (2006) *Tackling the Health and Mental Health Effects of Domestic and Sexual Violence and Abuse* (United Kingdom: Department of Health).

violators often initiate or encourage intimate partner substance abuse as a means to dominate and ensure control. Additionally, self-medication can be a response to domestic violence and<sup>141</sup> thus evidence of harm.<sup>142</sup> Assess such evidence in the context of power and control patterns within the relationship

### 8.11.2 Medical and health records: legal context

The starting premise, per La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ., in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, (1997), 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1, (1997), 42 C.R.R. (2d) 37, (1997), 4 C.R. (5th) 220, (1997), 29 B.C.L.R. (3d) 133, [1997] 1 S.C.R. 157, 1997 CanLII 403 (S.C.C.) is that “everyone owes a general duty to give evidence relevant to the matter before the courts, so that the truth may be ascertained.”

In a family law context medical and health records may be produced:

- on consent of the parties
- pursuant to summons to witness
- pursuant to pertinent rules governing discovery and disclosure of documents

#### 8.11.2.1 Relevance

Parties seeking the production of mental or medical health records of other family members must establish relevance and satisfy the requirements of applicable provincial court rules and statutes. Discussion here is limited to general principles.

The case law states that the obligation to disclose the existence of documents and the obligation to produce are separate obligations. The former relates to all pertinent documents.

If an application to produce documents is directed to a non-party, the application may

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<sup>141</sup> While a number of research studies state that women who abuse drugs or alcohol are targeted by domestic violence at elevated rates and that women who use alcohol and drugs are more seriously injured, these assertions should be considered in context. From a cause and effect point of view, substance abuse is often the result of domestic violence: The Report of the Taskforce on the Health Aspects of Violence Against Women and Children (2010) *Responding to violence against women and children - the role of the NHS* (London, England: National Health Service) page 10 on line; P. A. Fazzino, J. K. Holton and B. G. Reed (2005) *Substance Abuse Treatment and Domestic Violence* (Rockville, MD: U.S. Department of Health and Human Services); National Clearinghouse on Domestic Violence “Fact Sheet on Domestic Violence and Substance Abuse” (National Clearinghouse on Domestic Violence, Public Health Agency of Canada); L. Lightman and F. Byrne (2005) *Addressing the Co-occurrence of Domestic Violence and Substance Abuse* (Judicial Council of California Administrative Office of the Courts, Centre for Families Children & the Courts); M. Thompson and J. Kingree (2006) “The Role of victim and perpetrator alcohol use in intimate partner violence outcomes” in *Journal of Interpersonal Violence* 21(2): 163-177. All of the publications emphasize the importance of holding perpetrators accountable as well as the importance of ensuring that substance abuse treatment is offered in combination with domestic violence intervention.

<sup>142</sup> *Ibid.* See also Lisa Najavits, “Psychotherapies for Trauma and Substance Abuse in Women: Review and Policy Implications” in July 2009, 10(3) *Trauma, Violence, & Abuse*: 290 to 298; Sandra Martin, Kathryn Moracco et al. “Substance Abuse Issues Among Women in Domestic Violence Programs: Findings From North Carolina” in September 2008 14(9) *Violence Against Women*: 985-997..

require additional proof of material relevance and the inequity of proceeding to trial without examination of the document. According to the case law, the onus to prove relevance (and, when applicable to third parties, material relevance and inequity) rests with the party seeking production *F, K. (Litigation guardian of) v. White* (2001), 53 O.R. (3d) 391, (2001), 198 D.L.R. (4th) 541, (2001), 142 O.A.C. 116, 2001 CanLII 24020 (ON C.A.); *Grewal v. Hospedales* (2004), 33 B.C.L.R. (4th) 294, 2004 BCCA 561.

The cases are also indicating that relevance associated with production must be more than a ‘fishing expedition’ and that relevance must be based on evidence, not on speculative assertion or on discriminatory or stereotypical reasoning: *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, (1995), 130 D.L.R. (4th) 422, (1995), 103 C.C.C. (3d) 92, (1995), 33 C.R.R. (2d) 87, (1995), 44 C.R. (4th) 91, (1995), 88 O.A.C. 241, [1995] 4 S.C.R. 536, 1995 CanLII 52 (S.C.C.); *Cojbasic v. Cojbasic*, 2008 CanLII 8256 (ON S.C.).

In a family law context, relevance is often associated with proof, on balance of probabilities, that the documents will disclose health or mental health problems connected to the capacity to care for a child. Has the party seeking production established relevance in connection with parenting or the child’s best interests?

If the applicant is unable to prove relevance applications for production are denied. However, once material relevance is established, the cases indicate that the onus falls on the party claiming privilege to convince a court that the documents should not be produced on grounds of privacy and privilege.

#### **8.11.2.2 Privacy and privilege: production of medical and mental health records, family law**

Mental health and medical records are also governed by provincial and territorial Mental Health and Medical Acts. In the absence of client consent or waiver, medical and mental health professionals as well as other professionals and institutions will often have a professional ethical or statutory duty to object to production to persons other than the patient or client on the basis that production would harm a person and or interfere in treatment. Quebec recognizes a statutory privilege in connection with physicians pursuant to section 9 of its *Charter of Human Rights and Freedoms*. Public policy issues in a domestic violence include the public interest in encouraging victims of domestic violence to obtain counselling and the concern that broad access to records could discourage people, negatively affected by domestic violence, from seeking help.

If the relevance of the records has been established, the cases indicate that the onus falls on the party claiming privilege to convince a court that the documents should not be produced on ground of privacy and privilege. *La Forest, L’Heureux-Dubé and Gonthier JJ.* suggest, in *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, (1995), 130 D.L.R. (4th) 422, (1995), 103 C.C.C. (3d) 92, (1995), 33 C.R.R. (2d) 87, (1995), 44 C.R. (4th) 91, (1995), 88 O.A.C. 241, [1995] 4 S.C.R. 536, 1995 CanLII 52 (S.C.C.), a broad and open-ended, and evolving definition of private records. Thus private records, or records in which a reasonable expectation of privacy lies, may include medical or therapeutic records, school records, private diaries, social worker activity logs, and so on.

Privilege is assessed in accordance with the principles set out in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, (1997), 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1, (1997), 42 C.R.R. (2d) 37, (1997), 4 C.R. (5th) 220, (1997), 29 B.C.L.R. (3d) 133, [1997] 1 S.C.R. 157, 1997 CanLII 403 (S.C.C.) and the Wigmore test. The cases indicate that private medical and mental health records do not necessarily enjoy privilege as a class: *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, (1995), 130 D.L.R. (4th) 422, (1995), 103 C.C.C. (3d) 92, (1995), 33 C.R.R. (2d) 87, (1995), 44 C.R. (4th) 91, (1995), 88 O.A.C. 241, [1995] 4 S.C.R. 536, 1995 CanLII 52 (S.C.C.); *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, (1997), 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1, (1997), 42 C.R.R. (2d) 37, (1997), 4 C.R. (5th) 220, (1997), 29 B.C.L.R. (3d) 133, [1997] 1 S.C.R. 157, 1997 CanLII 403 (S.C.C.).

In the absence of statutory or class privilege, privilege is assessed on a case-by-case basis in accordance with common law principles and the “Wigmore test”:

- the communications originated in confidence that is essential to the relationship in which the communication arose
- the relationship must be in the public good
- the interests served by protecting the communications from disclosure must outweigh the interests in getting at the truth and correctly deciding the litigation

While courts expect litigants to accept intrusion to the extent necessary to get at the truth in civil litigation, the cases indicate that this does not grant the other party a license to delve fully into the other party’s private affairs. While courts have protected marital counselling and child counselling records from disclosure (for example *L.M.B v. I.J.B.*, 2005 ABCA 100), courts will often respond to privilege and privacy claims by imposing conditions on the scope of production or the use of the information. For example, orders of partial disclosure are including provisions such as: disclosure of a limited number of documents, editing by the court to remove non-essential material, imposition of conditions on who may see and copy the documents (refer to *Saskatchewan (Social Services) v. RW*, 2012 SKCA 75 in connection with concerns about restrictions affecting child protection authorities), removal of information identifying non-parties, imposition of conditions on the return of documents and provisions specifying how invasions of privacy should be limited (in civil actions) to that necessary to do justice in the civil litigation:

- *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, (1997), 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1, (1997), 42 C.R.R. (2d) 37, (1997), 4 C.R. (5th) 220, (1997), 29 B.C.L.R. (3d) 133, [1997] 1 S.C.R. 157, 1997 CanLII 403 (S.C.C.)
- *Juman v. Doucette*, 2008 SCC 8
- *Matty v. Rammasoot*, 2011 ABCA 339
- *Children’s Aid Society of Algoma v. D.P.* (2007), 42 R.F.L. (6th) 144, 2007 CanLII 39363 (ON S.C.)
- *Saskatchewan (Social Services) v. RW*

Consequently, when the parties are involved in multiple proceedings (family, criminal, and child protection) family lawyers, child protection authorities, criminal defense

lawyers and the Crown, will wish to consider very carefully the effects, positive and negative, of inclusion of conditions that limit the scope of production and the potential use of such records in other proceedings. Family lawyers representing family members targeted by domestic violence may wish to consult the Crown and, potentially, depending on the circumstances of the case, the client's child protection lawyer, regarding the use of the victim's health records in the other proceedings. Similarly, family lawyers representing alleged perpetrators may wish to consult with the client's criminal defence and child protection lawyer in connection with the use of the accused's medical and mental health records in other proceedings.

