THE FAMILY LAW ACT AND FAMILY VIOLENCE: INDEPENDENT AND IMPARTIAL PARENTING ASSESSMENTS

The Legal Framework and Best Practice Issues

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OVERVIEW

It is a privilege to be asked to discuss with you the topic of parenting assessments and family violence. This topic is particularly relevant since the enactment of the B.C. *Family Law Act*[2] (the "FLA") in March 2013, with its new Parenting Assessment provisions and its focus on family violence. As mental health professionals acting as assessors you play a very important role within the family justice system. You bring expertise and clinical experience to the "best interests of children" analysis that parents, lawyers and judges often do not have.

You are appointed as an independent assessor to be a neutral, impartial evaluator, not an advocate. You are being asked to make decisions about parenting and to make recommendations to the court based on those decisions. As a result, when you are appointed to undertake a Parenting Assessment you are engaging in a very important, judge-like, decision making role.

When you are appointed to do such an assessment, significant trust is being placed in your ability to do so fairly and impartially. For parents, participating in an assessment process can be a stressful experience, and one that significantly intrudes into their private lives. It can be a financially costly one in circumstances where the funds needed to pay for the assessment are often not readily available. The recommendations you make deal with people's children and their futures.

You undertake this role within a particular legal framework. My task is to identify that framework and its implications for your work as independent, impartial assessors. I will first describe the legal framework within which you do your work, and what it means, within that framework, to be an impartial decision maker. I emphasize the importance of providing reasons for your decisions. I discuss particular equality concerns that can arise when the credibility of women's allegations of family violence are being assessed.

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[1] This paper was prepared for *Assessment of Parenting Arrangements After Separation in the Context of Domestic Violence,* a workshop presented for the College of Psychologists of British Columbia by Dr. Peter Jaffe, November 21, 2013. Donna Martinson is now a Visiting Scholar at the University of British Columbia, Faculty of Law, and an Adjunct Professor at Simon Fraser University's School of Criminology. In addition to her role as a judge of the British Columbia Supreme Court, she has worked as a judge of the Provincial Court of British Columbia, and as Crown counsel, a lawyer in private practice doing family law and criminal law litigation, and a law professor at the Faculty of Law at the University of Calgary and the Faculty of Law at the University of British Columbia.

[2] [SBC 2011] Chapter 25.

The second part of the paper deals with some practice issues that some lawyers, judges and others think need to be addressed. I ask you to evaluate their suggestions, based on your own experience and expertise. You may agree with all, some, or none of them. I say that steps need to be taken to address matters that are of concern and to address misconceptions. I then, respectfully, make some best practice suggestions for your consideration. I conclude with an appeal for more collaboration among all people who work to help families.

I discuss all of these matters under these heading:

I. The Legal Framework

- A. The Law Relating to Family Violence
  1. The Family Law Act
     - a. Broad Principles
     - b. Best Interests Factors that Must Be Considered
     - c. The Participation of Children
     - d. Denial of Parenting Time and Contact
     - e. Protection from Family Violence Orders
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- B. Meaning of Impartiality
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- D. The Requirement for Reasons for Decisions: Explaining How and Why Decisions are Reached
- E. Assessing Credibility in Family Violence Cases – A Cautionary Note

II. Best Practice Issues – Independent Impartial Parenting Assessments

- A. Issues Raised by Judges, Lawyers and Others
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III. Concluding Remarks

I. THE LEGAL FRAMEWORK

The Chief Justice of Canada, Beverley McLachlin has described what makes a good decision maker in a keynote address to judges in Scotland in June 2012, called, *Judging: the Challenges of Diversity.*[3] She repeated her comments in a keynote address to a judicial education program for all British Columbia judges in November 2012. Though she speaks of judges as decision makers, what she says also applies to you as a decision maker in your judge-like role.

She says, in short, that decision makers must know the law and apply it. But knowing the law is not enough. It must be applied with "informed impartiality", which requires: an understanding that there are subjective elements to judging; the ability to be introspective, open and empathetic; and an appreciation of the social context within which the matters at issue arose. I will consider each of these issues, (1) the law, including the FLA and relevant equality and human rights law, (2) informed impartiality, and (3) appreciating social context, in turn. I will then conclude this section on the legal framework by discussing two points. The first is the importance of the legal requirement for reasons being given for decisions reached. The second is limitations on the ability of decision makers to assess credibility generally, and the particular gender equality issues that arise when decision makers assess the credibility of women who make allegations of family violence.

A. The Law Relating to Family Violence

1. The Family Law Act

The approach to family violence developed by the B.C. Ministry of Justice and approved by the Legislature in the FLA, to use the Ministry's words, modernizes the ***Family Relations Act*** to better reflect current social values and research.[4] It was enacted after many years of reviewing research, consulting widely and considering Canada's Charter of Rights and domestic and international human rights obligations.

The Act sets out both broad principles and very specific factors that must be considered by both parents and the Court in reaching decisions about what is in the best interests of children. These include very specific provisions relating to family violence, and a broad definition of family violence.

Parenting assessments ordered under s. 211 are not separate from, but rather form an integral part of this legal framework. That is, the purpose of an assessment is to assist parents, and the Court in reaching a decision that is in the best interests of the child by applying the assessor's expertise to the specific best interests factors found in the Act. It is not to provide a general analysis about best interests outside this legal framework.

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[3] Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, June 7, 2012, Edinburgh, Scotland: http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf

[4] As described in the Ministry's *Explanation of the Family Law Act.*

Section 211 provides that a court may appoint a person to assess one or more of the following: s. 211(1)

(a) The needs of a child in relation to a family law dispute

(b) The views of a child in relation to a family law dispute

(c) The ability and willingness of a party to a family law dispute to satisfy the needs of a child.

The person appointed in this way must be a family court counsellor, a social worker or another person approved by the court: s. 211(2)(a); the person must not have had any previous connection with the parties unless each party consents: s. 211(2)(b); the court can order that a copy of the report not be given to each party; and an application can be made without notice: s. 211(3). Under the ***Family Law Act*** the assessment is "for the purposes of a proceeding under Part 4 *[Care of and Time with Children]"*.

I will describe first the broad principles and then the specific considerations, in the form of a check list.

a. Broad Principles

The overall approach to parenting issues found in the FLA is different from that found in the ***Family Relations Act***:[5]

- The ***Family Law Act*** focuses on parenting arrangements, rather than custody and access. Parenting arrangements "means arrangements respecting the allocation of parenting responsibilities or parenting time or both": s. 1.

- The question of who is a parent is dealt with, in a comprehensive way, in Part 3 of the ***Act*** and includes parenthood by assisted reproduction.

- Only parents who are guardians have parenting responsibilities and parenting time: s. 40(1).

- Parents who are not guardians may have, instead, contact, obtained either by:
  - making an agreement with all guardians having parental responsibility for making decisions respecting with whom the child may associate: s. 58(3), or
  - obtaining a court order respecting guardianship: s. 59.

