VIOLENCE AGAINST WOMEN AND CHILDREN: SOME LEGAL ISSUES

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INTRODUCTION

Family violence is a pervasive problem in Canada. Affected families frequently find themselves before the courts, in criminal proceedings, family law proceedings, or often, both. If there are children, the spouses may have regular contact for years after separation. Often, this contact provides an opportunity for the abuse to continue.

The challenge for lawyers, judges, police, court staff, community service workers and other professionals is to understand the complex dynamics of family violence and work to ensure that all family members – women and children and men – are safe from violence and abuse.

This article addresses some legal issues faced by victims of spousal abuse and their children. The focus of the article is on violence directed against women and children.[1]

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[1] Overwhelmingly, domestic violence is committed by men, against women and children. Police Forces across North America report that 95% of family violence victims are women and children. Peter Jaffe, "Children of Domestic Violence: Special Challenges in Custody and Visitation Dispute Resolution" in Nancy K.D. Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes* (San Francisco: Family Violence Prevention Fund, 1995) 19 at 20. Anyone can find themselves in an abusive relationship – men,

Some Statistics[2]

- Nearly 3 in 10 Canadian women (29%) who have ever been married or lived in a common law relationship have been physically or sexually assaulted by a marital partner at some point during the relationship (Canadian Centre for Justice Statistics, 1994);

- Women are 8 times more likely to be victimized by a spouse than are men (Fitzgerald, 1999);

- Of 33775 victims of spousal violence reported to police in 1997, 28633 (85%) were female and 5142 (15%) were male (Statistics Canada, 2000);

- One-third of women who were assaulted by a partner feared for their lives at some point during the abusive relationship (Rodgers, 1994);

- 2598 spousal homicides were recorded in Canada since 1974. 2000 victims (77%) were women. There were 67 spousal homicides in Canada in 2000; three-quarters of victims were women; During the same year, 31

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women, gays, lesbians, bisexuals and trans-gendered persons. The fundamental aspects of domination, power, and control are common to all abusive relationships but there are also many differences.

2 Cited in the FREDA Centre for Research on Violence Against Women and Children, "Violence against Women: Statistical Highlights" (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2000), online: <http://www.harbour.sfu.ca/freda/reports/gss01.htm>; or The Coalition for Woman Abuse Policy and Protocol, "Woman Abuse in Canada" (P.E.I.: The Coalition for Woman Abuse Policy and Protocol, 1993), online: <http:www.isn.net/cliapei/womanabuse/woman.htm> unless otherwise noted

children were killed by family members. (Statistics Canada, 2002)

- When a man is killed by a woman, the most common precursor is domestic violence against the *woman* (75% of cases) (Campbell *et al.*, 2003);

- In almost two-thirds of wife assault cases, violence occurred on more than one occasion (Rodgers, 1994);

- 49% of women who reported spousal violence in 2000 also reported injuries (Rodgers 1994);

- Abuse is the single major cause of injury among women – more frequent than auto accidents, muggings and rapes combined (Hadley, 1992);

- Women constitute 98% of spousal violence victims of kidnapping, hostage-taking and sexual assault (Fitzgerald, 1999);

- Until 1983, a man in Canada could not be charged with the rape of his wife, even if the couple were separated;[3]

- Of the 1990 solved homicides of children and youth recorded by police in Canada between 1974 – 1999, family members (including women and siblings) were responsible for 63% of the deaths;[4]

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[3] Nicholas Bala & Sara Edwards, "Legal Responses to Domestic Abuse," (1999) online: Family Law Centre <http://www.familylawcentre.com/ccbafadomviolence.html>.

[4] Statistics Canada, *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: National Clearinghouse on Family Violence, 2003), online: Statistics Canada <http://www.statcan.ca/English/freepub/85-224-XIE/0100085-224-XIE.pdf> at 15.

- Over the past two decades, three times more wives than husbands were killed by their spouses (Fitzgerald, 1999);

- A large majority of wife killings are precipitated by a man accusing his partner of sexual infidelity; by her decision to terminate the relationship, and/or by his desire to control her (Wilson and Daly, 1994);

- Female victims are most frequently stalked by a current or former partner: 39% by an ex-husband, 2% by a current husband and 17% by a current or former boyfriend (Kong, 1996);

- When men receive counselling for abusive behaviour, 81% of women will return to the relationship; even when men receive no counselling, 70% of women return to the relationship (Fitzgerald, 1999);

- 4 in 10 women who experience spousal violence report that their children witnessed the violence. This means that more than 1 million Canadian children have witnessed violence by their fathers against their mothers (Fitzgerald, 1999);

- Women currently in violent marriages were three times as likely as women in non-violent marriages to state that their fathers-in-law were violent to their spouses, and were twice as likely to have witnessed their own fathers assaulting their mothers (Rodgers, 1994).

This article addresses dual charging, "no contact" orders, lethality assessment tools, mediation, and selected aspects of custody and access. This article does not attempt a review of case law. Others have already produced excellent overviews of case law on custody and access where there are

issues of abuse.[5] A number of other important issues are beyond the scope of this paper, including child sexual abuse, *K.G.B./F.J.U.* applications and recanting spouses, Bill C-22 (amending the *Divorce Act)*, provincial domestic violence legislation, spousal tort liability,[6] and law reform,[7] among others.

DUAL CHARGING/CROSS-CHARGING

Commencing in 1983, all jurisdictions in Canada adopted pro-arrest, pro-charge policies (also called mandatory arrest provisions) as a response to what was seen as unacceptably low charge rates and prosecution rates in domestic violence cases.[8]

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5 See, for example, Martha Shaffer & Sheila Holmes, "The Impact of Wife Abuse on Custody and Access Decisions" (Paper presented to the Canadian Bar Association's National Family Law Conference, St John's, Nfld., July 2000). See also Linda Neilson's work, "Spousal Abuse, Children and the Courts: The Case for Social Rather Than Legal Change" (1997) 12 C.J.L.S. 101; Linda Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Y.B. Access Just. 115.

6 For an interesting look at the development of inter-spousal tort liability, see Sheila Holmes & Martha Shaffer, "From Interspousal Tort Immunity to Interspousal Tort Liability" (Paper presented to the Canadian Bar Association's National Family Law Conference, St John's, Nfld., July 2000).

7 For an excellent, comprehensive look at key law reform issues, see Bala *et al., Spousal Violence in Custody and Access Disputes: Recommendations for Reform* (Ottawa: Status of Women Canada, 1998).

8 The R.C.M.P. adopted their wife assault charging policy in 1986. Nova Scotia adopted a pro-charge, pro-prosecution policy in 1996. In one London, Ontario study, Jaffe *et al.*, found the charge rate for spousal assaults had risen from 3% in 1979 to 89% in 1990 as a result of the implementation of pro-charge policies. See Dawn Russell & Diana Ginn, *Framework for Action Against Family Violence: 2001*

The policies are designed to remove discretion from police officers (and sometimes prosecutors) and to eliminate any incentive on the part of an accused to coerce his spouse to withdraw charges by requiring that charges proceed regardless of the spouse's wishes in the matter. All Canadian jurisdictions have spousal abuse policies with many key elements in common, including pro-charge, pro-prosecution requirements.[9]

Once instituted, pro-arrest, pro-charge policies had a "perverse and unintended"[10] effect: a significant increase in the arrest of both the offender *and* the victim. In Concord, New Hampshire, the percentage of women arrested for domestic violence rose from 23% in 1993 to 35% in 1999. Vermont saw a similar increase from 16% in 1997 to 23% only two years later, in 1999.[11] In Connecticut in 1997, both parties were arrested in 53% of all adult intimate violence arrests.[12] In Nova Scotia, charge rates (both sexes) increased from 34% in 1995 to 47% in 1997.[13] One organization described the problem this way:

> Dual arrests may occur for a variety of reasons. Police responding to domestic violence calls may be confronted with sharply conflicting accounts of what transpired, with each party

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Review c. Summary of Findings at 1 (Nova Scotia: Department of Justice, 2001) online: Nova Scotia Department of Justice <http://www.gov.ns.ca/just/Publications/russell/toc.htm>.

9 Russell & Ginn, *ibid.*, c. Summary of Findings at 9.

10 Margaret E. Martin, "From Criminal Justice to Transformative Justice: The Challenges of Social Control for Battered Women" (1999) 2 Contemp. Just. Rev. at 423.

11 C. Goldberg, "Spouse Abuse Crackdown, Surprisingly, Nets Many Women" *The New York Times* (23 November 1999) A16.

12 Martin, *supra* note 10 at 423.

13 Russell & Ginn, *supra* note 8, c. Police at 3.

> claiming to be the victim. The victim may have used justifiable force against the abuser in self-defence. A false cross-complaint may be made by the abuser. Both parties may exhibit some injury. The police may fear that failure to arrest both parties may result in civil liability.
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> When dual arrests occur in domestic violence cases, the victim of domestic violence is re-victimized by the criminal justice system. It is likely that a victim who calls the police only to be arrested herself will avoid the criminal justice system the next time she is abused – the exact opposite of the intention of ... the Act.[14]

In sexual assault cases, women who do not actively defend themselves risk the suggestion that they consented; in contrast, abused women who do defend themselves risk being labelled as "mutually violent."[15]

New York State is one of many jurisdictions that created *Primary Physical Aggressor Guidelines* in response to the foregoing concerns.[16] The 1998 Guidelines provide that police shall not make cross-complaint arrests based solely on

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[14] Office for the Prevention of Domestic Violence, "Spring 1999 Bulletin" (Albany, NY: Office for the Prevention of Domestic Violence, 1999), online: New York State Office for the Prevention of Domestic Violence <http://www.opdv.state.ny.us/public_awareness/bulletins/spring1999/aggressor.html>.

[15] Sandy Chesnut, "The Practice of Dual Arrests in Domestic Violence Situations: Does it Accomplish Anything?" (2001) 70 Miss. L.J. 971 at 974.

[16] *Primary Physical Aggressor Guidelines*, c. 4 pursuant to the Laws of 1997 (New York State), cited in "Spring 1999 Bulletin", *supra* note 14.

the parties' allegations. Police are required to arrest the person whom police conclude was the "primary physical aggressor." The Guidelines provide an explicit list of factors to consider when making the assessment:

> a) the primary physical aggressor is not necessarily the person who was first to use force;
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> b) the comparative severity of any injuries inflicted by and between the parties;
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> c) whether any such person has made threats of future harm against another party or another family or household member;
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> d) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain;
>
> e) whether any such person acted defensively to protect himself or herself or a third person from injury.[17]

The Guidelines go on to require that the officer *not* consider "the willingness of a person to testify or otherwise participate in a judicial proceeding,"[18] and that no arrest shall be made for acts which officers have "probable cause to believe were committed in self-defence in accordance with [state law]."[19]

Prince Edward Island's domestic violence policy specifically deals with dual charging by requiring officers to

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17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

consult with the Crown and consider a number of factors in determining whether to charge both parties, including: "the parties' relative size, strength, demeanour, and gender, statements of witnesses (including children); reasonableness and timing of the counter-accusations; and visible marks."[20]

For abused women who are cross-charged, it is becoming increasingly difficult to address the matter short of a trial. Police officers may incorrectly represent self-defence as "mutual violence" in police reports relied on by prosecutors in exercising their discretion.[21] What discretion is available to prosecutors has been eroded and replaced in a number of jurisdictions with "no drop" policies.[22] The 2001 Review of Nova Scotia's *Framework for Action Against Family Violence* found a number of police officers under the (mistaken) impression that the Province's pro-charge policy *required* them to lay a charge in every case where there was a complaint, even if they believed that they did not have reasonable and probable grounds to lay the charge. Some police officers felt the discretion left in the policy was "more theoretical than real, given the direction of the Attorney General to police and the accountability of front line police to superior police officers."[23]

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20 Russell & Ginn, *supra* note 8, c. Police at 8. Visible marks may be an unreliable indicator of aggression. See Chesnut, *supra* note 15 at 974.

21 Melissa Hooper, "When Domestic Violence Diversion is No Longer An Option: What to Do with the Female Offender" (1996) 11 Berkeley Women's L.J. 168 at 173.

22 For example, in Nova Scotia, prior to withdrawing a spousal assault charge, Crowns are required to consult with the investigating officer and, if possible, the Regional Crown Attorney or a delegate. A decision to discontinue a prosecution must be reported to the Deputy Director of Public Prosecutions. Where public interest considerations are the reason for the decision not to proceed, those reasons are to be stated in open Court unless it would be inappropriate. See Russell & Ginn, *supra* note 8, c. Crown Attorneys at 5.

23 Russell & Ginn, *supra* note 8, c. Police at 5.

Mandatory prosecution policies first put into place to protect women from coercion to drop charges have also been criticized as re-victimizing women and as transferring the control and coercion from the batterer to the prosecutor or to the justice system.[24] The increase in prosecutions comes at a price. An abused woman may now be "forced to assist in the criminal prosecution of an abusive partner, regardless of her physical danger from retaliation assault, her cultural and religious misgivings about breaking up the family, her economic vulnerability to the loss of spousal support, and her individual need for agency and control."[25] She may face charges herself.

