DRAFT

FINAL REPORT ON

COURT-RELATED HARASSMENT

AND FAMILY LAW "JUSTICE"

❖ A Review of the Literature & Analysis of Case Law ❖

Funded and Support by:

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CONTENTS

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Vancouver Association of Women and the Law (VAWL) is a member caucus of the National Association of Women and the Law (NAWL) which is a Canadian non-profit organization that has worked to improve the legal status of women in Canada through law reform since 1974. NAWL promotes the equality rights of women through legal education, research and law reform advocacy.

Part I: Framing the Discussion

A. INTRODUCTION AND OVERVIEW

1. Introductory Comments and Overview of the Issues

There is widespread acknowledgment of the acrimonious and protracted nature of family litigation — though much of the commentary and analysis is conducted in gender-neutral language which describes equally-matched, equally-intransigent and hostile parties engaged in an open-ended public dispute over custody, access, support and the division of property issues. Increasingly though, there is a recognition that there is more "going in" in these cases than excessive litigation between two hostile parties. The need to examine these same features of family law from an equality rights or gender-based perspective that takes into account the many manifestations of post-separation woman abuse is apparent.

Front-line workers and advocates have documented the post-separation harassment and intimidation experienced by women both inside and outside the courtroom in relation to custody and access disputes particularly.[1] Their qualitative research shows a correlation between the experience of abuse during a relationship and their subsequent subjection to a wide range of abusive tactics and behaviours by their ex-husbands including repeated court applications, custody blackmail, failure to pay support, verbal and physical assaults during access exchanges, criminal harassment, and threats of child abductions among others.

Moreover, the same research reveals that women experience the family justice system as being complicit in the extension of the abusive relationship into the courtroom and in failing to consider the implications of male violence and abuse in relation to custody and access determinations in a way that is respectful of women's substantive equality rights, including the right to a safe and secure existence.

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[1] Georgina Taylor, *In Whose Best Interests: A Report on Women's Experiences in Custody and Access* (Vancouver: YMCA, 1992); Susan Crean, *In The Name of the Fathers: The Story Behind Child Custody* (Toronto: Amanita Enterprises, 1988); Phyllis Chesler, "Mothers on Trial: The Custodial Vulnerability of Women" (1991) 1(3) *Feminism and Psychology* 409; and Georgina Taylor, Jan Barnsley and Penny Goldsmith, *Women and Children Last: Custody Disputes and the Family "Justice" System* (Vancouver: Vancouver Custody and Access Support and Advocacy Association, 1996).

These two issues — court-related harassment and the complicity of the family justice system — are inextricably interwined, such that it is not possible to examine one without the other and capture the totality of women's experience.

This Report identifies other sources of support which lend credence to these observations — both to the existence of court-related harassment as a gendered phenomenon. The feminist legal literature, particularly, U.S. literature, is replete with references to the phenomenon of battering men using the legal system as a means of continuing the harassment and abuse of their ex-wives. [2] The term 'separation assault' provides the analytical link between past violence and current legal disputes. Academic research and analysis in the Canadian context is not as far advanced.[3] Moreover, there is now social science research that documents the post-separation manifestations of male violence and abuse including, physical violence, threats of violence, wife killing, criminal harassment, economic abuse and violence and abuse of children. The conceptualization of court-related harassment as an extension of that male violence and abuse fits within this framework.

Similarly, research documents (1) the gendered aspects of custody blackmail, (2) the inefficacy of joint custody in 'high conflict' families, (3) myths surrounding the prevalence of false allegations of sexual abuse, (4) the fact that violence and fear affect many women's ability to negotiate for marital assets after separation, (5) the conceptualization of abusive husbands as abusive fathers, and (6) the negative effects of witnessing abuse on children. This research shows that the current assumptions that inform the application of family law in contested custody cases — particularly where there allegations of wife abuse — should be revisited.

Case law research is conducted to ascertain whether it is possible to identify a subset of contested family cases are extremely protracted and acrimonious and to what extent gender figures in the observations that made with respect to these cases. A sample of case law is reviewed to ascertain whether there is any support for the claims of court-related harassment and to determine the extent to which the detrimental impact of the failure to incorporate an analysis of male violence is reflected in the case law.

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[2] Mary Cooper, *Child Custody and Access in the Context of Family Violence: An Overview and Annotated Bibliography* (Vancouver: B.C. Institute on Family Violence, 1994).

[3] One of the few contributors is Melanie Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-Making" (1997) 4 *Canadian Journal of Family Law* 31. While Canadian academic literature is underpresented, there has been a considerable amount of collection of qualitative and anecdatal data and community-based research in this regard. See, Taylor, Barnsley and Goldsmith, for example. *Supra* note 1.

Quantitative research on various aspects of this issue remains to be done. Attempts to conduct quantifiable research on court files were not successful as permission to access court files in various registries was not granted. Moreover, attempts to gain access to Family Maintenance Enforcement Program data were also not fruitful. The implications of the lack of research in this area are far-reaching as it is difficult to make concrete recommendations for reform without the benefit of quantitative data which shows the extent to which these issues are problematic for women litigants. The barriers to access have implications of their own for the potential of equality-seeking groups and independent researchers to conduct their own research and analysis.

Still, the incorporation of an analysis of male violence against women in relationships has largely eluded policy makers working in the family justice system. The result is what amounts to a policy vaccum in this regard. Indeed, the vast majority of research and analysis of the issue of male violence against women in relationships has been undertaken in the context of criminal law and policy — a direct result of the lobbying efforts of women's groups and advocates to have male violence 'criminalized' and brought into the public sphere.[4] The unintended consequence of these efforts to criminalize male violence has been to divert virtually all attention and resources to the criminal justice side of the equation — without adequately considering the need to address the issues in the context of the family justice system as well.

The failure to move to incorporate an analysis of post-separation wife abuse into the development of family law and policy is not surprising. Contemporary family law and policy is, to a large extent, predicated on an assumption of gender equality that is couched in gender neutral terms.[5] For instance, the *Divorce Act* directs judges to (1) use the "best interests of the child" standard when making decisions involving child custody and access; (2) refrain from considering evidence of past conduct unless it is relevant to the best interests of the child; and (3) consider which parent, as the custodial parent, will likely facilitate maximum contact with the non-custodial parent. The substantive law does not expressly contemplate the consideration of woman abuse in the context of custody and access decisions.

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[4] On a policy level, in British Columbia at least, there is no equivalent in the family justice system to the Policy on the Criminal Justice System Response to Violence Against Women in Relationships (Updated August 1996). See also Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in Susan B. Boyd. ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 87.

[5] Martha L. Fineman, "Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality" (1989) 3 Canadian Journal of Women and the Law 256; and Susan B. Boyd, "From Gender – Specificity to Gender – Neutrality? Ideologies in Canadian Custody Law" in Carol Smart and Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge) 126.

Similarly, the Rules of Court of any particular province which govern the courts' procedure are similarly silent, and perhaps even more impervious to the need for gender analysis. The provisions that exist to deal with vexatious or abusive litigation are inadequate because they are not interpreted in a way that incorporates an analysis of male violence.

> "...the relative neglect of the crime of wife assault by agents of the family law system is part of the broader pattern of neglect by agents of the criminal justice system"[6]

2. Terms of Reference and Working Definitions

a. Working Definitions

In 1995 the B.C. Ministry of Women's Equality commissioned research on a very narrow formulation of 'court harassment'; that is, the use of multiple court proceedings which are abusive or harassing in nature by ex-husbands in family law litigation — and particularly litigation of custody and access disputes. One of the main findings of the Report entitled *Women Litigants' Experience of Court Harassment — A Working Research Report* [7] was that a much broader definition of the term 'court-related harassment' was needed to accurately reflect the totality of women's experience. With funding from B.C./Yukon Women's Programs and the Feminist Research Education Development and Action Centre (FREDA), the opportunity arose to further conduct research on the issue of court-related harassment — the results of which are reflected in this Report.

This Report adopts a broad working definition of the term 'court-related harassment' — referring to the range of tactics and behaviours adopted by ex-partners to harass and intimidate inside and outside of the courtroom in the context of custody and access disputes. The abusive use of multiple court proceedings represent one tactic within this range of behaviour. Others include custody blockmail, failure to pay support, verbal and physical assaults during access exchanges, criminal harassment, and threats of child abductions.

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[6] Desmond Ellis, "Family Courts, Marital Conflict Mediation and Wife Assault" in Zoe Hilton, ed., *Legal Responses to Wife Assault: Current Trends and Evaluation* (Newbury Park: Sage, 1993) 165.

[7] prepared by Sandra A. Goundry for the Ministry of Women's Equality (April, 1995)

The terms "wife abuse", "woman abuse" and "male violence against women in relationships" are used interchangeably to refer the central concern in this Report — violence and abuse against women in a heterosexual family context. The term "wife" includes women living common law or having intimate relationships with men and underscores the role of familial ideology in relation to abuse.[8] The terms "post-separation wife/woman abuse" are interpreted the same way.

b. Terms of Reference

The Proposal submitted to the funders was ambitious in scope — a copy of the Proposal is on file with the author. The original Work Plan contemplated (1) a literature review and consultation with the family bar and community-based women's groups and (2) case law research and review of relevant legislation and policy. A comprehensive literature review was conducted and an Advisory Committee was formed so that on-going consultation with community-based women's groups would be maintained throughout the Project. An Interview Guide was developed for the purpose of interviewing family law practitioners, however, time and resource constraints militated against its full use as only a small number (5) of interviews were conducted.

A substantial amount of case law research was conducted using a combination of computer-assisted research and manual searches of reported and unreported family law cases as anticipated in the Proposal (See Part III for details). In what now appears to be a case of foreshadowing, the Proposal identified research involving a review of a sample of Family Court files at specific Registries as "contingent on the resolution of access and privacy issues with the presiding Administrative Judge."

In any event two factors substantially limited the ability to carry out all of the activities outlined in the Proposal; namely, (1) a significant shortfall between funding requested and funding received, and (2) the barriers encountered in attempting to gain access to various databases. The first factor is a predictable feature of project-based funding an is usually dealt with by 'scaling back' both the objectives and the work plan for the Project.

It is the second factor that may be of interest to various readers as attempts to gain access to various databases containing relevant family law information were

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[8] See Wanda A. Wiegers, "Compensation for Wife Abuse: Empowering Victims" (1994) 28 *U.B.C. Law Review* 247 at 248, fn. 2. As Wiegers notes this focus on wife abuse distinguishes it from other instances of abuse that share some of the same characteristics, including elder abuse, child abuse and partner abuse within lesbian and gay relationships.

unsuccessful. Attempts were made to access both the Family Maintenance Enforcement Program (FMEP) and Provincial Court family case files at a number of registries across the province. These attempts to access other sources of data spanned the course of almost a year.

(i) The Family Maintenance Enforcement Program Database

While outside the parameters of the original research proposal, the FMEP database was identified as containing potentially relevant information with respect the relationship between allegations of violence or abuse and the frequency of repeated applications to vary maintenance orders. While acknowledging data was based on a restricted population; that is, only clients of FMEP would be reflected in the database, it was determined that the data may be of relevance to the Project.

In any event, after initial discussions with FMEP officials in August of 1996, a formal written request was submitted to the Program asking for permission to access the database in a limited fashion. The ensuing events unfolded over the next year, ultimately, access to the FMEP database was denied.

In November of 1996, the Program indicated that a decision on our request would be delayed until May of 1997 when amendments to the *Family Maintenance Enforcement Act* were scheduled to be passed. In May of 1997 discussions with FMEP were renewed regarding access to the database. In June of the same year a second request for access was submitted on the advice of Program personnel. In July of 1997 we learned that the proposed amendments to the Act would not be passed until January 1998. Some limited statistics were made available but they were not in a form that was useful for our purposes. Further discussions related to having the FMEP conduct 'special runs' on publicly available data continued through June and July. In November the Program advised us that it would not be possible to conduct the 'special runs' we had requested.

(ii) Provincial Court Family Files

The original Proposal contemplated a review of a small sample of Provincial Court family case files for various indicia of 'harassment'. This task in the work plan was proposed with the express condition that its completion was contingent on gaining permission from the presiding Administrative Judge. In the end, this research avenue was not available. Again, the attempt to gain access to these court files spanned a six month period before the issue of access was finally resolved. A brief outline of events follows.

In November of 1996 letters requesting permission to access Provincial Court Family law files were forwarded to the Administrative Judges in Kelowna, Prince George, Prince Rupert and Vancouver. The Administrative Judge in Vancouver granted access; the one in Prince Rupert granted access with the stipulation that only the research lawyer would be granted. A decision was made to conduct the case file research in Vancouver during the summer months when both law students would be available to work as research assistants and, at the time, the courts would be closed which would minimize disruption for registry staff. However, upon attempting to finalize these arrangements with personnel at the Robson Square registry in the Spring of 1997, we were informed that a rotation of judges had occurred and permission for access had been rescinded by the 'new' Administrative Judge for Robson Square.

As already alluded to, the barriers encountered in researching the issue were substantial. The roadblocks encountered resulted in significant delays for the Project and a further inability to carry out other aspects of the research plan because of the expenditure of resources in attempting to gain access to these databases. Beyond the difficulties raised for this particular research project, this experience, if a common one, has implications for the potential of equality-seeking groups and independent researchers to conduct their own research and analysis.

For these reasons among others, the research component of the Project focused on conducting an comprehensive literature review and review of a sample of case law drawn from Quicklaw and the database of B.C. Supreme Court judgements located on a website. (See Part III). A small number of interviews with family law lawyers were conducted on an informal basis.[9]

3. Objectives

The specific objectives of this Report are:

- to provide a context within which to discuss the issue of court-related harassment as a gendered phenomenon and its relationship to post-separation wife abuse

- to identify support in the legal and social science literature for the qualitative community-based research conducted by front-line workers and advocates;

[9] Only five interviews were conducted due to time and cost constraints.

- to determine whether the themes identified in the literature review are reflected in a sample of British Columbia case law;
- to ascertain what other evidence is available to support the claims of women litigants and their advocates and their calls for policy and law reform;
- to make some preliminary recommendations for reforms to family law and policy which will provide a starting point for meaningful discussions between policy makers, administrators, service providers and women's advocates.

4. The Structure of the Report

This Report has four Parts.

Part I sets out some introductory comments as well as the objectives and structure of the Report. This Part introduces some context for the research and analysis presented in the body of the Report. This contextual piece has two components — both are presented in summary fashion. The first provides an overview of the spectrum of post-separation violence and abuse experienced by women leaving intimate relationships. The second highlights three related political and legal trends; namely, the fathers' rights movement, the erosion of mothers' custody rights and the widespread introduction of alternative dispute resolution (ADR) — especially family mediation programs.

Part II highlights those aspects of court-related harassment that have been identified as problematic for women litigants and their children based on a review of community-based and academic literature. A number of principal themes are canvassed and their implications for family law and policy explored.

Part III involves a review of reported and unreported case law with a view to determining whether the same themes described in the literature are reflected in this sample of case law. Other observations which can be made based on an analysis of this case law are also highlighted for further discussion.

Part IV summarizes the main observations and findings of the Research Report, laying the foundation for further research and policy analysis. The final item in the Report involves the presentation of preliminary recommendations for reform of the legal and policy framework which informs the family justice system.

First though, it is necessary to provide a context for the research and analysis that is presented in the remainder of the Report. To this end, the spectrum of post-separation violence and abuse experienced by women and children is outlined. Afterwards, a number of trends are highlighted for further consideration; in particular,

(1) the fathers' rights movement;

(2) the erosion of mothers' custody rights; and

(3) the large-scale introduction of alternative dispute resolution (ADR) programs — especially mediation — as an alternative to the court-based family justice system.

B. THE CONTEXT FOR ANALYSIS — MAKING THE CONNECTIONS

1. The Spectrum of Post-Separation Male Violence and Abuse Against Women in Intimate Relationships and Their Children

There is a significant body of literature and research documents the systemic nature of post-separation violence and abuse directed at women and their children in the course of leaving intimate relationships. This literature and research underlines the fact that a woman's separation from an abusive partner does not necessarily mean she has escaped further abuse. (McMahon and Pence, 1995; Macleod, 1987; Zorza, 1995, Pagelow 1994, Geffner & Pagelow, 1990).

The research suggests that it is not uncommon for these women to be pursued by their abusive husbands or partners after the relationship has ended. These women continue to be vulnerable to a range of violence and abuse perpetrated by their ex-partners, including physical and sexual assaults (and threats thereof), intimate femicide, criminal harassment and economic abuse. Moreover, children suffer from the traumatic effects of witnessing the violence and abuse directed at their mothers and are at risk of being abused themselves.[10] A picture of the nature and extent of this abuse is presented in the following pages.

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[10] U.S. research is in line with the Canadian research outlined below. Joan Zorza uses U.S. morbidity and mortality statistics to show that the assumption that a battered woman will be safe once she leaves her abuser is a false one. Joan Zorza, "Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women" (1995) 29(2) *Family Law Quarterly* 273 at 274.

a. Physical Violence, Threats of Violence and Intimate Femicide

Women who have separated from abusive male partners often continue to experience physical violence and threats of violence.[11] According to the 1993 Canadian Violence Against Women Survey, approximately 20% of separated wives were physically abused by their former spouse when they separated despite the conventional wisdom that links these women's safety with the act of leaving the abusive relationship. Thirty-five per cent of these women reported that their husbands had become more violent after they had separated.[12]

According to the *Final Report of the Canadian Panel on Violence Against Women*, battered women who are separated from their partners are five times more likely to be killed by their ex-partners than are other women.[13] In short, not only are women separating from abusive men at risk of serious injury, they are also at greater risk of being killed.