- Each parent of a child is the child's guardian while the child's parents are living together and after the child's parents separate: s. 39(1).

[5] [RSBC 1996] chapter 128.

- There is an exception when there is an agreement or order saying a parent in not the child's guardian which is made either after separation or when the parents are about to separate: s. 39(2).

- A parent who has never resided with his or her child is not the child's guardian unless: s. 39(3)

  - the parent regularly cares for the child: s. 39(3)(c).
  - that parent makes an agreement with all of the child's guardian providing that the parent is a guardian: s. 39(3)(b).

- A person is a guardian when there is an arrangement relating to assisted reproduction under s. 30: s. 39(3)(a).

- A person does not become a child's guardian only by marrying or entering into a marriage like relationship with a child's guardian: s. 39(4)

- The best interests of the child is the only consideration: s. 37(1)

- The best interests of the child test applies to the parties in reaching an agreement with respect to guardianship, parenting time and contact as well as to the Court in making a decision: s. 37(1).

- In reaching an agreement the parties and the court must take account of the overarching consideration that an agreement is not in a child's best interests unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being: s. 37(3).

- Agreements about parenting arrangements and contact reached without proper consideration being given to family violence and its impact on a child's physical, psychological and emotional safety, security and well-being <u>must be set aside by the court,</u> because such agreements are not in the best interests of children: s. 44(4), s. 58(4).

- There is specifically no starting presumptions about either parenting responsibilities or parenting time when making agreements or orders and in particular the following must not be presumed: s. 40(4).
  - that parental responsibilities should be allocated equally among guardians;
  - that parenting time should be shared equally among guardians;
  - that decisions among guardians should be made separately or together.

b. <u>Best Interests Factors that Must Be Considered</u>

I have provided the best interest factors in the form of a check list. It can be used to ensure that all of the factors relating to the best interests of children found in the FLA are considered:

Check List

To determine what is in the best interests of a child, the parties and the court must consider all the needs and circumstances of the child, including the following 10 factors: s. 37(2).

- € the child's health and emotional well-being; s. 37(2)(a)
- € the child's views, unless it would be inappropriate to consider them; s. 37(2)(b)
- € the nature and strength of the relationships between the child and significant persons in the child's life; s. 37(2)(c)
- € the history of the child's care; s. 37(2)(d)
- € the child's need for stability, given the child's age and stage of development; s. 37(2)(e)
- € the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities; s. 37(2)(f)
- € the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member; s. 37(2)(g) *See also the additional factors found in s. 38 factors, (listed below).*

  "Family Violence" means: s. 1.

  - € Physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm. s. 1(a)
  - € Sexual abuse of a family member. s. 1(b)
  - € Attempts to physically or sexually abuse a family member. s. 1(c)
  - € Psychological or emotional abuse of a family member, including: s. 1(d)
    - o Intimidation, harassment, coercion or threats respecting other persons, pets or property, s. 1(d)(i).
    - o unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy, s. 1(d)(ii)
    - o stalking or following of the family member, s. 1(d)(iii), and
    - o intentional damage to property. s. 1(d)(iv)
  - € In the case of a child, direct or indirect exposure to family violence. s. 1(e).

- € whether the actions of the person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs; 37(2)(h) *See also the additional factors found in s. 38 factors, (listed below).*
- € the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family member; 37(2)(i).
- € any civil or criminal proceeding relevant to the child's safety, security or well-being. 37(2)(j)

When considering section 37(2)(g) [impact of family violence] and section 37(2)(h) [family violence and impaired ability] a court must consider all of the following: s. 38.

- € the nature and seriousness of the family violence; s. 38(a)
- € how recently the family violence occurred; s. 38(b)
- € the frequency of the family violence; s. 38(c)
- € whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member; s. 38(d)
- € whether family violence was directed toward the child; s. 38(e)
- € whether the child was exposed to family violence that was not directed toward the child; s. 38(f)
- € the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence; s. 38(g)
- € any steps the person responsible for the family violence has taken to prevent further family violence from occurring; s. 38(h)
- € any other relevant matter. s. 38(i)

c. The Participating of Children[6]

The FLA provides that parents, in making an agreement, and the Court:

- must consider the child's views, unless it would be inappropriate to consider them: s. 37(2)(b).

This requirement applies to all children, including those children in cases where there are allegations of family violence, and other high conflict cases.

The words "unless it would be inappropriate to consider them" will likely be interpreted in light of the provisions of Article 12 of the *United Nations Convention on the Rights of*

[6] This discussion is based on *The Child's View* in The Honourable Donna Martinson, "The FLA: Protecting the Safety, Security and Well-Being of Children and Other Family Members – Changing Legal Frameworks and Professional Responsibilities,", BCCLE – The Family Law Act - Everything you Always Wanted to Know, January 2013, a pp. 5.5.18 – 5.5.21.

the Child.[7] The Supreme Court of Canada has addressed the importance of this *Convention*, and particularly Article 12, in *A.C. v. Manitoba (Director of Child Services)*,[8] concluding that "…With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from the child."

Therefore, hearing the views of children would be inappropriate only if they do not want to be heard or are incapable of expressing their own views: *B.J.G. v. D.L.G.*[9] Once the views are heard, in whatever manner, the child's guardians or the court would decide what weight will be attached to the views of the child, given the child's age and maturity.

This is so because the British Columbia Legislature, when enacting the provision, is presumed to respect the values and principles enshrined in the *United Nations Convention on the Rights of the Child* so that its legislation reflects those values and principles: *Baker v. Canada (Minister of Citizenship and Immigration)*[10]. Article 12 of the *Convention* provides that children have two legal rights in this respect: the right to express the child's views as long as the child is capable of forming his or her own views; and the right to have those views given due weight in accordance with the age and maturity of the child. The British Columbia Court of Appeal spoke about the importance of Article 12 in a relocation/mobility case: *Stav v. Stav*.[11]

> [67] Article 12 of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which was ratified by Canada in 1991, provides, in part:
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> 1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The British Columbia Supreme Court, in 2011, considered how and why the ***Convention*** applies in British Columbia. Justice Wedge, in *N.M.K. v. R.W.F.*,[12] a case of alleged parental alienation decided under the *Divorce Act*, said that children in Canada have a legal right to be heard in all matters affecting them. She concluded that the right is rooted in both the *Convention* and Canadian domestic law. She adopted the analysis in this respect used by the Yukon Supreme Court in *B.J.G. v. D.L.G.*,[13] and referred specifically to the following points:[14]

- The Convention was ratified in 1991 with the support of the provinces.
- Article 12 of the Convention says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings

[7] http://www2.ohchr.org/english/law/crc.htm
[8] 2009 SCC 30 at para. 92.
[9] YKSC 44 at para. 44. (Martinson J.)
[10] [1999] 2 S.C.R. 27.
[11] 2012 BCCA 154.
[12] 2011 BCSC 1666.
[13] 2010 YKSC 44
[14] At paras. 200-204.