In Nova Scotia, approximately 61% of spousal assault charges are disposed of by a guilty plea. Charges are stayed in 1% of cases and withdrawn in 10%. The Court dismisses the charge in 9% of cases (likely as a result of want of prosecution when a key witness such as the alleged victim or a police officer does not attend for trial). Of the cases that go to trial, an accused charged with spousal assault has roughly a 50/50 chance of acquittal: 11% of cases result in a finding of guilty and 8% result in acquittal.[26]

As indicated by Nicholas Bala, physical and sexual assaults of women by intimate partners have not been treated with the same degree of seriousness as assaults against strangers.[27] Even now, first offenders generally receive a

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24 Martin, *supra* note 10 at 424.

25 Deborah Epstein, "Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System" (1999) Yale L.J. & Feminism 3 at 5.

26 *Ibid.*, c. Summery of Findings at 4 (these statistics are based on data collected between January 1, 1997 to March 31, 1997).

27 Bala & Edwards, *supra* note 3 at 10.

sentence of probation, unless the assault was very serious.[28] In Nova Scotia from 1996 to 1998, 57% of spousal assault convictions result in a sentence of probation, followed by custodial sentences (22%), fines (11%), conditional sentences (8%) and other dispositions (2%) including conditional discharges.[29]

The difficulty with non-custodial sentences lies with a lack of resources to monitor compliance with the conditions imposed by the Court. According to Russell & Ginn, without effective monitoring "victims perceive that offenders are breaching their conditions with impunity." Imposition of anger management counselling as a condition is also problematic. Offenders require spousal abuse treatment, not anger management counselling.[30] The two are not synonymous. In Nova Scotia, wait times to access the counselling can be twelve months with the result that the probation period is ending before the offender has started treatment. However, where offenders do enter treatment, it can produce very successful results. 86% of victims in one Ontario study reported feeling safer three months into their spouse's treatment. A two-year Calgary treatment program was successful in eliminating violence in 85% of participants for the duration of the program.[31]

"NO CONTACT" ORDERS

The cycle of violence first described by Lenore Walker in 1984 is particularly important to understanding the complexities of

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28 *Ibid.* at 9.

29 Russell & Ginn, *supra* note 8, c. Courts at 5.

30 *Ibid.*

31 *Ibid.*, c. Gaps in the 1995 Framework for Action Against Family Violence at 3.

contact and no contact in domestic violence cases.[32] Walker described a model of the cycle of violence as having three separate and distinct phases:

(a) *Tension-building*: increasing tension and verbal abuse, with the abused spouse attempting to placate her partner. The tension builds until there is an acute battering incident;

(b) *Acute battering incident*: involving verbal, physical and possibly sexual abuse. The woman may leave or call police at this stage;

(c) *Loving contrition by the abuser*: The batterer is remorseful, apologizes and may send flowers or "court" his partner. She wants to believe that he will not assault her again and may resume the relationship. Without intervention, it is virtually inevitable that the pattern will reoccur, sometimes with the level of violence increasing.

The cycle repeats at varying intervals, from weeks to months or even years. Police are often called, and charges laid, immediately after the acute battering incident. When the relationship moves into one of the other two phases, women may seek to have "no contact" bail provisions deleted, whether out of pressure, fear, or a desire to resume a relationship with their spouse.

Criminal Code bail and probation conditions specifying "no contact" are the most effective means (other than custody) to prevent contact between parties, because they are the most enforceable, and because they carry the most

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[32] Lenore Walker, *The Battered Woman* (New York: Harper and Row, 1979), cited in Carole Curtis, "Representing the Assaulted Woman in Family Law Cases: A Practical Approach" (Toronto: Carole Curtis Barristers & Solicitors, 1999) (QL).

immediate and severe consequences for breach. Peace bonds and restraining orders pursuant to civil domestic violence legislation are the next most effective (though a distant second place), and "no contact" terms in custody and access orders the least effective, because of several factors, including police reluctance to enforce these orders in certain circumstances, lack of timely, significant consequences for breach, and lack of a timely enforcement mechanism.[33]

The primary drawback of *Criminal Code* "no contact" orders is that it is still relatively common for release orders to permit various exceptions, particularly for access to children. Peace bonds are generally considered a useful option only where there is insufficient evidence to lay a charge.[34] In recent consultations for the Nova Scotia *Framework for Action on Family Violence*, abused women characterized peace bonds as "useless" because police rarely enforce them and their spouses were not deterred by them.[35]

If there are no criminal charges, a "no contact" order can come from a common law or s. 810 *Criminal Code* peace

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[33] See *e.g.* Bala & Edwards, *supra* note 3 at 14. Section 127 of the *Criminal Code*, R.S.C 1985 provides that it is an indictable offence to disobey a lawful order of the Court without lawful excuse, except as regards payment of money. The maximum sentence is two years in prison. However, this section is not available for enforcement of family law orders unless there is no other enforcement mechanism specified by law. Multiple courts have held that contempt of court proceedings constitute an "other enforcement mechanism." Parties who need to enforce family court orders are therefore left with only contempt of court applications. Such applications are extremely rare, not because orders are infrequently breached, but because the enforcement process does not lend itself to the same kind of police assistance, prompt reaction and timely resolution as breach charges handled through the criminal courts.

[34] Russell & Ginn, *supra* note 8, c. Police at 8.

[35] *Ibid.*

bond, civil domestic violence legislation, or as part of a custody/access order. However, if the abuse was primarily verbal, emotional or financial, if it has been some time since the last episode of physical violence, if the woman has had voluntary contact with her spouse since the separation, or permits her children to have unsupervised contact with him because she does not feel he would harm them directly, it is possible that a "no contact" order may be denied.[36] The only thing worse than needing this type of order, is needing one and not getting one. Any success in Court will embolden an abusive spouse and could shatter the confidence of the abused woman in herself, and her belief that the justice system will protect her.

Even when an order is granted, it is becoming "increasingly difficult" to protect an abused woman who remains in the matrimonial home after separation, though she may feel that this is a safe place for her and her children.[37] Neighbours or babysitters may let her spouse into the house. He may stalk her or break into the house. The children may allow him to come in.[38] At minimum, she should change the locks immediately.

Once in place, "no contact" orders should only be varied after a careful consideration of the surrounding circumstances. In Nova Scotia, Crown Attorneys generally require the complainant to testify as part of the application to have the bail conditions varied.[39] (Questions asked of the woman at this time may elicit confirmation under oath that the assault did in fact occur.) Nova Scotia's *Framework For Action Against Family Violence* found that there was "deep and

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36 See Bala *et al.*, *supra* note 7 at 36.

37 Carole Curtis, "Representing the Assaulted Woman in Family Law Cases: A Practical Approach" (Toronto: Carole Curtis Barristers & Solicitors, 1999) (QL) at para. 48.

38 *Ibid.*

39 Russell & Ginn, *supra* note 8, c. Crown Attorneys at 4.

widespread concern that judges need training to enhance their understanding of the complex dynamics of intimate partner violence, of the many pressures which can be brought to bear on the victim by the alleged perpetrator, and of the post-traumatic stress disorder that long term abuse often causes in women."[40] In response to this concern, the Province circulated copies of the Report to the province's Chief Justices and Judges.

Another difficulty is the problem of conflicting court orders. If there is a family court order granting unsupervised access to children on alternate weekends and a criminal court order requiring that a spouse have "no contact" with his wife or children, which order takes precedence? Most participants in the consultations around Nova Scotia's *Framework For Action Against Family Violence* agreed that the criminal court order should take precedence, particularly if it was the most recent order. It was also generally agreed that family and criminal court judges should make a point of requiring that counsel find out about and advise the court as to any other outstanding orders. The solution proposed in the Report – to word no contact provisions as "no contact except with another person present for the purpose of arranging access to the children" – is a positive step forward.[41]

The problem with allowing exceptions, or "wiggle-room" in "no contact" orders is that they can seriously compromise the safety and well-being of the woman they are designed to protect. First, such orders become extremely difficult to enforce. Instead of having to prove the fact of contact, the Crown is faced with having to prove contact that went beyond permissible limits. Second, such orders do little to protect the woman from ongoing verbal and emotional abuse.

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[40] *Ibid.*, c. Police at 7.

[41] *Ibid.*, c. Police at 7, 10.

A great deal of abuse has been inflicted on women ostensibly while discussing "the children."

These are the characteristics of an effective "no contact" order:

- The order should provide for "no contact of any kind, direct or indirect" and if necessary, include no contact with the children. If there is concern about pre-empting concurrent family or criminal law proceedings, the order can be made "pending further order of a court of competent jurisdiction."

- Exceptions for access with children should be structured around a third party (ideally someone acceptable to both parents, but since this is often an area around which no agreement can be reached, the person should at least be someone with whom the abused spouse feels safe.) The person should be designated in writing. The order should require all communication between the spouses to go through the third party and the third party to be present for all access exchanges, as a precondition of access. This can be cumbersome but is the only way to minimize the risk. Even third party exchange supervision will not prevent harm where one spouse is intent on harming the other. (Many orders currently allow broad exceptions allowing significant opportunity for abuse, such as "no contact, except to communicate regarding the children," or "no contact, except for access exchanges," "no contact, except by telephone," or "no contact, except with the consent of the wife.") If the order is breached, it becomes difficult or impossible to prove when and how contact shifted from being permissible to impermissible. Police may be extremely reluctant to enforce these weak orders or lay charges for breach.

- Include a term that the spouse remain away from certain places (i.e. the woman's home or workplace, the children's school, etc). Unless the woman's address must remain secret, set out each prohibited address in the order. If there is a prohibited space (i.e. 500m) then this should be set out as well.[42]

- Ensure that police will enter any peace bond order on CPIC by meeting the necessary criteria ("specific, detailed information and an expiry date of not more than 5 years"). When the order is issued, send a certified copy to police with a request that it be entered into the computer system. Orders under civil domestic violence or family law legislation should also be forwarded to police. [43]

- Provide the woman with at least two certified copies of the order.

It is important to note that "no contact" orders are frequently breached. It has been said that they are "not worth the paper they're written on." Such orders are most likely to be effective where a spouse

> wants to preserve his reputation in the community or his relationship (either with victim or access to his child). The psychological and deterrent effect of appearing in court and being told by a judge 'keep the peace' and perhaps obey other conditions, is most likely to be effective if history of violence is limited and there is no prior criminal record or history of defying court orders.[44]

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[42] Curtis, *supra* note 37 at para. 51.

[43] *Ibid.*

[44] Bala & Edwards, *supra* note 3 at 12.

As was noted in *Spousal Violence in Custody and Access Disputes*, "court orders only provide protection if the abusive spouse has a basic respect for the legal system, which is often not the case, or has a realistic fear of a quick police response."[45]

Research shows that in almost 50% of cases, violence decreases after police intervention.[46] Research also shows that breaches of "no contact" orders increase risk to abused women. Women whose spouses are bound by "no contact" bail provisions should be advised to call police and report every breach of the order. Some (perhaps most) women permit contact, or at least do not call police, if the contact with their spouse is not abusive. Weeks or months later, there will be another assault and she will call police. Women should be advised that they cannot pick and choose which contacts are acceptable and which are not without seriously compromising the protective nature of the order.

Even breaches that appear innocuous must be taken seriously, for two reasons. The first is that to treat these breaches differently is to respond as if the order required only that the accused "keep the peace and be of good behaviour." "No contact" orders impose additional obligations. Second, any contact with the accused can be terrifying for his spouse, a fact well known to him. When a woman arrives home to find a hand-delivered card in her mailbox or flowers on her doorstep from him, she knows that he has been there and that he is watching her. These are not loving gestures. They are designed to elicit and do elicit great fear.

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45 Bala *et al.*, *supra* note 7 at 36.

46 Karen Rodgers, "Wife Assault: The Findings of a National Survey" (1994) 14:9 Juristat 1 at 17.

USE OF LETHALITY/DANGEROUSNESS ASSESSMENT TOOLS

A number of different tools have been created to assess whether a batterer will kill his spouse. However, there has been little research on the precise links between lethality/dangerousness assessment tools and research into spousal homicide.[47] It is impossible to know precisely which spousal relationships will end in homicide.[48] Many abusive relationships exhibit a number of the characteristics set out in lethality/dangerousness tools and yet do not end with the death of one or both spouses by homicide.[49] Less than 1% of abused women are killed by their spouses or partners.[50]

However, according to Dr. Neil Websdale, research has identified a number of common antecedents that often emerge in lethal situations. In order of importance, they are:[51]

- A prior history of domestic violence. [In 2000, 67% of Canadian spousal homicides included a history of reported domestic violence[52]]

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47 Neil Websdale, "Lethality Assessment Tools: A Critical Analysis" (Minnesota: Center Against Violence & Abuse, 1999-2003), online: Violence Against Women Online Resources <http://www.vaw.umn.edu/documents/vawnet/lethality/lethality.html > at 1.

48 *Ibid.* at 5.

49 *Ibid.*

50 *Ibid.* at 1.

51 *Ibid.* at 3.

52 Statistics Canada, *Family Violence in Canada: A Statistical Profile 2002* (Ottawa: Statistics Canada, 2002), online: Statistics Canada <http://www.statcan.ca/english/freepub/85-224-XIE/85-224-XIE00002.pdf> at 11-12.

- Estrangement, separation, or an attempt at separation nearly always by the female party.