In a study of demographic risk patterns for uxoricide or 'wife killing' in Canada, Wilson and Daly find that the risk of wife killing is substantially elevated in the aftermath of separation. These authors note that in any sample of well-described spousal homicides, there are generally three categories of precipitating events, including: (1) the husband's accusing the wife of infidelity; (2) a unilateral decision by the wife to terminate the relationship; and/or (3) a generalized inability to control her.[14]

Another study entitled "*Women Killing: Intimate Femicide in Ontario* 1974-1990" found that of the 896 women killed during that period, 61% were killed by estranged or intimate partners. Moreover, although data from the police files was not complete, a history of violence against the victim by the accused was present in more than half

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[11] Jane Vock, et al., "From Child Witnesses to Pawns: Post Separation Tactics of Abusive Ex-Partners (Conference on Children Exposed to Family Violence, London, Ontario, June 1997) [unpublished] at 7 (citing Daniel G. Saunders, "Child Custody Decisions in Families Experiencing Woman Abuse" (1994) 39(1) *Social Work* 51).

[12] Holly Johnson and Vincent F. Sacco, "Researching Violence Against Women: Statistics Canada's National Survey" (July 1995) *Canadian Journal of Criminology* 281 at 340; Jane Vock, et al., *ibid.* at 7; and Peter Jaffe, "Children of Domestic Violence. Special Challenges in Custody and Visitation Dispute Resolution" full cite unavailable 19 at 24.

[13] Final Report of the Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence – Achieving Equality* (Ottawa: Supply and Services, 1993) at 163.

[14] Margo Wilson, Martin Daly and Christine Wright, "Uxoricide in Canada: Demographic Risk Patterns" (July 1993) *Canadian Journal of Criminology* 263 at 264-265 (citing numerous authors).

the cases where the killer was a current or estranged partner.[15]

These findings are supported in similar studies from other jurisdictions as well. For example, an Australian study found that 47% of victims of wife killing in New South Wales were killed within two months of separation[16].

A study conducted by Mary Cooper in British Columbia found that for male-perpetrated, partner-only homicides, separation was the main precipitating event.[17] Fully one-third of the family homicides came about as a result of an intimate relationship breaking up. Cooper also concluded that killing others as a result of separation is primarily a male phenomenon. Four-fifths of the perpetrators were men.

This finding is consistent with other studies of killings of intimate partners. However, Cooper's study is unique in that it also looked at which other family members were killed as a result of separation. Cooper found that intimate partners comprised only two-thirds (67%) of the 46 victims who were killed. Thirteen children were also killed — accounting for 28% of all victims of separation homicides.

b. Criminal Harassment aka "Stalking"

Section 264 of the *Criminal Code* creates the offence of criminal harassment. According to the Metro Action Committee on Public Violence Against Women and Children (METRAC), the section is designed to deal with situations where a person, usually a women, is subjected to harassing behaviour, most often by a former partner. This harassing behaviour causes the victim to legitimately feel a threat to her safety.

Research shows that victims of criminal harassment are usually women who are stalked by men.[18] Data from the Revised UCR Survey reveals that 80% of 7,472 victims were female and 88% of 5,382 accuseds were male.[19] Analysis of the relationship between the victim and the accused indicates that approximately 40% of

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15 Maria Crawford and Rosemary Gartner, *Women Killing: Intimate Femicide in Ontario 1974-1990*, A Report Prepared for the Women We Honor Action Committee, April 1992.

16 Margo Wilson, Holly Johnson and Martin Daly, "Lethal and Nonlethal Violence Against Wives" (July 1995) *Canadian Journal of Criminology* 331 at 341 (citing A. Wallace, *Homicide: The Social Reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986)).

17 Mary Cooper, *Wasted Lives: The Tragedy of Homicide in the Family* (Vancouver: B.C. Institute on Family Violence, 1994) at 11, 19.

18 Rebecca Kong, "Criminal Harassment" 16 (12) *Juristat* (Ottawa: Statistics Canada).

19 *Ibid.* at 3.

female victims were harassed by ex-spouses and approximately 18%, by ex-boyfriends.

Further, Brockman and Gill conducted a study on stalking which involved an analysis of a sample of criminal harassment cases. The researchers found that 57% of the cases in the sample involved current or former partners and the majority of victims were female.[20] In addition, previous violence was reported in 50% of the criminal harassment cases involving current or former partners.[21]

Brockman and Gill also noted that one of the advocacy groups interviewed for the purposes of the research warned that this *Criminal Code* section is actually fostering a false sense of security and promoting an unfounded belief that women are now better protected. In fact what is happening according to this advocacy group is that abusive men are using the section to file criminal harassment charges against women.[22]

c. *Economic Abuse*

There are numerous references in the literature to women's experience of various forms of economic abuse once they separate from their abusers.[23] Custody litigation in the context of domestic violence is presented as an additional weapon which batterers use to force economic concessions from the women they have battered. The foundation of economic abuse appears to rest on the creation of financial insecurity and the depletion of assets and resources. Liss and Stahly point out that abusive fathers are much more likely to refuse to pay child or spousal support than are fathers who are not abusive.[24] One author notes that an abusive ex-partner may circumvent legal obligations to pay child support by quitting his job or working under the table — if in fact he decides to pay at all. Other authors suggest that these men use the family justice system to drain the mother of any financial resources.

Keenan notes that many battered women cannot afford any legal representation whatsoever. As a consequence they are forced to accept whatever is offered in the way of financial support, if anything. She cites gender bias reports which underline the fact that courts routinely decline to order more the financially secure husband to

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20 Richard Gill and Joan Brockman, *A Review of Section 264 (Criminal Harassment) of the Criminal Code of Canada* (Ottawa: Department of Justice, 1996).

21 *Ibid.* at 29.

22 *Ibid.* at 62.

23 Vock, et al., *supra* note 10 at 8.

24 Zorza, *supra* note 9.

pay the wife's temporary and final legal fees and costs.[25]

d. Post-Separation Abuse and Children

Cooper's study is important for its findings with respect to children as homicide victims following marital violence and separation. Children constituted more than one-quarter of victims killed by men whose partners had left them, often following chronic violence against the women.[26] In fact, chronic violence preceded most of the homicides.

As suggested in Cooper's research, children are often targets, direct and indirect, of various manifestations of post-separation wife abuse. Children may experience several forms of violence themselves in addition to witnessing violence. Children are killed, assaulted, abused, abducted and traumatized by witnessing the abuse of their mothers.[27] Conservative estimates suggest at least a 30% overlap between wife assault and child abuse.[28]

One study of abductions of children during custody and access disputes showed that abductions occurred in four percent of custody and access disputes. Eighty percent of the perpetrators were male and disputes over access were involved in 60% of the cases.[29]

2. The Big Picture — Ideological and Political Developments

There are interrelated ideological and political developments which are germane to any discussion of women litigants' experiences with the family justice system —

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25 Keenan, *ibid.* at p. 251, fn. 11 citing a number of U.S. Gender Bias Reports.

26 *Ibid.* at 22.

27 Mildred Daley Pagelow, "Effects of Domestic Violence on Children and their Consequences for Custody and Visitation Agreements" (1990) 60(2) *Mediation Quarterly* 347 at 355; Vock, et al, *supra* note 10 at 2 (citing J. Blinkoff, "Empowering Battered Women as Mothers" in E. Peled, P. Jaffe and J. Edleson, eds., *Ending the Cycle of Violence* (London: Sage Publications, 1995); Peter Jaffe, D. Wolfe and S.K. Wilson, *Children of Battered Women* (Newbury Park, CA: Sage Publications, 1990).

28 Jaffe, *supra* note 11 at 22 (citing others); Pagelow, *ibid.*; and Susan Schechter and Jeffrey L. Edleson "In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies" <http:www.mincava.umn.edu/papers/wingsp.html> (28 January 1998).

29 W.A. Cole and J.M. Bradford, "Abduction During Custody and Access Disputes" (1992) 37 *Canadian Journal of Psychiatry* 264 at 264-265.

particularly with respect to the issues of custody and access. It is beyond the scope of this Report to examine these developments in any kind of detail. However, they are highlighted in order to remind the reader that the following discussion of court-related harassment takes place within a larger context.

First, the emergence of a **fathers' rights movement** and its influence on public policy makers is drawing the attention of feminist academics and researchers. (Drakitch & Bertoia, 1993; Boyd, 1989; Crean, 1988; Munroe, 1990; Taylor, 1992; Arendell, 1995) Using a rhetoric of rights and a gender-blind, same treatment approach to equality, the fathers' rights movement has become a considerable force in relation to the law of divorce and custody and access in Canada. The development of the movement is described in the following terms:

> *The problem of non-paying fathers had begun to be publicized, and the groups attempted to counter the image of the "deadbeat dad" with their own political interpretation of the situation. Custody soon became an issue for the fathers' groups, as they justified widespread non-payment of child support with the images of beleaguered fathers who were only reacting to a court system which always gave mothers custody and treated them as nothing more than "walking wallets."*[30]

Impeded access is the new battle cry of the father rights activists. Yet statistics indicate that the real problem is not impeded access but rather a failure to maintain contact.[31] Whether a result of the fathers' rights movement, or simply part of the larger backlash against women, there appears to be a concerted effort to undermine women's collective credibility on custody and access issues. The introduction of concepts like 'parental alienation' and 'malicious mother syndrome' into the discourse on custody and access work to further this goal.[32]

Second, gender-neutrality has come to be associated with an **erosion of mothers' custody rights.** Broken down this erosion is marked by an attack on the mother-custody norm, the disassociation between mothering and nurturing, a devaluation of

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30 M.L. Fineman and A. Opie, "The Uses of Social Science Data in Legal Policy Making: Custody Determinations and Divorce" (1987) *Wis. L. Rev.* 107 at 116

31 Karen M. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" (1992) 30(3) *Alberta Law Review* 852 at 865; and Chesler, *supra* note 1.

32 See generally, as examples, Lynn D. Wardle, "Divorce Violence and the No-Fault Divorce Culture" (1994) *Utah Law Review* 741 and Richard A. Gardner, The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Sex Abuse (Creskill, N.J.: Creative Therapeutics, 1987) and Ira Turkat, "Divorce Related Malicious Mother Syndrome" (1995) 10(3) *Journal of Family Violence* 253.

mothering per se, and support for fathers' rights at the expense of mothers.[33] The available statistics show that while mothers get sole custody of their children in 86% of non-contested cases — this figure represents the mutual decision of both parents to award sold custody to the mother. When fathers petition for custody, the available research shows that (1) custody awards are distributed almost equally between mothers and fathers custody awards or (2) father petitioners are granted custody in 74% of Provincial Court and 91% of Supreme Court cases.[34]

Further, the displacement of the 'tender years' presumption by the decidedly gender-neutral "best interests of the child" principle is consistently cited by academics as a marker of the erosion of mothers' custody rights. Boyd and others have focused on the ways in which the concept of gender neutrality has worked against mothers in contested cases and explored the extent to which the philosophy of shared parenting and 'expanded' access regimes have further contributed to the erosion of mothers' custody rights.[35]

Third, the introduction of **alternative dispute resolution (ADR) programs — particularly family mediation programs** — is another national tread that must be taken into account when considering the issue of court-related harassment in the context of family law litigation. The term ADR encompasses a wide range of dispute resolution mechanisms, including mediation and conciliation, that are generally promoted as low-cost alternatives to litigation that are both constructive and consensual. Family mediation programs and parent 'education' courses are increasingly being adopted into the family justice systems of various provinces.

However, women's advocates and feminist academics are not convinced that family mediation is a panacea for all of problems associated with the court-based family

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[33] Jane Pulkingham, "Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination" (1994) 9 #2 *CJLS* 73 at 87.

[34] Carl Bertoila and Janice Drakich, "The Fathers' Rights Movement: Contradictions in Rhetoric and Practice" (1993) 14(4) *Journal of Family Issues* 592.

[35] Susan B. Boyd, "W(h)ither Feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12 *Canadian Journal of Family Law* 331; Susan B. Boyd, "Child Custody, Relocation, and the Post-Divorce Family Unit: *Gorden* v. *Goertz* at the Supreme Court of Canada" (1997) 9 *Canadian Journal of Women and the Law* 447; Dawn M. Bourque, " 'Reconstructing' the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10(1) *Canadian Journal of Law and Society* 1; Susan B. Boyd, "Child Custody, Idealogies, and Employment" (1989) 3 *Canadian Journal of Family Law* 111; Chesler, *supra* note 2.

justice system.[36] Instead, they are highly critical of a number of aspects of family mediation — focusing particular attention on issues related to (1) abuse and power imbalances, (2) the failure to protect individual rights and entitlements, (3) the lack of integration of diversity issues, (4) the absence of mediator accountability, (5) the problems with mediator neutrality and (6) the failure to ensure financial disclosure and confidentiality. In short, many of the same criticisms that are made with respect to the court-based family justice system are also duplicated in critiques of ADR generally and family mediation particularly.

C. SUMMARY

The long-standing assumption that women who experience violence and abuse in their intimate relationships need only leave their abusers in order to escape further violence and abuse has been shown to be false. In fact, the above research shows that women are at risk for escalated violence and abuse. What is clear from this picture of post-separation violence is that abusive men do not relinquish control over their partners upon separation. In fact, women are subjected to a whole range of new tactics designed to physically intimidate, emotionally terrorize and financially bankrupt.

As well, there is a larger political and legal context to consider which is marked by the emergence of a fathers' rights movement, the erosion of mothers' custody rights, and the introduction of ADR, particularly family mediation, as an alternative to the court-based family justice system. All of these developments have implications for women confronted with the necessity of having to rely on the family justice system to settle a custody and access dispute.

The remainder of this Report sets out other sources of support for the observation women litigants in custody and access disputes are often confronted with harassing tactics and intimidating behaviours that are carried out both inside and outside the court room — hence the term 'court-related harassment'. As well, the Report examines the family justice system's complicity in women's overall negative experience with that system.

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[36] See Barbara Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7(4) *Mediation Quarterly* 317 and Sandra A. Goundry, Yvonne Peters & Rosalind Currie, *Family Mediation in Canada: A Review of the Literature & Analysis of Data from Four Publicly Funded Mediation Programs* prepared for SWC Policy Research Fund (March 1998) in press.

Part II: Making the Connections

— Court-Related Harassment and Wife Abuse: A Review of Recent Research and Literature

A. INTRODUCTION

This section of the Report examines (1) references to court-related harassment, as narrowly and broadly defined, in both the academic and community-based literature; and (2) the experiences of women litigants with a family justice system which appears to sanction this post-separation harassment and abuse. Court-related harassment refers to the post-separation harassment tactics and behaviours of abusive ex-partners both inside and outside the court room.

The purpose of this section is two-fold: (1) to ascertain which aspects of court-related harassment are identified and recognized as systemic problems for women litigants; and (2) to examine the correlation between court-related harassment and male violence and abuse against women in intimate relationships. The evidence in the literature cited in support of these observations and analyses is canvassed.

B. THE CORRELATION BETWEEN COURT-RELATED HARASSMENT AND WIFE ABUSE

1. Introduction

For years, women's advocates have warned policy makers and justice system administrators that it is not safe to assume that women are able to escape further abuse and harassment simply by leaving an abusive relationship. In fact, women's advocates, and an increasing number of academics, contend that the same dynamics of power and control that characterize an abusive spousal relationship extend to the post-separation 'relationship' — with abusive ex-partners becoming more creative in their harassing tactics and ploys.[37]

As demonstrated in the previous section, there is a growing body of research which

[37] Taylor, *supra* note 2; Chesler, *supra* note 2; Crean, *supra* note; Zorza, *supra* note 9; and Taylor, Barnsley and Goldsmith, *supra* note 2.

supports the view that separation and divorce are particularly dangerous times for women leaving abusive spouses. Further, since many women leave their abusers as a consequence of violence and out of fear for their future safety (and that of their children), the need to resolve issues related to custody, access, and support provide ex-spouses with legal and extra-legal opportunities to inflict further abuse. In short, legal issues that must be decided upon separation and divorce offer the abuser another forum within which to harass his ex-partner.

The situation of women litigants in this scenario is exacerbated by the failure of actors within the family justice system to recognize the nature of the dynamic of post-separation wife abuse and the extent to which is operative. Contemporary family law and policy is based on a liberal conception of equality between spouses in which the concept of gender-neutrality guides decision-making. In custody and access determinations, consideration of the 'best interests of the child' principle is undertaken within this paradigm. Moreover, it is assumed that children benefit from as much contact as possible with both parents, even in situations where women abuse is evident. Judges are directed to consider which party will best facilitate that contact.

In this formulation there is little room for consideration of the dynamics of male violence and abuse. This incongruence between theory and women's reality carries with it serious consequences for women and fuels calls for a reconsideration of the assumptions and ideologies which inform policy and legislation[38].

There are a number of identifiable themes in the literature which are related to the exploration of the dynamic between wife abuse, post-separation wife abuse and women's experiences of court-related harassment. While writers focus on different aspects of the dynamic and use various terms to name and describe what they observe, the underlying themes remain constant. That is, women who leave abusive relationships are very often subjected to continued harassment and abuse both within the court room and outside of it. Only the picture is getting clearer, the connections more apparent and the complicity, whether intentional or not, of the family justice system more defined.

For instance, the degree to which evidence of wife abuse is ir/relevant in custody and access determinations has been analysed as has the practice of pathologizing mothers who raise allegations of abuse. The literature review revealed more than one reference to the use of social services agencies as a weapon by non-custodial ex-husbands in custody and access disputes. The various strategies employed by ex-partners to maintain financial control and/or precipitate the financial impoverishment of women are consistently highlighted.

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38 *Ibid.*

The especially protracted and acrimonious nature of family law litigation has long been recognized as idiosyncratic in relation to other forms of civil litigation. Only relatively recently have the gender-neutral descriptions of this very public forum for dispute resolution — the courts — given way to references to the possible connections between abusive or vexatious litigation and gender bias issues.

Further, recent social science research and analysis is beginning to shed light on some of the seemingly intractable problems which are part and parcel of the phenomenon of court-related harassment. Most importantly, this social science research provides support for the claims of women litigants and their advocates and underlines the need for changes to the assumptions that are informing family law legislation and the decisions of judges — at a minimum. For instance, there is now research which (1) details the effects on children of witnessing domestic violence; (2) identifies the correlation between abusive husbands and abusive fathers; (3) underscores the inappropriateness of joint custody for 'high conflict' families; (4) examines the gender implications of the phenomenon of 'custody blackmail'; and (5) reveals the prevailing myths surrounding allegations of child sexual abuse.

