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Unable to Relinquish Control: Legal Abuse in Family Court

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Setting the Context

Luke's Place Support & Resource Centre for Women & Children provides family court support to women who have been subjected to abuse, and their children, through the family law process. We have developed a unique approach that integrates direct service work at the regional level with provincial training and resource development.

This approach has provided Luke's Place with the opportunity to observe issues that arise in the family law process for women fleeing abuse, both in Durham Region and across the province. Legal bullying has emerged time and again as a serious challenge for women, who often fear for their safety and the safety of their children as a result.

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Introduction

Terms and Focus

Woman Abuse

This paper focuses on tactics engaged in within the case management system that amount to legal abuse. Legal abuse is one particular form of continued abuse against women. It should be noted from the start that this paper adopts the same approach to language as was adopted by Pamela Cross and Tanya Conlin,[1] preferring to use the terms "violence against women" and/or "woman abuse" as opposed to gender-neutral descriptors of abuse such as "domestic violence" or "intimate partner violence."

This approach does not deny the occurrence of violence against men within families or the existence of intimate partner violence in the context of same-sex relationships. This language choice was made because the use of gender-neutral descriptors misrepresents the terrain, as evidenced by statistics.[2] The misrepresentation, where adopted, can hinder the development

[1] Pamela Cross & Tanya Conlin, *After She Leaves: A Resource Manual for Advocates Supporting Woman Abuse Survivors & Their Children During the Family Law Process* (Oshawa: Luke's Place, 2010) at 12 [Cross & Conlin].

[2] Ontario, Office of the Chief Coroner, Domestic Violence Death Review Committee, ***2015 Annual Report*** (November 2016) at 8. Of the 363 homicides that were investigated, 81% of those murdered were adult females.

and/or effectiveness of policy-based responses.[3] There are specific implications for family law that arise from the common use of gender-neutral discourse.

As *Transforming Communities,* the report of Ontario's Domestic Violence Advisory Council, states: "gender-neutral language promotes understandings of woman abuse as mutual, reciprocal, or bidirectional."[4] Because this language is used within a system that already presumes equality, the effect can be to mask the true nature of the violence with repercussions for the application of, for instance, the "best interests of the child" principle.[5] The case of *Peterson v. Peterson*[6] stands as an example. Mrs. Peterson was hit over the head with a metal bar when Mr. Peterson discovered her relationship with another man. In spite of the occurrence of this unidirectional act of violence against the woman, the Court stated that "[c]onduct by the parties *vis a vis* one another does not necessarily have a bearing on parenting ability."[7] Mr. Peterson was then granted interim custody. While this case was heard in 1988, Martha Shaffer's 2004 review of case law indicated that there is ongoing concern about whether or not wife abuse is being properly assessed.[8]

Effort must be put towards properly addressing this issue because the effects of abuse are severe. According to the 2016 report from Canada's Chief Public Health Officer, the effects can include, in addition to the physical injuries, poor mental health, psychological and emotional distress, suicide, and increased risk of chronic diseases and conditions such as cancer, heart disease and diabetes.[9]

Legal Abuse

The tactics of "legal bullying" do not belong to a particular gender. However, it is important to note that these tactics have a particular meaning and effect when the previous relationship involved woman abuse. The abuser may be attempting to find new methods of exerting control and causing harm, the family court system providing opportunities to do so. Further, the woman may be entering the court system feeling the residual effects of abuse, which could manifest in low energy, low self-esteem, or high levels of stress/anxiety (among other things).[10] Some common reactions to trauma experienced by abuse survivors include: re-experiencing the

[3] Ontario, Domestic Violence Advisory Council for the Minister Responsible for Women's Issues, ***Transforming our Communities*** (May 2009) (Chair: Clare Freeman).
[4] *Ibid*.
[5] Melanie Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-Making," (1997) 14 Can J Fam L 31 [Rosnes].
[6] *Peterson v Peterson*, 1988 CarswellNS 180.
[7] *Ibid* at para 13. Emphasis added.
[8] Martha Shaffer, "The Impact of Wife Abuse on Child Custody and Access Decisions," (2004) 22 CFLQ 85.
[9] Public Health Agency of Canada, Chief Public Health Officer, ***A Focus on Family Violence in Canada:*** *The Chief Public Health Officer's Report on the State of Public Health in Canada 2016* (Ottawa: Public Health Agency of Canada, 2016) at 7.
[10] Rosnes *supra* note 5 at para 13.

abuse through spontaneous memories, recurring dreams, flashbacks and prolonged psychological distress;[11] avoidance of re-traumatizing activities that serve as reminders of the event(s);[12] experiencing negative thoughts and feelings;[13] and/or either hyper-[14] or hypo-arousal.[15]

These are not just minor symptoms experienced by a few litigants. This is a serious and prevailing issue that most survivors must deal with and that has both psychological and physical impacts on the woman's ability to engage with the legal process, making her more vulnerable to legal bullying. Legal bullying is thus identified in this paper as a certain type of abuse.

This is not a novel. In *M.W.B. v. A.R.B.*,[16] the British Columbia judge found that "the Claimant's litigation conduct … [was] a form of emotional abuse and harassment that constitute[d] a form of family violence."[17]This case was cited with approval in a subsequent British Columbia decision, *Hokhold v. Gerbrandt*,[18] where again the Court determined that the former partner's conduct in litigation was emotionally abusive, amounting to intimidation and harassment, and was thus a form of family violence.[19]

Manipulation of the Family Court Process as a Form of Legal Abuse

The primary focus of this paper is the manipulation of the family court system as a way for the abuser to engage in legal abuse post-separation. Legal abuse is, of course, not the only form of post-separation abuse. Research indicates that separation is a time of elevated risk for the woman who leaves an abusive relationship.[20] One prevalent form of post-separation abuse, among other forms,[21] is stalking.