### **8.11.2.3 Production of medical and mental health records: child protection**

In child protection cases, production of parents' medical and mental health records is often authorized by statute and ordered by the court.

The paramount best interests of the child concerns associated with parental health records (for example, records associated with parental drug and alcohol misuse, medical and mental health history, counselling records associated with domestic violence treatment [victims] or intervention [perpetrators]) will often prevail over privacy interests in child protection cases. See, for example: the *Nova Scotia (Minister of Community Services) v. B.L.C.*, (2007), 254 N.S.R. (2d) 52, (2007), 282 D.L.R. (4th) 725, (2007), 37 R.F.L. (6th) 326, 2007 NSCA 45 (CanLII).

Yet, one of the documented reasons for the failure of victims of domestic violence to divulge information in family law cases or to cooperate in criminal processes is the fear that the information could be used against the targeted parent in child protection proceedings. Given the broad disclosure requirements in child protection cases, and the potential for use of records in the criminal or in family law case as well as in the child protection case, it is important that family lawyers (separate lawyers for each parent since the parents should be considered adverse in interest in a domestic violence context) establish strong working relationships with child protection authorities, and with the Crown or criminal defense lawyers in order to protect the privacy interests of clients and to protect against the inappropriate use of such records in other proceedings.

## ***8.12 Responding to applications from criminal defense lawyers to produce the civil litigation file***

Refer to the principles in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445. The accused, charged criminally with sexual offences, sought production of the complainant's civil litigation file. The civil litigation file was connected to a claim for damages associated with the same sexual offences. The appeal was allowed and the order for production was set aside. The court does note, however, that while solicitor-client privilege is a matter of fundamental importance, it is not absolute and may yield, in some cases, to enabling an accused to make full answer and defense. Nonetheless the case imposes a stringent 'innocence at stake' test:

- the information is not available from any other source
- the presence of core issues going to the guilt of the accused

- an inability to raise a reasonable doubt any other way
- the establishment of an evidential basis for the claim that the solicitor-client communication would raise a reasonable doubt
- a genuine risk of wrongful conviction

## **PART 9: HEARINGS, CROSS-SECTOR EVIDENCE ISSUES**

### ***9.1 Evidence from prior judicial proceedings:***

See: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18:

*“A judgment of a prior civil or criminal case is admissible, if considered relevant, as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. The weight to be given to the earlier decision will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest but on all the varying circumstances of the particular case.”*

The case states that admissibility is distinct from the issue of whether the prior decision will be conclusive and binding, since the prejudiced party is given an opportunity to lead evidence to contradict the earlier finding - unless precluded by doctrines of *res judicata*, issue estoppel, or abuse of process. As a matter of public policy, the case endorses a “strong public interest in avoidance of multiplicity of proceedings” test.

For discussion of application of these principles in family and child protection cases, see: *Wong v. Giannacopoulos*, 2011 ABCA 277 (in connection with a vexatious litigant ruling); *Delichte v. Rogers*, 2011 MBCA 50; *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 27; *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 55; *L.D. v. Children's Aid Society of Cape Breton-Victoria*, 2010 NSCA 64; *BL v. Saskatchewan (Social Services)*, 2012 SKCA 38.

Indeed, in connection with child protection matters, Ontario's child protection statute, *Child and Family Services Act*, RSO 1990, c C.11, section 50(1)(b) refers explicitly to the admission of “the reasons for a decision in an earlier civil or criminal proceeding” while other child protection statutes, for example, Newfoundland/Labrador's statute (*Children and Youth Care and Protection Act*, SNL 2010, c C-12.2) refer to a “finding in an earlier civil or criminal proceeding.”

*J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 55 extends *British Columbia (Attorney General) v. Malik* principles to the admission and use of prior court findings and rulings in a family law context in the absence of express statutory authority.

For discussion of admission and use of police records, see: *BL v. Saskatchewan (Social*

Services), 2012 SKCA 38 and *W.N. v. C.G.*, 2012 BCCA 149.

## ***9.2 When a perpetrator challenges a prior conviction or guilty plea in a family law context***

Non-acceptance of responsibility is characteristic of many perpetrators of coercive domestic violence; denials of criminal responsibility (despite criminal convictions) are to be expected.

Family lawyers will wish to keep in mind that proof that a party pleaded guilty or was convicted of a criminal offence is *prima facie* proof of the criminal act, subject to potential rebuttal (in some limited circumstances).<sup>143</sup>

The cases state that the onus is on the person seeking to introduce rebuttal evidence to establish that re-examination will not constitute an abuse of process. Nonetheless rebuttal evidence has been allowed by courts in limited circumstances, for example: where the first proceeding was tainted by fraud or dishonesty, where fresh evidence not previously available calls into question the conviction, where the facts that gave rise to the civil action are not sufficiently similar to the facts that gave rise to the criminal conviction, or where fairness dictates the original result should not be binding in a new context. Courts have not allowed rebuttal evidence that is in essence a re-litigation of the criminal case in family court on the basis that it constitutes abuse of process.

Pertinent case law:

- *British Columbia (Attorney General) v. Malik*, 2011 SCC 18
- *F., K. (Litigation guardian of) v. White* (2001), 53 O.R. (3d) 391, (2001), 541 D.L.R. (4th) 198, (2001), 142 O.A.C. 116, 2001 CanLII 24020 (ON C.A.)
- *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, (2003), 68 O.R. (3d) 799, (2003), 232 D.L.R. (4th) 385, (2003), 17 C.R. (6th) 276, (2003), 9 Admin. L.R. (4e) 161, (2003), 9 Admin. L.R. (4th) 161, (2003), 179 O.A.C. 291
- *R. v. Mahalingan*, 2008 SCC 63 (CanLII), 300 D.L.R. (4th) 1, 237 C.C.C. (3d) 417, 61 C.R. (6th) 207, 243 O.A.C. 252
- *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, (2003), 232 D.L.R. (4th) 443, (2003), 9 Admin. L.R. (4th) 263, (2003), 179 O.A.C. 201, 2003 SCC 64
- *Polgrain Estate v. The Toronto East General Hospital*, 90 O.R. (3d) 630, 293 D.L.R. (4th) 266, 60 C.R. (6th) 67, 238 O.A.C. 1, 2008 ONCA 427 (CanLII)
- *W.H. v. H.C.A.* (2006), 82 O.R. (3d) 215, (2006), 272 D.L.R. (4th) 621, (2006), 219 O.A.C. 73, 2006 CanLII 27865 (ON C.A.)

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<sup>143</sup> See, for example: *Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149, (2003), 232 D.L.R. (4th) 443, (2003), 9 Admin. L.R. (4th) 263, (2003), 179 O.A.C. 201; *McGowan v. Toronto (City)*, 2010 ONCA 362 (CanLII); *Hill v. Kilbrei*, [2005] 11 W.W.R. 1, (2005), 195 Man. R. (2d) 76, 2005 MBCA 81 at paragraphs 51 to 53; *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, 2004 NLCA 58, (2004), [2005] 241 Nfld. & P.E.I.R. 13, (2004), 245 D.L.R. (4th) 234; *W.H. v. H.C.A.*, 2006 CanLII 27865 (ON C.A.); *Children's Aid Society of Toronto v. C.(S.A.)*, 2005 ONCJ 274.