Further, there is increasing recognition in the literature of the need for policy makers and family justice system personnel to incorporate an analysis of post-separation wife abuse into all aspects of family law policy, legislation and administration. Such an analysis has to take into account its wide-ranging implications for women in the context of custody, access and support disputes.

Other jurisdictions are beginning to move in this direction. Many U.S. jurisdictions have introduced reforms to their legislative provisions with respect to custody and access in an attempt to recognize the need to consider evidence of domestic violence/wife abuse in the process of making custody and access determinations. It will be important for Canadian policy makers to monitor the experience of women litigants in these U.S. jurisdictions with a view to making changes to federal and provincial legislation and policy.

2. Naming the Problem and Making the Connections

The literature highlighted in the Report to the Ministry of Women's Equality was largely focused on demonstrating that a correlation exists between wife abuse and a

pattern of harassment and abuse post-separation.[39] The work of Martha Mahoney is representative of this body of literature. Mahoney suggests that the term "postseparation woman abuse" begins to grapple with the intractable problem of power and control in women's experience of violence in a relationship — and by implication its continuation through the point of separation and beyond. [40]

'Separation assault' is treated as a kind of analytically distinct concept, and, according to Mahoney, reveals the underlying motivation in the ensuing legal action.[41] In other words, in cases where custody and access are contested *and* there is a history of family violence which has continued post-separation, the underlying reasons for legal action by the battering spouse may be inherently suspect. In Mahoney's words:

> *...separation assault provides a link between past violence and current legal disputes by illuminating the custody action as part of an ongoing attempt, through physical violence and legal manipulation, to force the women to make concessions or return to the violent partner. It reveals the potential for continuing danger from a batterer who may not have struck out physically in the recent past.*[42]

Further on the issue of abusive litigation, she writes: "...violent men will likely seek new means of control when old ones fail. Batterers use the legal system as a new arena of combat when they seek to keep their wives from leaving."[43]

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[39] Linda R. Keenan also writes about the inter-relationship between domestic violence and custody litigation and describes the focus of her inquiry as: "...the special problems faced by battered women in custody litigation, including the use of custody as a battering weapon and the dangers to battered women created by modern family law trends..." Linda R. Keenan, "Domestic Violence and Custody Litigation: The Need for Statutory Reform" (1985)12 *Hofstra L. Rev.* 407 at 410. Other scholars have commented on specific aspects of the issue. Ilona M. Bessenyey has examined the legal issues which arise in the context of visitation and domestic violence. She writes: "Visitation is frequently used by batterers as a way of harassing, annoying, and abusing the victim." Ilona M. Bessenyey, "Visitation in the Domestic Violence Context: Problems and Recommendations (1989) 14 *Vt. L. Rev.* 57-78 at 68.

[40] Martha R. Mahoney has developed a legal analysis of the concept of "separation assault" to explain the continuum of violence and abuse on which battered women attempt to exist despite the battering males they live with and sometimes leave. Mahoney notes that it is when women leave or attempt to leave abusive relationships that they usually have their first encounter with law enforcement authorities. It is also at this juncture - separation or attempted separation - that the batterer's quest for control becomes most acutely violent and potentially lethal. Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation (1990) 90(1) *Michigan L. Rev.* 1-94.

[41] Mahoney, *ibid.* at 75

[42] *Ibid.* at 78.

[43] *Ibid.* at 44 citing Lenore E. Walker and G. E. Edwall, "Domestic Violence and Determination of Visitation and Custody in Divorce" in Daniel Jay Sonkin, ed., *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (New York: Springer, 1987) pp. 127-152 at 130.

Others set out to develop a picture of what this post-separation abuse 'looks like'—particularly in relation to custody and access. Phyllis Chesler is one of the first academics to begin to document the experiences of women in the context of particularly protracted and hostile custody disputes.[44] Chesler interviewed sixty 'custodially-challenged' mothers in the U.S. She found that the litigation in these custody and access disputes lasted an average of three years, but that women were "chained to the stake of the legal system" until their youngest child became eighteen. The ongoing interaction with the legal system was the product of endless applications by their ex-husbands to have custody and access issues re-litigated.

Similarly, Walker and Edwall have examined the relationship between wife abuse and the court-based determinations related to custody and access.[45] In their view, when custody and access disputes end up in the courts, the batterer is presented with another forum within which to attempt to maintain control over his ex-wife post-separation.

Walker and Edwall's picture of ongoing harassment is one which affects multiple aspects of a woman litigant's life. What women experience as harassment and abuse is a product of the whole process — the preparations for court, the court appearance(s), the resulting order(s), and their ex-husbands' reaction to that order. Outside the court room, access orders, for example, serve as court-sanctioned opportunities for abusive men to further harass their ex-partners around the pick-up and return of the children. The instigation of multiple and frequent court hearings usually depletes her finances before his, thereby constituting another common tactic to continue the harassment.[46]

One of the most common areas in which batterers continue their harassment and other abuse involves the determination of custody and access of the children. It is not unusual for battered women to: (1) lose custody of their children; (2) be forced to co-parent them with their abuser in some kind of formal joint custody agreement;

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[44] Phyllis Chesler, *Mothers on Trial: The Battle for Children and Custody.* (Toronto: McGraw-Hill Book Co. 1991;. Phyllis Chesler "Mothers on Trial: The Custodial Vulnerability of Women" (1991) *Feminism and Psychology* 409.

[45] Walker and Edwall, *supra* note 42. Walker and Edwall rely in part on research by Sonkin and his colleagues which showed that batterers tend to pursue their ex-wives relentlessly when they write:

> One way to continue the relationship, for those men who cannot disconnect from the women they abuse, is to use the legal system as a new arena of combat. Thus there may well be a high percentage of contested divorces where there has been abuse. I estimate that at least one-half of all contested child custody cases involved families with a history of some form of family violence.

[46] *Ibid.* at 151.

and/or (3) continue to be assaulted around the time of access or visitation.[47]

There is more than one reference in the literature to the risk that battered women with children are forced to bear when judges decide that it is in those children's 'best interests' to have maximum contact with their abuser fathers. The result is a situation in which a battered woman, who escapes from an abusive relationship, is essentially court-ordered to meet with her abuser the next weekend to facilitate his access to the children.[48]

3. Official Recognition

a. Multiplicity of Court Actions as a Gender Bias Issue

Increasingly though, there is a recognition that there is more "going on" in these cases than excessive litigation between two hostile parties and the need for gender-based analysis of these issues is underlined. As a result, gender bias studies and government reports are consistently identifying the protracted nature of family law litigation as a significant public policy issue that requires attention.

As noted in the previous Report for the Ministry of Women's Equality — The Report of the Law Society of B.C. Gender Bias Committee, *Gender Equality in the Justice System*, specifically refers to the problem of multiple court applications, stating that "numerous cases where women were required to appear in court many, many times as a result of applications to vary maintenance, custody, access, and other matters." were brought to the Committee's attention.[49] The Gender Bias Committee reported learning of one woman's case in which, over a period of six years, she was brought into court by her ex-husband over one hundred times to deal with various applications to reduce maintenance and vary the terms of the access order. Unfortunately there is little detail or analysis which accompanies these statements.

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47 *Ibid.* at 127.

48 Robert B. Strauss and Eve Alda, "Supervised Child Access: The Evolution of a Social Service" (1994) 32(2) *Family and Conciliation Courts Review* 230 at 234.

49 Law Society of British Columbia, Gender Bias Committee, *Gender Equality in the Justice System*, Volume II (Vancouver: Law Society of British Columbia, 1992) at 5-68 and 5-71.

b. *Acknowledgment of a Correlation Between Woman Abuse and Court-related Harassment*

The *Report of the British Columbia Task Force on Family Violence Is Anyone Listening?* (February 1992) acknowledges the correlation between wife abuse and court-related harassment and develops the analysis further:

> *Once a battered woman leaves her abusive husband, one effective way for him to maintain power and control may be through the children. Batterers can use the legal system to achieve this by court order. Increasingly, battered women are losing custody of their children to their abusive former partner. Others are given joint custody, which enables the batterer to have ongoing contact and to continue the abuse...*

The *Report of the Canadian Panel on Violence Against Women* similarly pointed out that "[a]ccess is often an entry point for ongoing threats, intimidation and harassment of estranged partners and their children"[50].

C. COURT-RELATED HARASSMENT AND THE COMPLICITY OF THE FAMILY JUSTICE SYSTEM

Other themes in the literature involve: (1) an examination of the response (or lack thereof) of the family justice system to accounts of wife abuse and post-separation wife abuse, and; (2) consideration and analysis of recent reforms designed to address the problem(s).[51]

1. Wife Abuse — Implications for Custody and Access Determinations

Melanie Rosnes is one of the few Canadian contributors to this discussion.[52] She underlines the fact that the issue of how male violence affects women and children in

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50 *Ibid.* at 229.

51 See also, Demie Kurz, "Separation, Divorce, and Woman Abuse" (1996) 2(1) *Violence Against Women* 63.

52 Rosnes, *supra* note 3. Rosnes reviewed all custody and access cases published in the Reports of Family Law (R.F.L.) under the heading "Children-custody and access" during the period April 1992 to April 1994 inclusive. The total number of cases was 103 of which 16 were found to contain allegations, or evidence of, physical violence.

the context of child custody and access is a relatively neglected topic in Canadian academic literature.[53]

After reviewing reported family law cases on custody and access Rosnes concludes that sections 16(9) and 16(10) of the *Divorce Act* are being interpreted in ways which have serious implications for women dealing with violent men in child custody and access litigation. Specifically, she observes that maximum contact with both parents is often equated with the best interests of the children — an equation which supports the notion of a post-divorce family unit. The fact that such an ideological construct is informing judicial decision-making is problematic for women and children dealing with violent men.

Moreover, Rosnes found that a certain amount of violence within a relationship was considered acceptable by the courts and that for judges, evidence of such violence did not necessarily reflect badly on the parenting capacity of these men. Rosnes' findings support the earlier and ongoing work of women's advocates and groups like Georgina Taylor, Vancouver Custody & Access Support & Advocacy Association and Mothers on Trial.

Access often displaces custody as the focus of the ongoing dispute once a final custody order is made. One of the key points of concern raised in the literature and by women's groups in relation to access decisions is the fact that battering husbands are often granted access to their children on the basis that they are good fathers.[54] The courts appear to be preoccupied with ensuring that these batterers, as non-custodial parents, have the opportunity to maintain 'normal' relationships with their children. The safety and security of the mother is not necessarily a factor that is considered in making an access determination. Where the fact or threat of continued violence and abuse is taken into consideration, supervised access may be ordered as a means of protecting the mother and possibly the children.

There are indications in the literature that a previous history of partner abuse, and even child abuse, is not necessarily considered sufficient to warrant the termination of access rights. One author refers to judges being faced with the "unacceptable alternatives" of cutting off contact between an allegedly abusive parent and risking the safety of a child and a parent.

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53 See also, Lorenne M.G. Clark, "Wife Battery and Determinations of Custody and Access: A Comparison of U.S. and Canadian Findings" (1990) 22(3) *Ottawa Law Review* 691.

54 See Rosnes, *supra* note 3 40 citing Keenan *supra* note 38.

Lerhman notes that the recent report — *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*, firmly discourages custody awards to a parent who has been violent against the child's other parent. The Report offers three reasons for this:

(1) the abuser, in harming the other parent, ignored the child's interests;

(2) abusers often continue their controlling and threatening behaviour even after the parents are separated; and

(3) abusers who have custody of their children often use them to control the other parent.[55]

In summary, there is increasing recognition that a family history of partner abuse complicates custody litigation; as such, it is necessary to factor domestic violence into custody and access determinations. Further, there is greater recognition of the fact that the best interests of a child in a nonviolent household may be the worst interests of a child in a family where partner abuse occurs.[56]

2. Pathologizing' Mothers

Women litigants embroiled in custody and access disputes are also vulnerable to having their fitness to parent placed in issue before the court. When this happens, a whole other set of assumptions and presumptions about what it means to be a 'good mother' come into effect and quickly become the central issue to be determined. [57]

The most common way a mother's fitness to parent is placed in issue as a result of allegations by her ex-husband. Often allegations of abuse are countered with both denials and cross-allegations by the ex-husband which place the women's fitness to parent in issue. These allegations usually focus on the mother's mental health and/or alcohol or drug abuse.[58] One author notes that an abusive parent may deny any

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55 Frederica Lehrman, "Factoring Domestic Violence into Custody Cases" (1996) 32(2) *Trial* 32 at 34.

56 *Ibid.*

57 Judith Mosoff, " 'A Jury Dressed in Medical White and Judicial Black': Mothers with Mental Health Histories in Child Welfare and Custody" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 227.

58 Jaffe, *supra* note 11 at 25.

violent behaviour and accuse the injured parent of fabricating the abuse; thereby placing her credibility directly in issue.

As well, mental health professionals and members of the other helping professions are routinely retained in custody and access cases — sometimes by the parties themselves, other times by the court only. Predictably, the opinions of mental health professionals carry a lot of weight with the court. As Mosoff has noted, when custody cases become "battles of the experts", the party, usually the ex-husband, with the greater financial resources can buy more opinions, therapies and support. As a result

> *[M]others may therefore be discredited as mentally ill in custody hearings even when there is no previous psychiatric history because of the wealthier party's easier access to resources. In short the best interests of the child standard is such a pliable concept that decisions are almost inevitably shaped by the input of mental health professionals when a mother has a mental health label.*[59]

A review of the literature indicates that "pathologizing" mothers who allege wife or child abuse is not a rare occurrence. Women litigants, who are candid about their experiences and emotions, are often portrayed as unstable and overly emotional, or hysterical and/or vindictive by child custody evaluators and assessors — such portrayals undermine their cases for custody and access.[60]

The dangers inherent in custody evaluations have been reviewed elsewhere — suffice it to say that the custody evaluation introduces another element around which women litigants have to strategize and guard their "psychological flanks". Martha Deed writes:

> *'Defensive parenting' is a must. Spontaneity and a natural flow of emotion are dangerous. Each parent is continually second-guessed. Because the realities of family life are complex, there is always the danger of the single telling vignette which will be cited in court to pinpoint what is wrong with this parent.*
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> *Thus, the burdens fall disproportionately. The parent who spends the most time with the children is the most likely to deal with school, health, and discipline. Any of these areas can provide fodder for a negative evaluation even in the best of*

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59 Mosoff, *supra* note 56 at 241.

60 The problems with custody evaluations have been well documented, see Taylor, Barnsley and Goldsmith, *supra* note 2 at 69-78; Chesler, *supra* note 2 at 411; Martha L. Deed, " Court-Ordered Child Custody Evaluations: Helping or Victimizing Vulnerable Families" (1991) 28 *Psychotherapy* 76.

families.[61]

The fact that women are subjected to a higher level of scrutiny by mental health professionals and social workers should not come as too much of a surprise. Interestingly, the work of Paula Caplan and Ian Hall-McCorquodale documents the extensiveness of the phenomenon of "mother-blaming"; that is, the tendency of mental health professionals to blame mothers exclusively for whatever goes wrong with their children. [62]

Moreover, once psychologists and psychiatrists are brought into the picture as experts, there is a another 'science' and discourse which has to be translated for the court, the lawyers and the parties. One problematic result is that lawyers and judges do not necessarily understand this other 'science', but use various materials in support of their positions and rulings. For instance, Martha Deed notes that lawyers often cite Gardner's work (1987) for the statement that 95% of sex abuse allegations in the context of custody litigation are false — despite the fact that Gardner himself cites no research in support of the statement.[63]

Another concern raised in the literature is the tendency for the courts and their experts and other assessment personnel to disregard the effect of abuse on the ability to parent. There is now research which supports the view that the abuse most women experience from their partners does have a negative effect on their parenting abilities.[64] To the extent that this is true, women should not be penalized for their ex-partner's behaviour. Instead, they should be provided with the necessary support in services to allow them to parent in safety.

3. Use of Social Services Agencies

Another theme that is emerging in the literature is that of the use of social services agencies as a harassing tactic or weapon in the course of custody and access disputes. There are references in the literature to ex-husbands using social services agencies, to harass and abuse custodial mothers. Simply by filing false allegations of neglect and/or abuse with the police and child protection agencies and/or false allegations of

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61 Taylor, et al., *ibid.* at 78.

62 Paula J. Caplan and Ian Hall-McCorquodale, "The Scapegoating of Mothers: A Call for Change" (1985) 55(4) *American Journal of Orthopsychiatry* 610.

63 Deed, *supra* note 58.

64 Vock, et al., *supra* note 10 at 2 citing Blinkoff, *supra* note 18; Jaffe, *supra* note 11.

fraud with social welfare agencies, an abusive ex-partner can attempt to create additional problems for the custodial mother by involving the state in one way or the other.[65]

4. Financial Impoverishment of Women

Both the literature and the accounts of women's advocates underline the various ways in which their participation in family law litigation contributes to, and may even precipitate, the financial impoverishment of women. First, litigation is inherently expensive — any savings or assets are quickly dissipated by legal fees and disbursements. While there is a high demand for civil legal aid in Canada, the capacity of legal aid plans to remove some of the financial burden on women is severely undermined by the continuing deep cuts to civil legal aid in B.C. and across the country. Access to civil legal aid for women family law litigants is an increasingly rare occurrence.[66] Where access is obtained, the level of funding available to pursue a case is far below that which is usually required to litigate these cases.

Second, it is evident that ex-husbands and non-custodial fathers employ various strategies and tactics designed to maintain financial control over their ex-partners including: (1) the initiation of a multiplicity of applications; (2) the non-payment of spousal and child support; (3) the accumulation of arrears followed by applications for their cancellation; (4) applications for reductions in the amount of child support; (5) the irregular payment of child support; (6) the filing of bankruptcy papers; and (7) the non-disclosure of assets.[67]

5. The Dangers in Alleging Child Sexual Abuse

Related to the issue of the court-related harassment women experience in relation to abuse is the issue of the effect of child sexual abuse allegations — whether founded or unfounded — during a custody and access dispute. Despite the research which demonstrates the rarity of false allegations, the debate about whether recovered memories of childhood sexual abuse are genuine or fabricated has propelled the

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65 Vock, *ibid.* at 9.

