Spousal Violence in Custody and Access Disputes: Recommendations for Reform

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- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected;
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy-makers, researchers and other target audiences.

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PREFACE

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. Public consultations held in 1996 on the structure and priorities of the Policy Research Fund identified the need to fund both long-term emerging issues and urgent issues. Urgent issues are defined as those which are currently on the public policy agenda, where time is of the essence, the gender dimension may not be adequately debated, and there is an opportunity to effect change by participating in the policy process.

The issue of child custody and access was identified as an urgent issue in August 1997, in response to the decision of the Government of Canada to convene a Special Joint Committee on Child Custody and Access. The hearings of the Committee are scheduled to begin in late February 1998.

Given the potential of the Committee hearings to precipitate changes in programs and legislation relating to custody and access, and the need to ensure a gender perspective in the public debate, two areas were identified as requiring immediate research: spousal violence in custody and access disputes, and relocation rights of custodial parents.

Spousal Violence in Custody and Access Disputes: Recommendations for Reform was written by Nicholas M. C. Bala, Lorne D. Bertrand, Joanne J. Paetsch, Bartha M. Knoppers, Joseph P. Hornick, Jean-François Noel, Lorraine Boudreau and Susan W. Miklas. It considers many aspects of spousal and domestic violence, and discusses both legislative and social programming policy recommendations.

Relocation of Custodial Parents, by Martha Bailey and Michelle Giroux, examines the major issues surrounding the relocation rights of separated and divorced parents with children. The recommendations which flow from their analysis include those for legislative amendments, judicial guidance and desirable social program responses.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy development process. We believe that good policy research leads to good policies. We thank all the authors for their contribution to this objective.

ABSTRACT

Spousal abuse not only affects direct victims -- most often women -- but is also harmful for children who live in families where there is spousal abuse. While some recent Canadian case law demonstrates that issues of spousal violence are being recognized in the courts, there is a need for legislative provisions that specifically acknowledge the effects of spousal violence on children and the special vulnerability of women. Explicit legislative provisions would help in the education of judges, lawyers, other individuals involved with the justice system, as well as victims, perpetrators, and the public. Several jurisdictions outside of Canada, including the United Kingdom, Australia, New Zealand, and most American states, have developed better legislation and policies to deal with child custody and access disputes in which spousal violence is involved. The purpose of this paper is to review the legislation and policies that have been implemented in Canada and compare them with these other jurisdictions. Following a review of the extent of spousal violence and its effects on children, the current legislative responses to this issue in Canada are presented, as well as the responses in several other jurisdictions. Issues regarding social supports and programs are also discussed. Finally, 24 specific recommendations for reforms in Canada are made.

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Spousal abuse not only affects direct victims -- most often women -- but is also harmful for children who live in families where there is spousal abuse. While some recent Canadian case law demonstrates that issues of spousal violence are being recognized in the courts, there is a need for legislative provisions that specifically acknowledge the effects of spousal violence on children and the special vulnerability of women. Explicit legislative provisions would help in the education of judges, lawyers, other individuals involved with the justice system, as well as victims, perpetrators, and the public.

Several jurisdictions outside of Canada, including the United Kingdom, Australia, New Zealand, and most American states, have developed better legislation and policies to deal with child custody and access disputes in which spousal violence is involved. The purpose of this paper is to review the legislation and policies that have been implemented in Canada and compare them with these other jurisdictions. Following a review of the extent of spousal violence and its effects on children, the current legislative responses to this issue in Canada are presented, as well as the responses in several other jurisdictions. Issues regarding social supports and programs are also discussed. Finally, 24 specific recommendations for reforms in Canada are made.

Recommendations

#1: Legislation should specifically acknowledge the significance of domestic violence to custody and access issues.

#2: Domestic violence should be clearly and concisely defined.

#3: Safety of the abused parents and children should be a paramount concern.

#4: There should be a presumption that custody should not be awarded to the perpetrators of domestic violence.

#5: The "friendly parent" presumption should not apply in cases where there has been domestic violence.

#6: Legislation should make explicit provision for supervised access and exchange.

#7: Legislation should allow a court to require perpetrators of domestic violence to undertake counselling or treatment as a condition of custody or access.

#8: Legislation should allow for non-disclosure of the abused spouse's residence.

#9: Legislation should recognize that domestic violence may justify a variation to a custody or access order.

#10: Flight from the matrimonial home for fear of safety should not be a factor in custody and access disputes.

#11: Legislation should place restrictions on the use of mediation in cases of domestic violence.

#12: There should be a presumption against joint custody in cases of domestic violence.

#13: Courts should be allowed to set aside previous agreements consented to because of domestic violence.

#14: Cases involving domestic violence should have priority for legal aid representation.

#15: Unrepresented parties in domestic violence cases must be provided with appropriate supports.

#16: Service providers must receive specialized training to deal with domestic violence.

#17: Broad-based media campaigns are needed on the effects of spousal violence on children.

#18: Provincial and territorial legislation should provide for expeditious and inexpensive access to the courts in cases of domestic violence.

#19: Provincial and territorial legislation should provide for expeditious granting of interim custody and access orders in cases of domestic violence.

#20: Provincial and territorial governments should provide funding for women's shelters.

#21: Provincial and territorial governments should provide programs for access and exchange supervision.

#22: The importance of treatment and counselling programs should be recognized in provincial and territorial legislation.

#23: Further research is needed on the effects on children of various custody and access arrangements in cases of spousal violence.

#24: Legislation and programs dealing with domestic violence need to be monitored and evaluated.

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Some portions of this paper are a revised version of articles by Bala that appeared in the Canadian Journal of Family Law (1996) and in a published collection of the Proceedings of the Second International Conference on Children Exposed to Family Violence (Haworth Press, 1998).

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1.0 THE PROBLEM

1.1 Introduction

Issues of spousal violence and abuse have received increased public and professional attention in recent years.[1] There is a growing awareness of the nature, extent, and effects of spousal abuse. Spousal abuse not only affects direct victims -- most often women -- but is also harmful for children who live in families where there is spousal abuse. Children who live in a home in which spousal abuse is present are at greater risk of being directly abused themselves, and there is a growing understanding that children who witness a primary caregiver -- frequently their mother -- being abused suffer emotional trauma from this experience.[2] There is also a concern that even if children do not directly witness physical abuse, they may suffer emotional harm from growing up in a home where there is significant hostility and verbal abuse. Of further concern is the fact that the majority of abusers have either witnessed violence or been the victims of abuse themselves, and so the abuse may have an intergenerational dimension.

In situations of relationship breakdown, the prevalence of spousal abuse is very high, which raises unique issues concerning custody of and access to children of the relationship. At the present time, Canadian legislation and institutions do not deal adequately with custody and access disputes where spousal violence is present. Canadian custody and access statutes (with the exception of Newfoundland) make no specific reference to spousal violence as a factor to be considered in determining custody and access arrangements.

In its 1993 Final Report, the Canadian Panel on Violence Against Women advocated strongly for legislative and institutional reform:

> Access is often an entry point for ongoing threats, intimidation and harassment of estranged partners and their children. Courts need qualified child assessors who are knowledgeable about violence against women, and they need community services such as supervised centres that allow for some restrictions and provide safety during visitation or access exchange. There was broad support for a review of the *Divorce Act* and all provincial and territorial legislation dealing with custody and access. An amendment to this legislation should explicitly state that violence by one spouse against another is relevant in determining custody and access issues.[3]

While some recent Canadian case law demonstrates that issues of spousal violence are being recognized in the courts, there is a need for legislative provisions that acknowledge the effects of spousal violence on children and the special vulnerability of women.[4] Specific legislative provisions would help in the education of judges, lawyers, other individuals involved with the justice system, and the public. Further, such legislation may send a message to abusers that their behavior is unacceptable and will result in negative consequences.

It is especially important that women who are victims of violence have access to information that makes clear how the law will protect them and their children, as abusive men often use the threat of seeking custody as a means of maintaining control of their spouses and keeping them in abusive relationships. Clearer legislation could also help prevent the exploitation of women in the negotiation of out-of-court settlements.

The law and professionals also need to recognize that the concept of spousal violence is broad and complex, and that there is a need for sophistication in dealing with domestic violence issues, especially when children are involved. There is a need to recognize that perpetrators of violence often deny the allegations, and that victims often fail to admit that the abuse occurs. Professionals and courts need to be aware of the gender dimension of spousal abuse, recognizing that women are the most frequent and most severely affected victims of abuse, but that men can be victims also and that in some relationships there are significant patterns of mutual abuse. There are also special issues among some ethnocultural and immigrant groups where there may be different attitudes to spousal abuse and gender roles. Specific legislation dealing with situations of spousal violence in the context of custody and access disputes would be very helpful in educating professionals about the issues involved in these cases and, as well, would provide the tools for justice system professionals and victims to deal more effectively with the issues that arise.

Several jurisdictions outside of Canada, including the United Kingdom, Australia, New Zealand, and most American states, have developed better legislation and policies to deal with child custody and access disputes in which spousal violence is involved. The purpose of this project is to review the legislation and policies that have been implemented in Canada and compare them with these other jurisdictions. It is hoped that this discussion will be an important part of the process of legislative and institutional reform in Canada.

Following a review of the extent of spousal violence and its effects on children, the current legislative responses to this issue in Canada will be presented, as will the responses in the other jurisdictions mentioned above. Issues regarding social supports and programs will be discussed. Finally, based on this review, specific recommendations for legislative and program reforms in Canada will be presented.

This paper focuses on issues of family law, and specifically excludes focused discussion of criminal prosecution and enforcement, though inevitably, mention is made of such issues.

1.2 Extent of Spousal Violence

This section of the paper will review currently available information concerning the extent of spousal violence. Following a brief discussion of the sources of data that are frequently used in determining the prevalence of spousal violence, data available from Canada will be presented.

1.2.1 Sources of Data

It is difficult to estimate the number of persons who are the victims of spousal assault, although several research studies have attempted to do so. There are several different sources of data that are typically used in these studies, each with their own limitations that can affect the estimates made. Each of these sources is discussed briefly.

Police Statistics

Incidents reported to the police have traditionally been a source of data concerning the extent of crime. In Canada, the Uniform Crime Reporting Survey has been the method by which crime statistics have been reported and compiled. Police statistics, however, have certain inherent limitations that can affect their accuracy. It is important to realize that only reported crimes can be entered into police statistics, and it is known that many violent crimes never result in a call to police. This may be particularly true in cases of spousal violence, where there are often strong pressures for the victim not to report an assault. Further, if a victim believes that a certain amount of violence within a marriage is to be expected, she may be less likely to report a spousal assault to police than she would be to report an assault by a stranger. In addition, many other factors influence a victim's decision to report a spousal assault: "the seriousness of the event for her; her relationship to the offender; her age, education, and social standing; the circumstances surrounding the incident; her past experiences with the same offender and the same type of incident; and her past experiences with the police."[5] These factors all suggest that police statistics on spousal violence reflect only a proportion of the abuse that actually exists.

Clinical Samples

Many of the early attempts to examine spousal violence relied on clinical (sometimes called "convenience") samples. These studies typically examined spousal violence among women at shelters for abused women, at medical facilities, or among women who had sought treatment for physical or psychological injuries related to abuse. Relying on this source for data on spousal abuse has the same inherent problem as relying on police statistics: women who seek out professional assistance because of spousal violence or who seek refuge in a shelter for abused women only represent a subset of the total group of women who suffer spousal violence. Further, women who are seen at treatment facilities typically represent those who have experienced the most serious abuse for the longest periods of time and, for those who go to shelters, frequently have few financial resources available to them.[6] While clinically-based studies provide important information on the experiences of victims of spousal violence and the nature and consequences of the abuse, they are less useful in trying to estimate the prevalence of spousal violence in the population as a whole.

Population Surveys

Population surveys involve asking a representative, random sample of the entire population about the characteristic or behaviour under investigation, and then generalizing from that sample to the population as a whole. In the case of spousal abuse in Canada, this involved surveying a sample of women concerning their experiences with spousal violence, and then inferring the extent of violence among women in Canada using the responses from this sample.

Population surveys have the advantage over both police statistics and clinical samples in that the respondents are representative of the entire population, and thus should provide a more accurate estimate of the level and nature of spousal violence than the other methods. However, a major problem with population surveys relates to the candour and accuracy of the respondents; this is a particularly important consideration when respondents are asked questions about sensitive experiences such as spousal violence. This potential bias may lead to estimates of spousal violence that are lower than the actual occurrence in the population. The problems raised by this issue may be reduced somewhat by paying particular attention to the wording and ordering of the questions in the survey and, in the case of telephone or face-to-face interviews, the training of the interviewers.

In 1993, the Canadian Department of Health commissioned Statistics Canada to conduct the country's first population survey dedicated solely to the issue of male violence against women, based on telephone interviews with 12,000 Canadian women. Results from the Violence Against Women Survey relating to spousal violence are discussed in the next section.

1.2.2 The Violence Against Women Survey[7]

The Violence Against Women Survey (VAWS) collected data on many forms of male violence against women including physical violence, sexual assault, threats, intimidation, and fear of victimization. In addition, extensive data were collected concerning the relationship between the victim and her assailant. Specific findings related to spousal violence were:[8]

- of all women who had ever been married or lived in a common law relationship, 29% had experienced at least one episode of violence by either a current or former partner. This percentage represents more than 2.6 million Canadian women. Types of violence included in the definition ranged from being pushed, grabbed, or shoved, to being threatened or having a gun or knife used on her. Sexual assaults were also included in the definition;

- 15% of all women reported assault by a current partner, but for prior relationships the rate was 48%, suggesting that almost half of all women who were separating or divorcing had experienced spousal violence;

- 3% of the women who were living with a partner at the time of the survey reported they had been the victim of violence by the partner in the preceding year;

- of all women who had been the victim of spousal violence, 63% indicated that the violence had occurred more than once, and 32% indicated that there had been more than 10 episodes;

- of all women who had experienced violence, 45% indicated that they had suffered injury, and 43% of these injured women had required medical attention;

- of all women responding to the VAWS who had ever been married or lived in a common law relationship, 8% indicated that a current or former spouse had sexually assaulted them;

- sexual assault tended to be associated with physical violence -- of all women who had been physically abused, 27% indicated that they had also been sexually assaulted. Further, 92% of women who had been sexually assaulted by a partner indicated that they had also been hit, slapped, punched, choked, beaten up, or threatened with a weapon by that partner;

- the incidence of spousal violence decreases with age: in the one-year period prior to the survey, 12% of the respondents aged 18-24 reported that they had been assaulted. This figure declines steadily with the women's age to just 1% of women aged 45 and older;

- spousal violence appears to be more prevalent in common law relationships than in marriages: in the one-year period prior to the survey, 9% of the women in common law relationships had been the victim of spousal violence, compared to 2% of married women;

- about 20% of women who experienced abuse from a prior partner reported violence during or following separation, and in 35% of these cases the violence increased in severity after separation, but in only 8% of cases of violence did it begin after separation;

- in 39% of all relationships where there was violence, the women reported that children were observers, rising to 61% of those women who were injured; i.e., a child was more likely to witness more serious violence. Of those women whose children observed an assault, 60% left their abusive partner, versus only 34% of women whose children did not observe the abuse;

- the occurrence of spousal violence was strongly related to whether a woman had witnessed spousal violence in her home when she was growing up -- 25% of women in a relationship at the time of the survey who had witnessed violence during childhood had been assaulted by their partners, compared to 13% of women who had not witnessed violence; and

- the number of Canadian women murdered by their partners has remained relatively stable between 1974 and 1993 at an average of 78 per year.

1.3 The Nature of Spousal Abuse

Early research understandably focused exclusively on the problem of abuse of women, who are most frequently the victims of spousal abuse. These women often feel guilty and ashamed, and may blame themselves for the abuse. In many cases, especially during an ongoing relationship, victims of abuse minimize or deny that any abuse is occurring, making research and advocacy difficult. Abuse can take different forms, and may include physical, sexual,[9] financial and emotional abuse. It can be a continuing feature of a relationship, or might begin or become worse at some point in time, such as during pregnancy, or when the spouses are separating.[10]

About one third of all women in the VAWS (17% in a present relationship and 59% in previous relationships) reported serious emotional abuse in a marital relationship (e.g., denial of access to information about family finances, verbal denigration, or an excessively controlling husband). In a majority of cases, emotional abuse was accompanied by physical or sexual abuse. Emotional abuse is an important concept, and is sometimes used by judges dealing with family law disputes, though it is a nebulous concept, and in contrast to physical and sexual abuse, it is not a criminal offence (unless it involves post-separation harassment or threats[11]).

The psychological effects of wife assault can be far-reaching. Victims of spousal abuse report depression, anger, fear, drug and alcohol abuse, guilt and lowered self esteem. While, in general, a woman is more likely to experience drug or alcohol problems if there is both physical and emotional abuse, or if the physical abuse is more severe, for some women even a single act of physical abuse can create a very intimidating, emotionally destructive environment.

The VAWS reveals a very broad spectrum of abusive conduct, ranging from a substantial number of cases where there was only one -- relatively minor -- assault over the course of an entire relationship, to situations where there was a pattern of serious repeated physical and emotional abuse, with incidents of abuse increasing in frequency and severity.[12]

1.3.1 Models of Spousal Violence

One of the influential early scholars in the field of domestic violence has been the American psychologist Lenore Walker, who developed a descriptive model of the "cycle of violence"[13] as well as the concept of the "battered woman syndrome."[14] The "cycle of violence" describes a pattern of wife abuse with three distinct phases: (1) tension building; (2) acute battering incident; and (3) loving contrition by the abuser. In the first phase there is increasing tension and verbal abuse, with the woman attempting to placate her partner. The tension builds until there is an acute battering incident, involving verbal, physical and possibly sexual abuse; the woman may leave or call the police at

this stage. In the contrition phase, the batterer is remorseful, apologizes and may send flowers or "court" his partner; she may persuade herself that he will not abuse again and resumes the relationship, though without intervention it is virtually inevitable that the pattern will reoccur, sometimes with violence increasing in the next cycle. Though not all abusive relationships fit with this pattern, many do and understanding of this cycle of abuse is extremely important for those who work with abuse victims, since they are often called upon immediately after the abusive incident but then find themselves working in the "contrition" phase. Helping victims and abusers to understand this cycle can be a part of a successful intervention strategy.