### ***9.3 Can incidents of domestic violence be considered by a family or child protection court despite a ‘not guilty’ finding?***

There are many reasons a Crown prosecutor may not be able to prove a criminal charge beyond a reasonable doubt. For example, evidence may have been ruled inadmissible on technical grounds or the targeted person or child may not have cooperated or may have recanted the criminal complaint, for example, as a result of promises of change, fear, intimidation or manipulation. Thus, despite a not guilty finding in a criminal court, evidence of domestic violence can be considered in a family or child protection case. In *Penner v. Niagra (Regional Police Services Board)*, 2013 SCC 19 the majority of the Supreme Court of Canada held that issue estoppel would not bar a subsequent civil action against police officers, despite a dismissal of the complaint against them in a disciplinary proceeding, because the standards of proof and purposes of the two proceedings differed. Since the onus of proof and the application of evidence rules differ in criminal and civil contexts, a not guilty finding in a criminal court is not a reliable indicator in a family law or a child protection context that the domestic violence did not occur.

### ***9.4 When a ‘victim’ attempts to refute a criminal conviction***

Researchers are reporting that ‘victims’ of domestic violence are being charged, prosecuted and convicted for criminal acts of resistance violence that do not technically qualify, in criminal law, as self-defence. Unless the targeted adult can establish grounds to admit rebuttal evidence (part 9.2 above), the criminal conviction or guilty plea can preclude denial of responsibility for the particular criminal act. Family and child protection lawyers will recall, however, that there is no crime of coercive domestic violence in the Canadian *Criminal Code*. The *Code* does prohibit individual criminal actions, some of which are associated with domestic violence (such as assault). Yet, as set out in Part 5 above, coercive domestic violence can only be fully understood as a pattern and a cumulative process; domestic violence is seldom a single criminal act.

As discussed earlier (in Part 5 above), it is not uncommon for those subjected to coercive domestic violence to react with an act of violence (resistance violence). Presumably, therefore, it is open to the party subjected to a pattern of coercive domestic violence to demonstrate, in a family custody/access or child protection case, the criminal act of violence occurred as a reaction to having been subjected, on other occasions, to a pattern of coercive domestic violence.

For an example of informative judicial reasoning on this issue in *T.H. v. R.H.*, 2011 ONSC 6411 (CanLII).

### ***9.5 Interpreting a victim recant in a criminal case in a family law context***

#### **9.5.1 The recant problem: introduction**

Rates of victim recant are extremely high in criminal domestic violence cases. Former S.C.C. justice L’Heureux-Dubé recognized this issue almost two decades ago in *R. v. Marquard*, 1993 CanLII 37 (S.C.C.), [1993] 4 S.C.R. 223, (1993), 108 D.L.R. (4th) 47,

(1993), 25 C.R. (4th) 1:

*it is information which can be compared to such well-recognized phenomena among victims of sexual abuse or domestic violence as recantation of the reported assaults and delay in reporting which also, if weighed without knowledge of the particular context in which they occur, reflect negatively on the credibility of the witness.”*

The reasons are well documented.<sup>144</sup> Although additional research on the issue is warranted, it seems likely that many 'victim' recants in criminal domestic violence cases are false.

Canadian criminal and civil protection courts are responding, in appropriate cases, with the admission and evidentiary use of prior inconsistent statements made to police in accordance with the principles set out in *R. v B. (K.G.)*, [1993] 1 S.C.R. 740 and subsequent cases. *R. v. Ord*, 2012 NSCA 115, leave to appeal dismissed without costs in *Jason John Ord v. Her Majesty the Queen*, 2013 CanLII 22323 (SCC), expands these principles in a domestic violence context. Such statements are commonly called K.G.B. Statements. In connection specifically with the domestic violence context and the high rate of 'victim'/complainant recant in these cases, courts are conducting careful comparative analysis of similarities and differences between the content of KGB statements and other evidence, in an effort to: 1) distinguish true from false claims and 2) to prevent the success of false 'victim'/witness recant. For examples, see:

- *R. v. Ord*, 2012 NSCA 115
- *R. v. Bishop*, 2011 NSPC 95
- *Park v. St. Jules*, 2011 ABQB 86
- *R. v. S.C.R.*, 2012 BCPC 122
- *Kla v. R.*, 2008 NBCA 30
- *R. v. Bishop*, 2011 NSPC 95
- *R. v. Sasakamoose*, 2008 SKPC 164
- *Borutski v. Borutski*, 2011 ONSC 7099

Outside of courts, researchers are documenting a disheartening pattern of obstruction of justice via witness tampering in domestic violence cases.<sup>145</sup> Nonetheless scarce criminal

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<sup>144</sup> See, for example: Crown Prosecution Service (United Kingdom) (2013) [\*Domestic Violence, non-engagement or withdrawal of victims; JEC Domestic Violence Bench Book\*](#); Michigan Judicial Institute (2013), *supra* note 63; Sarah Buel (2010) "[Putting Forfeiture to Work](#)" 43 *University of California-Davis Law Review*, Vol. 43, p. 1295; Joanne Belknap et al (2000) *Factors Related to Domestic Violence Court Dispositions in A Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables*; Hadar Dancig-Rosenberg and Dana Pugach (2012) "Pain, Love and Voice: The Role of Domestic Violence Victims in Sentencing" 1(5) *Michigan Journal of Gender & Law* 423; Sonia Gauthier (2010) "The Perceptions of Judicial Interveners of the Consequences of Dropped Charges in Domestic Violence Cases" 16 (12) *Violence Against Women* 1375-1395.

<sup>145</sup> *Ibid*, particularly Crown Prosecution Service (2013), as well as Amy Bonomi et al. (2011) "Meet Me at the Hill Where We Used to Park: Interpersonal Processes Associated with Victim Recantation" in *Social Sciences & Medicine* (July 2011) 1054-61; Vera Institute in (2004) *Enhancing Responses to Domestic Violence Promising Practices From the Judicial Oversight Demonstration Initiative Prosecuting*

justice attention has been devoted to this issue. Offenders are seldom investigated or charged,<sup>146</sup> despite the obstruction of justice provisions in section 139 of the *Criminal Code*. For examples of exceptions (domestic violence cases in which offenders have been charged and convicted for obstruction of justice), see: *R. v. Crazyboy*, 2011 ABPC 380 and the successful appeal of the sentence by the Crown in *R. v. Crazyboy*, 2012 ABCA 228; *R. v. Zimmerman*, 2010 ABPC 228; *R. v. Jones*, 2006 BCPC 278; *R. v. S.C.R.*, 2012 BCPC 122; *R. v. Desjarlais*, 2009 MBPC 45; *R. v. J.R.S*, 2010 SKQB 33.

The degree of intimacy between offenders and ‘victims’ in domestic violence cases increases the likelihood of contact (direct and indirect) between the complainant and accused before trial, particularly when the complainant and alleged perpetrator have children in common. Obviously repetitive contact between accused and complainants or between accused and the complainant's children prior to the criminal trial elevates the risk that contact will be used to attempt to dissuade the complainant from testifying. Failure to offer protection, to investigate and to charge when obstruction of justice occurs results in:

- Rewarding offenders for breaches of section 139 of the *Criminal Code*
- Blaming the ‘victims’, instead of offenders, for the high collapse rates in criminal domestic violence cases

Four research studies, two in the United States, one in United Kingdom, and a small study in Canada shed light on why ‘victims’ recant, even in dangerous, high-risk cases. The first involved analysis of tape-recorded telephone calls of alleged perpetrators who were being held in jail pending trial in serious domestic violence felony cases in Milwaukee. The study disclosed severe levels of harassment, intimidation, and manipulation of ‘victim’ witnesses, from jail, in the vast majority of the felony cases. More recently, another telephone study also in the United States in 2011<sup>147</sup> (expanded to include less serious domestic violence charges) documented a pattern of manipulative interaction between alleged perpetrators and complainants resulting in complainants ultimately agreeing to retract domestic violence claims in favor of testifying for the accused. Similar results are reported in the Canadian and United Kingdom studies.<sup>148</sup>

### **9.5.2 The recant problem: potential solutions**

Close monitoring of interim release provisions and no contact orders, with careful attention to the circumstances surrounding accused-complainant contact, particularly in circumstances suggesting possible breaches of section 139(2) of the *Criminal Code*, would do much to discourage these practices. Documented suspicious circumstances

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#### *Witness Tampering, Bail Jumping, and Battering From Behind Bars.*

<sup>146</sup> A CanLII search on June 5, 2012, revealed 430 cases involving section 139 of the *Criminal Code*, the majority involving section 139 (2). Of these, merely a few (9) were associated with family or domestic violence.

<sup>147</sup> See Vera Institute and Bonomi et al., *supra* note 145.