66 See generally, Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (June 1997) [unpublished] at 23. Lisa Addario cites Statistics Canada sources for the following , that is, of 742,904 approved applications, 387,238 were for civil legal aid.

67 See generally, Taylor *supra* note 2; Chesler *supra* note 2; Taylor, Barnesley and Goldsmith, *supra* note 2.

specter of false allegations further into the spotlight.[68]

For the parent alleging the abuse — usually the mother — she is in a no-win situation. If she does not report her suspicions, she risks both her child's safety and her reputation as a responsible parent. On the other hand, if she does allege sexual abuse, but is unable to prove it, she risks being viewed as a vindictive and selfish parent which can also jeopardize her rights.[69] Macleod writes that women are "damned if they do and damned if they don't".[70]

This no-win situation has ramifications for the ways in which their cases are presented to the court and presages potential legal liability. *The Report of the Law Society of B.C. Gender Bias Committee* notes that even though the research shows that false allegations during custody disputes are not prevalent, lawyers tend to advise their female clients not to make accusations of sexual abuse because to do so is to decrease their chances of getting or retaining custody.[71] Moreover, the fact that a parent has nothing to gain from making false allegations is underscored by recent U.S. case law which suggests that a parent may also be liable for failing to protect his or her child from the perpetrator of the abuse if that parent failed to take corrective action.[72]

D. THE CONTRIBUTIONS OF SOCIAL SCIENCE RESEARCH — STOCKPILING THE EVIDENCE

Contributors to social science literature have begun to examine the effects of male violence and post-separation partner abuse on children.[73] Others are focusing on the connections between child abuse and partner abuse and the policy implications which flow out of examining the overlap between the two phenomenon.[74] Still other

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68 See Penfold, *infra* note 90 and explanatory text at note 92.

69 Lisa Helene Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child?" (1994)12 *Can. J. Fam. L.* 91 at 95

70 *Ibid.* at 107 citing J.G. MacLeod, "Annotation to P. (G.L.) V.P. (J.M.)" (1990) 27 *Reports of Family Law* (3d) 64.

71 Law Society of British Columbia, Gender Bias Committee, *supra* note 48 at 5-49.

72 Zarb, *supra* note 68 at 66; Howard A. Davidson, "Child Abuse and Domestic Violence" Legal Connections and Controversies" (1995) 29(2) Family Law Quarterly 356.

73 Jaffe, *supra* note 11; Vock, *supra* note 10.

74 Davidson, *supra* note 71.

authors have analysed what has previously always been referred to in gender neutral terms — the phenomenon of custody blackmail and the use of children as pawns in matrimonial litigation.[75]

1. Effects of Witnessing Domestic Violence on Children

Research on the effect on children of witnessing the abuse of their mothers is coming to the fore. The concept of "child witnesses" appears in the literature as a descriptive term for the 80 - 90% of children who indicate that they are aware of the violence that is perpetrated against their mothers in the context of an intimate/spousal relationship.[76] Research shows that in 25% of cases where women are killed by their husbands, those killings are witnessed by the children.[77]

Saunders argues that subjecting children to the victimization of their mothers is a severe form of psychological maltreatment which has varied traumatizing effects over the short- and long-term.[78] The short and long-term consequences for children of witnessing violence depends on the children's sex and stage of development. In the short-term, emotional and behavioral problems often surface — of sufficient degrees of severity to require mental health interventions.[79] Jaffe describes the long-term impact of witnessing domestic violence in the following terms:

> *The majority of abusive husbands have grown up in families where they witnessed their fathers abuse their mothers. The landmark studies in this field suggest that sons of severe batterers had wife abuse rates that are ten times the level of sons of non-violent fathers. Abused women are less likely to seek assistance if they have witnessed violence in the family of origin.*[80]

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75 Jaffe, *supra* note 11; Pagelow, *supra* note 26.

76 Vock, *supra* note 10; Jaff, *supra* note 11 at 20; Pagelow, *supra* note 26.

77 Crawford and Gartner, *supra* note 14.

78 Saunders, *supra* note 10 at 52.

79 Jaffe, *supra* note 11; Pagelow, *supra* note 26 at 349.

80 Jaffe, *ibid.* at 22.

2. Abusive Husbands As Abusive Fathers

Davidson notes that the clearest link between child abuse and domestic violence is that women battered by their adult male partners frequently report their batterers have also committed child physical or sexual abuse within their homes. Abusers often have been brutal in their treatment toward everyone in the family.[81]

A national U.S. study of family violence found a strong correlation between adult partner abuse and child abuse. In fact, in homes where mothers were victims of domestic violence, both partners were found to be more likely to be abusive toward their children, though children suffer more severe abuse at the hands of fathers. In the final analysis, children are three times more likely to be abused by their fathers or father-substitutes.[82]

Vock and others refer to the underlying distinction that pervades the literature between the abusive partner and the adequate, good enough or even excellent father.[83] Vock and others question the accuracy of this distinction which often operates as an assumption, that is, just because he abuses his wife does not necessarily mean he is a bad father. Instead, Vock et al point to the father's continued abuse of the mother, his undermining of her as a parent, and his intentional attempts to sabotage the relationship between the children and their mother as compromising the potential of the mother's relationship with the children to mediate the adjustment to separation and divorce. Vock etal suggest it may be more accurate to name him as an 'abusive father'. McMahon and Pence (1995) are cited for challenging the existence of a distinction at all, they argue that

> *... we cannot conceptualize children or the "best interests of the child" as if children stand alone and are not integral to the power relations that are part of violence against women.*[84]

Vock et al begin to explore the policy implications for the family justice system of eliminating this artificial distinction and beginning to refer to the behaviour of abusive husbands/fathers as 'child abuse':

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81 Davidson, *supra* note 71 at 358.

82 As cited in Davidson, *ibid* at 357.

83 See also, Chelser, *supra* note 1 at 413.

84 Vock, *supra* note 10 at 21 citing M. McMahon and E. Pence, "Doing More Harm Than Good? Some Cautions on Visitation Centers" in E. Peled, P. Jaffe and J. Edleson, eds., *Ending the Cycle of Violence* (London: Sage Publications, 1995) at 188-189.

> *... the father's continued abuse against his ex-partner and his direct use of the children constitutes child abuse and hence the children are in need of protection. To effectively provide this protection, both the artificial distinction made between the man as a partner and as a father, and the powerful ideology of patriarchal control, need to be challenged in our judicial system. Without these challenges, the judicial system protects the interests of abusive men, not the "best interests" of children.*[85]

3. The Appropriateness of Joint Custody

The U.S. legal literature in particular has identified the imposition of court-ordered joint custody as particularly egregious for women dealing with abusive ex-partners.[86] Suffice it to say, the social science research generally used to support parental rights and joint custody is based for the most part on two sources of research; they are: (1) research on fatherhood conducted in the 1950's with intact families; and (2) research on post-divorce sole custody and joint custodial families who *voluntarily* adopted these arrangements.[87]

There is now some critical commentary from the social sciences that research on intact families may not be generalizable to divorcing or divorced families. Further, there is a qualitative difference between **voluntary** joint custody and **court-imposed** joint custody.

Without exception, researchers of joint custody acknowledge that it requires parental cooperation, and only succeeds under certain conditions.[88] Saunders cites Elkin (1987) for a list of the types of parents for whom joint custody is appropriate. Basically, both parents have to: (1) commit to making joint custody workout of love for their children; (2) be willing and able to negotiate differences; and (3) be able to separate husband and wife roles from parental roles. As Saunders notes "these are rarely the characteristics of domestic violence cases."[89]

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85 Vock, *ibid.* at 24.

86 Lerhman, *supra* note 54 at 34; Saunders, *supra* note 10 at 56.

87 Munro, *supra* note 30 at 869.

88 *Ibid.* at 879.

89 Saunders, *supra* note 10 at 56.

4. Myths Surrounding the Prevalence of False Allegations of Sexual Abuse

Susan Penfold identifies as invalid six commonly held assumptions about child sexual abuse allegations during custody disputes:

(1) False allegations are very common during child custody disputes;

(2) In the context of a child custody dispute, false allegations are deliberately deceitful and stem from parental coaching or from the child lying;

(3) False allegations are made by mothers who are vindictive, mentally ill or have been abused themselves as children;[90]

(4) Referral for physical examination will definitely demonstrate whether or not the child has been sexually abused[91]

(5) A skilled interviewer can discover whether a child has been abused or not; and

(6) Assessment of the alleged perpetrator can rule out the possibility of abuse.[92]

There is a growing assumption that the court system is faced with an epidemic of false allegations made by 'sick' or 'malicious' mothers in the course of custody disputes. However, large-scale U.S. studies show that sexual abuse allegations occur in only 2% of disputed custody/access cases.[93]

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90 See the work of Richard A. Gardner, *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Sex Abuse* (Creskill, N.J.: Creative Therapeutics, 1987).

91 P. Susan Penfold, "Questionable Beliefs About Child Sexual Abuse Allegations During Custody Disputes" (1997) 14(1) *Canadian Journal of Family Law* 11 at 20.

92 *Ibid.* at 23-24; Julia A. McIntosh and Ronald J. Prinz, "The Incidence of Alleged Sexual Abuse in 603 Family Court Cases" (1993) 17(1) *Law and Human Behavior* 95; and Chesler, *supra* note 2 at 413.

93 Of course the second question is, of this 2%, how many are false? In another large-scale study of child sexual abuse, 8% of cases were considered false. Penfold cites general agreement among authors that false allegations occur more frequently in child custody/access disputes - one study found that 16.5% of allegations in such disputes are false or unfounded. In a large-scale survey, Thoennes and Tjaden found that mothers made 70% of the accusations, but only 48% concerned the child's father. Fathers made accusations too: against mothers, step-fathers, live-in boyfriends, and etc. Mothers were no more likely than fathers to make false allegations: Penfold, *supra* note 90 at 14 (citing others).

Zarb notes that there are many reasons, other than malice, for false reports[94], including:

(1) increased media and societal exposure to the causes and effects of the sexual abuse of children which leads to interpretations of what would otherwise be considered everyday events as indications of child sexual abuse[95];

(2) many parents who make these allegations are emotionally fragile;

(3) parents as a rule have no reason to disbelieve a child who tells them of abuse at the hands of the other parent; and

(4) lack of trust between parents.

The final point that has to be kept in mind is that women have absolutely nothing to gain from accusing their husbands of sexual abuse of their children.

5. Violence and Fear as Factors in Negotiating for Resources During Separation

Given the recent statistics which document the high rates of violence and abuse that women experience after separation (see Part I)[96], it is almost axiomatic that women's experiences of violence and abuse during separation affect their ability to negotiate for marital assets.[97] The results of a Philadelphia interview study of a random sample of 129 divorced women with children confirm this thesis.[98] In fact, the study found that 30% of women in the sample were fearful during their negotiations for child support, with few race or class differences among them.

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94 A false report is one that is judged not to have occurred. Numerous conditions can lead to 'false' reports but it is important to acknowledge that "false" can be interpreted in a variety of ways. There are basically 3 types of allegations which have different names but can be referred to as:
a. found, true, substantiated, proven
b. unsubstantiated, unfounded, insufficient information
c. false, fictitious, erroneous

95 Zarb, *supra* note 68 at 106.

96 Demie Kurz, *supra* note 50 at 69.

97 See also, Barbara J. Lonsdorf, "Coercion: A Factor Affecting Women's Inferior Financial Outcome in Divorce" (1989) 3(4) *American Journal of Family Law* 281.

98 Kurz, *supra* note 50 at 65-66.

These women's fears were strongly related to their experience of violence during marriage. There was a statistically significant relationship between women's fear during negotiations for child support and their experience of violence during marriage and separation. The fear of violence caused some women to either give up requests for child support altogether or accept lower amounts of child support than what they believed they were entitled to.

6. Children as Pawns in Family Litigation

There are numerous references to the use of children as pawns by mothers and/or fathers in the process of separating and formalizing the break-up of their relationship. Many of the early references to this phenomenon are decidedly gender-neutral and intimate that mothers and fathers are both capable of and culpable with respect to using their children in this fashion. However, increasingly, there appears to be a willingness to recognize the fact that abusive men frequently use their children as pawns in their determination to punish and reassert control over their former partners.[99]

In the last three years there has been more analysis of the connection between pre- and post-separation abuse, particularly in relation to courtroom tactics. Some of the analysis in the Canadian context is focusing on developing an understanding of the post-separation experiences of children who have been exposed to their father's abuse of their mother.

This work tackles head on the idea that both mothers and fathers equally use their children as "pawns" or "bargaining chips" in the course of legal negotiations and courtroom battles. The analysis underlines the fact that there is a qualitative difference between predictable 'bad behaviour', that is, the 'normal' bad behaviour exhibited in the course of relationship breakdown, and that which goes on in situations where there is a history of abuse. The distinction is explained in the following terms:

> *In some respects, it could be argued that many parents, fathers and mothers, behave "badly" during a separation by circumventing their children's needs and attempting to garner their children's loyalty. The difference is that there is a history of patterned behaviour wherein abusive tactics have been systematically and purposefully employed by the abusive partner/father prior to the*

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[99] Jaffe, *supra* note 11 at 25; Pagelow, *supra* note 26 at 355; and Patricia Abrahams, "Violence Against the Family Court: Its Roots in Domestic Violence" (1986) 1(1) *Australian Journal of Family Law* 67.

> *separation. For child witnesses and their mothers, therefore, their post-separation experiences are really an extension of what they experienced while the woman and her partner were still together. In short, both the mothers and their children carry histories of abuse into the separation.*[100]

A direct reference to the connection between abusive husbands and harassing ex-husbands is contained in the following passage:

> *When a separation occurs, the abuser also transfers much of his control onto their children. He uses their children in a direct and deliberate fashion as pawns in an attempt to elicit a reconciliation with the mother or to sabotage the mother's creation of a new life for herself and their children.* [101]

7. Custody Blackmail

There are a number of references to the practice of 'custody blackmail' found throughout the literature and accounts of women litigants. Custody blackmail refers to the practice of some fathers of threatening to sue for custody as a negotiating tactic to force the mother to agree to less or no spousal or child support.[102] The results of the Philadelphia study support the contention that custody blackmail does in fact occur (See above). Pagelow suggests that battered women are intensely fearful of losing custody, while batterers have nothing to lose by using custody as a bargaining tactic.[103]

The work of Arendell (1995) also provides confirmation of use of custody blackmail as a form of harassment. Arendell's work is particularly interesting because she interviewed a group of 75 fathers. Three quarters of the fathers in her study had threatened their wives with a custody challenge after the divorce and nearly one third issued a "formal threat through an attorney".[104] Arendell concluded that custody challenges were initiated "primarily, although not solely, to harass and oppose the

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100 Vock, *supra* note 10 at 2.

101 *Ibid.* at 1.

102 Polikoff, "Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations" (1982) 7 *Women's Rights Law Reporter* 235.

103 Pagelow, *supra* note 26 at 354.

104 Terry Arendell, *Fathers and Divorce* (Thousand Oaks, CA: Sage Publications, 1995) at 130-131.

former wife."[105]

8. Summary

The implications of these findings, when considered in light of recent trends in the family justice system, are staggering. Certainly, the serious negative effects of witnessing and experiencing violence as a child should inform custody and access policy development and law reform. At a minimum, court-imposed joint custody arrangements in families with histories of partner abuse, post-separation women abuse and/or child abuse are certainly contraindicated. The same negative implications attach to the imposition of mandatory mediation with respect to custody and access disputes.

E. POTENTIAL AND REALIZED REFORMS IN OTHER JURISDICTIONS

The need for reforms in the law of custody and access, statutory and otherwise, has been the focus of some mainly U.S.- based authors. These writers start from the premise that domestic violence and custody litigation are interrelated problems and that reform of the family justice system is necessary in order to protect these women.[106]

There is also evidence in the form of legislative reforms with respect custody and access issues involving domestic violence that U.S. policy-makers and legislators are listening and responding. Of particular interest is the review of family law legislation in the U.S. which counted forty-four states (and the District of Columbia) which had enacted custody statutes which contain some provisions concerning domestic violence to guide judges in making custody and access determinations.[107]

In a similar reform-minded vein, Zorza writes about the need to give battered women comprehensive protection, not only from the abuse but also from intrusions and harassment. The need to protect women's privacy and confidentiality is highlighted

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105 *Ibid.*, at 130.

106 Catherine F. Klein and Leslie E. Orloff, "Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law" (1993) 21(4) *Hofstra Law Review* 801; Keenan, *supra* note 38.

107 The Family Violence Project of the National Council of Juvenile and Family Court Judges, "Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice" (1995) 29(2) *Family Law Quarterly* 197 at 199.

as areas where both society and the legal system have in the past failed women.[108]

F. SUMMARY

The observation that battering men use the legal system as a means of continuing to harass and abuse their ex-wives is a predominant theme in the literature. Women litigants experience harassment both inside and outside the court room during custody and access disputes. The extent to which these observations reflect reality has a number of implications for public policy.

Generally, these observations, taken together, undermine the efficacy of our collective advice to women in abusive relationships to "just leave him". The societal admonition to leave cannot be made without a corresponding ability to provide assurances that women will be supported in their decisions. There must be assurances that the criminal justice system will work to keep these women and their children safe and secure upon departure and the family justice system will work to ensure that the process of formalizing the break-up acknowledges their experience and the detrimental effect of wife abuse and post-separation wife abuse. Neither system can participate in their re-victimization.

> *"In my experience of over 20 years of completing custody and visitation assessments, the real problems lie in overlooking violence and most women under-reporting out of embarrassment, humiliation, and lack of trust for legal and mental health professionals"*[109]

108 Zorza, *supra* note 9.

109 Jaffe *supra* note 11 at 24.

Part III: Observations from the Case Law Research

— A Snapshot of Family Law Litigation

A. INTRODUCTION

In addition to the literature review, a sample of British Columbia case law was drawn from two electronic databases — Quicklaw and the website for the B.C. Supreme Court judgments. The purpose of conducting case law research was to ascertain the extent to which the themes identified in the literature review are reflected in the case law.

