

Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective

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The views expressed herein are solely those of the author and do not necessarily reflect those of the Department of Justice Canada.

I. INTRODUCTION: SCOPE OF THIS PAPER

Purpose & Perspective of this Paper

This paper explores the issues that arise in child protection proceedings involving family violence, where there are concurrent family¹ and/or criminal proceedings. A particular focus is on issues in concurrent proceedings in cases involving intimate partner violence, though there is some discussion of child abuse cases, especially those involving emotional and other child abuse issues arising in the context of high-conflict separations. We discuss and compare the social and legal contexts of these different proceedings, offer analysis of both legal and professional practice concerns that concurrent proceedings create, and conclude by offering suggestions about promising practices to improve processes and outcomes for children in these challenging cases.

These cases are inevitably complex and difficult for parents, children, professionals and the justice system. While the same factual circumstances may be considered in each of the proceedings, if there are concurrent proceedings there is the potential for inconsistent and even conflicting outcomes and orders. This paper explores the complex social, institutional and legal context of these concurrent proceedings, and provides suggestions for changes that should result in more effective and efficient interventions.

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¹ Generally the term "family proceedings" is used in this paper to refer to civil proceedings involving separated or divorced parents, and are distinguished from "child protection" proceedings that involve a child protection agency and parents. In many locales in Canada, both types of proceedings are within the jurisdiction of a Family Court (which may be either a superior court or a provincial court.)

This paper is written primarily from the perspective of the professionals and agencies involved in the child protection system, that is those with a responsibility for the protection of children and promotion of their best interests, and with the primary focus of improving the process and outcomes for children involved in that system. However, it is recognized that the protection of children and promotion of their interests must be balanced against other concerns. The justice system must also consider the accountability of perpetrators and the protection of rights of accused persons, and the rights and interests of parents. And in all parts of the justice system, reform is constrained by significant resource issues.

We use the term “family violence” to refer to both “intimate partner violence” and “child abuse”. “Intimate partner violence” refers to violence perpetrated by one spouse against the other, or by both spouses to each other. “Child abuse” refers to physical or sexual violence perpetrated by either or both parents against a child; it also includes neglect and emotional abuse that children may suffer, including from witnessing or living in families where there is intimate partner violence or a high-conflict separation. “Family proceedings” usually refers to custody and access proceedings, and may also include applications for child support, spousal support, restraining orders and division of property.

Situations Where There May be Concurrent Proceedings

There are a number of situations where there can be child protection proceedings and concurrent criminal or family proceedings. There is a significant likelihood of concurrent proceedings in four situations:

- (1) Cases where there is only one parent involved in the child’s life (usually the mother) and there are allegations of abuse or neglect by that parent. There may be child protection proceedings and the parent may also face criminal charges based on the abuse or neglect.
- (2) Cases where both parents are cohabiting and there are allegations of direct child abuse or neglect by one or both parents. There may be child protection proceedings, and one or both of the parents may also face criminal charges based on the abuse or neglect, or a failure to protect the child.
- (3) Cases where the parents have not separated but there are intimate partner violence issues giving rise to concerns that the child may be emotionally or physically harmed as a result of exposure to intimate partner violence. In these situations, the abuser may face criminal prosecution for intimate partner violence, and there may also be child protection proceedings if there is also serious risk to the children. At some point

in these proceedings, the parents may separate, resulting in the possibility of family proceedings.

- (4) Cases where the parents have separated and one parent alleges that the other parent has abused a child or engaged in intimate partner violence, or there is ongoing parental conflict that does not involve violence but may place the child at risk. In such situations, there may be concurrent child protection, criminal and family proceedings.

This paper largely focuses on the last two situations, where the alleged violence or conflict between the parents is placing the child at risk and there is the prospect of concurrent proceedings, though some of the discussion may be relevant to the other situations as well.

The Challenge and Complexity of Concurrent Proceedings

For parents involved in high-conflict separations, especially for those who are the victims of intimate partner violence, the lack of coordination between agencies, professionals and court proceedings can be bewildering, time-consuming, and emotionally and financially devastating. The parents and children may have to navigate between two or three legal processes (child protection, criminal, family, which itself may have proceedings in both superior and provincial courts, and in some cases, immigration), repeat their stories in multiple proceedings, understand the consequences of different and often conflicting orders, and reconcile different results in the different proceedings. An acquittal of the alleged abuser in the criminal proceedings, a finding that the children are in need of protection resulting from exposure to violence in the child protection proceedings, and an order for joint custody in the family proceedings are all possible determinations for one family.

Parents who are victims of intimate partner violence, most often mothers,² may face the threat of apprehension of a child by a child protection agency for failing to keep the abuser from the child, but may have felt insufficiently protected from prior victimization by the criminal or family justice systems, or worry that they will not be adequately protected in the future. The stress and financial consequences of dealing with multiple concurrent proceedings while the parents deal with the stress of ending or managing a violent relationship can lead targeted parents to recant, drop out of contact with police and child

² As will be further discussed in this paper, women and men report being victims of intimate partner violence in roughly equal numbers. However, women are much more likely to be subject to “coercive controlling violence” and are more likely to be the primary caregiver of their children. They are therefore more likely to face the possibility of having their children apprehended in the event that the CPA has concerns about their ability to protect them from exposure to violence.

protection services, and refuse to contact authorities following subsequent incidents of violence; the stress may also trigger abusers to engage in further threatening and violent behaviour. Finally, the presence of both parents at multiple court appearances can increase the risk of abuse and the emotional trauma resulting from contact between the victim and the abuser.³

Children may be interviewed by a number of unfamiliar professionals about matters that they find deeply troubling, be represented by counsel and/or speak to the judge in the family or child protection proceedings. They may have contact with one or both parents prohibited, be reintroduced to the parents and then prohibited from contact again, and may have to accompany their custodial parent to the multiplicity of court dates that can all result from the same underlying history of violence. In some cases, especially in the criminal process, children may be required to testify against a parent.

Concurrent proceedings also pose significant challenges for professionals, agencies and the courts. While all of the professionals involved may in some way want what is best for the children, they also have defined roles and expectations, and may face significant resource constraints. In some cases, some professionals may not appreciate the limitations and expectations of other agencies and professionals involved with the same family. Policies or laws may hinder or prevent effective communication and co-ordination between agencies and systems, frustrating professionals and parents, and in some cases preventing the implementation of plans that will best meet the needs of the children involved.

In some cases, confusion resulting from conflicting orders in concurrent proceedings and a lack of information-sharing between service providers may have contributed to the deaths of children and their parents.⁴

Outline of the Paper

Following this Introduction, Part II discusses the institutional context of these cases, with particular attention to the role of the child protection agency (CPA) in responding to cases of intimate partner violence, child abuse and high-conflict separation. Part III explains the social context of these cases, exploring the effects of intimate partner violence (IPV) and high-conflict separations on children, including some discussion of allegations of alienation,

³ The Honourable Donna Martinson and Dr. Margaret Jackson, “Judicial Leadership and Intimate Partner Violence Cases – Judges Can Make a Difference.” National Judicial Institute, 2012.

⁴ See, for example, the Report of the BC Representative for Children and Youth, *Honouring Kaitlynn, Max and Gordon: Make Their Voices Heard Now* (2012)

which are sometimes made in high-conflict separations or in response to allegations of IPV. Part III also provides an introduction to typologies of intimate partner violence, including mutual or conflictual violence, separation engendered violence, and coercive controlling violence.

Part IV explores the issues that arise when there are concurrent child protection and family proceedings, while Part V explores issues that arise if there is a concurrent child protection and criminal proceeding. Part VI identifies some promising practices that can address the problems and challenges of concurrent proceedings.

Part VII concludes the paper by emphasizing the importance of better systemic responses to high-conflict separation cases, especially those involving allegations of IPV, and by briefly discussing some of the limits of current knowledge and suggesting issues that need to be further researched.

II. INSTITUTIONAL CONTEXT: THE CHILD PROTECTION PERSPECTIVE

The first child protection agencies (CPAs) were established late in the nineteenth century to provide protection and care for children who were abused, neglected, orphaned or abandoned. While these agencies were originally private charities, they are all now effectively regulated and funded by provincial and territorial governments. They have a legislative mandate to exercise state powers to investigate suspected cases of abuse and neglect, and, if appropriate apprehend children from parental care and place them in the temporary or permanent guardianship of the agency, with the potential placement in a foster or group home, or adoption. These agencies have significant state powers to enter premises, search for evidence and obtain records, but they operate subject to the control of the courts, primarily through the child protection process.

While child protection agencies have very significant powers to intervene in the lives of parents and children, and exercise state powers (subject to judicial control), their function and operation is very different from the police. The mandate of these agencies is not to punish or hold accountable parents who may have abused or neglected their children, but rather to protect children and promote their welfare. Legislation governing CPAs in Canada states that the mandate of these agencies includes the promotion of the “best interests of children,” though as will be discussed, there is a presumption in child protection proceedings that the best interests of children is promoted by their being cared for by parents or relatives. There is an onus on the CPAs to justify intrusions into parental care.

Approaches to child protection vary somewhat across Canada as under the *Constitution Act*, child protection is an area of provincial/territorial jurisdiction, with each province and

territory having its own governing legislation and distinctive institutional structures and policies. While many of the basic concepts are the same in all jurisdictions, such as a focus on the protection of safety with a presumption that it is in best interests of the child to remain in parental care, there are significant differences between the statutes and institutional structures.

In most provinces and territories, child protection is the responsibility of a government department with local offices that deal exclusively child welfare matters. In Quebec, however, child protection services are provided through regionalized Youth Centres that also provide family counselling, services for families with custody disputes and services to young offenders. In Ontario, children's aid societies are regionally based non-profit organizations; they are subject to provincial regulation and funding, but have a significant degree of operating autonomy. For historical reasons, in Ontario there are agencies for Catholic and Jewish families in a few large cities. Relatively recently a number of Aboriginal communities across the country have established Aboriginal child protection agencies, a process known as devolution.⁵

The provinces and territories have responsibility under the *Constitution Act* for child protection. There are also some Treaty First Nations which have developed their own child welfare legislation. With respect to child protection on reserves, the Government of Canada provides funding to the provinces and territories through the First Nations Child and Family Services (FNCFS) Program. This program funds and promotes the development and expansion of child and family services agencies designed, managed and controlled by First Nations. Since child and family services is an area of provincial and territorial jurisdiction, these First Nation agencies receive their legal mandate and authorities from provincial or territorial governments and function in a manner consistent with existing provincial or territorial child protection legislation. In areas where First Nations Child & Family Services agencies do not exist, Aboriginal Affairs and Northern Development Canada (AANDC) funds services provided by child protection agencies operated by provincial and territorial governments.

Across Canada there are similar statutory provisions, policies and guidelines for the assessment of risk and determinations of what is in a particular child's best interests. However, agency culture, history, resources and the level of training and experience of

⁵ For example, Catholic Children's Aid Society of Hamilton, Jewish Child and Family Services (Toronto), and Dilico Anishinabek Family Care in northern Ontario. Manitoba reorganized its child protection system in 2003 - 2005 to transfer responsibility for a significant number of cases to Aboriginal agencies, through the Aboriginal Justice Inquiry-Child Welfare Initiative (AJI-CWI). See <http://www.aji-cwi.mb.ca/eng/phasesTimelines.html>.

workers, supervisors and the lawyers who act for them will all affect the child welfare response to an individual case.

Of the three legal processes that are used with families dealing with violence issues, the child protection response often holds the most promise for effective intervention and prevention that focuses on protection of children. This is because CPAs have staff and policies that are intended to support parents as well as children, and a statutory mandate focused on meeting the best interests of the child. While involuntary involvement and court proceedings are always a possibility, the most common CPA response is through the voluntary provision of supportive services. In some cases the CPA and parents will enter a voluntary agreement for provision of services to parents and children to help address possible protection concerns. In either scenario, the CPA and, if involved, the court will be able to engage in ongoing monitoring of the family for months or, if necessary, years. However, the child protection system is often hampered by a lack of resources, lack of effective training of staff on family violence dynamics, and few intervention options for families affected by violence. Further, despite their mandates to assist families where appropriate, child protection agencies are, not surprisingly, often seen as being in an adversarial relationship with parents. There has, for example, been a tendency in cases involving children's exposure to IPV to place responsibility on the mother to protect the children, and to focus on separation from the violent partner as the only acceptable means of keeping children safe, resulting in resistance from parents to child welfare involvement. An approach to child protection cases which focuses on harm reduction, communication between agencies and courts, and working with the perpetrator – with an understanding of the challenges and opportunities associated with those concurrent legal proceedings - may be the best means for reducing children's exposure to family violence.

III. THE CONTEXT OF FAMILY VIOLENCE & 'HIGH-CONFLICT' SEPARATIONS

Types of High-Conflict & IPV Cases

Any relationship characterized by high conflict and/or IPV poses risks to children, and often their parents, but the dynamics and impact varies from case to case, and the nature of the legal and social responses should vary depending on the nature and intensity of the conflict, as well as the assessment of future risk. Cases involving parental alienation, for example, require different intervention than those involving hostile parental communication; intimate partner violence cases pose special risks and raise concerns about continued contact

between separated parents and children.⁶ An appreciation of varying situations of high-conflict and IPV is helpful, even though in practice many cases will not fit neatly into only one category.

Exposure to Intimate Partner Violence

In homes where there is intimate partner violence, children are very likely to be aware of the violence, even if the parents do not realize this: these are children “exposed” to intimate partner violence. Even if they do not witness an assault, they are likely to hear the violence or see the aftermath in terms of damages to the home or injury to a parent, or to sense the fear that one parent has of the other. Research has established that exposure to intimate partner violence (living in a home where there has been spousal abuse) has significant negative effects on child development, and, even if the child is not directly victimized or has not directly witnessed the violence, this is a form of emotional maltreatment of children with potential long term negative effects. Further, intimate partner violence sometimes creates or contributes to mental health and substance abuse challenges for victims, compromising the parenting capacity of the person who is often the child’s primary caregiver.

Studies show that children who are exposed to intimate partner violence are more likely to have:

- behavioural problems and lower social competence: boys tend to externalize and have school difficulties or be more aggressive, including the commission of offences for adolescents, while girls tend more towards depression;
- low self-esteem and high anxiety, as evidenced by sleep disturbance and nightmares;
- risk of abusing drugs or alcohol in adolescence;
- developmental delays, particularly for infants who may suffer attachment problems or 'failure to thrive'; and
- abusive relationships as adults: boys as abusive partners and girls as abused women.⁷

⁶ Birnbaum & Bala, “Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law” (2010) 48:3 Fam Ct Rev 403 at 404.

⁷ *CAS of Toronto v LH*, 2008 ONCJ 5855, at para. 210, citing Tina Hotton, *Childhood Aggression and Exposure to Violence in the Home* (Ottawa: Statistics Canada and Department of Justice Canada, 2003); see also e.g. Ayoub, Deutsch & Maraganore, “Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence” (1999) 37:3 Fam Ct Rev 297 at 298.

In cases of intimate partner violence, when a decision is being made about the future care of the children, it is important for the pattern of violence to be properly understood, and future risk of physical or emotional harm assessed.⁸ It is useful to be aware of typologies or categories of intimate partner violence, though it is also important to appreciate that the types of spousal abuse that will be discussed here are based on generalizations, and many cases of intimate partner violence do not fall neatly into a particular category. These typologies have been described as “heuristic frameworks for descriptive purposes” which do not have predictive value; they should not be relied upon to determine the child’s best interests or the level of risk to the targeted parent or child in any individual case.⁹

In some cases, intimate partner violence reflects an escalation of a verbal argument and **mutual conflict**, with some responsibility by both spouses for the situation while they continue to cohabit, and reasonable hopes of de-escalation of violence if they separate. In other cases, there are only a few incidences of violence close to the time of separation reflecting intense anger or feelings of betrayal or loss of trust by one partner – **separation engendered violence** – and there is only limited risk of further post-separation violence (although it has been noted that separation can be a very dangerous time and that separation engendered violence can escalate into severe violence and even homicide).¹⁰

The greatest risks are usually in cases of **coercive controlling violence**, where one spouse, usually the husband, is the primary perpetrator and the violence is used to control and dominate a partner, and continues or escalates after separation; there may be a pattern of separation after a violent incident and then resumption of the relationship. It is also important to note that these categories of violence are generalizations, and not all cases of violence will necessarily fall into a particular category. For example, it has been noted that there may be a risk of lethality (homicide of the targeted parent or child, and/or suicide of the perpetrator) even where there has not been severe or coercive controlling violence.¹¹

Depending on the nature of the violence, the likelihood of recurrence, and the child’s level of fear, it may be necessary to suspend or terminate contact between an abusive parent and the child, or at least require supervision of contact.¹² However, if intimate partner violence has

⁸ See e.g. Jaffe, Johnston, Crooks & Bala, "Custody Disputes Involving Allegations of Intimate Partner Violence: The Need for Differentiated Approaches to Parenting Plans" (2008) 46 *Family Court Review* 500-522.

⁹ Austin & Drozd, "Intimate Partner Violence and Child Custody Evaluation, Part I: Theoretical Framework, Forensic Model, and Assessment Issues." (2012) 9 *Journal of Child Custody* 250-309, at 262

¹⁰ Austin & Drozd (2012) at 274.

¹¹ Austin & Drozd (2012) at 279.

¹² Birnbaum & Bala, "Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law" (2010) 48:3 *Fam Ct Rev* 403, at 412.

ceased after separation, safety concerns have been adequately addressed, and the children have a positive relationship with both parents, it may well be appropriate for the children to have continuing contact with both parents, and possibly even to be in a joint custody arrangement. If an abusive spouse has been the children's primary care-giver and does not pose a risk to the children, it may even be appropriate for that person to retain custody of the children.¹³

High-Conflict Separations (Without Intimate Partner Violence)

While many high-conflict separations are characterized by intimate partner violence, there are also cases where there is no physical violence, but there is intense and continuing anger and hostility between the parents. Over the past two decades there has been a growing awareness that high-conflict spousal relationships and separations pose significant risks for emotional harm to children, even in cases where there has not been significant intimate partner violence or child abuse. These cases also pose significant challenges for professionals, agencies and the courts, and they too may raise issues of concurrent child protection, family and possibly criminal proceedings (for example, where there have been threats or perceived threats, or calls to police regarding very minor incidents).

While in most situations of parental separation there is an understandable focus on settlement by mediation or negotiation and resolution outside the family court system, separation cases involving high conflict or intimate partner violence are less likely to be appropriate for resolution outside the court system, and are likely to only be resolved through the court process, with the prospect of multiple court appearances, and not infrequently proceedings in more than one court.

High-conflict separation cases usually have different dynamics and present different challenges for agencies, professionals and the courts than the more common child protection cases that child protection professionals are most familiar with involving allegations of abuse or neglect outside of parental separation. In many high-conflict separation cases that do not involve intimate partner violence, each parent may function reasonably well alone, and when the parents were living together, the children may not have been at risk of serious abuse or neglect. It may be only after separation (and in the period leading up to separation) that there are serious concerns about parental deficits, which often reflect personality

¹³ See *CAS Waterloo v MJD*, [2002] OJ 5877 (SC) where a primary care-giver mother made threats against the father and once threatened him with a knife but was awarded custody.

disorders, exacerbated by the feelings of betrayal, anger and mistrust related to the separation.

In cases involving high-conflict separation, a primary focus of the child protection agency may be to reduce the level of conflict and allow both parents to continue to have a role in their children's lives, but in some of these cases the agency may determine that the interests of the child require supporting one parent, and limiting or even terminating the involvement of the other parent in the child's life, at least for a period of time.

Alienation and Estrangement

In many cases parental conflict around the time of separation may abate and the parents, perhaps with professional assistance, may be able to establish a good co-parenting relationship. However, an important characteristic of some high-conflict separation cases is that one or both parents fail to support the child's relationship with the other parent,¹⁴ and indeed continually attempt (consciously or unconsciously) to undermine the child's relationship to the other parent. In some of these cases, children manage to maintain a good relationship with each parent, despite stress caused by one or both parents being unsupportive or even highly negative about the other. However, in a significant portion of high-conflict cases children become resistant to having contact with one of their parents.¹⁵

A child's resistance to contact with a parent may be due to the alienating attitudes or actions of a favoured parent. Parental influence in alienation cases can range from a parent sharing frustrations and anger about the other parent with the child to unfounded allegations of sexual or physical abuse of the child. The alienating parental behaviour is emotionally damaging, and causes the child to develop distorted views of the rejected parent and reality. Alienated children are more at risk for behavioural, emotional and social problems, which may continue well into adulthood and are reflected in higher rates of adult depression and relationship difficulties.

¹⁴ There are cases where there is significant parental disagreement and litigation over economic issues, but the parents are able to maintain a good co-parenting relationship; these situations are not the subject of this paper.

¹⁵ See e.g. Fidler, Bala, Saini, *A Differential Approach to Children Resisting Post-separation Contact: A Guide for Legal & Mental Professionals* (Oxford University Press, New York, 2012); and Fidler & Bala, "Children Resisting Post-separation Contact With A Parent: Concepts, Controversies And Conundrums" (2010) 48 *Family Court Review* 10-47. The use of the concepts of parental alienation and alienating parental behaviours in this paper is **not** an endorsement of parental alienation *syndrome*, a concept advanced by some advocates, but not adopted by the American Psychological Association as an accepted mental disorder.

It is not uncommon in high-conflict separations for both parents to engage in alienating conduct, consciously or unconsciously attempting to undermine the child's relationship with the other parent. In most of these cases, children will align with the parent with whom they primarily reside, who is often the mother. In cases where fathers have sole or joint custody, they are also able to alienate their children from their mothers. It is less common for children to become alienated from a parent with whom they reside by a parent with access, though this too can occur.