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[11] This can make it difficult for her to function from day to day and can affect cognitive function and processing. Her lawyer may find that she forgets appointments or tasks she has been asked to complete.

[12] This can manifest in missed appointments, substance use, self-injurious behaviour, intentionally putting herself in unsafe situations, isolating herself, and/or suicidal ideation.

[13] The negative feelings can include self-blame, depression, loss of self-worth, estrangement from others, mistrust, shame, anger, and fear. It can manifest in an inability to recall significant aspects of an event/events.

[14] In this state, she may appear aggressive, quick to anger and have an overactive startle response. Hyperarousal may affect her ability to make appropriate choices.

[15] In contrast to hyper-arousal, hypo-arousal is a shutdown of her nervous system. It may result in a flat affect and she may appear calm when she is not. Hypo-arousal can cause memory loss. She may be confused and have a hard time concentrating. Cognitive processing can be a challenge as the ability to think clearly is impaired, hindering the appropriate assessment of dangerous situations.

[16] *M.W.B. v A.R.B.*, 2013 BCSC 885.

[17] *Ibid* at para 199. In this case the conduct involved commencing needless litigation which forced the other party to incur great expenses, the stress of which aggravated a medical condition that required surgery (at paras 200-01).

[18] *Hokhold v Gerbrandt*, 2014 BCSC 1875.

[19] *Ibid* at para 134.

[20] Douglas A Brownridge, Ko Ling Chan, Diane Hiebert-Murphy, Janice Ristock, Agnes Tiwari, Wing-Cheong Leung & Susy C Santos, "The Elevated Risk for Non-Lethal Post-Separation Violence in Canada: A Comparison of Separated, Divorced and Married Women," (2008) 23 Journal of Interpersonal Violence 117.

[21] See *M(BP) v M(BLDE)*, 1992 ONCA 349 for a description of some abusive post-separation behaviours.

Stalking is repetitive harassment or threatening behaviour that causes the woman to become physically or emotionally fearful or apprehensive. This can include harassing her at her place of work, calling her repeatedly, following or tracking her (personally, using GPS, engaging in online searches, through public records, or by hiring a private investigator), using hidden cameras, monitoring her phone or computer use, going through her garbage, threatening harm (to her, her family, friends and/or pets), damaging property, and/or appearing where she is.[22] Engaging in legal bullying during family court proceedings can itself be considered a form of stalking.

Legal abuse is not limited to manipulation of the family law case management process. Other facets of the legal system can be used with the aim of retaliation, the reassertion of power and control, or even forced reconciliation.[23] One example of this is the counter or dual charging of women, which is one of the unintended consequences of mandatory police charging in response to domestic violence calls. Another is the threat or commencement of civil lawsuits for defamation against a woman who has brought the history of abuse against her to the attention of the court in the family law proceedings. A third example captures tactics often referred to as immigrant abuse; these two categories (immigrant abuse and legal abuse) frequently overlapping to some degree. There are also quasi-legal arenas of legal abuse, which could include attempts to impact the woman's housing.

Counter-Charging:

Mandatory police charging appeared as a practice in the 1980s, requiring the police to make the decision about whether or not to lay charges rather than asking the partner who made the call whether they wanted charges to be laid.[24] The purposes of the mandatory charging policy were to protect women from their abusive partner and to "reinforce the view that domestic violence is a crime."[25] Mandatory charging also started to bring the concept of violence against women out of the private and into the public realm.

These goals are laudable, and it is not disputed that the directive has had positive effects on certain situations.[26] However, another consequence of the policy has been an increase in charges initiated by the man against the woman,[27] even though he may actually be the long-term abuser[28] and her actions have been taken in self-defence.[29] The mandatory charging regime has been criticized for more than the cross-charging effect, though a discussion of these additional shortcomings is beyond the scope of this paper.[30]

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[22] This list is non-exhaustive.

[23] Cross & Conlin *supra* note 1 at 39.

[24] Nicholas Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach," (1996) 13 Can J Fam L 215.

[25] Alfred JC O'Marra, "The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change," (2006) 10 Can Crim L Rev 237 [O'Marra].

[26] Mark Anthony Drumbl, "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform," (1994) 12 Can J Fam L 115 [Drumbl]. See also Lawrence W Sherman et al., "The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment" (1992) 83 Journal of Criminal Law and Criminology 139 [Drumbl].

[27] Elizabeth Comack, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood Publishing, 2004) at 154.

Defamation Lawsuits:

The abuser may attempt to retaliate against the woman by seeking damages through a civil action for defamation.[31] This was the situation in the case of *Booth v. Coleman*,[32] where Mr. Booth sought damages based on Ms. Coleman's complaints to the police which alleged physical assault and threatening bodily harm.[33] In other situations, the action may only be threatened, but the threat itself remains an attempt to regain power and control over the situation and over the woman. The protections afforded by privilege, when it comes to reporting abuse, are a matter deserving of their own research paper. Here, it is sufficient to say that the abuser will likely misrepresent the legal landscape in any communications with the woman. While these lawsuits may not be a frequent occurrence, lawyers should remind their clients to be careful in what they say to third parties and in what they post to social media.[34] In *Marks v. Maximchuk*,[35] the court summarily dismissed a claim against the woman that had been based on her report to the Ministry of Social Services and Housing, yet the defamation claim against her based on her communication to third parties was allowed to proceed to trial.[36]

The decision of *Pizza Pizza Limited v. Toronto Star Newspapers Ltd*[37] indicates that intending to silence the other party through a defamation action is not in itself a collateral or improper purpose.[38] At the same time, where the predominate (not exclusive) purpose of the defamation action is ulterior in the sense that the plaintiff merely seeks to "further foster and continue a climate of fear and intimidation,"[39] the first part of the two-part test of the tort of abuse of process could potentially be made out, according to *Lee v. Globe and Mail*.[40] This paper is not

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[28] Catherine A Simmons, Peter Lehmann & Shannon Collier-Tenison, "Men's Use of Controlling Behaviours: A Comparison of Reports by Women in a Domestic Violence Shelter and Women in a Domestic Violence Offender Program," (2008) 23 J Fam Viol 387.