<sup>148</sup> Crown Prosecution Service (United Kingdom) (2013) *supra* 145; Inspector Richard Konarski, Langley RCMP, (2011) “Negotiating Domestic Violence: An Exploratory Study” Continuing Legal Education Society of B.C. on line at: <http://www.cle.bc.ca/PracticePoints/FAM/12-NegotiatingDomesticViolence.pdf>

include:

- An established pattern of withdrawn domestic violence charges, particularly when withdrawn charges and/or not guilty findings are the result of complainants' lack of cooperation and circumstances indicate the likelihood of a pattern of domestic violence. The Alberta Court of Appeal endorsed crown arguments relating to suspicious circumstances surrounding a 'victim' recant - a prior pattern of recants with the recants themselves recanted - in *R. v. L.G.P.*, 2009 ABCA 1.<sup>149</sup>
- A dramatic change in willingness to cooperate following contact or communication with the accused (direct or indirect, for example, via the children, friends, family of the accused, or the defense lawyer in the absence of a lawyer or domestic violence advocate for the complainant).<sup>150</sup>

The Vera Study recommends a number of best practices to reduce 'victim' recant, including Crown monitoring and seeking explanations for changes in the stories 'victims' tell, while exploring the circumstances surrounding the changing story, and police and Crown teaching 'victims' how to collect evidence documenting breaches of no contact orders.<sup>151</sup>

In a family law context, when interpreting a 'victim' recant in a criminal case, one should resist the assumption that a criminal recant necessarily demonstrates that the 'victim' was not telling the truth about the violence in the original statements made to police. Informed conclusions about validity or lack of validity of original claims can only be made after considering all of the evidence and surrounding circumstances, including the degree to which the evidence is consistent or inconsistent with the particulars of each statement, and after examining the circumstances surrounding the recant, including full particulars of any direct or indirect contact between the 'victim' and the accused.

### ***9.6 Evidence rules in family & criminal contexts: past conduct***

While basic rules of evidence apply in family (custody and access and child protection) as well as in criminal cases, rules relating to the admission and use of information in a criminal context tend to be more restrictive than in a family law context. This means that evidence that could not be considered in a criminal law context may be admissible in a family law and child protection context.

For example, in a criminal case, evidence of past acts of domestic violence and past parental conduct may or may not be admissible, depending on whether or not it is

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<sup>149</sup> When, however, the pattern of withdrawn is associated with spurious claims in other proceedings and contexts (for example spurious child protection claims or false claims against others), the pattern may indicate a propensity to make false claims or a mental health problem.

<sup>150</sup> A complainant may have valid reasons for resisting continuing participation in the criminal proceeding. Nonetheless, if a complainant must meet with the accused's defense lawyer prior to trial, the presence of a Crown prosecutor or the complainant's family lawyer could help to prevent the appearance of inappropriate influence.

<sup>151</sup> See also M. Dawson and R. Dinovitzer (2001) "Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court" *Justice Quarterly* 18(3); Joanne Belknap et al., *supra* note 144.

admissible as similar fact evidence or under another evidence rule. The reason admission and use of such information is restricted in a criminal context is that such evidence is often presented as 'propensity evidence', i.e. it is offered to 'prove' it likely that the accused person is the sort of person who would commit the criminal act. The potential for injustice is obvious.

In a family law and child protection context such evidence is presented for an entirely different purpose. The aim is not to find a party responsible and accountable for the commission of a particular criminal act. The focus, instead, is on safety and child best interests. In such a context the evidence loses most of the qualities of propensity evidence. As a general rule (with some exceptions pertinent to specific child protection and family law contexts)<sup>152</sup> information and evidence pertinent to safety and to the best interests of children will usually be admitted in family law cases. As we have seen, in a family law context, complete evidence of past patterns of domestic violence enables accurate assessment of risk and safety, of civil liability, of support issues, of parenting issues, of the best interests of the child and of child protection issues.

Numerous provincial and federal family law and civil statutes require consideration of the patterns of domestic violence when deciding child protection or child custody and access matters. Nonetheless family and child protection courts continue to consider the admissibility of such evidence since trial judges have discretion to exclude relevant evidence when the prejudicial impact outweighs the probative value "even where the admissibility of evidence is provided for by statute". Thus, when admissibility of prior domestic violence conduct is contested, family and child protection courts may engage in a weighing of prejudicial and probative value

The starting point – during *voir dire* when admissibility is contested – is that, generally speaking, rules of evidence apply in family (custody/access and child protection) cases as well as in criminal cases. See, for example: *C.L.M. v. D.G.W.*, 2004 ABCA 112. In family law cases "suitability for parenting" is central to determination of the best interests of the child.

Because domestic violence in current and past relationships, and prior violence in general, have direct relevance to the other partner's safety, to "suitability for parenting," and to child best interests as well as, in the child protection context, to whether or not the child is in need of intervention services or protection, relevance and probative value will usually be high in family law cases (custody and access as well as in child protection). Finally, courts will assess whether or not the potential prejudice of such evidence overcomes relevance and probative value.

### **9.6.1 Past conduct (family and child protection): prior violence, past parenting**

In *C.L.M. v. D.G.W.*, [2004] 346 A.R. 381, (2004), 2 R.F.L. (6th) 75, 2004 ABCA 112, the

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<sup>152</sup> This report focuses on best practices at the intersection of family, child protection and criminal systems rather than on best practices within child protection and family law systems. Consequently, the report will include limited discussion of evidence rules within family and child protection proceedings.

Court of Appeal of Alberta considered a trial judge's decision to strike affidavits of a mother, the mother's mother and two sisters as well as an older daughter. The father was seeking unsupervised access to three daughters. The trial judge struck information in the affidavits relating to the father's past sexual deviancy and use of pornography on the basis that such evidence was scandalous, irrelevant, and prejudicial. The Court of Appeal disagreed, ruling that evidence about his previous sexual behaviour, his admitted sexual propensity, and the potential harmful effects on the children while in his unsupervised presence were all relevant to, and highly probative of, the type of access to be granted. See also *W.N. v. C.G.*, 2012 BCCA 149 in connection with alcohol and drug use and violent behavior not witnessed by the child.

Unlike the situation in the criminal context, if the disputed evidence is relevant and probative to determining what is in a child's best interest, its prejudicial effect on a parent will rarely be sufficient to exclude it.

Similarly, in *R.C.M.S. v. G.M.K.* (2005), 266 Sask. R. 31, 2005 SKQB 296, a case that included a pattern of domestic violence against the mother, the father objected to testimony from a former intimate partner about his emotional and physical abuse of her during a prior intimate relationship. Justice Ryan-Froslic comments, in support of the decision to admit the evidence, that while rules of evidence apply, their application is less rigid in civil than in criminal matters. In connection specifically with evidence of acts of domestic violence against the non-party, the evidence was admitted in connection with the father's ability to act as a parent and in connection with assessment of the best interest of the children.

All child protection statutes in Canada authorize court intervention if children are being neglected or emotionally harmed by the behaviour of a parent. Thus evidence relating to the past pattern of domestic violence of either parent is admitted regularly throughout Canada. See D. A. Rollie Thompson (2003) for discussion of evidence rulings on this and other issues in family law and child protection contexts.<sup>153</sup>

As a result, family law and child protection courts may consider considerable extensive evidence relating to past conduct that may not be available to a criminal court. This is yet another reason why decisions about contact with children are best left with family courts and/or child protection authorities.

### **9.6.2 Past conduct (family and child protection): Mutual violence and self defense**

Not surprisingly, it is fairly common in family and child protection cases (and presumably in criminal cases) for perpetrators to claim that the violence was minor and isolated, that the other partner was the instigator of the violence, that their own violence was defensive, or that the violence was mutual or accidental. Prior domestic violence

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<sup>153</sup> For discussion of evidence rulings in family law and child protection contexts, see: D. A. Rollie Thompson (2003) "The Cheshire Cat, or Just His Smile? Evidence Law in Child Protection" 2003, 21 C.F.L.Q. 319, "Are there any Rules of Evidence in Family Law?" (2003), 21 *Canadian Family Law Quarterly* 245.

conduct evidence can be admitted in such circumstances to refute such claims. Consequently, family lawyers representing the targeted party should consider ensuring that the crown prosecutor in the criminal case is aware of any patterns of prior abuse and violence.

### **9.6.3 Past conduct: concluding comment**

In sum, family and child protection courts will usually have access to considerably more information about the nature and pattern of domestic violence than can be made available to a criminal court. In addition, because the onus is different in criminal and family courts, such that proof in a criminal court must be beyond reasonable doubt while proof in a family and child protection court is on balance of probabilities, a not-guilty finding in a criminal court should not preclude consideration of domestic violence evidence in a family law context.