Walker also developed the concept of the "battered woman syndrome" to refer to the state of mind of a woman who has repeatedly been through cycles of violence and is suffering from lowered self esteem and "learned helplessness." She may not have disclosed the abuse to anyone and feels unable to leave the relationship, perhaps because of threats (which may have been acted on in the past) from the abuser that he will pursue her if she leaves. She is acutely sensitive to her partner's control and tendency to violence, and can sense his building anger. In this mental state, she may "reasonably" believe that the only way to escape from the relationship is to kill her partner. It should be appreciated that not all victims of spousal violence suffer from "battered woman syndrome," and the "learned helplessness" explanation does not explain why all victims stay in abusive relationships. In many cases, a lack of financial resources or alternate accommodation, pressure from family or community, a desire to preserve a home for children or a sense of guilt may keep a victim in such a situation.

Many other researchers have studied abusive relationships. Donald Dutton, a University of British Columbia psychologist, in a study of 1,100 abusive men concluded that an insecure attachment to mother, experience in an abusive home environment, and a rejecting father are important background factors in determining whether a man will be abusive in intimate relationships.[15]

Other researchers have found that if there is a pattern of abuse or control while the parents are living together, the abuser will often resort to threats to seek custody of the children, either to keep his partner in the relationship, or to extract a favourable financial settlement if they separate.[16] Even if such an abusive person may not be likely to succeed in court in legally obtaining custody, the threat may seem very real to a spouse who has been constantly denigrated by her partner. Further, the threat of prolonged litigation, which may be very credible, can be a very worrying prospect. In some situations, the implicit or explicit threat may be that if the victim attempts to leave with the children, the abuser will abduct the children to obtain control of them. In other cases the abuser may threaten to kill his partner or the children if she leaves, or may threaten suicide. What is clear is the finding that the risk of a woman being killed by her abusive partner is significantly elevated in the period following separation.[17]

In 1993, Janet Johnston and Linda Campbell, two California-based mental health professionals, developed a differentiated set of "profiles" of relationships involving interspousal abuse, arguing that parent child relationships also differ in each of these situations. This range of profiles provides a richer picture than Walker, though it clearly builds on her work. The Johnston and Campbell profiles which follow were based on a

sample of their custody and access assessments, during which period three-quarters of their assessments involved cases where there was an issue of domestic violence.[18] Their profiles were as follows:

On-going or Episodic Male Battering

This closely resembles Walker's "battered wife" scenario and made up under a fifth of the cases in their samples, though this type of situation may have been under-represented in their samples, since these situations may be less likely to be litigated and assessed in custody and access disputes. In these cases the propensity for violence lies within the makeup of the man, who demonstrates low tolerance for frustration and poor impulse control, at least in the context of the spousal relationship, and is possessive, domineering and jealous about his partner. Physical abuse usually develops early in the relationship and is on-going or intermittent. The potential for violence is high and may escalate after separation, often with harassment and threats alternated with pleas for return. While children sometimes have superficially good relationships with these fathers (especially girls who may be treated "princess-like"), these children tend to be very afraid of their fathers. Their fathers have a low tolerance for stress and tend to be very demanding. These men are quite likely to be abusive of both their partners and children. Johnston and Campbell recommend that, in these situations, visitation should be supervised or suspended, especially if the threat of violence continues after separation.

Male Controlling Interactive Violence

The defining feature of these relationships is the man's attempt to control his partner, and maintain an authoritarian or dictatorial role. Physical aggression could be initiated by either spouse, as part of a struggle for control. There tends to be mutual blaming and anger in these cases, which were about 20% of the cases in their study. Once separated, there is a good prognosis for termination of violence. Both parents in this scenario tend to be abusive towards children, at least emotionally, and would benefit from help in developing parenting skills; access should be clearly structured to minimize possibilities of power struggles and abuse of the children.

Separation-Engendered and Post-Divorce Trauma

About one quarter of the cases in the Johnston and Campbell study fit this pattern in which violence was notably absent during most of the relationship, but one or more acts of violence occurred around the time of separation, perhaps associated with the humiliating discovery of a lover. Because the violence is uncharacteristic, it casts a shadow of fear and distrust over the victim, but there is generally a good prognosis for a positive parent-child relationship, and after the incidents of violence at the time of separation there is likely to be a violence-free relationship between the parents.

Female Initiated Violence

In these cases the woman initiates the acts of physical aggression, which has its source in her internal state of tension. These women were sometimes characterized as histrionic, emotionally unstable, dependent and self-preoccupied. Their male partners were

characteristically passive, sometimes depressed, obsessive and intellectualizing. The man usually retained his self control in the face of aggression. These situations were 10% - 15% of the cases in the Johnston and Campbell study.[19] Relationships between the mother and children were erratic and unpredictable; boys were especially likely to be the victims of maternal abuse. Fathers, to the extent that they were passive and intimidated by their wives, were not considered good role models and contributed to the child's feelings of ambivalence towards the mother.

Psychotic and Paranoid Reactions

These situations involve often unpredictable attacks by either spouse based on disordered thinking or a drug-induced state, and leave the victim feeling traumatized, intimidated and fearful. About 5% of the cases in the sample were in this category; some of the children in this situation were badly traumatized, while others identified with the psychotic parent and were themselves psychotic-like. Johnston and Campbell argue that visitation should be supervised or suspended in these situations.

Although Canadian courts have not referred to the Johnston and Campbell typology, it is useful in trying to analyze and understand what judges have been doing. It is also consistent with the VAWS that found a broad range of situations of abusive conduct, from those where there may have been just one assault reported (about one third of the reports) to those where there is a repeated cycle of violence with the potential for escalating risk after separation (also about one third of the reports).

1.3.2 Gender and Spousal Violence

One controversial aspect of the Johnston and Campbell typology that is relevant to matrimonial litigation and deserves further comment is that of abuse by women in domestic relationships -- a question that the VAWS did not address. The relative size of the Johnston and Campbell categories must be approached with real caution, due to the small size of the study (140 families). Further, as it was a sample drawn from litigation cases sent for assessment, it probably understates the proportion of serious abuse by males -- cases that would not get to the assessment stage of custody or access disputes because the father is so obviously inadequate.

A Canadian study by Jaffe and Austin found only 4% of a sample of contested custody and access cases involving domestic violence was spousal abuse by the wife alone, and 9% involved mutual abuse.[20] A study carried out by researchers at the University of Calgary reported that 18% of men admitted to physically assaulting their female partners, compared to 23% of women,[21] though it is very probable that men are more likely to deny their abuse than women. One large scale American study revealed that for 38% of couples where there was spousal violence, the woman initiated the physical attack.[22] While some scholars dismiss all female initiated violence in relationships as self defence, there is substantial Canadian[23] and American[24] data that calls such blanket assertions into serious question.

It is also apparent from both the research and case law that in some relationships there is a pattern of mutual abuse, in which each partner, at different times, will initiate physical

abuse. The physical violence in these relationships is a manifestation of an on-going power struggle within the relationship.

Gender is a very important dimension for understanding issues of spousal abuse, but it is clearly not the only dimension.[25] This is, for example, illustrated by the fact that partner abuse is also a serious problem in same sex relationships.[26] Moreover, many men who hold traditional patriarchal views of marriage do not abuse their wives.

As Johnston concludes:[27]

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

There are reported Canadian family law cases where the woman has clearly been the aggressor,[28] but these are relatively rare. There is a need to take violence against men by their partners seriously,[29] and to recognize that for some of these men a feeling of humiliation may make disclosure more difficult. However, it is also important to recognize that, in general, abuse of husbands has less serious consequences than abuse of wives, because of differences in social and economic power, as well as strength. Further, women are more likely to be injured and intimidated by their partners' abuse, and to have the abuse affect their self image and ability to effectively protect their interests and their children. Abused women are more likely to feel that their partners controlled the relationship; some research indicates more frequent post-separation disputes about visitation and other issues related to the children for abused than non-abused women.[30]

It is also necessary to consider the social context of abuse. Some women, such as those who are members of immigrant communities with language or cultural barriers and possibly immigration concerns, may be especially vulnerable. A particular concern for women in some immigrant groups in Canada is that they may be isolated from support services in the broader community, and pressured by members of their own ethnic group to remain in an abusive relationship.[31]

In each case where the issue of spousal abuse is raised, there is a need to consider the specific nature and context of the abuse. As Johnston points out:[32]

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

In order to assess the best response to spousal abuse, it is necessary to consider a range of questions. Who is the primary aggressor? What is the frequency, nature, and intensity of the abuse? What is the effect of the abuse, since the same acts will affect different individuals in different ways? What is the prognosis for recurrence of abuse,

given different possible interventions? Is there evidence about the effects of the above on the children?

1.4 Effects of Spousal Violence

There is now a substantial and growing body of research on the negative effects on children of growing up in a home where there is inter-parental abuse, even if the children are not direct observers of the abuse.

1.4.1 Direct Effects -- Potential for Child Abuse

Research indicates that at least one-quarter of men who physically abuse their partners also physically abuse their children.[33] In some studies, as many as three-quarters of abusive husbands also abused their children; at least some of the variation of rates depends on the type of population studied, with higher degrees of spousal abuse making abuse of children more likely.[34]

Young infants caught in situations of spousal abuse or conflict may be dropped or accidentally injured. Older children may be injured trying to protect an abused parent.

There is also the possibility of abduction of children by an abusing spouse. Sometimes the abusive spouse will threaten abduction to intimidate or control a partner, and if separation occurs, the abusive parent may abduct the child. If there is a possibility of abduction, this may be grounds for supervising or denying access.[35] In the most serious cases, an abusive parent -- usually the father -- may kill both his spouse and his children, or may kill his children and commit suicide; such homicides are more likely to occur in the context of marital breakdown or separation than if the abused spouse remains in the relationship.[36]

1.4.2 Indirect Effects of Spousal Abuse on Children

There is a growing body of research on the negative effects on children of observing or hearing one parent being abused by another. Children who observe inter-parental abuse are often terrified by the experience, and may not understand it. In some cases witnessing even a single serious incident of abuse can produce post-traumatic stress disorder in children.[37] Even if a child does not directly observe spousal abuse, living in a home where there is spousal abuse can have serious negative effects. The worst outcomes for children are associated with both observing spousal abuse and being directly abused.

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

- more behavioural problems and lower social competence; boys tend to externalize and be more aggressive, including the commission of offences as adolescents, while girls tend more towards depression;

- lower self esteem and higher anxiety, as evidenced by sleep disturbance and nightmares; and

- a greater likelihood of becoming involved in abusive situations as adults -- boys as abusive partners and girls as abused women.[38]

Fortunately, there is evidence that for most children[39] there will be substantial improvements in behaviour and emotional state if the child ceases to live with the abusive parent, and that therapy for the child is often helpful. There is a need for more research into long-term effects on children of spousal abuse, as well as on the effects of different types of legal arrangements (e.g., no access vs. supervised access vs. open access). There is also a need to research the effect of different patterns and types of spousal abuse on children, since most of the research to date has been based on situations where the abusive parent has not had contact after separation, and where the women lived in a shelter for a period of time, situations that are likely to involve more severe abuse and lower income families. Some children seem relatively immune to growing up in a violent home, and there is also a need for research into this resilience.

1.4.3 Effect on Abused Parent

An abused spouse often suffers from lowered self esteem, depression, drug or alcohol abuse or may take out feelings of powerlessness by mistreating their children. A history of physical aggression in the family is "strongly associated with mother's diminished parenting, in that mothers from violent relationships are less warm and more coercive with their children."[40]

While it is clear that children suffer from the diminished parenting capacity of an abused parent, there may be difficulty in deciding how to take account of this in a custody dispute. It may be argued that it is unfair for an abusive spouse involved in a custody dispute to be able to "hold against" the abused partner parental inadequacies that are caused by abuse. A response may be for the abused parent to adduce evidence in court on the positive effects of therapy for victims of spousal abuse after separation, in particular for improving parenting capacity. It may also be important for advocates of abused spouses to introduce evidence of the controlling and possessive nature of abusive spouses, and the negative effect that this can have on their parenting capacity, even if there is no direct abuse of the children.

1.5 Spousal Violence in Custody and Access Disputes

There are many challenges for advocates for victims of abuse in custody and access disputes involving spousal violence. Some of the challenges arise out of the potentially life-threatening consequences for women and/or children in these cases; others occur in the context of proving the abuse in what are often emotionally charged cases. For example, three common arguments made by abusive husbands are: (1) the mother is psychologically unstable; (2) the mother is financially incapable of caring for the

children; and (3) the mother's allegations of violence are exaggerated or unfounded.[41] Judges, lawyers, and other professionals working with families where spousal violence is present need to recognize the abuse, its seriousness, and its profound effect on children. A particular challenge in American and Canadian custody disputes is taking into account the "best interests of the child" where spousal violence exists, and how the court should consider children's wishes.

1.5.1 Protecting Women and Children

If there has been a history of violence, or seems to be any risk of future violence, it is essential that an assessment of risk and dangerousness be undertaken, bearing in mind that it is often difficult to assess the potential for violence and that, in some cases, violence and risk may escalate after separation. It may be necessary for a woman with an abusive partner to develop a "safety plan." Workers from a shelter are often able to provide assistance for women in developing a safety plan, though lawyers also play a role, at least in helping to ensure safety in court and assisting in liaison with police, Crown prosecutors and shelter workers.[42] A woman in this situation may need help with finding secure shelter, financial support or welfare. If there is a serious risk of post-separation harassment or violence, the police should be involved. Though some police forces have given these cases a low priority, increasingly Canadian police forces have policies and specially trained officers to deal with these cases.

In some more serious cases, if the legal system seems unable to protect a woman and her children, she may even have to change her name and go "underground." As a result of a professional discipline case brought against an Ontario lawyer, it has now been established that if a lawyer has a "reasonable and honest belief" of imminent danger to a child, the lawyer will be ethically justified in advising a client to defy a court order and take the child "underground," provided immediate steps are taken to bring a court application to resolve the situation.[43] The law must deal sensitively with cases where a parent takes a child away from the jurisdiction to protect the child from an abusive situation.

1.5.2 Proving the Abuse

In all family cases, and to some extent in all litigation, there are problems of proof associated with witnesses having selective memories and taking interpretations most favourable to themselves or to their friends or relatives, as well as of deliberate manipulation and dishonesty. Problems of proof can be especially difficult in spousal abuse cases, as the abusive conduct often occurs in private, and the perpetrator will often have a psychological tendency to deny or minimize his conduct as well as a tactical motivation for dishonesty. Beyond the testimony of the parties, the spouse seeking to prove abuse may submit such evidence as letters admitting abuse or photographs that depict it. In some cases there will be relatives, neighbours or professionals such as doctors,[44] police or social service workers who can testify as to having observed abusive

conduct, or seen injuries or other evidence of abuse. One of the difficulties in proving abuse is that at the time it occurs, victims often hide or deny their abuse. The VAWS revealed that only 26% of assaulted women had ever called the police, but most told a friend or neighbour; only one-quarter told a doctor and 22% told no one.[45]

Sometimes children can testify about spousal abuse, though it will generally be preferable not to call them as witnesses and embroil them in parental disputes unless absolutely necessary.[46] In some cases a child's disclosure of spousal abuse may be revealed through an investigation by police or child protection services, or in an assessor's report, or through a neighbour or relative who heard the child speak about the violence in the home. Often, however, children are very frightened in abusive families, and will be reluctant to disclose, especially in the context of on-going litigation.[47] Sometimes an abused mother will know of other women who have been involved in previous[48] or subsequent relationships with the abuser who may also have been victimized, and who can testify as to his abusive behaviour. If they were involved in a relationship after the separation with the mother, they may be able to testify about the father's abuse towards children during access visits.[49]

1.5.3 False and Exaggerated Allegations

While minimization of domestic violence by abusers (and often by victims, at least in intact relationships) is more common than exaggeration, judges and lawyers need to be aware of problems of false or exaggerated claims of spousal abuse. There are substantial conceptual problems in trying to do research about false claims (or false denials) of abuse. One interesting study by Johnston found very substantial disparities in descriptions of divorced partners about the extent and initiation of verbal and physical aggression during their relationship, with men and women most commonly each reporting that their partner was the aggressor and minimizing their own role. She concluded that it is in general more likely men are refusing to acknowledge their violence, since women were offering "more detailed and highly specific accounts, whereas men tended to be vague or dismissive of the event."[50] Johnson recognized that both women and men can be aggressors, and there is a "lack of clear gender discrepancy in aggressive behaviour," but "that the consequences of male aggression are expected to be more serious."[51]

The incidence of false allegations probably varies over time (and perhaps locality). Johnston and Campbell compared two samples they studied of divorcing parents who were contesting custody or visitation:[52]

With respect to exaggeration and elaboration of incidents...in the first sample studied during the years 1982-84, only two women clearly did this. In the second sample, seen more recently during 1989-90, by which time some spouses and their attorneys had become very familiar with the feminist sociopolitical position with respect to domestic violence and the battered women's syndrome -- through television, the press and women's shelters -- seven women and one man (13%) were judged to have exaggerated the issue of violence as a ploy in the custody dispute.

With more awareness among the public, and a much higher degree of psychological validation and support than in the past, it is quite possible that there may now be more false or exaggerated claims of spousal abuse than in the past, with such claims being advanced either to gain an advantage in litigation, or genuinely reflecting the victim's interpretation of her past. However, it must also be appreciated that the more supportive climate has facilitated more genuine victims of abuse coming forward, and there are still many victims who do not disclose their abuse.

An example of a case where a judge concluded that a woman embellished her account of abuse was the 1995 Ontario decision of *K.A.S. v. D.W.R.*[53] The parents separated when the child was less than a year old; the father was seeking access more than a year later, while the mother sought to deny access. There was evidence that the father had been controlling and on occasion abusive of the mother; he pled guilty to criminal harassment of her as a consequence of post-separation telephone calls, and was convicted of offences relating to assaults of previous partners. However, Katarynych Prov. J. concluded that much of the mother's testimony had exaggerated incidents of abuse. She observed:

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

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

From a societal perspective, the problem of male abusers denying or minimizing their acts is a more pervasive and serious problem than the problem of women exaggerating or falsifying claims of abuse. However, justice system professionals must approach each case on its own facts, and be prepared to deal with both types of problems. Peter Jaffe's response to claims of women magnifying violence is: "In 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."[54]

1.5.4 Children's Wishes

Children's wishes can be very problematic in spousal abuse situations because the abused parent may be seen as weak and "ineffectual," and children may wish to align themselves with the "stronger," more powerful, abusive parent. An abusive spouse can be very manipulative and the denigration of the other parent may influence a child's relationship with a victim of abuse, or the abusive parent may coerce or threaten the children to express views favourable to himself. In some cases, a man who is an abusive spouse will have a superficially good relationship with a child, especially a daughter who may be treated "princess-like," and who will express a desire to live with him, though the child may still have a profound fear of the abuser. It can be psychologically difficult for an abused parent to accept a situation where children are ambivalent or express a desire to live with a parent who has been an abusive spouse.