[29] Charmaine M Wong, "Immigration and Refugee Law: Legislative Responses to the Plight of Battered Immigrant Women in Canada and the United States" (1999) 46 Imm LR 252 at fn 66.

[30] See Drumbl, *supra* note 27.

[31] Feldthusen describes an "increasing tendency" for parties to select this course of action. Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa L Rev 203 at fn 40.

[32] *Booth v Coleman*, 2013 ONSC 2267 [*Booth*].

[33] *Ibid*. After the charges were made against him, Mr. Booth entered into a peace bond and the criminal charges were withdrawn. He was unable to prove any impact on his reputation or his ability to work. See para 16.

[34] Simon Chester, "Defamation for Family Lawyers in a Nutshell: What You Need to Know" (2013) 32 CFLQ 117.

[35] *Marks v Maximchuk*, 1994 CarswellBC 1419.

[36] *Ibid*. In this case, the communications had led to the dismissal of Mr. Marks from his place of employment. In the Booth case, Mr. Booth was unsuccessful because, regardless of to whom Ms. Coleman repeated the allegations, he was unable to demonstrate any impact on his reputation or ability to work. *Booth supra* note 25 at para 16.

[37] *Pizza Pizza Limited v Toronto Star Newspapers Ltd*, 1996 WL 33328968 (Ont Gen Div).

[38] *Ibid*. See also *Lee v Globe & Mail (The),* 2002 CarswellOnt 42 at para 15 [*Lee*].

[39] *Lee, supra* note 39 at para 18.

[40] *Ibid.* In addition to the purpose being improper, for the tort to be made out, the plaintiff must have made an "overt and definite act or threat, separate and distinct from the proceedings themselves, in furtherance of the improper purpose" at para 14.

suggesting that a counterclaim for abuse of process is advisable or likely to succeed,[41] but it is relevant that courts have recognized how the defamation lawsuit can sometimes be a stalking horse with the true purpose of intimidating the other party and inducing fear.[42]

Immigrant Abuse:

The final form of legal abuse discussed in this paper overlaps with immigrant abuse to some degree. The abuser may tell the woman that she will be deported if she contacts that police to report the abuse,[43] mischaracterizing the legal system in an effort to support the threat or lying about her immigration status. In instances where the abuser has already been charged, he may threaten to cancel the woman's sponsorship unless she recants.[44] This type of legal abuse may even intersect with the "counter-charging" method of legal abuse, when a charge is brought against the woman, or a counter-petition for a restraining order is filed, with the purpose of causing immigration-related consequences.[45]

These other forms of legal abuse deserved mention though they are not the focus of this particular paper. As stated above, this paper explores the manipulation of the case management system in family law by the abuser as a form of post-separation abuse.

Why?

Realizing the Serious Nature of Legal Abuse

The dynamics of power and control do not disappear at the time of separation. In the words of Kerr and Jaffe, "[s]eparation may bring a new phase of violence in which the same abuse of power and control within the marital relationship gets played out through custody and access proceedings."[46]

The effects of this form of continued abuse should be recognized and not minimized. Legal abuse is a serious form of abuse with a significant impact. The abuser's conduct may run up

[41] *Ibid*. *Lee v Globe and Mail* (*supra* note 39) is a case where the plaintiff brought a motion for an order striking out the counterclaim. The party claiming abuse of process in this case was only successful to the extent that it was not plain and obvious that that Counterclaim disclosed no reasonable cause of action.
[42] *Ibid* at paras 18 & 20.
[43] Tereza Coutinho, *The Specific Problems of Battered Immigrant Women: A Review of the Literature (Toronto: Education Wife Assault*, 1986) at 4.
[44] Sheryl Burns, *Single Mothers without Legal Status in Canada: Caught in the Intersection Between Immigration Law and Family Law* (Vancouver: YWCA, 2010).
[45] Linda Kelly, "Domestic Violence Survivors: Surviving the Beatings of 1996" (1997) 11 Geo Immigr LJ 303. Kelly referenced the story of a client that filed for a restraining order against her abusive husband, who, in turn, filed a counter-petition for a restraining order in spite of the absence of any supporting facts.
[46] S Grace Kerr & Peter G Jaffe "The Need for Differentiated Clinical Approaches for Child Custody Disputes with Findings of Domestic Violence and Legal Aspects of Domestic Violence and Custody/Access Issues," (1998) Syrtash Collection of Family Law Articles [Kerr & Jaffe].

legal costs with serious financial consequences for the woman.[47] Even if the woman does not have a lawyer, the costs of frequent absenteeism from work or the calculation of personal time required for court preparation can add up to create a substantial drain on her resources, especially if the abuser is at the same time refusing to pay support.[48]

Stresses associated with ongoing litigation can have a negative impact on her physical, emotional, and psychological health.[49] This emotional, physical, psychological and financial toll may put enough pressure on her that she returns to the abuser out of financial need or emotional exhaustion. Even where she does not return, she may settle for a poor legal outcome rather than continue to deal with his legal bullying. The safety of the woman may also be put at risk. Where there is a prior history of abuse, a restraining order may be in place preventing the abuser from being within a certain distance of her except pursuant to a Family Court Order or for court purposes. Protracted litigation with frequent court appearance dates gives the abuser opportunities for contact with her in spite of the restraining order and when he might not otherwise know of her location, putting her safety at risk while she is at the courthouse[50] and when she is leaving.[51]