### **9.7 Good character evidence**

Custody and access as well as child protection cases differ from criminal cases in that personal characteristics associated with parenting are a central concern. Nonetheless evidence of good public reputation carries less weight in some circumstances than in others. For example, in a domestic violence context, social science research establishes that alleged perpetrator's calm, non-threatening public behaviour may have little resemblance to private behaviour. The Ontario Court of Appeal explicitly recognized this issue in a criminal context in *R. v. Minuskin* (2003), 68 O.R. (3d) 577, (2003), 181 C.C.C. (3d) 542, (2003), 180 O.A.C. 255, 2003 CanLII 11604 (ON C.A.) whereby the court recognized that domestic violence is "often committed by persons of otherwise good character and judgement".

### **9.8 Victim /witness demeanour**

Family, child protection and criminal (Crown and defense) lawyers will all want to keep in mind the need for caution when interpreting the demeanour of those who claim to be 'victims' in domestic violence cases. As discussed in part 4.2, domestic violence can produce exaggerated startle and defense responses that resemble anger, hostility and aggression.

When witnesses have been subjected to severe or patterned domestic violence, such patterns in testimony and demeanour can be expected. Demeanour is particularly unreliable in domestic violence cases.

### **9.9 Evidence of children**

See part 4.6 above: Eliciting information from children.

If a child must offer direct testimony, explore potential options for the child's comfort and protection such as:

- Ensuring that the child has pre-trial exposure to court surroundings. A number of jurisdictions have developed online services to help children understand court processes

- Seeking age appropriate breaks
- Preventing cross-examination of the child by a party (as opposed to the party's lawyer)
- Allowing the child to testify behind a screen or from another room via video link
- Allowing a support person to sit near the child. (A number of American jurisdictions are reporting use of trained courthouse dogs to provide emotional support and feelings of safety to children during testimony.)
- Making use of testimonial aides. Canadian courts are affirming the constitutional validity of testimonial aides for child witnesses: *R. v. J.Z.S.*, 2010 SCC 1. Note that while such options reduce opportunities for intimidation while the child is testifying, they do not prevent potential harm to parent-child relationships as a result of testifying against a parent
- Preventing age-inappropriate questioning
- Limiting use of repeat questioning<sup>154</sup>

For additional information, see:

- Articles by Nicholas Bala et al., on child witnesses and child witness testimony, for example, Nicholas Bala et al. (2010) "The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform" *International Journal of Children's Rights* 18, 53-77
- New York State Permanent Judicial Commission on Justice for Children (2008) *Tools for Engaging Children in Their Court Proceedings*
- AIJA Committee on 'Children Giving Evidence' (2012) *Bench Book For Children Giving Evidence in Australian Courts, Updated December, 2012* (Australian Institute of Judicial Administration)

### ***9.10 Polygraph evidence***

Family lawyers will sometimes be asked by clients to introduce polygraph evidence in support of denials of domestic violence or child abuse. In the criminal context, the Supreme Court of Canada has ruled repeatedly that polygraph evidence is inadmissible because it is unreliable, is a form of oath enhancement and the bolstering of credibility, is hearsay, and is good character evidence.

In the family and child protection context, however, trial decisions on admission are inconsistent. Few appellate courts have ruled directly on the use of polygraph evidence in family law cases. With this caveat in mind, generally, courts have been concluding that: evidence of willingness to take a polygraph test is relevant and admissible but no firm conclusions may be drawn from a refusal to take a polygraph.

Many cases mention (usually without explanatory comment) testimony from a party that he or she took and passed a polygraph test but most of the judgements do not mention expert testimony introducing the test results.

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<sup>154</sup> Krahenbuhl and Blades, *supra* note 30.



*British Columbia (Director, Child, Family and Community Services) v. D.M.G.*, 2007 BCCA 415, is one of the few appellate decisions on the admissibility of polygraph evidence in a family law context. The parents in this case sought to appeal on the basis in part that the trial judge had not allowed them to introduce information about polygraph tests conducted with four caregivers that might have helped them refute claims of inadequate protection for the child. In denying leave to appeal, Justice Hall endorsed the decision of the trial judge, who adopted the reasoning in *R. v. Béland*, 1987 CanLII 27 (S.C.C.), [1987] 2 S.C.R. 398, 36 C.C.C. (3d) 48, and in *E.W. v. D.W.*, 2005 BCSC 890, 50 B.C.L.R. (4th) 345, in refusing to admit polygraph evidence on the ground that it did not meet reliability requirements set out in the statute. See also: *L.D. v. Children's Aid Society of Cape Breton-Victoria*, 2010 NSCA 20 (CanLII). On the other hand, in *Carrier v. Tate*, 2009 BCCA 183, the appellate court endorsed the trial court's acceptance of expert testimony, including the assertion that, in his experience, willingness to take a polygraph is an indicator that the person is less likely to have committed the act. The judge had been careful, however, to indicate that willingness to take a polygraph was not proof of innocence. See also *K.M.W. v. L.J.W.*, 2010 BCCA 572 (CanLII).

Family lawyers may wish to keep in mind that polygraph tests are based on out-of-court behaviour and offends hearsay rules since the person taking a polygraph test usually has no direct knowledge of how to interpret test results and is informed of test results by the test administrator.

While concerns about reliability suggest that it might be best for family courts to follow the approach taken in criminal courts on admissibility and use of polygraph evidence, the cases as a whole are indicating that judges are more receptive to receipt of the evidence in family and child protection than in criminal cases.

## **9.11 Audio and visual recordings**

### **9.11.1 Introduction**

Court practices with respect to admissibility of recordings in a family law context are inconsistent. In practice, audio and visual recordings and transcripts of conversations between the parties or between the parties and their children are being admitted and considered.<sup>155</sup> On occasion recordings have even been admitted even when illegally obtained.<sup>156</sup> Nonetheless admission is controversial. A number of courts have disallowed such evidence, objecting strongly to privacy issues and the covert nature of

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<sup>155</sup> Often the evidence is admitted without judicial comment on admissibility or it is admitted on the basis that the evidence is relevant to assessment of the best interest of the child. For example: *L.S. v. Alberta (Child Youth and Family Enhancement Act, Director)*, 446 A.R. 135, 2009 ABCA 10 (CanLII); *M.(K.A.A.) v. M.(J.M.)*, 2005 NLCA 64 (the Court of Appeal mentions but does not comment further on the trial judge's consideration of recordings made by the mother of the father's conversations with the child).

<sup>156</sup> *Sweeten v. Sweeten*, 1996 CanLII 2972 (BC S.C.) (the mother sought to introduce an illegally taped telephone conversation between the child and the father. The tape was admitted and considered on the basis that the content was relevant to the best interest of the child); see also: *L.S. v. Alberta (Child Youth and Family Enhancement Act, Director)*, *ibid.*

the evidence.<sup>157</sup> Indeed the Ontario Court of Appeal endorses, at paragraph 12, of *Sordi v. Sordi*, 2011 ONCA 665 a “sound public policy of trying to discourage the use of secretly recorded conversations in family proceedings”.

### **9.11.2 Recordings: domestic violence context**

See part 5.8 above in connection with cell phone texting messages, emails, and the contents of computers.

In a domestic violence context, a perpetrator's attempts to introduce covert audio or video recordings can actually constitute evidence of continuing monitoring, stalking or surveillance of the targeted parent, or of attempting to ‘set up’ the targeted parent as a litigation tactic. In such circumstances, family lawyers opposing introduction of tapes, may wish to contact police in connection with a potential criminal investigation (e.g. an invasion of privacy offence).

On the other hand, audio or visual recordings can be document evidence of continuing domestic violence or deficient parenting (for example when the recording demonstrates denigration of the other parent to a child). Subject to the qualifying comments below, such recordings can also assist in assessment of credibility.

One must consider the aspect of control of content. The person making the recordings, unlike the person recorded, has control over matters such as: timing of the recording, surrounding circumstances at the time of the recording, his or her own responses, and the choice of what to include and what to exclude. Thus in *Borstein v. Borstein*, 2002 BCSC 479, Justice Ralph refused to assign any weight to a tape recording, noting that the father was in a position of control when he made the recording. See also: *Zinyama-Mubili v. Mubili*, 2010 ONSC 3928 (CanLII) at paragraph 26; *F.J.N. v. J.L.N.* (2004), 9 R.F.L. (6th) 446, 2004 CanLII 6247 (ON S.C.); *Norland v. Norland*, 2007 CanLII 20786 (ON S.C.); *L.N. v. D.E.N.*, 2006 CanLII 42602 (ON S.C.).

Nonetheless in the particular circumstances of *L.S. v. Alberta (Child Youth and Family Enhancement Act, Director)*, 446 A.R. 135, 2009 ABCA 10 (CanLII) the Court of Appeal of Alberta affirmed the trial judge's decision to admit and give considerable weight to video evidence despite concerns that the video might have been edited by the parent introducing the evidence. Despite this issue, the court had serious concerns about depictions of sexually inappropriate behaviour on the part of the mother in the presence of the children.