Perhaps the most infamous Canadian example of children expressing a desire to live with an abusive father was the *Thatcher*[55] tragedy. As his relationship to his wife began to deteriorate, he became increasingly demeaning, abusive and controlling towards her. After separation his sons and eventually his daughter indicated a strong desire to live with him, and continued to express support for him even after he was convicted of the murder of their mother, which occurred after she had remarried.

In *Worden v. Worden*[56] the husband had a drinking problem and a history of violence towards his wife, though there was no evidence that he ever directly abused the children. The woman left her husband after 17 years in the abusive relationship, taking the children with her to a shelter. While the 14-year-old son did not get along with his father, the 10-year-old daughter continued to express a desire to live with the father in the familiar home surroundings. Arguably the desire of the judge to maintain the child in "familiar surroundings" and proximity of friends was critically important to the decision in *Worden,* and the outcome might well have been different if the father had initially been required to leave, thus allowing the mother to have exclusive possession of the family home. The judge observed that given the age of the children, they would be likely to "resist and perhaps resent situations that are thrust upon them," and ordered that the father was to have custody of the daughter, on condition that he refrain from drinking in her presence and take counselling for his alcohol and anger management problems.

Sometimes individuals who are abusive of partners present very well and are highly manipulative, and are able to "con" assessors, especially those who may not be familiar with patterns of abuse, or who are impressed by children's wishes and their apparently close links to the abuser. This may be challenging for counsel for an abused spouse to counteract, but it is possible to do so, in particular by introducing independent evidence of abuse as well as testimony of other mental health professionals on the effects of spousal abuse on children. The courts have stated that they are not bound by an assessor's recommendation or a child's wishes, especially in situations of spousal abuse.[57]

However, a child's wishes can be an important factor favouring a parent who abused a partner, but appears to pose no risk of direct abuse to a child.[58] A child's wishes to live with an abuser should have less weight in cases where there has been spousal abuse than in other contexts, though it is not clear that Canadian courts always have followed this

approach. On the other hand, if a child expresses a reluctance to seeing a parent who has been abusive, judges should not ignore the child's concerns and fears. Unfortunately, there are cases in which assessors and judges have given little weight to a child's understandable reluctance to visit a father who has abused their mother, dismissing the child's fears as being "transferred" from the mother.[59]

ENDNOTES

[1] For some purposes it is useful to have a broad definition of "spousal abuse" that encompasses a range of abusive conduct such as physical, sexual, emotional, and financial. But such broad definitions create their own difficulties, and may need to be refined to be useful in certain situations. In line with legislative practices in other jurisdictions (e.g., the United States), for purposes of this paper the focus will be primarily on physical and sexual abuse, and the term "spousal violence" will be used to emphasize this.

[2] Edleson, Jeffrey L. In press. The overlap between child maltreatment and woman battering. *Violence against women.*

[3] The Canadian Panel on Violence Against Women. 1993. *Changing the landscape: Ending violence ~ Achieving quality*. Part. 4. Ottawa, ON: Minister of Supply and Services, 229-230.

[4] Bala, Nicholas. 1998. A differentiated approach to spousal abuse and children of divorce: The Canadian experience. In *Children exposed to family violence: Current issues in research, intervention, prevention and policy development,* edited by Geffner, Robert, Peter G. Jaffe and Marlies Sudermann. Bingham, NY: Haworth Press, forthcoming.

[5] Johnson, Holly. 1996. *Dangerous domains: Violence against women in Canada*. Scarborough, ON: Nelson Canada, 28.

[6] Johnson 1996.

[7] A special issue of the *Canadian Journal of Criminology* (July 1995, Volume 37(3)) contains several articles related to specific findings from the Violence Against Women Survey.

[8] These findings are summarized from Johnson 1996.

[9] Sexual abuse includes various forms of non-consensual sexual activity, including forcing or coercing a partner into participating in group sex. One particularly hazardous dimension of abusive relationships is that women who are abused may also be at higher risk of HIV infection and sexually transmitted diseases from their partners: "In an abusive relationship you can't practice safe living, never mind safe sex." McLeod, Debra. 1996. Women at high risk need to know it, *Vis-a-Vis* 13 (3): 9.

[10] Media reports frequently remind Canadians of the potential for violence perpetrated by estranged spouses, especially husbands. This was particularly emphasized by the tragedy in Vernon, British Columbia in April 1996. A man, whose wife returned to her family due to his abuse, killed her and eight of her family members, and then killed himself. While there are legitimate questions about whether this man should have had a firearms permit after his threats and abuse, it may have been difficult to predict that this man had the potential to commit such a violent mass murder. See e.g., Canadian Press, Shooting turns holiday celebration into time of mourning, 7 April 1996; and Inquest into Vernon massacre releases 29 recommendations, 30 September 1996, section A, 3.

[11] *Criminal Code of Canada* s. 264, criminal harassment, s. 372(3), harassing phone calls, and s. 264.1, uttering threats.

[12] Another 1994 Statistics Canada report, this one on spousal homicide, revealed that women are more than three times as likely to be killed by their spouses than are men, and nine times as likely to be killed by

a spouse as by a stranger. Wilson, Marge and Martin Daly. 1994. Spousal homicide, *Juristat* 14 (8); see also Wilson, Marge, Holly Johnson and Martin Daly. 1995. Lethal and nonlethal violence against wives, *Canadian Journal of Criminology* 37: 305-330; and Femicide increasing study shows, 29 April 1997, *The Globe and Mail*, section A, 6.

[13] Walker, Lenore. 1979. *The battered woman.* New York: Harper and Row.

[14] Walker, Lenore. 1984. *The battered woman syndrome.* New York: Springer Publishing.

[15] Dutton, Donald. 1996. *The batterer: A psychological profile.* New York: Basic Books.

[16] See e.g., *Fowler v. Fowler* (1992), 331 A.P.R. 172 (Nfld. U.F.C.) where the parties lived together for 10 years, during which time there were incidents of verbal and physical abuse by the man, though only one assault in the last two years of cohabitation. Shortly after the husband found out his wife had committed adultery, he told her to sign a separation agreement waiving her right to claim support or seek a share of marital property, threatening that if she did not he would prevent her from seeing their daughter again. She signed the agreement and left the home with her daughter. The court ruled that the separation agreement was obtained under duress and invalid. Chief Justice Hickman concluded that the woman had a reasonable apprehension of violence when she signed the agreement, considering the entire history of abuse in the marriage. Further, while the man's threat to obtain custody, let alone deny access, was legally untenable, given the "emotional trauma," the woman was not in a position where she could "be expected to rationally decide...her rights...with respect to custody" at the time of separation.

[17] Wilson and Daly 1994.

[18] Johnston, Janet, R. and Linda E. G. Campbell. 1993. Parent child relationships in domestic violence families disputing custody. *Family and Conciliation Courts Review* 31 (3): 282-298. They studied 140 domestic violence cases.

[19] For a discussion of research on situations where females are the initiator of domestic violence, see Hamberger, L. Kevin. 1997. Female offenders in domestic violence: A look at actions in their context. In *Violence and sexual abuse at home: Current issues in spousal battering and child maltreatment*, edited by Geffner, Robert, Susan B. Sorenson, and Paula K. Lundberg-Love, 117-130. New York: Haworth Press Inc.; and Pearson, Patricia. 1997. *When she was bad: Violent women and the myth of innocence*. Toronto, ON: Random House Canada, esp. 114-145.

[20] Jaffe, Peter G. and Gary Austin. 1995. *The impact of witnessing violence on children in custody and visitation disputes*. Paper presented at the 4th International Family Violence Research Conference, Durham, NH.

[21] Coren, Michael. Domestic violence against men should not be dismissed. *The Globe and Mail*, 30 November 1994, section A, 26.

[22] Fekete, John. 1994. *Moral panic: Biopolitics rising*. Chapter 2. Montreal: Robert Davies Publishing, reporting on a study by Schulman (Kentucky, 1979).

[23] Fekete 1994, reporting on a 1994 Winnipeg study by Reena Sommer indicating that only 19% of women and 15% of men involved in episodes of domestic violence reported themselves as acting in self defence. While women who attack their present or former partners often claim to have been acting in self defence or battered spouse situations, the courts do not always accept this defence; see e.g., *R. v. Vanessa Weeden*, Ont. Gen. Div. per Watt J. where a woman was charged with first degree murder after stabbing her common law husband and killing his lover; the court agreed to accept a guilty plea to manslaughter, and sentenced the woman to nine years and eight months imprisonment. See *The Globe and Mail*, 28 May 1996, section A, 9.

[24] See especially Straus, Murray A., Richard J. Gelles and Suzanne K. Steinmetz. 1980. *Behind closed doors: Violence in the American family*. Newbury Park, CA: Sage Publishing; and Straus, Murray A. and Richard J. Gelles. 1988. Has family violence decreased? A reassessment of the Straus and Gelles data. *Journal of Marriage and Family* 50: 281-291.

[25] See Lenton, Rhonda. 1995. Power versus feminist theories of wife abuse. *Canadian Journal of Criminology* 37: 305-330; and Lenton, Rhonda. 1995. Feminist versus interpersonal power theories of wife abuse revisited. *Canadian Journal of Criminology* 37: 567-574, for a sociologist who takes this moderate position, and reviews some of the feminist literature that takes a more strictly gender-based focus.

[26] See e.g., Faulkner, E. 1991. Lesbian abuse: The social and legal realities. *Queen's Law Journal* 16: 261-286; and Coalition Committee. 1995. *A review of criminal justice responses to lesbian battering*. London, ON: London Battered Women's Advocacy Centre.

[27] Johnston, Janet. 1995. Domestic violence and parent-child relationships in families disputing custody. *Australian Journal of Family Law* 9: 12-25 at 16.

[28] See discussion below. See also e.g., *MacDonald v. MacDonald* (Ont. Gen. Div. 1991), *Lawyers Weekly* No. 1112-016, where the wife was alcoholic and violent towards her husband; the separation occurred after she stabbed him while he was driving. Flaningan J. reduced the amount of spousal support that she would have been entitled to on account of her "gross repudiation of the relationship." See also *Stead v. Huard* (1995), 13 R.F.L. (4th) 369 (Ont. Prov. Ct.) where following separation the mother arranged for various men to assault her former partner, and she herself assaulted his new partner.

[29] Save us from our wives, say battered men. *Kingston Whig Standard,* 30 May 1992; and Peter Raeside. Women's violence against men is our last taboo. *The Globe and Mail,* 10 November 1993, section A, 22; and Abuse at the hands of a once loving wife. *The Toronto Star*, 19 October 1997, section A, 1.

[30] Newmark, Lisa, Adele Harrell and Peter Salem. 1995. Domestic violence and empowerment in custody and visitation cases. *Family and Conciliation Courts Review* 33: 30-62.

[31] See e.g., *P.A. v. F.A.,* [1997] B.C.J. 1566 (S.C.) where the husband was abusive of both his wife and children. Both the spouses were members of the Nigerian Christian community in Vancouver. The woman was advised by members of that community not to seek the assistance of the Ministry of Social Services, despite the husband's physical, sexual and emotional abuse of the children. Members of the community, including one who was supervising post-separation access, continued to encourage the woman to remain with the man, despite the continuing abuse.

[32] Johnston 1995, 24.

[33] In general in this section, see Jaffe, Peter G., David Wolfe and Susan Kaye Wilson. 1990. *Children of battered women*. Newbury Park, CA: Sage Publishing; Peled, Einat, Peter G. Jaffe and Jeffrey L. Edelson, eds. 1995. *Ending the cycle of violence: Community responses to children of battered women.* Newbury Park, CA: Sage Publishing; Geffner, Robert, Susan B. Sorenson and Paula K. Lundberg-Love, eds. 1997. *Violence and sexual abuse at home: Current issues in spousal battering and child maltreatment.* Binghamton, NY: Haworth Press; and Geffner, Robert, Peter G. Jaffe and Marlies Sudermann, eds. 1998. *Children exposed to family violence: Current issues in research, intervention, prevention and policy development.* Binghamton, NY: Haworth Press, forthcoming.

[34] Straus, Gelles and Steinmetz. 1980; 28% of children in couples classified as having high levels of violence were abused in year prior to the interview, and 77% had been abused at some time in the past. An American study based on a large population survey reveals that the greater the use of violence by a spouse against a partner, the more likely that person will also physically abuse children; the correlation was especially strong for male abusers: Ross. 1996. Risk of physical abuse to children of spouse abusing parents. *Child Abuse and Neglect* 26: 589.

[35] See e.g., *Zahr v. Zahr* (1994), 24 Alta. L.R. (3d) 274 (Q.B.).

[36] Wilson and Daly 1994, report that 94% of "familicides" (killing of one's spouse and children) in Canada were committed by men, compared to 76% of non-familicidal spousal killings. For a description and analysis of a familicide arising out of an abusive marriage, see Busch, R. and N. Robertson. 1994. I didn't know just how far I could fight: Contextualizing the Bristol inquiry. *Waikato Law Review* 2: 41-68.

[37] Saunders, Daniel G. 1994. Child custody decisions in families experiencing woman abuse. *Social Work* 39 (1): 51-59.

[38] Davidson, H. A. 1995. Child abuse and domestic violence: Legal connections and controversies. *Family Law Quarterly* 29: 357-373, at 359.

[39] Mertin, Peter. 1995. A follow up study of children from domestic violence. *Australian Journal of Family Law* 9: 76-85.

[40] Johnston, Janet R. 1994. High-conflict divorce. *The future of children* 4 (1): 165-182, at 175.

[41] Sun, Myra and Elizabeth Thomas. 1987. *Custody litigation on behalf of battered women*. New York: National Center on Women and Family Law.

[42] See e.g., Zorza, Joan. 1995. Recognizing and protecting the privacy and confidentiality needs of battered women. *Family Law Quarterly* 29: 273-311.

[43] See *Law Society of Upper Canada v. Curtis*, *Lawyers Weekly* 1323 -018 (Discipline Comm. L.S.U.C., 29 Sept 1993). In this case the initial allegations were that the father was sexually abusing his daughter during access visits. Although after the mother "resurfaced" it became apparent that the allegations were unfounded, at the time that she went "underground" there were reasonable grounds to believe the allegations.

[44] Although spousal abuse is underdiagnosed, physicians are increasingly receiving education and training about the need to suspect spousal abuse and ask questions, as well as providing treatment to victims and abusers; e.g., Ferris, L. E., M. McMain-Klein and L. Silver. 1997. Documenting wife abuse: A guide for physicians. *Canadian Medical Association Journal* 156: 1015.

[45] Rodgers 1994.

[46] For a recent case where the children testified about abuse by the father of both themselves and their mother, see *S.L.T. v. M.L.T.*, [1997] M.J. 285 (Q.B. Fam. Div.).

[47] Lehrman, F. 1996. Factoring domestic violence into custody cases. *Trial* 32: 38.

[48] See e.g., *Allen v. Allen*, [1995] S.J. 410 (Q.B.).

[49] See e.g., *A.J.M. v. T.D.M.*, [1996] O.J. 1342 (Gen Div.); and *F.K.H.W.B. v. F.S.M.W.B.*, [1995] N.S.J. 471 (Fam. Ct.).

[50] Johnston 1995, 16.

[51] Johnston 1995, 16.

[52] Johnston, Janet R. and Linda E. G. Campbell. 1993, 286.

[53] [1995] O.J. 1711 (Prov. Div.). For a similar case, see *Sekhri v. Mahli* (1993), 112 Sask. R. 253 (U.F.C.) where Klebuc J. accepted that there had been at least one assault by the father, but concluded that the

mother "grossly exaggerated...in some instances, on the verge of being untruthful" allegations of physical and verbal abuse towards her by the father during their nine years of cohabitation in marriage. An assessor concluded that the father was "incapable of significant violence," but recognized that the daughter was fearful of her father due to the mother's influence over the six years since the parents separated. The daughter came to believe that the father would kill her, though there was no evidence to support this fear. Recognizing the fears of the mother and daughter, however unfounded, the court ordered a process of initially supervised access, with a psychiatric assessment of the father and counselling for the mother and daughter. Similarly *Lindsay v. Lindsay* (1985), 19 R.F.L. (4th) 163 (Ont. Gen. Div.); and *M.B. v. Y.M.*, [1996] Q.J. 1276 (Que. S.C.) where the mother made allegations of spousal abuse in affidavits filed before trial but retracted the allegations when testifying. See also *Blackwell v. Burden*, [1996] O.J. 472 (Ont. Gen. Div.); *B.A. v. A.T.* [1997] N.S.J. 323 (Fam. Ct.); *K.H.P. v. R.P.*, [1997] B.C.J. 1166 (S.C.); and *Brigante v. Brigante* (1991), 32 R.F.L. (3d) 299 (Ont. U.F.C.).

[54] Jaffe, Peter G. 1995. Children of domestic violence: Special challenges in custody and visitation dispute resolution. In *Domestic violence and children: Resolving custody and visitation disputes*, edited by Carter, Janet, Barbara Hart and Candace Heisler. San Francisco, CA: The Family Violence Prevention Fund, 24.

[55] See e.g., (1980), 16 R.F.L. (2d) 263 (Sask. Q.B.) and 20 R.F.L. (2d) 75 (Sask Q.B.). At least initially, the court did not rely on the children's expressed wishes, though eventually it did. See Siggins, Maggie. 1985. *A Canadian tragedy: JoAnn and Colin Thatcher: A story of love and hate.* Toronto, ON: MacMillan.

[56] (1994), 154 N.B.R. (2d) 60 (Q.B. Fam. Div.). For a similar case, see *Pearce v. Pearce*, [1996] O.J. 207 (Gen. Div.).

[57] See e.g., *Young v. Young,* (1989), 22 R.F.L. (3d) 227 (Ont. S.C.), discussed above. More recently see *A.J.M. v. T.D.M.*, [1996] O.J. 1342 (Gen. Div.).

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

[59] See e.g., *Stochmarski v. Stochmarski*, [1997] S.J. 18 (Q.B. Fam. Div.) where the father admitted to slapping and bruising his wife on a number of occasions, which the children observed. The wife left the marital home with two children after one assault that resulted in a criminal conviction. The father was required to take an anger management course as a condition of probation, but continued to deny that he had an anger problem. The children expressed fear of their father and the daughter did not want to visit the father. The two assessors involved in the case felt that the children's fear of their father was "transferred" from the mother and babysitter, and recommended unsupervised access. The judge ordered unsupervised access, and directed the mother not to "make rejective comments or...express fear" of the father in the children's presence, and to encourage the daughter to visit, though stipulated that the eight-year-old girl should not be "forced" to visit her father for another six months.