- It also provides that they have the legal right to have those views given due weight in accordance with their age and maturity.
- There is no ambiguity in the language used by the Convention; all children have these legal rights to be heard, without discrimination. The Convention does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. (emphasis mine)
- The Convention does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.
- Children have a voice, not a choice.
- A key premise of the legal rights to be heard found in the Convention is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them.
- Receiving children's input can reduce conflict by focusing or refocusing matters on the children and what is important to them.
- Children's participation in the decision making process also correlates positively with their ability to adapt to new family configurations. Conversely, excluding children and adolescents may have adverse effects such as feeling ignored, isolated and lonely; experiencing anxiety and fear; being confused and angry at being left out; and having difficulty coping with stress.
- Further, longer term effects of not consulting with children and adolescents can include loss of closeness in parent-child relationships; less satisfaction with parenting arrangements; less compliance with those relationships and more "voting with their feet"; and longing for more or less time with the non-resident parent.
- The Convention provides the necessary flexibility for the Court to make a determination as to whether a child is capable of forming his or her own views. Children must be capable of having the cognitive capacity to form their own views and express them. In parental alienation cases, the issue of parental conduct should be considered not at the stage of permitting the child to express his or her views, but at the stage dealing with the second right, which is the right to have the child's views given the appropriate weight in accordance with his or her age and maturity. In some cases of parental alienation, the Court may conclude that the child is not really capable of forming his/her own views.
- Finally and importantly, there are many different ways in which children's views can be obtained, depending on the age and maturity of the child and on the circumstances of the particular case. In appropriate cases the Court may decide to take that step. Evidence of the child can be presented by either parent, or by a lawyer or other representative of the child, or by witnesses as to what the child has said to the person about his or her wishes, or by an expert report presented on behalf of one or both parents.

If a child is 12 years of age and older, and a person who is not a parent applies for guardianship, a court must not appoint that person without the child's written approval, unless satisfied that the appointment is in the best interests of the child: s. 51(4).

d. Denial of Parenting Time and Contact

The Family Law Act: (ss. 61-64)

- Provides new remedies for denial of parenting time and contact.
- Sets out circumstances when denial is not wrongful, including circumstances when a person reasonably believes the child might suffer family violence if the parenting time or contact were exercised.
- Provides remedies for failure to exercise parenting time and contact.

e. Protection From Family Violence Orders ss. 182-185

A new approach is taken to protecting family members, including children, from family violence.

- Here are some key aspects of the approach:
    - A stand-alone application (one not associated with any other application) can be made, and can be made without notice.
    - Sets out specific risk factors that must be considered.
    - If a child is involved the court must also consider:
        - whether the child may be exposed to family violence and
        - whether there should be a specific Protection Order protecting the child.
    - Expires one year after it is made unless it says otherwise.
    - Will be enforced under s. 127 of the Criminal Code, not under the Family Law Act or the Offence Act.
    - Sets out criteria to be applied when there are "mutual" applications.

2. ***Equality and Human Rights Law***[15]

I refer here to laws such as the Charter of Rights and Freedoms, human rights legislations and relevant international conventions. Their importance to impartial decision making is helpfully described in *Ethical Principles for Judges*[16], created by the

[15] This section is based on *Changing Judicial Roles – Contextual Judging*, in The Honourable Donna Martinson and Dr. Margaret Jackson, "Judicial Leadership and Domestic Violence Cases –Judges Can Make a Difference", prepared for the NJI National Judges Conference: Managing the Domestic Violence Case in Family and Criminal Law, October 29 – November 2, 2012, Vancouver, British Columbia and Trial Courts and the British Columbia National Judicial Institute Education Program: Trial Courts and the Rule of Law Judges Education Conference, November 2012, Vancouver, British Columbia. http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf

[16] Ethical Principles for Judges, the Canadian Judicial Council, http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

Canadian Judicial Council for federally appointed judges, and reflected in guidelines for provincially appointed judges.

The ethical principles state that fundamental to our justice system are the principles of judicial independence and judicial impartiality. They speak about the importance of equality law, saying that "judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability."[17] The Commentary to the ethical principles states that "the Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination."[18] The Commentary emphasizes that the constitutionally protected right to equality is not a commitment to identical treatment, but rather to the equal worth and human dignity of all persons, and a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.[19]

B. Meaning of Impartiality

As noted above, you, as an assessor who is making judge-like decisions, must be impartial. Commentary to the Ethical Principles for Judges makes the important point that equality according to law is "not only fundamental to justice, but is strongly linked to judicial impartiality."[20]

Chief Justice McLachlin says that what is required is "informed" impartiality. The image of a blind judge must be supplemented by the image of the informed judge. An informed judge recognizes that there is a subjective element in judging. She says that judges, like everyone else, possess preferences, convictions, and, as she puts it "yes, prejudices". They arrive as judges shaped by their experiences and by the perspectives of the communities from which they come. She describes these as leanings of the mind and says judges cannot help but bring these to the act of judging.

As the Chief Justice puts it, "subjectivity intrudes on judicial thinking at all levels." This includes assessing credibility and drawing inferences from facts, which cannot be done without drawing on a judge's general knowledge and understanding of human behaviour. The result is that initial thinking about a case may make use not only of valuable knowledge and experience that the judge has, but also "certain unhelpful, misleading subjective elements, such as prejudices and biases."

With recognition that there is a subjective element must come the ability to take steps to address it. She explains that impartiality does not eliminate preconceptions and biases; rather, it requires an evaluation of the initial conclusion to identify inappropriate preconceptions and prejudices that it may contain. She acknowledges that this is easier said than done. She suggests three attitudes that a good judge must possess in order to try to accomplish this. They are introspection, openness (enlargement of the mind), and empathy.

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[17] Ibid, 5, Equality, Principle 2.
[18] Ibid, 5 Equality, Commentary 1.
[19] Ibid, 5 Equality, Commentary 1.
[20] Ibid 5, Equality, Commentary 2.

By introspection she is referring to taking moral stock of oneself, to obtain a clear understanding of one's mental and ethical susceptibilities. Enlargement of the mind means a judge must be open and receptive to ideas and arguments that may compete with the judge's personal preconceptions. In her view this willingness to receive and act upon new and different ideas, arguments and views lies at the heart of judicial impartiality. People, she says, have the right to a judge who will truly hear them and be willing to be convinced by views different from their own. By empathy she is referring to the ability to see the world from the perspective of others and the legitimacy of diverse experiences and viewpoints. A judge, she says, by an act of imagination, must systematically attempt to imagine how each of the contenders sees the situation. Empathy does not require a judge to adopt a particular point of view, but allows the judge to truly hear the parties who appear before her.