B. OVERVIEW OF THE RESEARCH METHODOLOGY

Two searches of B.C. judgments were conducted through Quicklaw in June of 1997. The search term "divorce + abuse /2 process" was used for the first search; the term "divorce + frivolous, vexatious, harassment" was used for the second.[110] A total of 51 cases were retrieved on the first search; 87 cases were retrieved on the second search.[111] Between the two searches, a total of 72 cases were determined to be relevant for the purposes of this study. In both searches a number of cases were removed from the sample; for instance, in the first set, some of the cases removed as 'irrelevant' did in fact involve abuse of process issues but in a corporate context. In both sets of cases the majority of judgements involved ongoing litigation with respect to the resolution of custody and/or access issues.

A single search of the B.C. Supreme Court database using the search term "acrimonious, abus"was conducted in order to supplement the case law retrieved through Quicklaw. Only the first 300 cases which match the search terms are displayed using this particular database. Of these, 96 cases were identified as

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[110] The search terms identify cases which have both the term "divorce" in it as well as "abuse" within 2 words of "process". The second search identifies cases with the term "divorce" and any of each of "harassment", "vexatious" and "frivolous".

[111] The searches were conducted on June 11, 1997 and June 2,1997. The database includes cases from the present back to 1986.

potentially relevant and downloaded for inclusion in the research sample[112].

There are some benefits to using these electronic databases; for example, the sample includes the judgments for interlocutory and variation applications which constitute the bulk of the litigation — particularly in custody and access matters. These judgments are unlikely to be found in the print-based reporting services. However, even the electronic databases, as yet, do not report oral judgments which are quite common in interim and variation proceedings.

With this case law research there was no attempt to determine the incidence of court-related harassment or the incidence of allegations of wife abuse. The search was not designed for those purposes. Further, this particular research methodology does not allow for the reconstruction of a picture of the entirety of the litigation. Rather, what is presented is a slice of that picture — the nature and outcome of one particular application or trial related to custody, access or support issues in which there were indications of allegations of abuse and/or harassment behaviours and tactics.

C. THE CONTENT OF THE SNAPSHOT

1. General Features

As indicated in the above, the vast majority of family law cases collected as part of Quicklaw and the B.C. Supreme Court databases searches did, in fact, involve the litigation or re-litigation of custody and/or access issues. Several division of asset and spousal support cases also formed part of the research sample. The types of cases varied immensely as did their fact situations. The majority consisted of interlocutory applications prior to a trial of the issues. There were also considerable number of variation applications to both interim orders and trial decisions.

As detailed in the next section, it is apparent from a review of the case law that (1) many of these cases were in their later stages and (2) a considerable period of time had elapsed from the beginning to later stages of the litigation. The duration of the litigation was determined from references to the date of first application listed in the judgment. On review, it was not uncommon to find the court making a reference in the judgment to the many years that had elapsed over the course of the litigation.

It was also clear from some of the judgments that numerous judges had at one time or

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[112] Twenty-one (21) of these cases were note reviewed closely

another sat to hear different aspects of a particular case. While not the practice of all judges, a number of them set out the history of the proceedings — even on interim applications. Judges rarely remain seized of a particular file, although there certainly are exceptions.[114] When express consideration is given to doing so and declined, the reason offered usually consists of a concern with scheduling and the need to respond on an urgent basis to many of these applications.[115]

The search terms caught references to wife abuse, harassment or abuse of process in other types of cases in which the immediate context was not necessarily a divorce or separation but where the term divorce appeared in the judgement. Those 'other' types of cases, while not relevant to family law litigation *per se,* were often still relevant to the wider issues of wife abuse and post-separation wife abuse. For instance, a number of criminal law cases were retrieved — for example *R.* v. *Mohammed*[116] involved an appeal of a stalking conviction in a matrimonial situation. Other 'non-family' cases retrieved as part of the research sample fell under the immediate rubric of corporate commercial litigation. The facts in *Re Drozdik*,[117] a proceeding under provincial bankruptcy legislation, showed that the larger context for the litigation was a divorce and division of assets.

2. The Acrimonious and Protracted Nature of Family Law Litigation

A long-standing feature of custody and access cases is that they never really 'close' because of the need for flexibility to adapt to changing circumstances post-divorce. Generally, either party can go back into court for the purpose of varying and even reversing a previous custody, access or child maintenance order. The applicant need only be able to show a 'material change in circumstances' in order to be heard by the judge on a custody, access or support matter has already been heard. These types of family law disputes are essentially open-ended, which preserves flexibility, but operates to facilitate excessive litigation in those circumstances where one or both of the parties is intractable and/or determined to harass the other.

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114 *Loucks* v. *Trach* (14 December 1993), Victoria 5939/23658 (B.C.S.C.).

115 *Ibid.*, at para 25; *Galay* v. *Bott* (27 January 1994) Vancouver D090266 (B.C.S.C.).

116 *R.* v. *Mohammed* (11 September 1997) New Westminster X047670 (B.C.S.C.).

117 *Drozdik (Re)* (8 February 1993) Vancouver 1439/91 (B.C.S.C.).

Numerous aspects of child support, custody and access can be litigated repeatedly through interlocutory (interim) applications, trials, summary trials, and appeals of various orders. Consequently, where a separation and divorce is particularly acrimonious, there is ample opportunity to carry on the court action indefinitely. As such, the potential for litigation to serve as an effective weapon in the power and control arsenal of the batterer is apparent.

a. Generic References to Acrimonious and Protracted Litigation

A noteworthy feature of many of the cases was the duration of the litigation; it was not unusual in some of these highly contested cases for the litigation to have spanned five, six and even, seven years.[118] In one of the cases the judge refers to the proceedings as "long and tortuous". [119] A multiplicity of interim applications marked the procession of these cases; the existence of which is noted by references to the "thickness" of the file and "formidable court file"[120]

One judge, hearing an application for costs at the end of "bitterly litigious" proceedings, remarked — not without a hint of disapproval — that this particular case had lasted longer than the marriage of seven years.[121] The judgment on this application revealed that the trial, at which both financial and custody issues were hotly contested, lasted seven weeks. Further the judge stated that there were "...many more interlocutory motions than usual, even in hotly contested matrimonial proceedings".

In other cases there are disparaging comments made by the judges with respect to the propensity of parties to prolong the litigation of the issues through numerous interim applications — never taking the steps to settle the matter by set it down for trial. In *McIvor* v. *McIvor* the judge noted that whether the interlocutory wrangling has the fault of the parties or their counsel, or a combination thereof, the fact that the litigation had been going on for six years indicated that the parties were acting only

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118 See, for example, a case involving a seven year fight in the courts with a succession of solicitors. The Court noted the file showed a "bitterly fought matrimonial action". *Manarin* v. *Manarin* (30 March 1994) Kelowna 85/802 (B.C.S.C.).

119 *Simpson* v. *Simpson* (20 March 1987) New Westminster D014823 (B.C.S.C.).

120 *Ibid.*

121 *Metzner* v. *Metzner* (27 January 1997) Vancouver D073690 (B.C.S.C.). The parties had incurred legal fees totalling many hundreds of thousands of dollars - the ex-wife's legal bill was in excess of $320,000. She was representing herself at the costs application.

in their own interests and not in the best interests of the child.

In addition to the inordinate length of time and excessive number of applications which characterize these cases, the courts frequently comment on the level of hostility and bitterness which underlay much of protracted custody and access litigation. [122] More often than not, the courts will comment on the negative effect on the children of protracted litigation and on the self-serving nature of the parties.[123]

The case law research includes many references to both litigation with long histories and acrimonious marriages or relationships. The observation made in the literature that the acrimonious history of the relationship is often carried over into the court room appears to be supported by this research. What is remarkable about these cases though is the relative absence of scrutiny of the underlying gender dynamic.

The possibility that there is a connection between the allegations of wife abuse and the multiplicity of actions is not usually adverted to by the judges. While judges make reference to the acrimonious nature of the litigation, there is little dissection of the previous litigation and/or relationship history with a view to ascertaining whether one of the parties is using the court process to harass the other. When judges do register their disapproval, it is often in relation to the effect of such court battles on the children.

An exception to this observation is found in a case where the judge notes that the parties have had "many difficulties with respect to access and maintenance since separation in 1991".[124] The Court goes on to specifically underline the fact that all of the applications, apart from the divorce itself, have been brought by the ex-husband. "That has been seen in Provincial Court as 'vexatious' and, as a consequence, applications there cannot be brought without leave of the Court". Other exceptions to the above are found in judgments which characterize certain by-products of the litigation as "legal harassment".

In British Columbia the *Wright* case is probably the most often used example of the repeated use of legal action to harass an ex-spouse over custody, access and support issues. Interestingly, only one judgment turned up in a Quicklaw search for the

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122 For example, *Seddon* v. *Seddon* (9 May 1994) New Westminster D027618 (B.C.S.C.). The Court noted that "The father's bitterness and vindictiveness gave the court pause.

123 *Cassidy* v. *Cassidy* (17 September 1996) Vancouver F950728 (B.C.S.C.). In this case, the court refers to the fact that both parties were using the children as a "conduit for their rage against each other".

124 *Curll* v. *Curll* (20 June 1995) New Westminster D030531 (B.C.S.C.).

various judgments that must have been rendered during the course of the *Wright* litigation included disputes over custody, access, support and disclosure of financial information.

In this particular case in the *Wright* litigation, an application was brought by the ex-husband to reduce spousal maintenance.[125] Rowles J., in dismissing the application, reviews the previous history of the litigation which had been ongoing for four years. Thirty-three orders had been made before the matter even got to trial. The trial did not bring about an end to the applications. There is a reference to an order by Drost J. which requires any further applications regarding the children to be served on a child advocate. An examination of the entire *Wright* file would provide good material for a case study.

b. References to Court-related Harassment — Express and Implied

The forms in which court-related harassment occurs are as varied as the literature suggests and, to some extent, defy categorization. Not all harassing situations are labelled as such by the courts. Rather what often happens is that some of the background history of the case is recounted in the judgment in terms which lead little doubt that the court is cognizant of the situation.

References to court-related harassment do appear in the case law — though they are few and far between. The term "legal harassment" is most often used by judges. Where reference is made specifically to conduct that amounts to harassment, generally, the litigation has been on-going for a number of years. As such these judicial acknowledgments of the problem come late in the day after years of litigation.

In *Pesic* v. *Pesic*[126] the judge found reason to comment on the "extremely hostile and adversarial position" adopted by the respondent husband and his parents against the petitioner as a result of the breakup. The husband through his parents had attempted to bring about a foreclosure on the matrimonial home by refusing to accept the petitioner wife's monthly cheques for the mortgage payments and by cancelling the insurance on the property. In a separate builder's lien action initiated by the parents, the entire claim was found to be based on documents which were later admitted to have been fabricated. As well, outside the court room, there was a fire set in the front

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125 *Wright* v. *Wright* (21 October 1991) Vancouver A861738 and G00969 (B.C.S.C.).

126 *Pesic* v. *Pesic* (27 November 1991) Vancouver D072504 (B.C.S.C.). Alexandra Pesic was eventually murdered by a contract killer hired by her husband.

yard and various acts of vandalism or harassment which the wife attributed to the husband and his family. Moreover the ex-husband had failed for the most part to comply with an interim order for child support.

In *Langner* v. *Langner*[127] the husband attracted the scrutiny of the court as a respondent to an interim application. The Court reviewed the history of the proceedings and focused on the fact that the husband had alleged fraud and undue influence on the part of his wife — allegations which were not supported by any evidence. These unsupported allegations constituted the driving force for his unrelenting attempts to have a separation agreement set aside despite the fact that the issue was *res judicata*. The judge was very sympathetic to the plight of Mrs. Langner and the effect that this course of action must have on her.

> *These parties separated in 1981. The matter continues through the courts. Mrs. Langner is constantly faced with the expense of meeting Mr. Langner's repetitious claims. Mrs. Langner should be allowed after more than six years to go about making her own life. Mr. Langner seems bent on denying her that right. It would seem appropriate in these circumstances of harassment and badgering, causing Mrs. Langner distress, worry and expense that an order for solicitor client costs would be most appropriate. Family matters must have an end. Maybe this is the most effective way to achieve that goal.*

There is some indication, though minimal, in the case law that some judges are both aware of the potential for abuse of the litigation process in these protracted family law cases and consider using the procedural mechanisms they have at their disposal to deter further similar conduct. In *Schwan* v. *Schwan*[128], an application for the variation of a spousal support order, the judge, in dismissing the application, affirmed the respondent husband's right to reapply after a reasonable period of time if his ex-wife did not obtain employment. At the same time, however, the judge issued a warning that the right to apply should not be used as a tool of harassment or intimidation. The judge let it be known that in the event that such an application is found to be brought *mala fides*, special costs may well result.

The practice of filing affidavit material for the purpose of interlocutory applications is also open to abuse by parties intent on harassment. There are numerous references to voluminous affidavit material which generally set out irreconcilable views of the

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127 *Langner* v. *Langner* (26 May 1987) Vancouver CA005375 (B.C.S.C.).

128 *Schwan* v. *Schwan* (18 March 1996) Vancouver D093709 (B.C.S.C.).

dispute.[129] As a result, judges often decline to make a custody decision based on affidavit material because there is a need to make credibility determinations which require testimony.[130] Particularly in interlocutory applications, judges will usually opt to have the matter determined at trial. Only in extreme cases will judges comment on the inappropriateness of the content or the amount of the affidavit material.[131]

One exception is Justice Drake in *Sandrin* v. *Piros*.[132] In considering applications for corollary relief regarding access, a separation agreement and the joint guardianship of three children, the court found that the custodial mother had been "sorely tried by the methods of communication employed by the petitioner". Specific mention is made of the fact that the petitioner husband filed affidavits on the last day of the hearing — which in effect accuse the mother of sending the children on an access visit while they were suffering from colds. Further, the petitioner swore in his affidavit that this visit was the cause of his second wife's miscarriage.

The current way affidavit material is produced and submitted to the court is problematic for many women litigants. Given the vastly incongruous stories presented in affidavit material, it is apparent to the court that one of the parties is either lying or embellishing his or her evidence to such a degree that it amounts to lying. There are virtually no procedural safeguards in place to preclude the filing of such affidavits except. As a result, it is possible to make unsubstantiated allegations, which if true, would be cause for alarm, in order to present the opposing party in the worst light. This tactic, when used by ex-husbands, puts women litigants on the defensive from the outset as shown in those situations where allegations of mental health or substance abuse problems are raised against the mother — a situation which is discussed *infra*.

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129 *Goosen* v. *Geisler* (12 June 1997) Victoria 96/2777 (B.C.S.C.); *D.G.* v. *G.D.Z.* (18 April 1997) Vernon 17953 (B.C.S.C.).

130 *Henderson* v. *Henderson* (7 May 1996) Victoria 5939/30602 (B.C.S.C.); *Leaman* v. *Leaman* (30 April 1997) Vancouver D099732 (B.C.S.C.).

131 *M.R.W.* v. *L.M.M.* (31 July 1996) Chilliwack E222 (B.C.S.C.).

132 *Sandrin* v. *Piros* (18 July 1995) Vancouver D079252 (B.C.S.C.).

c. *Express References to Post-Separation Harassment and Abuse Outside the Courtroom*

The types of tactics indentified by women litigants and discussed in the literature are reflected in the cases. Post-separation wife abuse and harassment are evident in the cases; ranging in form from physical intimidation and abuse, to psychological and emotional abuse, to financial abuse. Harassment often occurs contemporaneously inside and outside the courtroom and includes threats, sometimes followed by actions, to: (1) kidnap the children, (2) seek sole custody, (3) financially ruin the women, (4) kill her and/or the children, (5) commit suicide, and (6) commit acts of vandalism against ex-wives and others.

The limitations of case law research are underlined by the fact that any analysis or observation are dependent on judges recording and detailing the imagined types of behaviour in the judgment. Not all judges view what goes on outside the court room between the parties as relevant to the proceedings. Furthermore, many judges do not view repeated applications as 'abuse'. As a result, it is extremely likely that the 'harassment' and other abusive behaviour that goes on in these cases is severely under-reported in the decisions.

The reaction of judges to this kind of behaviour warrants mention. Generally, judges seem to disapprove of these kinds of behaviours. However, when it comes to making access determinations, there is often no connection made between the abusive behaviour of the husband and his capability as a parent. In making these orders, there appears to be little or no reference to the effect on the wife of granting access in situations where the ex-husband is engaged in behaviour that amounts to harassment. When judges do take women's safety and security into account, it usually manifests as an order for supervised access or a provision for a safe exchange point.[133] There is further analysis of this issue later in this Report.

Orders for supervised access cut both ways — supervised access allows women some means of protecting themselves and ensuring their safety and that of their children. However these orders also give judges a way out of making the real hard decisions. Serious consideration of the option of terminating access completely rarely surfaces in the judgments. Instead, judges seem to vacillate between imposing unsupervised access and supervised access on a non-custodial parent, who has been accused of abusive behaviour in the past, but has shown no indication of continuing the abuse in recent times.

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[133] *Boyko* v. *Purdue* (15 February 1996) Vancouver D095392 (B.C.S.C.). *Johnston* v. *Johnston* (23 December 1996) Kamloops 11244 (B.C.S.C.).

One particularly disturbing case in which the court details incidents and behaviour amounting to post-separation harassment and abuse is *Loucks* v. *Trach*.[134] In an application by the father for unsupervised access to his two sons, the judge declined to award unsupervised access, but increased his supervised access three-fold. The wife had testified that in response to her request for a separation in the summer of 1990 the father had threatened to kidnap their sons and to kill the boys and himself. He also faked a suicide attempt by appearing to swallow a full bottle of pills, among other things.