2.0 CURRENT LEGAL RESPONSES IN CANADA

2.1 Legal Responses to Spousal Violence

Until the 1960s, the issue of spousal abuse was largely ignored as a social and legal problem.[1] Justice system professionals, such as judges, lawyers and police, who were virtually all men, displayed little sensitivity or understanding for a range of forms of violence arising in intimate contexts, such as wife abuse, sexual assault and child abuse. There was a tendency to view those cases of "domestic" violence that came to the attention of the police as "private" matters. Except in the most serious cases of wife assault or homicide, the police were unlikely to lay charges, and spousal abuse was only to be a factor in family law cases if it was "excessive." Health and social service professionals who were involved with spousal abuse generally viewed "family preservation" as a primary objective, and disregarded issues of safety. Female victims of abuse were often characterized as "masochistic" or "neurotic."[2]

The late 1960s saw the beginnings of the modern feminist movement and the beginnings of an awareness of the serious and extensive nature of abuse of women in intimate relationships. In 1968, as part of Canada's divorce law reform, physical and mental cruelty became grounds for dissolution of marriage. In the 1970s, advocates for women and various professionals began to demand government action to respond to the realities of spousal abuse and the first shelters for battered women were established.[3]

By the early 1980s, there was a growing concern about the inadequacy of the legal responses to spousal abuse. In particular, the practice of police expecting abused wives to bring their own "private prosecutions" in criminal court was criticized; these women invariably lacked the psychological and financial resources to carry forward their cases, or were easily intimidated or cajoled by their abusers into withdrawing charges. There was also a growing awareness of the "cycle of abuse," which often resulted in abused women repeatedly going through an emotionally destructive and physically dangerous pattern of abuse and reconciliation with their partners. In the early 1980s, many police forces began to respond by increasing training for their officers and introducing policies requiring mandatory police charging in response to all cases of domestic violence.[4]

There continued to be many examples of judicial "insensitivity" to wife abuse in the 1980s,[5] though by the early 1990s judicial education programs in Canada were dealing with domestic violence, including presentations by advocates for battered women, and civil and criminal courts were starting to display more understanding of the problems of domestic violence and wife battering. In 1990 in *R. v. Lavallee,*[6] the Supreme Court of Canada ruled that a woman charged with murdering her common law partner might be considered to be acting in "self defence," even though at the time of the killing she faced no immediate threat to her physical safety, if taking account of her mental state as an

abused woman, she had a "reasonable apprehension of death or grievous bodily harm." The jury could hear expert evidence about the mental state of abused women to

determine whether this particular victim of battering was acting reasonably, taking account of all of her circumstances and the context of the abusive relationship.

By the mid 1990s, not only have there been highly publicized[7] criminal trials dealing with spousal abuse, but the media and popular culture have raised public and professional awareness of the existence of the phenomenon of the "battered woman."

2.1.1 Custody

Until the late 1980s, Canadian judges clearly downplayed the importance of domestic violence in all legal contexts, including custody and access proceedings.[8] More recently, however, Canadian judges have begun to place significant weight on spousal abuse as a factor in child-related proceedings, though some judges display less understanding of spousal abuse than others, and all judges consider the nature and effect of the spousal abuse on the children, as well as the individual circumstances of the case in making a determination.

While over 40 American states have legislation that explicitly mentions domestic violence as a factor in custody and access related cases, in Canada only Newfoundland's *Children's Law Act* makes specific reference to this factor, providing that:

> 31(3) In assessing a person's capacity to act as a parent, the court shall consider whether the person has ever acted in a violent manner towards
> a) his or her spouse or child;
> b) his or her child's parent; or
> c) another member of his household;
> otherwise a person's past conduct shall only be considered if the court thinks that it is relevant to the person's ability to act as a parent.

The federal *Divorce Act* and legislation in most provinces specifies that in assessing a child's "best interests," the court shall not take account of a person's "past conduct unless that conduct is relevant to the ability of that person to act as a parent of a child."[9] While this statutory provision may exclude evidence of such marital "misconduct" as adultery, there is now a significant body of Canadian case law in which judges have held that spousal abuse is relevant to custody and access and given it significant weight as a factor in deciding about these issues.[10] In many of the "earlier" reported decisions -- only from the late 1980s -- expert testimony was essential to establish the effects of spousal abuse on children; while in practice this type of expert evidence is still valuable, it is no longer essential in every case.

One of the first reported Canadian cases dealing with the effects of spousal violence on children was *Young v. Young,* decided in 1989. The parties separated after about 15 years of marriage. While the children, aged 11 and 13, expressed a wish to live with their father, Bolan L.J.S.C. was concerned that the father was trying to manipulate the children by showering them with lavishness during visits. There was significant emotional abuse of the wife by the husband throughout the marriage, several incidents of the husband sexually abusing the wife in the last two years of cohabitation, and two physical assaults after the separation. There was expert testimony from three mental

health professionals. The judge remarked that "relevancy of this finding of abuse is that it goes to [the father's] ability to parent the children on a full time basis." The judge accepted the expert testimony based on the literature on the effects of spousal abuse on children, namely that:[11]

1. An abuser who goes without therapy will continue to abuse in another relationship;
2. Children who witness abuse can become abused even though the abuse is not intentionally directed at them;
3. Abused male children often become abusers and abused female children may become compliant to abusers.

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

Since *Young* there have been many reported Canadian cases in which mothers who have been victims of emotional and physical abuse have called expert witnesses to testify about the negative effects of this abuse on the children, and hence explain why the father should not get custody.[12] These experts have also explained how the abuse has affected the victim, for example causing loss of self esteem and depression, and how counselling can (or has) helped the victim to recover and be an effective parent.

At least some Canadian judges are aware of the effects of spousal abuse on children. In one 1997 British Columbia case, the judge observed that the father's:

> abuse of the [mother]...affects the health and well-being of the children because they have witnessed it over and over again. The [expert] evidence shows that they are, as a result, fearful for their mother's safety, guilty that they cannot protect her and afraid of repercussions if they do try to protect her.[13]

In a 1997 Ontario case involving a child who was too young to have remembered witnessing any incidents of spousal abuse, the judge awarded custody to the mother, remarking on the father's abuse of the mother:

> Although the evidence on the issue of [spousal] violence and emotional abuse is only indirectly relevant to the issue of custody and access, I cannot ignore it as a factor...the manner in which he treated his wife reflects on his character, his values and his suitability as a role model.[14]

In some more recent cases, abused women have been able to obtain custody without calling expert evidence, even in the face of an assessor's report favourable to the father. At least some judges are now prepared to accept the harmful effects of spousal abuse on children without the testimony of an expert in domestic violence.[15] For example, in the 1995 British Columbia case of *Stewart v. Mix,*[16] the parties cohabited for seven years, during which time the man attempted to constantly control the woman, verbally abused her daily, and displayed a temper that could quickly be inflamed to violence, including assaulting his partner. The last assault occurred in the presence of their then two-year-old son at the start of an access visit, which was the only occasion on which criminal charges were laid. An assessor recommended that the father should have custody, in

large part because the mother had moved and formed a new relationship and had a young baby, and the assessor felt that the older boy had bonded to the father's extended family. The judge rejected the assessor's recommendation that the father should have custody and observed that the "father has a history of a violent temper, was consistently jealous of his [former] common law wife, used violence when aroused...It is difficult to see how he can be considered a good role model." The judge awarded custody to the mother, with specified access to the father, including a provision for supervision of the exchange of the child.

While many judges are aware of the significance of spousal abuse in custody and access cases, clearly others are not. An example of judicial insensitivity is provided by a 1993 Ontario decision in a case where the mother was alleging both spousal abuse and sexual abuse of the daughter. The judge discounted the testimony of an expert witness and believed that the mother was not a believable witness because she hesitated in her answers, and avoided questions that "would put her in a bad light vis-a-vis her behaviour in her marriage." In awarding the father unsupervised overnight access, despite his history of past violence and the mother's concerns about sexual abuse, the judge remarked:

> While it is true he has demonstrated violence in the presence of his wife and others, normally directed towards his wife, such was almost on all occasions provoked by the applicant's [wife] immature behaviour.[17]

This type of judicial attitude demonstrates the need for legislation that deals explicitly with spousal abuse as a factor in custody and access cases.

Joint Custody

Joint custody is not appropriate if there has been a history of spousal abuse and the abused parent is unable to effectively negotiate issues without the involvement of an advocate. Indeed joint custody is not appropriate if there is a high level of parental conflict or serious power imbalances, even without abuse;[18] there is all the more concern if there is a history of spousal violence. There are Canadian judgments which recognize that where there is a history of significant disagreement and argument, let alone abuse, joint custody is not likely to be appropriate,[19] though it would be preferable to follow the example of several American states and have a statutory prohibition against joint custody if there is a significant history of domestic violence,[20] as there have been Canadian cases in which judges have imposed joint custody despite a history of spousal abuse.[21]

Mutual Spousal Abuse

As discussed in Chapter 1.0, Section 1.3.2, there are some relationships that can be characterized as ones of "interactive violence," where either party can initiate physical aggression as part of a struggle for control, with mutual blaming and anger. In general, these cases seem to have a relatively good prognosis for elimination of violence after separation.

In the 1997 British Columbia case of *Stackhouse v. Stackhouse*[22] the judge adopted the marriage counselor's characterization of the parents' relationship as a "classic power struggle." The judge felt that each party had a "strong need to justify their behaviour and persuade the court that one or the other was the perpetrator." The judge believed that there was mutual shoving and insulting behaviour, and that both would benefit from counselling, and both were participating in programs. The court awarded custody to the mother, and in the absence of evidence that the father posed a direct risk to the children during a period of supervised access, allowed unsupervised access. The court observed that during the supervised access visits, the children appeared to enjoy a "healthy, fulsome relationship with their father." In light of the history of marital conflict, it would have been preferable to have at least a period of exchange supervision.

Abusive Women

Women are most commonly the victims of spousal abuse, or are more seriously affected if there is a mutually abusive relationship, but Johnston and Campbell as well as other researchers have found that in a minority of cases the wife appears to be the initiator of physical abuse. There have been a few reported recent Canadian cases in which it is apparent that the woman was the more aggressive partner. In some cases, the woman's aggressive behaviour may reflect her emotional condition, while in others she may be psychotic. Even if the woman has initiated the spousal abuse, there are often mitigating factors, such as that the mother is clearly the child's primary caregiver, which support her custody claim. Further, there is considerable evidence that women who abuse their partners are less likely to directly abuse their children than men who are spousal abusers. As a result, abusive spousal behaviour by a wife is generally seen by judges as less decisive in a custody dispute than abuse by a husband.[23]

In *D.M. v. L.M.*,[24] the court accepted that during the marriage the mother had behaved in an erratic and violent fashion towards the father and the contents of the house, and that the "child [had] been exposed to these outbursts in a totally unacceptable way." The mother had interim custody. A court appointed assessor recommended that the father should have custody, but the judge chose to rely on the opinion of the mother's doctor, to the effect that after the assessment but before the trial the mother's emotional condition substantially improved and was under control by drug treatment. The court ordered joint custody, with the child's principal residence with the mother and extensive access to the father.

In a 1997 British Columbia case[25] the parents had two children, both of whom experienced developmental delays, and the mother stayed at home to care for them. The evidence of the father and the mother's father as well as of a neighbour was that the two spouses argued noisily, with the mother being the louder of the two. The mother admitted assaulting her husband on at least one occasion, and there was evidence that she pushed and shoved him at other times, though the judge would not accept the husband's allegations of more serious violence involving her use of knives and throwing chairs. The husband was verbally abusive of his wife, denigrating her appearance, especially after she gained weight with the birth of her children. While Vickers J. concluded that the mother was the more physically aggressive of the two, the judge accepted that she was the primary caregiver and did not pose a risk to the children. She

was awarded physical custody of the children, with the father sharing guardianship rights, and having regular specified access.

These cases illustrate that while spousal abuse should always be considered by a court in deciding custody and access issues, it should always be seen in an appropriate context. In particular, in a relationship characterized by mutual abuse or female initiated physical violence, the primary caregiver should generally not be deprived of custody, unless there is evidence of direct abuse of the children.

Separation-Engendered Violence

It is possible to categorize some cases as ones in which abusive conduct is not a constant feature of the spousal relationship, but rather is confined to a few episodes around the time of separation. Such situations often have a better prognosis for future relations than relationships where violence has been more pervasive.

In *Hallett v. Hallett*[26] the parents cohabited for 14 years in a relationship that was apparently free of abuse. During the process of separation, which went over several months, the man assaulted the woman on three occasions in incidents involving shoving and some hitting; one of the two children saw one of these incidents and later told an assessor that he was frightened by it. The police were called and charges laid after the third assault, and the woman and her children went to live in a battered women's shelter. While the man questioned whether the woman should have had the "advantage" of a support network and long-term housing for "battered women," a worker from the shelter testified on behalf of the mother at the custody trial. Schnall Prov. J. commented on the limited amount of physical violence in the relationship and observed:

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

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

2.1.2 Access

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

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

This provision has been cited by the Supreme Court of Canada to help justify restraining the mobility of a custodial parent[27] and as the basis for not restricting the right of a Jehovah's Witness father from sharing his religious faith with his children during visits.[28] In practice, s. 16(10) creates a presumption that access by the non-custodial parent is in the best interests of a child. While this provision is used by advocates for abusive spouses to secure access rights, at least some judges have indicated that in cases where there is evidence of a significant risk of harm to a child, access will be restricted or even denied. The tone of s. 16(10), however, may sometimes make victims of abuse who are seeking custody reluctant to put forward a claim to restrict access for fear of appearing "unfriendly."

Denial of Access

Although the legislation and case law create a presumption that continued contact between a non-custodial parent and child is in the child's best interests, a significant number of reported Canadian decisions have recognized that in situations where there has been a history of serious spousal abuse or violence, access may not be in the child's best interests and should not be permitted. As stated by Pugsley J.A. of the Nova Scotia Court of Appeal in *Abdo v. Abdo,* where an abusive husband and father was denied access to his three children:[29]

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

There are a growing number of cases in which access has been denied to an abusive spouse. They are situations of repeated physical violence and emotional abuse by a man, directed at his female partner, and sometimes at the children as well, and almost all have involved some form of post-separation spousal abuse. Although in most of the cases the custodial mother relied on expert testimony to support the application to deny access, there are cases in which access has been denied without such testimony.[30]

One of the leading precedents on denial of access to an abusive spouse is the 1992 Ontario Court of Appeal decision in *B.P.M. v. B.L.D.E.M.* The woman had a son from a previous relationship; the parties were married for two years, during which time the wife gave birth to a daughter. The father began to be abusive during the pregnancy, undermining the woman's relationship with her family and having "violent rages;" after the birth he became increasingly violent and threatened to kill her. In 1985 the woman left out of concern for the safety of herself and the child. After the separation, the father had access to his daughter, while the harassment and threats against the mother escalated. The man often followed the woman around, left her harassing notes, and was verbally abusive to her at the time of access. He sometimes threatened not to return the child after access. Despite this type of conduct, judges in 1986, 1988 and 1989

permitted unsupervised access; during this time the woman moved from Alberta, where the parties were married, to Ontario to be near her parents. The daughter was finding the visits stressful. Supervised access was ordered, but the child continued to experience stress related to the visits. Eventually in 1991, access rights were terminated; a decision affirmed by the Ontario Court of Appeal in 1992. The Court of Appeal characterized the man's post-separation conduct as "incessant and obsessive," creating stress on both the child and mother.[31] While the child continued to tell an assessor that she was not adverse to seeing her father, as long as it was infrequent and supervised, Abella J.A. observed that a court should also consider the effects of continued access on the custodial parent, especially when she has been the victim of continued harassment by the father:[32]

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

Abella J.A. denied the father's application for supervised access. However, Finlayson J.A dissented and felt that s. 16(10) of the *Divorce Act* precluded the making of such a "draconian" order, and would have permitted supervised access. While the position of Abella J.A. arguably reflects the dominant judicial thinking in Canada today, it is apparent that not all judges adopt her views. Given the inherent vagueness of the "best interests" test and the existence of the "friendly parent" presumption, legislation should be enacted to ensure that a mother and child should not be expected to live through years of unsupervised access with such an abusive man, as occurred in the late 1980s in *B.P.M. v. B.L.D.E.M.*

If a court has initial concerns about access and orders supervised access, the court may consider abusive conduct or a failure to regularly visit as a reason for terminating supervised access.[33] Similarly, if it is acknowledged at the time of the original access order that the man has an anger problem and must take part in a counselling program, the failure to complete a program[34] or the completion of a program but the continuation of harassment and threats against the mother,[35] may justify termination of all access. Although the situations will be "rare," there have been cases involving abusive spouses where the courts have refused access without any attempt to try access, even on a supervised basis.[36]

The unhappiness of a custodial parent about access, or her sense of anger or hatred towards the non-custodial parent, do not justify a termination of access. However, where there is a history of abuse of the custodial parent during, and especially after the end of the period of cohabitation, some judges have held the effects of abuse on emotional condition of the custodial parent may legitimately be an important factor in terminating access. In *Matheson v. Sabourin* the parties cohabited for one and a half years during which time they had a son. The father physically and verbally abused the mother during the period of cohabitation, and continued to harass and assault her for three years after the separation. In terminating all access Hardman Prov. J. wrote:

> There can be no question that it is dangerous to state as a principle of law that if access causes stress for the custodial parent then it should be terminated. However, it is clear that there are circumstances where the impact on the custodial parent is such that extinguishing access must be considered...No one could put it more clearly than the [mother]...did in her evidence: 'I'm trying to raise him and you're trying to destroy me and that affects him.'[37]

While the decision in *Matheson v. Sabourin* demonstrates sensitivity to spousal abuse, the woman and child were subjected to abuse for far too long before access was terminated. In situations where spousal abuse continues after separation, legislation should require that access be terminated, or at very least the exchange of the child should be supervised. A parent with primary responsibility for the care of a child should not be subjected to abuse so that her former partner can continue to enjoy a relationship with the child, especially since spousal abuse is harmful to the child.

Although the wishes of a child about access are not determinative, they will be an important consideration in dealing with access issues, especially those involving a battering husband. When there has been a significant history of spousal abuse and the children have become fearful of their father and express a desire not to see him, this should be a very persuasive factor in denying access.[38]

Conversely, a child's continued desire to have contact with a parent with a history of spousal abuse is likely to influence a court to permit access. In *Brusselers v. Shirt,*[39] the parents did not cohabit after the child's birth, though they were married. The father had been abusive of the child's mother during their cohabitation, and there was conflict between them about access. He had been abusive of women in other relationships and the mother also had concerns about the father's parenting skills and wanted to deny him access. However, an assessor testified that the eight-year-old girl wished to see her father, a desire related to her seeing the relationship that other children whose parents had separated enjoyed with their fathers. Justice Smith noted that the father was taking counselling for his abuse problems and seemed to have a good relationship with a young son from another relationship, and ordered unsupervised access.