- A display of obsessive-possessiveness or morbid jealousy on the part of the eventual perpetrator; often accompanied by suicidal ideations, plans, or attempts; depression (clinical or more rarely, psychotic); sleep disturbances (sometimes under treatment medically), and stalking of the victim. [Jealousy is the most common motive for killing an ex-partner; 41%, while escalation of an argument is the most common motive for killing current spouses; 56%.[53]]

- Prior police contact with the parties, more so in cases of single killings; often accompanied by perpetrators failing to be deterred by police intervention or other criminal justice initiatives.

- Perpetrator makes threats to kill victim; often providing details of intended *modus operandi* and communicating those details in some form or other, however subtle, to the victim herself, family members, friends, colleagues at work, or others.

- Perpetrator is familiar with the use of violence and sometimes has a prior criminal

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[53] Statistics Canada, *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: National Clearinghouse on Family Violence, 2001), online: Statistics Canada <http://www.statcan.ca/english/freepub/85-224-XIE/0100085-224-XIE.pdf> at 34.

history of violence. Included in this group are a small but significant number of killers who have both access to and a morbid fascination with firearms. [40% of women killed by their spouses in Canada, between 1974 - 2000, were killed by shooting, 23% by stabbing, and 32% by beating/strangulation.[54]]

- Perpetrator consumes large amounts of alcohol and/or drugs immediately preceding the fatality; especially in cases of single killings.

- Victim has a restraining order or order of protection against perpetrator at time of killing. [8% of accused had a restraining order against them at the time of killing.[55]]

A recent American study identified the following additional risk factors: abusive spouse unemployed; woman has a child from a previous relationship in the home (step child), never living together, and forced sex. However, the primary risk factor identified in the study was access to firearms.[56]

While it is extremely rare, spousal homicides do occur when none or very few of the risk factors are present (or at least, do not appear to be present).[57] Professionals using these

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54 *A Statistical Profile 2002, supra* note 52 at 11.

55 *A Statistical Profile 2001, supra* note 53 at 35.

56 J.E. Bailey *et. al.*, "Risk Factors for violence death of women in the home" (1997) 157 Arch Int Medi 777 at 782 cited in J. Campbell *et al.*, "Medical Lethality Assessment and Safety Planning in Domestic Violence Cases" (2003) 5 Clinics in Family Practice 101.

57 Websdale, *supra* note 47 at 5.

assessment tools should take care not to leave the abused woman with the impression that she is not at risk if none or only a few of the risk factors are present. Risk is not an exact science. Any violent relationship might end in homicide.[58]

No assessment tool can take the place of safety planning or listening to the abused woman for her assessment of danger. If she feels she is in grave danger, it should be taken seriously. However, abused women may underestimate the danger; in one study of femicide, approximately half the victims did not feel that they were at risk to be killed.[59]

Care should be taken not to send a copy of the assessment tool home with the abused woman – her spouse discovers the form, it could place the woman in serious danger.[60] The tool should be administered in a sensitive manner that strikes a balance between ensuring that the abused woman is apprised of the fact of risk without unduly or unnecessarily compounding her fear.[61] A sample assessment tool is attached in Appendix "B."

MEDIATION

The advancement of mediation in the family courts is a progressive development and a means for many families to avoid the crushing bitterness and permanent damage to relationships that often follows litigation. However, there is a growing body of evidence showing that it is difficult, and may well be impossible, to mediate between an abused and abusive

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58 *Ibid.* at 5.

59 Campbell *et. al.*, *supra* note *56* at 10.

60 Websdale, *supra* note 47 at 6-7.

61 *Ibid.*

spouse in a manner that puts the two on the necessary equal footing.[62]

> Women's advocates have expressed specific concerns about the dangers of mediation for women. A particular concern is whether it is appropriate for women who are exiting violent or abusive relationships, or for women who have been controlled and dominated by their partners. These critics observe that mediation is designed for parties who enter into negotiations voluntarily and who share equal bargaining power ... Proponents of family mediation point to a number of factors that make mediation an attractive alternative dispute resolution method. These factors include that mediation (a) is non-adversarial and emphasizes joint problem solving by the parties, (b) results in agreements with higher compliance rates, (c) is less costly and less time-consuming; and (d) has higher rates of satisfaction among its users.[63]

Unfortunately, none of these benefits materialize in mediations in cases involving domestic violence. Kerr and Jaffe concluded that "mediators who understand the dynamics of domestic violence usually refuse to mediate custody and

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62 Peter Jaffe & Robert Geffner, "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service and Legal Professionals" cited in Robert Geffner *et al.*, *Children Exposed to Marital Violence: Theory, Research and Applied Issues* (Washington: American Psychological Association, 1996) at 393-94.

63 Sandra A. Goundry *et al.*, *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) online: Status of Women Canada <http://www.swc-cfc.gc.ca/pubs/familymediation/index_e.html>.

access issues in such cases."[64] Nonetheless, a 2001 study concluded that fifty to eighty per cent of cases referred to court-based divorce and custody/access mediation programs involved domestic violence.[65]

Some common concerns about mediation arising out of a 1998 *Status of Women Canada* literature review and interviews with policy-makers and service providers at four publicly funded mediation programs in Canada were that:

- Policy-makers and service providers have not properly assessed the impact of family mediation programs on women's equality. Instead, mediation has been characterized as an attractive cost-saving policy option.

- Many subtle and not-so-subtle pressures that encourage and even compel parties to opt for family mediation over other mechanisms of dispute resolution are eroding the voluntariness of mediation. The recent introduction of mandatory family mediation legislation in Quebec is a cogent example of this erosion.

- The lack of structures and processes to ensure mediator accountability, including certification standards, academic

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64 S. Grace Kerr & Peter G. Jaffe, "The Need for Differentiated Clinical Approaches for Child Custody Disputes with Findings of Domestic Violence and Legal Aspects of Domestic Violence and Custody/Access Issues" (Paper presented to the National Family Law Program Conference, 1998) at 23.

65 A. Zylstra, "Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators" (2001) 2 J. Disp. Resol. 253.

> qualifications and training may result in inconsistent standards of practice and quality of service.
>
> - Serious concerns still exist about the inability of mediation services to screen out, with a high degree of accuracy, those women who have experienced violence or abuse and for whom mediation could provoke a dangerous situation. Tools have been introduced to screen out inappropriate cases and, where cases have been accepted for mediation, to balance power where there is unequal power between the parties. However, the effectiveness of these tools is not yet fully understood and therefore must be evaluated.[66]

All of these concerns were echoed in a recent study on abused women in family mediation conducted for the Transition House Association of Nova Scotia (THANS). The January 2000 study concluded that mediation and conciliation re-victimized abused women, who reported that mediation was the "single most painful aspect of their search for resolution of family issues with an abuser."[67] Abused women felt that mediation led to unfairness and was a "waste of time and resources" (theirs and the government's) as they knew from the beginning that it was "bound to fail."[68] The study reported that many of the mediators "showed limited ability to detect or handle abuse issues."[69] Women felt coercive pressure to agree

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66 Goundry *et al.*, *supra* note 63 at 3.

67 Transition House Association of Nova Scotia, *Abused Women in Family Mediation: A Nova Scotia Snapshot* (Halifax: T.H.A.N.S., 2000) at 7.

68 *Ibid.* at 3.

69 *Ibid.*

to, and did agree to (ostensibly voluntary) mediation when it was raised by conciliators, their lawyers, and particularly when it was raised by judges.[70]

The THANS report recommended that if it comes to the attention of any conciliator, mediator, lawyer or judge that there is "any history of physical, sexual, emotional, psychological or financial abuse" between the parties that they "should not be considered candidates for self-representation in less formal justice processes such as mediation," and that mediation should be neither offered, recommended, nor ordered for these parties.[71] This was so, even if the abuse was disputed, since the focus at this stage was not on fact-finding but on the suitability of both parties as candidates for alternative dispute resolution.[72] The report further concluded that the problem was likely "irremediable" as a result of "systemic problems such as access to legal aid, ineffectiveness of protection orders, and current judicial understanding of abuse issues."[73]

Some of the problems raised in the THANS report include:

- Many women did not recall any screening for abuse or questions about the history of their relationship. Some mediators inquired only about safety concerns or the impact of abuse on children or assumed that all women could identify different types of abuse;[74]

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70 *Ibid.* at 16.

71 *Ibid.* at 13.

72 *Ibid.* at 8.

73 *Ibid.* at 3.

74 *Ibid.* at 13.

- Women frequently did not disclose abuse to conciliators or mediators because they were uncomfortable or felt it was inappropriate;[75]

- Some mediators or "conciliators minimized emotional, psychological or financial abuse, or simply did not recognize certain behaviours as abusive."[76] No mediator in the study screened out parties for emotional abuse in the absence of physical abuse;[77]

- "When women brought up the fact that their ex-partner was harassing, stalking, or otherwise continuing to abuse them, their mediators did not terminate the mediation."[78] In some cases, mediators failed to recognize ongoing abuse and harassment that occurred *during* the mediation (both inside and outside of sessions) even after the woman discussed her concerns with the mediator;[79]

- Women reported that judges referred them to mediation or tried to mediate between the parties themselves, even in cases where the parties had been screened out of mediation as a result of the history of abuse and even where the judge had full knowledge of the history of abuse, existence of protective orders, pending criminal charges and/or convictions;[80]

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75 *Ibid.*

76 *Ibid.* at 8.

77 *Ibid.* at 13.

78 *Ibid.* at 8.

79 *Ibid.* at 14.

80 *Ibid.* at 13.

- Mediators tended to favour joint custody, regardless of whether abuse was present;[81]

- Mediators did not seem aware of security or safety risks. Two women in the study had their phone numbers revealed to their spouses after specifically requesting that the numbers be kept confidential. Some mediators suggested that abused women contact their spouses to arrange mediation sessions despite a history of telephone abuse and harassment. A judge could not understand why a woman might be reluctant to share her new bank account number with her spouse. One woman expressed fear of her spouse and asked that she not be left alone with him; during the session she was left alone with him several times while the mediator left the room to take phone calls. Another mediator refused to allow a woman to have someone present with her for support during the mediation. Another woman asked for her lawyer to be present, but was told, "lawyers don't get involved in this;"[82]

The THANS mediation report was controversial. It was criticized for (amongst other things), its narrative methodology and the fact that the report did not name the mediators whose conduct were found wanting. Regardless of methodological criticisms, the report demonstrated that mediation in domestic violence cases does not result in lasting agreements. Only two of 24 cases studied (8%) reached full agreement and avoided the courts. Of those, one had no custody or access issues. Two others reached partial agreements.[83]

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81 *Ibid.* at 14. This concern was echoed in Bala *et al.*, *supra* note 7 at 35.

82 *Abused Women in Family Mediation: A Nova Scotia Snapshot*, *supra* note 67 at 15.

83 *Ibid.* at 7.

The 84% failure rate is not surprising. Mediation is predicated on both parties genuinely desiring to settle their differences and on their willingness to listen and respond in good faith. Quite simply, abusive spouses may have little or no interest in listening, responding or reaching agreement. To the extent that agreement would serve to diminish their contact with and control of the other spouse, they may resist. In other cases, the abusive spouse may see mediation as an opportunity to continue to exert control so he can obtain a favourable agreement.

In the wake of the THANS report, Nova Scotia's Supreme Court (Family Division) developed a screening tool for mediators and conciliators with input from women's groups. The tool is administered to both parties early on in the proceeding and contains 16 yes/no questions. A "yes" answer to any of the questions will divert the case from mediation. Once administered, the questionnaire is destroyed. It is not kept on the court file. A copy of the screening tool is attached in Appendix "A."

Like the THANS report, the screening tool has been controversial. The questions have been criticized as too general, and the descriptions of abuse so broad as to apply to virtually any couple. There is concern that too many cases are being screened out of mediation. However, the most innocuous question on the list is: "During your relationship did the other party, on a regular basis, try to make you feel stupid by putting you down, by calling you names, angrily blaming you for things that go wrong or threatening to have you put away in a psychiatric hospital or other institution?" It is precisely this behaviour that many abused women find more hurtful and damaging than a slap, shove or punch.

CUSTODY AND ACCESS

Is a father's abusive conduct towards a mother relevant to his ability to parent their child? Even a decade ago, the answer

would likely have been "no." Recently, a growing body of evidence and research into the effects on children of witnessing family violence demonstrates that there is a link between spousal abuse and an abuser's ability to parent. Unfortunately, lawyers and judges have not yet caught up to social science in this area.

In a paper presented at the 2000 National Family Law Conference, Martha Shaffer and Sheila Holmes argued that the belief that wife abuse is not relevant to parenting generally rests on three assumptions:

> The first is that wife abuse is a type of violence that is specific to the husband-wife relationship and has no carry-over to the way a man relates to other intimate family members, including his children. In other words, one can be a wife abuser but a perfectly good father. The second assumption is that wife abuse is not necessarily harmful to children, particularly if they are not present when it is occurring. The third assumption is that wife abuse ends when the relationship between the spouses breaks down, with the result that children are not at risk if they are in the abuser's custody since there is no further abuse.[84]

All three assumptions are false.

(1) Men who abuse their wives are much more likely to abuse their children.

Numerous studies have found a strong correlation between wife abuse and child abuse. Edelson (1997) found that 30 – 60% of wife abusers also abused their children; other studies found different, but similarly high rates including 53% by

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84 Shaffer & Holmes, *supra* note 5 at 2-3.