However, in some cases a child may be resistant to having contact with a parent due to the child's own experiences with that parent of abuse or poor parenting or problems in the step-family. These cases of justified rejection of a parent are often referred to as situations of justified estrangement. Indeed, in a large number of cases where intimate partner violence or child abuse is alleged by one parent (usually the mother), the other parent (usually the father) alleges alienation in response. Determining whether a child's rejection of a parent is due to alienation, estrangement or a combination of factors is a major challenge for child protection agencies and the justice system.

There is a need for caution in identifying a case as alienation, since a situation may be misidentified as a mutually antagonistic high-conflict separation when in reality one parent (usually the mother) is a victim of intimate partner violence and requires protection, and the child's estrangement from the other parent is caused by the violence.

Although many children who witness intimate partner violence are afraid of an abusive parent and hence may be reluctant to visit with that parent – justified estrangement – in some cases children will become aligned with the abusive, “more powerful” father and become alienated from the “weaker” victimized mother.

IV. CONCURRENT CHILD PROTECTION & FAMILY PROCEEDINGS

While concurrent child protection and family proceedings may, at least in part, be based on the same incidents of alleged abuse or neglect, the proceedings differ in very significant ways. The following discussion compares the child protection and family processes, and considers the complex challenges that arise if there are concurrent proceedings.

A. COMPARING THE CHILD PROTECTION AND FAMILY PROCESSES

If parents have separated and are unable to agree about custody or access, either parent can bring an application under provincial legislation (like Ontario's *Children's Law Reform Act*) or the federal *Divorce Act* (if the parents were married) for custody or access based on an assessment of the "best interests of the child." Allegations of violence will be relevant to the determination of the "best interests of the child", for determination of both custody and access.

Exposure to intimate partner violence that comes to the attention of child protection authorities will usually trigger an investigation and possibly intervention, and increasingly, high-conflict family cases, including those involving allegations of alienation and estrangement, are also seen as within the mandate of CPAs to investigate. Child protection and family proceedings have many similarities, but some significant differences, described below.

Jurisdiction, burden and standard of proof

Both family and child protection proceedings are civil proceedings, subject to the same burden of proof (on the applicant – in family matters, the person commencing the application; in child protection matters, the child protection agency) and the same standard of proof (balance of probabilities). In jurisdictions with Unified Family Courts, child protection and family proceedings will be heard in that court (which has Superior Court jurisdiction). In most other jurisdictions, child protection cases and custody/access cases which do not involve divorce actions are heard in Provincial Court, while proceedings under the *Divorce Act* are heard in Superior Court.

An order made under provincial child protection legislation, even in a Provincial Court (like the Ontario Court of Justice), will supersede a prior order made under the provincial family legislation or the *Divorce Act*, even if made by a Superior Court judge, since under the child provision statute the court is exercising a state mandated protective jurisdiction.¹⁶

Focus of the proceeding and relevance of IPV

Intimate partner violence is explicitly identified as a factor to be taken into account in proceedings to deal with custody and access in Ontario, Alberta, British Columbia and most

¹⁶ See e.g. *Children's Aid Society of the Regional Municipality of Waterloo v BA*, 2005 ONCJ 220, [2005] OJ 2844, Kent J.; *Re J.D.* (1978), 8 R.F.L. (2d) 209 (Ont. Prov. Ct.); and *Re Fortowsky*, [1960] O.W.N. 235, 23 D.L.R. (2d) 569 (Ont.C.A.).

other provinces;¹⁷ much of this legislation was enacted in the past two decades. The provisions of the federal *Divorce Act* dealing with custody and access have not been substantially amended since they came into force in 1986.¹⁸ It has been suggested that the *Divorce Act* and similar provincial legislation should be amended to take specific account of family violence as a factor in making custody and access decisions, including concerning joint custody.¹⁹ While it seems generally accepted in Canadian jurisprudence (if not appreciated by all lawyers and litigants) under the *Divorce Act* that proof of intimate partner violence is a factor in custody and access cases, many of those affected by the legislation, especially self-represented litigants, may not be aware of the significance of intimate partner violence.

The legal basis for child protection agency involvement is that a child is in “need of protection,” as defined in the applicable provincial or territorial child protection legislation. While there is some variation in the definitions, all child protection statutes in Canada include emotional or psychological harm or abuse as a basis for CPA involvement; in a number of jurisdictions including Nova Scotia and New Brunswick exposure to intimate partner violence is an explicit ground for agency involvement, and it is now accepted in other jurisdictions that exposure to intimate partner violence is an aspect of psychological or emotional abuse or harm. A child protection proceeding will be commenced by a CPA when its staff believes that a child is “in need of protection,” and the parents cannot adequately care for a child without some form of intervention (either removal of the child from the parents’ care, removal of one parent from the home, or the imposition of conditions on one or both parents).

A CPA may become involved with a family because police, teachers or medical treatment providers report concerns about the child’s exposure to violence. They may also become involved in a high-conflict parental separation case because one or both parents report to the agency that they believe that the other parent (or a new partner) is abusing or neglecting the child. Although these reports may well be true, and must of course be investigated, in some cases the reported allegations are exaggerated or false.²⁰ The fact that such allegations

¹⁷ See e.g. Ontario *Children’s Law Reform Act*, s. 25(4), in force 2006; and British Columbia, *Family Law Act*, ss. 37(2)(g) & (h) and 38, in force 2013.

¹⁸ Private members Bill C-252, First session, 39th Parliament,, enacted as S.C 2007, c. 14, added s. 17(5.1) to the *Divorce Act* to provide that in the case of a former spouse who is terminally ill or in critical condition, the court shall make a variation order in respect of access that is in the best interests of the child.

¹⁹ This reform was recommended in 1996 in the Special Parliamentary Joint Committee Report, *For the Sake of the Children* and appeared in Bill C-22 (2003), which was not enacted.

²⁰ Reports of sexual abuse made in the context of parental separation have a much higher rate of being unfounded or classified by CAS workers as being fabricated than reports made in other contexts, though of course they must be investigated and some are founded; see Bala, Mitnick, Trocmé & Houston, “Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?” (2007) 13 *Journal of Family Studies* 26-56.

are being made, however, raises concern that this may be a high-conflict separation that is causing emotional harm to the child.²¹

While children are invariably emotionally distressed by parental separation, in most separations not involving intimate partner violence, the distress of the children is not sufficient to constitute “emotional abuse” within the definition in child protection statutes. Thus the “ordinary” emotional distress that children and adolescents commonly experience as a consequence of their parents’ separation will generally not meet the necessary test for finding that child in need of protection.²² The same evidence of instability and emotional distress that would lead a family court to award custody to one parent over the other may not justify CPA involvement.²³

However, in more intense high-conflict separation cases, exposing a child to a high-conflict separation *may be* emotional abuse for the purpose of child protection legislation, even if there is not familial violence that meets the threshold for criminal conduct.

In child protection cases, the courts face two distinct questions, and in some cases will actually divide a trial into two stages: first determining whether the child is in need of protection, and then, and only if that finding is made, considering what disposition is in the best interests of the child. In child protection cases based on concerns arising out of high-conflict separation or intimate partner violence, the determination that a child is in need of protection can be sought on the basis of emotional harm or risk of emotional harm.²⁴ In these cases, if it is established that a child has suffered “emotional harm,” as defined in child protection legislation and the child is found to be in need of protection, then, and only then, the court will consider an order that promotes the child’s best interests. Under child protection legislation courts must generally make the least intrusive order that will protect the child, which will mean considering leaving the child with her parents but under agency supervision before consideration is to given to an out-of-home placement. Further, placements that keep the child with family members under CPA supervision are preferred to placing the child in foster care or for adoption, provided that the relatives can provide adequate care and protection.

²¹ See *Ontario Child Welfare Eligibility Spectrum* (2006), Section 3, Scale 2 – Child Exposure to Adult Conflict. The *Welfare Eligibility Spectrum* is a document that provides detailed guidance for child protection workers in Ontario about investigations of child abuse and neglect, and for appropriate responses in different situations.

²² *Catholic Children’s Aid Society of Toronto v MR*, [2003] OJ 4385, at para 11.

²³ *Children’s Aid Society of the Regional Municipality of Waterloo v MJD*, [2002] OJ No 5877, 2002 CarswellOnt 6133 (Ont Sup Ct).

²⁴ *Ontario Child and Family Services Act*, s. 37(2)(f)-(g)

In custody and access disputes between parents, however, there is only one issue: what is in the child's best interests. Consideration of a child's emotional well-being and possible emotional harm caused by family violence or conflict is directly relevant to the inquiry into a child's best interests. Issues of emotional harm from being exposed to intimate partner violence will therefore be considered when making or varying custody and access orders. Consideration of the nature and effect of emotional harm may also affect conditions that may be placed on the exercise of custody and access rights.

Legal representation

A family proceeding is a private, civil action. The parents are responsible for bringing forward evidence and paying the costs of litigation. The court is entirely dependent on parties to bring forward evidence of intimate partner violence and associated expert evidence; legal representation is extremely costly, especially if a case proceeds to trial, and most parents are not eligible for legal aid (in some jurisdictions, victims of IPV may be eligible for legal aid in family proceedings).²⁵

Child protection proceedings, by contrast, are initiated by a state agency; the state pays the costs of the litigation by the agency, and legal aid often, but not always, covers the costs of litigation for the parent. Where legal aid is denied and the parent cannot afford counsel, the *Charter* requires that state-funded counsel be appointed; there is no corresponding requirement for state-funded counsel for indigent parents in family proceedings.²⁶

Resources to prove IPV or responsibility for alienation and high conflict

Family violence is considered relevant to determining what is in the interests of the child in family proceedings, but the onus is on the victim-parent to prove a history of violence. Often victims lack the resources and energy to prove that violence occurred, and may not even make the allegation due to a belief that it will not be believed or out of fear of retaliation by the abusive parent. Although police, child protection workers, doctors or other professionals can testify about their involvement with the case in a family proceeding, the victim must be able to prepare and introduce their evidence, which, for many victims, may be practically impossible without a lawyer. In many IPV family cases where there is no independent source of evidence of violence, the case will come down to a credibility contest between the parents,

²⁵ For example, legal aid is available to victims of violence in family law cases in Ontario (see http://www.legalaid.on.ca/en/getting/type_domesticviolence.asp) and in British Columbia in cases of IPV and high conflict (see http://www.lss.bc.ca/legal_aid/familyissues.php).

²⁶ See discussion of legal aid and appointment of counsel below.

both of whom will have interest in the outcome that may be seen as affecting their credibility. Self-representation is becoming increasingly common in family cases. If the parties do not have representation, they will have to deal with one another directly, including the daunting prospect that the victim may have to examine her abuser in court and then be cross-examined by him.²⁷

In contrast, in child protection cases it is the CPA, not the victim parent, who has the burden of proving IPV or other circumstances of high conflict leading to emotional harm to the child. While these public agencies face serious budget constraints, once they are involved in litigation, the agency may conduct the case without immediate financial constraints, with a much greater ability to retain counsel and experts than most parents. Moreover, the social worker will usually be seen as a more or less independent witness, particularly when reporting on statements made by the parents or children.

Interim and Urgent Orders

In a high-conflict separation case, especially if it involves intimate partner violence, the period immediately following separation can be particularly volatile, with risk of escalating parental conflict and serious violence. It is very important that the parents have expedited access to the family courts in these cases so that a judge can bring some stability to the situation, prevent further victimization and protect the interests of the children. However, the dominant trend in family cases is to encourage attempts at negotiation and mediation *before* judicial action is taken. This is, for example, reflected in Rule 14(4.2) of the Ontario *Family Law Rules*, which requires a case conference prior to a motion for interim relief, except in “urgent” cases.²⁸ While a case conference is often a valuable opportunity for a judge to encourage a settlement – and may be an occasion for what is in effect judicial mediation – a judge at a case conference can only make an order on consent, and having a conference will delay the possibility of court ordered relief.

In principle, it is now well accepted that cases involving allegations of intimate partner violence must be expedited in the family justice process, though in practice it can take a

²⁷ See e.g. Birnbaum, Bala & Bertrand, “The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2013), 91 Canadian Bar Review 67-96. The Criminal Code provides for the appointment of counsel to conduct the cross-examination of witnesses, which can prevent the accused in an IPV case from personally cross-examining the victim (s. 486.3(2)); there is no corresponding provision in family law statutes.

²⁸ See e.g. *Porter v McLennan*, 2011 ONCJ 278, where a case conference was required before a motion for interim relief for a father, despite the fact that the mother had excluded the “stay at home dad” from the matrimonial home.

significant time for a victim of violence to obtain proper advice, begin court proceedings, appear in front of a judge and obtain an order. More recently there has been some recognition that high-conflict cases involving issues of emotional harm and potential alienation also need to be addressed in an expedited fashion before a child's attitudes and behaviors become entrenched.²⁹

Even when a high-conflict case gets to court for an "urgent motion," it is often a real challenge for the courts to make sound decisions at an interim motion since the evidence is based on often conflicting affidavits. This can be a critical stage in the family justice process, and it is important that child protection agencies and police are able to provide any known information about the family to the judge dealing with the case.

In child protection proceedings, agency staff are authorized to remove a child from a dangerous situation immediately (in most jurisdictions with the expectation of a warrant where reasonably obtainable), and a hearing regarding the temporary care and custody of the child must be held within a short period (usually 5 to 10 days depending on the jurisdiction) of the apprehension. In most cases of IPV and high conflict, the CPA will not apprehend the child, but will seek an order of supervision placing the child with one of the parents, usually with restrictions on the other's access; unlike in many family proceedings, no case conference is held prior to this initial motion being heard. Like family proceedings, these motions are usually done based solely on affidavit evidence, but the court will usually find the affidavit of the CPA worker to be inherently more reliable than a parent's affidavit. One of the many ways in which the CPA holds a significant advantage over the parent is that the CPA will be represented at this initial stage, while the parent usually is not. (Interim child protection orders are usually initially made "without prejudice" to permit later variation once the parent has counsel and can argue the motion fully.)

To date, seven provinces (Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland and Labrador and Saskatchewan) and three territories (Northwest Territories, Yukon and Nunavut) have enacted legislation that provides victims of family violence with expedited access to civil orders relating to contact between parents and their children, as well as possession of the home and use of the family vehicle. This type of statute provides for expeditious access to the civil courts in cases where family violence is a concern, and a criminal response has not been invoked, perhaps because the victim does not want the

²⁹ *Clement v. Clement* [2010] O.J. 653. See also *P.A.C. v W.D.C.*, [2012] A.J. 74 (C.A.) where the Alberta Court of Appeal upheld a lower court decision to award interim custody to the father, due to a concern about the mother alienating the children from the father.

police and criminal justice system involved or out of concern that the evidence will not meet the much more restrictive “reasonable doubt” standard of proof. This type of statute provides a greater flexibility for victims. Research indicates that this type of legislation has value,³⁰ and it is a promising practice to allow expeditious access to the justice system to allow civil orders to be made where family violence is at issue, particularly where there is adequate support to allow victims to make effective use of such laws.³¹

Expert evidence in Family and Child Protection Proceedings

Qualified mental health professionals often provide critical evidence about children and parents in family cases involving high-conflict and family violence issues.

In all jurisdictions, if the parents are able to afford it, the court may order an independent mental health professional to undertake an investigation about the children and prepare a report.³² Assessments take time, however, and the parents are required to pay costs ranging from \$5,000 - \$25,000. Further in many locales there are few professionals qualified to prepare these reports. These issues of expense, delay, and difficulty in finding a qualified professional, mean that many cases are resolved without an assessment.

In addition to assessments paid by the parties, in some jurisdictions, a court dealing with a family case may request that a government paid social worker or mental health professional become involved in the case to prepare a report, though there may be limits to the extent of involvement that may be provided or long delays before a government paid professional can prepare a report. These professionals provide valuable services and recommendations that assist the court and that can facilitate settlement.

There are concerns about a lack of guidance and uniformity in how assessments are prepared. More fundamentally, there are concerns about the lack of education and training for the mental health professionals who undertake assessments; there is no designated set

³⁰ Bala & Ringseis, “Review of the Yukon *Family Violence Prevention Act*,” (for Yukon Territorial government on contract with Canadian Research Institute for Law & the Family) (July 2002).

³¹ The *Family Homes on Reserves and Matrimonial Interests or Rights Act* S.C. 2013, chap 20, Royal Assent on June 19, 2013 but not yet in force, provides that in situations of family violence on a reserve, a court can make an emergency protection order to, among other things, order that the applicant’s conjugal partner temporarily vacate the home.

³² For a discussion of the issues related to high-conflict separations and assessment reports, see Fidler, Bala, Birnbaum & Kavassalis, *Challenging Issues In Child Custody Assessments: A Guide For Legal And Mental Health Professionals* (Toronto: Carswell, 2008).

of qualifications in any Canadian jurisdiction.³³ In particular, while many of these professionals are highly knowledgeable, there are concerns that some mental health professionals who undertake assessments and prepare reports for the courts do not fully appreciate the effects of intimate partner violence on children,³⁴ or the special challenges of high-conflict separation cases. Experts who provide opinions for the family courts need appropriate education and training, in particular for understanding the effects of high-conflict separations and family violence on children as well as the dynamics of high-conflict separations, and preferably should have on-going supervision and monitoring of their work by a government agency (like the Ontario Office of the Children’s Lawyer).

Expert evidence from qualified mental health professionals is also often important in child protection cases, especially if the case is based on the concept of emotional abuse, but it is not essential. It is common in these cases for the court to make an order before trial for an assessment under child protection legislation like Ontario’s *Child And Family Act* s.54 by a qualified, independent mental health professional to better understand the child’s needs, the parents’ ability to provide for those needs, and the effect of their behaviour on their child. However, expert evidence will not always be required to establish exposure to violence or emotional harm in a child protection case. In many cases there may be sufficient evidence of harm – usually through the observations and investigation of the child protection worker - to allow the necessary inferences to be drawn without expert testimony.³⁵ The cost of the expert will almost always be borne by the CPA, although parents wishing to tender an opposing expert opinion may be required to pay the associated fees themselves, if they are not covered by legal aid.

Counselling and other resources

Courts in both family and child protection proceedings may order counselling and other interventions for either of the parents and/or the child as a term of an order.

³³ Bala & Leschied, “Court-Ordered Assessments In Ontario Child Welfare Cases: Review And Recommendations For Reform” (2008) 24 *Canadian Journal of Family Law* 1-56.

³⁴ Shahnaz Rahman & Laura Track, *Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women* (Vancouver: West Coast LEAF, 2012); and National Council of Juvenile and Family court Judges, *Navigating Custody and Visitation Evaluations in Cases with Intimate Partner Violence: A Judge’s Guide* (2004), online: <<http://www.afccnet.org/Portals/0/PublicDocuments/ProfessionalResources/BenchGuide.pdf>>

³⁵ *CAS Ottawa v PY*, [2007] OJ 1639 (Ont Sup Ct).

Although there is case law that questions whether courts in custody and access cases have the authority to order parents to attend counselling,³⁶ most courts dealing with family cases are prepared to make orders for counselling for both the children and the parents.³⁷ It is not uncommon for judges to order that, as a condition of exercising access under family legislation, a parent with a history of intimate partner violence attend an anger management or partner abuse course. Such conditions for access are appropriate, but as discussed below, if there is significant risk to a child, it may be appropriate to suspend contact with an abusive parent until counselling is completed and risk can be reassessed.

In cases of alienation from a parent, counselling for one or both parents and the child may be directed at changing a child's relationship with a rejected parent and "reuniting" the child with that parent, or at improving the communication skills of both parents.³⁸ However, as Henderson J. observed in *Kramer v. Kramer*,³⁹ orders for counselling should be used "cautiously" as counselling is likely ineffective unless the parents are willing to meaningfully engage in the process, and also encourage their children to do so.

Orders for counselling and other interventions are very common in child protection cases; indeed, provincial and territorial child protection statutes often require the court to inquire as to what services have been recommended and offered to the parent prior to making any order for placement of the child. Participation in such interventions is also frequently specified in contracts for voluntary service between the CPA and the family.

In family cases, identifying, engaging with and paying the cost of such interventions is the responsibility of the parties. CPAs, in contrast, are often able to assist parents in locating and even attending counselling and other services, can advocate for free or subsidize services for families with limited resources, and may be able to provide some services directly.⁴⁰ One

³⁶ See *Kaplanis v Kaplanis*, [2005] OJ 275, 194 OAC 106, 249 DLR (4th) 620 at para 2 in which Weiler JA ruled that the trial judge had exceeded her jurisdiction by ordering counselling. Despite this ruling, judges are still prepared to order that parents attend parenting classes, anger management or counselling as a condition of exercising custody or access rights.

³⁷ *Florito v Wiggins*, 2011 ONSC 1868, 2011 CarswellOnt 5622, *W.C. v C.E.*, 2010 ONSC 3575, [2010] OJ 2738, *Filaber v Filaber*, [2008] OJ 4449; and *J.K.L. v N.C.S.*, [2008] OJ No 2115.

³⁸ *L.M. v. T.M.*, [2012] N.B.J. 376 (Q.B.)

³⁹ [2003] OJ No 1418, 37 RFL (5th) 381 (Ont Sup Ct) Henderson J.

⁴⁰ We note that there is significant variation in the ability of agencies and third party service providers to provide this kind of assistance to families.

example is therapeutic access, in which parents learn and apply parenting skills during structured access visits.⁴¹

Settlement

Unless a family proceeding is subject to case management, the case will not be automatically returned to court for the next step in the proceeding, but it will be up to the parents to schedule a return date. In family cases there are often financial or other pressures to settle. While settlement is often desirable, it will not be appropriate if a victim of abuse agrees to an order that endangers the child or victim. Where a case settles, there will be no findings of fact made by the court; the judge may simply endorse minutes of settlement without inquiry into whether the order sought is in the best interests of the child. This is particularly likely in cases that have not been case managed, where the presiding judge may not be aware of any allegations of violence. Even where a court declines to make the order agreed to out of concern regarding allegations of violence, the victim parent who is exhausted or intimidated may recant or withdraw the case from the court process (formally or by failing to bring the matter back to court); even though the children's interests may not be adequately protected in such a situation, this removes the court's ability to intervene, except through reporting to CPA.