Supervised Access

Supervised access may be appropriate if there is a reasonable apprehension of a threat to the safety of a child during a visit, if the child is afraid of the visit or refusing to visit, or if there is a reasonable apprehension that the non-custodial parent will abduct the child.[40] Supervision can help reduce fears of a custodial parent if there has been a history of abuse. Some supervisors will keep records and be able to testify about the quality of parent-child interaction during a visit. In some cases, there will be sufficient evidence of hostility or stress on the part of the child during supervised access to obtain an order terminating all access, though this will generally require that the supervisor is a person qualified to express an opinion about parent-child relationships.[41] In a number of localities supervised access projects have been funded, at least in part by the government, and these are valuable services for helping to maintain parent-child relationships while protecting children. Unfortunately, these services are facing

cutbacks and are becoming less available. In the absence of a suitable supervisor, access should be terminated if there is a risk to safety of a child.

A supervisor can be a professional, a volunteer, or a relative (e.g., a member of the father's family chosen by the mother).[42] It is important that the supervisor not be an inappropriate person, in particular not someone who may be controlled by the abuser and who may not actually protect the child.[43]

While the legal precedents indicate that courts are unwilling to award access where it is shown to be harmful to the child, 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 alone with a child, but rather should be a "temporary measure...to help resolve a parental impasse over access."[44] 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.[45]

Some parents have such a high potential for unpredictable or uncontrollable violence or abuse towards the children that a court should not order supervised access. A judge should also be concerned about subtle non-physical threats or psychological abuse that can still occur during supervised access and be a basis for rejecting this option.[46] Ultimately, even if there is no immediate risk to the child, a court should deny any access if it is not satisfied that the child will receive some benefit from visits with the parent.

Exchange Supervision

In some situations where there is a concern about the potential for violence, or at least verbal abuse between the separated parents, but the risk of direct harm to the children seems low, it may be appropriate to have supervision of the process of exchanging care of the child for access visits. In high conflict situations, the process of exchange of the child has the potential for spousal violence or verbal abuse.[47] Supervision may be especially appropriate during an initial period after separation when the risk of violence may be higher. Exchange supervision is less costly, intrusive and restrictive than access supervision, but should only be contemplated if the there is no significant risk of direct harm to the children from the abusive spouse.

Some American judges order that the access exchange should occur at a police station or in a court house to limit any threat of violence at the time of exchange. While this may be a last resort, these locations may be frightening for a child as well as inconvenient.[48] Finding a suitable, willing exchange supervisor is preferable.

It should be appreciated that if a man with a history of spousal abuse is awarded custody, the exercise of access rights by the mother may be occasions for continuing the abuse, intimidation or control, and a court order may be required to supervise the exchange of the child or otherwise prevent harassment.[49]

2.1.3 Mediation

It has been argued that if there is a history of spousal abuse, mediation is never appropriate because the parties do not have equal bargaining power and there is a risk for continued abuse. Mediated agreements tend to result in joint custody awards (because past misconduct is not considered), and mediators seldom encourage supervised access or exchange.[50] Many mediators, however, have begun to recognize the importance of issues of spousal abuse and power imbalances. Prominent Canadian mediators have articulated the principle that: "While we are neutral as to the particular agreement reached (provided it is reached voluntarily), we are not neutral about the safety of our clients and their children."[51]

The Ontario Association of Family Mediators has developed a Policy on Abuse which recognizes that:[52] "Abuse in intimate relationships poses serious safety risks and may significantly diminish a person's ability to mediate." The policy requires mediators to have training in dealing with situations where there has been abuse, to screen out inappropriate cases, and take steps to ensure safety of clients during the mediation process. The policy also states that there should not be mediation about "the fact of abuse," though there can be mediation about the appropriate response. It is not clear from this how mediators should respond to the common scenario of a husband denying or minimizing his abusive behaviour, though one would expect that if there is a denial of an allegation of abuse, the case is not appropriate for mediation.

If these policies and principles are followed, a victim of abuse who has recovered her self confidence and no longer fears her former partner may be a suitable candidate for mediation, provided that she wishes to try this alternative to litigation or negotiation through counsel. However, mediation is not a regulated profession, and perhaps not surprisingly, research from the United States indicates that many mediators are still not adequately trained to recognize and deal with cases where there has been domestic violence.[53] It is not clear that the situation is different in Canada although Quebec law now requires that all applicants seeking certification as a family mediator must undergo a basic training course which includes at least three hours of training regarding family violence.[54]

2.1.4 Interim Orders for Custody and Access

In cases involving spousal abuse, and in particular violence, there is often a need for quick action to protect the victim of abuse and ensure that she is not driven out of the house and away from children, setting up a possible *de facto*-continuity argument for custody of the children by the abuser. Arguably in a situation of potential for serious harm to a child from an abusive spouse, a parent has a *duty* to take immediate steps to protect a child and seek a court order later. As stated by L'Heureux-Dubé J. in the Supreme Court of Canada in *Young v. Young:*[55] "a custodial parent aware of sexual or other abuse by the noncustodial parent would be remiss in his or her duty to the child not to cut off access by the abuser immediately, with or without a court order." The same principle should apply if the parents are residing together and one parent believes that it is necessary to leave the matrimonial home to protect the children. This view is reinforced by *Criminal Code* s. 285, which creates a defence to a prosecution for

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

2.2 Other Civil Remedies

2.2.1 Restraining Orders

When there is a significant risk of post-separation harassment or violence, it is often appropriate to seek a civil order, such as under Ontario's *Children's Law Reform Act,* s. 35, which permits an order to be made "restraining a person from molesting, annoying or harassing" the applicant or a child in her care. Legislation in Saskatchewan and Prince Edward Island facilitates the process for victims of spousal abuse who are seeking immediate protection through an interim court order,[56] while British Columbia is in the process of introducing such legislation, and there is a proposal for enactment of a similar law in Alberta.[57] Judges will generally expect some evidence of recent violence or harassment to obtain such an order, and, for example, a single incident two years prior may not be sufficient.[58] The legislation in Saskatchewan and Prince Edward Island deals explicitly with issues of domestic violence, and facilitates relatively quick access by victims to the courts, and for orders excluding an abuser from the home, as well as for possession of personal property and police protection if a victim returns home to collect personal property. This type of detailed legislation is preferable to the more general laws, like those in Ontario. No Canadian legislation, however, deals explicitly with domestic violence as a factor in the making of interim custody and access orders; such provisions should be enacted.

For some abusers, the mere fact that a court order has been made will be a significant constraint on their behaviour, but for other abusers enforcement may be a serious problem. While there are sometimes difficulties in getting the police to enforce this type of order,[59] as their training about domestic violence issues increases, the police are becoming more responsive. Counsel for a victim of abuse would be well advised to send the police a copy of any order, and set out any special concerns. The applicant should be advised to contact the police if there is a breach, and be given a certified copy of the order to show them. If there is a concern about police reluctance to enforce a civil order, it may also be useful to obtain a recognizance (or peace bond) under the *Criminal Code* s. 810, which only requires an applicant to establish "reasonable grounds" for a fear of injury to herself or her children. Some police are more willing to enforce such *Criminal Code* orders that "mere" civil orders.

Ultimately 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.

2.2.2 Possession of the Home

Many female victims of domestic violence leave their spouses and seek accommodation in a women's shelter or with relatives. Taking this step generally has the advantage of obtaining moral and other types of support, as well as accommodation. However,

obtaining an order for exclusive possession of the home -- and excluding the abuser -- is often the least disruptive alternative for the children, as well as for the abused parent.

All provinces have legislation which provides for exclusive possession orders, generally with a specific reference to the "best interests of children" and domestic violence as factors for a court to consider, as well as permitting for orders to be made on an interim basis.[60] It may, however, be difficult to obtain an interim order without clear evidence of abusive conduct, such as from a doctor, a police officer or some other neutral party. While spousal abuse is not the only factor in deciding exclusive possession, difficulties in proving abuse at the interim stage limit the efficacy of civil exclusive possession orders for victims of abuse. It is necessary to have a situation where there is sufficient evidence to persuade a judge that continued cohabitation is no longer appropriate, and the other parent is at fault and should be excluded.

If a criminal prosecution has been commenced as a result of an incident of spousal abuse, it is possible to contact the police or prosecutor and try to have a bail condition inserted to have exclusive possession of the home for the victim and children. Some judicial decisions indicate that the mere fact that there has been an assault is not sufficient to obtain a civil exclusive possession order;[61] there must be some indication that there is a possibility that violence will reoccur.[62] The better view would be that the fact that there has been a recent assault creates an environment in which it is psychologically inappropriate to expect a victim to remain, and that even significant emotional abuse should be a basis for obtaining exclusive possession.[63]

With some abusive spouses, an exclusive possession order may not be sufficient protection, as enforcement can be a problem; in such cases, the victim will only be safe if more secure accommodation is found, such as at a shelter.

2.2.3 Child Protection Proceedings

Parents who live in relationships where there has been serious spousal abuse, and in particular violence, may find themselves involved in child protection proceedings. In Alberta, New Brunswick, Nova Scotia, Newfoundland, Saskatchewan and Prince Edward Island, child protection legislation specifically refers to domestic violence as a factor in finding that a child is in need of protection. For example, the New Brunswick *Family Services Act* s. 31(1)(f) states that the "security or development of a child may be in danger when...the child is living in a situation where there is severe domestic violence." While the *Quebec Youth Protection Act* does not specifically refer to domestic violence, sec. 38 does mention situations where the child is in the custody of a person whose behaviour creates a risk of moral or physical danger for the child.

The courts in other provinces have also demonstrated a willingness to take account of spousal violence as a factor in protection proceedings.[64] Spousal violence is rarely the only factor operative in protection proceedings, but rather is often combined with a family environment involving other types of child abuse or neglect. When there is a high degree of spousal abuse, the abusive partner is often abusive towards the children, and the parenting capacity of an abused person often suffers.

In some cases where the father is abusive of his spouse and children, the child protection agency may become involved and allow children to remain in the mother's care only on condition that the father has no contact. In some abusive relationships, the abused woman may allow the man to move back in during his next "contrition phase," again endangering children and provoking the agency to apply to remove the children from the mother's care.[65] In abusive relationships, the agency will want evidence that the mother understands the cycle of abuse and has broken the pattern, for example, by seeking counselling, leaving the relationship and moving into a shelter.[66]

In some situations, the concerns of the agency are not limited to abuse of the mother by the father, but rather it is a violent relationship involving mutual abuse, often combined with neglect or abuse of children.[67] If there is an on-going pattern of spousal violence in these mutual abuse cases, the instability of both parents and the lack of protection for the child may make removal of the children more likely.

Some authors argue that use of child protection laws in this way discriminate against minorities, and could represent a serious threat to parents who want to retain custody of their children, especially if mandatory reporting to child protection agencies is required in cases of women battering where children are present. Battered women might be deterred from seeking help for fear of losing their children. [68]

2.3 Quebec Civil Code

Under the *Civil Code of Quebec,*[69] the best interests of the child is determined with regards to the moral, intellectual, emotional, and material needs of the child, the child's age, health, personality and family environment, as well as other aspects of the child's situation (art. 33). The *Civil Code of Quebec* does not specifically refer to the parents' conduct (unless subsumed in "family environment") as a criterion for determining the best interests of the child with regards to custody or access.

With regards to access disputes, the courts of Quebec do not always require evidence that the children are themselves victims of violence in order to limit the access rights of the violent parent. The conduct of the violent parent, best interests, and safety of the child are the determining elements.

In *Droit de la famille -- 1585*,[70] the father, having been convicted of assaulting his spouse, was later denied access rights towards his two children, aged two and five. There was evidence that both children had witnessed the violent acts committed against their mother, and that the mother feared for her life, as well as for the lives of her children. The court held that the safety of the children could not be dissociated from that of their mother.

The debate over access rights of a violent parent can sometimes lead to a different kind of inquiry. Under the *Civil Code of Quebec*, decisions relating to custody and access are based on parental authority and, more specifically, on the rights and duties of custody, supervision and education. Art. 606 states:

> The court may, for a grave reason and in the best interests of the child, on the application of any interested person, declare the father, the mother, or either of them, or a third person on whom parental authority may have been conferred, to be deprived of such authority.

In cases where such an extreme measure is not warranted by the situation, but where action is nevertheless necessary, the court may instead declare only a partial deprivation of parental authority, that is to say the withdrawal of an attribute of parental authority, such as custody, supervision or education. Whether or not total deprivation is also accompanied by an application for a change of name, this application is often a measure of last resort, one intended to forever close the door on access rights for the parent.[71]

The question is whether evidence of domestic violence can be grounds for a deprivation of parental authority. Judicial approaches to this issue vary. Some judges only consider the criterion of best interests of the child after evidence of a "grave reason" has been successfully established.[72] Furthermore, some judges insist that violence, in order to be considered a "grave reason," has to be aimed directly at the child.

In *Droit de la famille -- 2646*,[73] the father, a known criminal and drug addict, had spent half of the last 20 years incarcerated. An aggressive man, he was psychologically unstable and considered dangerous. For his wife, life at home in his presence had proved to be difficult. Evidence showed that on many occasions he had been extremely violent and unpredictable, putting the life of his wife and child, as well as his own, at risk. In 1992, after the couple had separated and the mother had asked for custody of their only child, he had threatened to kill both her and the child. After being convicted for these threats, he was ordered by the court to stay away from both victims. The mother was later awarded custody, and no access rights were granted to the father. After his release from jail, the father again threatened the mother and managed to see the child under the supervision of his own mother. The judgment of divorce pronounced in 1994 confirmed this practice and awarded him supervised access rights. Later, an application by the mother to have the father deprived of parental authority failed, even though taped conversations had revealed more threats to the mother in order to obtain access to the child. According to the court, no evidence had been provided with respect to violence, abuse or maltreatment on the person of the child, nor a loss of interest of the father with regards to his child. Since the first condition ("grave reason") stated in art. 606 had not been met, the court felt that there was no need to examine the second condition, namely, the best interests of the child.[74]

In *Droit de la famille -- 2194*,[75] the mother tried to have the court deprive the father of parental authority, claiming she had been a victim of domestic violence, sometimes in the presence of the child. The court refused, stating that in order to succeed, one has to give evidence of indignity or conduct that might endanger the safety, health or morality of the child. According to the court, no such acts were committed against the child. Again, since the first condition stated in art. 606 had not been met, the court felt that there was no need to examine the best interests of the child.

On the other hand, some judges have granted application to declare a violent father deprived of parental authority without evidence that the child had been the direct victim

of violence. Furthermore, they have considered the conditions stated in art. 606 of the *Civil Code of Quebec* to be innately linked, rather than independent.

In *Droit de la famille -- 2391*,[76] the father had been previously convicted of physical and sexual abuse with respect to two of the child's brothers and sisters, and was now facing deprivation of parental authority. The judge stated that the court enjoys a great deal of discretion in evaluating both the best interests of the child and the "grave

reason" before ordering a deprivation of parental authority. And so, while the father had not sexually abused the child, his actions towards his wife, as well as his other children, were proof enough of his unworthiness. The father was therefore deprived of his parental authority and denied all access rights.

Although Quebec courts are divided on the question of whether parental authority can be withdrawn without evidence of violence directed at the children, in cases where such evidence does exit, the courts show less hesitation in depriving abusive and violent fathers of their parental authority in order to ensure the best interests and protection of the children.[77]

ENDNOTES

[1] For a history of the treatment of wife abuse in Canada, see Hilton, N. Zoe. 1989. One in ten: The struggle and disempowerment of the battered women's movement. *Canadian Journal of Family Law* 7: 313-336.

[2] Pagelow, Mildred. 1997. Battered women: A historical research review and some common myths. In *Violence and sexual abuse at home: Current issues in spousal battering and child maltreatment,* edited by Geffner, Robert, Susan B. Sorenson and Paula K. Lundberg-Love. Binghamton, NY: Haworth Press Inc., 97-116.

[3] Shelters are an extremely important resource for abused women, but they can also have complex "politics." At least in part this may reflect the tension between the more radical feminist stance of some of the women involved compared to the more moderate positions of others; see e.g., Interval house must prove it can do the job. *Kingston This Week.* 12 July 1995, section A, 6. As a one day count, 2,300 women and 2,200 children were in shelters in Canada; see More women, children using shelters. *The Globe and Mail*, 12 December 1995.

[4] See McMurtry, Roy. Crowns crack down on family violence. *Lawyers Weekly*, 20 May 1983.

[5] Slapping of women justified sometimes, judge suggests. Canadian Press, 5 April 1989; see generally Canadian Panel on Violence Against Women. 1993. *Changing the landscape: Ending violence ~ Achieving equality.* Ottawa, ON: Ministry of Supply and Services; and MacLeod, Linda. 1987. *Battered but not beaten: Preventing wife battering in Canada.* Canadian Advisory Council on the Status of Women.

[6] [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97. In coming to this conclusion, the Supreme Court relied heavily on the work of the American psychologist Lenore Walker, which is discussed in Chapter 1.0. These developments in the courts coincided with the appointment of more women judges, with *Lavallee* written by Justice Bertha Wilson, the first woman appointed to the Supreme Court of Canada.

[7] The most highly publicized trial in world history, the O.J. Simpson prosecution, also raised the issue of spousal violence.

[8] See e.g., *Peterson v. Peterson* (1988), 85 N.S.R. (2d) 107 (Co. Ct.) and more generally Canadian Panel on Violence Against Women 1993, 229-231.

[9] *Divorce Act,* R.S.C. 1985, c.3 (2nd Supp), s. 16(9).

[10] See e.g., *Alexander v. Creary* (1995), 14 R.F.L. (4th) 311 (Ont. Prov. Ct.); and *A.J.M. v. T.D.M.*, [1996] O.J. 1342 (Ont. Gen. Div.).

[11] (1989), 19 R.F.L (3d) 227, at 235 (Ont. S.C.). See also *Renaud v. Renaud* (1989), 22 R.F.L. (3d) 366 (Ont. Dist Ct.) decided by the same female judge as *Young,* Bolan J, and having a similar outcome.

[12] See e.g., *Thind v. Thind*, [1994] B.C.J. 1131 (S.C.), per Meredith J.; and *Blackburn v. Blackburn*, [1995] O.J. 2321 (Prov. Div.), per Dunbar J.

[13] *P.A. v. F.A.*, [1997] B.C.J. 1566 (S.C.), para. 78. The father in this case was denied access.

[14] *D.E.G. v. D.T.G.*, [1997] O.J. 1976 (Gen. Div.), para. 83.