Walker (1984); 63% by Giles-Sims (1985) and 70% found by Bowker, Arbitell and McFerron (1988).[85] The correlation may be as high as 75%.[86] Moreover, there was also a correlation in severity: the more severely a woman was abused, the more severe the abuse to the child.[87]

Typical injuries to children vary with the age of the child. Even if violence is not directed at the child, infants and very young children can become injured because they are in their mother's arms at the time of the attack. They may be hit with blows or objects meant to harm their mother or be dropped as a result of the violence. Older children may get caught in "cross-fire" violence or suffer injury while attempting to protect their mothers.[88]

Ironically, testimony by an abused woman that she does not fear for her children when they are with their father may be used to discredit her testimony that she was abused at all. If she was assaulted as she claims, why would she agree to let her children go with him unsupervised? The foregoing research demonstrates that men who are dangerous to their spouses may – or may not – pose physical danger to their children.

Domestic violence is not about momentary loss of control or poor anger management so much as an expression of power and control.[89] Controlling behaviour manifested by abusive spouses often extends to other means of ensuring

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85 *Ibid.* at 3. See also Melanie Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision Making" (1997) 14 Can. J. Fam. L. 31.

86 Bala, *et al.*, *supra* note 7 at 11.

87 Edelson, cited in Shaffer & Holmes, *supra* note 5 at 4.

88 Shaffer & Holmes, *ibid* at 4.

89 *Ibid.* at 16.

compliance than violence or threats of violence. As put by Shaffer and Holmes, "The fact that a child may not be at risk of being physically abused does not mean that the relationship with the batterer will be a healthy one ..."[90] A man who abuses his spouse may have "a tendency to dominate, control and coerce the children, rather than to nurture and empower them."[91]

A spouse who engages in conduct designed to control the other spouse through manipulation, violence, threats and verbal or other types of abuse so as to undermine the mental and physical health of the children's primary caregiver should be seen as acting knowingly contrary to the best interests of the children.[92]

Shaffer and Holmes argue that abusive spouses are not appropriate role models for children.[93] Where their abusive conduct is not eliminated or sanctioned, children receive the message that abuse is normal. Research shows that children learn this lesson well. Boys who grow up in homes where their mother is abused are many times more likely to become batterers themselves. Girls who grow up in homes where their mother is abused are more likely to be abused in their adult relationships.[94]

But an abusive father is better than no father, isn't he? In fact, the majority of studies based on large national surveys

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90 *Ibid.*

91 Patrick Parkinson, "Custody, Access and Domestic Violence" (1995) 9 Austl. J. Fam. L. 41 at 50, cited in Shaffer and Holmes, *supra*, note 5 at 16.

92 Shaffer and Holmes, *supra* note 5 at 17.

93 *Ibid.*

94 *Ibid.* See also Jaffe & Geffner, *supra* note 62; Jaffe , *supra* note 1 at 22.

in the United States found little association between father visitation and children's well-being.[95] A strong bond with one parent may be enough, though it is certainly desirable to maintain a bond with both parents – *if* the contact is healthy and positive. The error lies in the assumption that contact with both parents is necessarily beneficial unless proven otherwise. There is a large and growing body of research to show that children are much more aware of domestic violence than their parents believe, and suffer significant lasting effects that can carry well into their adult lives.

(2) Children are harmed by exposure to family violence, whether or not they are directly abused themselves.

The single most common form of emotional maltreatment in Canadian children is exposure to family violence, accounting for 58% of all substantiated cases.[96] Children saw or heard one

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[95] See *e.g.* Valerie King, "Variation in the Consequences of Non-Resident Father Involvement for Child's Well-Being" (1994) 56 Journal of Marriage and the Family 963; Denise Donnelly & David Finkelhorn, "Does Equality in Custody Arrangement Improve the Parent-Child Relationship?" (1992) 54 J. Marriage Fam. 832; C. James Richardson, "Divorce and Family Mediation Research Study in Three Canadian Cities: An Overview of Research Results" (1988), prepared for the Department of Justice Canada, 31-32, cited in The National Association of Women and the Law, "Custody and Access" (Presented to the Special Joint Committee on Child Custody and Access, 1998), online: The FREDA Centre for Research on Violence against Women and Children <http://www.harbour.sfu.ca/freda/reports/custody.htm>.

[96] *A Statistical Profile 2001*, *supra* note 4 at 1. These yearly statistical profiles have been criticized by women's groups for methodology that over-reports violence committed against men and under-reports violence committed against women. Data is gathered through telephone calls with participants. No distinction is made between force used to assault and force used in self-defence. Some prevalent types of abuse (verbal, emotional) were not measured at all. There is a likelihood that telephone reports under-estimate violence against

parent assaulting the other in an estimated 461 000 households, representing 37% of all households reporting spousal violence in the five years preceding a Statistics Canada survey.[97] Estimates suggest that approximately 800 000 children are exposed to domestic violence each year in Canada.[98] Recognition of this harm to children is a relatively recent development.

Children who did witness spousal violence "were more likely to witness assaults against their mothers (70%) than against their fathers (30%), and assaults witnessed against mothers tended to be more serious. Over half of the female victims in these cases feared for their lives because of the violence."[99] Many parents think that their children are not aware of the violence, however, research has shown that 80-

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women as many women do not feel safe or comfortable disclosing abuse to a stranger. Even with these methodological problems, the Survey showed that women experience more severe forms of abuse and that the impact of the abuse is greater on them as compared to men who report abuse by female partners. For example, 20% of abused women reported being choked and another 20% reported sexual assaults. Only 4% and 3% of men respectively, reported choking or sexual assault. 25% of abused women reported being beaten, versus 10% of men. 40% of abused women feared for their lives, compared to 10% of men who reported abuse. For more analysis of the Statistics Canada data, see Yasmin Jiwani, "The 1999 General Social Survey on Spousal Violence: An Analysis" (2000) cited in FREDA, *supra* note 2.

97 *A Statistical Profile 2001*, *ibid.* at 2.

98 The Peel Committee Against Woman Abuse, *Breaking the Cycle of Violence: Children Exposed to Woman Abuse* (Mississauga: The Peel Committee Against Woman Abuse, 2000), citing Jaffe & Poisson, 1999, online: Ontario Women's Justice Network <http://www.owjn.org/issues/custody/exposed.htm>.

99 *A Statistical Profile 2001*, *supra* note 53 at 2.

90% of children indicate the opposite.[100] "Most children know what happened and can give detailed descriptions about the escalation of the violence. Children may be at their bedroom door, or at the top of the stairs, or may enter the kitchen shortly after a violent episode."[101] In a recent American study, "almost half of the intimate partner femicides were witnessed by a child or a child was the first to find the 'body'."[102]

Children often believe that the violence is their fault.[103] One of the leading experts in Canada on children exposed to domestic violence is Dr. Peter Jaffe, of the London Family Court Clinic in Ontario. Dr. Jaffe and others have concluded that:

> Children who witness violence are at risk for a number of significant emotional and behavioural problems such as aggression, bullying, anxiety, destruction of property, insecurity, depression and secretiveness. Almost 60% of children who are exposed to violence show symptoms consistent with a DSM-IV diagnosis of post-traumatic stress disorder (Lehmann, 1995). Children who witness violence are also at risk in developing inappropriate attitudes about the use of violence to resolve interpersonal conflicts – especially in "loving" relationships. In the long term, boys who are exposed to violence are more likely to end up being an abuser in an intimate relationship.[104]

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100 Jaffe, *supra* note 1 at 21.

101 *Ibid.*

102 Campbell *et al.*, *supra* note 56 at 3.

103 *Breaking the Cycle of Violence*, *supra* note 98 at 4.

104 Kerr & Jaffe, *supra* note 64 at 2-3.

One 1980 study found that "boys whose fathers abused their mothers have 1000% greater likelihood of abusing their partners as adults, than sons of non-violent fathers."[105] Girls are more likely to enter into relationships where they are abused.[106] Carole Curtis cited a study in which "25% of children who had lived in a shelter thought it would be okay for a man to hit a woman if the house was messy."[107] According to Jaffe *et al.* "serious behaviour and emotional problems are 17 times higher for boys and 10 times higher for girls who observed woman abuse, than children that did not have the experience."[108]

The effects of exposure to wife abuse vary with a child's age.

- In pregnancy, abuse is associated with low birth weight and birth defects.[109]

- Infants exposed to violence may have significant sleep and feeding disruptions and exhibit failure to thrive, depression or lethargy. They are also at risk of being dropped or injured.[110]

- Pre-schoolers may exhibit "regressive behaviour such as excessive clinging to adults and fear of being left

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105 Strauss, Gelles, & Steinmetz, (1980), cited in *Breaking the Cycle of Violence*, *supra* note 98 at 6.

106 Curtis, *supra* note 37 at para. 62.

107 *Ibid.* at para. 64.

108 Jaffe, Wolfe & Wilson, (1990), cited in *Breaking the Cycle of Violence*, *supra* note 98 at 6.

109 Jaffe, *supra* note 1 at 21.

110 *Ibid.*

alone."[111] They feel great confusion and insecurity and may experience nightmares.

- Latency age children (5-12) may exhibit "a range of internalizing and externalizing emotional and behavioural problems." The short term impact on boys is greater than for girls: 30% of boys who witness violence have "problems so severe that they would qualify for a significant mental health intervention." Boys' symptoms tend to be externalized: destruction of property, disobedience in school, fighting and attacking others. Girls tend to exhibit internalized symptoms, such as "depression, anxiety, withdrawal, and somatic complaints."[112]

- Adolescents may try to cope by abusing alcohol or drugs, or by running away. Frequently they become involved in abusive relationships themselves.[113]

However, "not all children are equally affected by witnessing violence. In fact, children from the same family develop in different ways."[114] Researchers have identified a number of factors that reduce the risk of harm to children, including "alternative adult role models, strong and positive attachments to mother, and extensive supports within the community."[115] Clinical and judicial interventions can also promote safety and positive adjustment.[116]

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[111] *Ibid.* at 21.

[112] *Ibid.*

[113] *Ibid.* at 227.

[114] *Ibid.* at 23.

[115] *Ibid.*

[116] *Ibid.*

> Too often judges award access to assaulting men in exactly the same format they would to a non-assaulting man. Too often judges ask, "Did he hit the kids?", as though it is all right to hit the mother. Treating assaulting men the same as non-assaulting men minimizes the importance of the assault and suggests that assaulting the mother is irrelevant to determining the best interests of the child. The research data, however, says otherwise. An abusing man who gets no treatment will continue to abuse in another relationship. Children who witness wife assault experience the same symptoms as children who are themselves assaulted.[117]

The well-being of the primary caregiver and the well-being of the children are inextricably tied. As one abused mother testified in an Ontario case: "I'm trying to raise him [their son] and you're trying to destroy me and that affects him."[118]

(3) Separation frequently does not end the abuse. In many cases, abuse does not start until after separation.

Separation does not necessarily mark the end of violence in a relationship. According to a 1999 Statistics Canada survey, 37% of abused spouses reported that the violence continued after separation. Of those who reported spousal violence after separation, 24% reported that the violence became more serious after separation. 39% reported that the violence did not *start* until after the separation.[119] For many women who first

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[117] Curtis, *supra* note 37 at paras. 61-62.

[118] *Matheson v. Sabourin*, [1994] O.J. No. 991 (Prov.Ct.) (QL) at para. 18 as cited in Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 Can. J. Fam. L. 215 at 268.

[119] *A Statistical Profile 2001*, *supra* note 53 at 31.

experienced violence after separation, the violence was severe: the majority (57%) reported being beaten, choked, sexually assaulted or threatened with a gun or a knife. 60% were assaulted more than once.[120]

In fact, separation is a factor that significantly elevates the risk of spousal homicide for women (but not for men). Between 1991 and 1999, women were killed by estranged husbands at a rate of 38.7 per million couples compared to a rate of 4.5 per million killed by current husbands.[121] More than half of all women killed by their spouses are killed after leaving the relationship, or while attempting to leave.[122] There is a sharply demarcated danger period: approximately half (49%) of homicides committed by ex-spouses occur within 2 months of separation, while another 32% occur between 2-12 months after separation. Only 19% of spousal homicides are committed more than 1 year after separation.[123] Young women aged 15-24 are most at risk after separation. Women in common law relationships are at a higher risk than married or divorced women.[124]

With male (but not female) perpetrators, almost half of spousal homicides are followed by a suicide (39%) or attempted suicide (6%).[125] Fear of infidelity was a "central

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120 *Ibid.* at 32.

121 *Ibid.* at 33.

122 Rosnes, *supra* note 85 at 32.

123 *A Statistical Profile 2001*, *supra* note 53 at 33.

124 Between 1991 – 2000, women aged 15 – 24 were killed at a rate of 113.4 women per million separated couples; compared to women aged 55+ at 9.5 per million separated couples. Women in common law relationships were killed at a rate of 29.5 per million couples versus 4.4 and 2.0 per million couples for married and divorced women. See *A Statistical Profile 2002*, *supra* note 52 at 23.