Child protection cases also usually settle, but resource limitations will not be a factor, and the agency will not agree to a settlement that it considers may place a child at significant risk of harm. Unlike family cases, an order cannot be made without evidence as to the risk of harm to the child and the child's best interests, although a protection application can be withdrawn with the result that the child returns to the care of the person caring for the child at the time of the intervention.

Enforcement

In family proceedings, it is up to parents to enforce any parenting orders that they obtain, often a frustrating and expensive process.

As discussed elsewhere in this paper, in cases involving intimate partner violence, there may be real challenges and concerns in ensuring that abusers will comply with orders that restrict contact or communication, and this can create substantial safety concerns.

⁴¹ Mary Rella, BA Dip C.S. "Therapeutic Access: From Supervising Access to Building Parent-Child Relationships." IMPrint: The Newsletter of Infant Mental Health Promotion, Volume 47, Winter 2006-07, revised April 2010. (excerpts available at <http://www.oacas.org/pubs/oacas/journal/2010Fall/access.html>)

There are also distinct but related concerns in ensuring compliance with court orders relating to parenting, especially those giving parents rights to contact or requiring an exchange of care. Non-compliance with parenting provisions of court orders is common in high-conflict cases, especially those with alienation issues. This in part reflects that alienating parents often persuade themselves that non-compliance is promoting the interests of their children or protecting the rights of their children.

The problems in enforcing orders against abusive or alienating parents reflect a variety of factors, including the relatively high incidence of personality disorders, and distortions in perception in this high-conflict population. In some of these cases, failure of a court to enforce an order only reinforces their narcissism, false sense of power, and disregard for authority. Judges are increasingly aware that enforcement of parenting orders can be very difficult: the law is a blunt instrument and not well designed to the promotion of good parenting, but sometimes court orders are essential to address emotionally or physically abusive post-separation parental conduct.

While a judge may include a provision in an order directing the police to apprehend and deliver the child(ren) to the person entitled to custody or access,⁴² an order for direct police involvement to apprehend or transfer care of children “... is an order of last resort ... to be made sparingly and in the most exceptional circumstances.”⁴³

The issue of police enforcement is especially challenging in high-conflict cases involving alienation, where custodial parents and children are resistant to complying with the terms of an access order. Because calling the police is a very intrusive step, alienated parents are reluctant to seek such orders. If the police are actually called to enforce an access order on more than one occasion, serious consideration should be given to other solutions. Even without an explicit “police enforcement clause,” the police have some obligation to assist in the enforcement of any court order, including a custody or visitation order. In practice, however, whether or not there is a “police enforcement clause” in a family proceeding order, without an order from the criminal process or under family violence legislation, police are reluctant to become involved in “family matters.” If the police are contacted by an access parent about the alleged violation of an order granting visitation rights, they may go to the home of the custodial parent to discuss the matter and encourage compliance with the order,

⁴² For a statutory provision allowing for an order for police enforcement, see e.g. Ontario, *Children’s Law Reform Act*, s. 36; for a discussion of the inherent authority of courts to direct police enforcement, see e.g. *Allen v. Grenier*, [1997] O.J. 1198, 145 D.L.R. (4th) 286 (Gen. Div.).

⁴³ *Allen v. Grenier*, [1997] O.J. 1198, 145 D.L.R. (4th) 286 (Gen. Div.).

but they will be very reluctant to physically remove children from their homes to go on visits with a non-custodial parent. Such police involvement may be very upsetting and intimidating to children, and can seriously affect the child's relationship with one or both parents.

In child protection proceedings, subject to the control of the court, the agency has very significant powers of enforcement, and the police will enforce a child protection order, though most parents comply with orders to allow access to their children or surrender them to the care of the agency or other designated persons because they are aware of the threat of police enforcement.

Involvement of child protection in family cases

Given the increasing recognition that high-conflict cases can cause harm to children, some courts have considered their authority to require CPA involvement in such cases. In the 2011 Ontario case of *Florito v. Wiggins*,⁴⁴ Harper J. invoked the inherent *parens patriae* jurisdiction⁴⁵ of a Superior Court to order a local Children's Aid Society to provide services to parents in a high-conflict parental custody dispute being resolved under family legislation. Justice Harper concluded that there was a "legislative gap" that the court should address: in some regions of Ontario there are unified Family Courts with a jurisdiction to apply both the family and child protection legislation, resulting in a disadvantage to the children of litigants residing in regions (such as the one where this trial took place) where the Superior Court and the Ontario Court of Justice divide jurisdiction, and the Superior Court does not have a statutory mandate to deal with child protection applications.

Among the court's reasons for invoking the Court's *parens patriae* jurisdiction was the fact that the Children's Aid Society had had a file open for more than two years concerning the family, including notations of concern about the risk of emotional harm to these children due to the high-conflict parental separation, yet the agency had never fully investigated whether this was a case of emotional harm as defined in the child protection legislation and therefore required agency action. Further, the court concluded that on a balance of probabilities, the

⁴⁴ 2011 ONSC 1868. The *parens patriae* [Latin for parent of the country] jurisdiction of superior courts in Canada refers to the inherent authority of these judges to make orders to protect the interests of children in situations where there is no legislation that addresses a problem or prohibits court action. It is based on the historic jurisdiction of the English Chancery. It would seem that judges in Ontario are somewhat more inclined to use and expand this historic jurisdiction than judges elsewhere, and in Quebec there is some doubt as to whether the Superior Court has the same historic jurisdiction.

⁴⁵ See Aliamisse O Mundulai, "Stretching the Boundaries in Child Access, Custody and Guardianship in Canada," (2005) 21 Can J Fam L 267 at 269; *Bahjan v Bahjan*, 2010 ONCA 714, 104 OR (3d) 368, Weiler JA; and *AA v BB*, 2007 ONCA 2, [2007] OJ 2, 83 OR (3d) 561.

test for finding a child in need of protection on the grounds of emotional harm or risk of emotional harm had been satisfied, but no application had been made pursuant to the child protection legislation. Justice Harper invoked his *parens patriae* jurisdiction to craft an order that would best protect the children in this destructive family dynamic. The order included directions for the CAS to:

- undertake home visits to interview the children and supervise the mother’s custody;
- arrange counselling for the children and both the mother and father;
- supervise access of the children with their father at the CAS; and
- prepare and submit monthly progress reports to the court.

While Harper J. held that he had the authority to order CPA involvement in a family proceeding, the decision remains controversial. On the one hand, the decision is child focussed and attempts to put in place the most effective plan for the child, and recognizes that CPA can have an important role in helping children in high-conflict separation cases. However, the decision does “push the envelope” on the role of courts in mandating child protection agency involvement in private family disputes, and is only applicable in situations where a superior court judge (a federal appointee) is dealing with the family case. At present, there is no appellate authority in Canada to confirm that superior courts have the jurisdiction to order a CPA to provide services in a family proceeding.

In child protection proceedings, the CPA may offer to withdraw its application in favour of a custody order to one of the parents, with appropriate terms of access to the other parent, if satisfied that the custodial parent will adequately protect the child. This can, however, be a cumbersome process, as the proposed custodial parents will have to commence a proceeding.⁴⁶

Dispositions

There are a number of dispositions available to courts hearing IPV and high-conflict cases; because in both child protection and family cases, the test is what is in the “best interests of the child”, the same disposition may be ordered in both proceedings.

⁴⁶ In Ontario, the *Child and Family Services Act* s. 57.1 allows a court in a child protection proceeding to make a custody order under the provincial family statute in favour of a parent; this usually requires the consent of the agency. As discussed earlier, ordinarily orders under child protection statutes take precedence over orders under family law, but if the CPA agrees to a stay of the protection proceeding or the making of a custody order, this family order will be given effect.

a. Family dispositions in IPV cases: Although family legislation and case law generally operate on the assumption that continued contact between a non-custodial parent and child will usually be in the child's best interests, a number of appellate Canadian decisions have recognized that in situations where a custodial parent has proven that there is a history of serious intimate partner violence or harassment, especially if it continues post-separation, access is not 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:⁴⁷

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

Almost all of the cases where access is terminated can be categorized as situations of "coercive controlling violence," where there has been repeated physical violence and emotional abuse by a man, directed at his female partner and sometimes at his children, and most of the cases have also involved post-separation spousal abuse or extremely serious violence.⁴⁸ Although in many of these cases the custodial mother relied on expert testimony to support the application to deny access, there are cases involving serious intimate partner violence where access has been denied without such testimony.⁴⁹

In some cases of intimate partner violence, especially violence that continues after separation, it will be appropriate to order that visits with a child are to be supervised.⁵⁰ The Nova Scotia Court of Appeal in *Slawter v. Bellefontaine* indicated the onus is on the parent requesting supervised access to "demonstrate that restrictions are in the best interests of

⁴⁷ (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.); and *B.P.M. v. B.L.D.E.M.* (1992), 42 R.F.L. (3d) 349 at 359-60 (Ont. C.A.).

⁴⁸ For a case where a mother with a history of drug use and threatening behaviour was given access only with the permission of the custodial parent, see *McGrath v. Thomsen* (2000), 11 R.F.L. (5th) 174 (B.C.C.A.).

⁴⁹ See e.g. *Salehi v. Haghighi*, 2011 ONCJ 731; *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.

⁵⁰ *J.M. v. A.L.*, [2013] N.S.J. No. 34 (Fam. Ct.)

the children."⁵¹ The Nova Scotia Court of Appeal endorsed the approach of the Supreme Court of that province in *Lewis v Lewis* where Forgeron J. wrote:⁵²

There can, of course, be no dispute that access is to be determined only according to what is in the best interests of a child....

Supervised access is appropriate in specific situations, some of which include the following:

[a] where the child requires protection from physical, sexual or emotional abuse;

[b] where the child is being introduced or reintroduced into the life of a parent after a significant absence;

[c] where there are substance abuse issues; or

[d] where there are clinical issues involving the access parent.

Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits.

If there are threats or heated arguments when there is an exchange of the child, but the access parent does not pose a risk to the child, it may be appropriate to have supervision of the exchange.

In some locations there are government subsidized programs for supervision of access or exchange, but in many areas these services are not available or are too expensive for many parents to use. While CPAs provide supervised visitation, it is generally available only if children have been apprehended or placed in their care under child protection legislation, and not if the child is being dealt with under family legislation.

b. Family dispositions in alienation cases: In high-conflict cases where alienation has been established, the most intrusive order that a family court can make is to vary custody, in some cases suspending contact between the child and the emotionally abusive parent even where that parent had been the primary caregiver prior to the variation. The court will only make an order transferring custody of children from an alienating parent to a rejected parent where it determines that the detrimental effect of the continued care by the alienating parent outweighs the upset or trauma of separating the children from the alienating parent, and the

⁵¹ 2012 NSCA 48, at para. 39

⁵² 2005 NSSC 256, at para 24-25.

court is satisfied that the rejected parent has the capacity to care for the child.⁵³ Transferring custody to an alienated parent is an intrusive judicial response to an alienation case, and it is generally necessary that the parent seeking a custody variation establish that emotional harm has occurred or is imminent if the status quo is maintained.⁵⁴ Expert evidence is usually necessary to persuade a court to make this type of order.

If a court finds that a variation in custody is needed, it may also decide that contact with the alienating parent is to be supervised or suspended for some time so that the child's relationship with the rejected parent cannot be further undermined. The courts may encourage the new custodial parent to seek counselling or therapeutic support to facilitate the child's adjustment, but will generally not order this, as the court will want to give the parent the flexibility and responsibility for making decisions about the child.

c. Child protection dispositions in IPV cases: If a child is found in need of protection, the judge has a broad jurisdiction under child protection legislation to make an order removing a child from the care of one or both parents if this is necessary to promote the child's "best interests." These orders may result in a child remaining with a parent or being placed with another relative subject to CPA supervision, or being placed in the temporary or permanent custody of the agency (referred to as guardianship or wardship). If the child is removed from the care of parents and relatives, the child may be in a foster home, a group home, or the child may eventually be placed for adoption.

In making a disposition in a child protection case where there are concerns about intimate partner violence, a major issue will be the capacity of the parent who has been the target of violence to care for and protect the child. In some cases, that parent (usually the primary caregiver) may have compromised parenting capacity due to problems such as drug or alcohol abuse, which may themselves be related to the victimization in the relationship. In these cases, it may be necessary to at least temporarily remove the child from the care of the primary caregiver, depending on whether the victim parent can be effectively supported to address those parenting issues. (The damaging impact that IPV can have on primary

⁵³ See e.g. *Rogerson v Tessaro* [2006] OJ 1825 (C.A.); *Pettenuzzo-Deschene v. Deschene* 2007 CarswellOnt 5095, 40 RFL (6th) 681 (SCJ); *C.J.B. v. R.C.J.*, [2007] BCJ 212 (BCSC); *T.S. v. A.V.T.*, [2008] AJ 293 (ABQB); *Savage v. Savage*, [2007] OJ 312 (S.C.J.); *Polsfut v. Polsfut*, [2008] SJ (SKQB); and *Faber v Gallianco*, 2012 ONSC 764.

⁵⁴ See Fidler, Bala, Saini, *A Differential Approach to Children Resisting Postseparation Contact: A Guide for Legal & Mental Professionals* (Oxford University Press, New York, 2012); and Fidler & Bala, "Children Resisting Post-separation Contact With A Parent: Concepts, Controversies And Conundrums" (2010) 48 *Family Court Review* 10-47.

caregivers, and therefore on the child's long-term prospects even in the absence of the abusive parent, highlights the importance of early and effective intervention in these cases.)

If the targeted parent has good parenting capacity, the court will be concerned about whether she is capable and willing to protect the child from further exposure to intimate partner violence, which will require her willingness to end the violent relationship and comply with court orders restricting contact with the abusive parent.

There are some cases, even those involving coercive controlling violence, in which the abusive parent makes significant and successful efforts to change his behaviour and the family can be reunited; the differential response model for IPV cases (discussed more fully in the concluding sections of this paper) encourages CPA staff to work toward this possibility where both parents wish to stay together.⁵⁵

The most serious child protection disposition is permanent placement in the care of the state and complete termination of parental rights (usually for the purpose of placing the child for adoption). This option is reserved for the most serious cases. Severance of parental rights are sometimes ordered in IPV cases, particularly where the child has been directly harmed by the violence and the victim parent has a history of engaging in relationships with violent partners, despite interventions by CPAs and other service providers. (As well, often there are other issues such as neglect and substance abuse affecting the disposition of the case.)

d. Child protection dispositions in high-conflict cases: In high-conflict separation cases that do not involve intimate partner violence, one, or perhaps both parents, are usually capable of caring for the child, and the most common order is to place the child in the care of one parent, often under CPA supervision. Supervision orders keep the CPA involved in the case by providing that the agency may supervise any contact with the non-custodial parent, conduct home visits, prepare regular reports on the family's progress for the court, or perform any other function that will assist the parents in developing better communication and healthier relationships (such as arranging counselling for the children or parents). These supervision orders are time limited and subject to judicial re-assessment at the end of the supervision period.

Permanent removal of the child from both parents would be extremely rare in high-conflict cases unless both parents showed a complete inability to abide by court orders and prevent emotional harm to the child.

⁵⁵ See discussion below.

e. Cessation of legal proceedings in alienation cases: In some high-conflict alienation cases, including some that may involve a child protection agency, alienating parents and their children are highly resistant to any efforts to change their attitudes and behavior, and efforts to force a change in behaviour may be more emotionally harmful than allowing the child to live with the status quo. Even if the child's refusal to visit is the result of alienating conduct by a custodial parent, if a change in custody is not a suitable option, it may be in the best interests of the child for the parent to cease legal efforts to enforce terms of access. It can be very difficult for professionals and the non-custodial parent to come to terms with this type of situation, but in some of these cases, it may be preferable to give up the effort to attempt to force a child to have contact with a parent.

In a family case, the decision to cease efforts may reflect the emotional or financial exhaustion of the rejected parent. It may also reflect that parent's assessment that it is better for the child that the parent does not seek to enforce an access order. In a child protection case, it may be the CPA which concludes that it is best for the child if the agency abandons efforts to use the legal system to require the child to have contact with a rejected parent.

In some cases the court may decide that it is not appropriate to order or enforce access,⁵⁶ or may make comments suggesting that continuing efforts to enforce access may not be in the child's best interests,⁵⁷ despite (or because of) the alienating conduct of the custodial parent. Even if a court determines that a child's rejection of a parent is due to alienation (and not justified estrangement), it may nevertheless conclude that it would be contrary to a child's best interests to force a child to have a relationship with the parent.

V. CONCURRENT CHILD PROTECTION & CRIMINAL PROCEEDINGS

While a concurrent child protection and criminal proceeding may be based on the same incidents of alleged abuse or neglect, the child protection proceeding differs from criminal proceedings in very significant ways. The following discussion compares the criminal and

⁵⁶ See e.g. *Bailey v. Bailey* [1996] OJ 4891; *Roda v. Roda* [2000] OJ 3786 (SCJ); and *El-Murr v. Kiameh* [2006] OJ 1521 (OCJ)

⁵⁷ See e.g. *P. (J.E.) v. W. (H.J.)*(1987), 11 R.F.L. (3d) 136 (Sask. Q.B.) where a six year old girl had an aversion towards her father because of the mother's hostility to him. The mother was opposed to access, despite mediation efforts. The court refused to order access, at least until "the child is considerably older". See also *R.G.A. v K.A.C.*, 2011 Carswell Ont 4462 (OCJ) where the court found that the custodial mother had been engaging in alienating conduct, but concluded that since the father was not seeking custody, there was no realistic way to enforce access, and declined to order access.

child protection responses, and considers the complex challenges that arise if there are concurrent investigations and proceedings.

A. COMPARING CHILD PROTECTION AND CRIMINAL RESPONSES

Focus on protection of children vs. penal consequences

Finding a child in need of protection requires a finding that the child has been in some way abused or neglected, but if such a finding is made, the focus shifts to the child's best interests. This requires consideration of the child's needs on a forward-looking basis, in contrast to the retrospective focus of criminal proceedings. The focus in a child protection case is not punitive and, at least in theory, it is not primarily on the parent. Rather, if the child is found in need of protection, the goal is to find the placement, treatment and conditions that will promote a healthy, productive future for the child. Placement may with a parent, with supervisory conditions, or with a relative, foster home or group home, or eventually in an adoptive family.

Duty to report

The duty to report cases where there are reasonable grounds to believe that a child is at risk of abuse or neglect is found in all provincial and territorial child protection statutes. Some statutes provide for penalties only for failure to report by certain professionals; others provide for penalties for any individual who fails to report, and in a few jurisdictions there is no penalty for failing to report abuse or neglect.⁵⁸

This duty to report results in child protection agencies having numerous sources of information about families where family violence is or may be an issue: teachers, medical professionals, neighbours, social services staff, and of course police, among others. Police in particular have become much more aware of their duty to report and it is now common in many places in Canada for police to contact the CPA concerning any intimate partner violence case where children are present in the home. This is reflected in the substantial increase over time in reports to CPA's in Canada where intimate partner violence is the primary reporting concern: now, over one third of all reports to CPAs are based on intimate partner violence concerns.⁵⁹

⁵⁸ See, for example, s. 4(1) and s. 4(6) of Alberta, *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 and ss. 14(1), (3) & (6) of British Columbia, *Child, Family and Community Service Act*, RSBC 1996, c 46.

⁵⁹ In 2008, 34% of all substantiated investigations identified exposure to intimate partner violence as the primary category of maltreatment (an estimated 29,259 cases or 4.86 investigations per 1,000 children): Nico Trocmé et al., *Canadian Incidence Study of Reported Child Abuse and Neglect 2008*. (Public Health Agency of Canada, 2011).

There is no corresponding duty to report possible violations of the *Criminal Code* to the police or other authorities, and many victims of intimate partner violence do not report their victimization to the police or disclose to other professionals. Professionals like emergency room physicians and nurses who believe that an adult seeking treatment for injuries suffered as a result of intimate partner violence may encourage the victim to report to the police or go to a shelter, but it is for her to decide what to do. However, if medical staff has reasonable grounds to believe that a child whom they are treating has been a victim of abuse or neglect, including emotional abuse from being exposed to family violence, they have a duty to report to the local CPA so that an investigation can be carried out. The investigative responses that will be adopted by a CPA are discussed below.

No right to silence

The constitutional right to silence only applies to criminal investigations and proceedings. In theory, a parent can refuse to speak to agency workers and decide not to testify in response to the CPA's case. However, the child protection court is likely to make an adverse inference in such a case, and the parent could, in theory, be called as a witness for the CPA.

In most provinces and territories, a parent involved in a child protection proceeding is required to file an answer and plan of care for the child with the court, failing which the court may prevent the parent from participating further in the proceedings. Further, the agency's case may be based in large part on statements made by the parent to child protection agency social workers or others. The agency worker does not have to warn the parent that statements made by them may be used in the child protection proceedings, and there is no right to have counsel present during conversations with agency workers.⁶⁰ As will be discussed below in more detail, a parent's statement to a CPA worker may not be directly admissible in a criminal proceeding if the parent does not testify, but any statement made to a child protection worker may be used to cross-examine the parent and undermine the parent's credibility in the criminal process.