C. Understanding Social Context

1. *Generally*

What Chief Justice McLachlin has said so far about the requirements of good judging is, she continues, necessary, but not sufficient. In order to truly understand and appreciate the various perspectives necessary to reach a just result, the judge must understand the social context of the matter in issue. That is, the judge must understand not just the legal problem but the social reality out of which the dispute arose.

She states that judges apply rules and norms to human beings embedded in complex social situations. To judge justly they must appreciate the human beings and the situations before them, and appreciate the "lived reality of the men, women and children who will be affected by their decisions."

Appreciating social context is directly linked to Canada's commitment to equality. Former Supreme Court of Canada Justice Frank Iacobucci has explained how legal principles dealing with equality relate to social context. He said, "…understanding the Canadian social context and incorporating this into the process of adjudication requires that we always bear in mind the moral underpinnings of our Constitution and in particular the fundamental principles of equality."[21]

2. *Social Context and Family Violence*

Social context information is relevant to family violence cases. It can have different purposes. I suggest that in your parenting assessment work it can have three broad purposes:

1. It adds to the knowledge base you have developed through your life experience.

2. It can expand your view of what is relevant to a particular case, and in this way assist you in both searching for relevant facts and reaching a just result.

[21] Hon. Justice Frank Iacobucci, "The Broader Context of Social Context", Remarks, Social Context Education Faculty and Curriculum Design Program 1, Part II, Victoria, June 2001.

3. It can assist you in testing for erroneous background assumptions when you make decisions, and when you draw inferences and make credibility findings in the process of making those decisions.

What social context family violence information is needed to understand the realities of the lives of the people involved?

Dr. Margaret Jackson[22] and I have considered this question in our paper, *Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference.*[23] The paper has been provided to judges and lawyers. We discuss research relied upon by the B.C. Ministry of Justice in the development of the FLA. The B.C. Legislature, when it enacted the FLA, passed legislation that has social context principles relating to family violence at its core. I will refer here to some of the social context topics covered and to some of the points made.

The Nature and Context of Family Violence

The Ministry suggests that:

- family violence takes many forms. Controlling, coercive patterns of emotional abuse are one of the highest predictors of future risk. Family violence includes sexual violence, which is often overlooked. Physical violence can go beyond an assault and can involve forced confinement and deprivation of the necessities of life; and that

- many different typologies of violence have been identified. The Ministry has concluded that taking into account the differences in types of family violence may help family justice professionals to make more accurate assessments of risk and to guide the development of responses tailored to the particular situation and differing risks of future violence.

Putting Family Violence in Context

- While men do experience family violence, and while men are without question entitled to the benefit of and protection of the law when that happens, the research relied upon by the Ministry shows that violence, particularly within the family, significantly and disproportionately impacts upon women and children. The Ministry points out that according to statistics Canada, the nature and consequences are more severe for women.

- Women are more likely to experience the most severe and frequent forms of spousal assault, are more likely to be physically injured and require medical attention, and are more likely to report negative emotional and psychological

[22] Dr. Jackson is a Professor Emeritus at the School of Criminology at Simon Fraser University and the Director of the FREDA Centre.
[23] Above, note 15.

consequences. Children are more likely to witness violence inflicted on their mothers.

Exposing Children to Family Violence

- The Ministry concluded that being exposed to violence is harmful to children whether they see it, hear it, or experience its aftermath.

- Children exposed to violence are at greater risk of psychological harm, including increased incidence of aggression, hyperactivity, anxiety, depression or behavioural problems.

- Serious concerns arise with respect to the way that stress experienced by children can negatively impact upon children's brain development. This includes stress caused by both the trauma of living with and witnessing family violence or other forms of high conflict, together with stress of continuing contentious legal proceedings.

Linking Violence to Post-Separation Parenting

The Ministry relied upon research showing that:

- spousal violence often does not end with separation'
- there is a high overlap between spousal violence and child abuse;
- a violent parent is a poor role model;
- victims of violence may be undermined in their parenting roles;
- spousal violence may negatively affect the victim's parenting capacity;
- a violent parent may use litigation as a form of ongoing control and harassment; and
- in extreme cases spousal violence following separation is lethal.

False Allegations of Family Violence

- The Ministry points to research conducted by Professor Nick Bala suggesting that deliberately or maliciously false allegations of family violence are few, and most false claims result from misunderstandings. Further, denials and failure to report real situations of abuse are more common than false claims.

Risk Assessment

- Some studies indicate that a family break-up may mark the beginning or the escalation of violence.

- The Ministry has identified breaches of protection orders as a key indicator of escalating risk.

- The following are examples of risk assessment tools used for domestic violence, intimate partner violence situations:
    - ODARA –Ontario
    - B-Safer – British Columbia, New Brunswick
    - Domestic Violence Investigation Guide BC (der. from Alb.)
    - Spot the Signs – Coupal
    - SARA
    - VRAG
    - PCL-R
    - HCR-20
    - Danger Assessment Scale (Jacqueline Campbell)

  There are several key factors (red flags) that are important to any risk assessment:

- Recent separation of two partners
- Power and control over partner issues
- Past/ongoing/escalation of abuse prior to present incident
- Alcohol/drug abuse/mental illness
- Complainant's perception of personal safety and future violence
- Lack of support systems – family and community
- Use of threats to use weapon/firearm

  Intersecting diversity issues impact on both risk and responses to domestic violence.

  This impacts in particular on aboriginal, immigrant, and refugee women. Factors that are significant include:

- Minority status
- Language/cultural challenges
- Sponsorship threats
- Poverty/lack of access to services
- Social and geographic isolation
- Lack of services/lack of access to services

Part of our paper emphasized the reality of women's lives and some concerns women have about the way their cases are dealt with by the justice system. It focuses on violence by men against women and was informed by a community consultation conducted through Simon Fraser University for judges programming on family violence.[24] We know that men can be victims of violence by women and by other men, that women can be victims of violence by other women, and that violence occurs in

[24] Above, note 15 at pp. 22-38.

relationships involving other sexual minorities. These are important issues and the FLA language is gender neutral to ensure their inclusion.

We chose this focus because we agreed with the Ministry of Justice that the evidence shows that violence in heterosexual relationships remains the most prevalent problem and violence in those relationships significantly and disproportionately negatively impacts upon women and children. We think this is so in spite of the gender symmetry arguments that are sometimes made, and we discussed the reasons why we reached that conclusion. Though the focus was on violence by men against women, many of the issues we covered would also apply to other relationships.