125 *A Statistical Profile 2001*, *supra* note 53 at 34.

theme" for male perpetrators and was the most common motive for the killing, at 41%.[126] In the majority of spousal killings, the homicide marked the end of a pattern of violence in the relationship. "Police were aware of previous domestic violence in 74% of homicides perpetrated by ex-husbands, 57% of homicides perpetrated by common-law husbands and 41% of husbands in legal marriages."[127] At least 8% of male perpetrators had a "no contact" or restraining order against them at the time of the killing. 65% had criminal records and 45% had criminal records for violent offences.[128]

Paradoxically, reports by women of increased violence post-separation (or commencement of violence after separation) may not be believed, or may be seen as an attempt to "manipulate the courts" or to gain advantage in a custody or access dispute.[129] Male violence may be explained away as only an "emotional reaction" to the separation.[130] Peter Jaffe states that "[i]n my experience of over 20 years of completing custody and visitation assessments, the real problems lie in overlooking violence and most women under-reporting out of embarrassment, humiliation and lack of trust for legal and mental health professionals."[131]

Access to the child is access to the mother.[132] Access often provides an opportunity for frequent, regular contact with the abused spouse where further abuse or violence can occur. "Violence at the point of access is clearly harmful to children

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126 *Ibid.*

127 *Ibid.* at 34-35.

128 *Ibid.* at 35.

129 Jaffe, *supra* note 1 at 24.

130 *Ibid.*

131 *Ibid.*

132 Rosnes, *supra* note 85 at 26.

because it can perpetuate the harms suffered by exposure to violence during the relationship."[133] Kerr & Jaffe report that, "in one study of high conflict divorces, 25% of batterers used access as a means of threatening or continuing their abuse of their partner."[134] Access can even prove fatal.[135] A custodial parent should not be required to live in constant fear or trepidation that access exchanges may escalate into violence or abuse at any time.

Children can be used as emotional weapons. "Children often represent another weapon for batterers to employ in harassing, threatening, annoying, punishing and dominating an ex-partner."[136] "Access time may be used by an abuser to subjugate the children as a means of controlling their mother. Furthermore, awareness must be raised as to the increased risk of child abduction by the perpetrator after separation.[137]

Physical abuse does not exist in a vacuum. It may be (and often is) accompanied by other types of abuse, such as sexual assault, verbal abuse, emotional abuse or financial abuse.[138] For example, 77% of abused women reported

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133 Shaffer & Holmes, *supra* note 5 at 18.

134 Kerr & Jaffe, *supra* note 64 at 3.

135 For example, see Mark Gollom, "Slain Mother of Two Denied Police Escort During Child Exchange" *National Post* (7 December 1999), as cited in Shaffer & Holmes, *supra* note 5 at 18. A single week in March, 2002 saw 11 children dead in Canada and the U.S. – shot or burned or left in a field – their fathers (some separated, some not) implicated in each death. (*The Globe and Mail*, 16 March 2002, A1).

136 Kerr & Jaffe, *supra* note 64 at 1.

137 *Ibid.* at 25.

138 Margaret Denike, Agnes Huang & Patricia Kachuk, "Myths and Realities of Custody and Access" (Vancouver: FREDA, 1998), online: The FREDA Centre for Research on Violence against Women and Children <http://www.harbour.sfu.ca/freda/reports/myths.htm> at 4.

emotional abuse in combination with physical abuse, while 18% of abused women reported emotional abuse in the absence of physical abuse.[139] Women in abusive relationships may feel that "the emotional abuse is more severely debilitating than the physical abuse."[140]

Often, custody and access orders involving abused women do not even attempt to prevent anything other than physical abuse. They may allow the abusive spouse unlimited contact with her, provided that the contact relates to the children or is for the purpose of access exchanges. Such orders offer no protection against verbal or emotional abuse, limited protection against physical abuse, and virtually no recourse to the abused spouse, except an application for contempt of court. It should be a priority and a necessary pre-condition to any access order that the mother and children are made safe from further abuse.

Courts should scrutinize applications made by abusive spouses to ensure that they are not an abuse of the Court's process.

An application for custody can be a very effective tool to re-establish control over a spouse who is the children's primary caregiver and fears losing her children above all else.[141] A custody application (or even the threat of an application) can be

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[139] Statistics Canada, *Violence Against Women Survey, 1993* (Ottawa: Statistics Canada, 1993), cited in Health Canada, "What is Emotional Abuse?", online: Health Canada <http://www.hc-sc.gc.ca/hppb/familyviolence/html/fvemotion_e.html> at 2.

[140] *Ibid.* at 3.

[141] Jaffe & Geffner, *supra* note 62 at 378. Men who abuse their partners are twice as likely to seek sole custody of their children than men who do not abuse their partners. American Psychological Association, *Violence and the Family: Report on the American Psychological Association Presidential Task Force on Violence in the Family* (Washington: American Psychological Association, 2003).

used to coerce a spouse to return to the relationship or to extract concessions in virtually every other area, from access to valuation of assets, to waiver of rights with respect to matrimonial homes or pensions. Carole Curtis put it thus:

> [A] man who has assaulted his partner will do almost anything to keep her with him and to get her back once she leaves. His ego and his self-worth are tied to his continuing ability to control and manipulate her. He will fight a very hard fight to ensure her compliance with his needs. He will pull out every stop, and aggressively pursue every avenue possible. His goal is to make her come back to him. He knows that if he succeeds in getting the children, that she will likely reconcile with him rather than face losing her children. These are extremely litigious cases, almost without exception ... Economic control is part of the pattern of dominance and dependence that marks wife assault, and this control continues in the litigation ... The assaulting man almost always claims custody of the children, either sole custody or joint custody ... In most of these cases, this claim is a strategy.[142]

Abused women are particularly vulnerable to these tactics because many view their spouses as all-powerful, or larger than life. They may also believe that their spouses can carry out their threats with impunity and will not be held accountable by the law.[143]

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[142] Curtis, *supra* note 37 at paras. 37-40.

[143] This view is echoed by Curtis where she observes that "Assaulted women experience and describe their partners as very powerful and very successful in whatever they demand. She often sees his lawyer in the same light, and thinks her partner has 'bribed the judge' or

The FREDA Centre for Research on Violence against Women and Children notes that "case law studies and literature reviews clearly show that many men who initiate custody and access challenges through the family law court system do so in order to harass or maintain control over their ex-spouses ... Battered women are intensely fearful of losing custody, while men who batter feel they have nothing to lose by using custody as a bargaining tactic."[144] Judges and lawyers have a responsibility to consider whether litigation is being used to perpetuate a pattern of dominance and control by an abusive spouse, and if it is, to take steps to ensure that the Court's process is not co-opted in this manner.[145]

The presence of one or more of the following factors in combination with allegations of spousal abuse should act as a red-flag that a custody or access application may be an abuse of the Court's process:

- a parent who has never had a primary care-giver role or who has had little regular involvement with the child(ren) applies for full custody;

- a parent who cannot or will not produce a comprehensive parenting plan nonetheless seeks full custody;

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otherwise successfully and inappropriately influenced the outcome [of the case]" (Curtis, *supra* note 37 at para 43).

144 Denike, Huang & Kachuk, *supra* note 138 at 2-3.

145 Canadian Advisory Council on the Status of Women, "Recommendations, Summary Notes of the Custody and Access Workshop" (Ottawa: 24-26 September 1993), cited in The National Association of Women and the Law, "Custody and Access", *supra* note 95 at 7. See also Kerr & Jaffe, *supra* note 64 at 25.

- a parent who maintains irrelevant or unsubstantiated claims of infidelity on the part of the other parent;

- a parent who indicates he is self-represented by choice because he can do a better job than a lawyer;

- the application is drawn out over a longer than usual period or involves multiple adjournment requests by one parent without good cause;

- frequent changes of counsel, often immediately prior to a hearing date so as to necessitate an adjournment;

- repudiation of agreements immediately after they are reached and resumption of litigation;

- requests for highly personal medical or other records without adequate foundation as to their relevance;

- a multiplicity of applications to vary access or custody over a short time period (i.e. where less than a year has passed since the last application was resolved);

- a multiplicity of applications or police reports alleging denials of access even though there is no significant lapse in access.

The time to assess whether an application is *prima facie* an abuse of process is when it is first before the Court, not months or years later at trial. Most Family Courts have adopted the Civil Rules of Court and those rules contain provisions for summary judgment and for the striking of pleadings in frivolous or vexatious claims. Where there is concern, the applicant should be required to prove a *prima facie* case, to show cause why the application should proceed. In the event of a finding that a party has abused the Court's process, that party should be specifically precluded from making further

applications without leave of the Court, or without posting significant security for costs.

Once in Court, an abusive spouse may test the system by acting out. He may shout or interrupt his spouse or her lawyer during evidence or submissions, harass his spouse during cross-examination (or remain self-represented so that he can cross-examine her himself), or he may employ non-verbal signals to threaten and intimidate her during the hearing. He may also attempt to distract the Court or show derision by snorting, laughing or facial gestures. If this conduct is tolerated by the Court and the offending spouse is not immediately called upon to cease and desist, both spouses learn that the Court is prepared to tolerate his abuse and he is significantly emboldened.

Custody, Access, and Abuse in Canada: Current Law

In their paper presented at the Canadian Bar Association's National Family Law Conference in 2000, Martha Shaffer and Sheila Holmes undertook an analysis of 46 Canadian custody or access cases involving abuse that were decided between 1997 and May 2000. The cases involving wife abuse spanned the spectrum of violent conduct from verbal abuse accompanied by some physical violence up to extreme levels of chronic violence against the wife or sexual abuse of the children. They found that in all but two cases, it was the mother who first indicated abuse by the father.[146]

Two fathers claimed that mothers abused them, but the Courts found the claims to be totally untrue in one case and largely unfounded in the other.[147] In many cases where the wife raised abuse, the husband also claimed that the wife had been violent towards him. In some cases the husband admitted to

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146 Shaffer & Holmes, *supra* note 5 at 20.

147 *Ibid.* at 20.

some violent conduct but refused to take responsibility for it, one husband argued that his criminal convictions were based on lies. In a number of cases, the father made allegations of child abuse against the wife or her new partner. These claims were typically held to be unfounded. Shaffer and Holmes noted that:

> These findings are interesting in light of the current concern – articulated forcefully in the Special Joint Committee hearings – that women routinely make false allegations of abuse against men. To the extent that the cases we surveyed were representative this claim is not borne out by the case law. In fact, the reality appears to be quite the opposite: abusive men seem to be more likely to make false allegations of both spouse abuse and child abuse in the context of custody and access litigation.[148]

Professor Bala concurs:

> ... even in divorce cases where there is on-going controversy over various issues, the vast majority of allegations of spousal abuse are true, and the reality is that perpetrators of abuse are much more likely to deny or minimize abuse than 'victims' are to fabricate. Indeed, the problem of false recantations by genuine victims due to intimidation, pressure or guilt is more common than fabrication.[149]

Shaffer and Holmes identified two areas where they questioned "whether the understanding of the impact of wife abuse on children had gone far enough:" the granting of access

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[148] *Ibid.* at 21.

[149] Bala & Edwards, *supra* note 3 at 5.

to abusive parents and the terms on which access was granted, as well as a concern that the experts who provided assessments and/or expert testimony to the Courts did not have an adequate understanding of the dynamics of domestic violence.[150] Their concerns are echoed in Nova Scotia's 2001 Review of the *Framework for Action Against Family Violence*, which indicated "widespread and serious concerns" about the need for judicial training on domestic violence.[151]

In three-quarters of the cases studied, sole custody was awarded to the mother. The father received sole custody in approximately 10% of cases. Joint custody has long been recognized as inappropriate in cases with high levels of parental conflict, but nonetheless was ordered in approximately 10% of cases, sometimes because it represented a confirmation of the status quo, in one case because the mother sought it, and in others where the mother's claims of abuse were discounted or not believed.

In about 15% of the cases no access was granted. These cases tended to be at the extreme end of the spectrum, because of extreme violence towards the mother or children who were "clearly terrorized" by the violence.[152] Supervised access (whether professional or by family members or others) was seldom utilized, though it is not clear whether this was as a result of lack of facilities, cost, or a view that the children were not at risk of harm. In one case the abused mother was ordered to supervise the visits. Only approximately 10% of the cases studied resulted in an order for supervised access. Supervised access exchanges (or exchanges facilitated by a third party) were more commonly ordered. Professor Bala notes:

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150 Shaffer & Holmes, *supra* note 5 at 21.

151 Russell & Ginn, *supra* note 8, c. Training at 4.

152 Shaffer & Holmes, *supra* note 5 at 22.

> there may be a tendency for some judges to order supervised access as a 'compromise' rather than make the difficult decision of terminating all access. Given its intrusive, expensive and artificial nature, supervised access should not be seen as a permanent arrangement when a parent is too much of a risk to be left alone with a child, but rather should be a 'temporary measure ... to help resolve a parental impasse over access.' Preferably during the period of supervised access, the abuser will be taking steps, such as participation in counselling, that will reduce the risk to the child and permit unsupervised access at some future time.[153]

In my submission if there is such risk that access would need to be supervised indefinitely, then an order terminating access should be seriously considered. Even these apparently final orders are reviewable in the future, should the abusive parent be able to demonstrate a significant change in circumstances.