The impact of legal bullying on the children of the relationship should not be ignored. In *E.(S.) v. W.(M.J.)*[52] the Court recognized the serious stress suffered by the child when a parent is a serial litigator,[53] which was also a theme in *Metzner v. Metzner*[54] where the Court concluded

[47] See *Ballentine v Ballentine*, 1999 CarswellOnt 2591 as an example. The ex-husband repeatedly brought the same application and the cost to the woman in legal fees was approximately $150,000. See also *Beattie v Ladouceur*, 1992 CarswellOnt 2380, where the abusive litigant owed the woman $352,000 in costs.

[48] In *Hersey v Hersey*, 2016 ONCA 494 the Court considered the woman's claim that she had to reduce her workload to part time in part because of the anxiety disorder caused by the marriage's breakdown and her former partner's abusive litigation strategy. See also Glenn Feltham & Alan Macnaughton, "Varying Child Support Awards: Tax and Non-Tax Factors" (1997) 15 CFLQ 343, where the authors assume that unrepresented parties still undertake approximately 25% of the costs amount the represented parties have to pay, in part because of the costs of losing days' pay.

[49] Esther L Lenkinski, Barbara Orser & Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 CFLQ 337 [Lenkinski *et al*]. Lenkinski, Orser and Schwartz noted in their article on legal bullying that both litigation literature and case law have been largely silent on the psychological and physical impacts of family court legal bullying. However, for example in *Apotex Inc. v Relle*, there was evidence that the protracted and acrimonious lawsuit had resulted in anxiety, chest pains, and elevated blood pressure for the plaintiff. There is no reason the physical effects would be less severe in family law proceedings where there is already a history of abuse and established patterns of intimidation. *Apotex Inc. v Relle,* 2012 ONSC 3291 at para 22. See also Jenna Calton & Lauren Bennett Cattaneo "The Effects of Procedural and Distributive Justice on Intimate Partner Violence Victims' Mental Health and Likelihood of Future Help-Seeking" (2014) 84 American Journal of Orthopsychiatry 329 [Calton].

[50] Assaults can occur at courthouses in spite of the presence of security. See *R v Gunning*, 2006 BCSC 664.

[51] Women in these situations are often advised to inform security of their situation when they enter the courthouse, to wait in a safe part of the courthouse after the appearance -- giving time for the abuser to leave before she herself goes to the parking lot/bus stop, and to request that a security guard walk her to her vehicle as she leaves.

[52] *E(S) v W(MJ)*, 2017 ONSC 861.

[53] *Ibid* at para 18. See also *AA v SNA*, 2009 BCSC 387 at para 79, stating that "children can be seriously harmed by the ongoing acrimony and lack of a timely resolution."

[54] *Metzner v Metzner*, 1993 CarswellBC 2992.

that the children "felt that their mother was manipulating them to 'win' custody."[55] The physical safety of the child may also be put at risk as a result of legal bullying. In *Gauthier v. Gauthier*,[56] Dr. Peter Jaffe attributed Ms. Gauthier's acquiescence to expanded access to a feeling of hopelessness on her part that in turn created a desire to get things settled and avoid further hassles. "This would cause her to make decisions that were not necessarily in the children's best interests, just to settle the matter."[57]

The court system itself feels the negative impact of the abusive litigant. The cases can be lengthy and therefore resource-draining. Additionally, experiences within the court system could affect perceptions of the procedural fairness of the system overall, women being unable to comprehend how their former partner is able to "get away" with his tactics. Finally, the abusive litigant may begin to make outrageous claims against actors within the system as the drowning man clutching at straws. In *Dyce v. Ontario*,[58] Mr. Dyce brought actions against Ontario Court Judges, Judges of the Superior Court, numerous staff in Sarnia, and Her Majesty the Queen in Right of Ontario, claiming that they had made wrong decisions in Mr. Dyce's family law case. Cunningham A.C.S.C.J. referred to these allegations against public officials as "serious and unsubstantiated."[59] As the Court noted in *Butterfield v. LeBlanc*,[60] these types of lawsuits require public officials to undergo the expense "of defending a frivolous and vexatious claim, but also a claim that casts aspersions on their character with no justification."[61]

Understanding the Role of the Lawyer

It is important to acknowledge the vast number of unrepresented litigants in family court, and the number of woman abuse survivors who are proceeding through family court absent the shield and support that can be offered by a lawyer. This problem must be addressed.[62] Adequate and effective legal representation must be available for these women as they proceed through family court. Lawyers taking these cases must have the knowledge and skill to effectively handle cases with a history of abuse.

[55] *Ibid* at para 40.
[56] *Gauthier v Gauthier*, 2011 ONSC 1230.
[57] *Ibid* at para 105.
[58] *Dyce v Ontario*, 2007 CarswellOnt 3437 [*Dyce*].
[59] *Ibid* at para 28.
[60] *Butterfield v LeBlanc*, 2007 BCSC 235. This was not an action against family court judges yet the described effect on the defendants remains the same. The plaintiff here alleged conspiracy relating to his conviction for failing to pay income tax.
[61] *Ibid* at para 32.
[62] Some steps have been taken in this direction in Ontario, inasmuch as, in 2015, Legal Aid Ontario introduced different financial eligibility criteria for domestic violence cases. As a result of this, more victims of domestic violence are now able to obtain a lawyer paid for by a legal aid certificate.