Here is some of the additional information we included in our paper, obtained from our community consultation:

The Reality of Women's Lives

- Women can face a myriad of issues which make them particularly vulnerable and less able to access justice; they may:
- face combinations of disadvantage, such as:
  - living in poverty, with all its consequences - disadvantages that disproportionately impact upon women; and
  - being one or more of the following:
    - an aboriginal woman;
    - a racialized woman;
    - a woman with disabilities;
    - a senior woman;
    - an immigrant/refugee woman, and
    - a sexual minority.
- They have to deal with many other social and economic challenges, which can also include administrative challenges, such as obtaining:
  - an adequate standard of living, which includes access to accessible, adequate day care;
  - social assistance when required;
  - appropriate affordable housing;
  - adequate health care;
  - access to education; and
  - access to mental health support for challenges caused or contributed to by the violence.

Understanding Challenges Created by Court Processes

- The court process itself can have an adverse impact on women.
- There can be multiple court processes taking place at the same time, but operating separately, and in often inconsistent ways, such as family proceedings,

criminal proceedings, child protection proceedings and immigration proceedings; this problem can be exacerbated by a lack of coordination between or among other parts of the justice system, such as police, crown counsel, probation services and the like. This can create a "dangerous disconnect" for women.

- Litigation harassment and abuse can be a significant problem. Concerns, which can escalate the conflict and increase the risk of harm, include:
  - the continuation of controlling behaviour;
  - emotional and financial stress; and
  - delay.
- Lack of legal advice at all stages of the process is a significant concern.

<u>A Contextual Approach to Disclosure of Abuse</u>

- There are many valid reasons why women do not report abuse; they include a considered decision that staying in a relationship is the best way in the circumstances to protect the children and to protect her.
- Decision makers would benefit from learning more about the reasons why many women do not report assaults to the police so that adverse decisions are not made about their credibility just because they did not do so.

<u>Cultural Considerations and their Impact</u>

There are numerous challenging issues facing people from other cultures, including:

- lack of awareness of the Canadian criminal justice system; being used to systems of justice that are very different;
- limited English language skills;
- the problems of interpretation; it is needed at all stages of the process. Yet:
  - it is often not available at all;
  - if it is, it is often of poor quality; and
  - there is little understanding of the impact on some women of having a male interpreter when they are required to describe violence.
- the fact that women are judged against "white middle class values/laws" which don't fit immigrant populations.

There are significant implications of alleging violence for the many women without immigration status.

Judges would benefit from a greater understanding of honour killing.

- The whole family/community rather than the individual plans the act
- There is a concern that "culture" may become a defence to acts of violence.

- Information about family systems would be useful in custody cases where the best interests of children are at issue. For example, parents often stay in the father's home with his parents; the mother may be alienated in the process.
- Yet, our justice system looks at couples rather than family systems

Particular Challenges Faced by Women with Disabilities

There are particular issues facing women with disabilities, including education about the abilities of people with disabilities that are often overlooked in discussion about women's equality. For example:

- there can be a stigma that suggests they are less intelligent/capable;
- there are challenges with respect to accessing court, especially if the women's partner is relied upon for mobility; and
- there are concerns about women having to teach their children how to keep safe because court orders are not effective.

"Good Enough" English

- Some decision makers allow "good enough" English to suffice, rather than providing adequate translators at all stages of the process.

- This is a significant concern; some decision makers wrongly conclude that if you can get by in English in your day to day life, you can also effectively communicate in a stressful situation, such as being in court:

    - There are many examples of women not knowing words in English.
    - For example, there is no word for sexual assault in the Punjabi language.

Risk Assessment

- There is often either no or a limited assessment of either the nature and extent of the violence or the risk of future harm.

- Risk is particularly acute for women with disabilities, who are often unable to protect themselves.

Use of Language

- Some decision makers do not "name what happened" in a violent situation, and use language which excuses, shifts blame for, and minimizes the violence.

3 The Appropriate Use of Social Context Information

Understanding the social context of family violence aids in decision making, but it can never take the place of an actual analysis of the facts of a case. There can be no starting presumptions, based on social context information, about the credibility or lack of credibility of a particular person in a particular case. A case by case analysis is required.

Nor are you expected to accept at face value social context information that may be provided to you. Dr. Jackson and I have commented on the fact that judges will evaluate information about social context just as they evaluate other information. We said:[25]

> Judges, of course, do not have to accept all of the information and suggestions provided. Such information forms a part of the total information judges have accumulated, based on their education and life experience. We agree with the comment of Justice Sheilah Martin, a judge of the Court of Queen's Bench of Alberta, when she was dean of the Faculty of Law, University of Calgary. Dean Martin said that she has never heard a compelling argument against more knowledge. Judges will evaluate it in the same way that they evaluate other information they receive.

The same reasoning applies to mental health professionals. You are in fact particularly well-placed, based on your education and experience, to assess the validity of social context information.

We also made the point that if judges do not agree with concerns that are raised, after giving them full and fair consideration, it is important to consider whether steps can be taken to correct what the judge considers to be misconceptions. Misconceptions can create a lack of confidence in the legal system in the same way that real concerns do. People confronted with domestic violence must feel that they can have confidence that they will be treated fairly by the judicial system.

The same point can be made with respect to mental health professionals. You are also particularly well placed to provide reliable information relating to family violence and should consider doing so, particularly if you disagree with information that is being provided.

D. The Requirement for Reasons for Decisions: Explaining How and Why Decisions are Made

Judges in making decisions are required to explain how/why they made credibility assessments, drew inferences and reached conclusions. The people using the courts are entitled to know not just that they "won" or "lost", but why they did so. A judge cannot simply say, for example, "I believe X" and "I disbelieve Y" or to say "I think X is a better parent", without explaining how the judge came to that conclusion. That judge's

[25] Above, note 15 at p. 10.

decision, made without reasons, would be overturned quickly by the Court of Appeal; the judge's role is not only to decide, but to explain/persuade so that the reasoning process can be evaluated.

The same is true of decisions made by assessors. The judge who ordered the assessment and the people to whom it relates (and their lawyers if they have lawyers) are entitled to know not just the result, but how that result was reached. This includes how decisions about credibility were made. Providing clear and articulate reasons for decisions is particularly important in cases involving parenting. Parents and children find themselves in a stressful situation when parenting arrangements relating to their child/ren are at issue. They can be particularly vulnerable. And yet they usually want to do what is best for their children. Clear, articulate reasons by assessors can go a long way in persuading the parents that both the process used to make the decision, and the result, are fair and in the best interests of the child/ren.

Clear, articulate reasons allow the parents to make an informed decision about whether to accept or challenge the assessment conclusions and recommendations. If they are challenged the judge has a critical role to play. The assessor's reasons for the recommendations are necessary for this purpose. The judge will carefully evaluate the qualifications of the assessor, the effectiveness and fairness of the process by which the report was created, and the reasons given by the assessor for reaching the opinion, to determine what weight (importance), if any, should be given to the opinion. While judges know that the views of assessors can be very helpful, they also know that deferring to an expert opinion without such an analysis would be tantamount to allowing the expert to usurp the role of the Court.