Standard of proof

Like the Crown in criminal cases, the state agency in child protection proceedings bears the burden of proof. However, as noted above, the standard of proof in a child protection case is the civil test of balance of probabilities, while the criminal standard is the higher test of

⁶⁰ *Family and Children's Services of St. Thomas and Elgin County v F(W)*, 2003 CanLII 54117 (ON CJ)

“proof beyond a reasonable doubt.”⁶¹ Further, the agency can obtain a finding that the child is in need of protection due to a risk of harm to the child, including emotional harm. While in theory a factual finding that any particular incident has occurred is not required, in practice the agencies do have to prove that specific past events, such as incidents of intimate partner violence, occurred. However, the focus is on the risk of emotional or physical harm to the child, rather than a specific event, and the existence of parental high conflict short of criminal conduct may be sufficient to ground a finding in need of protection.

Relaxed evidentiary rules

There are significant differences in the applicable rules of the law of evidence between child protection and criminal proceedings. Most of the Canadian jurisprudence accepts that the stringent application of evidentiary rules applied to criminal cases is inappropriate in cases involving the welfare of children,⁶² even if both proceedings require proof of the same incidents of abuse or neglect. There are also statutory provisions permitting the use of evidence that would be inadmissible in criminal proceedings. For example, hearsay information is expressly permitted at the interim stages of a child protection proceeding, including the hearing as to interim placement of the child.⁶³

Justice Sheilagh O’Connell of the Ontario Court of Justice recently made the following comments about the approach to evidence rules in child protection cases:

Although civil in nature, a child protection proceeding is quasi-criminal in certain respects. However, unlike a criminal case, the application of the rules of evidence in a child protection case poses distinct challenges. The primary focus of a child protection case is the protection and well-being of the children involved. The best interests of the children are considered paramount. Child protection judges have struggled with ensuring that the best evidence and information is available to appropriately decide a case in a way that is least harmful to the children involved, but in accordance with the principles of fundamental justice.⁶⁴

⁶¹ *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, citing a British child protection case, *In re B (Children)*, [2008] 3 WLR 1, [2008] UKHL 35; *DCW (PEI) v AH and JD*, 2009 PECA 19; Nova Scotia (Community Services) v CM, 2011 NSSC 112 ; *SJB et al v Child and Family All Nations Coordinated Response Network*, 2009 MBQB 12 ; *PCI v Saskatchewan (Social Services)*, 2009 SKQB 335; *Catholic Children’s Aid Society of Metropolitan v AD* (1994), 1 RFL (4th) 268 (Ont Ct Gen Div).

⁶² For example, *C.L.M. v. D.G.W.*, [2004] A.J. No. 329, 2004 ABCA 112. For the opposing view, see *Children’s Aid Society of Niagara Region v. D.M.*, [2002] O.J. No. 1421 (Sup.Ct.)

⁶³ See, for example, *Ontario Child and Family Services Act*, RSO 1990, c C.11, s 5

⁶⁴ *Children’s Aid Society Region of Halton v. O.(J.)* 2013 ONCJ 191, 2013 O.J. 1691 at par.29

In this case, the judge ruled that the transcripts of testimony of three children given at the preliminary inquiry for criminal charges for alleged parental abuse were only to be admissible in the child protection hearing if counsel for the parents could cross-examine the children in the child protection proceeding based on the same allegations. While noting that this might be a “difficult experience for the children,” she noted that there was no evidence that they would be emotionally harmed by the cross-examination, which was to occur out of the presence of the parents.

At child protection trials, some judges take a deliberately “relaxed” approach to the admission of hearsay statements of children, in particular disclosures of abuse. Other judges purport to apply the Supreme Court test of *R v Khan*, requiring hearsay to be admitted only if it is found to be “necessary” and “reliable,” as in criminal proceedings, but taking a less stringent view of what constitutes “necessity,” in terms of limiting emotional harm from testifying in a proceeding against a parent.⁶⁵ As a consequence, it is rare for children to testify in child protection cases, but relatively common in criminal cases involving abuse allegations. Evidence of past parenting – which would likely run afoul of the rule against character or bad disposition evidence in a criminal context - is also expressly permitted in child protection hearings, and it has been held that courts can consider post-application events when determining whether the child is in need of protection.⁶⁶

Effect of Charter violations

When police or Crown officials breach the *Charter*-protected rights of accused persons, the remedies can include stays of proceedings or exclusion of evidence (often leading to acquittal).

Child protection proceedings engage section 7 of the *Charter*, and must comply with the principles of fundamental justice, such as disclosure, hearings before impartial judicial officers, and the right of indigent parents to state provided counsel.⁶⁷ Searches by CPA

⁶⁵ For a discussion of the jurisprudence in these cases, particularly regarding the need for expert evidence demonstrating the child would be traumatized by testifying, see *Children's Aid Society Region of Halton v. O.(J.)*, *supra*.

⁶⁶ *Children's Aid Society of Hamilton-Wentworth v KR and CW*, (2001) OJ No 5754; *Alberta (Child, Youth and Family Enhancement Act, Director) v. C.M. and D.L.* (2005), 23 R.F.L. (6th) 10; *Newfoundland and Labrador (Manager of Child, Youth and Family Services) v. A.C.* [2012] N.J. No. 54.

⁶⁷ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46.

workers may also be held to breach section 8 of the *Charter*. *Charter* violations in the child protection context will not result in a stay of proceedings or in the exclusion of evidence where the exclusion of the evidence would place the child at risk, due to the focus on the child's welfare.⁶⁸ This is not to suggest that *Charter* breaches in the child protection context are taken less seriously than they are in the criminal context, but rather that the analysis of their effect is complicated by the fact that the interests of the child are to be taken into account. As stated by Justice Murray of the Ontario Court of Justice: "it is imperative that we not lose sight of the potential for abuse that exists with any agent of the State, including children's aid societies nor should we forget that parents have compelling rights that deserve to be respectfully considered when balancing all of the competing interests" in an analysis of the appropriate remedy for a *Charter* breach.⁶⁹

Options of voluntary involvement

Many families who become involved with child protection services do so without court proceedings being commenced, through temporary care agreements (in which children are placed in short-term foster care with the written agreement of the parents), voluntary agreements (in which the parents agree that while the child will remain in their care they will meet certain conditions, such as substance abuse treatment or parenting courses, without court order) or kinship placements (where children are placed with family members, again without a court order). These options are less costly, often more positive for family members (who avoid the stigma of a finding that their child is in need of protection as well as the cost and intrusiveness of court proceedings), and can in some cases allow child protection involvement even where the agency might not be able to meet the legal standard for intervention. There is, of course, no "voluntary" equivalent in criminal proceedings, although in "problem-solving" courts, such as some domestic violence courts, the Crown may agree to a stay of proceedings in exchange for voluntary participation in treatment.

Negotiated resolution and plea bargaining

There is a range of situations in which the Crown will engage in "plea bargaining" (or plea negotiations or agreements to make joint submissions). Often the Crown will agree to drop some charges or seek a lesser sanction if the accused agrees to plead guilty to some charges.

⁶⁸ *Chatham-Kent Children's Services v JK*, [2009] OJ No 5423. While courts will be reluctant to exclude evidence in a child protection proceeding, in some contexts judges do take account of the *Charter* to exclude evidence that might be considered unreliable : see e.g. *C.A.S of Toronto v D.M.*, [2001] O.J. 4425 (Ct. J.); and *Catholic C.A.S. of Toronto v J.L.*, [2003] O.J. 1722 (Ct.J.), per Jones J.

⁶⁹ *Chatham-Kent Children's Services v JK*, supra at par. 63.

In some cases, the Crown may agree to drop charges against one accused in exchange for testimony against another, more serious co-perpetrator.

Negotiation in the child protection context usually focuses on the order being sought – so an agency might agree to a greater amount of access to a ward than it would seek in court, or a parent may agree to more stringent conditions in a supervision order than they might argue is reasonable at trial. In some cases, the agency may withdraw its protection application where it appears that the child is no longer in need of protection.

Unlike the Crown Prosecutor in a criminal case, who does not take instructions from the police but rather decides whether to proceed with charges based on an assessment of whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest, the child protection lawyer has a regular solicitor-client relationship with the child protection agency. The agency lawyer does not have the professional authority to withdraw cases based on concern about *Charter* breaches, inadmissible evidence, or the need to prioritize other cases. However, there is certainly pressure on child protection agencies to reduce the number of cases that they bring to court and to trial, and pressure on judges to encourage the settlement of cases prior to trial, as well as recognition of the value for children and parents of having a consensual resolution.

Mediated Resolution

It is becoming increasingly common in child protection cases to have mediation between the agency and parents, as well as more creative approaches such as family group conferencing, in which parents, extended family members, clergy, neighbours and others who might be able to assist in creating and/or implementing a plan to address the child protection concerns engage in a facilitated, frank discussion, often with very positive outcomes.⁷⁰ The specific grounds for the finding that a child is in need of protection may also be the subject of negotiation. However, the agency is unlikely to withdraw its application or agree to an order proposed by the parents where there are serious concerns about the child's well-being and a plan acceptable to the agency cannot be negotiated.

Sentencing circles and other restorative justice measures in adult criminal court have somewhat similar structures and goals, and can also have positive results, but are typically

⁷⁰ International Institute for Child Rights and Development, University of Victoria. *Family Group Conferencing Literature Review*. Report prepared for the Child and Youth Officer for British Columbia, October 2005. http://www.rcybc.ca/groups/Project%20Reports/fgc_lit_review.pdf

only available to Aboriginal perpetrators. There is also considerable disagreement as to whether, and in what circumstances, restorative justice measures should be used in cases involving intimate partner violence.⁷¹

Case conferencing and case management

Increasingly in Canada (though not everywhere) child protection cases are dealt with by “case management,” meaning that the case is dealt with by one judge at all appearances (as opposed to coming back before a different judge at each appearance). Many child protection judges involved in case management will make considerable efforts to move the parties toward settlement, far more so than criminal court judges typically can. Some child protection judges utilize problem-solving approaches to come to a resolution, especially on an interim basis, that meets the child’s needs while also encouraging parents to change their behaviour.⁷²

Criminal cases involving intimate partner violence are increasingly being dealt with in special domestic violence courts, where prosecutors, victim support workers, abuse counsellors and judges place some emphasis on encouraging abusers to accept responsibility for their actions and undertake counselling or other interventions to reduce the likelihood of recurrence of violence. There is invariably some incentive for accused persons to take responsibility and complete these interventions, such as an offer for a plea bargain or a stay of proceedings.

Effect of conviction and acquittal

A conviction for a criminal offence related to child abuse or neglect is prima facie proof of the offence for the purposes of child protection proceedings. This means that if there are concurrent criminal and child protection proceedings and the criminal process is resolved by a conviction or guilty plea, the agency generally does not have to prove the offence.⁷³ However, the opposite is not the case: an acquittal on a criminal charge does not have any legal effect on the child protection proceedings, except insofar as it may result in an

⁷¹ See, for example, Angela Cameron, “Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective” (2006) 18:2 Canadian Journal of Women and the Law 479-512.

⁷² *Problem-solving in Canada’s Courtrooms: A Guide to Therapeutic Justice*. National Judicial Institute, 2011, p.30; Kierstead, Shelley M., “Therapeutic Jurisprudence and Child Protection” (December 30, 2011). Barry Law Review, Vol. 17, No. 1, p. 31, 2011; Osgoode CLPE Research Paper No. 34/2012

⁷³ See *Children’s Aid Society Region of Halton v. O.(J.)*, supra at par. 43.

immediate need to take measures to protect a child from a parent who has been in custody or subject to restrictions on contact due to criminal charges. Because the standard of proof in the child protection case is the balance of probabilities, the agency can still prove abuse took place despite an acquittal.⁷⁴ While this is a legal reality, parents may be surprised or frustrated to learn that child protection proceedings are continuing despite an acquittal.

Further, because of the lower standard of proof and differences in the rules of evidence, the fact that there has been a finding that a child is in need of protection will have no effect on any criminal proceedings.

Role of Child and Child's Counsel

In both theory and practice, children have a very different role in child protection and criminal proceedings. In child protection proceedings, the child's views and wishes are a factor in assessing a child's best interest. Although not universal, in a number of provinces (Alberta, Ontario and Quebec) lawyers are commonly appointed to represent the interests of children in child protection case, and at least in some cases may advocate for the outcome desired by the child.⁷⁵ While child protection courts discount wishes of children if they want to return to abusive or neglectful parents, their views must always be considered.

In criminal cases, the child may be called as a witness, and the child who has been victimized may be permitted to make a statement before sentencing. However, the child's wishes will usually have very little impact on the court at the sentencing stage. Further, there are concerns that in some cases children's views may not be considered when the Crown is deciding whether to make an application to use closed circuit television or make use of other accommodations.

Comparing Child Protection and Criminal Proceedings: Summary

In summary, child protection agencies have a lower standard of proof to meet, with more relaxed rules of evidence, limited likelihood for cases being dismissed due to *Charter* breaches or other concerns, a broader range of options in terms of placement and services potentially ordered by the court, a wide range of professionals with a duty to report concerns

⁷⁴ The principle that an acquittal in a criminal prosecution will not bar a civil action arising from the same circumstances is discussed in *Polgrain Estate v. Toronto East General Hospital*, [2008] O.J. No. 2092 (CA)

⁷⁵ See e.g. Bala, Birnbaum & Bertrand, "Controversy about the Role Children's Lawyers: Advocate or Best Interests Guardian? Comparing Attitudes & Practices in Alberta & Ontario – Two Provinces with Different Policies" (accepted for Oct 2013), *Family Court Review*.

to their local agencies, and the option of voluntary service. Therefore, in theory at least, child protection agencies should be much better placed to reduce the risk of future violence for both the targeted parents and their children than the criminal or family systems.⁷⁶ However, there are limitations and constraints which may hinder effective responses.

B. LIMITATIONS OF THE CHILD PROTECTION RESPONSE

Concerns about 'Abuse of power'

Many of the factors which give child protection agencies more options and information also create the risk of abuse of power. For example:

- parents may agree to voluntary services or even a voluntary placement in the care of relatives without legal advice and without clear legal grounds, out of fear that a refusal to agree will lead to apprehension or commencement of court proceedings;
- the lack of prohibition on acting on anonymous reports can lead to false reports against a parent, sometimes made by the other parent in a high-conflict separation; and
- the lack of stringent rules of evidence may lead agencies to base their determinations about a family on questionable hearsay or expert evidence.⁷⁷

Child protection work is stressful. As a result there is a high turnover in staff, reluctance on the part of experienced workers to work on the front-lines, and a tendency to be overly interventionist. Child protection cases involving child fatalities lead, understandably, to inquests, internal agency reviews, newspaper headlines, and in rare cases, criminal negligence charges against the child protection workers.⁷⁸ As a result of pressures to take protective steps, the jurisprudence is replete with examples of agencies being criticized for acting with apparent tunnel vision, failing to adequately assist parents, structuring access in a way that undermines the parents' relationship with the child, focusing on the negative and in other ways failing to act appropriately and assist parents pursuant to their legislated duties.⁷⁹

⁷⁶ Where the evidence does not support a conviction or where a breach of the *Charter* is proven and the evidence is excluded under s. 24(2) of the *Charter*, withdrawal of the charge or an acquittal is, of course, the appropriate legal outcome for the criminal proceeding. Our concern is with the protection of children in cases where it is more likely than not that they are at risk of violence.

⁷⁷ See, for example, *DCP v. J.P., J.L., and L.M.*, 2013 PESC 6.

⁷⁸ *R. v. Heikamp*, [1999] O.J. No. 5382. The charge was quashed at the preliminary inquiry stage.

⁷⁹ See, for example, *Children's Aid Society of Ottawa v MB*, [2007] OJ No 1054 (Sup Ct J); *Children's Aid Society of Ottawa v CW*, 2008 CanLII 13181 (ONSC); *Children's Aid Society of Hamilton v EO* [2009] OJ No 5534 (Sup Ct); *CB v Alberta (Child, Youth & Family Enhancement Act, Director)*, 2008 ABQB 165; *Winnipeg (Child and Family Services) v LMT*, 1999 CanLII 14177 (MB QB).

Lack of resources

The lack of resources for child protection agencies is a significant concern. For example, the 2012 Ontario Association of Children's Aid Societies annual report suggested that child protection funding in Ontario was not sufficient, given recent budget cuts, to deal adequately with child protection cases and keep children safe.⁸⁰ Similarly the Saskatchewan Child Welfare Review Panel concluded that the child welfare system in that province is "pushed to the limit... As a result, not all children and youth are safe."⁸¹ In Newfoundland and Labrador, heavy worker caseloads were identified as a key issue requiring attention.⁸² A 2010 review of Alberta's child welfare sector noted that "regional staff are stretched in their ability to deliver services and conduct casework as envisioned and required."⁸³ It seems that almost inevitably the first programs to be cut are those which are preventative and intended to intervene and support parents before children are taken into care.

Lack of adequate funding for child protection services is a serious issue for children on reserve. In addition to inequities in the amount of funding provided to agencies providing direct child welfare services, concerns have been raised about the lack of additional services, such as shelters, violence against women (VAW) services and intimate partner violence interventions.⁸⁴

Representation of Parents

Under s. 7 of the *Charter*, everyone has the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In its 1999 decision in *New Brunswick (Minister of Health) v. G. (J.)*,⁸⁵ the Supreme Court of Canada held that a parent's "security of the person" – the parent's relationship to the child – is threatened by state action in a child welfare proceeding and accordingly the "principles of fundamental justice" may be invoked to give the court

⁸⁰ OACAS *Child Welfare Report*, 2012, p.10

⁸¹ *For the Good of Our Children and Youth: Report of the Saskatchewan Child Welfare Review Panel*. November 2010, p.29. <http://saskchildwelfarereview.ca/CWR-panel-report.pdf>

⁸² Ken Fowler, PhD, *Children in Care in Newfoundland and Labrador*, September 2008, p.89 <http://www.gov.nl.ca/cyfs/publications/childcare/InCareReport.pdf>

⁸³ *Closing the Gap Between Vision and Reality: Strengthening Accountability, Adaptability and Continuous Improvement in Alberta's Child Intervention System*. Final Report of the Alberta Child Intervention Review Panel, June 30, 2010, p.70. http://cwrp.ca/sites/default/files/publications/en/AB-Child_Intervention_Panel.pdf.

⁸⁴ See, for example, the Auditor General's report in 2008 (http://www.oag-bvg.gc.ca/internet/english/parl_oag_200805_04_e_30700.html#hd5i) and 2011 (http://www.oag-bvg.gc.ca/internet/english/parl_oag_201106_04_e_35372.html#hd5h).

⁸⁵ [1999] 3 S.C.R. 46.

jurisdiction to order that the state fund representation if a parent is “indigent.” Generally, the biggest hurdle faced by parents seeking a *Charter*-based appointment of counsel is establishing “indigence.”

Some child protection courts have taken a narrow approach to the concept of indigence, meaning that people who are “working poor” but above the low legal aid eligibility criteria will be unrepresented and effectively unable to challenge agency decisions in court.⁸⁶ Some commentators question how realistic it is for lower income parents without much discretionary income to retain counsel for a contested child protection application.⁸⁷ There is a strong argument that for the purpose of providing counsel for parents in child protection cases, the concept of “indigence” should be assessed in the context of the particular proceedings. This more contextual approach recognizes that child protection proceedings are often highly complex and generally much broader in scope than criminal proceedings. It also considers the importance of counsel for parents not only in presenting their case in court, but in developing an appropriate plan of care and providing advice about how to undertake efforts to improve their parenting.⁸⁸

Even if parents in a child protection case are eligible for legal aid for legal representation, there are significant concerns about whether there will be adequate support to mount a proper defence. Not only are the hourly rates paid by legal aid low, but legal aid limits the amount of time that it is prepared to fund for child protection representation work; while there are provisions for seeking additional funding for complex or lengthy cases, they are cumbersome and often counsel will find themselves doing work for which they are not remunerated. This makes many lawyers unwilling to undertake this type of work and makes it difficult for parents to get adequate representation.

Limited Education and Support for Child Protection Lawyers

There is only a limited amount of education available for law students and young lawyers in the area of child protection. There are currently few law schools in Canada that have courses focused on child protection.⁸⁹ Similarly, there is only limited education in law school

⁸⁶ See e.g. *Re V*, 2009 SKQB 50; and *Huron-Perth CAS v JJ*, [2006] OJ 5372 (Ont. Ct. J.), where the court stated that “it is reasonable to think that the legal aid program in the province is capable of assessing financial eligibility in a sensible, logical and humane fashion.”

⁸⁷ Kate Kehoe and David Wiseman, “Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases”, (2012) 63 UNB LJ 166.

⁸⁸ This approach was adopted by the British Columbia Supreme Court in *British Columbia (Director of Child, Family & Community Service) v. L.(T.)*, 2010 BCSC 105.

⁸⁹ Notable exceptions are courses that address child protection issues at the University of Ottawa, the University of Toronto, Osgoode Hall and Queen’s University.

regarding the dynamics of intimate partner violence, although the Law Commission of Ontario has developed a number of modules on family violence that are being considered for integration into law school curricula in Ontario.⁹⁰ There have been some laudable efforts to recruit and train lawyers interested in child protection,⁹¹ but the availability of qualified, well-trained legal counsel for parents in child protection proceedings remains a serious issue.

It is also notable that in many parts of Canada, lawyers who represent child protection agencies are significantly more poorly paid than Crown prosecutors who present criminal cases in the same jurisdiction. Some agency lawyers also get relatively little in-house education and because the work is difficult and relatively poorly paid, they tend to leave prior to developing significant experience.⁹²

Approaches to Family Violence and High-conflict Separation in Child Protection Agencies

It has only been relatively recently that child protection agencies and the courts have recognized that exposure to intimate partner violence causes serious harm to children, even if they are not physically harmed, and that violence by one partner towards another partner can also predict violence and maltreatment toward a child.⁹³ Similarly, police, Crowns and judges have changed their attitudes towards the seriousness of family violence as well as the unique dynamics of these cases.