Given the serious nature of the abusive conduct, lawyers must be attentive to the existence of this form of ongoing abuse.[63] Some procedural responses will be outlined in later sections of this paper, yet the lawyer must hold more than simply a toolkit; the lawyer must have an understanding of the impact of abuse. Whether the abuse is in the past or is ongoing or, most commonly, both, it can affect the woman's ability to make decisions effectively. The role of the lawyer in these cases is not to be her counsellor (this would be expensive, and lawyers do not necessarily have the required skills to be counsellors), but to aid her in finding the appropriate supports.[64] Without these supports in place, the lawyer may find that the woman displays avoidance responses, which can have a negative impact on communication and the overall productiveness of the relationship.[65]

The lawyer should consider how the abuser is likely to respond to a certain legal action before a move is made. For example, if the abuser is served with a request to admit, will he respond in good faith or is he more likely to see this as a new tool for harassment given the history of abuse? It should always be remembered that the woman is the expert of her circumstances, and she may be the one best able to predict the responses of her former partner.

Where the lawyer represents a litigant wanting to engage in abusive strategies, they must bear in mind the comments of Rivoalen J. in *Skinner v. Skinner*,[66]

> Clients can take unreasonable positions, but lawyers must serve as their own gatekeepers of professional conduct rather than blindly following instructions. Lawyers are not free to act on whatever instructions they might receive from their clients. On the contrary, lawyers are obliged by their rules of professional conduct to refrain from acting on certain instructions. Put another way, distinct restrictions or disabilities accompany the rights and privileges afforded to lawyers. One such restriction or disability precludes them from carrying out the instructions of over-zealous clients.[67]

Recognizing the Need for Systemic Change

"Epstein and Madsen's" has described judicial dealings with custody and access in "high conflict"[68] cases as a "continuing saga."[69] In *Kaplanis v. Kaplanis*,[70] the Ontario Court of Appeal

[63] See Kerr & Jaffe, *supra* note 47. See also Nicholas Bala "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996)13 Can J Fam L 215 at para 41.
[64] Cross & Conlin *supra* note 1 at 43.
[65] *Ibid*. Refer to Cross & Conlin for a more thorough discussion of the impact of fear and PTSD on the lawyer-client relationship.
[66] *Skinner v Skinner*, 2013 CarswellMan 612.
[67] *Ibid* at para 23.
[68] The term "high conflict" is problematic in the same sense that the use of gender neutral terms such as "domestic violence" are problematic. The term "high conflict" implicates both parties when it may be one individual engaging in a unidirectional

appeared to state that joint custody not be awarded in these situations.[71] However, cases heard since *Kaplanis* have demonstrated that this is perhaps a mere guiding principle, if that, rather than a rule or binding precedent. More frequently, courts seek to address conflict by issuing orders that, in theory, reduce the opportunity for conflict.[72] Setting aside discussion about the specifics of how custody matters should be dealt with in "high-conflict" cases, it is at least generally accepted that there should be differential treatment for these cases, even if this view sometimes appears more in judicial opinions than as a set of regulations. It is, for one thing, considered imperative for these cases that one judge manage the case from start to finish.[73] The comments of Madam Justice Martinson in *A.A. v. S.N.A.*[74] are widely cited in support of this, where she labelled it a required practice under s. 14 of British Columbia's *Supreme Court Act*,[75] and yet, there is no mandatory case management of these files in Ontario.

In the high-conflict case of *Low v. Bowering*,[76] the Court quoted Dr. Amundson in saying access details "should not be left in the hands of the parents alone."[77] This is to say that in high-conflict cases, the court should attempt to remove opportunities for conflict. One way to minimize conflict is to craft specific and detailed orders that leave little room for manipulation. This should not only be the case in the segments of the order dealing with custody, but also in relation to access communications, schedules and exchanges as well as in the description of the order's enforcement. An order that is not specific and detailed can provide the abuser with an opportunity to manipulate the conditions and terms, with the potential result that the woman must bring a motion to change. Not only does this subject the woman to continued legal abuse, it is a waste of the court's time and resources. This additional drain can be avoided if the orders are written in a detailed fashion, tailored to the facts and history of the case, to begin with.[78]

There is also some recognition that these cases benefit from a comparatively early trial. In the Saskatchewan case of *Wiebe v. Wiebe*,[79] Koch J heard the matter after it had already seen five different judges on motions (it was clear that the father was engaging in a collateral attack) and labelled it imperative at this point that the matter be designated "high conflict" and scheduled

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form of violence. Recognizing that the term is problematic, it is used throughout this section because of its prevalence and meaning in family law.

[69] Philip Epstein & Lena Madsen, *This Week in Family Law*, 2006-18 (July 18, 2006).

[70] *Kaplanis v Kaplanis*, 2005 CarswellOnt 266.

[71] *Ibid* at para 11.

[72] Philip Epstein & Aaron Franks, "Case Comment on *Tymoszewicz v Tymoszewicz*" (2007) 43 RFL-ART 94 at para 1. See also *Ursic v Ursic*, 2006 CarswellOnt 3335.

[73] *AA v SNA*, 2009 BCSC 387 at paras 77 & 79.

[74] *Ibid.*

[75] *Supreme Court Act*, RSBC 1996, c 443.

[76] *Low v Bowering*, 2005 ABQB 632.

[77] *Ibid* at para 15.

[78] This does not mean that the parties are required to schedule the entirety of their lives in advance or make unreasonable commitments. It simply means that the terms of the decision-making powers need to be described specifically, as do the methods and terms of communication etc.

[79] *Wiebe v Wiebe*, 2009 CarswellSask 30.

for pre-trial and trial as soon as possible.[80] Epstein and Madsen's applauded Koch J's "wise words" and lamented the absence of a process for streaming out high-conflict cases that should be dealt with expeditiously.[81] Because no such process currently exists, "high-conflict" cases are not immediately designated as such, and the abuser is afforded greater opportunities for continuing the legal abuse,[82] while the woman is denied any benefits of this classification.