E. Assessing Credibility in Family Violence Cases – A Cautionary Note

The Ring of Truth, the Clang of Lies – Assessing Credibility in the Courtroom[26] is an article written by Justice Lynn Smith of the British Columbia Supreme Court in 2011. In it she discusses the challenges of detecting deliberate lies. The article is informed by a long term credibility assessment project undertaken by her; as an experienced and highly respected judicial educator, she frequently speaks to judges about these challenges.

Her conclusions are instructive. She says, in essence, that the body of social science research into detecting deception shows that credibility assessment is an inherently difficult task. The research consistently shows both that people, including professionals, are not particularly good lie detectors, and that most people overestimate their competence at lie detecting.

She points to a large scale meta-analysis of 79 studies from 1980 to 2007 showing that accuracy rates for deception detection averages 54.27%. She makes the point that the rates for what she calls professional lie catchers are only marginally better; another analysis of 28 studies from 1991 to 2007 found an average accuracy rate of 55.91%.

[26] Viscount Memorial Lecture, University of New Brunswick, 63 U.N.B.L.J. 10 (2012)

These concerns are particularly relevant when assessing the credibility of women in cases in which they allege family violence. Women, in addition to facing these challenges to the ability of a decision maker to assess their credibility, have also faced significant social and legal discrimination relating to their credibility. A contextual analysis by an impartial decision maker requires an understanding of the gender equality implications of that discrimination.

When I went to law school in the early 1970s, violence in the home was viewed as a private matter; those cases which did come to court were not dealt with in criminal courts but in family courts, which were not viewed as dealing with "real" crime. It was not even a crime for a husband to rape his wife.

There were highly discriminatory laws and attitudes about women and about their credibility in cases where a woman said a man assaulted her. This was particularly true if she alleged a sexual assault. For example, a man could not be convicted on the testimony of a woman alone as it was said by the male law makers and judges that it was dangerous to do so. Supporting evidence was needed, a requirement only applied to women in these cases. A woman's statements were suspect if she did not report the assault quickly, a legal principle known as the doctrine of recent complaint.

A textbook on the law of evidence, still in use at the time I went to law school, emphasized the need for supporting evidence:[27]

> Modern psychiatrists have studied the behaviour of errant young girls and the women coming before the courts in all sorts of cases. Their psychic complexes are multifarious and distorted. One form taken by these complexes is that of contriving false charges of sexual offences by men.

The author of that text concluded that charges should not proceed to court unless a psychiatrist testified as to the woman's ability to tell the truth.

While the laws have changed since then, and no longer require supporting evidence or a recent complaint, the deeply rooted discriminatory beliefs and attitudes about women and their credibility that lead to their enactment in the first place do not change easily or quickly. It is in this context that decision makers today should test assumptions being made about women and their credibility to ensure that unconscious bias based on such discriminatory myths and stereotypes is not at play.

Justice Smith, in her credibility assessment article, emphasizes the importance of giving reasons for credibility decisions. She makes the important point that the process of writing reasons itself helps to ensure fair and accurate decision making. That writing process forces the decision maker to think carefully about how and why decisions are being made.

[27] J. Wigmore*, Evidence* 3rd Edition 1940

II. BEST PRACTICES ISSUES – INDEPENDENT IMPARTIAL PARENTNG ASSESSMENTS

A. Issues Raised by Judges, Lawyers and Others

As I said at the outset, judges and lawyers value the experience and expertise that mental health professionals bring to decision making relating to the best interests of children. British Columbia legislators value your experience and expertise as well, as evidenced by the inclusion of s. 211 in the FLA, permitting judges to order such assessments. There are many praiseworthy parenting assessment reports prepared. There are, however, issues that have been raised about the necessity for and the effectiveness of some reports. Judges and lawyers are increasingly being challenged to make sure that all expert evidence generally, and all parenting assessments in particular, are independent, impartial, cost effective, and actually relevant to parenting decisions that parents and the court have to make.

With respect to the admissibility of expert evidence, it is of course well established by the Supreme Court of Canada decision of *R. v. Mohan*[28] that a four part test should be applied in deciding whether such evidence is admissible. The evidence must be:

1. relevant;
2. necessary in assisting the judge;
3. not subject to an exclusionary rule of evidence; and
4. given by a properly qualified expert.

In addition, the Court must consider whether the probative value of the evidence outweighs any prejudicial effect.

The Goudge Report in Ontario in 2008, the *Inquiry into Paediatric Forensic Pathology in Ontario,*[29] made the point that judges have a vital role to play in protecting the legal system from the dangers of unreliable, prejudicial expert evidence. The judge is said to play an important "gatekeeper" role in this respect. This focus on the gatekeeping role of judges is happening at a time when there is a public crisis of confidence in the ability of the family justice system to provide "equal access to justice for all" in Canada in a timely, cost effective way.[30] Discussions are taking place across the country in an effort to effect major change.

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[28] [1994] 4 S.C.R. 44.

[29] http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html

[30] See: The Supreme Court of Canada Initiative, *A Roadmap for Change*, Final Report of the National Action Committee on Civil and Family Justice, Professor Trevor Farrow, October 2013.
http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf
Foundation for Change, Report of the Public Commission on Legal Aid in British Columbia, Commissioner Leonard T. Doust, Q.C., March 2011.
http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf
The Canadian Bar Association, An Invitation to Envision and Act
A summary report by the Canadian Bar Association Access to Justice Committee, Dr. Melina Buckley, August 2013.

With respect to family law, for example, *Foundation for Change, Report of the Public Commission on Legal Aid in British Columbia,* says that the lack of legal aid for family law cases has had devastating effects. It comments on the disproportionate impact on women, particularly in situations involving violence towards her by her partner:[31]

> In particular, *w*omen are disproportionately affected by inadequate legal aid in family law because they are frequently in a situation of relative economic disadvantage and they often bear the lion's share of both the short-term and long-term consequences of our failures in this regard.

That Report points out that the need for adequate legal aid is very compelling in situations where a woman is attempting to leave an abusive relationship, and her life and her physical and emotional security are at risk, as is the safety of her children. It also points out that less obvious, but no less pressing, is the need for legal assistance to ensure that women and their children do not face poverty in the short and long term.

All decisions about whether there is a need for a parenting assessments at all, and if there is, the manner in which it should be prepared and "assessed", will be made with this concern for accessible affordable justice for everyone firmly in mind.

Who is raising concerns about parenting assessments, and what are those concerns? Let me give you some examples. Judges have made presentations to other judges, asking them to consider carefully issues such as: how an assessment will be relevant to the issues with which parents and the judge are concerned; how psychological tests are relevant to parenting generally, and to specific parenting issues such as those relating to family violence; and ways in which judges can be sure that the tests are appropriate to a particular case, particularly in a diverse society such as ours. They also raise questions about the qualifications needed to do an assessment when family violence is an issue and encourage judges to ensure that the assessor is particularly qualified to assess for family violence. They remind judges that as long as they are satisfied that the witness is sufficiently experienced in the subject matter at issue, in this case family violence, the court will not be concerned with whether the skill is derived from specific studies or by practical training.[32] The new approach may broaden the number of people who are found to be qualified to assess family violence to include those with significant "on the ground" experience, and may exclude some who have been doing the work without the necessary qualifications.