In many jurisdictions, child protection agencies tend to effectively place the responsibility for stopping the violence (or leaving the relationship) on the mother. Mothers who have been victims of intimate partner violence may experience child protection agency involvement as a negative “blaming” experience, and a threat to their continued relationship to their children, rather than as supportive.⁹⁴

⁹⁰ <http://www.canadianlawyermag.com/law-commission-calls-on-schools-to-instruct-students-on-realities-of-violence-against-women.html?print=1&tmpl=component>

⁹¹ The Ontario Chapter of the Association of Family & Conciliation Courts (AFCC-O) has begun to address the lack of professional education in the child protection field by offering a four day program in Toronto in the fall of 2013.

⁹² Professor Nicholas Bala raised this issue during his testimony before the Inquiry into Pediatric Forensic Pathology in Ontario on February 21, 2008. The transcript of Professor Bala's testimony can be found online: http://mail.tscrip.com/trans/pfp/feb_21_08/index.htm

⁹³ *Honouring Kaitlynn, Max and Cordon – Make Their Voices Heard Now*. Report of the BC Representative for Children and Youth, 2012, p. 72; P Jaffe & M. Juodis, “Children as victims and witnesses of intimate partner homicide: Lessons learned from intimate partner violence death review committees” [2006] *Juvenile and Family Court Journal* 13 – 27.

⁹⁴ *Honouring Kaitlynn, Max and Cordon – Make Their Voices Heard Now*, p.54, 59

Although child protection agencies can have a positive role in high-conflict separation cases, at present too few child protection workers have the necessary education, training and experience to deal with them effectively. As a result, there continue to be cases where the courts have been critical of insensitive and inappropriate involvement by agency workers.

In high-conflict separation cases the CPA may have an especially challenging role in balancing concerns about protection of children with the rights of their parents. In some cases the agency may be criticized for taking insufficient steps to recognize the seriousness of the intimate partner violence and its effect on the children, but in others the agency may be criticized for being too ready to “blindly accept” the (unfounded) allegations of abuse from an alienating parent and erroneously conclude that the child’s rejection of a parent is justified.⁹⁵

C. CHALLENGES & OPPORTUNITIES OF CONCURRENT PROCEEDINGS

Criminal Process Assisting Child Protection Process

In a significant portion of child protection proceedings where intimate partner violence or child abuse is a factor, there will also be concurrent criminal investigations and charges. Charges may include assault of a parent or child, threatening, or failure to provide the necessities of life (where one or both parents may have injured a child or failed to seek adequate medical treatment). Once criminal proceedings are commenced, there may be additional charges if parents breach the terms of orders that have been made in either process that prohibit contact or otherwise restrict parental behaviour. None of these charges automatically engages the child protection system, but police or Crown counsel will usually alert the agencies pursuant to the duty to report.

The fact that there are concurrent proceedings can assist the child protection agency and support the victim parent in family violence cases in a number of ways, including:

- The police investigation may result in information being obtained that can assist the agency in proving its case; some of this information may not be relevant or admissible in the criminal process, but may be significant for the child protection process. However, as will be discussed, there needs to be appropriate sharing of information obtained by the police with the CPA.
- If the abusive parent is detained in custody pending resolution of the criminal process, or sentenced to custody following conviction, the targeted parent may be

⁹⁵ See e.g. *W.C. v C.E.*, 2010 ONSC 3575.

better able to find adequate housing, obtain counselling, and improve their parenting, without having to deal with threats or pressure from the abusive parent.

- Restrictions on contact and/or orders for intimate partner violence intervention imposed through bail or probation conditions can also relieve the agency of having to seek a supervision order. Restrictions imposed by the criminal justice system, backed up with the threat of additional charges and imprisonment, may carry more weight with police and an abuser than conditions imposed in child protection proceedings, where there is unlikely to be a penalty for failure to comply (other than increased restrictions on access).⁹⁶
- A conviction in the criminal process is *prima facie* proof of the essential elements of the offence, which can relieve the child protection agency from having to prove a history of violence.
- The transcripts of evidence in the criminal proceedings may be used in the child protection proceedings, particularly where there has been a conviction in the criminal proceedings. This can relieve the children and other witnesses of the need to testify in two proceedings.⁹⁷ Note, however, that in some circumstances the children may have to be available for cross-examination on this evidence, particularly where there has not been a conviction.

Differences in Professional Orientation

While the fact that there are concurrent proceedings can create opportunities for collaboration, concurrent criminal proceedings can also create obstacles for a child-focussed resolution of child protection proceedings. These obstacles may both result in and contribute to a tension between professionals and agencies in the two systems.

In many places there is poor communication and even distrust between professional in each system (criminal and child protection) by the other. Crowns, police and possibly judges in criminal proceedings may hold the view that child protection staff and courts do not take intimate partner violence seriously enough and are not able or willing to effectively respond to keep children and targeted parents safe. This belief is reflected in the statement made by

⁹⁶ Breach of a child protection order is a provincial offence, and may not be prosecuted with vigour in a system with already stretched resources. Maximum penalties for breaching child protection orders vary from six months/\$1000 fine (Ontario) to 24 months/\$50,000 fine (Manitoba). A person who breaches a bail, probation or conditional sentence order, on the other hand, may be subject to immediate detention under the *Criminal Code*.

Parents without care of children and a history of intimate partner violence (i.e. typically abusive men) may have less incentive to comply with terms of child protection orders.

⁹⁷ See *Children's Aid Society Region of Halton v. O. (J.)*, *supra*, where the court permitted the introduction of transcripts of the children's evidence in a criminal preliminary hearing for assault charges against their parents, but permitted counsel for the parents to cross-examine the children on this evidence.

a Toronto Crown counsel that she is cautious about relying on family court orders when crafting bail conditions because of the different goals of the child protection and criminal process; in her view child protection proceedings are “often aimed at reunification of the family while criminal proceedings focus on safety issues and ensuring an effective prosecution.”⁹⁸ Deaths of children known to the agencies undoubtedly reinforce this view.

Child protection staff might respond to this type of comment by observing that the primary focus of the child protection process is on best interests of the child, and reunification with parents is only recommended where the agency or child protection court considers this to be consistent with the safety of the child. Those who work in the child protection system often have a similarly negative view of the criminal system, believing it to be slow to charge perpetrators of violence and child abuse and quick to allow plea bargains and acquittals based on “technicalities.” Child protection workers may also believe that it is inappropriate for police, Crown prosecutors and criminal court judges, who are not necessarily trained in child development, to make decisions that can effectively terminate the parent-child relationship, at least for a period of time.

There may well be some merit to both views; much of the distrust, however, is based on misunderstandings regarding the objectives and legal contexts of the two systems. With better cross-training and improved communication and cooperation, those working in each system should come to see the two types of proceedings as complementing each other.

Scheduling and Delay

There is a tendency for criminal proceedings to take priority in terms of scheduling, whether due to constitutional concerns (the *Charter* right to trial within a reasonable time) or due to requests by counsel for a parent to postpone the child protection proceeding until the criminal matter is resolved, so that nothing that is said in the child protection process can affect the criminal process.

Where the parents have separated and only one parent is charged, the parents may have different views about delaying the child protection process as the parent who is not charged may want timely resolution of the child protection process to allow reunification with the child. Not infrequently, however, even if only the perpetrator is facing criminal charges, both parents will want the child protection process delayed, with a victim of intimate partner

⁹⁸ Helen How, quoted in Di Luca et al, *Best Practices Where There is Family Violence (Criminal law Perspective)* (March 2012) p.15; see also *Peguis Child and Family Services v. C.S.*, [2009] M.J. No. 302 (Q.B.), where police objected to the release of records involving minors to a child protection agency on the grounds that the child protection agency seeking the records would not treat the minors properly.

abuse wanting time to address such issues as substance abuse while the perpetrator will want the criminal charges resolved.

In some cases, one or both of the parents or the agency may want the child protection proceeding delayed until resolution of the criminal case, because a finding of guilt and incarceration of a parent may affect the type of dispositions that can be made in the child protection case.

The notion that child protection proceedings are less important than criminal proceedings and should be delayed pending their resolution was challenged by Justice Keast of the Ontario Court of Justice in a case in which the Attorney General argued that societal rights in protecting a criminal investigation overrode the child protection agency's interest in obtaining the records of the police investigation for use in the child protection investigation:

How do we rank the child protection value? From the perspective of the Attorney General, although the value is important, it is not as important as the value of an effectively functioning criminal justice system.... The Attorney General sees the criminal justice system at the top of the ranking scale.

But why? Does the public interest in the criminal justice system have a higher value than the public interest in the child protection system?

The primary purpose of the criminal justice system is the protection of society. Of the various components of the system, police services are the first line of defence. They strive to ensure compliance with criminal and quasi-criminal laws. Although part of police work is preventive, most police work is reactive, dealing with crime that has already been committed. Part of the protection of society is the protection of children. The police role in child protection is limited to crimes wherein children are the direct victims.

The concept of the protection of society encompasses more than a police investigative and prosecutorial function. The serious criminal, who has been charged and prosecuted, evolved into that state, usually over a period of many years. A 25-year-old hardened biker and gang criminal was once a five-year-old boy - innocent, but very vulnerable. How did he get that way? There are those who say genetics are a factor, but there is a consensus among criminologists and others that a wide range of environmental influences shape the evolving criminal mind.

It is the child protection system that is primarily involved in that environment or milieu that spawns serious criminal behaviour. The root causes of serious crime in society are well known. There are common themes seen daily in pre-sentence reports (for teenagers and adults, in particular, as such) relate to serious crime and violent crime. These include low income and poverty, addictions, limited parenting skills, fractious and chaotic home environments, a parent or parents who have abandoned their children; multiple broken family relationships, often leading to attachment and bonding problems; crime in the family

unit such as intimate partner violence between spouses or crime directly to children, such as sexual assault and physical assault.

It is well known that serious crime is often cyclical. How often do we see an adult, convicted of a sexual assault, was once a child victim of sexual assault? How often do we see an adult, convicted of physical assault, was once a child victim of physical assault? Spouse abusers were often exposed to intimate partner violence when they were children.

Children's aid societies are involved with future criminals well before the police are involved. The ability of the child protection system to protect children and to mitigate the factors that influence criminal behaviour is directly related to the protection of society - which is exactly the same function of the criminal justice system.

The criminal justice system and the child protection system are approaching the same goal, but from different roads. Each road is as vital as the other for the overall protection of society. There is a tendency in thinking to segregate the criminal justice system from the child protection system. This is illogical. They are both absolutely necessary to achieving the ultimate goal of the protection of society. There is no basis for ranking the investigative-prosecutorial value ahead of the child protection value.⁹⁹

Justice Keast made similar comments in a 2008 case involving a request by a child protection agency for access to police records about intimate partner violence for use in the child protection process:

The Attorney General argues that the public interest in intimate partner violence criminal proceedings is a higher value [than the public interest in child protection cases] in that the ultimate goal is the protection of this particular female complainant and, in the broader sense, the protection of women in intimate partner violence cases. Thus, women who are the victims of alleged intimate partner violence and are also respondents in child protection proceedings ought not to be entitled to the disclosure of the records of the criminal proceeding against the fathers.

The answer starts with an appreciation of the purposes of the criminal justice and child protection proceedings. The primary purpose of the criminal proceeding is the protection of the complainant mother. There is a secondary interest that, by protecting the mother, the children are by logical extension also protected. The primary purpose of the child protection proceeding is the children. However, risk factors associated with the mother in a intimate partner violence context must be eliminated or sufficiently minimized in order truly to protect the children.

⁹⁹ *Children's Aid Society of Algoma v. P.(D.)*, 2006 ONCJ 170 at pars. 44-51 (Emphasis in original)

In reality, the collective criminal justice system and child protection system are integrated and have separate and overlapping features to protect the mother and the children. Neither system by itself offers the optimal protection of the mother or the children. Only a blend of the two systems and proceedings can optimize the protection of the mother and children.

Recognizing this, to achieve the end goals of protecting the mother and children, you cannot have the one system paramount to the other system. These two systems are parallel tracks going in the same direction. The children will be compromised by giving the one system priority over the other.¹⁰⁰

When there are concurrent proceedings, there are complex issues that need to be addressed in the context of the specific issues raised, but given the critically important interests at stake in both proceedings, it is not appropriate to automatically presume that one type of proceeding should take precedence. As noted above, section 7 *Charter* interests are implicated in both types of proceedings. As the Supreme Court has stated: “The interests at stake in the [child protection] custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent’s right to security of the person at stake, the child’s is as well.”¹⁰¹

D. IMPROVING CO-ORDINATION OF CONCURRENT PROCEEDINGS

There are a number of issues that should be considered to improve co-ordination between the child protection process and the criminal process when there are concurrent proceedings, or even the potential for concurrent proceedings.

Investigation and Initiating Proceedings

Although the criminal and child protection processes have different purposes and constraints, there is a need for better co-ordination between the agencies and professionals responsible for the different proceedings.

One area where this has been recognized is through the development and implementation of police-CPA joint protocols for investigations where there are child victims or witnesses. While there is variation in the extent to which they are being adopted and implemented in Canada, these protocols are operational in many places and are encouraging co-operation,

¹⁰⁰ *Children’s Aid Society of Algoma v. B. (S)*. [2008] OnCJ 358 (CanLII), at pars 13 – 16.; see also *Peguis Child and Family Services v. C.S.*, [2009] M.J. No. 302 (Q.B.)

¹⁰¹ *New Brunswick (Minister of Health) v. G.J.* [1999] 3 S.C.R. 46 at par. 76 per Lamer C.J.C

helping to improve the quality of evidence obtained and reducing the number of times that children need to be interviewed.

There is, however, a need for greater co-operation and improved information sharing in investigations concerning intimate partner violence where the children are exposed to the violence but are not potential witnesses in the criminal case.

Further, there is a need for greater co-ordination at the next, critical stage of the process, the decision whether to commence proceedings. While the ultimate decision about whether to lay charges must be made by the police and Crown, in some cases, such as an isolated incident of an assault of a child, it would be desirable for these criminal agencies to consult with any CPA that is involved with the family before a decision is made. In some cases, the interests of the children should be one factor that is taken into account in deciding whether it is in the “public interest” to lay charges.

Advice to remain silent

A parent facing criminal charge will typically be advised by his or her criminal defence lawyer not to speak to the police or child protection workers about the allegations. If the CPA worker and other service providers take the position, as they often do, that the parent needs to acknowledge the violence or abuse in order to participate in counselling or other interventions, it will be difficult for the parent who refuses to discuss the allegations to demonstrate to the CPA or the child protection court that the risk of violence has been reduced.

The recent paper by criminal defence lawyers Joseph DeLuca, Erin Dann and Breese Davies offers some suggestions about facilitating discussion between parents and CPA staff prior to the resolution of the criminal process.¹⁰² It is important for defence counsel and child protection agencies to have a dialogue about how communication between parents and the agency can be facilitated. We note that the suggestion by Di Luca et al that counsel for parents should be present whenever the CPA attempts to speak to a parent may not be realistic, as workers often speak to parents informally and in a range of locations, such as supervised access visits, where it would be impractical and even undesirable for their defence lawyers to be present.

The child protection trial itself may also present difficulties for a parent facing criminal charges. The 2012 Supreme Court of Canada decision in *R. v. Nedelcu*¹⁰³ suggests that while

¹⁰² Di Luca et al, *Best Practices Where There is Family Violence (Criminal Law Perspective)* (March 2012) p.29

¹⁰³ *R. v. Nedelcu*, 2012 SCC 59

the testimony of a parent in the child protection trial cannot be used to directly implicate the same parent in criminal proceedings, it can be used to impeach the parent's credibility if the parent testifies in the criminal trial. Even prior to the decision in *Nedelcu*, parents' counsel often sought to have the child protection proceedings stayed or adjourned until the criminal proceeding was resolved in order to avoid prejudice to the parent. Such delay, however, assumes that criminal proceedings should take scheduling priority, and poses a direct challenge to the oft-cited need to avoid delay in child protection proceedings as well as the statutory provisions governing timelines for the resolution of child protection applications in order to have decisions about the child's future made in a timely way that best meets the needs of the child. There are child protection cases in which judges have raised concerns about undue delay of the child protection process in order to allow completion of the criminal process, as this would be contrary to the interests of the child.¹⁰⁴

Conditions of Release Affecting Attendance in Child Protection Court

A parent charged with criminal offences relating to intimate partner violence or child abuse may be detained or may be subject to bail conditions prohibiting contact with the other parent and child. The prohibition on contact with the other parent or child may mean that the parent facing charges may not legally be able to attend the child protection proceeding; further difficulties in communication and obtaining representation mean that a charged parent will rarely have documents for the child protection proceeding ready for filing in the time limits prescribed for these proceedings.

It is, however, quite common for a parent subject to such conditions to attend the child protection proceedings, even where the bail condition does not expressly allow this exception to the conditions of release. The lawyers or agency worker on the case may attempt to keep the parents and/or child separated, both in and out of the courtroom, in order to comply with the conditions of bail release, but in many cases these restrictions are forgotten or ignored at the courthouse where protection proceedings (or family cases) are being addressed.

Conditions of bail release or probation should specifically address how a parent involved in the criminal process may also be involved in concurrent child protection or family proceedings, including provision for court preparation and attendance. In general, it is preferable for restrictions on contact in the criminal process to be "subject to such contact with the other parent as may be necessary for participation in child protection or family proceedings."

¹⁰⁴ *Children's Aid Society of Huron County v. R.G.*, [2003] O.J. No. 3104 (O.C.J.)

Conditions of Release Affecting Parent-child Contact

A parent charged with a family violence offence may be subject to conditions of release which prohibit any contact with the child or otherwise affect contact (for example, prohibiting contact with the other parent, who would normally be present at access exchanges). These conditions can present challenges to parents and child protection workers:

- These conditions are not easily varied in the criminal process as variations require the consent of the Crown, and bail reviews must be done on application to a higher court.
- Under the constitutional doctrine of paramountcy, conditions imposed on the accused in a criminal proceeding restricting contact will override any conditions allowing for contact made before or *subsequently* by a child protection court where there is a direct conflict between orders.
- Criminal court conditions on release can, in some cases, be broader than necessary to protect the child, such as absolute prohibitions on contact between primary caregivers and children. Such conditions can also undermine efforts by the agency to work with the family, such as through joint counselling or monitored visits with the children.

Di Luca et al suggest that child protection authorities and family courts may not always appreciate the need for no-contact orders because they do not understand the emotional pressure that a child may experience at the prospect of testifying against a parent in the criminal process.¹⁰⁵ There are certainly cases in which protection of the emotional well-being of a child will require complete suspension of all contact with a parent facing criminal charges. However, in our view, a decision about parental contact with a child should be made by a child protection or family court taking into account all of the circumstances of the particular child, and with a focus on the best interests of the child, which includes safety concerns but other factors as well. Further, there needs to be flexibility to change the terms of contact as the circumstances and condition of the child change, especially if there is a lengthy delay until conclusion of the criminal process.

¹⁰⁵ Di Luca et al, *Best Practices Where There is Family Violence (Criminal Law Perspective)* (March 2012) p.15. A similar suggestion that participants in the criminal justice system have a better understanding of children's needs than do child protection workers was addressed by Justice Thompson of the Manitoba Queen's Bench, Family Division, in *Peguis Child and Family Services*, [2009] M.J. No. 302 (Q.B.): "This position is difficult to understand. Peguis Child and Family Services is a mandated child protection agency whose staff has typically greater training and experience in dealing with children in distress than do the members of the Service."

In many cases, feelings of guilt and pressure for a child to recant will not only come from an accused parent, but from other non-accused family members. In many cases a child who will be expected to testify against a parent will not receive any emotional benefit from a no-contact order; indeed a child may experience even more guilt – and trauma – where there is a no-contact order than where the parent is permitted to see the child. Attempts to coerce the child into recanting, or more subtle guilt-inducing comments from an accused parent, can be generally prevented through supervised contact.

The prospect of child witnesses recanting is, we argue, much better dealt with through obtaining proper videotaped “*K.G.B.* statements” by children at the time of the incident,¹⁰⁶ rather than by prohibiting all contact between all child and accused parents – particularly given the low numbers of children who actually end up testifying in criminal proceedings.

Parents often erroneously assume that court orders made in child protection or family proceedings after conditions of release are imposed in the criminal process will override those conditions of release. Parents may also be confused as to which conditions stem from which proceeding (leading to assumptions, for example, that the withdrawal of criminal charges will remove *all* conditions, including family or child protection court orders). The parents’ confusion over which conditions were in effect, and which conditions took precedence, was a recurring theme of the B.C. Representative for Children and Youth’s report on the deaths of the Schoenborn children.¹⁰⁷ Child protection workers may share the confusion and may have difficulty ascertaining whether conditions of release imposed in the criminal process have been varied or withdrawn. Police and Crowns may not realize that child protection officials have been relying on criminal conditions, and may not alert child protection authorities when those conditions change.¹⁰⁸

We agree with the recommendations of Di Luca et al regarding the need for a court granting bail and deciding terms of release to be aware of:¹⁰⁹

- any child protection or family proceedings, and court orders in those proceedings;
- the accused’s contact with children of his own or of an adult complainant;
- any risk assessments or safety checklists prepared by police;

¹⁰⁶ *K.G.B. statements* refer to statements taken by the police from a witness or victim that can be used to prove the guilt of the accused even if the witness or victim is recanting. To be admissible these statements must be taken in accordance with a process established in the Supreme Court decision in *R. v. K.G.B.*, [1993] 1 S.C.R. 740, which requires a reliable record (usually satisfied by video-recording) and a warning to the person making the statement of the importance of truth telling in making the statement and possible consequences of dishonesty

¹⁰⁷ *Honouring Kaitlynn, Max and Cordon*, pp. 33, 38, 41

¹⁰⁸ *Honouring Kaitlynn, Max and Cordon*, p. 49

¹⁰⁹ Di Luca et al, *Best Practices Where There is Family Violence (Criminal Law Perspective)* (March 2012) p.15

- restrictions on contact imposed by a child protection agency; and
- the accused’s history, or lack of history, of violence.