The creation of such a screening process may help to deter legal abuse. However, it may be preferable that, if such a screening system were created, woman abuse cases not be given the designation "high conflict," which can lead to misunderstandings as to the nature and direction of the violence such as occurred in the case of *Peterson v. Peterson*.[83]

Such screenings must be conducted and the process must be developed by individuals trained in domestic violence/violence against women; otherwise there is the risk that individuals and relationships will be improperly categorized.

Also, while Koch J in *Wiebe* considered trial to be the appropriate route, a more appropriate method of dealing with these cases may be through focused hearings (also referred to as focused trials or Rule 2 hearings). Subrule 2(2) of the *Family Law Rules* requires the court to deal with cases "justly." This includes ensuring the procedure is fair, saving expense and time, dealing with cases appropriately and giving consideration to court resources. A focused hearing allows the court to make a final order on select issues following what can be called a "mini-trial," which requires less time and fewer resources than those demanded by a trial.

As a further note, short page limits for conference briefs should not be imposed in these cases. When they are, it is impossible to provide adequate evidence of the history of abuse, which leaves the woman unable to present critical information about her situation.[84]

An Integrated Domestic Violence Court was established as a pilot project in Toronto in 2011. It created one court where family cases and domestic violence criminal charges were heard before a single judge, whereas typically there is no coordination or information sharing between the criminal and family courts. However, this Court (being part of the Ontario Court of Justice rather

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[80] *Ibid* at para 10.

[81] Philip Epstein & Lena Madsen, *This Week in Family Law*, 2009-10 (March 10, 2009).

[82] For instance, without one judge being seized of the case, the abuser has the opportunity to shop through alternative opinions and is also afforded more time to continue the abuse because each judge must become apprised of the facts. Also, if a judge is not writing orders with the understanding that the abuser will try to "wiggle" out of them, then the woman is more likely to have to return to court regarding the enforcement of the nonspecific order. Finally, where the path to trial is not in any way expedited, then the abuser simply has a long space of time within which they can engage in any variety of the tactics outlined in this paper.

[83] *Peterson, supra* note 6. See page 1 of this paper.

[84] The Consolidated Practice Direction Concerning Family Cases in Central East Region released May 1, 2016 placed a six-page limit on the length of conference briefs.

than the Superior Court) only accepts summary conviction criminal cases and does not become involved in family law cases containing property claims or applications for divorce. While there is currently very little information on the success of the project, Birnbaum, Bala and Jaffe's preliminary evaluation of stakeholder views indicates that information sharing between the areas of criminal and family law has been a positive outcome.[85]

The following elements of the family law system also work to facilitate legal bullying tactics, although it is not being suggested that there are no other areas where improvements could be made.

The *Divorce Act*:

Section 16(10) of the *Divorce Act*[86] can be divided into two parts which Kerr and Jaffe refer to as the direct and indirect effects.[87] The direct effect is the creation of a presumption that it is always in the child's best interests for the non-custodial parent to have generous access.[88] This is the maximum contact principle. In *Young v. Young*,[89] McLachlin J (as she was then) said that, "[maximum contact] stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider."[90] It is possible for this principle to conflict with safety concerns for the child and mother where there is a history of abuse. McLachlin J did specify in *Young* that contact is to be restricted only where it conflicts with the best interests of the child,[91] yet a history of wife abuse is not determinative of the outcome.[92] In spite of such a history, custody and access arrangements that place the woman in danger by requiring continuous contact may still be ordered.

Tying this back into the topic of legal bullying, in *G.(G.P.) v. L.(P.)*[93]maximum contact was considered to be so important that the court refused to limit the abusive father's ability to continue to bring motions regarding access even though he had already brought numerous (failed) motions.[94] Similarly, in the Newfoundland decision of *M.(J.M.) v. M.(K.A.A.)*,[95] where there had been 20 court applications and costs exceeded $600,000, the judge stated that it

[85] Rachel Birnbaum, Nicholas Bala & Peter Jaffe, "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned" (2014) 29 Can J Fam L 117 at 170.
[86] *Divorce Act*, RSC 1985, c 3 (2nd Supp).
[87] Kerr & Jaffe *supra* note 47 at para 19.
[88] *Ibid.*
[89] *Young v Young*, 1993 CarswellBC 264.
[90] *Ibid* at para 212.
[91] *Ibid.*
[92] Eleanor M Schnall, "Custody and Access and the Impact of Domestic Violence" (2000) 18 CFLQ 99.
[93] *G(GP) v L(P)*, 1994 CarswellNB 201.
[94] *Ibid* at para 19. The woman had brought a motion pursuant to Rule 37.12 seeking an order prohibiting him from bringing further motions in the proceeding without leave of the court.
[95] *M(JM) v M(KAA)*, 2009 NLUFC 3.

cannot be frivolous or vexatious for a parent to seek access[96] and that "it would only be in the most exceptional case that a Court would restrict in any way the free access of any person to the Courts to assert his or her civil rights and remedies."[97]

The "indirect" effect is also known as the "friendly parent rule."[98] The 1998 report on Spousal Violence in Custody and Access Disputes had recommended that this rule not apply to cases with an abuse history.[99] Essentially, the rule states that the court shall consider the willingness of each parent to facilitate maximum contact with the other parent. This rule can work to discourage women from being candid about the abuse history, though there may be good reasons for wanting limits placed on contact the abuser has with the children.[100] The section also can assist the abuser in a legal bullying strategy that seeks to use a custody claim as a bargaining chip or only wants joint custody so that abuse against the woman can be more easily continued.