It is also important to note that while supervised access may eliminate any risk of physical abuse, subtle non-physical threats or psychological abuse can still occur during supervised access. It is not without risk to the child.[154]

The single most common access order in the study (approximately 40% of cases) was for the abusive parent to have unsupervised, specified access to his children, with orders setting out varying conditions and degrees of specificity. Many of the decisions left significant "wiggle room" which could later become fertile ground for conflict and control by the abusive spouse. For example, one case awarded each parent

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153 Bala *et al.*, *supra* note 7 at 34.

154 *Ibid.*

"half" of the holiday time. A father who had already breached a restraining order was ordered not to communicate with the mother (nor she with him) except for purposes regarding the child and was awarded certain access with other access "as agreed to by the parents." In another case, access with a 7 year old girl was specified and could be "extended at her wishes." Several orders left access at the discretion of, or open to extension at the wishes of the child. This raises a concern that the child could become subject to coercion or manipulation by an abusive parent who seeks to influence the child to ask for more frequent access (or whatever access the abusive parent desires). In another case, the father's probation order specified no contact with the mother "except for purposes of access." This "wiggle room" is significant when coupled with data that suggest that access exchanges can become flashpoints for ongoing harassment and abuse. A "no contact" order that permits contact on such undefined terms as "as regards access" or "in relation to the children" is virtually unenforceable and provides no protection at all.

In the final 25% of cases, the father was awarded full, unsupervised access with few or no specifications. Several of the joint custody cases fell into this category.

In another study, Linda Neilson examined 5 170 family law decisions reported in the Reports of Family Law between 1983 and 1996 and culled every case that mentioned partner abuse with custody or access. The study yielded 182 such decisions, or 3.5% of reported cases. Given the prevalence of family violence in Canada, and the fact that cases involving abuse (usually "high conflict" cases) go to trial more frequently than others, Neilson anticipated that 20-30% of reported cases would involve abuse, not 3.5%. She concluded that "Canadian judges are commonly dismissing or discounting women's allegations of abuse."[155] Among her findings, women were criticized for overstatement or their credibility was questioned.

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[155] Neilson, *supra* note 5 at 130.

Courts used technical, neutralizing language to describe abuse (i.e. "alleged assaultive behaviour," or "offences against the appellant") that tended to trivialize and sterilize women's experiences. Abuse was characterized as isolated or as mutual violence. Neilson further concluded that:

> These cases make it clear that some Canadian judges have been giving women the impression that the Canadian legal system considers their experiences of abuse unimportant. Not surprisingly, abused women complain of revictimization in legal processes. More specifically, they complain that, when they tell judges of their children's wish not to see their father, judges characterize these assertions as 'manipulation of the children by the respondent or other persons acting in her interests,' or they accuse them of lying ... Women's stories, when they were told, had little or no effect in the reported cases on abusers' access to children ... The reported cases indicate that Canadian courts award parents who abuse their partners access to their children most of the time. Nor did severity of the abuse or violence appear to be a determining factor. Access to children was conceded to men who used weapons against their wives. Commonly, no reasons for granting access were given. The courts seemingly assumed that access would not be denied to a man simply because he abused his wife. Moreover, in 40 of the cases, it was clear that courts were insisting on abusers having access to their children in the face of evidence that the abuse against the custodial parent (usually the mother) was continuing, sometimes in the face of evidence that the abuser was using contact with the children to provide the opportunity for that abuse. In the few cases where access was

> denied to the abuser, the denial seldom was justified on the basis of the need to ensure the mother's safety or well-being. Generally, when access to the children was denied, it was because (1) the abuse was directed against the child as well as the spouse or partner, (2) the court found that the access was not benefiting the child, or (3) the abuse was seen to be affecting the mother's ability to care for the children. Supervised access was ordered in only nine of the 40 cases involving continuing harassment or abuse. In conclusion, these cases present what appears to be either an appalling lack of concern for the health and safety of abused women or little knowledge or sensitivity to the dynamics of family violence and abuse.[156]

If Neilson is correct, this view of abuse also likely trickles down into the majority of cases that are resolved prior to trial. As Neilson notes, "if judges say that partner or spousal abuse has little or no bearing on decisions about access to children, it is likely that many, if not most, lawyers will advise their clients and negotiate accordingly."[157]

It is clear that courts and legislators have shown a reluctance to deprive a natural parent of his/her rights, based solely on allegations of domestic violence. No Canadian statute specifically prohibits an abusive parent - even one who has killed the other parent - from winning a custody battle.[158] A court's order that a woman or child have continuing contact with an abusive spouse or father may violate the woman's or child's s. 7 rights to security of the person, though to date, there do not appear to be any cases where this issue was argued.

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156 *Ibid.* at 134-38.

157 *Ibid.* at 128.

158 Kerr & Jaffe, *supra* note 64 at 8.

Witnessing abuse is now considered to be a child protection issue and in some cases, sufficient to find that a child is in need of protection and remove the child from the home. While this approach is becoming more common in child protection cases, it is rare in custody and access cases. This creates a dichotomy whereby "a father who has been abusive to his partner [is] granted unsupervised access to his children at the same time as child protection authorities tell the mother that she may be unsuited to parent her children because she has failed to protect them from witnessing the abuse of the mother."[159]

Another serious problem is whether courts can make a finding of wife assault (and structure access accordingly) if there was no conviction in criminal court, or if there was an acquittal, or if charges were dismissed or withdrawn. When is the matter *res judicata*, if at all? Courts do appear to take criminal convictions into account, even where it is asserted that they are "based on lies." But what about a proceeding that was never tried on the merits? Or a proceeding that resulted in acquittal, perhaps on the basis that after hearing both parties testify, the court applied *R. v. W.(D.)*[160] and acquitted the accused? Notwithstanding the different purpose of family law proceedings (best interests of a child versus criminal guilt or innocence) and the lower standard of proof in family law cases

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159 Pamela Cross, "Children's Safety: Contradiction in the System" cited in the Ontario Women's Justice Network, online: <http://www.owjn.org/custody/contra.htm>.

160 *R. v. W.(D.)*, [1991] 1. S.C.R. 742, 63 C.C.C. (3d) 397, (S.C.C.) stands for the proposition that where the case turns entirely on the credibility of the complainant and accused, the issue is not which party to believe, but whether the Crown has proved its case beyond a reasonable doubt. If the Court believes the evidence of the accused, the Court must acquit. Even if the Court does not believe the evidence of the accused, the Court must still acquit if any evidence raises a reasonable doubt.

(balance of probabilities versus beyond a reasonable doubt), some judges feel that they cannot consider an abuse allegation that resulted in an acquittal; others are prepared to consider any relevant evidence. Often, in private family law proceedings, the court is loathe to make factual findings that abuse occurred, although it is sometimes apparent from the terms of access that access was structured to minimize contact between the spouses.

In my submission, if there was spousal violence or abuse in a relationship it is demonstrably relevant to custody and access proceedings. Courts should not shrink from making highly relevant findings of fact, where the evidence supports a finding. An acquittal in criminal court should not prevent a civil court from considering the allegation as well, given the differing burdens of proof and focus of the inquiry. When Courts decline to make such findings when evidence warrants, it sends a message that violent or abusive conduct isn't relevant. The message to the abusing spouse is that his abusive conduct - past or future - will be ignored by the Court. The message to the abused spouse - who may have revealed highly personal and perhaps humiliating details to lawyers and in a hearing -- is that there are no consequences for abusing her.

RECOMMENDED TERMS OF ACCESS

(a) Consider requiring a third party chosen by the abused woman to facilitate the access exchange so that there is no contact between the parties (stronger) or consider third party supervision of the access exchange (weaker).

What about supervising only the access exchange? If one spouse is abusive, the process of exchange of the child has the potential for physical or emotional spousal violence. "Exchange supervision is less costly, intrusive and restrictive than access supervision but should only be contemplated if

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[161] Shaffer & Holmes, *supra* note 5 at 25.

there is no significant risk of direct harm to the children from an abusive spouse."[162] Some courts have ordered that an access exchange occur in a public place, such as a police station or court house. These locations may be inconvenient for the spouses and frightening to the children.[163] They also require the woman to have regular contact with her husband. Curtis recommends that access exchanges take place on neutral territory where the wife does not have to attend, or at least does not have to have contact with her husband.[164] Finding a willing, suitable exchange supervisor so that the children can be dropped off by one spouse and picked up by the other (resulting in no contact between them) is preferable.[165]

It is important that any access supervisor be someone in whom the abused woman has confidence. This generally means that she should choose the supervisor or at least have a veto. However, abused women should not be saddled with the responsibility for locating or arranging access supervisors and then be penalized if there are times when they are unable to do so" Access supervision is costly and cumbersome and it can be difficult or impossible to locate willing, qualified supervisors who are prepared to act for lengthy periods of time.[166]

(b) Consider an order for supervised access.

If there is risk to the child, but it is in the child's best interest that access continues, all access should be supervised, rather than just the exchange. Unfortunately, supervised access is not widely available, and may only available at limited times, and

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162 Bala & Edwards, *supra* note 3 at 34.

163 Bala *et al., supra* note 7 at 34.

164 Curtis, *supra* note 37 at para. 74.

165 Bala & Edwards, *supra* note 3 at 34.

166 The National Association of Women and the Law, "Custody and Access", *supra* note 95 at 44.

on a fee-for-service basis.[167] An order for supervised access pending successful completion of a treatment program can provide significant motivation to spur an abusive parent into therapy. If the treatment is successful, the child's best interests are served in a number of ways. The child's own risk is lessened. The child can resume a normalized (and arguably better quality) relationship with the access parent. The custodial parent's risk is lessened, which also provides significant benefit to the child. An abusive parent who is granted unsupervised access may see no reason to voluntarily enter treatment. More commonly, an abusive parent will take the position that if supervised access is imposed, he will drop out of the child's life entirely.

(c) Consider an order for no access.

Jaffe states that "access provides a time for an abusive spouse to continue the control, intimidation and violence towards his abused partner."[168] If access cannot be structured to protect the child's mother from further harm, then access should be terminated until the abusive spouse has obtained treatment and is no longer a risk to her. The well-being of the primary caregiver is more important to a child than contact with a father who assaults and demeans the child's mother.

No custody or access order is permanent in the private family law context. Even where access is terminated, it remains open for a parent to obtain treatment and address the problems that led to the termination of access and return to court seeking resumption of access, whether or not the court's decision specifically leaves this option available.

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[167] Curtis, *supra* note 37 at para. 74.

[168] Kerr & Jaffe, *supra* note 64 at 24.

(d) The abused spouse should have sole custody and sole decision-making power regarding the children and should not be required to consult with the spouse who abused her.

Any contact between the spouses significantly increases the risk of verbal, emotional and physical abuse. Moreover, joint decision-making is unrealistic. Abusive spouses are adept at using any decision-making input as a tool of harassment. "This type of behaviour includes making arbitrary or capricious decisions and changing the decision multiple times, insisting on certain decisions, linking one decision to another, and making threats."[169]

(e) The access order should be worded as specifically as possible.

Every aspect of the order should be spelled out. Vague clauses such as "reasonable access" or access "every other weekend" are ineffective and may be dangerous in domestic violence cases.[170] Similarly, access should not be left to be arranged "as agreed upon by the parties." A high degree of specificity is necessary, and might include access clauses worded thus:[171]

- Access shall take place every first and third Saturday from 10:00am to 3:00pm at the home of and in the presence of Mary Smith, the petitioner's aunt, at 123 Main Street, Charlottetown. The wife is responsible for dropping off the child by 9:45am and picking up the child at 3:15pm. In the event that visitation cannot take place, the party who cancels the visit must telephone Mary Smith at (902) 555-5555 by 8:30am and

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[169] The National Association of Women and the Law, "Custody and Access", *supra* note 95 at 28.

[170] Jaffe, *supra* note 1 (Appendix).

[171] These examples are taken from the appendix in *Ibid.*

visitation shall be rescheduled for the following Saturday with the same provisions.

- If the husband wishes to exercise access, he must telephone Mary Smith by 10:00am the day before the scheduled access. Mary Smith will then contact the wife.

- The husband shall consume no alcohol or illegal drugs during the 12 hours prior to and during access. If he appears to have violated this provision, Mary Smith is authorized to deny access that week.

- Access is conditional on the husband attending weekly batterer's counselling with X organization for the following period of time: (e.g. 1 year).

In cases where there is no third party available to facilitate access pick up and drop off, a clause in an order might look like this:

- Access pick up and drop off shall occur in the lobby of the police department located at 123 Main Street, Charlottetown. The husband shall leave with the children immediately. The wife may request a police escort to her car or to public transportation. At the conclusion of access the husband shall wait in the lobby at least 20 minutes while the wife leaves with the children.[172]

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[172] *Ibid.* Public or police station access exchanges are problematic and should only be considered in lower-risk situations. There is no guarantee that police will be agreeable to the use of the police station for this purpose and they may not have anyone available who could escort a spouse to her vehicle. In December 1999, an Ontario woman was shot to death in front of her children in a hotel parking lot while attempting an access exchange with her estranged husband. Her request for a police escort had been refused.

If the risk is relatively low and the children old enough, and if there is no third party available to supervise or facilitate the exchange and a public exchange is not workable, consider a provision requiring that the husband remain in his vehicle at the curb or that he remain at the front door during access pick-up and drop-off (depending on which spouse is driving). Curbside pickup/drop-off is not appropriate in higher risk situations or where there is a significant possibility that the abusive spouse will not comply with the provision.