[15] For a general discussion of the extent to which judges in family law proceedings should rely on "judicial notice" [a judicial determination made without evidence or testimony, based on the judge's personal knowledge] and not require expert testimony, see L'Heureux-Dubé, Claire. 1994. Re-examining the doctrine of judicial notice in the family law context. *Ottawa Law Review* 26: 551- 577; and Bala, Nicholas. 1996. Mental health professionals in child related proceedings: Understanding the ambivalence of the judiciary. *Canadian Family Law Quarterly* 13: 261-312.

[16] [1995] B.C.J. 2414 (S.C.). For a similar decision, see *Pare v. Pare*, [1993] S.J. 511 (Q.B.) where there was some physical and even more mental abuse by the husband during the course of eight years of marriage; Lawton J. awarded the mother sole custody of the three children with reasonable access to the father, and a judicial admonition that the father must not "upset...the routine into which their mother...settles the children."

[17] *K.M.W. v. D.D.W.* (1993), 47 R.F.L. (3d) 378 (Ont. Prov. Div.). Emphasis added. For a review of cases in the Reports of Family Law in the 1992-94 period which display similar insensitivity, see Rosnes, M. 1997. The invisibility of male violence in Canadian child custody and access decision-making, *Canadian Journal of Family Law,* 14: 31-60.

[18] See e.g., Johnston, Janet R. 1994. High-conflict divorce. *The future of children* 4 (1): 165-182, at 175.

[19] See e.g., *Hallett v. Hallett,* [1993] O.J. 3382 (Prov. Ct.); *D.E.C. v. D.T.G.*, [1997] O.J. 1976 (Gen. Div.); and *T.N.L. v. B.C.M.*, [1996] B.C.J. 2743 (Prov. Ct.).

[20] Family Violence Project of the National Council of Juvenile and Family Court Judges. 1995. Family violence in child custody statutes: An analysis of state codes and legal practice, *Family Law Quarterly* 29: 197-227, at 200.

[21] See e.g., *Boothby v. Boothby*, [1996] O.J. 4346 (Prov. Div.), where the mother testified that the father was "controlling, demanding and...emotionally abusive" towards her during the period that the parties cohabited. He had interim custody after separation, and on occasion thwarted the mother's access visits; the court awarded joint custody, with primary residence to the mother.

[22] *Stackhouse v. Stackhouse*, [1997] B.C.J. 425 (S.C.).

[23] See e.g., *Jacob v. Jacob* (1994), Can. Law Book 94-152-014 (Sask. U.F.C.), per Carter J. 23/3/94. As noted here, women who initiate spousal abuse are considerably less likely to directly abuse their children than men who abuse their partners; see Ross. 1996. Risk of physical abuse to children of spouse abusing parents. *Child Abuse and Neglect* 26: 589.

[24] [1993] O.J. 1973 (Ont. Prov. Ct.) per Pedlar Prov. J.

[25] *Ouimet v. Ouimet*, [1997] B.C.J. 2127 (S.C.).

[26] [1993] O.J. 3382 (Prov. Ct.) per Schnall J. Judge Eleanor Schnall has written extensively on the effects of spousal violence on children, and this judgment should not be dismissed as an example of judicial insensitivity.

[27] *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 134 D.L.R. (4th) 321. On the facts of this specific case, the court allowed the custodial mother to move. However, this decision has made courts more reluctant to allow custodial parents to move.

[28] *Young v. Young*, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117.

[29] (1993), 50 R.F.L. (3d) 171, at 181-183 (N.S.C.A.); see also *E.H. v. T.G.* (1995), 18 R.F.L. (4th) 21 (N.S.C.A.).

[30] *Rasalingam v. Rasalingam*, [1991] O.J. 1241 (Prov. Ct.); *C.D. v. J.B.*, [1996] A.Q. 181, *Parker v. Hall*, [1996] O.J. 756 (Ont. Prov. Ct.) and *Alexander v. Creary* (1995), 14 R.F.L. (4th) 311 (Ont. Prov. Ct.) and; see also *Matheson v. Sabourin*, [1994] O.J. 991 where Hardman Prov. J. cited literature on the effects of having witnessed spousal violence on children, apparently without this literature having been introduced by a witness.

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

[32] (1992), 42 R.F.L. (3d) 349, at 359-60. (Ont. C.A.).

[33] *Lacaille v. Manger*, [1994] O.J. 2880 (Prov. Div.).

[34] *Lacaille v. Manger*, [1994] O.J. 2880 (Prov. Div.).

[35] *DeSilva v. Giggey*, [1996] N.B.J. 133 (Q.B.); *Drummond v. Drummond*, [1995] B.C.J. 1560 (S.C.).

[36] *Pereira v. Pereira*, [1995] B.C.J. 2151 (S.C.) husband was violent towards wife during marriage, and after separation even attempted to arrange for her murder.

[37] [1994] O.J. 991 (Prov. Ct.). The judge, Hardman Prov. J., was a well-known feminist prosecutor before becoming a judge.

[38] See e.g., *DiMeco v. DiMeco*, [1995] O.J. 3650 (U.F.C.) where father was violent and abusive to mother, including a threat made in the presence of the children to kill her; the children told an assessor that they feared him; access was denied. *Rasalingam v. Rasalingam*, [1991] O.J. 1241 (Prov. Ct.) access denied to father with history of violence towards mother until children and their mother consent.

[39] [1996] A.J. 333 (Q.B.).

[40] See *Zahr v. Zahr* (1994), 24 Alta L.R. (3d) 274 (Q.B.), per Hunt J. where the court ordered supervised access for a father's visits with his 13-year-old son because of his past threats to take the boy to Lebanon,

and because the boy had witnessed acts of violence by the father against the mother, and had not seen the father for two years.

[41] *B.P.M. v. B.L.D.M.* (1992), 42 R.F.L. (3d) 349, at 360 (Ont. C.A.).

[42] See e.g., *F.K.H.W. B. v. F.S.M.W.B.*, [1995] N.S.J. 471 (Fam. Ct.).

[43] See e.g., *P.A. v. F.A.*, [1997] B.C.J. 1566 where the supervisor was a member of the parents' ethnic community who saw his role not being one to observe and protect the children, but rather as encouraging the parents to reconcile, despite the father's history of spousal and child abuse.

[44] Judge Norris Weisman. 1992. On access after parental separation. 36 R.F.L. (3d) 35, at 74, quoted with approval by Abella J.A. in *B.P.M. v. B.L.D.M.* (1992), 42 R.F.L. (3d) 349, at 360 (Ont. C.A.).

[45] See e.g., *F.K.H.W. B. v. F.S.M.W.B.*, [1995] N.S.J. 471 (Fam. Ct.) and *D.F.M. v. J.S.S.* (1995), 17 R.F.L. (4th) 283 (Alta. CA). The failure to comply with terms of supervised access, such as obtaining counselling for anger management, may result in the termination of even supervised access: *C.D. v. J.B.,* [1996] A.Q. 181 (Sup. Ct.).

[46] *Abdo v. Abdo* (1993), 50 R.F.L. (3d) 171 (N.S.C.A.).

[47] See e.g., *Z.M. v. S.M.*, [1997] O.J. 1423 (Gen. Div.) where the father denigrated and verbally abused the mother in the presence of the child at each access exchange.

[48] Straus, R. B. 1995. Supervised visitation and family violence. *Family Law Quarterly* 29: 229-253.

[49] *Brown v. Brown* (1996), 23 R.F.L. (4th) 23 (Ont. Gen. Div.).

[50] Zorza , Joan. 1995. How abused women can use the law to help protect their children. In *Ending the cycle of violence: Community responses to children of battered women*, edited by Peled, Einat, Peter G. Jaffe and Jeffrey L. Edleson. Thousand Oaks, CA: Sage Publications.

[51] Landau, Barbara. 1995. The Toronto forum on woman abuse: The process and the outcome. *Family and Conciliation Courts Review* 33: 63-78 at 71.

[52] Landau 1995, 76-78.

[53] Thoennes, N., P. Salem and J. Pearson. 1995. Mediation and domestic violence: Current policies and practices. *Family and Conciliation Courts Review* 33: 6-29.

[54] Code of Civl Procedure, R.S.Q., c C-25, s. 827.8.

[55] (1993), 49 R.F.L. (3d) 117, at 184 (S.C.C.).

[56] *Ontario Family Law Act*, R.S.O. 1990, C.F. 3 s. 24(3) and (4); Saskatchewan, *Victims of Domestic Violence Act*, ss. 1994, c. v-6.02; Prince Edward Island, *Victims of Family Violence Act*, S. P.E.I. 1996, c. 47.

[57] See Alberta Law Reform Institute. 1997. *Protection against domestic abuse*. Edmonton, AB: Alberta Law Reform Institute.

[58] *Kelleppan v. Kelleppan,* [1993] B.C.J. 725 (S.C.).

[59] Meredith, C. 1995. *Review of the use and effectiveness of judicial recognizance orders and civil restraining orders.* Ottawa, ON: Department of Justice Research Directorate.

[60] See e.g., *Ontario Family Law Act*, R.S.O. 1990, c. F 3, s.24(3) and (4). Saskatchewan (*Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02) and Prince Edward Island (*Victims of Family Violence Act*, S.P.E.I. 1996, C. 47) have legislation that specifically meets some of the needs of victims of spousal abuse for civil orders and Alberta is considering enacting similar legislation. See Alberta Law Reform Institute. 1997. *Protection against domestic abuse*. Edmonton, AB: Alberta Law Reform Institute.

[61] See e.g., *Perrier v. Perrier* (1989), 20 R.F.L. (3d) 388 (Ont. H.C.) [was the court dismissive of the allegations in this case because they were made by a man?]; and *Dolgopol v. Dolgopol* (1994), 10 R.F.L. (4th) 368 (Sask. Q.B.).

[62] *Skrak v. Skrak*, [1993] O.J. 2642 (Gen. Div.) per O'Connor J.

[63] *Hill v. Hill* (1987), 10 R.F.L. (3d) 225 (Ont. Dist. Ct.).

[64] See e.g., *C.A.S. of Sarnia v. D.R.S.,* [1995] O.J. 4127 (Prov. Div.); *Catholic C.A.S of Metro Toronto v. A.D.,* [1993] O.J. 3129 (Gen. Div.).

[65] *C.A.S. of Peel v. P.T.*, [1995] O.J. 103 (Prov. Ct.); *C.A.S. of Haldimand-Norfolk v. D.C.* [1996] O.J. 3471 (Ont. Gen. Div.).

[66] See e.g., *New Brunswick (Minister of Health and Community Services) v. M.P.F.*, [1997] N.B.J. 80 (Q.B.) where the father abused the mother in a "stormy" relationship. The children were taken into the care of the child welfare authorities. After the parents separated and the mother sought counselling and support, they considered the return of the children into her care, under their supervision.

[67] See e.g., *C.A.S. Ottawa-Carleton v. R.L.*, [1996] O.J. 746 (Prov. Ct.); see also Enos. 1996. Prosecuting battered mothers: State laws' failure to protect battered women and abused children. *Harvard Women's Law Journal* 33: 229.

[68] Peled, Einat. 1993. Children who witness women battering: Concerns and dilemmas in the construction of a social problem. *Children and Youth Services Review* 15: 43-52.

[69] *Civil Code of Quebec*, 1991, chapter 64, art. 32, 33, 514 and 604.

[70] [1992] R.D.F. 376 (C.S.).

[71] See, for example, *Droit de la famille -- 1042*, [1986] R.D.F. 460.

[72] In spite of art. 32 and 33 *C.C.Q.*

[73] [1997] R.D.F. 252 (C.S.).

[74] [1997] R.D.F. 255 (C.S.).

[75] [1995] R.D.F. 327 (C.S.).

[76] [1996] R.D.F. 296 (C.S.). Leave of appeal refused.

[77] See: Droit de la famille -- 2524, J.E. 96-2055; Droit de la famille -- 1726, J.E. 93-295 (C.A.); and Droit de la famille -- 1669, J.E. 92-1590.

3.0 LEGISLATIVE RESPONSES IN OTHER JURISDICTIONS

As Canada considers adopting legislation to deal with custody and access issues in situations of spousal violence, we may have much to learn from legislative reforms adopted in other jurisdictions. As discussed in Chapter 1.0, several common law jurisdictions such as Australia, New Zealand, England and Wales, and several U.S. states, have enacted legislative provisions to deal with this issue. This chapter will discuss these reforms. As an example of a civil law perspective, the approach taken in France will be reviewed.

3.1 Australia

Until quite recently, family courts in Australia did not consider the presence of spousal violence as relevant to the determination of custody and access decisions. According to the federal Family Law Act 1975 s. 64(1)(a), the overriding principle to be considered in making decisions regarding custody and access is the "welfare of the child." Traditionally, family courts distinguished between violence directed towards the children, which was viewed as relevant to their welfare, and violence between the parents, which was frequently viewed as not relevant in decision-making regarding the welfare of children.[1] One early, and frequently cited, Australian Family Court decision clearly viewed the husband's violence toward his wife as irrelevant to a custody determination:

> I should emphasise that there is no suggestion that Mr. Heidt has ever treated his children with the violence with which he has treated his wife…The conduct...of a parent in relation to custody is relevant only in so far as it reflects upon his or her fitness to take charge of a child...[I]n assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband.[2]

While the husband was not granted custody in this case, it is clear that his history of violence toward his spouse was not a factor in reaching this decision.

However, a growing awareness in recent years of the deleterious effects on children of witnessing spousal violence in their homes, as well as an acknowledgment of the relationship between spousal violence and child abuse, led the Law Reform Commission in Australia, as well as various women's groups, to call for amendments to the Family Law Act 1975 that would reflect this reality.[3] The Law Reform Commission's Report was based on over 600 oral and written submissions, a striking feature of which was the extent to which women across Australia spoke out about the effects of violence in their lives and how the legal system had failed in responding to it.[4]

In response to the Law Reform Commission's Report, as well as increasing public pressure, the Australian government passed the Family Law Reform Act 1995, which came into force on June 11, 1996. This legislation repealed and replaced Part VII of the Family Law Act 1975. The new legislation made several sweeping changes to the

previous *Act*. In line with earlier reforms in the United Kingdom (*Children Act 1989*), the new Australian legislation replaced the traditional concepts of "guardianship," "custody," and "access" with the new concepts of "parental responsibility," "residence," and "contact." The changes were intended to shift the emphasis from rights and powers of parents to a notion of continued parental responsibility following divorce, regardless of where the child lives.[5] The concept of "residence" replaced "custody," and refers to the child's home and does not carry any right of sole decision making power regarding the child. "Contact" essentially is synonymous with the traditional term "access," and refers to contact between a child and another person who need not be their parent.

The new legislation also replaced the "welfare of the child," as the paramount consideration when making decisions regarding the child, with the "best interests" of the child. The legislation lists several factors that a court must take into account when determining the best interests of the child, and the court should consider these factors "in the context of" the child's "right to know and be cared for by both parents" (s. 60B(2)(a)) and the child's "right of contact, on a regular basis, with both parents" (s. 60B(2)(b)). The list of factors in s. 68F(2) to be considered explicitly includes "any family violence involving the child or a member of the child's family" and "any family violence order that applies to the child or a member of the child's family." The *Act* also makes it mandatory for lawyers to bring to the attention of the court the existence of any family violence orders (s. 68J).

A further provision of the *Act* deals with the relationship of orders made by the federal Family Court and domestic violence orders made under the various state laws by courts of summary jurisdiction. If a Family Court makes a contact or other order that is inconsistent with an existing domestic violence order, it must explain why it has done so, and arrange for someone to explain to the parties in language they can clearly understand "the purpose of the order; the obligations under the order; the consequences of a breach; the reasons for departing from the family violence order; and how the order may be varied or discharged."[6] The order must also clearly indicate how any contact provided for in it is to take place. Conversely, another provision of the new legislation (s. 68T) allows courts of summary jurisdiction (i.e., those which make family violence orders such as intervention or restraining orders) to vary or discharge an order for contact when making a family violence order, if the court believes that this is in the best interests of the child. A non-legislative component of the reform process involves creating a register of state/territory family violence protection orders that will be accessible to Family Court judges.[7]

The *Family Law Reform Act 1995* also introduced a new concept of Primary Dispute Resolution: a statutory encouragement to parents, and an obligation on lawyers and judges, to make use of alternative dispute resolution, primarily mediation services, before resorting to litigation. However, the Family Law Regulations expressly prohibit mediators from dealing with a dispute between parents where mediation is inappropriate because of family violence between the parties or where there is any concern about the safety of the parties or their emotional, psychological, or physical health (Reg 62(2)).

While there have been more court judgments in Australia that take family violence into account when determining a child's best interests since the enactment of the new

legislation, the gains made have not been as great as advocates for change would have wished to see.[8] Further, it has been suggested that some of the other provisions contained in the *Family Law Reform Act 1995* might serve to counteract the gains that might be expected from the explicit inclusion of family violence. For example, the *Act* contains an increased emphasis on private agreements between the spouses, which might prove problematic in cases where spousal violence is an issue. It has also been argued that fundamental questions of "women's social, economic and legal inequality and of power imbalances in domestic relations, particularly where there is violence, are not accommodated by the Reform Act."[9] Despite these criticisms, it is important to recognize that the new Australian legislation does not contain a legislated presumption of joint parenting following separation, although there is a presumption in the statute that children have a right to know and to be cared for by both parents, and a right to contact with them. However, issues of spousal violence are clearly intended to be taken into account as each case is decided on its own merits. In this respect, the legislation is an improvement over the previous state of affairs.

3.2 New Zealand

Prior to 1996, the situation in New Zealand regarding the relevance of spousal violence to custody and access disputes was quite similar to the approach in Australia prior to 1995. While Family Court judges were free to consider the existence of violence in the home when making decisions regarding children, it appears that in practice such factors infrequently played a substantial role in decision-making. Following a shocking triple homicide in 1994, in which a father, following several years of severely abusing his estranged wife, killed himself and their three daughters, issues surrounding spousal violence started to receive increasing public attention. At the time of their deaths, the three children were in their father's custody, following an interim custody order made three months earlier.

The public outcry following this incident led the Minister of Justice to appoint a commission of inquiry into the way in which the Family Court had dealt with earlier legal actions arising out of this marriage, and to provide recommendations regarding changes in the law or practice in Family Courts. In the final report of this Inquiry, Sir Ronald Davison recommended amendments to the legislation:

> once a person has been shown to have used violence in a domestic situation either to his/her spouse or to a child or to both, then such person should be presumed (unless exceptional circumstances are shown to exist for deciding to the contrary) to be unsuitable either to have custody or unsupervised access to the child until such time as such [a] person can establish that it is safe for the child to be given into his/her custody or for him/her to have unsupervised access to that child.[10]

The Inquiry also recommended that in cases where a parent has used violence against the other parent, the court must be satisfied that the safety of the non-violent parent is ensured during access changeover times.