Evidence relating to the circumstances surrounding the recording is particularly important in domestic violence cases in order to identify cases in which a violator purposely provoked the other parent immediately prior to the recording or doctored the evidence. See, for example, *M.(L.V.J.) v M.(D.L.)*, 2005 BCSC 995 at paragraph 126 to 127.

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<sup>157</sup> *Sordi v. Sordi*, 2011 ONCA 665; *Shaw v. Shaw*, 2008 ONCJ 130.

Some courts are imposing qualifications on admissibility in addition to relevance and probative value, such as proof of authenticity and lack of alteration, introduction of the complete recording, and voice identification: *D.(W.L.) v. D.(R.C.)*, 1999 SKQB 178 at paragraphs 14 to 20. But see also *L.S. v. Alberta (Child Youth and Family Enhancement Act, Director)*, 446 A.R. 135, 2009 ABCA 10 (CanLII).

Subject to the cautionary comments above in connection with violator stalking and surveillance and scrutiny of surrounding circumstances, evidence from audio or visual recordings of exchanges between parents or between parents and children can, on occasion, provide valuable evidence about issues such as parental manipulation of a child, parental undermining of the other parent, harmful parenting practices, continuing intimidation, stalking, threats or monitoring. For examples, see: *Caparelli v. Caparelli*, 2009 CanLII 73655 (ON S.C.); *Re I.S.*, 2007 ABPC 2; *L.S. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 10. Video recordings can also document the extent to which the children have been harmed by domestic violence. For example, see Judge N. Flatters' careful analysis of a video tape evidence in *Re I.S.*, 2007 ABPC 2 (CanLII).

### **9.11.3 Audio and visual recordings: family to criminal context**

Family lawyers representing clients who seek to admit or who seek to oppose admission of recordings will also wish to keep in mind the potential implications of such evidence in a criminal law context. Consider whether or not such evidence could have the potential to become evidence of criminal harassment pursuant to section 264 of the *Criminal Code* or evidence of unauthorized interception of private communications pursuant to section 184 of the *Code*.

## **9.12 Strangulation (attempted)**

Family lawyers responding to not-guilty findings in criminal domestic violence cases, where the criminal charges related to attempted strangulation, may wish to keep in mind (and if necessary present to the family court) information pertinent to medical signs of strangulation.

Strangulation is a common method of intimate-partner homicide (along with shooting and stabbing). Prior attempted strangulation is strongly associated with the potential for future lethal outcome (see Part 7 above). Medical research informs us that 'victims' can die from strangulation without the presence of a single physical mark. External physical signs become visible in only about 50% of strangulation cases. Moreover, physical signs of strangulation can take many hours to appear. Finally, death from strangulation may ensue after a delay of days or even weeks.<sup>158</sup>

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<sup>158</sup> D. A. Hawley, G. E. McClane, and G. Strack (2001) "A Review of 300 Attempted Strangulation Cases Part III: Injuries n Fatal Cases" in *Journal of Emergency Medicine* 21(3) 317-322; G. E. McClane, G. Strack, and D. Ahwley (2001) "A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim" in *Journal of Emergency Medicine* 21(3) 311-315; A. Turkel (2007) "[And Then He Choked Me: Understanding and Investigating Strangulation](#)" Update 20(8) (American Prosecutors Research Institute); OPDV Bulletin [Strangulation in Domestic Violence and Sexual Assault](#)

Family lawyers representing clients who claim to have been subjected to strangulation attempts but whose abuser was found not guilty in a criminal court may wish to keep these issues in mind when presenting information related to the attempted strangulation to the family court, particularly when the accused, in the criminal case, was found not guilty because the Crown failed to present medical evidence or a witness testified that there were no physical signs or marks on the client's neck after the alleged strangulation attempt. Expert medical testimony is advisable.

### ***9.13 Avoidance of conflicting agreements and orders: reminder***

Crown, defense, child protection and family law lawyers can prevent conflicting agreements and orders by ensuring the exchange of agreements and orders across legal systems, by ensuring that provisions in agreements and orders in each legal system are consistent with provisions in agreements and orders in other legal systems, and by ensuring that orders and agreements in each sector take into account how provisions in orders and agreements could affect the clients in legal proceedings in the other sectors.

## **PART 10: COURT CONNECTED SERVICES: BEST PRACTICES**

### ***10.1 Domestic violence intervention programs: Do the programs stop domestic violence?***

All legal systems (criminal, child protection, and family) make use of the same services in domestic violence cases. Enhanced consultation and collaboration among lawyers and service-providers across sectors could help to make more effective use of such services by keeping in mind the literature on the effectiveness of such services and by ensuring that the services are operating in a unified fashion rather than at cross purposes.

The effectiveness of domestic violence intervention programs is not firmly established. The programs help some perpetrators, particularly those whose domestic violence is not firmly entrenched, but not others.<sup>159</sup> It cannot be assumed, therefore, that completion of a domestic violence program guarantees safety.

Nonetheless, intervention programs are certainly known to do more good than harm. At the very least, the programs provide a monitoring function while the perpetrator is in

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*cases* (New York Office for Prevention of Domestic Violence).

<sup>159</sup> It is not surprising that the research is equivocal, given the large variation in approaches to domestic violence intervention as well as the complex and varied psychological and behavioural profiles of perpetrators. A list of intervention evaluation research is available from the author on request. While a developing body of research suggests a degree of promise in new approaches to domestic violence, particularly programmes that target perpetrator parenting problems, caution is advised pending a consistent body of research evaluating such programs. For an overview of the current state of research on this issue, see: Edward Gondolf (2012) *The Future of Batterer Programs: Reassessing Evidence-Based Practice* (Northeastern).

attendance.<sup>160</sup> Specialized domestic violence intervention programs that deal with domestic violator parenting problems are beginning to show some degree of promise.<sup>161</sup>

When reading evaluation research it is important to keep in mind that improved attitudes and understandings of the impact of domestic violence on children do not necessarily translate into changed behaviour. Look for evaluation studies that contain behaviour change data, preferably longitudinal data, derived from the family members who were subjected to the domestic violence (as well as police records).

When interpreting the potential value of directing a client to a domestic violence intervention program, Crown, defense and family lawyers should consider the accused's record of attendance and participation in such programs in the past. Has the perpetrator attended such programs in the past? Did the perpetrator attend regularly and benefit from the program? Did the benefit translate into changed behaviour? Have the circumstances changed such that the perpetrator is likely to benefit now? In connection with interpreting the impact of participation on family safety: Has the perpetrator attended regularly? Does the perpetrator demonstrate acceptance of responsibility and a changed attitude toward domestic violence? Has the change in attitude resulted in changed behaviour?

Keep in mind that referrals to intervention programs should give the intervention service an opportunity to assess the perpetrator's suitability for the particular program. Domestic violence intervention programs differ. A program can be suitable for some perpetrators, not for others. Crown, family and child protection lawyers will wish to obtain information, when available, about the effectiveness of the domestic violence intervention program. Ideally, such programs should be vetted by domestic violence experts to ensure that protocols are in place to prevent the release of confidential information that could affect 'victim' or child safety. One should also ensure that the program being recommended or ordered addresses the particular type of domestic violence involved in the case. For example, domestic violators who engage in sexual violence require specialized programs to deal with sexual abuse;<sup>162</sup> perpetrators who have children require specialized content on parenting; perpetrators who are members of particular cultural communities require services that are culturally appropriate. Child protection authorities, Crown, and family lawyers will also wish to ensure that domestic

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<sup>160</sup> S. Bocko and C. Cicchetti (2004) [Restraining Order Violations, Corrective Programming and Recidivism](#) (Massachusetts Trial Court); A. Cissner and N. Puffett (2006) [Do Batterer Prevention Program Length or Approach Affect Completion or Re-Arrest Rates? A Comparison of Outcomes between Defendants Sentenced to Two Batterer Programs in Brooklyn](#) (New York: Center for Court Innovation).

<sup>161</sup> J. Edleson and O. Williams (eds) *Parenting by men who batter: new directions for assessment and intervention* (Oxford University Press); Gondolf, *supra* note 159; Family Violence Prevention Fund "Fathering After Domestic Violence Project"; K. L. Scott and C. V. Crooks "Effecting change in maltreating fathers: Critical principles for intervention planning" in Spring 2004, *Clinical Psychology: Science and Practice* 11: 95-111, "Intervention for Abusive Fathers: Promising Practices in Court and Community Responses" in Summer 2006 *Juvenile and Family Court Journal*: 29-44.