We would also recommend that the bail court have access to a history of any prior findings and orders made by a child protection court, the results of any risk assessment conducted by the CPA, and current or past mental health issues (keeping in mind that bail hearings can only be adjourned for more than three days with the consent of the accused).

It is also important for all professionals involved with families where there is a history of family violence to be aware of the dangers of relying on the mother to keep the accused from the children if detention is not ordered. In practice, imposing bail conditions restricting a parent’s access to his children puts the onus on the children’s primary caregiver – usually the mother – to enforce them. This may be unrealistic and can be seen to be unfair. Women face many challenges in keeping abusers from themselves, let alone their children.¹¹⁰ In some cases, a detention order may be the only means for addressing the risk to other family members. This is particularly so in cases immediately following separation, and/or involving apparent sudden changes in the accused’s mental health, which have been repeatedly identified as factors raising the risk of lethality toward complainant mothers and children.¹¹¹ Children may well be at risk even where the accused has only directed violence at the mother.¹¹²

Conditions of bail release or probation should take account of the fact that there may be concurrent (or subsequently commenced) child protection or family proceedings, and that the family or child protection court will usually be better placed to make orders that appropriately balance concerns about protection of alleged victims and children with concerns about allowing a child whose parent is involved in the criminal process to maintain an appropriate, safe relationship with that parent. In general, it is preferable for restrictions on contact in the criminal process to be “subject to such contact with the child and other parent as may be permitted by the child protection or family court judge, provided that judge has awareness of this criminal court order.”

Duty to Report

¹¹⁰ *Honouring Kaitlynn, Max and Gordon*, p. 57

¹¹¹ Intimate Partner Violence Death Review Committee (Ontario) 2011 Annual Report, pp.8 – 9.

<http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec160943.pdf>

¹¹² Jaffe, P. and Juodis, M. (2006) *Children as victims and witnesses of intimate partner homicide: Lessons learned from intimate partner violence death review committees*. *Juvenile and Family Court Journal*, 13-27.

As noted above, child protection legislation requires a report to child protection authorities by any person with reasonable grounds to believe that a child may be in need of protection.¹¹³ However, judges, lawyers and court staff in family and criminal proceedings in which a risk to a child may become apparent may not always appreciate that they have a duty to report, or may assume that others, such as police, have already reported. There is a need for education of all professionals, including those who work in the justice system, to be aware of their reporting duties.

Lack of Information Sharing

Child protection agencies have limited investigatory capacity and resources. Behaviour by the parent that suggests a risk to the children will often come to the attention of police, but not to the child protection agency. Better information sharing on an ongoing basis between police and child protection authorities may reduce the risk of harm to children and their parents. This is particularly the case where there is the potential for lethality. Signs of substance abuse and deterioration in an alleged offender's mental health should be – but often aren't – immediately communicated to child protection agencies.¹¹⁴

Disclosure of Police Records for CPA Investigations

Where there are or have been criminal charges related to family violence, a child protection agency may seek access to the police and Crown records. In some cases, the Crown may refuse to provide those records, or request a lengthy adjournment to redact the records, for reasons including the following:

1. The Crown may take the position that information relating to third parties contained in the records cannot be released due to privacy concerns. This argument has been upheld by the Ontario Divisional Court, insofar as applications for records are made by private litigants.¹¹⁵ However, courts in Ontario and other jurisdictions have held that in child protection case the privacy rights of third parties are secondary to the

¹¹³ In Manitoba, there is no penalty for any person failing to report, but members of regulated professions who breach this duty can be reported to their licensing body. *The Child and Family Services Act*, C.C.S.M., c. C80, s.18. Prince Edward Island, Saskatchewan, and Quebec and Yukon do not impose penalties or provide for advising regulating bodies of a failure to report. *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1., s.22; *Child and Family Services Act*, S.S. 1989-90, c. C-7.2; *Youth Protection Act*, R.S.Q., chapter P-34.1; *Child and Family Services Act*, S.Y. 2008, c. 1.

¹¹⁴ *Honouring Kaitlynn, Max and Cordon*, p.78

¹¹⁵ *D.P. v. Wagg* (2002), 61 O.R. (3d) 746 (Div. Ct.)

public interest promoted by child protection proceedings, and have ordered release of such information to the agency.¹¹⁶

2. The Crown may also object on the grounds that the release of records may compromise an ongoing police investigation. The prevailing judicial approach requires the court to balance the competing public interests in the police investigation and the child protection investigation or trial prior to ordering disclosure.¹¹⁷
3. The Crown may agree to provide the records but request a lengthy adjournment to compile, review and redact the records. Although the work involved in preparing such records can be significant, delay in production should be minimized wherever possible, depending on the nature of the child protection investigation. As noted by the Manitoba Queen's Bench Family Division:

“It has been observed before, on many occasions, that such delays [in producing records] may result in tragic results. Where the threshold matter of relevance is conceded by consent disclosure, disclosure ought generally to be full and immediate. These comments [in the context of an impending child protection trial] leave aside, entirely, a most interesting additional consideration, one which is related to one of an Agency's fundamental purposes, investigation. Investigation of children in potential danger by an Agency also ought not normally to be impeded or slowed by non-disclosure or incomplete disclosure.”¹¹⁸

Impact on Child of Criminal Proceedings: Preparing the Child for Court

It is important for Crown counsel and police to communicate with child protection agencies where a child in their care or under agency supervision is expected to testify at the criminal trial. The child protection agency will be able to provide information relevant to the impact of testifying on the child, including reports by mental health practitioners as to whether testifying would be damaging to the child such as to require a *KGB* application. The agency can also make suggestions regarding accommodations such as screens, closed circuit television, the adoption of videotaped evidence, and the presence of support people if the

¹¹⁶ *Children's Aid Society of Algoma v. P.(D.)*, 2006 ONCJ 170, affirmed [2007] O.J. No. 3601 (ONSC); *Peguis Child and Family Services v. C.S.*, [2009] M.J. No. 302 (Q.B.)

¹¹⁷ *Children's Aid Society of Algoma v. P.(D.)*, 2006 ONCJ 170, affirmed [2007] O.J. No. 3601 (ONSC); *Awasis Agency of Northern Manitoba v. B.D.B.*, [2009] M.J. No. 419; 2009 MBQB 316 (Man QB Family Division)

¹¹⁸ *Peguis Child and Family Services v. C.S.*, [2009] M.J. No. 302 (Q.B.), at par. 41 per M. A. Thompson J.

child does testify. Finally, the child protection agency can provide information regarding any special needs – such as cognitive or communications challenges – the child may have.

Plea Bargains

A criminal conviction is *prima facie* proof of the underlying facts for the purpose of child protection proceedings. It can only be rebutted with evidence that was not available at the criminal trial.¹¹⁹ Child protection authorities often hope for a conviction where there are charges involving family violence, which can then promote settlement in the child protection case, avoid the need for trial in the child protection case where the central issue is whether the underlying acts took place, and depending on the sentence, may remove the offender (in serious cases) or impose a threat of imprisonment if the offender fails to meet the conditions of sentence, including treatment and restrictions on contact.

Withdrawal of a charge or an agreement to a plea to a lesser charge in the criminal proceeding may lead the offender and often a targeted parent, to believe the child protection case may also be withdrawn in response. As well, a pattern of abuse may be much more difficult to prove where previous charges resulted in withdrawals or convictions for lesser charges, particularly where charges for sexual assault – which are relatively common in intimate partner violence cases – are reduced to simple assault.¹²⁰ Finally, resolution of the charges will often result in the removal of bail or other conditions restricting the parent's access to the child.

Plea bargains are a normal part of the criminal justice system, and there are many considerations at play – including, in many cases, the impact on the child of having to testify against a parent – in such situations.¹²¹ In some cases, where the plea negotiations provide the Crown with the opportunity to do so, it may be helpful for the Crown to consult with the CPA as to the status of the child protection proceedings and any relevant conditions or interventions. Where the Crown would normally advise the victim of a plea of imminent release, advising the CPA at the same time would also allow the CPA to make necessary arrangements to protect the child and targeted parent where there are concerns about risk.

¹¹⁹ *W.H. v. H.C.A.*, 2006 CanLII 27865.

¹²⁰ *R. v. Miller* (2000), 147 C.C.C. (3d) 156 (BCCA) *R. v. R.A.M.*, [1994] M.J. No. 597 (Man.C.A.).

¹²¹ A judge is not required to accept an agreement made between the accused and the Crown as to sentence, and may refuse to accept a plea to a lesser charge. However, “trial judges in most cases do, and should, give great weight to the decision of counsel for the prosecution, as a representative of the public interest with heavy responsibilities, to accept a plea of guilty to an included or lesser offence.” Provided the Crown demonstrates that the plea reflects “a reasonable exercise of prosecutorial discretion having regard to the public interest in the effective administration of justice”, it is reasonable for a judge to accept the plea: *R. v. Naraindeen* (1990), 80 C.R. (3d) 66 (Ont.C.A.) at para. 29.

Of course, many plea negotiations take place the morning of trial and consultation and information-sharing may not be possible.

Accused Seeking Disclosure of Child Protection Records

Prior to trial, the accused may seek disclosure of child protection and counselling records related to the child or the other parent in order to allow a full defence to be prepared. If the accused is charged with a sexual offence, these applications are made as part of the criminal trial process under s. 278.2 of the *Criminal Code*, which provides a two-stage application process. Generally, such applications require the court to balance the accused's right to a fair trial with confidentiality concerns. From the perspective of the child and victim parent, such applications often seem highly intrusive. In some jurisdictions, state-funded counsel is provided to a child or other third parties who may have privacy interests in the records, which greatly assists the CPA in determining and presenting an appropriate response to the application.

Applications for third party records in other cases require the court to engage in the approach set out by the Supreme Court of Canada in *R. v. O'Connor*, first requiring the accused to satisfy the court of the relevance, and then considering the salutary and deleterious effects of an order for production.¹²² In cases involving family violence with *O'Connor* applications for access to records of child protection agencies, consideration should be given to the provision of state-funded counsel to a child or other vulnerable parties who may have privacy interests in the records.

Increased Use of Court Resources and Costs to Parents

One significant consequence of having multiple proceedings to deal with one family is increased use of court resources. This in turn contributes to delays in obtaining court dates. Delay is a significant and seemingly inevitable problem in all parts of the legal system that respond to family violence cases. Delay can lead to stays of proceedings in the criminal system, continued conflict between the litigants pending the resolution of the proceeding, increased costs to all parties, and of course significant stress to the litigants and children. Because child protection statutes contain limits on the length of time a child may be in temporary foster care, before a permanent placement must be ordered, parents who are unavailable to care for their children for lengthy periods due to detention or restrictive bail conditions may face the possibility of losing their children to a permanent wardship and the

¹²² *R v McNeil* (2009), 62 C.R. (6th) 1 (S.C.C.)

possibility of adoption. Delay in child protection cases has been repeatedly identified as contributing to poor outcomes for children.¹²³

It should also be appreciated that concurrent proceedings impose emotional and financial costs on families with very limited resources.

While the cost of having concurrent proceedings to the justice system and families can never be determinative of the decision to discontinue one proceeding, those responsible for commencing proceedings and making decisions in those systems should be aware of these costs and take all reasonable steps to reduce them.

Complications if There are Youth Criminal Justice Act (YCJA) Proceedings

There may be additional challenges if either an abusive parent is a minor or a victimized child is charged with an offence, as the provisions of the *YCJA* must also be taken into account.

If a parent who is charged with child abuse or neglect or intimate partner violence is under the age of 18 at the time of the alleged offence, the parent is charged under the *YCJA* and dealt with in youth court. This may add to challenges in information sharing and co-ordinating proceedings, as another set of agencies and professionals may need to be involved in the case.

It is not uncommon for adolescents who have been victimized by parental abuse or neglect or exposure to intimate partner violence to engage in offending behaviour, and be charged under the *YCJA*. If this occurs, the youth may be placed by the youth court under section 31 of the *YCJA* with a “responsible adult” pending resolution of the charges, or placed under the supervision of an adult as part of a term of probation. It is important for the youth court to be aware of any criminal, family or child protection orders that prohibit contact by the “responsible person” with the youth in question, and more generally whether that person has a history of family violence. This too may raise issues of information sharing and co-ordinating proceedings.

VI. PROMISING PRACTICES

This section identifies a number of options for legislative, systematic and individual responses to the challenges created by concurrent proceedings. This is not an exhaustive list of options. Many of these practices and proposals have not been evaluated, and their

¹²³ *Children’s Aid Society of Algoma v. P.(D.)*, 2006 ONCJ 170, affirmed [2007] O.J. No. 3601 (ONSC).

inclusion in this list should not be taken as an unqualified recommendation, but rather as a suggestion that they merit serious study.

1. Legislative provisions

A number of provincial statutes have provisions that address concurrent proceeding issues in intimate partner violence cases. These include:

- Definitions of best interests of the child in custody/access legislation, which includes consideration of the impact of intimate partner violence on children,¹²⁴ including consideration of intimate partner violence on joint custody;
- Requirements in custody legislation that courts consider the existence of criminal and/or civil (including child protection) proceedings relevant to the child's safety, security or well-being when considering the best interests of the child;¹²⁵
- Presumptions in child protection legislation that access between a child and a parent who has been charged or convicted of an act of violence toward the child or other parent be supervised;¹²⁶
- Broad definitions of family violence which include emotional abuse, financial abuse, and children's exposure to intimate partner violence;¹²⁷
- Requirements that the specific level of seriousness, frequency, and timing of the violence, along with evidence of coercive and controlling behaviour, be considered when assessing the impact of violence on parenting ability and the child's best interests;¹²⁸
- Provisions making the breach of family law restraining orders a criminal offence;¹²⁹ this could be extended to child protection orders as well;
- Provisions requiring police to share information with child protection officials that may be relevant to a child protection investigation or application;¹³⁰

¹²⁴ British Columbia, *Family Law Act*, s. 37(2)(g) & (h) & 38; Ontario *Children's Law Reform Act*; Nova Scotia *Maintenance and Custody Act* s.18(6)(j)

¹²⁵ British Columbia, *Family Law Act*, s. 37(2)(j)

¹²⁶ Ontario, *Child and Family Services Act*, s.59.2

¹²⁷ British Columbia, *Family Law Act*, s.1; Nova Scotia *Maintenance and Custody Act* s.2(da)

¹²⁸ See e.g. British Columbia, *Family Law Act* s.38; Nova Scotia *Maintenance and Custody Act* RSNS 1989 c160 s. 18(7).

¹²⁹ Ontario *Children's Law Reform Act*, s35; *British Columbia Family Law Act* s. 188(1)(b). Because breaches of restraining orders are not identified in these statutes as provincial offences, such breaches are now enforceable under s.127 of the *Criminal Code*. Child protection courts in Ontario can also impose such orders: *Child and Family Services Act*, s. 57.1(3)&(4).

¹³⁰Manitoba, *Child and Family Services Act* s.18.4(1.1)

- Requirements that parents or other persons applying for custody or access to a child advise the court of the applicant's current or previous involvement in any family, child protection or criminal proceedings;¹³¹
- Provisions requiring child protection authorities to be notified of any custody application, and granting a CPA standing in the custody application if it determines it is in the best interests of the child to intervene;¹³²
- Provisions in child protection legislation allowing the court to make a custody order in favour of any person named in the child protection application, which avoids the need for a parallel family law proceeding;¹³³
- Provisions in child protection legislation clarifying that the duty to report is an ongoing and personal duty, which remove the option of delegating the reporting or failing to report as new information arose.¹³⁴
- Enactment of legislation in all provinces and territories to allow expeditious access to the justice system to obtain civil orders where family violence is at issue, and provision of adequate supports to allow victims to make effective use of such laws.

Other statutory provisions that might improve outcomes in concurrent proceedings include:

- Including exposure to intimate partner violence as an explicit ground for a finding that a child is in need of protection under child protection legislation. We note that many child protection statutes make no reference to intimate partner violence in terms of the definition of a child in need of protection.¹³⁵ The jurisprudence has generally evolved to consider a history of exposure to intimate partner violence as relevant to a finding that the child is in need of protection and to the application of the best interests test; however, specific reference to intimate partner violence – including exposure to violence – would assist the parties, child protection staff and the public (when contemplating whether they have a duty to report).¹³⁶
- Effective enforcement provisions for family and child protection court orders with police assistance and criminal penalties for breaches.¹³⁷

¹³¹ Ontario, *Children's Law Reform Act*, s.21(2)(b)

¹³² New Brunswick *Family Services Act* SNB 1980 cF-2.2, s.7(a)

¹³³ Ontario, *Child and Family Services Act*, s.57.1

¹³⁴ Ontario, *Child and Family Services Acts* s. 72(2). A practice memorandum was created in response to these amendments, to clarify the Crown's duty to report to the CAS in Ontario. March 31, 2000 Practice Memorandum.

¹³⁵ New Brunswick's *Family Services Act* (s. 31(1)(f)) and Alberta's *Child, Youth and Family Enhancement Act* (s.1(3)(a)(ii)(C)) both include exposure to intimate partner violence as grounds for child protection intervention.

¹³⁶ The BC Representative for Children and Youth noted the challenges CPA workers face in determining whether exposure to violence is grounds for a finding that a child is in need of protection in the absence of explicit language in the governing statute. *Honouring Kaitlyne, Max and Cordon*, p. 64.

¹³⁷ Such as is currently provided for in the British Columbia *Family Law Act*, ss. 183(3)(c) & 188(2)

2. Record-keeping systems

Database of cases, orders and conditions

A computerized database of all charges, applications, court proceedings, orders and conditions, accessible by the Crown, police, child protection officials, judges and lawyers would be of enormous benefit to all actors in the system. While there clearly need to be some “fire walls” for some types of information, at present even matters of “public record” are not being adequately shared. Police and child protection workers should be aware of all current orders affecting the family; courts would avoid making conflicting orders; and court appearances could be coordinated to minimize disruption to the family. Such a system has been established in some jurisdictions (such as New York State). It would be desirable to create an alert system through such a database to inform all parties of any changes in orders or proceedings (such as dropped charges, findings that a child is in need of protection, or variations in conditions).

3. Court structure and procedure

Unified Family Courts

Unified Family Courts replace the separate provincial and superior courts with one court, which has jurisdiction over all family-related matters. Where the child protection, divorce/property, and custody/access matters are all heard in the same court, they can be consolidated and heard at the same time by the same judge (assuming the court also has one-judge-one-case case management in place, and a mechanism for identifying related proceedings). This significantly reduces the strain on families caused by multiple proceedings, is a more efficient use of court resources, avoids conflicting or missed information from one proceeding to the next, and avoids conflicting family law orders and conditions. A number of recent reports have recommended that Unified Family Courts be created in all jurisdictions where it is feasible to do so, with an appropriate degree of judicial specialization and support services.¹³⁸

Case management

Case management (one judge hears each case from first appearance through settlement conferencing, though a second judge may preside at the trial) has been repeatedly

¹³⁸ See e.g. *Action Committee on Access to Justice in Civil and Family Matters, Meaningful Change for Family Justice: Beyond Wise Words: Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters* (April 2013), Recommendation 19

recognized as a key measure to ensure effective resolution of family law cases, including child protection. Having one judge hear both the intimate partner and child protection applications can have a particular benefit in family violence cases, as it reduces the risk of conflicting orders and missed information (which can hamper the court's ability to effectively assess risk). Case management also reduces the potential for litigation abuse, and allows the case management judge to become familiar with the complex dynamics typically involved in these cases. Other general benefits of one-judge-one-case management include reduced delay, more efficient use of court resources, and higher rates of settlement.

Integrated domestic violence courts

The Ontario Court of Justice has created an integrated domestic violence court pilot (IDVC) project in Toronto. This court is able to hear the custody/access and criminal proceedings relating to the same family. Child protection cases are not being heard in the IDVC at this time, and few cases overall have been dealt with as participation was initially voluntary. Use of the IDVC is expected to increase because as of April 2013, it has become mandatory to use this court for all intimate partner violence summary conviction criminal charges scheduled for appearance in two Toronto courts, where the accused is out of custody and is a litigant in a related custody/access or support case within the jurisdiction of the Ontario Court of Justice. The IDVC may hear all matters related to either proceeding, including short trials.¹³⁹ One dedicated judge hears both matters on the same day in the same courtroom, and will be able to monitor the family, which may increase the accountability of the accused and enhance the complainant's safety. The IDVC initially had a Community Resources Coordinator who was responsible for assisting the parties in finding resources and services to assist the parties,¹⁴⁰ although that position has been eliminated. The goals of the IDVC are "a more integrated and holistic approach to families experiencing intimate partner violence, increased consistency between family and criminal court orders and quicker resolutions of the judicial proceedings."¹⁴¹

The IDVC in Ontario is modelled on the IDVC in New York State, where 24 courts hear family and criminal cases together (including, in some jurisdictions, child protection cases) and the

¹³⁹ Practice Direction regarding the Integrated Intimate partner Violence Court at 311 Jarvis Street, Toronto (April 26, 2013) <http://www.ontariocourts.ca/ocj/legal-professionals/practice-directions/toronto-region/integrated-intimate-partner-violence-court/>

¹⁴⁰ <http://www.ontariocourts.ca/ocj/integrated-intimate-partner-violence-court/overview/>

¹⁴¹ As explained on the Ontario Court of Justice website: <http://www.ontariocourts.ca/ocj/integrated-intimate-partner-violence-court/>

presiding judge decides whether a given case will be transferred to the IDVC.¹⁴² The goals of the IDVC in New York have been identified as follows:

- informed judicial decision-making based on comprehensive and current information on multiple matters involving the family;
- consistent handling of multiple matters relating to the same family by a single presiding judge; efficient use of court resources, with reduced numbers of trips to court and speedier dispositions;
- linkage to social services and other resources to address comprehensively the needs of family members;
- promotion of victim safety through elimination of conflicting orders and decisions;
- increased confidence in the court system by reducing inefficiency for litigants and by eliminating conflicting orders; and
- coordinated community response and collaboration among criminal justice and child welfare agencies and community-based groups offering social services and assistance to intimate partner violence victims and their children.¹⁴³

We note that in New York, the IDVC is under the jurisdiction of the Superior Courts, which permits all criminal and family cases to be heard by one judge. The Toronto IDVC is part of the Ontario Court of Justice, the provincial court; therefore, any case involving proceedings under the *Divorce Act* is not eligible for the IDVC, as they can only be heard by Superior Court judges.