Largely as a result of the findings and recommendations of the Davison Report, major reforms to domestic violence legislation were enacted in the *Domestic Violence Act 1995*, along with companion amendments in the *Guardianship Amendment Act 1995*. This new legislation came into force on July 1, 1996. The *Domestic Violence Act 1995* allowed a much broader range of situations to fall within the Family Court's jurisdiction when considering violence issues, such as same sex partners, close personal associates, and family members.[11] The new legislation clearly defines the scope of the term "violence" as including physical abuse, sexual abuse, and psychological abuse including intimidation, harassment, damage to property, and threats of physical, sexual, or psychological abuse (s. 3). The legislation allows for an individual to apply for a protection order that invariably contains the following provisions that the respondent must not:

> (a) Physically or sexually abuse the protected person; or
> (b) Threaten to physically or sexually abuse the protected person; or
> (c) Damage, or threaten to damage, property of the protected person; or
> (d) Engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or
> (e) Encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the respondent, would be prohibited by the order. (s. 19)

The legislation also expressly prohibits persons against whom a protection order is made from possessing weapons, and accords the courts considerable powers in ordering respondents to attend anti-violence counselling and programs. Further, abused spouses or their children may apply to the court to attend a program which may include counselling (s. 29). In addition, when a court makes a protection order, it is required to direct the respondent to attend a specified treatment program (s. 32). In these cases, under s. 44, the program provider's fees and expenses are covered by the government. Early indications are that the provisions in this new legislation have been widely used, and there were approximately 2,000 applications in the first three months, involving 3,000 children.[12]

Most important to issues of custody and access is the companion legislation contained in the *Guardianship Amendment Act 1995*.

> The centrepiece is the direction in s. 16B(3) [of the *Guardianship Amendment Act 1995*] that no party who has used violence against a child or the other party to the proceedings shall have custody of, or unsupervised access to, a child who is the subject of the proceedings unless the Court is satisfied that the child would be safe if custody or unsupervised access were granted...It is suggested that the word "safe" must, in this context, mean free from the risk of physical harm.[13]

This legislation effectively creates a legal presumption that a person who has committed violence against either the child who is the subject of a custody or access proceeding or the other party to the proceeding (typically the mother) should not be granted custody or unsupervised access to the child. For purposes of the *Guardianship Amendment Act 1995*, violence is restricted to physical abuse or sexual abuse, and threats of abuse are not specifically covered.

Similarly, if a Family Court is satisfied that violence has been used in the home, its discretion is limited by the new legislation in that the court is directed not to make an unsupervised access order in favour of the abusive person unless it is convinced of the child's safety during access visits. The onus is on the abusive partner to prove to the court that the child will be safe. It has been argued that threats to others who are close to the child such as the custodial mother are relevant to the safety of the child and thus should be considered in judicial determinations of the child's safety.[14] In line with this, in one case under the amended *Act*, the judge decided that this provision could also be used to assess the safety of the custodial parent, and in particular the custodial parent's psychological and emotional safety.[15] In cases where a judge believes that the only way for a child's safety to be ensured is to have no contact with an abusive person, the new legislation permits the court to issue a no-access order.

Supervised access is explicitly defined in the *Guardianship Amendment Act 1995* as:

> ...face to face contact between a parent and a child, at a place approved by the Court, where access can be appropriately supervised, or in the immediate presence of a person approved by the Court. The provision goes on to state that the person who supervises the access may be a relative, a friend of the family or such other person as the Court considers suitable...supervised access by a relative of the access parent is normally inappropriate because the relative is not likely to believe abuse has occurred.[16]

As noted in Section 4.3 below, Australia and New Zealand have been very progressive in setting up supervised access centres, and have drafted detailed principles and operational guidelines for them.

3.3 England and Wales

In the mid 1980s, the Law Commission in England and Wales undertook a comprehensive review of child custody legislation[17] at the same time as a parallel review of child welfare law was conducted by the Department of Health and Social Security. The report of the Law Commission indicated that the legislation relating to child custody was a confusing array of uncoordinated statutes.

> In divorce, the differences between sole and joint custody orders were so unclear the professionals tended to disagree about their meaning and effect almost as much as parents did about the actual arrangements. There was even uncertainty as to who decides arrangements for children

> in divorce. In the vast majority of cases, parents thought the court made the decisions whereas the court thought parents made them.[18]

Based on this review, the Law Commission concluded that England and Wales needed a single, modernized legislative base dealing with children in divorce cases, accompanied by new procedural rules and guidelines. The basic premise of the new law is that parents have primary responsibility for raising their children. In situations of divorce, the State's role should be to help parents in meeting this responsibility, and the State should only interfere when the child is placed at risk.

The Law Commission's recommendations resulted in the passage of the *Family Law Act 1989*, a piece of legislation that produced substantial changes to the manner in which children of divorcing parents were treated. Similar to more recent legislation enacted in Australia discussed in Section 3.1 above, the *Children Act 1989* eliminated the terms "custody" and "access." In place of these terms, courts were empowered to make four specific orders:

(1) "residence orders" which specify the person or persons with whom a child is to live, without abrogating either parent of responsibility for the child's upbringing;

(2) "contact orders" which require the person with whom the child lives to allow contact between the child and another person;

(3) "specific issues" orders which allow the courts to deal with some other unspecified dispute over some aspect of parental responsibility; and

(4) "prohibited steps" orders that indicate that some specified action is not to take place without the court's consent.

The overriding principle of the *Children Act 1989* was to minimize State interference in parents' determination of the nature of their relationships with their children following divorce. Historically, there was a presumption in the legal system that the best interests of the child were synonymous with contact with both parents, and that domestic violence was largely viewed as a "private" family problem.[19] At least in part because of these reasons, family violence was not emphasized in the *Children Act 1989* as a factor to be taken into account by the court when making residence and contact decisions.

Growing awareness of the problems of spousal violence and its effects on children, however, necessitated subsequent legislative amendments specifically intended to deal with this issue in divorce cases. The *Family Law Act 1996*, which came into force on October 1, 1997, contains a section (Part IV) devoted to family violence, and provided a single set of remedies that are available in all courts with jurisdiction over family issues. Further, many of the provisions of this legislation are designed to dovetail with proceedings that may be going on concurrently under the *Children Act 1989*.

Much of this new legislation introduced by the *Family Law Act 1996* deals with occupation of the family home, and includes provisions to exclude an alleged abuser from the home when spousal violence is an issue. Further, the new legislation provides

for "non-molestation" orders whereby the respondent is prohibited from engaging in specific actions or behaviours or molestation in general directed towards the applicant or a relevant child.

One important amendment to the *Children Act 1989* enacted by Part IV of the *Family Law Act 1996* concerns residence of the child in cases where the court makes an emergency protection order or an interim care order for the protection of a child. Prior to the new legislation, when such orders were made, it was the child, rather than the abusive person, who was removed from the home. The amendment permits the court to attach an exclusion requirement to these orders that will allow the removal of the abusive person from the home rather than the child.

Part IV also provides the court with the power to make orders under specific sections of the *Children Act 1989* when dealing with applications for non-molestation or occupation orders. This includes residence, contact, specific issue, and prohibited steps orders. Thus, while the legislative changes in England and Wales do not go as far as recent amendments in Australia and New Zealand in dealing with the welfare of children when spousal violence is present, they do explicitly acknowledge that situations in which domestic violence occur may require special intervention and lay out the form that these interventions might take.

3.4 United States

In the United States, individual state legislatures have responsibility for enacting legislation related to issues of child custody and access in divorce cases. In the majority of states, custody decisions require an initial assessment of the fitness of both natural parents, followed by a determination of the custody arrangement that is in the best interests of the child. Statutes also frequently list factors that the court should consider in making its best interests determination.[20] In recent years, an increasing number of states have explicitly recognized domestic violence as a factor that should be considered when making custody and access decisions, and the National Council of Juvenile and Family Court Judges has produced the *Model Code on Domestic Violence* which provides a model legislation that may be used by state legislatures when drafting statutes related to family violence.[21] The *Model Code* further suggests that communities "develop specialized services such as supervised visitation centres and mediation programs that screen-out inappropriate domestic violence cases."[22]

As of 1995, 44 states and the District of Columbia had enacted legislation dealing with child custody that contain some provisions regarding domestic violence intended to guide judges when making decisions regarding custody and access.[23] The form and content of the legislation varies considerably across jurisdictions, and the following discussion presents an overview of the legislation in place in 1995.[24]

In 35 states, the law requires that courts consider domestic violence as an issue relevant to determining the best interests of the child. In two other states, consideration of domestic violence in the context of the child's best interests is discretionary for a judge rather than a mandatory requirement. The *Model Code* suggests that not only should

consideration of domestic violence be required in custody and access disputes, but that the well-being of the child *and* the abused parent shall be the primary consideration in determining the best interests of the child when there has been a finding of domestic abuse.[25]

Several states have explicitly dealt with issues of joint custody in situations of domestic violence, and 11 specifically require a court either to consider domestic violence as creating a presumption against joint custody or to prohibit joint custody in situations where a finding of domestic violence has been made.

Several states include "friendly parent" provisions in their legislation requiring that the custodial parent's ability to provide an "open, loving, and frequent relationship between the child and the other parent"[26] should be considered in determining the best interests of the child. Such provisions have been criticized by advocates for abused women because they believe that such provisions frequently punish the abused person if they appear to be uncooperative. The American Bar Association's Center on Children and the Law has stated that such friendly parent clauses are inappropriate and that these laws should be amended.[27] However, those states that do have friendly parent legislation typically also have other provisions that can be used to counter this provision in cases involving domestic violence. Further, all states that have legislation referring to a parent's right to frequent and continuing contact with their child also require that the court determine the parent's ability to be responsible for the child's health and safety.

There has been a growing emphasis in many state laws on maximizing the safety and protection of all victims of domestic violence, particularly as this relates to safe custody and visitation arrangements. The most common legislative provision requires a court to make custody and access determinations that best protect both the child and the abused spouse from harm. For example, in Michigan, "[t]he factors the court must consider include reasonable likelihood of abuse of the child or a parent resulting from the exercise of visitation..."[28] Legislation in Arizona requires the person who has committed domestic violence to prove that visitation will not endanger the child and his or her emotional development.

In several states, domestic abuse legislation provides a list of relevant evidence that the court is to consider when making determinations of child custody in cases where domestic violence is present. For example, the Arizona legislation requires the court to consider all relevant evidence in determining the presence of domestic violence "including, but not limited to, a finding from another court of competent jurisdiction, police reports, medical records, child protective services records, domestic violence shelter records, school records, and witness testimony."[29] Legislation in Hawaii requires that the court determine who was the primary aggressor, as well as the frequency and severity of domestic abuse. This provision is especially relevant where both partners may claim to have been victims of abuse.

While the enactment of legislation dealing specifically with domestic violence issues in custody and access cases by many states is encouraging, it appears that there is much work remaining to be done, in particular providing justice system professionals with education and training about spousal violence. Some problem areas that have been

identified include: (1) lawyers tend to be uninformed about the changes in legislation and how these changes can be put into practice in representing their clients and, consequently, the legal representation afforded abused persons is sometimes inadequate; (2) members of the judiciary are still sometimes uninformed about domestic violence in general and, thus, judicial treatment is inconsistent; (3) there is a lack of specialized court services to deal with domestic violence in custody and access cases, such as court staff members who are trained in risk assessment related to child abduction or recurring violence; (4) most custody evaluators and child representatives employed by the courts have minimal training in domestic violence issues; (5) in many states, if a court has issued a protection order to an abused parent, the existence of this order carries little weight in subsequent custody disputes; and (6) there is still a lack of suitable supervised visitation facilities in most areas of the country, which undermines the intended benefits of much of the legislation.

3.5 France

In France, the recognition of domestic violence as a social phenomenon worthy of attention is fairly recent. This is reflected in the legal system's response to issues of domestic violence, especially with regards to custody and access disputes.

Under French law, the mother and father exercise parental authority together.[30] Hence, they both have the rights and duties of custody, supervision, education, and maintenance of their children. In the event of divorce or separation, joint exercise of parental authority is generally maintained, and parents have to agree on a place of residence for the child.[31] If the parents cannot come to an agreement, or if such an agreement does not appear to be in the child's best interests, the judge can decide with whom the child will reside. The judge can also confer the exercise of parental authority (custody) on one parent, while granting the other access rights. The non-custodial parent will be denied access rights only if there are "grave motives"[32] to do so. The best interests of the child is always the determining factor in these matters.[33]

Even in the absence of divorce or separation, pursuant to art. 378 of the *French Civil Code*, one or both parents can be deprived of parental authority if convicted of having committed or contributed to a crime against the child, or if convicted of having contributed to a crime committed by the child.[34] Total deprivation of parental authority means that the parent loses custody as well as any access rights. A petition to regain the exercise of the attributes of parental authority (custody, access, supervision, education, etc.) can only be made after at least a year has elapsed since the deprivation, and only if new circumstances warrant it.[35]

Case law research revealed only one case where access was refused before the *Chambre civile* of the *Cour de Cassation*. In *Cass. civ. 1ère, 17 March 1993*,[36] the parents were divorced and the father had not been granted access rights, because evidence had shown that he had been violent towards his child. The Court of Appeal rejected the mother's request for the father to be totally deprived of parental authority. She appealed to the *Cour de Cassation*, which quashed the Court of Appeal's decision and so maintained refusal of access.

The case law review reveals that French courts have not been consistent in the way they approach domestic violence with regards to custody and access disputes. In some cases, the courts may offer some protection in restricting the violent spouse's exercise of access rights, and even requiring supervised access.[37] In other cases, however, the courts will grant a violent father unlimited access rights, regardless of the risk involved to both the custodial mother and the child.[38] Rarely have they recognized the moral prejudice inflicted by domestic violence, and sanctioned it by refusing access or by granting damages to the victim.

Few French legal authors address the issue of domestic violence. The French authors reviewed[39] do not mention domestic violence as a criterion in the determination of the exercise of parental authority or access rights. In fact, the only author who mentions violence does so in relation to the determination of fault in divorce proceedings.[40]

As stated earlier, neither legislation nor doctrine applicable in matters of custody and access (or even parental authority) refer, *per se*, to issues of domestic violence. As for the French courts, their concern over such issues has more to do with determining responsibility for the marriage's break-up than with their effect on custody or access rights. Hence, it is very difficult to provide a representative report of the phenomenon of domestic violence in France, or of its impact on decisions relating to custody and access disputes.

Interest in the issues of domestic violence in France is very recent. In fact, it was less than 10 years ago that the French government launched its first national awareness campaign on the subject.[41] Simultaneously, and for the duration of that campaign, a national phone help-line was set up in order to assist individuals in situations of domestic violence. On June 6, 1992, a permanent help-line on violence towards women was officially launched and has received more than 110,000 calls.

ENDNOTES

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[3] Law Reform Commission. 1994. *Equality before the law: Justice for women*. Final Report, Part One, Chapter 9.

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[22] Jaffe, Peter G. and Gary W. Austin. 1995. *The impact of witnessing violence on children in custody and visitation disputes*. Paper presented at the 4th International Family Violence Research Conference, Durham, NH.

[23] Family Violence Project of the National Council of Juvenile and Family Court Judges. 1995. Family violence in child custody statutes: An analysis of state codes and legal practice. *Family Law Quarterly* 29: 197-227.

[24] Information in this discussion is summarized primarily from Family Violence Project of the National Council of Juvenile and Family Court Judges, 1995.

[25] National Council of Juvenile and Family Court Judges 1994, s. 402.

[26] Family Violence Project of the National Council of Juvenile and Family Court Judges 1995, 201.

[27] Davidson, Howard R. 1994. *A report to the president of the American Bar Association, The impact of domestic violence on children*. Chicago, IL: American Bar Association.

[28] Family Violence Project of the National Council of Juvenile and Family Court Judges 1995, 205.

[29] Family Violence Project of the National Council of Juvenile and Family Court Judges 1995, 211.

[30] Article 371-2 of the *French Civil Code*: "L'autorité appartient aux père et mère pour protéger l'enfant dans sa sécruité, sa santé et sa moralité."

[31] Article 287 of the *French Civil Code*.

[32] Article 288 of the *French Civil Code*.

[33] See: *Cass civ. 2e, 18 juin 1997: Juris-Data* #002887.

[34] Article 378 of the *French Civil Code*.

[35] Article 381 of the *French Civil Code*.

[36] Appeal # 91-05.029.

[37] See e.g., Cass. civ. 2e, 20 July 1993, Appeal # 92-11.658; Cass. civ. 2e, 28 April 1993, Appeal # 91-16.856; Cass. civ. 2e, 6 July 1994, Appeal # 91-20.171; Cass. civ. 2e, 18 March 1992, Appeal # 90-22.134; and Cass. civ. 2e, 6 January 1993, Appeal # 91-14.403

[38] See e.g., the case of the Coulibaly spouses, Cour d'appel de Versailles 2e, 6 March 1997; Cass. civ. 2e, 10 July 1996, Appeal # 93-10.149; and Cass. civ. 2e, 20 November 1996, Appeal # 95-13.657.

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4.0 SOCIAL SUPPORTS AND PROGRAMS

One of the many challenges for social services in cases of children witnessing spousal violence is the protection of both the children and their abused parents, which requires integration of the legal, child welfare, and social service systems. While women's shelters recognize the emotional and behavioural problems of children who witness violence, the limited resources available are often directed towards the battered women, though increasingly, shelters in Canada also have programs directed at children. Although child welfare systems focus on the children, priority is given to those in direct danger, and most cases involving domestic violence are not aggressively pursued.[1] There needs to be an integration of services to children, victims of abuse, as well as abusive parents. There is clearly a need for policy-makers to establish a social mandate and allocate the resources needed for services to families experiencing spousal abuse.

Challenges to the social service and justice systems include: (1) risk identification and safety planning; (2) emergency resources; (3) supervised access, including exchange supervision and the availability of supervised visitation centres; and (4) counselling victims and abusers.