(f) The access order should provide for no direct or indirect contact between the spouses. If this is not possible because of access requirements then the order should be drafted so that contact is as minimal and as protected as possible.

The order should name the third party who is supervising or facilitating the exchange (or require that the custodial parent designate in writing a person of her choosing). If no third party is available, contact may be limited to telephone contact only when required to cancel access, although even this opens a significant window for ongoing verbal or emotional abuse. Some women have had good results with contact only by e-mail (if both parties can send and receive e-mail) as it provides an extra element of distance and has the advantage that all communications are recorded in writing and may be produced in Court if required.

At one time courts were in the habit of ordering a notebook to accompany the child back and forth between parents, with all communication between the parents to be effected through the notebook. This practice seems to have dropped off in the last few years. The chief problem with the notebook system is that often, only the custodial parent uses it.

(g) It should be apparent from the face of the access order exactly what conduct is prohibited and when each parent is to have the children with him or her.

A police officer or judge must be able to ascertain solely by looking at the order whether the child should be with the mother or the father at any given time. Ambiguity in this part of the order (including phrases such as "alternate weekends commencing on ...") can result in confusion, accusations of denial of access, further violence, or crucial delay in the event that the child is not returned at the conclusion of the access visit.

(h) Consider obtaining a concurrent peace bond, file it with police, and have it entered into the Canadian Police Information Centre.[173]

This facilitates enforcement, particularly if a copy of the peace bond or order is not immediately available. A peace bond, domestic violence order, or family court order can also require that a party surrender or not possess any weapons. For appropriate language, see the weapons prohibition contained in s. 515(4.1) of the *Criminal Code*.

(i) Include a peace officer assistance clause in any family court order.

Typically the final clause in an order, this term specifically requires all peace officers to act to enforce the terms of the order. Some officers may be reluctant, or even decline, to enforce an order if this term is not included. Nova Scotia's Court-approved precedent Corollary Relief Judgment, reads: "All Sheriffs, Deputy Sheriffs, Constables and Peace Officers shall do all such acts as may be necessary to enforce this Order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this Order."

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[173] Curtis, *supra* note 37 at para. 51. See also Bala *et al.*, *supra* note 7 at 36.

(j) Other recommended terms of access

The National Council of Juvenile and Family Court Judges in the United States recommends the following conditions of access in cases involving violence against women or children:[174]

- Do not require or encourage contact between the parties;
- Order visitation in a location physically separate from the abused party (whether supervised or unsupervised;
- Require transfer of children between the parents in the presence of a third party and in a protected setting (i.e. police station or visitation centre);
- Start with short, daytime visits in a public place and increase length only if things are going well;
- Include "no alcohol or drug" provisions for the visiting parent and direction as to the immediate consequences of violation (e.g. other parent should call police);
- Place limits on overnight visitation;
- Require the perpetrator to successfully complete a batterer's intervention program, drug/alcohol program or a parenting education program before being allowed visitation;

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[174] Jaffe, *supra* note 1 (Appendix).

- Require a bond from the batterer to ensure the child's safe return;
- Build in automatic return dates for court to review how the order is working;
- Do not order the victim into counselling with the perpetrator as a precondition of custody or visitation.

ADVICE FOR THE FAMILY LAW PRACTITIONER REPRESENTING A WOMAN LEAVING AN ABUSIVE RELATIONSHIP:

1. Conduct domestic violence screening on every new client.

Women may not mention abuse unless asked directly, or may not understand that there are various forms of abuse aside from physical abuse (i.e. sexual, emotional, verbal, financial). She may not be aware that she has a right to refuse sex with her husband. She may not disclose abuse early in the solicitor-client relationship, even if asked. The *Manitoba Association of Women and the Law* advises family law lawyers to be concerned if a client rejects or is hesitant to pursue a valid claim for spousal or child support, if she does not want a division of property, or if she appears willing to agree to an improvident settlement suggested by her spouse (often signing away her interest in his pension or in the matrimonial home, with little in return) notwithstanding advice to the contrary. She may be reluctant to consider possession of the home, and may have little information about the family financial affairs and no access to bank accounts or important documents. She may show indifference to dividing household contents or leave valued possessions behind. She will likely want to sever all ties

with her spouse and may be reluctant to agree to access, particularly where it involves contact with her spouse.[175]

2. Make sure your client is safe.

Review the risk factors set out in a lethality assessment tool and consider reviewing it point by point with your client. Help your client develop a safety plan for herself and her children. A local shelter may be able to assist. Stress to her the importance of reporting all assaults to police. In some cases, a 911 cell phone or "panic button" may be available from police or a shelter until the acute danger passes. If your client feels she is in danger, encourage her to take her feelings seriously and protect herself. Make sure she knows that the danger is greatest for her and her children when she makes the decision to leave. She may underestimate her risk.

3. Assist your client in developing and teaching a safety plan to her children.[176]

Children often try to stop the violence by distracting the abusive parent or directly intervening in the violence. They should be taught that it is not their responsibility to make sure their mother is safe. The best and most important thing they can do is to keep themselves safe. Children should be taught to immediately leave the area in the house where the abuse is occurring. They should pick a safe room or place in the house, preferably with a lock on the door and a phone. Children should be taught to call for help. It is important that they not

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[175] Manitoba Association of Women and the Law, "The Client in Crisis: A Guide to Risk Assessment" (Winnipeg: Manitoba Association of Women and the Law, 1999). This is an excellent primer for lawyers representing women leaving abusive relationships. It includes checklists and information on safety-planning.

[176] This material was adapted from The Peel Committee Against Woman Abuse, *Breaking the Cycle of Violence*, *supra* note 98.

choose a phone where the abusive parent could see them, as this puts them at risk. If they cannot use a phone privately, they should be taught to seek an alternate phone: a cell phone, a neighbour's phone or a pay phone. The child must know their full name and address, including lot and concession number, if applicable. The mother can role play and practice with the children what they will say when they call 911: "Police. My name is ... I need help. Send the police. Someone is hurting my mom. The address here is ... The phone number here is ..." The child should leave the phone off the hook when finished, otherwise police may call back for verification, which could put the mother and children at greater risk. Children should know about neighbourhood block parents and how to use them. Children who are old enough should be taught to leave the home and go to a safe place chosen in advance (i.e. a neighbour's). The mother can meet the child there when it is safe to do so. Children should also be taught the safest route to get to the planned place of safety for them, whether it is in or out of the house.[177]

4. Educate yourself so that you can educate others.

Kerr & Jaffe point out that "a lawyer taking on a medical malpractice case would never dream of going to court without extensively educating him or herself in the area of concern."[178] Medical texts are read and expert reports obtained. The client is interviewed multiple times. Witnesses are interviewed and their evidence considered and utilized as appropriate. Case law is gathered, analyzed, and shaped into legal argument.[179] No less is required when dealing with a family law case involving spousal violence.

5. Be patient with your client.

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177 *Ibid.*

178 Kerr & Jaffe, *supra* note 64 at 9.

179 *Ibid.*

Spousal assault cases tend to have high lawyer involvement and many crises along the way. Your client may vacillate. She may cancel appointments, or fail to respond to phone calls and letters.[180] She may reconcile with her spouse and separate again. Encourage her to make decisions and to take control of her life.[181] It is important that you, as her solicitor, do not essentially replace her partner by making decisions for her. She may encourage or fall into this behaviour, particularly if it has been a life pattern for her.[182] Immigrant women and women of colour may be particularly reluctant to disclose personal information to lawyers, police and others.[183]

6. Support your client and do what you can to assist her in accessing whatever other supports are available in her community.

Research has shown that increased support from family, friends and professionals can be the factor that empowers women to exit the cycle of violence. Women who are supported are also more likely to testify against an accused spouse.[184]

7. Do not ask your client why she stayed in the relationship.

To do so suggests that she could control, and is somehow to blame for the violence. "Many assaulted women don't want to separate, , they just want the violence to stop."[185] Women who

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180 Nicholas Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 Can. J. Fam. L. 215 at 240-41.

181 Curtis, *supra* note 37 at para. 6.

182 *Ibid.*

183 Websdale, *supra* note 47.

184 Russell & Ginn, *supra* note 8, c. Victim's Support Services at 6.

185 Curtis, *supra* note 37 at para. 29.

do want to leave face many difficult hurdles; including their safety and the safety of their children, systemic barriers such as poverty and lack of affordable housing; cultural and racial barriers, including fear of deportation; religious or cultural pressures to remain in a marriage or to submit to a spouse's authority.[186] In some jurisdictions, researchers found that women leave five times before they are able to access sufficient support to consolidate their decision not to return.[187]

8. Consider applying for a peace bond or a "no contact" provision using domestic violence legislation.

It is not sufficient to state that your client was assaulted. Courts will require specifics: dates, triggering events, places, the type of assault (kicking, throwing things, slapping, etc), exact words spoken (if remembered), as well as injuries (if any).[188] Generally, some evidence of recent violence is required.[189] If corroborating information exists (witnesses, medical entries), it should be obtained. Abusive spouses may "deny ... and minimiz[e] the assaults, and ... suggest that the woman is crazy, lying or that the abuser acted in self-defence."[190] Anticipate that the opposing party may deny everything and prepare the case accordingly. If your client has a no contact order, she should be counselled to treat it seriously and not permit any contact and in particular, not to initiate contact. Voluntary contact on the part of the abused woman does not vitiate the no contact order in law but it certainly comes close in practice. She should be advised to report every breach to police as soon as it occurs, whether the breach involves abuse

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186 *Ibid.* at 30.

187 Lemon, *supra* note 1 at 24 citing the Canadian Panel on Violence Against Women, 1993.

188 Curtis, *supra* note 37 at para. 53

189 Bala *et al.*, *supra* note 7 at 36.

190 Curtis, *supra* note 37 at para. 52.

or whether it is innocuous. All breaches increase her risk. Unfortunately, some police officers may be reluctant to follow up on breach allegations that involve contact that does not end in further assaults or threats.

9. Prove your case.

Kerr & Jaffe recommend that lawyers have the client execute directions so that you can obtain corroborating medical records, police incident reports, counselling reports, etc.[191] "Relatives, neighbours and professionals ... should be interviewed and their suitability and availability as witnesses ascertained."[192] If available, obtain letters or cards in which her spouse admits to, or apologizes for, the violence. Obtain certificates of conviction for criminal offences if you are concerned that he will not admit a criminal record. If necessary, obtain and transcribe a tape of any relevant trial or sentencing for use in cross-examination (her spouse may misrepresent what occurred). If the spouse has served time in prison, parole and Correctional services documents can be subpoenaed and contain a wealth of important information. Past girlfriends or spouses can be very effective witnesses if they are willing to testify. Children may confide in an assessor or teacher or relative who may be able to attest to their statements.[193] (Unlike in criminal court, family courts are extremely loathe to have children testify and evidence of their statements is routinely admitted).

10. Consider retaining an expert in domestic violence to place the evidence in context and testify about the harm, particularly the harm to children who are exposed to abuse.[194]

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[191] Kerr & Jaffe, *supra* note 64 at 10.

[192] *Ibid.*

[193] *Ibid.* at 11.

[194] *Ibid.*

If there is no money to retain an expert, contact your local women's shelter or transition house for a referral. There may also be a worker who can be qualified to give expert evidence. Doctors or other professionals involved with the woman or her children may waive or reduce their fees for testimony or a report if the woman cannot afford it. Having an expert available to explain the dynamics of spousal abuse is particularly important if your client is seeking an order for no access or professionally supervised access.[195]

11. Take great care in choosing a custody or access assessor.[196]

An assessment may not be appropriate at all. Many assessors do not have sufficient understanding of the dynamics of wife assault and may strongly favour joint custody.[197] Avoid any expert who will provide a written or oral opinion without benefit of meeting with the parties.[198] "Since abusive partners come from all segments of society and often present very well, some are able to manipulate the assessor, particularly those who are inexperienced in the dynamics of separation and the patterns of abuse."[199] Many abused women express fear that

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[195] If you cannot proceed with an expert there is some authority that courts can take judicial notice of the dynamics of spousal abuse or risk of harm to children as described in social science literature. See, *e.g.* Honourable Justice Claire L'Heureux-Dube, "Re-Examining the Doctrine of Judicial Notice in the Family Law Context," 26 Ottawa Law Review 551-77; and Nicholas Bala, "Mental Health Professionals in Child Related Proceedings: Understanding the Ambivalence of the Judiciary" (1996) 13 Can. Fam. L.Q. 261-312 cited in Bala, *et al.*, *supra* note 3.

[196] Kerr & Jaffe, *supra* note 64 at 11.

[197] Curtis, *supra* note 37 at 59.

[198] Kerr & Jaffe, *supra* note 64 at 1.

[199] *Ibid.*

judges, assessors, police or others will not see through their spouse's "Jekyll and Hyde" personality.[200] Abusive men who do not fit the stereotype, or who are able to exert exceptional self-control when dealing with important people relating to their case, can be persuasive when they deny any wrong-doing, often with a powerful effect. This phenomenon also occurs with criminal prosecutions. Former prosecutor Cheryl Hanna put it this way: "Batterers can appear charming, respectful and persuasive; by contrast, abused women can appear hysterical, vindictive, or prone to exaggeration."[201]

12. If at all possible, choose an expert or assessor who has testified in similar matters.

Look up the previous cases in which the expert has testified to determine how the Court viewed the expert's evidence. A highly skilled, knowledgeable expert is of little use if she or he is not able to testify effectively. Do not assume an expert will handle him/herself well in court simply because the expert has testified in the past. Once you engage a good assessor, remain at arm's length to avoid any possibility of the assessor's evidence appearing tainted.