<sup>162</sup> Legal Momentum (2008), *supra* note 46.

violence interventions are combined with other interventions and treatments to address risk factors pertinent to each individual case (drug or alcohol misuse, mental health problems, special 'victim' or child vulnerability, lack of access to safe housing, language barriers, and barriers resulting from sexual orientation, lack of resources, immigration status, disability, or cultural group).

In addition, family lawyers will wish to consider the implications of clients participating in such services - in terms of confidentiality, disclosure, and court expectations of adult and child safety - in connection with the potential use of this information in other proceedings (child protection and criminal).

Non-attendance and dropping out of domestic violence intervention are associated, empirically, with increasing risk of continuing domestic violence. Consequently, best-practice standards for domestic violence intervention programs recommend that such programs prioritize 'victim' safety and have policies in place to ensure the timely reporting of:

- breaches of no contact orders
- increasing or changing risk
- child abuse, and
- non- attendance (failure to attend sessions, failure to complete)

Perpetrators may be asked to consent to the release of such information as a condition of providing the intervention service.<sup>163</sup> Given the documented connections between non-attendance and increasing risk, family lawyers representing 'victims' will wish to ensure that the intervention program being used in the case adheres to such best-practice standards and that the service has policies in place to ensure prompt notification of pertinent authorities as well as the targeted party in these circumstances. Family lawyers representing alleged perpetrators should check to see if this type of policy is in place and, if so, should discuss with clients the implications of the policies and any associated consent forms in connection with the potential use of information in criminal as well as in family law and child protection proceedings.

In the absence of mandatory attendance and monitoring, drop-out rates are high. The ideal is professional (or community) monitoring and review of the domestic violator's participation and progress. Given that these programs cannot provide assurances of safety, evidence of an established pattern of changed behaviour has more value in a family law and child protection context than proof of successful program completion.<sup>164</sup> One needs to look for changed behaviour. See, for example *Westhaver v. Howard* (2007),

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<sup>163</sup> In connection with standards for domestic violence intervention programs, see, for example: Batterer Intervention Services Coalition Michigan "Other State's Standards" online at [http://www.biscmi.org/other\\_resources/state\\_standards.html](http://www.biscmi.org/other_resources/state_standards.html). See also: Attorney General & Justice New South Wales (2012), *supra* note 33.

<sup>164</sup> Edward Gondolf and Heran Wernik (2009) "Clinical Ratings of Batterer-Treatment Behaviors in Predicting Reassault" 24(11) *Journal of Interpersonal Violence* 1792-1815. Gondolf and Wernik report that clinicians who deliver batterer intervention programs have a significant but weak ability to predict future severe violence among those who successfully complete batterer intervention programs.

260 N.S.R. (2d) 117, 2007 NSSC 357; *Aguilera v. Reid*, 2006 CanLII 6196 (ON S.C.); *T.R. v. R.T.*, 2006 ONCJ 173.

### ***10.2 Contraindicated intervention: anger management***

While debate continues as to whether or not there is value in teaching anger management as a component of specialized domestic violence intervention, anger management by itself is not recommended in coercive domestic-violence cases.<sup>165</sup>

The problem according to the literature is that anger management does not focus on the underlying causes of domestic violence; worse, anger management programs can serve to enhance control skills. More particularly such programs are said to:

- have limited proven effect
- lack standards to ensure those offering such programs have specialized domestic violence expertise
- offer a false sense of hope and safety
- focus attention on intimate partner behaviours that trigger anger (to enable the violator to learn how to control the anger response) instead of focusing attention on violator perceptions and actions that give rise to domestic violence
- fail to engage perpetrators in acceptance of responsibility for violence, and
- teach perpetrators new control skills when the goal in domestic violence cases is learning not to control.

A number of jurisdictions in the United States recommend that anger management not be used as a response to domestic violence.<sup>166</sup>

### ***10.3 Contraindicated: parent education***

Parent education programs that are not specifically designed to respond to domestic violence may offer parenting support and assistance to targeted parents but are unlikely to offer much help to perpetrators of coercive domestic violence. Specialized programs targeting parenting patterns specific to domestic violence contexts are needed.

### ***10.4 Supervised child access centres: choice and referral***

Detailed discussion of the circumstances in which supervision of child access is warranted is beyond the scope of this report. Nonetheless a few general comments pertinent to cross-sector decisions are warranted.

Subject to the particulars of each case, as a general rule, in most cases of coercive domestic violence (see Parts 5, 6 and 7 above) supervision of access is recommended until safety can be assessed and assured. In cases of isolated minor violence or

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<sup>165</sup> Michigan Judicial Institute (2009) *Domestic Violence Bench Book: A Guide to Civil and Criminal Proceedings*, 3rd edition (Michigan Courts: Michigan Judicial Institute) at page 1-7; Klein, *supra* note 21; E. Gondolf and D. Russell (1986) “[Case against anger control treatment programs](#)”. [Response to the Victimization of Women and Children](#) 9(3): 2-5. M. Butler Bailey (2006) “[Clegg Award Winner: Improving Domestic Violence Sentencing A Proposal to prohibit anger management therapy](#)” 21(3) *Maine Bar Journal* Summer 2006 140.

<sup>166</sup> Klein, *supra* note 21.

resistance violence, on the other hand supervision may be unnecessary. The Court of Appeal for Québec outlines some of the circumstances that warrant supervision of access in *Droit de la famille - 072263*, 2007 QCCA 1253 (CanLII) as does the Nova Scotia Court of Appeal in *Slawter v. Bellefontaine*, 2012 NSCA 48 (CanLII).

Access of any type (including supervised access) may not be appropriate when:

- access offers no benefit to the child
- there is a high risk of danger to the child, to the targeted parent or to supervision staff or
- there is a potential for lethal outcome (see Part 7 above).

In cases involving severe, repetitive, coercive violence, or the potential for lethal outcome, suspension of access may be the only safe option until safety can be assured.

Consider the security and safety measures in place at the supervised access centre. Are the measures adequate to address the circumstances of the case? Has the centre adopted security measures, employee training standards, forms authorizing release of perpetrator information, procedures to protect adult and child safety, as well as special accountability forms and procedures recommended for supervision of access in domestic violence cases?<sup>167</sup> Does the centre have the expertise and capacity needed in order to:

- Distinguish types of domestic violence and match the level of supervision to the type of domestic violence and the level of risk
- Provide therapeutic access designed to protect the children from parenting problems associated with coercive domestic violence cases and to help children overcome fear and harm from domestic violence
- Educate perpetrators on the effects of domestic violence on children
- Ascertain changing risk and act quickly to protect targeted parents and children
- Prevent child abduction
- Enable the perpetrator to respond appropriately to the safety and developmental needs of the children?

In response to the possibility that a perpetrator may not be a suitable candidate for a particular supervision of access program (for reasons similar to those mentioned in connection with domestic violence intervention programs i.e. language,<sup>168</sup> culture, disability, continuing mental health or addiction problems, gender, sexual orientation, type or level of violence, level of danger, inappropriate parenting, or child safety

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<sup>167</sup> Refer to the Clearinghouse on Supervised Visitation, Institute for Family Violence Studies, at Florida State University: <http://familyvio.csw.fsu.edu/clearinghouse/> particularly the reports and compliance forms connected to “Standards and Best Practices” in domestic violence cases. See also: Mary Pulido, Stephen Forrester and Janine Lacina (2011) “Raising the Bar: Why Supervised Visitation Providers Should be Required to Meet Standards for Service Provision” 49 (2) *Family Court Review* 379-387; United States Department of Justice (2007) *Guiding Principles Safe Havens: Supervised Visitation and Safe Exchange Grant Program* on line at <http://www.ovw.usdoj.gov/docs/guiding-principles032608.pdf>

<sup>168</sup> As noted above, it is important that supervisors understand the language spoken by the perpetrator with the child.



concerns), problems can be avoided by:

- Ensuring that the named supervisor or agency has consented to the supervision (after being fully informed about the type and frequency of the domestic violence and after having had a chance to screen the candidate) and
- Ensuring that, if the supervisor determines that the perpetrator is not a suitable candidate for the service, specific directions have been given as to when and to whom the matter is to be redirected for reassessment and potential modification of the terms of parent-child contact

Supervisors of access should be given copies of all court orders and rulings relating to the domestic violence as well as information pertinent to risk. In *Dhillon v. Dhillon* (2001), 22 R.F.L. (5th) 269, 2001 YKSC 543, for example, Justice Veale took the extra precaution of ordering, as a condition of any future supervised access, that “the proposed supervisor would have to be informed about my findings of physical and psychological abuse. So informed, the supervisor should be required to keep the child in line of sight and hearing at all times.” On the other hand, where risk is low, all that may be required is supervision of the exchange of the children.