4.1 Risk Identification and Safety Planning

Risk Identification

Risk identification involves the recognition that the children of abused parents (as well as the victims themselves) are at risk, particularly during separation. Once this risk has been identified, then prevention and early intervention efforts by professionals can deal with the emotional trauma to the children and can avert potential tragedies. According to Peter Jaffe and Gary Austin,

> ...Obviously, mental health professionals who become involved in these cases require a great deal of specialized knowledge, skills, and assessment strategies to contend with conflicting allegations and counter-allegations with children caught in an often frightening loyalty bind. Although this statement may seem apparent to most clinicians, several authors have pointed out that public policy, services, and debates on divorce are fashioned from the wisdom of the 80% of non-conflictual or even friendly separations...That is, the collective wisdom of both parents promoting the children's relationship with the other parent in a cooperative joint custody arrangement is meaningless when one parent has threatened to kill the other parent and has jeopardized the physical and emotional well-being of the children. In our study, clinicians [who dealt effectively with these cases] had clearly considered the violence in their recommendations by not offering joint custody as a plan and suggesting supervised access in a substantial number of cases.[2]

Safety Planning

Barbara Hart recommends that in cases where there has been spousal or child abuse, there should be safety planning for unsupervised visits to help children manage their fear and anxiety, and to minimize the risk of violence during visitation.[3] Professionals should help children identify safety issues and build problem-solving skills. Safety plans for children should be realistic, simple, and age-appropriate. Possible safety strategies to empower children are: (1) to provide information beforehand on how to handle queries about their mother's activities; (2) how to avoid situations (place, time, circumstance) of prior violence; (3) how to phone home, including making long distance calls or using operator assistance; (4) how to obtain emergency assistance, e.g., 911; (5) escape logistics; (6) how to manage an intoxicated parent; and (7) what to do if they are kidnapped.[4] Safety plans for children should be developed with the non-abusing parent and the child, and should be rehearsed.

4.2 Emergency Resources

A woman leaving a situation of spousal violence with her children may be in need of emergency resources, such as shelter, food and clothing, and financial support. Women's shelters play a very important role in providing these services, although the need far exceeds the availability of services. In cases where a woman fears for her or her children's safety, she should go to the police.

Emergency legal remedies are also available and discussed in Chapter 2.0, including interim orders for custody and access (Section 2.1.4), restraining orders (Section 2.2.1), and exclusive possession of the home (Section 2.2.2).

4.3 Supervised Access and Exchange Supervision

One strategy for protecting abused mothers and their children is for the court to order supervised access, or supervised exchange (Section 2.1.2). Typical reasons for court-ordered supervision include:

- The history of violence is such that any contact between the parents creates a danger of further violence.
- The child is at risk of physical or sexual abuse by the visiting parent.
- The parents have had a history of hostile or even violent arguments during the pickup and return of children.
- The visiting parent has a substance abuse problem that gives the custodial parent concern for the child's welfare.
- The courts suspect that the visiting parent may leave the state with the children.[5]

Supervision can be provided by an individual, e.g., a professional, a volunteer, or a relative, or it can be provided through a program operated by a social service agency or by a visitation centre. In some cases, abusers will subtly threaten children even during

supervised visits. Supervisors require training to ensure that they can meaningfully protect a child, both physically and emotionally, during visits.

Visitation Centres

Visitation centres protect abused parents and children from violence and abduction, while providing abusive spouses access to their children in an environment that encourages positive parenting. The establishment of visitation centres in Canada is a relatively recent development, e.g., Le Mitoyen in Montreal. In the United States, the Domestic Abuse Intervention Project of Duluth, Minnesota began a supervised visitation centre project in 1989.[6] The centre provides supervised exchange, on-site visits, monitored visits, and education and counselling for abusers on parenting and the impact of spousal violence on children. Participants are referred by the courts or child protective services, and the centre is open two days a week -- one weekend day, and one weekday and evening.

It was the experience of the Duluth Visitation Center that its role was "located at the margins of a complex bureaucracy...with multiple and competing discourses that direct its various practitioners."[7] Conflict over child custody produces tensions between the judiciary, acting as a defender of parents' rights through legal discourse, and social work professionals, acting as protectors of children's welfare. The organizers of the Duluth Visitation Center confronted the tensions by asking practical questions:

> What exactly was the Center to do? Was the Center to organize visitations, record information, and submit it to the courts and human service agencies? And if so, what information would be documented and about whom? To take the role of objective recorder would be to act as if such data had no social significance and as if the Center itself could act as a neutral social actor... How precisely, then was the Center to constitute itself as a safe place for children? In what ways was it to respond to the harm that violence does to children? What services would it offer? Who would decide?[8]

The organizers of the Duluth Visitation Center decided that part of its role was to intervene in and influence the judicial process from the standpoint of those who had been harmed by the violence, i.e., the children's viewpoint became the centre of the program's focus.

The concept of visitation centres is well developed in Australia and New Zealand. The Australian and New Zealand Association of Children's Contact Services (ANZACCS) was formed in 1994 to:

- promote a sound analysis of the role, and the limitations, of children's contact services;
- act as a clearinghouse for information in relation to children's contact services;

- establish a network for those involved in establishing or operating children's contact services;
- encourage governments to provide funding for the establishment of children's contact services;
- identify minimum standards; and
- advise on funding criteria.[9]

One of the goals of ANZACCS was to develop standards to encourage focused discussion on key issues and to facilitate the establishment of quality services. Interim Standards were developed, and approved by the Association in March 1995. In May 1995, the Australian federal government established a $5.3 million program of funding for supervised parent-child contact services. The Interim Standards were incorporated into the funding criteria for the program, meaning that all services funded under the program must comply with the Standards.

Children's contact services are operated by non-profit or community-based organizations that provide changeover transport, changeover supervision on or off site, and/or supervision of a contact visit on or off-site. ANZACCS recognized that while children's contact services have the potential to benefit many children and their parents, the viability of contact services depends on the quality of services. Thus, the Standards provide that the purposes of children's contact services are:

- to promote the safety and welfare of the child during changeovers and visits;
- to promote the safety of a vulnerable parent at contact changeovers;
- to facilitate child/parent and child/sibling interaction while contact is taking place; and
- where appropriate, to work towards the independent management of contact by the parties.

The principles that have been adopted by the Standards are: be independent, be accessible, assist to ensure safety, be pleasant, promote the welfare of the child, facilitate parent/child interaction during contact and, where appropriate, assist to overcome factors in the parent/parent interaction which adversely impact on contact. The comprehensive Standards also include information on the structure of services, administrative functions, staff, intake, operational procedures, confidentiality, reports, subpoenas, and clinical observations of the child during contact.
In Canada, some social service agencies receive some government funding to supervise access, for example, in Ontario, but no agencies have parental visitation as a central focus.

4.4 Counselling Victims

It is important to recognize that victims in spousal violence cases involve abused spouses as well as their children. The effects of spousal violence on children are described in Chapter 1.0, Section 1.4. Not only should abused spouses receive counselling, but

children who witness violence between their parents may also require social service intervention.

The goals of counselling adult victims of spousal violence differ somewhat from the goals of counselling child victims who witness spousal violence. A battered woman may need to deal with the following issues: why she was attracted to or stayed with a violent man, guilt over raising her children in a violent home, guilt over leaving the relationship, as well as economic and safety issues.[10] Programs for children who witness spousal violence generally help children to: define the violence and the responsibility for it; express their feelings, including guilt and anger; improve communication, problem-solving and coping skills; increase self esteem; develop social support networks; and develop safety plans.[11] The most documented approach for children who witness spousal violence is a group counselling program that helps children to understand that they are not alone.[12]

4.5 Counselling Abusers

Some custody and visitation orders require that the abuser receive counselling. Unfortunately, some interventions are ineffective or possibly hazardous for victims of abuse and their children.[13] Family systems theories and mediation models can be risky because they assume equal power among family members, as well as equal responsibility for family problems.

Innovative treatment programs for abusers have not been evaluated extensively. The limited information available suggests that many men leave treatment prematurely, even when they are ordered to attend,[14] psychological abuse by many of the men is not reduced following treatment, and recidivism rates can be fairly high, ranging from 15% to 40% one year after treatment.[15] There is some evidence, however, that men have lower child abuse potential following treatment.[16] It is recommended that treatment programs for spousal abusers should contain information on the effects of spousal violence on children, as well as materials on parent training. If the abuser has substance abuse problems, then these should be addressed as well. Where counselling is required as a condition of access, there must at least be a monitoring process to ensure that the abuser completes the program. In the United States, there is a nationwide move to establish standards for treatment programs, in the hopes of increasing treatment effectiveness.[17] In
New Zealand, the court may require the abuser to attend a specified treatment program as a condition of exercising custody or access rights; the programs are paid for by the government.

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5.0 RECOMMENDATIONS FOR LEGISLATIVE AND PROGRAM REFORMS IN CANADA

5.1 Reforming Custody and Access Laws

While there are judges who are not very sensitive to the issue of spousal violence, the review of case law indicates that more Canadian judges are starting to recognize the importance of spousal violence as a factor in custody and access disputes. Further, there is an increasing appreciation among the judiciary and other justice system professionals of the need for differentiated responses, depending on the nature of the abuse, the effects of that abuse on the children and the prognosis for the future, as well as on the risk of immediate harm.

Recommendation #1: Legislation should specifically acknowledge the significance of domestic violence to custody and access issues.

All Canadian jurisdictions should enact statutes that specifically recognize the significance of domestic violence for child-related proceedings, as has occurred in Newfoundland, most American states, Australia, New Zealand, and England and Wales. The enactment of such legislation would clarify the law, and facilitate the education of judges, lawyers, and other professionals, as well as the public. Such legislation would also have important educational and psychological value for victims of domestic violence, and hopefully may deter abusive behaviour by the perpetrators of domestic violence. The responsibility for reforming custody and access laws rests both with the federal government, in terms of the *Divorce Act* which governs parents who are divorcing, and with the provincial and territorial governments, which have legislation governing custody and access in other situations.

Recommendation #2: Domestic violence should be clearly and concisely defined.

For the purposes of determining custody and access under the *Divorce Act* and other legislation, there should be a definition that:

"Domestic violence" includes the occurrence of one or more of the following acts:

- attempting to cause or causing physical harm to another family member;
- causing a family member to have reasonable fear of physical harm;
- causing another family member to engage in involuntary sexual activity; or
- forcible confinement of the other parent.

This definition is similar to that used in the American Bar Association *Model Code on Domestic and Family Violence*, and provincial domestic violence legislation such as that in Saskatchewan. The definition focuses on acts that are concrete and avoids the use of more elusive and controversial concepts of "emotional abuse and financial abuse;" in particular, there is a concern that the concept of spousal emotional abuse might be

inappropriately used against mothers in custody or access disputes. Widening the definition might unduly protract litigation, but the use of the term "includes" in the definition is intended to give courts some flexibility to expand the concept of "domestic violence" in appropriate cases.

Recommendation #3: Safety of the abused parents and children should be a paramount concern.

In considering the effects of domestic violence, judges and professionals should consider the nature and timing of the violence, its effect on the parents and children, and the likelihood of recurrence, as well as issues of safety for both abused parents and children. Similar to legislation in several American states and New Zealand, Canadian statutes should specify that issues of safety should always be a paramount concern for the courts.

Recommendation #4: There should be a presumption that custody should not be awarded to the perpetrators of domestic violence.

As in New Zealand and some American states, there should be a statutory presumption that it is not in the "best interests" of a child to be placed in the custody of a parent who has perpetrated acts of domestic violence against the child or a parent of the child. The presumption against placing a child in the custody of a parent with a history of domestic violence should be rebuttable, in particular if that person has been the primary caregiver of the child and does not pose a risk to the safety of the child; this presumption might, for example, be rebutted in some of the relatively rare cases where a primary caregiver mother is the primary aggressor spouse.

Recommendation #5: The "friendly parent" presumption should not apply in cases where there has been domestic violence.

Access issues are a particular concern in cases of domestic violence. There is a potential for violence and verbal abuse at the time that the parents meet to exchange access. The "friendly parent presumption" of the *Divorce Act* s. 16(10) is also problematic. This provision requires the court to give effect to the "principle that a child should have as much contact" with the non-custodial parent as is consistent with the best interests of the child, and that in deciding on custody the court should consider the "willingness" of each person to facilitate such contact. While the principle of facilitating contact with the non-custodial parent is appropriate in many situations, it should not apply in cases where there has been domestic violence.

Recommendation #6: Legislation should make explicit provision for supervised access and exchange.

In assessing the "best interests" of a child in regard to access in a case where there has been domestic violence, consideration should be given to the detrimental effect that access may have on the parenting capacity of the custodial parent. Legislation should specify that in making arrangements for access, the safety of the parents and children should be a paramount consideration. There should be explicit provision for access supervision and exchange supervision. Parents with a history of domestic violence and

financial means should be required to pay for access supervision and exchange supervision. Supervised access should only be viewed as a temporary arrangement; in situations where abusers are not amenable to rehabilitation, there may be a need to terminate access.

Recommendation #7: Legislation should allow a court to require perpetrators of domestic violence to undertake counselling or treatment as a condition of custody or access.

Legislation should specify that a court may impose conditions on a custody or access order that require a perpetrator of domestic violence to undertake counselling or treatment to deal with problems such as anger management and lack of parenting skills as a condition of exercising access or other parental rights. New Zealand legislation requires that, in cases of protection orders, an abusive spouse attend a treatment program, paid by the government.

Recommendation #8: Legislation should allow for non-disclosure of the abused spouse's residence.

Legislation should provide that a parent who alleges domestic violence in a custody or access application can request that their residence not be disclosed as part of the court process, provided that there is some way specified to effect service of court documents upon the parent making the request, for example, through a lawyer.

Recommendation #9: Legislation should recognize that domestic violence may justify a variation to a custody or access order.

Legislation should specify that an act of domestic violence perpetrated since the making of a custody or access order is a material change of circumstance which may justify a variation of that order.

Recommendation #10: Flight from the matrimonial home for fear of safety should not be a factor in custody and access disputes.

Legislation should specify that if a parent leaves the matrimonial home because of a reasonable fear for the safety to the parent or child, this should not be a factor held against that person in a custody or access dispute. A court should refuse to order the return of a child to the jurisdiction of the child's ordinary or habitual residence where doing so would pose a significant risk to the safety of the child or a parent.

5.2 Mediation, Negotiation and Joint Custody

In cases where there is no domestic violence and parents can cooperate effectively, mediation and negotiation can play important roles in facilitating expeditious, amicable resolution of disputes, and joint custody may be an effective method of maximizing the continued involvement of both parents in a child's life. However, where domestic violence is present, there must be great caution in use of mediation, negotiation or joint custody.

Recommendation #11: Legislation should place restrictions on the use of mediation in cases of domestic violence.

Legislation should specify that a custody or access dispute should only be referred to mediation by a judge, lawyer or other professional if satisfied that there is no history of domestic violence, or if there is such a history that:

- the victim is not subject to coercion, and is in a position to voluntarily choose mediation, and voluntarily requests mediation; and
- the mediator has training in dealing with domestic violence, *and* adequate measures are in place to protect the safety and interests of the victim of domestic violence and the children.

Australian legislation prohibits mediators from dealing with cases where family violence is present or where there is any concern about the safety of the parties.

Recommendation #12: There should be a presumption against joint custody in cases of domestic violence.

Similar to several American states, legislation should specify that joint custody is not in a child's best interests if there has been domestic violence, or there is an absence of evidence that the parents can communicate effectively and as adults.

Recommendation #13: Courts should be allowed to set aside previous agreements consented to because of domestic violence.

Legislation should specify that any agreement or arrangement in regard to custody, access or child support may be set aside by a judge if the court is satisfied that a parent's consent to the arrangement was a product of acts or threats of domestic violence.

5.3 Legal Aid

Recommendation #14: Cases involving domestic violence should have priority for legal aid representation.

There should be a priority in the granting of legal aid representation for family law cases where there has been an allegation or threat of domestic violence. Lawyers and support staff who represent legal aid clients should have special training in the handling of domestic violence cases.

Recommendation #15: Unrepresented parties in domestic violence cases must be provided with appropriate supports.

There must be supports provided to unrepresented litigants in family law cases, especially in regard to domestic violence cases. These would include provision of public education materials and appropriate training for court staff.

5.4 Training and Education

All justice system professionals who work with divorcing couples, including lawyers, judges, police, assessors and mediators, need knowledge and training to deal effectively with situations where spousal abuse is at issue, and in particular to be aware of the risks faced by victims of abuse and their children. These professionals must appreciate that spousal abuse covers a broad range of conduct. Given the wide range of abusive spousal conduct and the high proportion of separations and divorces that involve at least one incident of spousal abuse, it is necessary for professionals to develop differentiated responses that take account of the specific situation of abuse, and its effect on the particular parents and children involved.

Recommendation #16: Service providers must receive specialized training to deal with domestic violence.

Service providers must receive appropriate training to deal with domestic violence cases and to cooperate effectively with one another in domestic violence cases. In particular, police and Crown Prosecutors must be ready to work effectively with lawyers, therapists, shelter advocates for victims, and with victims themselves.

Recommendation #17: Broad-based media campaigns are needed on the effects of spousal violence on children.

Information on the impact of spousal violence on children needs to be available not only to professionals working in the area, but also to the general public through broad-based media campaigns.

5.5 Provincial and Territorial Legislation and Programs

Recommendation #18: Provincial and territorial legislation should provide for expeditious and inexpensive access to the courts in cases of domestic violence.

All provinces and territories should enact legislation like that in Saskatchewan and Prince Edward Island, which provides victims of domestic violence with expeditious and inexpensive access to the courts to obtain orders for possession of the home and personal property, restraining harassment or contact, and police assistance.

Recommendation #19: Provincial and territorial legislation should provide for expeditious granting of interim custody and access orders in cases of domestic violence.

Legislation should also facilitate the expeditious granting of interim orders for custody and access in a manner that ensures protection for children and victims of domestic violence. These governments must also ensure that these orders are effectively enforced.

Recommendation #20: Provincial and territorial governments should provide funding for women's shelters.

Provincial and territorial governments need to explicitly recognize the importance of shelters for abused spouses and their children. Funds need to be allocated for the support of these shelters.

Recommendation #21: Provincial and territorial governments should provide programs for access and exchange supervision.

The provinces and territories must ensure that adequate programs are established for access supervision and exchange supervision. Australia and New Zealand have developed an excellent model for visitation centres and have provided standards for their operation. Provincial and territorial governments must provide financial support; the federal government also has a role in supporting these programs.

Recommendation #22: The importance of treatment and counselling programs should be recognized in provincial and territorial legislation.

Similar to legislation in New Zealand, Canadian legislation should recognize the importance of treatment and counselling programs for both victims and perpetrators of spousal violence, as well as for the children impacted by it. The federal government also has a role in supporting these programs.

5.6 Research and Monitoring

Recommendation #23: Further research is needed on the effects on children of various custody and access arrangements in cases of spousal violence.

There is a need for further research into the effects of spousal abuse on children, and of the impact of different patterns of access, supervised access and denial of access. Research should also focus on the most effective short and long-term strategies for reducing the incidence and effects of spousal and child abuse.

Recommendation #24: Legislation and programs dealing with domestic violence need to be monitored and evaluated.

There is a need to monitor and evaluate both new legislation as well as programs such as visitation centres and treatment programs to ensure they are meeting their stated objectives.

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