13. Be ready to argue (and back up with research) that children's wishes should have less weight in cases where there has been abuse of the child or mother because of the risk that children will (inaccurately) perceive the abused parent as weak and ineffectual or align themselves with the abusive parent, whom they perceive as more powerful.[202]

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200 Manitoba Association of Women and the Law, "The Client in Crisis", *supra* note 175 at 26.

201 Russell & Ginn, *supra* note 8, c. Police at 6.

202 Kerr & Jaffe, *supra* note 64 at 11. See also Bala & Edwards, *supra* note 3 at 6. Bala noted "perhaps the most infamous Canadian example [of children expressing a desire to live with an abusive father] was the *Thatcher* tragedy ... After separation his sons and

For many children, their mother has modeled silence during the relationship or their efforts to speak out simply angered the abusive parent and resulted in repercussions to them or to their mother.[203] Abusive parents are often much more willing than other parents to involve their children in custody and access disputes by inappropriate disclosure of separation-related details and issues, pressure on the children to express their wishes and to "choose" the abusive parent over the other parent, extravagant promises and bribery for aligning with the abusive parent, and punishment, including threats to drop out of the child's life entirely, if the abusive parent does not get his way.

14. Access supervisors may be particularly vulnerable to an abusive spouse's "Jekyll and Hyde" personality if the spouse is able to control himself for limited periods during access, since supervisors will spend many hours with the access parent and very little time with the custodial parent.

Access gives a parent the ear of the access supervisor for extended periods and opens the possibility that the supervisor will not remain impartial, or will relax vigilance after getting to know the parent. This issue is particularly significant where there is a possibility of sexual abuse. In sexual abuse cases, a highly trained supervisor is necessary.

15. Strongly advise your client not to agree to mediation or joint custody.

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eventually his daughter indicated a strong desire to live with their father and continued to express support for him even after he was convicted of murdering their mother." (Bala & Edwards, *ibid.* at 257-58).

203 Jaffe, *supra* note 1 at 25.

Mediation and joint custody are "totally unsuitable" in domestic violence cases and should not be considered.[204] In some jurisdictions, an order for joint custody is statutorily prohibited where there is a significant history of domestic violence.[205] Unfortunately, many abused women will instruct their lawyers that they will agree to joint custody against the lawyer's recommendation because their spouse "would never accept" anything else.[206]

16. Research what resources are available in your area for supervised access, parenting courses as well as counselling and therapy for the abused spouse, the abusive spouse and the children.

Talk to the providers and others in the system to assess the efficacy and comprehensiveness of whatever resources are available. Determine the cost and your client's position as to who should bear the cost. Do a search of an on-line legal database to see if the resource or professional has been mentioned (positively or negatively) in a previous decision. If you advocate for a requirement to use such services as a term of a custody or access order, present evidence on the availability of the service to accept the party, details of what services will be provided and the time frame for their involvement.

17. Accompany your client at all times in the Court building while her spouse is there or have her attend court with a support person.

The period immediately prior to and after Court hearings creates a prime opportunity for an abusive spouse to frighten or

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204 Curtis, *supra* note 37 at para. 54. See also Bala & Edwards, *supra* note 3 at 28.

205 Bala & Edwards, *ibid.*

206 Curtis, *supra* note 37 at para. 55.

intimidate the other spouse and she should not be alone during this time. A look or gesture from the abusing spouse may be sufficient to thoroughly intimidate your client. Speak to a Sheriff and arrange for her to be accompanied to her vehicle after Court if there is any concern. It may also be necessary to ask a Sheriff to remain in the courtroom during the hearing.

CONCLUSION

Violence against women and children is no longer a "private family matter." Lawyers, judges, police, court staff, community service workers and other professionals can and should develop and maintain a thorough understanding of the complex dynamics of family violence and keep abreast of research and case law developments in the area. What is at stake is not just the safety of the women and children who live with violence or fear of violence daily, but quite literally the future. Effective interventions now will work to ensure that boys and girls exposed to violence in their homes will not grow up to repeat it.

APPENDICES

Appendix "A": The Mediation Screening Tool

[This Safety Screening Tool was created and implemented by the Nova Scotia Supreme Court, Family Division.]

These are some questions to help the Court Officer to determine the most appropriate service for you. Please read carefully and check the appropriate response. These questions relate to you and the other party. If you have questions or comments regarding this questionnaire please raise them with the Court Officer.

Please note that this questionnaire will not be kept on your file.

1. Has the other party ever been charged with assaulting you or your children?

2. Are there now, or have there ever been, any undertakings, restraining orders, Peace Bonds in place to protect you from the other party; or probation orders?

3. Has the other party ever physically or sexually abused you?

4. Has the other party ever followed you, had you watched or harassed, controlled or intimidated you?

5. Have you ever feared for your own safety or that of the safety of your children because of the other party?

6. Has the other party ever physically or sexually abused your children, or have there been any allegations of child abuse against the other party?

7. Has the other party used violence or threatened violence against you or your children?

8. Has the other party ever kidnapped your children or do you fear that the other party may kidnap the children?

9. Are you now or have you ever been a resident at a transition house/shelter/safe housing because of the behaviour of the other party?

10. Has the other party ever confined, isolated, restricted your freedom of movement, or prevented you from leaving the house or a room by restraining through force or threats?

11. Has there been a history of extreme possessiveness such as excessive jealously where the other party threatened to commit suicide or harm you or themselves if you left the relationship?

12. During your relationship did the other party, on a regular basis, try to make you feel stupid by putting you down by calling you names, angrily blaming you for things that go wrong, or threatening to have you put away in a psychiatric hospital or other institution?

13. Has the other party ever harmed or threatened to harm your pets, or repeatedly destroyed or threatened to destroy your possessions in order to control or intimidate you?

14. During your relationship, did the other party control you by withdrawing basic needs of life such as withholding money for food, clothing, shelter, medical attention?

15. If you are living with disabilities and are dependent on care by the other party, has the other party ever refused or threatened to refuse to provide proper food, suitable clothing, safe or clean shelter, proper medical attention, care or supervision?

16. Has the other party ever taken your passport or threatened to have you deported, or ever used your or your family's immigration status to intimidate or control you?

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Appendix "B": Assessing Whether Batterers Will Kill

By Barbara J. Hart, Esq.

Some batterers are life-endangering. While it is true that all batterers are dangerous, some are more likely to kill than others and some are more likely to kill at specific times. Regardless of whether there is a protection from abuse order in effect, officers should evaluate whether an assailant is likely to kill his

partner or other family members and/or police personnel and take appropriate action.

Assessment is tricky and never fool-proof. It is important to conduct an assessment at every call, no matter how many times an officer has responded to the same household. The dispatcher and responding officer can utilize the indicators described below in making an assessment of the batterer's potential to kill. Considering these factors may or may not reveal actual potential for homicidal assault. But, the likelihood of a homicide is greater when these factors are present. The greater the number of indicators that the batterer demonstrates or the greater the intensity of indicators, the greater the likelihood of a life-threatening attack.

Use all of the information you have about the batterer, current as well as past incident information. A thorough investigation at the scene will provide much of the information necessary to make this assessment. However, law enforcement will not obtain reliable information from an interview conducted with the victim and perpetrator together or from the batterer alone.

1. **Threats of homicide or suicide.** The batterer who has threatened to kill himself, his partner, the children or her relatives must be considered extremely dangerous.

2. **Fantasies of homicide or suicide.** The more the batterer has developed a fantasy about who, how, when, and/or where to kill, the more dangerous he may be. The batterer who has previously acted out part of a homicide or suicide fantasy may be invested in killing as a viable "solution" to his problems. As in suicide assessment, the more detailed the plan and the more available the method, the greater the risk.

3. **Weapons.** Where a batterer possesses weapons and has used them or has threatened to use them in the past in his assaults on

the battered woman, the children or himself, his access to those weapons increases his potential for lethal assault. The use of guns is a strong predictor of homicide. If a batterer has a history of arson or the threat of arson, fire should be considered a weapon.

4. **"Ownership" of the battered partner.** The batterer who says "Death before Divorce!" or "You belong to me and will never belong to another!" may be stating his fundamental belief that the woman has no right to life separate from him. A batterer who believes he is absolutely entitled to his female partner, her services, her obedience and her loyalty, no matter what, is likely to be life-endangering.

5. **Centrality of the partner**. A man who idolizes his female partner, or who depends heavily on her to organize and sustain his life, or who has isolated himself from all other community, may retaliate against a partner who decides to end the relationship. He rationalizes that her "betrayal" justifies his lethal retaliation.

6. **Separation Violence.** When a batterer believes that he is about to lose his partner, if he can't envision life without her or if the separation causes him great despair or rage, he may choose to kill.

7. **Depression.** Where a batterer has been acutely depressed and sees little hope for moving beyond the depression, he may be a candidate for homicide and suicide. Research shows that many men who are hospitalized for depression have homicidal fantasies directed at family members.

8. **Access to the battered woman and/or to family members.** If the batterer cannot find her, he cannot kill her. If he does not have access to the children, he cannot use them as a means of access to the battered woman. Careful safety planning and

police assistance are required for those times when contact is required, e.g. court appearances and custody exchanges.

9. **Repeated outreach to law enforcement.** Partner or spousal homicide almost always occurs in a context of historical violence. Prior calls to the police indicate elevated risk of life-threatening conduct. The more calls, the greater the potential danger.

10. **Escalation of batterer risk.** A less obvious indicator of increasing danger may be the sharp escalation of personal risk undertaken by a batterer; when a batterer begins to act without regard to the legal or social consequences that previously constrained his violence, chances of lethal assault increase significantly.

11. **Hostage-taking**. A hostage-taker is at high risk of inflicting homicide. Between 75% and 90% of all hostage takings in the U.S. are related to domestic violence situations.

If an intervention worker concludes that a batterer is likely to kill or commit life-endangering violence, extraordinary measures should be taken to protect the victim and her children. This may include notifying the victim and law enforcement of risk, as well as seeking a mental health commitment, where appropriate. The victim should be advised that the presence of these indicators may mean that the batterer is contemplating homicide and that she should immediately take action to protect herself and should contact the local battered woman's program to further assess lethality and develop safety plans.

Barbara Hart, ""Assessing Whether Batters Will Kill" (Harrisburg, PA: Pennsylvania Coalition Against Domestic Violence, 1990).

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Appendix "C": Some Books and Resources for Children

[This list was compiled by the Peel Committee Against Woman Abuse, November 2002.]

These books were readily available in Canada in June 2003:

A Family That Fights, S. Bernstein (Illinois: Albert Whitman and Co., 1991)

All Kinds of Families, N. Simon (Illinois: Albert Whitman and Co., 1976)

Hands are Not For Hitting, M. Agossi (Free Spirit Press, 2000)

Hear My Roar: A Story of Family Violence, T. Hochban and V. Krykorka (Toronto: Annick Press Ltd., 1994)

Just Because I Am, L. Murphy-Payne (Free Spirit Press, 1994)

Never, No Matter What, M. Otto (Toronto: Women Press, 1988)

Something is Wrong at My House, D. Davis (Seattle: Parenting Press Inc, 1984)

Today I Feel Silly, Jamie Lee Curtis (Harper Collins, 1998)

These books may be out of print:

I Love My Dad But..., L. Wright (Toronto: Is Five Press, 1991)

I Wish The Hitting Would Stop: A Workbook for Children Living in Violent Homes, *S. Patterson and D. Softing-Freed*

(North Dakota: Crisis Center of Fargo-Moorhead, Red Flag, Green Flag Resources, 1987).

When Mommy Got Hurt, l. Lee and K. Sylvester (Kidsrights, 1996)

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Appendix "D": Some Useful Websites

Statistics Canada
www.statcan.ca

Status of Women Canada
www.sfc-cfc.gc.ca

National Clearinghouse of Family Violence
www.hc-sc.gc.ca/hppb/familyviolence/index.html

Canadian Research Institute for the Advancement of Women
www.criaw-icref.ca/index-e.htm

Canadian Health Network
www.canadian-health-network.ca

British Columbia Institute against Family Violence
www.bcifu.org

Alliance of Five Research Centres on Violence
www.uwo.ca/violence

Muriel McQueen Fergusson Centre for Family Violence Research
www.unbf.ca/arts/cfvr/info.html

Manitoba Research Centre on Violence Against Women and Family Violence
www.umanitoba.ca/academic_support/research_admin/resctre/famvio.htm
www.umanitoba.ca/resolve/

The FREDA Centre for Research on Violence Against Women and Children
www.harbour.sfu.ca/freda

Canadian Association of Elizabeth Fry Societies
www.elizabethfry.ca

The London Family Court Clinic
www.lfcc.on.ca

Prince Edward Island Government: Family Violence
www.gov.pe.ca/infopei/health/family_violence

Nursing Network on Violence Against Women – International
www.nnvawi.org

As of June 2003, Quicklaw introduced an on-line copy of the text, *Representing Victims of Sexual and Spousal Abuse*, by N. Desrosiers and L. Langevin (db RVSS)