Dr. Peter Choate was invited earlier this year to do a presentation on parenting assessments at an education program for family law judges from across Canada. He has published his paper, called *Parenting Assessments: The Good, The Bad and The Ugly.*[33] He, in the context of parenting assessments in child protection cases, deals with issues such as: whether an assessment is needed at all; the kinds of qualifications

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[31] Above, note 30**,** at p. 16.
[32] Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 5th edition, p. 537.
[33] http://www.academia.edu/3893605/Parenting_Capacity_Assessment_The_good_the_bad_and_the_ugly

needed by an assessor; the importance of assessors demonstrating that they have complied with professional standards; whether the assessor has considered the broader context of the people being assessed; and the requirements for a truly informed consent. He emphasizes that there is no science that tells us precisely what assessments must look like, how effective they are, or how accurate they are. He states that It cannot be said that there is a standardized methodology that is science based. He adds that this does not mean assessments are not of value, but the value should be considered in that context. He also makes the point that conclusions and recommendations made in parenting assessments should flow directly from the assessment data and the reader should be able to draw the linkage quite clearly.

On the issue of psychometrics Dr. Choate states that there are concerns about the applicability of many assessment measures to questions of parenting; there ought not to be an automatic battery of tests and the assessor should be able to show how the tests used relate to the question referred to him or her. He says that the measures used must fall within the scope of competence of the assessor. He emphasizes that assessment measures are only one source of data and judges should be concerned if assessments rely heavily on the results rather than integrating them into a more complex inquiry. He adds that there are concerns that "translations" of various instruments may not be representative of the client.

Dr. Allan Wade has made suggestions to lawyers who attended British Columbia Continuing Legal Education programming on family violence and the FLA. The suggestions, found at the Appendix to this paper, were made in response to questions asked by people participating in the program. They deal with the kinds of questions he says lawyers should consider asking when deciding if an assessor has expertise in family violence, and in evaluating overall parenting assessments that relate to allegations of family violence.[34]

West Coast LEAF has prepared a report on parenting assessments called *Troubling Assessments: Custody and Access Reports and their Equality Implications for B.C. Women*.[35] Among the concerns raised in the West Coast LEAF report were: the lack of screening for violence by those conducting parenting assessments; the lack of the necessary family violence training for many mental health professionals doing this work; a tendency to ignore or minimize violence allegations made by women; the use of and validity of psychological testing generally; inappropriate use of psychological testing to diagnose women with a mental illness accompanied by a conclusion that she is not a good parent; and their conclusion that consideration was not often enough given to the profound effects trauma, violence, and abuse can have on psychological test results. Many of these concerns were reflected in the community consultation done by Simon

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[34] Family Violence and the Family Law Act – Responses to Post-Program Participant Questions, "The FLA: Protecting the Safety, Security and Well-Being of Children and Other Family Members – Changing Legal Frameworks and Professional Responsibilities,", BCCLE – The Family Law Act - Everything you Always Wanted to Know, January 2013, at pp. 5.5.14 – 5.5.17.

[35] Prepared by Laura Track and Shahnaz Rahman.
http://www.westcoastleaf.org/userfiles/file/Troubling%20Assessments%20e-report%202012.pdf

Fraser University to which I earlier referred.[36] A related concern expressed was that there are cases in which there is a Post- Traumatic Stress Disorder diagnosis which results in "victim blaming"; this is said to be particularly the case when parenting assessments are completed in child protection cases.

You may disagree with some or all of the concerns that I have described or agree with some or all of the concerns; many fall squarely within your areas of expertise. Areas of disagreement among you will no doubt be the subject matter of on-going and inclusive professional discussions/debates. As I have suggested earlier, if, after fully considering them, you conclude that some or all of the concerns expressed are without merit, it would be helpful if you, individually, or collectively, take steps to correct the misconceptions. You have a Code of Conduct the deals with parenting assessments. You may wish to consider additional collective responses.

B. Best Practice Suggestions

I have made suggestions to lawyers and to judges in legal education programming about some best practices.[37] I very respectfully suggest that you may be able to adapt what is said to assist you in your own parenting assessment practices:

Expert assessments can be very useful in helping parents achieve an effective, long lasting settlement, and can assist the Court if a decision by a Judge is needed. At the same time they can be costly, time consuming and stressful. Before the parents agree to such a report, or before the Court orders such a report, even with the consent of the parents, questions such as these should be considered:

Factors to Consider When Judges are Asked to Order a Parenting Assessment

- *What are the real issues in dispute? Is the assessment required to resolve them?*
- *If so, what is the specific purpose of the report?*
- *What type of expertise is required to effectively address the issues that arise?*
- *Does the assessor being considered have the specific expertise needed?*
- *Does the assessor have the appropriate cultural competence needed?*
- *Is the assessor impartial, without any preconceived, biased notions about parenting roles?*
- *How will the views of the child be considered?*
- *Is psychological testing required? If so, what kind of testing and what is its purpose?*
- *What information will be provided to the assessor and why?*
- *If translation is required, how will it be effectively provided throughout the process?*

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[36] See above, notes 15 and 24.

[37] See for example, "The FLA: Protecting the Safety, Security and Well-Being of Children and Other Family Members – Changing Legal Frameworks and Professional Responsibilities,", BCCLE – The Family Law Act - Everything you Always Wanted to Know, January 2013, a pp. 5.1.27 – 5.1..28.

- *How will privacy of the contents of the report be assured?*
- *What is the cost of the report? Is the cost reasonable? Who will pay? How and when?*
- *What period of time is required to complete the report?*

Elements of an Effective Assessment Report

The assessment report will neither assist the parents in reaching an agreement nor provide assistance to the Judge if it is not conducted fairly, in an open and transparent way. The assessor's opinion based on that process must be perceived by both parents (and by the children when appropriate) as being fairly reached.

In considering whether the opinion offered in the assessment is helpful and effectively explained, these questions can be considered:

- *What facts has the assessor relied upon to reach the opinion?*
- *If, as is often the case, parents have differing views on key issues that impact upon the result, which view has been accepted, and what are the specific reasons why one is accepted and one is not? Are those reasons sound?*
- *If a mental health diagnosis is made with respect to one or both parents that is relevant to the result, is the basis for such a conclusion adequately explained, with reference to the specific medical basis for it? Is the diagnosis linked to the parenting issues in dispute? Is the conclusion about the diagnosis and its consequences well founded?*
- *Is a risk assessment appropriate, and if so, has a professionally sound assessment been conducted? Has a risk management plan been suggested?*
- *Has the assessor appropriately considered the views of the child and explained what weight was attached to those views and why?*
- *Has the assessor appropriately linked the opinion expressed to:*
    - *the specific purpose(s) for which the report was obtained,*
    - *the psychological testing, if appropriate,*
    - *the relevant facts, and*
    - *the relevant legal criteria relating to a child's best interests found in Part 4 of the **Family Law Act**.*

- *Has the assessor acted fairly and impartially overall?*

I would add to these two suggestions that relate directly to your assessment work in cases in which family violence is alleged.