A full evaluation of the Toronto IDVC would be valuable, and consideration should be given to expanding its jurisdiction to include child protection matters. Consideration also should be given to finding means for expanding such courts in cases where the criminal and family/child protection proceedings are in two different levels of court, and in jurisdictions in which family cases are heard in Unified Family Court.

Specialized criminal domestic violence courts

Specialized domestic violence criminal courts exist in most provinces and territories for dealing with criminal prosecutions for many intimate partner violence cases. These courts are not special locales and judges generally rotate through this assignment. However, these courts have specially trained Crowns and staffing, allowing prosecutors, police, victim services, abuser counselling programs and other service providers to better co-ordinate

¹⁴² www.nycourts.gov/courts/problem_solving/idv/home.shtml

¹⁴³ www.lawschool.cornell.edu/womenandjustice/Featured-Judges/Judge-John-Rowley-IDV.cfm

services and safety planning, especially at the bail stage, and where appropriate, allow an offender to have a sentence that includes a rehabilitative component. The models differ from jurisdiction to jurisdiction, and there is a need for a comprehensive evaluation of these courts to identify which models are most effective. For example, most DV courts only work with first-time offenders; in the Yukon, however, the specialized DV court is available to repeat offenders and may be more effective, as the stakes are higher for the accused and there may be more recognition of an ongoing, serious problem.¹⁴⁴

Some of these courts involve child protection agencies. For example, the Yukon Domestic Violence Treatment Option Court has a representative of the local child protection agency on its working group (providing advice on operational issues), has a protocol for reporting to and involving child protection workers in specific cases, and schedules court in order to allow child protection workers to attend.¹⁴⁵ Court workers in Calgary's domestic violence court liaise with child protection agencies where appropriate, although an evaluation of that court noted that a number of stakeholders believed that the court would be more effective if child welfare workers were actually part of the court team.¹⁴⁶

Given the prevalence of mental illness as a concern in intimate partner violence cases – particularly those cases where there is a risk of lethality – it would be helpful to have a mental health professional available to consult with these courts and their team of professionals.

These specialized courts often require offenders to complete specific, provincially-approved programs (such as PARS – Partner Assault Response Service – in Ontario). Again, a comprehensive evaluation of the effectiveness of such programs is important to ensure that the programs truly address the issues facing the family. There should also be consideration to allowing alternate programming for parents facing charges who are involved with child protection services, as those interventions may be as or more effective than the court-associated program. Programs specifically geared toward Aboriginal offenders and recommended by child protection authorities should also be considered acceptable alternatives. This will prevent individuals from having to complete one program for the criminal proceedings and another for the child protection proceedings (although it has been

¹⁴⁴ www.yukoncourts.ca/courts/territorial/dvtoc.html; Canadian Research Institute for Law and the Family. *The Intimate partner Violence Treatment Option (DVTO), Whitehorse, Yukon: Final Evaluation Report* October 2005 http://people.ucalgary.ca/~crilf/publications/Final_Outcome_Analysis_Report.pdf

¹⁴⁵ www.yukoncourts.ca/courts/territorial/dvtoc.html; Canadian Research Institute for Law and the Family. *The Intimate partner Violence Treatment Option (DVTO), Whitehorse, Yukon: Final Evaluation Report* October 2005 http://people.ucalgary.ca/~crilf/publications/Final_Outcome_Analysis_Report.pdf

¹⁴⁶ <http://www.ucalgary.ca/resolve/reports/2011/2011-01.pdf>

noted that parenting-focused programs such as Caring Dads do not replace programs focused on woman abuse).¹⁴⁷

Specialized courts using models that have been proven to be effective, with involvement of child protection officials and express requirements to consider the impact of concurrent family and child protection proceedings, should be considered in all jurisdictions.

Judicial communication

In the absence of integrated courts, a promising option is protocols for communication between courts hearing concurrent proceedings involving the same family.

The Honourable Donna Martinson, who was a judge of the British Columbia Provincial Court and then the British Columbia Supreme Court prior to her retirement in 2012, is a strong proponent of direct judicial communication in concurrent family violence cases.¹⁴⁸ She notes that direct judicial communication is currently used in cross-border litigation, typically Hague Child Abduction Convention cases but also class action cases and cross-border insolvency cases. Some courts have rules and guidelines for this type of communication.¹⁴⁹

The Canadian Network of Contact Judges for the Hague Convention is made up of trial judges from each superior court and authorized by the Canadian Judicial Council to consider judicial networking and collaboration in cases of child abduction and custody. The Network has developed guidelines for Canadian and international communication between courts. These communications occur through conference calls or video links and are “on the record,” with counsel and the parties directly involved.¹⁵⁰ As Martinson has suggested, this existing framework for judicial communication could be adapted for use in cases involving concurrent family violence proceedings.

Joint settlement conferencing

Where there are separate but related proceedings, consideration should be given to a joint settlement conference with judges from both proceedings, all of the parties in both proceedings, and other professionals agencies that may be involved with the family, including Crown and defence counsel, family lawyers, child protection staff, victims’ services

¹⁴⁷ <http://caringdads.org/pros/res/ap/130-response-to-respect>

¹⁴⁸ [The Honourable Donna Martinson, *One Assault Allegation, Two Courts: Can We Do A Better Job of Coordinating the Family and Criminal Proceedings, Managing the Intimate partner Violence Case*, National Judicial Institute Conference, Quebec City, November 16-19, 2010](#)

¹⁴⁹ Nova Scotia and British Columbia, for example

¹⁵⁰ For a discussion of how conferencing can work between two courts in Canada, see *Giesbrecht v Giesbrecht*, 2013 MBQB 115 per Diamond J.

and possibly mental health services. This would allow the litigants and different professionals to better understand how the other system could assist in addressing the problems faced by the family, and permit resolutions which do not conflict with each other.

Where, for example, the abuser has been working well with the child protection agency, and the agency and child protection court judge are comfortable with working towards reunification of the parent and child, that may assist the Crown in determining that a stay or plea without a custodial sentence may be best for the child and targeted parent. In cases where it becomes apparent that there is a significant risk to the child and targeted parent, the focus of court intervention may change to the criminal proceeding. Criminal sentences can be coordinated with child protection and family custody orders, and the judges can determine which proceeding ought to be given scheduling priority if a trial or trials are necessary. These joint conferences can also assist in information-sharing (see below) and disclosure issues, and may avoid unnecessary motions for production.

There are two significant challenges to joint settlement conferencing. The first is jurisdiction. In some places, and depending on the nature of the charge, the family and criminal matters will be heard by the same level of court (provincial, or superior). In other places, the criminal matter may be in superior court while the child protection and/or custody matter is in provincial court. The reverse may also be true. Coordinating proceedings may be difficult in these circumstances.

The second challenge is scheduling. It is difficult to schedule court dates for cases involving two lawyers and one judge; adding another judge and another two or more lawyers and other agencies may cause significant delay. Indeed, in most jurisdictions there is little or no judicial settlement conferencing in criminal proceedings; pre-trials are brief and negotiation often takes place on the day of trial.

Specific practices of criminal court judges and court staff:

The following practices could assist child protection agencies working with families who have concurrent criminal proceedings:

- ***Reporting concerns to child protection agencies:*** Some family court judges hearing a family case in which there are credible allegations of intimate partner violence or child abuse will report, or direct their court staff to report, to the local child protection agency. On occasion, criminal courts may report concerns to the child protection agency, typically where the mother recants or there is evidence that the parents have reunited in a case involving serious violence affecting a child.

However, reporting to CPAs is not uniformly accepted as a function of the judge or court staff. Regardless of whether the duty to report applies to members of the judiciary, reporting to child protection agencies allows for an independent investigation that is otherwise not available to judges hearing family cases, and may lead to the provision of services that can encourage the victim to testify in a criminal proceeding, and help the child and parents avoid future violence. Protocols setting out the process and factors for such communication by judges or court staff would assist in ensuring timely and appropriate reports and investigations.

- ***Seeking information:*** The impact of conflicting bail and probation orders on family proceedings can be minimized if the criminal court requests and is given accurate information regarding the state of any current or pending family proceeding prior to making any order of judicial interim release. With respect to child protection proceedings, the Crown can obtain information regarding the most recent court order and the position of the child protection authority by speaking to the social worker or the child protection lawyer acting for the agency. (The child protection lawyer is likely to have more accurate information than the social worker regarding the wording of the order and the stage of any application before the court.) Unlike most family law files, child protection court files are not available to the public. Orders in family or child protection cases are often varied, so up to date information should be sought at each appearance of the criminal matter.
- ***Considerations prior to release:*** In a case involving intimate partner violence, prior to determining whether to release the accused, and/or whether to attach certain conditions to the release, it is good practice for the criminal court judge to inquire of the Crown as to the following:
 - Are there any children in the home?
 - Were the children present during the alleged violence?
 - Has the local child protection agency been informed of the charges? If not, why not? The court can remind the Crown of the duty to report, and the jurisprudence indicating that exposure to violence constitutes grounds for a finding that a child is in need of protection.
 - Is there a history with the child protection agency? If so, are there any concerns about the accused's mental health, his or her ability to comply with conditions and/or the victim's ability to keep the accused from the home if necessary to ensure the children's safety?

- Is there any family or child protection court order, either in intimate partner or child protection proceedings, in place? If so, what are the terms?
- ***Prohibitions on contact:*** Conditions regarding contact between the accused and any children should, except in very serious cases, provide for access to be “as per family or child protection court order made following the date of this order, provided that judge has awareness of this criminal court order.” A term requiring the court clerk or Crown to inform the child protection and/or family court of the charge and of the terms of the criminal court release order would help ensure that the family court order is only made on notice of the criminal charges.
- ***Court attendance:*** Conditions permitting the accused to be in the presence of the victim and/or child for the purpose of attending court will avoid placing the parent in the position of breaching criminal conditions in order to participate in child protection or family proceedings.
- ***Changes to conditions:*** Where the Crown and defence suggest that restrictions on contact with the accused be changed or removed, it would be helpful if criminal courts were to inquire whether child protection authorities are aware of this plan and if there is a family or child protection court order in place addressing the contact. (For example, where a parent who presents a serious risk of violence or trauma to the child has been incarcerated since the date of the charge, the child protection order may not include a term restricting that person’s access to the child.) Where there is no family or child protection court order addressing access, options include adjourning the sentencing or bail review to allow child protection authorities to obtain a child protection court order, or imposing a term of sentencing that provides for contact to be as per family or child protection court order.
- ***Notice to agency:*** Where a sentence includes restrictions on contact with a child, or states that access should be as per a family or child protection court order, consider including a term requiring that the offender give notice to the child protection authorities prior to any application for access in family proceedings, in addition to the required notice to the custodial parent.
- ***Communication of findings and orders:*** Criminal court judges or court staff can order service or provide copies of bail orders, reasons for judgment, sentencing and probation orders on child protection authorities in cases of family violence, or related crimes (such as probation breaches).

Specific practices for child protection judges and court staff:

- **Screening:** Some child protection courts have developed protocols to screen for cases involving violence, so that court staff and security will be aware of the need to keep the parents separate and be alert to any potential conflict or threat.
- **Seeking information on criminal and civil proceedings:** In cases involving allegations of assault or other conduct that may result in criminal charges, judges in child protection cases can inquire about any undertakings or conditions of release. Judges can and usually do inquire about related family law proceedings; in some courts, it is standard practice for both files to be placed before the judge (where both proceedings are in the same jurisdiction), though there are many locales where the judge may not be aware of concurrent family and child protection proceedings even though they are in the same court.
- **Conflicting bail conditions:** Where the undertaking or conditions of release in criminal proceedings prohibit contact with children, and the child protection court is of the view that some form of contact is warranted, judges in child protection cases have, on occasion, asked CPA counsel to immediately locate a Crown counsel and then conducted a bail variation on the spot (provided that the judge has jurisdiction over this type of proceeding). Other options include:
 - endorsing the matter to provide for a return to child protection court upon two-days' notice in the event of a change in the parent's conditions of release by the criminal court ;
 - including a provision in the temporary child protection care order providing for access to the parent, "subject to any undertakings or conditions of release", thus allowing the access to commence as soon as there is a change of the criminal conditions, without a return to family court;
 - encouraging CPA counsel and the worker to contact the parent's criminal defence counsel, the Crown or the police officer in charge in an effort to have the conditions varied on consent in criminal court;
 - indicating in the endorsement that the child protection court is satisfied that the child will be safe under the access plan presented by the parties (which may help persuade the Crown to agree to a bail variation);
 - creating a committee of representatives from the bench, the Crown, local police services and the CPA to work toward a mutually agreeable standard condition of release pertaining to contact with children in such cases (such as "no contact, direct or indirect, with the child, except as ordered on a date following [date of release] by a family court of competent jurisdiction that is aware of this criminal court order.").

- **Disclosure requests:** The approach taken by Justices Keast and Thompson, cited above, values the child protection case equally with that of the criminal case (depending on the circumstances), and permits appropriate investigation for the child protection process by requiring disclosure of police files to the CPA.
- **Requests for adjournments:** As noted above, parents facing criminal charges often request adjournments of the related child protection proceeding on the grounds of potential prejudice to their criminal proceedings. The child protection court may refuse the request, depending on the anticipated consequences for the child;¹⁵¹ may direct CPA counsel or parents' counsel to contact the parent's criminal lawyer and ensure that lawyer is aware of the "potential cost of delay and silence in the face of companion protection proceedings,"¹⁵² propose a joint settlement conference/criminal pre-trial (involving judges and counsel from both courts in an attempt to resolve one or both matters); communicate directly with the judge in the criminal proceeding to determine which matter should take priority in scheduling, or explore ways in which the parent might be able to address the concerns of the CPA without making an admission that could be used against the parent in a criminal proceeding.

Use of a checklist, such as the following, may ensure that all relevant information is before the court:

CHECKLIST FOR CHILD PROTECTION JUDGES WHEN DV IS AN ISSUE

Is this a case where there may be family violence?

Are there criminal charges?

Are there any family or civil protection order proceedings? – if the answer is "unknown", direct child protection counsel or court staff to provide this information. Are there any bail or probation conditions relating to access to the child or other parent? If they affect the ability of this court to order access or interventions, what steps are appropriate? – endorsement specifying the intended access, to be provided to Crown; communication with criminal court; direction to CPA lawyer to communicate with Crown and possibly defence counsel.

Are there any interventions taking place as a result of the criminal proceedings that may be relevant to the child protection proceedings?

¹⁵¹ [Native Child and Family Services of Toronto v. P.\(S.\) et al., 2009 ONCJ 473.](#)

¹⁵² As suggested by Justice Glenn in [Children's Aid Society of Huron County v. R.G., \[2003\] O.J. No. 3104 \(O.C.J.\)](#) at par. 9

How will this court keep apprised of the criminal proceedings? E.g. condition of supervision order to keep CPA worker informed; undertaking by child protection counsel; communication with criminal court judge

Is this a case where it might be useful to hear from police or the Crown?

Is this a case where a joint settlement conference might be useful and possible?

4. **Practices for service providers**

Increased communication: A number of options exist to increase communication and collaboration between service providers and justice system actors, including Crown, defence, family and child protection counsel. These options include:

- Joint training of all professional groups on their respective roles and responsibilities in responding to and preventing family violence
- Formal protocols between agencies
- Co-location of services
- Sharing of staff between agencies¹⁵³
- Regular “wraparound” meetings regarding particular families
- Bench and bar committees focused on family violence

Regular communication can facilitate the following:

- Consultation by police with child protection staff during the criminal investigation. This would help police to receive and provide information relevant to the risk of future violence, determine whether the intervention of mental health professionals may be necessary, ensure which bail conditions and services the family may need to ensure safety if the accused parent is charged and released, and consider what measures could be put in place to minimize the likelihood of recantation by the complainant.
- Awareness by all parties, on an ongoing basis, as to the progress of the family, changes in charges, orders, bail and probation conditions, the family’s living situation, the accused parent’s level of cooperation with service providers, and other key information.
- Full understanding by the accused and his/her family lawyer and defence counsel as to the impact of a refusal to discuss the allegations on the child protection case.

¹⁵³ For example, a social worker from the Pembroke child protection agency works in the office of the Pembroke police services. <http://www.oacas.org/criticalconnections/resources/h1.pdf>

- Full understanding by police and Crowns as to the impact of a plea or charge withdrawal, and the opportunity by the child protection agency to plan for pleas and charge withdrawals (and consequential release from custody and/or revocation of bail orders).
- Sharing between agencies and parties of documents relevant to the violence. There is often documentary material filed in one proceeding that could well be significant to the court or parties in the other proceeding. For example, a parenting assessment done for the custody/access proceeding may be relevant to the child protection proceeding; a psychological assessment of a parent done for the child protection proceeding may be of use in the criminal sentencing hearing. While it is unrealistic to expect that all this material could or should be freely shared (due to privacy concerns, evidentiary rules and concerns about prejudice and self-incrimination in the criminal proceeding), there is considerable scope for improving the flow of information and resources about a given family. In the context of a joint settlement conference, in which the explicit focus is to find a solution for the child and family that is consistent with the public interest, all information about a family could be provided to the court; in other contexts, information may just be shared between agencies and parties.
- Awareness by Crowns and defence counsel of the accused parent’s progress in programs for reducing the risk of future violence, which can assist in the effective resolution of criminal charges.
- Awareness by the child protection agency of the victim parent’s level of cooperation (or lack thereof) with the criminal prosecution, which can, in some cases, indicate an increased risk to the child or suggest that another approach (towards reunification, for example) should be considered.
- Consideration by all professionals of sentences, custody orders and child protection orders that best meet the interests of the child.

Integration, collaboration and coordination: Numerous agencies have moved toward more collaboration, coordination and in some cases integration of services for family violence cases. The Ontario Association of Children’s Aid Societies hosted a forum on the topic, called “Critical Connections: Where Woman Abuse and Child Safety Intersect” in 2009,¹⁵⁴ showcasing a number of initiatives being developed in Ontario to increase inter-agency communication and collaboration such as Differential Response teams and the Family Violence Project of Waterloo Region (see below). Calgary has an Intimate Partner Violence Collective, aimed at coordinating the response of 50 agencies (including child

¹⁵⁴ Forum presentations can be found at <http://www.oacas.org/criticalconnections/>

protection and police) in intimate partner violence cases.¹⁵⁵ British Columbia has established a Provincial Office of Domestic Violence, which among other responsibilities has the mandate to provide training on information-sharing, host provincial consultation forums, identify strengths and gaps in all legislation, policies, programs, services and committees focused on intimate partner violence, and develop a website so service providers can share information on policies, services and initiatives across sectors.

Co-located services: One of the most effective means of ensuring information-sharing and collaboration would appear to be the creation of “one-stop” facilities where child protection workers, police officers, shelter workers and other service providers for families experiencing violence are in the same building. These provide numerous benefits, including information-sharing from the commencement of the family’s involvement with the justice system, numerous services accessible at once, and policy development borne from shared experiences between agencies.

The Family Violence Project of Waterloo Region in Ontario,¹⁵⁶ which opened in 2006, is the first such agency in Canada. One location – identified as a community services agency - houses the Waterloo intimate partner violence child protection teams, the intimate partner violence investigations branch of the police, an elder abuse response team, a Crown Attorney’s office, representatives from the Victim Witness Assistance Program, medical and counselling staff for victims of intimate partner and sexual violence, and numerous other support services such as victim relocation services, immigrant outreach, and credit counsellors. These service providers refer families to each other, and co-location allows for immediate coordinated response by multiple service providers to developments in the family’s situation. The Crown Attorney’s office consults with the child protection team regarding bail, and the Crown communicates with the judiciary to work towards better coordination of family and criminal court proceedings. There is also a high risk case review team providing a multi-service response to avoid gaps in communication. Co-location and integration of services significantly reduces the stress experienced by the parent seeking services, increases the reliability of risk assessment, and enables the immediate and comprehensive provision of services. Since the facility opened, the number of reports of intimate partner violence that have led to charges has significantly increased.¹⁵⁷

Protocols: Formal protocols between agencies can also assist in ensuring information-sharing and avoiding conflicting orders. Many police and child protection agencies have

¹⁵⁵ <http://www.endviolence.ca/about-us/>

¹⁵⁶ www.fvpwaterloo.ca/en/

¹⁵⁷ <http://www.oacas.org/criticalconnections/resources/h2.pdf>,

<http://www.wvlhin.on.ca/uploadedFiles/Celebrating%20Success%20-%20Family%20Violence%20Project.doc.pdf>

protocols for the joint investigation of cases where the parent is charged with abusing a child, but fewer may have protocols where the child is not the direct target of the abuse. It should be noted, however, that some provincial standards are now moving away from structured, traditional investigations in which existing protocols dictate the agency's approach, toward a more flexible, customized response that may or may not follow the protocols.¹⁵⁸

Promising practices for Crowns and police

Even without co-location, formal protocols or other institutional initiatives, individual professionals can change their practices so as to more effectively respond to some of the challenges presented by concurrent proceedings. Some of these practices include:

- **Consultation during investigation:** Consultation by police with CPA workers as soon as an investigation into allegations of intimate partner violence in cases where there are children resident would benefit the children. In some cases, for example, the police might learn from the CPA of prior incidents that were not reported, or otherwise unknown aspects of the family history (such as signs of mental illness) which could alter their response to the allegations. Consultation also allows the agency to provide services to the victim and children, and permits information relevant to detention and conditions of release to avoid conflicting orders.
- **Bail condition protocols:** Child protection agencies and police forces have, in some jurisdictions, worked together to identify conditions of release that permit access and interventions in the best interests of the child and victim.