In the reasons for judgment, the court finds that over the ensuing few years Mr. Trach harassed Ms. Loucks in various ways, causing her discomfort, and fear for her personal safety. Only a partial list of the intimidating and harassing tactics employed by Mr. Trach is included here, namely: (1) telephoning at unreasonable times and with unreasonable frequency forcing her to change her number twice; (2) scratching her car extensively; (3) assaulting her in a pub — an offense for which he was convicted; and (4) repeatedly breaching his terms of probation orders. There was also testimony with respect to the harassment of a boyfriend of Ms Loucks who had his cablevision cut off and who had paint thrown at this car twice. Despite this evidence, supervised access was continued, thereby discounting the effect of the harassment on the wife.

In *Winther* v. *Winther*[135], without setting out the wife's evidence with respect to the issue of access for the husband, the judge finds she has been put in fear by the actions of the respondent. The judge curiously characterizes the respondent husband's actions as "irresponsible and immature" both during the marriage and after its termination. In this case both parties were constantly at odds over access.

The evidence showed that the ex-husband was engaged in a range of court-related harassment outside the court room including: (1) forcing entry into her home after midnight, (2) stealing personal items, (3) threatening to abscond with the daughter, (4) making harassing telephone calls, (5) "slapping" her, and (6) threatening to kill himself and letting his daughter know that his death was the wife's fault. The evidence also showed that he had convictions for extremely violent bahaviour and he had breached no contact orders during his probation. What is missing from the judgement is an appreciation of the dynamics of this post-separation an abusive 'relationship' — the continuation of which is ensured by court-ordered access — whether supervised or not.

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134 *Loucks* v. *Track*, *supra note* 114.

135 *Winther* v. *Winther* (6 May 1994) New Westminster D027618 (B.C.S.C.).

3. Allegations of Male Violence in the Context of Custody and Access — Obervations Arising from the Case Law

The test which governs custody and access determinations is that of the "best interests of the child". Both federal and provincial legislation set out the factors which are to be considered in making these determinations using the 'best interests' standard. Section 16(9) of the *Divorce Act* directs judges "not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child" as part of their consideration of what is in the "best interests" of the child.[136] Section 16(10) requires the court to consider the willingness of the custodial parent to facilitate contact between the child and the other spouse in making its decision.

The comparable provisions in the B.C. *Family Relations Act* are similarly silent on the issue of wife abuse. Neither of these statutes and their relevant provisions expressly contemplate wife abuse as a factor to consider in a custody and/or access dispute. As underlined in the previous section, there has been little in the way of Canadian legal research of the effect of allegations of male violence in relation to determinations related to custody and access.

a. Wife Abuse as Ir/relevant to the Determination of the Best Interests of the Child

On the whole, the results of the case law research are a 'mixed bag' in relation to the themes which were identified in Part II. There are cases where there are allegations of wife abuse and women lose custody; this seems to be a particularly problematic feature of interim applications.[137] Moreover, when women win sole custody in these situations, access is almost always awarded to the allegedly abusive ex-husband.[138]

The concerns raised, especially in the U.S. literature, in relation to the high rate of joint custody awards in these cases, does not seem to be realized in this small sample. There are however a couple of cases which follow the U.S. trend — these cases will be

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136 *Divorce Act*, R.S.C. 1985 (2nd Supp.), C.3

137 *D.G.* v. *G.D.Z.* (18 April 1997) Vernon 17953 (B.C.S.C.); *Cote* v. *Cote* (14 November 1997) Prince George D02362 (B.C.S.C.); *Goose* v. *Geisler* (12 June 1997) Victoria 96/2777; *Grichsen* v. *Zuk* (29 February 1996) Victoria 5939123481 (B.C.S.C.).

138 *Boyko* v. *Purdue supra* note 133.

examined more carefully below. In any case, while joint custody does not appear to be awarded as often as the U.S. literature suggests, the liberal dispensation of access awards appears to have supplanted joint custody as one of the more problematic trends in British Columbia. custody and access law in the last few years.

Women's advocates have long insisted that evidence regarding wife assault in the context of a custody and access dispute is "at best irrelevant and at worst prejudicial".[139] A review of the case law demonstrates that there is considerable evidence to support this statement both at the level of interim applications and final determinations of custody and access.

(i) Evidence of Wife Abuse as Prejudicial

The first hurdle facing women alleging wife abuse is to be believed — which requires that the judges find them credible and for there to be some substantiation of their claims.[140] In this latter regard, the references in the literature to the importance of corroboration in the form of medical and police reports, stays at transition houses and/or charges or convictions for related offenses is reflected to some extent in the cases.[141] However, in another case the judge concludes that although the wife left her home for a transition house; it was 'planned' behaviour that was indicative of deceit.[142]

In *Cote* v. *Cote*[143] it was evident that the judge did not believe or was highly suspicious of the wife's allegations, she lost her bid for interim sole custody. In that case the judge simply did not believe that the husband was abusive and awards interim custody to the husband. The husband's evidence included allegations of infidelity and excessive 'partying' on the part of his wife. The wife's evidence has that she had an affair with another man after being battered emotionally and physically by her then husband. She testified that she lived in constant fear of her husband who also maintained complete control over the family's finances.

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139 Taylor, *supra* note 1.

140 See, for example, *Stalker* v. *Ploeger* (2 October 1997) New Westminster S012308 (B.C.S.C.). at paragraph 12.

141 *P.A.* v. *F.A.* (30 June 1997) Vancouver F950808 (B.C.S.C.).

142 Cite unavailable.

143 *Cote* v. *Cote* (14 October 1997) Prince George D02362 (B.C.S.C.).

The wife kept her son after one of his stays prompting the husband to apply for custody. Despite a Section 15 Custody and Access Report which supported an award of sole custody to the wife, the judge found that the husband was unlikely to be abusive. The judge cited the husband's reaction to finding his wife with another man, that is, of walking away, as not consistent with the reaction of an abusive man.

Cross-allegations of abuse characterized a number of cases.[144] When judges were faced with cross-allegations of abuse there was little in the way of analysis of the content of those allegations, that is, the nature and extent of the violence, whether it was prolonged or chronic and what types of injury resulted. Again, it is impossible to determine from a review of the cases if more details of the abuse were presented to the judge but were simply not recorded in the judgment.

In *Huygue* v. *Huygue*[145] the judgment indicates that there were mutual allegations of abuse leading to the conclusion by the judge that the couple had a "difficult marriage". In this case the precipitating event involves the arrest of the wife for assaulting her husband with a knife — an event which ultimately results in her losing custody.

(ii) Irrelevant or Discounted

Upon closer examination the judgments reflect a degree of internal tension as courts attempt to balance what they see as competing considerations in awarding custody and access to one or another of the parents. Allegations of physical, emotional and verbal wife abuse are often considered in relation to cross allegations that this same wife is an unfit mother. Her mental health or her abuse of drugs or alcohol may be placed in issue as a means of substantiating the claim that she is unfit as a mother. In circumstances where there are two competing sets of allegations, the allegations of wife abuse seem to be discounted or considered irrelevant in many cases. Presumably the courts reason that, as between the two, an allegation of parental unfitness is more directly relevant to a determination of what is in the best interests of the child. This shift serves to discount allegations of wife abuse even when the issue of parental fitness is determined in favour of the mother.

Some judges, when they believe allegations of wife abuse are founded, award sole custody of the children to the wife with some kind of access to the husband. The

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144 *Thomson* v. *Thomson* (17 July 1996) Courtenay D3932 (B.C.S.C.).

145 *Huygue* v. *Huygue* (17 February 1997) Kamloops 01108 (B.C.S.C.).

majority of courts appear to register their disapproval of wife abuse but then 'move on' to consider ways in which the abusive husband can maintain his relationship with their children. The site for increased conflict then moves to access arrangements.

In attempting to craft access arrangements, even in light of potential danger to the mother or the children, judges seem to concentrate on finding ways to promote a 'normal relationship' between these fathers and their children.[146] Despite their conduct to date, judges are often predisposed to giving these men the benefit of the doubt with respect to their future relationship with their children. For women's advocates, it is this apparent judicial sanction for continued access, even if supervised, in the context of a dysfunctional relationship, that is disturbing and unwarranted.

One of the few cases to expressly refer to the relevance of wife abuse in considering the best interests of the children is *Webber* v. *Wallace*.[147] In that case the wife's application for sole custody included affidavit material which submitted as evidence the fact that the husband had pled guilty to three counts of assaulting the plaintiff and causing her bodily harm. The husband attempted to have that paragraph of the affidavit struck out as irrelevant to the custody issue. The judge however disagreed, and declared such evidence admissible as "...relevant to the nature of the relationship between the parties, a matter which may affect the welfare of the children..."

b. The Inefficacy of Joint Custody

While there are instances where joint custody and/or guardianship are awarded to both parents in the context of allegations of wife abuse, those arrangements appear to be made on an interim basis to keep the playing field level until the trial. As a rule, such joint custody arrangements are generally short-lived.[148]

Despite the concerns underlined in the U.S. literature, joint custody orders do not appear to be frequently imposed on parties in cases where there are allegations of wife abuse and/or no apparent ability to co-operate and communicate. One exception is the case of *Davies* v. *Partridge*[149] which appears to follow the U.S. trend of awarding

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146 Loucks v. Trachs, *supra* note 114.

147 *Webber* v. *Wallace* (23 August 1994) Duncan S3639 (B.C.S.C.). at paragraph 13.

148 *Stalker* v. *Ploeger*, *supra note* 140; *Kitch* v. *Harpe* (30 January 1996) Vancouver A931473 (B.C.S.C.); *Boyko* v. *Purdue*, *supra note* 133.

149 Davies v. Partridge (2 May 1995) Vancouver D084809 (B.C.S.C.).

joint custody where parties cannot communicate. The research instead identified at least three cases where the court was careful to consider the inefficacy of such an order given the parties inability to co-operate.

In *Yavis* v. *Yavis*[150], the court, after considering Wilson J.'s dissent in *Kruger* v. *Kruger*[151], declines to order joint custody because it is simply not acceptable to the parties. In that case, the wife had alleged that her husband had made threats of violence against her, harassed her mostly by telephone and made the exercise of her custodial rights difficult because of his 'inconsistent conduct'. In *Wilbur* v. *Wilbur*[152], the judge similarly declined to award joint guardianship on application by the respondent husband. Instead the judge adopts the words of Vickers J. in *Hollingum* v. *Hollingum*[153]: "In my view, joint guardianship is a luxury reserved for those parents who are able to communicate..."

Similarly, in *Stark* v. *Stark*[154], on an application by the husband for interim joint custody and an order defining Christmas access, there were cross-allegations of physical abuse and of consumption of drugs and alcohol between the parties. The respondent wife admitted to the high use of prescription medication related to chronic back pain. The judge in awarding interim sole custody to the mother reasoned that:

> *It is clear to me that the parties are not communicating and are agreeing on virtually nothing. Both make serious accusations against each other. Some of those accusations may be made out at trial and others may not. An order for joint custody anticipates that the parents, regardless of the issues between them, have demonstrated an ability to communicate on matters concerning their children....My concern must be for the children and I have concluded that it is not in their best interest to make an interim order for joint custody.*[155]

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150 *Yavis* v. *Yavis* (23 June 1996) Kamloops SC06306 (B.C.S.C.).

151 (1980) 104 DLR (3rd) 480

152 *Wilbur* v. *Wilbur* (12 June 1996) Prince George 32230 (B.C.S.C.)

153 *Hollingum* v. *Hollingum* (16 April 1993) Vancouver D55486 (B.C.S.C.).

154 *Stark* v. *Stark* (10 December 1996) Kamloops 11706 (B.C.S.C.).

155 *Ibid.* at *para.* 8.

c. *Pathologizing Mothers*

At various junctures in family law proceedings there are opportunities for the court to garner the assistance of experts, counselors and assessors, to assist in the determination of what is in the "best interests" of the child(ren). Women's groups and many academics identify serious problems for women litigants as a result of the interventions of experts, counselors and assessors.

The concerns raised in the literature in relation to the pathologizing of mothers who raise allegations of abuse appear to be reflected in the case law. In many of the cases where the wife alleges abuse, the husband counters with allegations which put her fitness as a parent in issue. The allegations usually consist of questioning her mental health, alleging substance abuse problems, or raising her lifestyle as an issue. Once these types of allegations are made, the allegations of wife abuse do not seem to loom as large in the judgments. The focus of the inquiry shifts, the main question becomes whether the mother is capable of parenting her children. The abusive husband's conduct is not scrutinized in the same way. In some instances, the court appears to make a distinction between his conduct as a husband and that as a father, paying the way for the conclusion — he is a good *father* who has not abused the children.

The cases show that experts diagnose psychopathologies quite often in the course of their assessments. Diagnoses of paranoid personality disorders and manic depression commonly attach to women litigants.[156] It is rare for a male litigant to be so diagnosed. Even in cases where his behaviour is clearly inappropriate, it is unlikely that he is labeled with a pathological disorder. Rather, male litigants are more likely to be referred to anger management counseling which does not carry the same stigma. The one reference to a male litigant's depression was made by his doctor in support of his contention that he could not work and therefore could not maintain his financial obligations.[157]

The raising of parental fitness in many of these custody and access cases is quite suspect. Rarely is there any indication in the judgment that the 'concerned' ex-husband had supported his wife to get treatment — if, in fact, treatment was required. Further, there is a pronounced lack of any analysis of the possibility of a causal or aggravating relationship between the wife's alleged mental health problems, for example, and the husband's alleged abuse of her.

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156 *Galay* v. *Bott supra* note 115; *Desjardins* v. *Desjardins* (12 February 1996) Vancouver A911733 (B.C.S.C.).

157 Cite unavailable.

One notable exception is the case of *P.A.* v. *F.A.*,[158] (see below) where the judge acknowledged the physical and sexual abuse experienced by the wife who had been diagnosed as manic depressive. The judge noted that she became more ill when her husband was in the picture, thereby intimating that he thought the husband was an aggravating factor in his wife's illness.

In *Anderson* v. *Anderson*[159] the husband sought joint custody of the children and raised his wife's "emotional difficulties" as the reason she should not have sole custody. He alleged that she abused alcohol and drugs and that she was depressed and suicidal. The wife, in response, alleged that her husband was abusive of her generally and was so in the presence of her son. She alleged that he had a drinking problem as well. In this case, the wife was fortunate that her physician swore an affidavit stating that there was no reason that she could not care for her son even given her emotional state.

The obligation on the custodial parent to facilitate a continuing relationship between the children and the non-custodial parent looms large in a number of decisions. Women lose custody for perceived deficiencies in this regard. What seems to be happening in a significant number of cases is that women are given sole custody on an interim or permanent basis only to face the prospect of numerous contempt applications as difficulties mount around access. Ultimately, these women can lose custody altogether.

d. Applications for Production of Therapists' Records

Applications for the production of therapists' records are now turning up in family law cases — an observation which has alarming implications for battered women who seek counseling in the course of litigation. Two cases were identified as illustrative of the potential hurdles ahead — in the first of those cases, custody was in issue. In the second, the wife was trying to set aside a separation agreement.

In *R.C.T.* v. *M.T.T.*[160] the judge granted an application for the production of documents from a drug rehabilitation centre where the wife had been a client. The judge so ordered on the basis that her fitness to parent was in issue and she had

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158 *P.A.* v. *F.A. supra* note 141.

159 *Anderson* v. *Anderson* (5 June 1996) Kamloops 11532 (B.C.S.C.).

160 *R.C.T.* v. *M.T.T.* (5 May 1997) Campbell River 5945 D2361 (B.C.S.C.).

admitted that she has been treated for substance abuse.

In *Dubnov* v. *Dubnov*[161] the court finds that the wife had put her state of mind in issue by deposing in her divorce petition as to the constant harassment she experienced from her husband during the four or five months that they lived together. The respondent husband argued that he needed to find out from the marriage counselor whether the wife had discussed this harassment as part of their counselling sessions. He claimed this information was relevant to her state of mind during negotiations. The judge agreed.

4. The Involvement of Social Services Agencies

The involvement of social services agencies was identified in the literature review as a potential weapon in custody and access disputes. A review of the case law reveals that social service agencies are often involved with families who are going through a custody and access dispute. Unfortunately, it is difficult to determine the source of the complaint in most of these cases, and whether or not the agency is involved for reasons completely unrelated to the litigation.

There is one case where the threat of the involvement of social services agencies was used to deter the wife from disclosing abuse.[162] In another, the wife's affidavit evidence is fairly clear that she believed that her ex-husband had been complaining to social services about her fitness to parent.[163]

5. The Effect of Allegations — Founded or Unfounded

Another subset of problematic custody and access cases are those in which allegations of child sexual abuse are made. This subset of cases is not discrete in the sense that there is one subset of cases which involve allegations of wife abuse and an entirely different subset which involves allegations of child sexual abuse. Rather, there is often some overlap between the two subsets. It is the effect of these allegations on judicial decision-making which is of interest here.

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161 *Dubnov* v. *Dubnov* (16 June 1994) Vancouver D0882236 (B.C.S.C.).

162 *P.A.* v. *F.A. supra* note 141.

163 *F.S.* v. *The Director of the Child, Family and Community Service Act and W.S.* (3 July 1997) Prince George 01190 (B.C.S.C.).

In the context of sexual abuse allegations, more than one writer has noted that women are "damned if they do and damned if they don't". Judges as a rule take such allegations very seriously. Yet there are serious ramifications to making such allegations in court if they cannot be substantiated. This is so despite the difficulty of 'proving' sexual abuse.

In any event, if the allegations are determined to be unfounded, mothers, who are often the alleging parent, risk a very real chance of losing interim custody. First, it often seems that her credibility is tied to a finding that the allegations are substantiated — not to her having a reasonable belief in those allegations. What seems to happen is that mothers who make these allegations are held to a higher level of scrutiny. Little consideration is given to the difficulties in proving sexual abuse generally — let alone in the context of custody and access where the research shows that even evaluators and assessors are influenced by the spectre of the 'false allegation'.[164] Indeed, there are a number of express references by judges to the need for greater scrutiny of such cases because of the possibility of a false claim by a malicious mother.[165]

Second, mothers who make these allegations, and believe them, often also engage in conduct that they believe to be in the 'best interests' of their children; conduct that is not necessarily approved of by the court. For example, there are indications that these mothers withhold access privileges and insist on supervision that they can count on. These actions inevitably are not pursuant to the access order made by the court — placing these mothers at risk for contempt applications.