In sum, family and criminal lawyers (defence and Crown) involved in the case are advised to work with any child protection authorities involved, ideally in collaboration with domestic violence and child development experts, to design specific directions on the frequency and type of supervision required.

#### **10.4.1 Length of Supervision**

Generally, supervision of access has been viewed in family law cases as a short-term option for stabilization or for restoration of a positive relationship between the parent and child. It is not considered a long-term solution to deficient parenting, particularly when access offers no benefit to the child. Nonetheless, while many courts have expressed reluctance to grant long-term supervised access, the Ontario Court of Appeal has indicated a willingness to endorse supervision of access for longer durations, in exceptional cases, where such orders are in the best interests of the child and other options are not feasible: *C.A.M. v. D.M.*, 2003 CanLII 18880 (ON C.A.); *Merkand v. Merkand*, 2006 CanLII 3888 (ONCA), application for leave to appeal to Supreme Court of Canada dismissed; *Irshad Merkand v. Tallat Merkand*, 2006 CanLII 18512 (S.C.C.). See also *Slawter v. Bellefontaine*, 2012 NSCA 48 and Justice Blishen’s informative discussion of this issue in *V.S.J. v. L.J.G.*, 2004 CanLII 17126 (ON S.C.).

#### **10.4.2 Choice of supervision centre: when options are limited**

For obvious reasons, supervision of access by family members related to or romantically involved with the perpetrator should be avoided. The optimum practice is professional supervision, preferably by an access supervision centre that has special programming in place for domestic violence cases.

If the only available option is supervision by a non-professional acceptable to the targeted parent, it is particularly important for family and criminal lawyers working with child protection authorities, preferably in consultation with a domestic violence expert, to

clarify, in detail, expectations with respect to issues such as:

- Child, adult, and supervisor safety
- Supervisory role
- Degree and type of supervision required
- Policies if access appointments are missed (by the perpetrator or the ‘victim’)
- Policies if the supervisor is not available
- Confidentiality (and limits thereof)
- Information exchange policies
- Consent forms relating to release of information (specifying to whom the information is to be released) in the event of increasing risk, breaches of no contact orders, or concerns about parenting
- Reporting obligations, for example, to child protection authorities, to experts, to the other party, or to the court
- Medication and health issues
- Record keeping
- Referrals to other agencies
- Options and procedures with respect to cancelling supervision.

Access centres are far from uniform in nature or quality. Many were originally designed for use in child protection matters where family reunification is a goal. Some offer one-on-one individual monitoring and supervision; others offer a large room where multiple parties are supervised by a single supervisor. In some services the supervisor is present in the same room; in others the supervisor may be in a separate room with a monitor. Most supervision services, including some of the supervised access centres utilized by child protection authorities, utilize lay volunteers. Lay volunteers will often lack specialized domestic violence training, an understanding of parenting issues specific to the domestic violence context, and professional accreditation.

One should seek assurances of the quality of supervision, including checking the education of staff and the implementation of security policies. When specialized supervision is lacking in a community, lawyers and child protection authorities could consider working together with domestic violence experts and supervised access centres to educate and build capacity and to create special standards, processes, and forms for use in domestic violence cases.<sup>169</sup>

#### **10.4.3 Cautionary comments on evidence from supervisors of access**

Family lawyers will want to keep in mind that few supervisors of access are domestic violence or child development experts. Thus, while supervisors of access may testify on a lay basis as to observations during supervision, supervisory evidence is not dependable for evaluation of the parent-child relationship or to assess parenting.<sup>170</sup> For example, in *Kanwar v Kanwar*, 2010 BCCA 407 the court held that the success of supervised access was not proof that concerns about unsupervised access were no longer present.

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<sup>169</sup> For additional information, see the sources listed in note 167.

<sup>170</sup> Nat Stern & K. Oehme (2002) “[The Troubling Admission of Supervised Records in Custody Proceedings](#)” (MINCAVA)

Perpetrators are known to behave differently in public from the way they behave in private. The fact that a perpetrator is able to perform effectively as a parent under supervision is helpful information but does not by itself predict how the same perpetrator will behave when access is no longer monitored. See, for example, the concerns of the Manitoba Court of Appeal in *Weiten v. Adair* (2001), 21 R.F.L. (5th) 239, (2001), 156 Man. R. (2d) 308, 2001 MBCA 128. Refer as well to N. Stern & K. Oehme (2002) for an informative discussion of problematic evidence issues associated with admissibility and use of evidence from supervisors of access in domestic violence cases.<sup>171</sup>

### ***10.5 Programs for children***

While some children are more resilient than others (particularly those fortunate enough to have strong family support networks) and thus may recover spontaneously from exposure to coercive domestic violence, many children will benefit from participation in special domestic violence counseling programs for children. Indeed some children will require intensive, specialized therapeutic intervention for clinical problems associated with exposure. Yet, despite the obvious need, special programs for children have been rather late in coming. Thus evaluation research is limited.<sup>172</sup> Nonetheless a growing number of evaluations, guides and standards, some of them listed in the footnote,<sup>173</sup> offer useful guidance to lawyers, child protection authorities and service providers when choosing or establishing such services.

## **PART 11: CONCLUSIONS**

### ***11.1 Specialized Domestic Violence Courts***

Most collaborative initiatives in the domestic violence field have occurred in connection with specialized criminal courts. Davies, Dann and Di Luca, “[Best Practices where there is Family Violence \(Criminal Law Perspective\)](#)” document in a paper for the Department of Justice a new combined family / criminal court initiative in Toronto. Combined courts models should help to overcome some of the problems discussed here at the intersection of family, child protection and criminal cases, particularly as judges, Crown, defense, and family lawyers associated with such courts acquire specialized expertise in the domestic and family violence fields.

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<sup>171</sup> Stern & Oehme, *ibid.*

<sup>172</sup> Sandra Graham-Bermann (2001) “Designing Intervention evaluations for children exposed to domestic violence: Applications of research and theory” in Sandra Graham-Bermann and Jeffrey Edleson (ed.) *Domestic Violence in the lives of children: The future or research, intervention, and social policy* (Washington: American Psychological Association) 237-267.

<sup>173</sup> Leslie Tutty, Sarah Anne LeDrew et al. (2008) [The Evaluation of Saskatchewan's Children Exposed to Domestic Abuse Programs Final Report](#) (Regina: YMCA); Peter Jaffe, Linda Baker and Alison Cunningham (2004) *Protecting Children from domestic violence: strategies for community intervention* (New York: Guilford Press); U.S. Department of Justice and U.S. Department of Health and Human Services (2011) [Evidence-Based Practices for Children Exposed to Violence: A Selection from Federal Databases](#); Lias Jaycox, Laura Hickman et al (2012) [National Evaluation of Safe Start Promising Approaches Assessing Program Outcomes](#) (Rand Corporation).

Nonetheless there are also advantages of separate courts. Some authors caution that integrated courts could compromise some of the specialization, checks and balances, and thus protections offered by divided court processes.<sup>174</sup> Thus another model that may be worthy of consideration is a coordinated court model wherein the courts would still specialize in family, criminal and or child protection matters and these matters would still be heard by different judges but the proceedings, evidence, and court-related services could be co-ordinated by a court coordinator, advised by a cross-sector community family violence committee, to offer advice from time to time in connection with management of high risk cases and procedural reform.

### ***11.2 Concluding comments: Responding to challenge***

The social, economic, and personal costs of domestic violence challenge us to search for timely, long-lasting, effective solutions. Every time our legal systems fail families, the costs multiply. While the causes and solutions to domestic violence - particularly the need for the legal system to respond to domestic violence in a seamless, coordinated fashion - are reasonably clear, and have been reasonably clear for some time, achieving solutions has remained an elusive goal. Cross disciplinary and cross sector legal complexities continue to present formidable obstacles. Yet much can be done to overcome obstacles through cross-legal-system partnerships and collaboration at the intersection of court systems. It is hoped that this manual will encourage and support cross-sector collaboration for the end cause of keeping Canadian families and children safe.

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<sup>174</sup> Elizabeth Mac Dowell (2011) “When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism” Vol 20 *Texan Journal of Women and the Law* 95; Erika Rickard (2011) “Civil Protection Orders in Integrated Domestic Violence Court: An Empirical Study” (Scholarship at Harvard) on line: [http://works.bepress.com/erika\\_rickard/1/](http://works.bepress.com/erika_rickard/1/)