In the 1970s, Professor Lenore Weitzman conducted research on the version of the "friendly parent" rule that existed in the United States. She concluded that: "An unwilling parent is more likely to be coerced into a joint custody 'agreement' in states with a 'friendly parent' rule."[101]

Another problematic section of the *Divorce Act* is s. 16(9), which states that a court shall not consider a parent's past conduct unless this is relevant to his or her ability to act as a parent of a child. Before most provinces enacted legislation requiring the court to consider what is typically described as the "impact of family violence" on the children, this section had the effect of minimizing the relevance of a history of violence.[102] Most provinces have now enacted such legislation mandating consideration of this issue. For instance the *Family Law Act*[103] of British Columbia and the *Children's Law Act*[104] of Newfoundland contain sections requiring consideration of abuse history.[105] However, s. 1 of New Brunswick's *Family Services Act*[106] does not list a history of family violence as a circumstance to consider.[107] In P.E.I, though it is listed

[96] *Ibid* at para 18.
[97] *Ibid* at para 19.
[98] Kerr & Jaffe *supra* note 47 at para 19.
[99] Nicholas MC Bala *et al*., *Spousal Violence in Custody and Access Disputes: Recommendations for Reform* (Ottawa: Status of Women Canada, 1998).
[100] Brenda Cossman & Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 Can J of Fam L 13 at para 64.
[101] LJ Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985) at 246.
[102] See, for instance, *Sherry v Sherry*, 1993 CarswellPEI 15.
[103] *Family Law Act*, SBC 2011, c 25 [BC *Fam L Act*].
[104] *Children's Law Act*, RSN 1990, c C-13.
[105] There is also s.18(2)(b)(vi) of the Alberta *Family Law Act*, s.39(2.1)(c) of Manitoba's *The Family Maintenance Act*, and s. 18(6) of Nova Scotia's *Parenting and Support Act* to name a few.
[106] *Family Services Act*, SNB 1980, c F-2.2.
[107] Domestic violence is only referenced in the Child Protection segment of the *Act*, which considers only whether the child currently is living in a household where there is domestic violence.

as a relevant consideration in granting an exclusive possession order under the *Family Law Act*,[108] it is not listed as a "best interests of the child" consideration by the *Custody Jurisdiction and Enforcement Act*.[109] Ontario's *Children's Law Reform Act*[110] references the relevance of family violence in s. 24(4); however, this consideration is not part of the "best interests of the child" test which is outlined in s. 24(2). There is a need for greater recognition of the relevance of a history of abuse in custody and access proceedings. Even in the provinces where such legislation does exist, as Kerr and Jaffe note, the problem is that the judges deal with the presence of abuse history inconsistently without a clear legislative guide.[111]

Pressure to Mediate:

The woman may feel pressured to engage in mediation, which will often be an inappropriate route where there is a history of woman abuse. Given the power imbalance and ongoing fear, there is a risk of coercion that could result in unsafe or inequitable settlements.

The abuser himself may pressure her to accept mediation, although she may feel these pressures from judges[112] or even from Legal Aid Ontario as well.[113] High litigation costs can push women towards mediation even where it is not appropriate. Least subtle is the legislation from Quebec introducing mandatory family mediation. Women may feel that, if they do not agree to mediation, they will appear unreasonable or uncaring.[114]

While screening methods are typically used to locate power imbalances and other impediments to successful mediation, these methods are imperfect, and studies have indicated that many cases involving woman abuse are still referred to mediation programs.[115] A study conducted by the Transition House Association of Nova Scotia reported that mediators often "showed limited ability to detect or handle abuse issues."[116]

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[108] *Family Law Act*, SPEI 1995, c 12.
[109] *Custody Jurisdiction and Enforcement Act*, RSPEI 1988, c C-33.
[110] *Children's Law Reform Act*, RSO 1990, c C12
[111] Kerr and Jaffe, *supra* note 47 at para 27.
[112] This may be often be a more subtle pressure, though in Saskatchewan, for instances, Judges may order mediation pursuant to *The Children's Law Act*, 1997, s. 10 or *The Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, s. 15(1).
[113] See Pamela Cross, *It Shouldn't be This Hard: A Gender-Based Analysis of Family Law, Family court and Violence Against Women* (Oshawa: Luke's Place Support & Resource Centre for Women & Children, 2010) at fn 33 [Cross]. Legal Aid is able to withhold hours on a legal aid certificate until the parties attend a mediation session.
[114] *Ibid* at 35.
[115] A Zylstra, "Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators" (2001) 2 J Disp Resol 253.
[116] Transition House Association of Nova Scotia, *Abused Women in Family Mediation: A Nova Scotia Snapshot* (Halifax: THANS, 2000) at 3.

Court Responses to Abusive Litigants:

Lenkinski, Orser and Schwartz assessed patterns of workplace bullying and harassment and drew on these observations to inform an analysis of legal bullying.[117] Their analysis revealed that workplace bullies are more inclined to engage in harassing behaviours when they believe they can "get away with it."[118] This is something to bear in mind, given that surveys conducted in Ontario have revealed concern over systemic delay and excessive lenience shown towards non-compliant parties.[119]

> The prevailing view regarding contempt motions is "why bother." The non-offending parent absorbs all of the cost and the offending parent "gets away" with misconduct without consequence, until numerous contempt motions are brought.[120]

Limitations

Anecdotal Component

This paper relies to some degree on the anecdotal evidence provided by lawyers who have worked with clients of Luke's Place. This evidence is largely supported by academic research and a review of case law and, given their work with women who have left abusive relationships, these lawyers are in a position to offer qualified comments on this topic.