There is evidence in the case law that women are losing, or are at risk of losing, custody when allegations of child abuse are determined to be unfounded in the course of a custody and access dispute. In *Taylor* v. *Taylor*[166] the B.C. Court of Appeal considered an appeal of a sole custody order to the husband. The wife was trying to have the trial judge's order of sole custody to the father overturned or re-opened. She argued that the trial judge placed too much emphasis on her concern about sexual abuse and the actions she took as a result. The mother applied to adduce fresh evidence to offer an alternative explanation which would support a rational basis for her concern. The 'fresh' evidence introduced the possibility that two of the children's cousins had been abused which would explain why the Taylor children were saying

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164 Penfold, *supra note* 90.

165 *Erichsen* v. *Zuk* (29 February 1996) Victoria 5939/23481 (B.C.S.C.).

166 *Taylor* v. *Taylor* (13 March 1996) Vancouver CA19259 (B.C.C.A.).

the disturbing things that they did. The Court in this case did not review the facts in any detail and ultimately dismissed the appeal and awarded costs against her. Reading between the lines, it looks as though she alleged sexual abuse, the trial judge found none and then awarded custody to the "vindicated" father.

Similarly, where allegations of sexual abuse are determined to be unfounded, this finding by the court can lead to an application to vary an award of sole custody to the mother. In *Cassidy* v. *Cassidy*[167] the father applied for a variation of an interim custody order to the mother. He cited as material change in the unfounded allegations of sexual abuse and the continuing involvement of children in the court proceedings circumstances . In the end, the judge declined to vary the original order saying that the allegations were too serious to change the status quo in the circumstances. The custody issue has left to be determined by the trial judge.

6. The Complexities of Access Cases

Custody and access issues are often considered at the same time but not necessarily so. Whether or not this is the case largely depends on the stage of the litigation. There are layers of complexity to these cases and the sample is limited to a view of one particular aspect in what is usually on ongoing dispute.

In reviewing the case law there are two themes that warrant further analysis. First, there is a determined reluctance on the part of courts to terminate the non-custodial parent's access to his children on the basis of allegations of wife abuse or sexual abuse of children. Even restrictions on access are not ordered lightly. Second, custodial mothers are vulnerable to citations for contempt of court if the judge finds she has intentionally interfered with access. The ultimate sanction for these mothers is a variation of the custody order.

a. The Discounting of Wife Abuse and Elevation of Parental Right of Access as Sancrosanct

Presently, the right of access may be the most potent weapon in a batterer's arsenal. There is a determined reluctance on the part of courts to restrict the non-custodial parent's access to his children unless there is reason to believe that their safety may be compromised. Wife abuse does not usually count as such evidence.

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[167] *Cassidy* v. *Cassidy supra* note 123.

Allegations of wife abuse do not generally seem to factor into the decision-making process of some judges with regards to access. In *Wilbur* v. *Wilbur*[168] the court accepted the petitioner wife's version of events which included allegations of physical abuse and found that her fear of the petitioner was reasonably held. However, in considering her application for supervised access , the judge found there was no basis upon which to "impose this artificial regime on the respondent". This finding has made despite evidence of two altercations which occurred over access exchanges — which were considered by the court as justifying the petitioner's reasonable fear of her ex-husband.

In other cases, allegations of wife abuse are minimized by the court. Indeed, one judge, in awarding sole custody to the wife and weekend access to her ex-husband who she was afraid of because of his alleged abusive behaviour, instructed the parties to attempt to improve their "communication" skills.[169]

Even where there are allegations of physical or sexual child abuse, courts are more likely to award supervised access than no access. Supervised access orders are often varied to non-supervised access once an allegation of child sexual abuse is determined to be unfounded. The case law research revealed no case in which access was terminated — subject to no provisos or provisions. The extent to which the law favours maintaining contact on the off chance that a father-child relationship can be salvaged at some future point is demonstrated in the following cases. This outcome is apparently preferred to one which provides women and their children with a legal escape route from continued contact with their abusers.

In *D.H.C* v. *R.G.C.*[170] the non-custodial father was incarcerated for the sexual abuse of his own children. The mother won her application to terminate access entirely during the period of incarceration. The order was less clear as to whether it also included the entire period of probation. In any event, the judge decided that the father, who had cross-applied for supervised access and an order prohibiting a move outside the jurisdiction, could reapply for an order for supervised access at a later date. The judgment acknowledges that the mother kept the children out of counseling prior to his conviction so that there was no chance that father could argue that the allegations were planted by therapists. Remarkably the judge ordered the mother to keep the father informed with respect to the children's health and

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168 *Wilbur* v. *Wilbur* (12 June 1996) Prince George 32230 (B.C.S.C.).

169 *Boyko* v. *Purdue*, *supra* note 133.

170 *D.H.C* v. *R.G.C.*(12 November 1996) Vancouver D101318 and F960185 (B.C.S.C.).

education. This order ensured that contact must be maintained and left the door open for the father to reappear in their lives at a later date.

Leung v. *Currie*[171] is a case involving a battle that raged in and out of court regarding a father's desire to have access to his daughter. There was a of long history of court orders for supervised access and no access. This case is extreme in the sense that the abusive nature of the defendant father was acknowledged outright by the court.

In the context of the litigation he abused his ex-wife, assaulted a social worker and intimidated the court staff. The judge accepted testimony of the "terrible scenes" that the defendant father caused in front of his daughter during access visits — though no details were given in the judgment. The social worker testified that he had witnessed irrational behaviour on the part of the father who he believed was unstable. The father had threatened to kill the social worker on numerous occasions and had physically assaulted him. Criminal charges and a conviction followed the assault — adding to an already extensive criminal record. The Supervisor of Family Court Services testified that the father intimidated everyone in her office. Further, much of the 13-day long trial which was spread over 15 months consisted of an exploration of the conduct and character of husband.

There were also allegations that he sexually abused his daughter. The allegations of sexual abuse of the daughter were based on third party testimony; those allegations were later withdrawn. An investigation produced no firm conclusions, reporting that the father probably did not sexually abuse the child but may have masterbated in her presence. Given all this testimony the judge had little problem in disregarding the husband's allegations that his ex-wife was trying to deprive him of rightful access to his daughter on the basis of trumped-up charges of sexual abuse. The judge acknowledged that the wife had been left with a suspicion that, left alone with her daughter, the husband might resort to some inappropriate conduct. The wife wanted supervised access but not necessarily no access.

The judge, after detailing this evidence of his abusive character states that none of it justified depriving the husband of all access to his daughter. The judge conceded that, in the circumstances, any access must be supervised. The judge further conceded that any access order was complicated by the fact that the daughter was genuinely afraid of her father.

What the judge actually ordered though is illustrative of a great deal of conflict

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171 *Leung* v. *Currie* (13 November 1987) Vancouver G000807 (B.C.S.C.).

within the judgment. On the one hand, the judge declined to allow access until the daughter expressed an interest in meeting with her father — at which point some form of supervised access could be arranged. But then, on the other hand, so as to not postpone access indefinitely, the judge gave leave to the husband to apply for access with an updated report of a social worker any time after six months. The judge makes this order which effectively ties both mother and daughter to this man for the foreseeable future. This order has made despite testimony from numerous professionals that it is unlikely that the husband/father will change.

It is unclear what is the exact nature of the access application brought by the applicant father in *Curll* v. *Curll*.[172] In the course of his submissions, the father argued that the restraining order imposed in Provincial Court was a major hurdle to a successful access regime. A Provincial Court judge had declined to lift the order. As a result, the father came to Supreme Court with the same application and request. The ex-wife wanted the restraining order kept in place because of a history of past violence and reported incidents of disciplinary violence with respect to two of the children. The Supreme Court judge directed that the parties attend a mediation session with a Family Court Counselor to discuss the sole issue of access.

It was also revealed in the course of the judgment that the father was in arrears for maintenance. He had quit his $32,000 a year job and lived off his portion of the proceeds from the sale of the matrimonial home. He stopped paying maintenance soon thereafter. The judge further ordered that the ex-husband would not be permitted to bring any other applications without leave of the Court.

There are some indications in the case law that not every court room is anathema to women litigants who allege wife abuse. The court in *P.A.* v. *F.A.*[173] expressly took into account the wife's allegations of physical and sexual abuse and expressly found that the children were detrimentally affected by witnessing their father beat their mother. Custody has awarded to the mother/wife, with no access to the father until he completed therapy.

The details *P.A.* v. *F.A.* are worth recounting. The father had consented to the mother retaining sole custody of the children, the only issue was access. The wife had alleged physical abuse against her and physical and sexual abuse against the children. The judge commented positively on the credibility of the wife's evidence, underlining the fact that her testimony included specific details and dates of beatings and their

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172 *Curll* v. *Curll supra* note 124.

173 *P.A.* v. *F. A.*, *supra* note 141.

resulting injuries. The court referred to the fact that the police had been called to the home and that the wife had left for a transition house with the kids.

The father denied all allegations of abuse saying the wife had poisoned the children's minds against him. The father denied his involvement in any beatings. He testified that if he did engage in any assaultive behaviour, it was in self-defence. He further alleged that his wife was mentally ill and had attacked him in the past. The specific assaults complained of by the husband consisted of his wife seizing his keys and holding onto the back of his pants.

The complicity of the community in silencing victims of wife assault is also evident in this judgment. The wife had testified that she had been warned by members of their religious community against disclosing to anyone that the parties were having difficulties. She was told that if she did disclose the abuse she ran the risk of losing her children to the Ministry of Social Services.

Another potential problem was revealed with respect to the quality of supervision in supervised access situations. In this case there was a previous order for supervised access. However the 'supervision' was carried out by a friend of the husband who had no idea of what the obligation entailed.

b. Intentional Interference With Access — Use of Contempt Citations Against Custodial Parents and the Reversal of Custody Orders

Access is also one of the junctures where custodial mothers get into the most trouble with the courts. Non-custodial fathers often complain of the custodial mother's intentional interference with his right of access. The nature of these complaints vary from not having the children ready on time, to enrolling the children in extra-curricular activities which infringe on his access time, to frustrating or even denying access for a period of time. Whatever the reasons for 'interfering' with access, the courts are quick to intervene to reaffirm the right of access and make provisions for its enforcement. Interestingly, there is not one case in the entire sample of a custodial parent bringing a contempt application for the failure of a custodial parent to exercise access.

Applications for contempt citations are routinely made by disgruntled fathers — with varying degrees of success.[174] The main problem for women is that ongoing access

[174] *Christopherson* v. *Christopherson* (4 January 1996) Vancouver D87604A (B.C.S.C.).

disputes hold real potential as the basis for the reversal of custody orders. The courts deliver clear warnings to custodial parents as to the dangers of withholding access. In *McIvor* v. *McIvor*, the court cautioned:

> *...I will tell her that repeated refusals of access, whether they take the form of something active or whether they are merely the passive acquiescence in the wishes of the child, have led in the past in other cases to transfers of custody,.... When a judge gets to the point where he or she is satisfied that one of the parents is systematically being denied access without good reasons, that is looked upon as a very serious breach of the interests of the child.*[175]

The problem for women appears to be a difference of opinion with the judge as to what constitutes "good reasons". In *McIvor* v. *McIvor* the judge referred to Mrs. McIvor's interference with her ex-husband's right of access as conduct that was: "a deliberate, callous and mean-spirited violations of Mr. McIvor's essential parental rights and privileges". The context for her denial of access was an allegation against Mr McIvor of sexual abuse of her daughter. Such situations place custodial parents in an impossible position; they can allow access despite their children's allegations or withhold access and risk being found in contempt of court.

The law states that the custodial parent is obligated to facilitate access which some judges interpret as requiring the custodial parent to "encourage" the child to participate in access visits.[176] There has to be some standard of reasonableness introduced into the equation in cases like this. If a custodial parent makes a decision based on a reasonable belief in what her daughter or son says or does, then she should not be held accountable for denying access until the matter can be heard and the situation assessed.

It is noteworthy that in some of these cases the wife/mother takes the position that access should not be completely terminated nor terminated indefinitely.[177] Rather, many mothers seem to ask for supervised access rather than the complete termination of access. It is difficult to ascertain why mothers take this position by reviewing the case law. Is it because mothers are also operating under the assumption that children benefit from access to an abusive father/husband as long as their safety is ensured? Or is the explanation found in their counsel's advice against taking the hard line

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175 *McIvor* v. *McIvor* (15 May 1996) Prince George 19540 (B.C.S.C.).

176 *Ibid.*

177 Cite unavailable.

position because of the risk of appearing unwilling to meet their obligations under s. 16(10) of the *Divorce Act*.

7. The Relevance of Wife Abuse to Spousal Support and Division of Assets

There appear to be different approaches to making determinations about spousal support as compared to the division of assets. In the former, wife abuse may be considered as relevant; while in the latter, the case law is fairly clear that evidence of wife abuse is completely irrelevant.

Vlasik v. *Vlasik* is one case where the court made an order for permanent maintenance of the wife based on the abuse she suffered at the hands of her husband. The court found that she "suffered escalating and frequent emotional, physical and sexual abuse by the defendant..."[178] In considering section 57 of the *Family Law Relations Act* the court found that the wife, by the parties' agreement in the seventeen year marriage, fulfilled her role as a homemaker and child care provider. She experienced economic loss as a result. When that economic loss was taken together with her mental and physical disability which the court found to result directly from the marriage, she was left with an economic disadvantage that was the direct result of the marriage and its breakdown.

There are cases which hold that wife abuse is irrelevant for the purposes of determinations under section 51 of the *F.L.R.A.*, that is, the provision that governs the determination of family assets and the division of property. In *Verschuur* v. *Verschuur*[179] the court would only consider allegations of wife abuse and sexual abuse of the daughter with respect to the reason for the breakdown of the marriage[180]. The court rejected the submissions of the wife's counsel that evidence of wife abuse could be considered when determining the division of property. The court reaffirmed previous rulings and concluded that "misconduct" during the marriage — other than financial misconduct such as the dissipation of assets — is irrelevant and should not

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178 *Vlasik* v. *Vlasik* (8 April 1997) New Westminster A890536 (B.C.S.C.) at paragraph 9.

179 *Verschuur* v. *Verschuur* (24 December 1990) Chilliwack 5904/6994 (B.C.S.C.).

180 The former has determined not to be a consideration based on the wife's evidence that she would have stayed but for the sexual assault of her daughter

be considered in the determination and division of family assets under section 51.[181] This decision is in keeping with earlier B.C. decisions at both the Supreme Court and Court of Appeal.[182]

8. Financial Impoverishment of Women

Both the literature and the accounts of women's advocates underline the various ways in which women's participation in family law litigation contributes to and may even precipitate the financial impoverishment. Many of the same actions or strategies of ex-husbands and non-custodial fathers evident in the literature and by women's advocates were also evident in the case law including:

(1) the non-payment of spousal and child support;

(2) the accumulation of arrears followed by applications for their cancellation;[183]

(3) applications for reductions in the amount of child support;

(4) the irregular payment of child support;

(5) the filing of bankruptcy papers;[184] and

(6) the non-disclosure of assets.

An interesting observation is that male litigants often come to court to exercise their

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181 *Verschuur* v. *Verschuur* , supra note 179 citing *McLean* v. *McLean* (9 October 1990) New Westminster D022734 (B.C.S.C.).

182 *Ford* v. *Ford* (1 December 1986) Vancouver CA006478 (B.C.S.C.); *Murchie* v.*Murchie* (1984) 53 B.C.L.R. 157; *Tratch* v. *Tratch* (1981) 30 B.C.L.R. 98; See also *Maerzke* v. *Maerzke* (2 June 1997) Rossland 4366 (B.C.S.C.) where respondent husband applies for order that certain paragraphs of the affidavits filed on behalf of the petitioner wife be struck out as evidence relating to his alleged abusiveness and drug dependency was not relevant to the issue of spousal support or to the issue of divisions of assets. Wife alleges that previous partial division of assets was unfair because it was agreed to in order to avoid conflict and violence on the part of the respondent. He makes between $145,000 and $159,000 but submits after expenses income available of $1100-$1300 per month.

183 *Waltz* v. *Waltz,* cite unavailable.

184 *Mahood* v. *High Country Holdings Inc.* (29 November 1996) Vancouver A932672, 167462/VA96, 167463/VA96 and 1674/VA96 (B.C.S.C.).

rights at the same time they are not meeting their responsiblities and obligations. For example, male litigants often come to court seeking increased access, while in default of their financial obligations to their children. [185]

a. High Cost of Legal Proceedings

The cost of legal fees in any particular action is not necessarily ascertainable from the judgment — though there are references to legal fees amounting to many hundreds of thousands of dollars.[186] Further, there are other references to the financial hardship experienced by one or both of the parties because of the expenses incurred during litigation. One possible measure of the chilling effect of legal expenses is the number of women litigants who appear unrepresented, though men appear unrepresented as well.

b. Reduction of Child Support and Cancellation of Arrears of Maintenance

Applications for the reduction of child support and the cancellation of arrears of maintenance lend support to the observations made in the literature and by women's advocates that non-custodial fathers often behave in a financially irresponsible manner. There is research which suggests that child support awards are in general unrealistically low in the first place and that a significant proportion of them remain unpaid. As a consequence, any reduction of those awards has to be viewed as a serious blow to the financial circumstances of the custodial parent and the children.

Manolescu v. *Manolescu*[187] is a an example of an extreme case of nonpayment of support and a concomitant blatant disregard for court orders to do so. This particular application in the *Manolescu* litigation arose when the wife applied for an order of committal based on Rule 56. It is evident upon reading the case that Mr. Manolescu had been before the court numerous times because of his non-payment of child maintenance which dated back to 1985. The Chief Justice in another judgment had confirmed that arrears were owing in the amount of $84,485.94.

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185 *Pesic* v. *Pesic*, *supra* note 126.

186 See *Metzner* v. *Metzner*, *supra* note 121. In that case the court noted that $320,000 in legal fees had been spent.

187 *Manolescu* v. *Manolescu* (4 February 1991) Vancouver D46300 (B.C.S.C.).