Police, Crowns and criminal defence counsel should request that no-contact conditions allow exceptions for court attendance in family or child protection proceedings.

Further, where appropriate, no-contact orders should be subject to allowing "such contact with the child and other parent as may be permitted by the child protection or family court judge, provided that judge has awareness of this criminal court order and the nature of the charge."

- **Plea bargaining and withdrawal of charges:** When entering into plea negotiations, Crowns who are familiar with the child protection proceedings are in a position to consider the parent's progress in addressing the protection concerns, how the

¹⁵⁸ www.children.gov.on.ca/htdocs/English/topics/childrensaidd/childprotectionstandards.aspx#receipt

proposed plea and agreed-upon facts will affect the child and the options for the child protection proceedings. Where time allows, it is helpful for the Crown or police to advise the agency of any impending release from detention or change in conditions to allow the agency to respond appropriately. Advising the child protection lawyer as to the charges and facts pleaded to can also assist in the child protection proceedings.

- **Disclosure to child protection authorities:** When police or Crowns are responding to applications for disclosure of records to child protection authorities, efforts should be made to minimize the delay in releasing the records, given the importance of speed in responding to threats to children's safety. Regular communication by the Crown or police regarding specific events – such as new charges, recantation by the parent complainant, or convictions – which may be relevant to the child protection application would also be helpful.
- **Children testifying in criminal proceedings:** Where there is a chance the child will be subpoenaed to testify in the criminal proceedings, the Crown and child would both benefit from consultation by the Crown with the child protection agency to determine whether testifying will be harmful to the child, whether the child is receiving counselling or treatment, and what safeguards and accommodations may assist the child if s/he does testify.
- **Aboriginal families:** Where restorative justice measures are being used in the criminal process, inclusion of child protection workers or their delegates may be appropriate.

Promising practices for child protection lawyers and agency staff:

- **Screening of bail conditions:** Prior to court, counsel involved in child protection proceedings (for both parents and agencies) should attempt to learn whether criminal court conditions restrict the accused from having contact with the other parent or the child, and advise workers to keep parents in separate areas of the courthouse where necessary, as well as advising the child protection court of the existence of the conditions in advance.
- **Conflicting orders:** Where the criminal order prohibits contact between a parent and child and the child protection agency believes that it would be in the child's best interests to have such contact, child protection authorities should communicate directly with the Crown to determine what options are available, and whether the police have information regarding risk to the child that is unknown to the agency.

- **Communication regarding breaches:** Child protection workers are more likely than police to become aware of breaches of criminal court conditions regarding living arrangements and contact between the offender and the other parent and children. In some circumstances, it may be appropriate for the child protection workers to report these breaches to police. However, agency workers are often understandably reluctant to do so. In some cases, particularly where the breach or offence in question does not appear to affect the well-being of the children, police involvement may be seen as detrimental to the interests of the children. In many cases, reporting to police will damage – sometimes irrevocably – the relationship between the parents and the worker. For example, the BC Representative for Children and Youth noted that when Alan Shoenborn attended at the child protection offices for a meeting with his children, he was met by police who promptly arrested him;¹⁵⁹ a parent is unlikely to engage or trust workers following such an experience.

This apparent “one-way street” – where police have a duty to report to child protection officials, but child protection staff have no corresponding duty to report to police – can cause tension between the two agencies. Indeed, it highlights the chief tension felt by child protection workers themselves: they are mandated to assist families, but at the same time have the duty and authority to remove their children where appropriate. Joint training, local protocols and more communication between police and child protection agencies may assist in creating an understanding of their different roles and necessarily different approaches to particular developments.

Child protection staff should not be seen to be encouraging violations of conditions imposed by a criminal court. If CPA workers become aware of breaches of criminal court conditions, it is preferable for child protection staff to encourage the accused parent to have the bail conditions changed in order to reduce the risk of a criminal charge when the target parent has decided to reunite, provided reunification can be done safely for the children. It may be appropriate for child protection staff or agency counsel to contact the Crown to facilitate such a variation in bail conditions.

- **Child and parental statements:** Where a child and/or victimized parent have been interviewed by police, and the videotaped statement may be of use in the child protection proceedings, the child protection lawyer should request a copy from the Crown. This can ensure that the child protection court has the best evidence available.

¹⁵⁹ *Honouring Kaitlynn, Max and Cordon*, p.45

- **Review changes in criminal orders with both parents:** When the agency becomes aware that a parent's charges or conditions have been dropped or varied, the worker should review the remaining conditions – under family court or criminal court orders – with both parents, to ensure they are aware which conditions are now in force. CPA counsel can also advise the parents' counsel of the conditions if they are represented. The agency should also alert the parents' counsel of such changes, so that they can provide any necessary legal advice.
- **Reports on accused's progress:** Where a charged parent has participated in counselling or other interventions which suggest a reduction in the risk of future violence, child protection workers should advise the Crown. The parent's child protection lawyer can also advise defence counsel. This can assist in ensuring informed plea negotiations and sentencing. Child protection authorities should be cautious, however, about advising Crowns and police of any admissions made by a parent, as the use of that information against the parent may affect the parent's relationship with the agency.
- **Advise police and Crown of obstacles to progress:** Where the criminal charges or bail conditions are creating obstacles toward progress in the child protection case – for example by creating stress due to the possibility of deportation, or causing a parent who would otherwise admit to the abuse and undergo treatment to refrain from doing so for fear of prejudicing the criminal case – the child protection worker may advise police, the Crown and the parents' criminal and child protection lawyers, in the hopes that a resolution satisfactory to both agencies and in the child's and public's interest can be found.
- **Focus on the abuser, regardless of charges:** A number of child protection agencies have changed their overall approach to cases involving intimate partner violence. This has taken place in response to the significant increase in reports to child protection agencies of intimate partner violence cases in the last decade and a half (the Toronto CAS reported a 400% increase since 1999)¹⁶⁰ and a realization that the traditional model did not work. The traditional model resulted, in the typical case, in a brief opening of the file with the goal of achieving separation of the parents; closure of the file immediately upon separation, with little or no services provided; apprehension or threats of apprehension if the victim and children returned to the abuser; women hiding their family situation and going underground in response;

¹⁶⁰ Lisa Tomlinson, *Differential Response in Intimate Partner Violence Cases*, presentation to the National Judicial Institute, October 2012.

tension with the VAW community; tragedies where risk factors were not identified and/or there were gaps in the system; and workers feeling ill-equipped to deal with these cases. These agencies developed a **Differential Response** to intimate partner violence cases, with the following characteristics:

- **Dedicated teams focused on IPV cases:** The child protection agency intake departments screen cases and refer those with intimate partner violence concerns to specialized, trained intimate partner violence teams.
- **Work with the abuser (usually the father), not just the victim parent (usually the mother).** Communication with the abuser, which used to be secondary and often non-existent, is now a priority. The agencies spend considerable efforts trying to engage with the abusive parent, meeting him in prison if necessary, assisting him with other issues such as literacy or housing, and encouraging him to consider the impact of the violence on his children. Responsibility for ending the violence is placed on the abusive parent, rather than the victim.
- **Referrals to interventions specifically created for fathers:** Many of these agencies refer the abusive parent to the 17 week “Caring Dads” program, which focuses on the abusers in their role as parents. These can complement interventions focused on intimate partner abuse. The child protection agency will receive a report if the abusive parent fails to attend or otherwise indicates a lack of progress, and the agency can provide support to the abusive parent throughout the program.
- **Work with the family toward reunification, where safe to do so.** These agencies recognize the reality that women often return to a partner who has a history of abusing them, and that their reasons for doing so are complex. The agencies will not threaten to apprehend solely because the parties reunite; rather, they will work with the families to reduce the violence to a level where it is safe for the child to reside with both parents. The focus is on harm reduction rather than “zero tolerance.”
- **Work with police, Victim Witness Services, the VAW sector and other service providers.** The agencies using the differential response approach to intimate partner violence cases typically have far more involvement with other service providers. Agency workers may also appear in family and criminal court to advise the judge of the family’s progress, and sit on the intimate partner violence court advisory committee.

- **Work with the offender notwithstanding criminal charges.** The Differential Response approach does not require an admission of guilt to work toward reunification. This allows for better outcomes in cases where there are concurrent criminal charges and the parent is concerned about prejudicing the criminal proceedings.
- **Focus on voluntary involvement.** The Differential Response typically relies on voluntary child protection involvement with the families, and only rarely are protection applications commenced. This significantly reduces the pressure on families who may already be involved in the criminal justice system.

The CPAs which have adopted this Differential Response approach report that it has led to far better outcomes for families and children, including substantially fewer court applications and apprehensions.¹⁶¹ There has, however, been no comprehensive evaluation of this approach, other than some evaluations of the Caring Dads program, but the reports suggest it holds considerable promise for reducing violence, assisting families, and avoiding some of the challenges associated with intersecting proceedings.

A complaint often heard regarding specialized intimate partner violence courts, and which could also be made regarding this type of child welfare approach, is that it suggests that family violence is less deserving of judicial sanction than other kinds of violence or child abuse. There is a risk that the CPA may not intervene with sufficient zeal in serious cases for the sake of a differential response. It is important that agencies taking this kind of approach ensure that those cases involving serious violence and/or significant risk of lethality are treated appropriately, and that women do not feel pressured to reunite or withdraw charges for the sake of the children.

5. Concurrent Child Protection & Family Proceedings

Recognizing the complex dynamics of high-conflict cases

Where there are allegations of abuse or violence in the context separation that appear unfounded or significantly exaggerated, and especially if there are repeated unfounded allegations that the CPA has investigated, the CPA may become involved with a family due to the issue of emotional harm resulting from the conflict of the separation. In a high-conflict dispute between parents, the position of the CPA may evolve over time from support of one parent to support of the other, as the agency gains a better understanding of the dynamics of

¹⁶¹ Tomlinson, *ibid*

the case or as parental behaviour changes.¹⁶² While this change in position is appropriate, it can be a cause for strain in agency relationships with parents.

In some high-conflict separation cases involving possible emotional harm but no substantiated evidence of intimate partner violence, the agency may not have a strong view as to which parent is better able to care for the child and the agency may decide to present little evidence at a child protection trial and leave it to parents to call most of the evidence.¹⁶³ In other cases, the CPA may have a view about which parent is a preferable caregiver, but leave the parents to resolve the issue in a family proceeding, content to allow its worker to be called as witnesses. Presumably, in these cases the agency believes that the threshold for finding that a child is suffering “emotional harm” or at risk of emotional harm has not been met. There may, however, also be cases in which the agency has serious concerns but for resource or other reasons is not bringing a child protection application.

Child protection agencies are being called upon more frequently to play a role in high-conflict separations, as the emotional well-being of children, and sometimes their physical safety, is often at risk in these cases. The CPA can have an important role in investigating allegations and providing services; like other agencies involved with high-conflict cases, in many situations its primary role will be to help the parents resolve their disagreements in a child-focused manner. There will, however, also be cases where the agency should be playing an active role in family litigation.

Promising practices for family court judges and court staff:

- ***Duty to report:*** Where family violence is alleged in family court proceedings, or when the case appears to be one of high conflict, judges and court staff should consider whether the duty to report to child protection authorities has been triggered. It may be helpful to create a protocol for reporting such cases, and for sharing information such as reasons for judgment, expert reports and/or evidence of violence.
- ***Past history information:*** In those jurisdictions where disclosing to the family court information about prior child protection proceedings is not mandatory, it is helpful for judges hearing custody and access applications to inquire as to whether the family is or has been involved in child protection proceedings.

¹⁶² *CAS York v AS*, 2010 ONSC 1287 (SC), affd. 2011 ONSC 1732 (Div. Ct.).

¹⁶³ *CAS Waterloo v KAL*, 2010 ONCJ 80, per McSorley J.

- **Case management:** Some courts which do not impose case management in general will have case management for high-conflict family cases. This is a promising practice.
- **Educating parents regarding impact of conflict:** Judges have a key role in dealing with high-conflict separation cases. While this can be in the traditional judicial role of “decision-maker” in a judgment after a trial, it is increasingly accepted that judges have an important role at case conferences and interim proceedings in persuading parents to focus on needs of children and educating them about the harm to their children from their conflict and violence. These judicial efforts to reduce conflict may be revealed in comments that the judge makes in a conference or even in a judgment, and may result in court orders for counselling. This judicial role is most effectively achieved if high-conflict cases are case managed by a single judge through the family justice process.
- **Firm response to high-conflict and family violence cases:** While there is a growing emphasis on facilitating settlement of family cases, and on the whole this is a desirable trend, there is also a role for a firm, timely legal response to high-conflict cases, especially if there is alienating or violent behaviour. If parents believe there will be no effective legal response to such bad parental conduct as intimate partner violence or defying an access order, they may be more inclined to engage in such conduct, dispiriting the other parent and emotionally harming the children. Conversely if there are effective legal responses to bad parental conduct, parents may be more inclined to respect the terms of orders and promote the interests of their children.

Promising practices for lawyers for parents in family cases

- **Advising clients of impact of conduct on children:** Lawyers for parents are advocates for their clients, but they also have a critical role in advising and educating parents about the effects of their behaviour on their children. The *Rules of Professional Conduct* of Ontario’s Law Society provide that counsel for a parent has an obligation to advise a parent about the effect of their conduct on their children:

In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the

best interests of the child, where this can be done without prejudicing the legitimate interests of the client.¹⁶⁴

This advisory role requires family lawyers to understand how children are affected by high-conflict separations and intimate partner violence. While not parenting experts, lawyers need to warn abusive parents of the effects that their conduct may be having on their children. In alienation cases, lawyers should also be advising clients that, absent proof of abuse, they are expected to support, not undermine, the child's relationship to the other parent. It is often appropriate for a lawyer to point parents to various resources to improve their parenting or deal with the stress of separation, including making referrals to mental health professionals and agencies for advice and counselling.

- ***Other advice to clients:*** Lawyers are ethically obliged to advise parents about the emotional and financial costs of litigation, and should generally encourage settlement and dispute resolution early in the process, although in intimate partner violence cases a settlement must always afford the victim and children adequate protection. Lawyers should advise parents not to involve their children in litigation by discussing proceedings or showing them documents prepared for court. Most clients respect their lawyers, and modify their behaviour according to the advice that they receive. There are cases in which lawyers may, after fair warning to the client, feel that they must withdraw from providing representation for a client who is consistently refusing to follow their advice and whose on-going conduct is potentially harmful to their children. There are some clients who do not appreciate the advice of their lawyers, and who seek representation by other counsel, or who choose instead to represent themselves. However, there are also cases in which the conduct of the other party requires a lawyer to take a strong adversarial position to protect both the interests of the client and of the children.

While the focus of this discussion has been on “good family lawyers,” it must be acknowledged that some lawyers who represent clients in family cases may not be performing their roles according to the highest standards of their profession, and may be doing their clients, and the children of their clients, a long term disservice by actually heightening the level of animosity between the parents, and prolonging litigation rather than helping to resolve it. Better education of family lawyers (addressed below) is important.

¹⁶⁴ Law Society of Upper Canada, *Rules of Professional Conduct*, Commentary to Rule 4.01.

- **Duty to report:** Where a client advises their family lawyer of a history of violence, the lawyer should advise the client about the value of contacting the police or the CPA, and indeed may point to a parental duty to report in some situations. The lawyer should also consider whether he or she has a duty a report to the local CPA, or is at least permitted to do so. Because the duty to report does not apply where the report would result in a breach of solicitor-client privilege,¹⁶⁵ a report should only be made with permission of the client. Encouraging the client to report is clearly preferable than having the lawyer do this. Similarly, the client may reveal information during the course of the proceedings relevant to the risk to the child and/or victim parent; the lawyer may seek permission to disclose this information to the CPA, police and/or court where appropriate.

Specific practices for child protection agencies and other service providers:

- **Education:** CPA staff need more training about the dynamics of high-conflict cases, their impact on children, the potential for violence in such cases, and effective responses to high-conflict families.
- **Protocols and policies:** Protocols should be developed between child protection agencies and family courts, lawyers, children’s mental health and other service providers, to identify appropriate responses and information-sharing approaches in high-conflict cases.
- **High Conflict Forum:** The High Conflict Forum in Toronto is comprised of child welfare agencies, children’s mental health centres, judges, lawyers, family counselling agencies, police and other service providers. Its goals include providing multi-disciplinary training to professionals in the identification of high-conflict families, identifying best practices to diffuse conflict and focus on the children, prevent emotional harm to children, promote the development of a network of professionals for consultation, and develop a collaborative service response for high-conflict families.¹⁶⁶ A similar forum was established in Ottawa in 2006. This is a promising practice that deserves evaluation.

¹⁶⁵ The only exception to solicitor-client privilege is where there is a clear risk of imminent serious bodily harm or death: *Smith v. Jones*, [1999] 1 S.C.R. 455.

¹⁶⁶ Information on the High Conflict Forum in Toronto can be found on the website of Jewish Family & Child Services: http://www.ifandcs.com/Client/JFCS/JFCS_2011_LP4W_LND_WebStation.nsf/page/The+High+Conflict+Forum!open document

6. Interdisciplinary Education

Education and training are essential to effective responses to cases involving intimate partner violence and high-conflict separations. Joint training of police and child protection workers, alongside joint training for Crown counsel and child protection counsel, will create connections between the agencies, ensure a shared understanding of the dynamics of family violence and effective responses to those families, and go a considerable way toward addressing the tension that exists between the two systems in many jurisdictions. A number of joint training initiatives have been developed by the Centre for Research and Education on Violence Against Women and Children and their partners in Ontario, for example.¹⁶⁷

Forums like the Critical Connections Forum in Ontario are useful means of exploring the agency-based innovations. A national event, similar to the 2009 Justice Canada Symposium on Family Violence, but focusing on cases involving child protection proceedings, can bring those innovations to a much broader audience.

Many of the professionals involved in high-conflict and intimate partner violence cases are independent professionals in private practice, albeit in regulated professions. It is important that providers of professional education for lawyers, social workers, psychologists and mediators offer adequate education and training to allow them to deal in an effective, interdisciplinary fashion with these challenging cases. Interdisciplinary organizations like the High Conflict Forums in Toronto and Ottawa, and the Association of Family & Conciliation Courts are starting to provide this type of education and improve communication between professional groups.

Judicial education on concurrent proceedings is an ongoing part of the curriculum of the National Judicial Institute, and options for avoiding conflicting orders and promoting effective multi-sector responses are identified in NJI's publication, *Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice*. We note that in a number of provinces, judicial interim releases are presided over by justices of the peace, who would also benefit from increased education in this challenging area.

VII. CONCLUSION: IMPROVING RESPONSES AND ADDITIONAL RESEARCH

Intimate partner violence, child abuse, high-conflict separations and alienation allegations are complex problems. Cases with these issues present unique challenges for child

¹⁶⁷ See <http://www.learningtoendabuse.ca/about/news-events>

protection agencies, police, intimate partner violence workers, mental health professionals, the justice system and policy makers.

In some milder alienation cases and less serious intimate partner violence situations, the needs of the parents and children may be adequately addressed by referral to a parental education program or voluntary counselling. Such referrals may suffice to help parents understand the deleterious effects of their conduct and attitudes on their children, and may provide adequate protection and best promote the interests of all parties and their children. Although in general such diversion of family cases from the courts and adoption of non-adversarial approaches is to be encouraged, when there are significant intimate partner violence concerns or other high-conflict separation issues, an early, effective early legal response is necessary, including effective responses from the criminal justice and child protection systems. Further, knowing that there will be such a response will both tend to encourage compliance with court orders and promote the interests of children.

Cases involving child abuse, intimate partner violence or alienation need to be understood, prioritized and treated differently than most other types of parental separation cases. The final determination of how to respond to an individual case requires a weighing of many factors, but safety for children and victims of intimate partner violence must be a primary concern. There is clearly a need to improve communication and co-operation between agencies, professionals and judges in different parts of the justice system, in order to improve the efficiency of the justice system, the safety of the vulnerable and the interests of children.

Lawyers, judges, child protection agencies, police and other service providers need to be cognizant that their decisions and actions will address not just the immediate problems in the cases that they are dealing with, but will also affect the long-term interests of the children involved. These cases must be carefully assessed and responded to on an individual basis, and where appropriate be premised on the promotion of the interests of children, and the recognition that they are often the ones who suffer the most.

A final comment on the limits of present knowledge and the need for further research: while this paper and the works cited here offer many recommendations for improving the way in which agencies and professionals deal with family violence and high-conflict separation cases, there is clearly a need for further empirical research, and for the development and evaluation of pilot programs to deal more effectively with the complex problems that arise in these cases. We note, for example, that there is no organization in Canada monitoring courts and agencies across the country to identify innovative programs for high-conflict separations and cases of intimate partner violence, evaluate their effect and share information about effective responses. This report and the two companion reports on

concurrent proceedings have identified a number of approaches. There are undoubtedly more unknown to the authors and it is beyond the scope of this project to evaluate each option.