1. *Gathering Information*

The first deals with the information you collect for assessment purposes. Information gathering must of course be done fairly and impartially. This also applies to information about the case that you obtain from other professionals. For example, "front-line" professionals, whose work involves assisting women who allege family violence, may well have valuable information to provide to you about the case. Yet, it appears that they are rarely consulted. As an independent assessor, your role is to obtain

information and then decide, with, as Chief Justice McLachlin described it, above, informed impartiality, what significance that information may have, and to explain why it is, or is not, relevant

2. *Providing Reasons for your Decisions*

Providing reasons for your conclusions, including your decisions about credibility, is particularly important in cases where there are allegations of family violence.

I agree with Justice Lynn Smith that being required to articulate reasons for decisions can be an effective tool in the process of making impartial decisions. Speaking for myself, I have more than once changed my mind about a conclusion after trying to articulate the reasons for a tentative result.

I have emphasized that the FLA requires you, in conducting your assessment, to consider each of the best interests factors found in the Act, including those relating to family violence. Those factors are directly relevant to decisions that must be made about a child's future safety, security and well-being. If you conclude that a factor is not relevant, you should explain why it is not. If it is relevant, you should explain why it is relevant. You may find the check-list I have provided (above) useful in this respect. In addition to dealing with the factors individually, it is necessary to explain how they are linked to your broader conclusions.

III. CONCLUDING REMARKS

All professionals working on issues relating to family violence and parenting, whether they are mental health professionals, advocates, impartial decision makers, academics, policy makers, or one of a myriad of other people helping kids, have as their goal reaching results that are in the best interests of kids. Children would be well-served if we take more steps to collaborate, using our collective wisdom, to better keep our children well and safe and to give them an appropriate voice. This would go a long way towards achieving the laudable goal of ensuring that children will truly have meaningful access to justice.

APPENDIX

Dr. Allan Wade

Criteria for Qualifying as Expert Witness in Interpersonal Violence and Family Law

The criteria will vary depending on the evidence the expert is supposed to provide.

It is possible to be an expert in interpersonal violence and not an expert in family development, and vice versa. In family law and interpersonal violence cases, the ideal expert is expert in both areas. Most professional therapists should be considered experts in the area of family development. A smaller subset will satisfy both criteria.

University Degrees

University degrees in psychology, medicine, social work, child and youth care and other related fields typically do not have enough course work or depth of analysis in interpersonal violence to qualify graduates as professional experts in interpersonal violence. This is odd, given the prevalence of violence as a presenting or background issue, but true. And one course in violence or trauma studies does not an expert make.

Therefore, a graduate degree in these fields does not by itself qualify the professional as an expert. This said, a suitable degree should be one of the necessary criteria even if it is not sufficient.

Membership in Professional Organization

Is the professional a member in good standing of a professional college or association with an appropriate code of ethics and means of enforcing that code of ethics.

Does the professional organization articulate a scope of practice for work in family law and domestic violence cases, including guidelines for specific practices (i.e., informed consent, use of psychological tests)

Experience in Place of Degrees

Transition house and shelter workers, and child protection workers, many of whom do not have graduate degrees, may still hold expertise due to years and scope of service, even if the scope of practice in somewhat restricted.

Additional Training and Supervision

Has the professional undertaken specialized training and clinical supervision relating to interpersonal violence in university, during internships for example, or outside of university training? This can include experience in specialist agencies (i.e., shelters or

other agencies that focus on violence). What is the duration and scope of this experience?

Clinical Experience

Does the professional have significant experience providing treatment to adults and children who have been subjected to, or who have committed, violence?

General clinical experience may not include this specific type of practice, so cannot be taken at face value as expertise.

Research/Analysis and Publications

Does the professional have experience conducting research/analysis or publications in refereed journals or books on the subject of interpersonal violence?

Is the professional recognized by peers as an expert in the arena of interpersonal violence and family law? How?

Safety and Risk

Can the professional detail what special considerations must be taken into account, and how, when assessing or working with individuals who have been subjected to, or who have committed, violence? This would include knowledge of:

Risk assessment procedures
Safety planning procedures
Information sharing

Applications of Psychological Instruments

Qualification to administer psychological tests does not equal expertise in interpersonal violence.

If the professional is presenting a report that uses psychological tests, or is evaluating such a report, they should demonstrate knowledge of the uses and limitations/cautions of the tests used.

- Can they cite up to date research on the adequacy of the specific tests for use in cases of interpersonal violence?
- Can they cite research on the limitations of the tests they use? Specifically, can they describe how the tests in use can misrepresent victims, offenders and violent actions?
- Does the report they have presented show knowledge of, and take account of in its methods and conclusion, such up to date research/analysis?

Can the expert show that the test is both necessary to the specific case and designed to

be used as it is used in the specific case?

Interview Protocol

Can the professional clearly articulate the interview protocol they used in the specific case and why that approach to the interview(s) was necessary and appropriate?

Does the interview protocol show depth of analysis, as below.

Depth of Analysis

Is the professional able to describe what factors are important to consider when interpersonal violence is at issue in custody and access cases. This should include:

- The social context of the family life and violence, including the role of gender, age, income, race, ability, sexual preference/identify, and so on.
- The nature of the violence and related uses of power, over time
- The responses to the violence by the victim and children, over time, including resistance to the violence.
- Previous and current social responses to victim, offender and children and the importance of those social responses
- The responses of victim, offender and children to social responses
- Current levels of safety and risk
- How the violence, if same has occurred, is reflected in the quality of life of the victim and children.
- Strategies for assessing progress/lack of progress of the offender.
- The intersection of domestic and other forms of violence, such as sexualized assault, financial abuse, litigation abuse, and so on.
- The role of accurate language, e.g., the distinction between unilateral and mutual language.
- The nature of appropriate support strategies for family members.

Quality of the Report

The expertise of the professional should be apparent in the report itself.

Informed Consent

The professional should be able to describe what specific steps they took to ensure full informed consent, in light of the possibility or reality of domestic violence.

They should affirm they told the adults what assessment devices they plan to use, and why, and in general terms what questions they plan to ask, and why.

They should describe the special procedures they took to ensure consent of the children to the extent possible.

Limitations and Cautions

The report should list limitations and cautions of psychological tests used and the reasons for using psychological tests.