But what is noteworthy about this case is the court's discussion of what constitutes criminal contempt as opposed to civil contempt. Even though the judge expressly recognized the seriousness of Manolescu's demonstrated contempt of the court and in fact ordered him incarcerated, he was not ready to label his behaviour criminal. Civil contempt can only become criminal contempt if the continuing and deliberate disobedience of the court order(s) is apt to interfere with the administration of justice and has done so. While the judge deems Manolescu's misconduct as "reprehensible" and "deserving of the censure of the court", he found that:

> *...his misconduct does not have severe and wide-spread repercussions; it does not bring the court process into disrepute; it affects only his family. The fact that Mr. Manolescu is one of so many who have deliberately defied court orders to pay maintenance that the problem has become systemic does not render his misconduct criminal in the sense that the word is used when defining contempt. He was not preaching disobedience. He was not participating in an organized programme of civil disobedience. He was not challenging publicly the rule of law.*

The judge in *Manolescu* finds that it is not one person's deliberate disobedience of a court order to pay child maintenance that brings the judicial process into disrepute. Instead, the judicial process is brought into disrepute by the apparent inability of courts to enforce their own orders for periodic child, and indeed spousal, maintenance.

In *Cherry* v. *Cherry*[188] the B.C. Court of Appeal overturned a lower court's decision to reduce the arrears of child maintenance from almost $15,000 to $3,500. In *Inyallie* v. *Orr*[189] the petitioner ex-wife applied for a declaration that the respondent husband was in arrears for maintenance for child support from 1984 onwards. The total arrears added up to $31,200. The ex-wife deposed that she did not bring any proceedings to enforce the arrears previously because of the defendant's physical and verbal abuse throughout the marriage and after separation.

c. Non-Disclosure and Hiding of Assets and Declarations of Bankruptcy

A review of the both the academic and community-based literature points to the practices of hiding assets and under-reporting income as particularly harmful to women litigants. By definition, a review of the case law is unlikely to shed very much

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188 *Cherry* v. *Cherry* (21 March 1996) Vancouver CA019093 (B.C.S.C.).

189 *Inyallie* v. *Orr* (22 November 1996) Prince George 33664 (B.C.S.C.).

light on the issue. However, it is noteworthy the number of times that a judge will comment that one of the parties, usually the ex-husband, has not been forthcoming with financial information.[190]

Yet there is little that judges appear able or willing to do to enforce full disclosure. In this sample there was no case where a fine was levied against a non-disclosing party. In *Pesic* v. *Pesic* the court states that the husband's evidence that his gross income was $800 per month was unreliable[191]. Instead, the court substitutes a figure of $2,000 based on his testimony as to previous earnings in an outside shop.

Another notable feature of the case law was the number of times references were made to the bankruptcy of the non-custodial parent or ex-husband. An assignment in bankruptcy effectively allows the non-custodial father to default on his child support obligations. It is difficult to show the connection between the bankruptcy and the child support obligations simply by viewing the cases. In any event, a bankruptcy declaration was at issue in *Re Drozdik*[192]. As already indicated the court in *Manolescu* (above) annulled an assignment in bankruptcy as an abuse of process.

d. The Use of Costs

The general rule regarding an award of costs in matrimonial litigation — that is, which party pays for the lawyers — is the same as for any other civil litigation. Each party usually pays his or her own legal bills — unless the court orders otherwise. In British Columbia, the courts have been reluctant to set down strict rules as to when judges should exercise their discretion because the facts of family law cases vary so greatly. Factors such as hardship, earning capacity, the purpose of a particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge may take into account. The determination of which factors are most important in any given situation is left to the judge.

There is an interesting use of the rule of costs in *Matsell* v. *Young*,[193] an Ontario case,

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190 *Boden* v. *Boden* (11 September 1991) Vancouver CO71006 (B.C.S.C.); *Mahood, supra note* 185; *Schwann supra* note 128.

191 *Pesic* v. *Pesic*, *supra* note 126.

192 *Drozdik (Re)*, *supra* note 117

193 *Matsell* v. *Young* (1994) 5 R.F.L. (4th) 203.

where a mother brought a motion for an order that the father pay the costs of previous proceedings as a condition precedent to applying for a reduction in the quantum of support. The respondent father had failed to make payments as ordered and owed a substantial amount of arrears. The Director of the Family Support Plan had commenced default proceedings. The judge finds that the test used to make such a determination is one of fairness citing a previous decision *Zarate* v. *Calero*[194] in which that court had found on somewhat similar circumstances that

> *it would be unfair to permit the respondent to embark upon what may be further protracted litigation without fulfilling at least part of his obligation under the original order.*

In *Matsell*, the judge found that it would be unfair to force the respondent to pay unpaid costs as a condition precedent to determining the amount of unpaid support because the court may later determine that he is unable to pay either the unpaid costs or the unpaid support. While this strategy was not successful in this case, it may be in others in which the application to vary is more clearly abusive.

D. SUMMARY

The above 'snapshot' of family litigation underscores a high level of hostility and acrimony that is also adverted to in the literature. Many of the cases are protracted — extending over a number of years before even setting the matter down for trial. Judges sometimes detail the harassing behaviour and tactics of ex-husbands both inside and outside the courtroom.

Allegations of wife abuse are made in a significant number of cases. Given the assumption that lawyers often dissuade women from making such allegations, it is probable that there are many other cases in which wife abuse is a reality but not raised in the litigation. Allegations of wife abuse are often met with cross-allegations of parental unfitness of one form or another. The courts adopt approaches in dealing with such allegations that are as varied as the fact situations themselves.

In contested custody cases where allegations of wife abuse are raised, there are instances when women do lose custody. More commonly though, these women are ordered to maintain contact with abusive ex-husbands through access orders.

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194 (1986) 3 R.F.L. (3d) (Ont. Fam. Ct.).

Part IV — Conclusions and Recommendations for Policy and Legislative Reform

A. CONCLUSIONS

There is widespread acknowledgment of the acrimonious and protracted nature of family law litigation — particularly in relation to custody and access. Though usually expressed in gender-neutral terms, references to custody blackmail, the use of children as pawns and the multiplicity of applications are standard fare even in mainstream family law textbooks. Relatively recently, the gender implications of these same features of family law litigation have been examined; the consensus being that there is more "going on" in these cases than excessive litigation.

Front-line workers and advocates began the task of documenting the harassment and intimidation of women both inside and outside the courtroom in relation to custody and access disputes. Their qualitative research shows a correlation between male violence against women in intimate relationships and women's post-separation experiences of court-related harassment. Court-related harassment refers to the various tactics and range of behaviours adopted by abusive men to maintain power and control over their ex-spouses in relation to largely, custody and access disputes. Women experience this harassment and abuse inside and outside the court room — hence the term "court-related harassment".

In addition, the negative repercussions of this experience are compounded by what is seen as the complicity of the family justice system. Generally, the existence of a gendered 'court-related harassment' is not acknowledged — let alone recognized as either a serious abuse of power or process. Further, the law does not take into account the reality of male violence and abuse against women in relationships and after those relationships are over. As a consequence, women are doubly victimized — once by the court-related harassment of their ex-spouses and then again by a family law system that is reluctant to acknowledge the implications of woman abuse.

Feminist researchers and academics strongly endorse the view that there is a correlation between woman abuse and court-related harassment. They have moved this analysis forward by developing a discourse with which to describe these experiences. The term 'separation assault' provides the analytical link between past violence and current legal disputes.

There are a number of additional sources of support for the observations that court-related harassment is a gendered phenomenon and often an extension of male violence and abuse. First, there is an extensive body of research that documents the prevalence, seriousness and range of male violence and abuse experienced by women and children — particularly after separation. Abuse and violence are recognized as injurious in relation to one's physical, sexual, emotional, psychological and economic well-being and manifest as physical violence, threats of violence, wife killing, criminal harassment, economic abuse, and child abductions.

Further, social science research documents (1) the gendered aspects of custody blackmail, (2) the inefficacy of joint custody in 'high conflict' families, (3) myths surrounding the prevalence of false allegations of sexual abuse, (4) the fact that violence and fear affect many women's ability to negotiate for marital assets after separation, (5) the conceptualization of abusive husbands as abusive fathers, and (6) the negative effects of witnessing abuse on children. This research shows that the current assumptions that inform the application of family law in contested custody cases — particularly where there are allegations of wife abuse — should be revisited because they do not reflect the reality of the wide-ranging repercussions of male violence against women in relationships — either before or after separation.

Case law research shows that there exists a subset of family law cases which are extremely protracted and acrimonious. Judges do sometimes express their disapproval of the conduct of one or both of the parties in relation to the litigation, however that disapproval is often not followed by any sanction that will stop the behaviour. Further, individual cases support claims that some men use the legal system to harass women litigants — often there are allegations of violence and abuse against the ex-husband in these cases. There are references to post-separation woman abuse and harassment in the cases and include threats/actions to kidnap the children; seek sole custody, financial ruin the women, kill her and/or the children, commit suicide, commit acts of vandalism against her or others. Similarly, there are cases that show that financial tactics are often used to intimidate and harass women litigants.

What is more evident from the case law is the far-reaching implications inherent in the systemic reluctance to incorporate an analysis and understanding of the dynamics of woman abuse and by extension court-related harassment which is specific to custody and access determinations. Nowhere is this reluctance more apparent than in access determinations. The termination of a father's access 'rights' does not seem to be contemplated by the vast majority of judges regardless of both his past conduct and potential future threats to the woman's safety.

There is no research as yet that attempts to document court-related harassment in quantifiable terms. Attempts to conduct a review of a small sample of B.C. Provincial

Court files in relation to a small aspect of this phenomenon were unsuccessful. Other attempts to gain access to general data on the prevalence of red flags or 'abuse' indicators in relation to family maintenance enforcement proceedings were met with the same 'closed doors'. This reluctance on the part of family justice system personnel is disconcerting given the need for more, not less, research on the issue.

In any event, there is enough 'circumstantial' evidence to place policy makers, administrators, judges and lawyers on notice that there is a subset of women and children who experience court-related harassment — thereby, in effect, precluding equitable access to the courts and arguably bringing the administration of justice into disrepute. There are many references in the literature to the correlation between woman abuse and court-related harassment. There are just as many references to the inability of the family justice system to deal with the reality of woman abuse and post-separation woman abuse in a way that is respectful of their **substantive** equality rights, including the rights to a safe and secure existence.

The implications of these observations are far-reaching for policy makers. At the very least, it is evident that as a society we are giving women in abusive relationships mixed messages. Insofar as woman abuse is acknowledged as a systemic problem, we collectively 'respond' by asking "why doesn't she leave him?" Yet there is a little support for any decision to leave other than the short term support provided by transition houses and shelters. In fact, the absence of support is also evident in the administration of the family justice system which often compounds women's problems because there is no understanding of the dynamics and prevalence of male violence pre- and post-separation.

A recent report prepared for the American Bar Association summarized the challenge as:

> *The time has now come for the entire legal profession to scrutinize and respond to this problem. The law must protect children who live in violent home environments. The law must work to save lives, to protect abused parents and their children by removing violent abusers, and to protect victim-parents from continued exposure to domestic violence without risking the loss of child custody to their batterers.*[195]

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[195] Jaffe, *supra* note 11 at 28-29 citing ABA Center on Children and the Law (1994) *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*, Washington, D.C.: American Bar Association.

B. RECOMMENDATIONS FOR REFORMS

It is clear that policy makers a need to address the issues raised in this Report, particularly (1) the experience of women litigants with court-related harassment both inside and outside the courtroom and (2) the ways in which the failure to incorporate an analysis of male violence and post-separation woman abuse has operated to the disadvantage of women in custody and access disputes.

The difficulty in making concrete proposals for reform in this area of the law is compounded by (1) the prevailing assumption of same treatment gender equality which informs the legislative and interpretive framework, and (2) the extent to which gender bias pervades the family justice system. Taken together, these realities have the potential to undermine any positive developments that might flow out of any reform initiatives

There is the related perspective that cautions against using law reform as a strategy to protect women in the absence of social change.[196] Without social change, statutory reforms intended to protect women can in fact produce the opposite effect. In considering whether judges should be directed to consider, for example, "spousal" or partner abuse when making decisions about children, one writer suggests the need for caution:

> *....both the discourse of judges and the historic evolution of law... illustrate a lack of judicial sensitivity to the vulnerabilities of abused women. Consequently, it is likely that, in the absence of judicial education and social change, statutory reform requiring judges to consider partner or spousal abuse when making child custody and access decisions, will place abused women at a disadvantage.*[197]

As repeatedly stressed in the course of Advisory Committee meetings and informal interviews with family lawyers, reforms have to be considered carefully because of their potential to 'cut both ways' and ultimately be used against women. With these cautions in mind, some recommendations for reform are presented with a view to persuading policy makers to conduct the necessary research and consultation to determine the efficacy of these proposals. Further, the utility of these recommendations are prefaced by the need to ensure certain large-scale issues are addressed prior to or in conjunction with more specific recommendations for reform.

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196 Linda Neilson, "Spousal Abuse, Children and the Courts: The Case for Social Rather Than Legal Change" (1997) 12 #1 *CJLS* 101

197 *Ibid.* at 106.

Other reports and studies have attempted to formulate recommendations that would address these and other problems with the family justice system — in many cases they are quite extensive and will not be reproduced here.[198] This Report supports the recommendations made in these other documents and draws upon them for guidance in formulating recommendations of our own.

Generally, the need to introduce and implement a zero-tolerance policy with respect to woman abuse, child abuse and court-related harassment in the context of the family justice system is apparent. Correspondingly, there is a need to ensure the safety and security of women separating from abusive men and to remove young people from role models who are abusive and violent.

1. Large-Scale Issues/Reforms that Need to Be Addressed as a Prerequisite to Positive Change for Women

There are a number of 'larger' issues that need to be addressed prior to, or in conjunction with, statutory reform of the substantive law or law of procedure. The family justice system requires a re-ordering of priorities and a new set of assumptions and policy directives to guide the courts, legislators and family courts personnel. At a minimum, the following issues must be fully addressed:

(1) Women's constitutional right to substantive equality must replace the same treatment model of equality that presently guides policy makers and judges in relation to the family justice system

(2) The reality of male violence against women in intimate relationships and post-separation woman abuse has to be recognized and its implications for all aspects of the family justice system addressed

(3) Women require increased access to legal aid for family matters on a basis that reflects the time and expertise required to litigate these cases properly. Women need to go into court with quality legal counsel who sensitive to the issues of woman abuse and post-separation woman abuse.[199]

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198 Taylor, Barnsley & Goldsmith, *supra* note 1, Canadian Advisory Council on the Status of Women, *Summary Notes of the Custody and Access Workshops*, Sept 24-26 1993.

199 Jaffe *supra* note 11 at 25-27.

(4) Family justice system personnel need to be educated in the dynamics of male violence against women in intimate relationships and post-separation woman abuse. Continuing education programs for lawyers, judges, policy makers and other family justice system personnel need to be implemented after consultation with women's groups and social science researchers. Further, there is a need to raise awareness of the detrimental effects of children witnessing violence particularly among legal, medical, education, social service, and mental health professionals.[200] Front-line professionals such as teachers, police officers, social workers and family doctors need to recognize and respond to the early warning signs of violence and abuse.

2. Specific Recommendations for Reform

A number of more specific recommendations are underlined for further consideration and consultation:

(1) Judges should be directed to consider evidence of woman abuse and/or post-separation woman abuse in making custody and access decisions. Woman abuse should be included in the list of factors which judges are directed to consider when making determinations as to the 'best interests of the child'. Where men allege abuse as well judges should be directed to consider the nature, duration, and severity of abuse including any reports from medical authorities, police, crisis centres, and transition houses.

(2) There should be some 'presumptive' status accorded to the consideration of these factors.

(3) There should be a strong presumption that in cases where evidence of woman abuse is accepted as valid, the abusive ex-partner should not be considered as a potential custodial parent.

(4) The present provisions which direct the custodial parent to facilitate access should be rendered inoperative in cases where wife abuse is accepted as a factor.

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200 See generally the recommendations contained in Jaffe.

(5) Access orders should be expressly framed as containing both rights and responsibilities. Any order for access should clearly state that it is providing for both a right of access and a responsibility to carry through with the exercise of that right.

(6) The above presumptions would apply to variation applications as well, that is, an abusive ex-husband could not claim that he is no longer abusing his ex-wife as a material change in circumstances.

(7) Restrictions on both the timing and number of applications to vary or appeal custody and access orders should be considered.

(8) The imposition of a cooling off period after a final custody order — where neither parent can apply for a variation unless there is a reasonable belief that the children's emotional, physical or psychological well-being is at risk.

(9) The Rules of Court should be revised to bar further applications from parties who are defying other orders of the court in the same action except where that defiance is related to a reasonable belief that the children's emotional, physical or psychological well-being is at risk.

(10) There should be more guidance from the Bench in relation to the drafting of affidavits. The rules regarding affidavits should be changed in family matters to expressly place the responsibility for providing quality affidavits on legal counsel. Sanctions should attach to those lawyers who do not follow these rules.

(11) The efficacy of case management regimes which provide for the continuity of judges and rigorous scrutiny of requests for adjournments should be examined.

(12) Measures to level the financial playing field between the parties from the outset of litigation should be considered. This would allow women to have access to funds for the purposes of litigation at the outset. For example, a case-specific litigation pool or fund could be established through the lawyers or the court from which all legal fees and disbursements associated with the litigation are disbursed on an equal basis. In this way, both parties are limited to the funds available in the pool to litigate the action so that 'deep pockets' cannot drive the litigation.

Generally, researchers and policy makers must give much more attention to the role of violence in cases of divorce. Responsibility for tracking cases involving allegations of abuse and cases which involve "excessive" litigation falls to the administrators of the family justice system and their personnel. The same responsibility exists in relation to undertaking the necessary gender-based analysis to determine (1) whether "justice" is being administered in these cases and (2) what reforms might address these problems in a way that is respectful of women's substantive equality rights. To do so, requires a system-wide commitment to prioritize women and children's safety as an essential cornerstone of the justice system — in both the criminal and family justice arenas.

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