Her Story is Unique

Each woman's story is unique. While women leaving abuse and involved with family court do not share identical experiences, there are some common legal bullying tactics. Women with certain stories may face additional barriers in the court system and may experience unique forms of legal bullying. The partners of lesbian mothers and trans parents, for instance, may seek to exploit societal ignorance and discrimination throughout the process.[121] Additionally, women living in rural communities face particular challenges. For example, if the small town where the family has been living has only a few family law lawyers, it is easier for the abuser to conflict out the local lawyers. The woman must then travel outside the community to find a lawyer to represent her. This can also affect her ability to access FLIC and duty counsel services.

There is a Continuing Need for Access to Adequate Legal Representation

A large number of litigants proceed through family court unrepresented. The provision of legal

[117] Lenkinski *et al, supra* note 50.
[118] *Ibid.*
[119] John-Paul Boyd, "Enforcing Orders for Access: The Views of the Family Law Bar" (2013) 32 CFLQ 173.
[120] *Ibid.*
[121] Cross, *supra* note 114 at 16.

information on its own does not meet their needs, and particularly the complex needs of survivors of abuse. The Law Commission of Ontario has noted that:

> The concerns with respect to access to justice are mostly related to a lack of legal representation, rather than a lack of information and that self-help can only assist persons with significant legal literacy in less complex cases.[122]

Just as legal representation cannot be replaced by legal information, neither can it be replaced by the licensing of paralegals for family court as Justice Bonkalo's report recommended. Cases involving woman abuse require a highly specialized response and comprehensive legal training. This paper supports the comments provided in response to Justice Bonkalo's report by Luke's Place and the Barbra Schlifer Clinic in recommending adequate resourcing of Legal Aid Ontario so it can properly support litigants in cases involving woman abuse.[123]

Before the Trial

1. Conflicting Out

The first legal bullying tactic discussed in this paper was briefly mentioned above as a problem affecting, particularly, women living in rural communities. What happens is this: the abuser meets with a number of lawyers and discusses with them elements of the case; the woman then begins to look for representation only to find that a (large or small) number of lawyers cannot represent her because they are privy to the first party's confidential information.[124]

While the situation may sometimes arise innocently enough, without one party maliciously intending to conflict out the lawyers the partner may have otherwise hired, other times the abuser may intentionally create conflicts of interest simply to make the process of hiring a lawyer difficult for the woman. In small towns and rural areas, this is easy because there are so few lawyers. This is not to say it cannot happen in larger cities. The client in the case of *Stewart v. Debora*[125] found himself conflicted out in a city as large as Toronto.[126] If the woman will be relying on a legal aid certificate, all the abuser needs to do is conflict out the smaller number of lawyers who accept those certificates.

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[122] Law Commission of Ontario, ***Towards a More Efficient and Responsive Family Law System*** (February 2012) at 66.
[123] "The Special Needs of Survivors of Family Violence in the Family Court Process: Comments on Justice Bonkalo's 'Family Legal Services Review'" (15 May 2017), online: Luke's Place <http://lukesplace.ca/the-special-needs-of-survivors-of-family-violence-in-the-family-court-process-comments-on-justice-bonkalos-family-legal-services-review/>.
[124] Bill Rogers, "Ontario Master Slams Lawyer Shopping as Unfair" (1998) 18 The Lawyers Weekly.
[125] *Stewart v Debora*, 2009 ONSC 3858.
[126] *Ibid* at para 10.

Even though this tactic of abuse is not necessarily facilitated by the structure of the case management system,it is nevertheless worth mentioning. In the American case of *Shadow Traffic Network v. Superior Court*,[127] the Court said that "allow[ing] a party to deplete the pool of available experts simply by interviewing all of the available experts, even though it had no intention of retaining them … is a legitimate concern."[128]

Finding a solution is more difficult than identifying the problem. Some lawyers seek to deter lawyer-shoppers by charging for all consultations.[129] The problem with this response is that women who have experienced abuse need a lawyer who is sensitive to the dynamics of abuse

and who knows where and how to present the necessary evidence. Given how difficult it is to change lawyers for a client using a legal aid certificate, it is important that the woman be able to retain an appropriate lawyer at the start of the process.

According to *MacDonald Estate v. Martin*,[130] there are two questions to be asked when determining whether there is a disqualifying conflict of interest. These are:

- Did the lawyer receive confidential information from the former client relevant to the matter at hand?
- Is there a risk that it will be used to the prejudice of the former client?

The task is to balance the interests of the public, which should be able to have confidence in the integrity of the legal profession and the administration of justice, against the interests of an individual seeking to retain their choice of counsel.

In *G.(E.A.) v. G.(D.L.)*[131] – a Yukon case – the Court balanced these competing interests and paid special attention to the challenge of retaining a family law lawyer in a rural area with limited selection. Accepting that there were additional factors in that case (it was disputable whether or not the confidential information the lawyer had received was actually relevant to the matter at hand), the court concluded that "the principle of choice of counsel in family law where resources are scarce and the public interest in the expeditious and economic conduct of legal proceedings involving children and child support [were] paramount in this case."[132]

[127] *Shadow Traffic Network v Superior Court*, 24 Cal. App. 2d 1067, 1080 N.9 (1994).
[128] *Ibid.* The context may have been different, the Court here referencing experts rather than lawyers, yet the problem remains, in essence, the same.
[129] Bill Rogers, "How to set up and thrive as a sole practitioner - Communication is the key to client satisfaction, seminar told," (1998) 17 The Lawyers Weekly.
[130] *MacDonald Estate v Martin*, [1990] 3 SCR 1235.
[131] *G(EA) v G(DL),* 2010 YKSC 24.
[132] *Ibid* at para 34.

The same analysis could perhaps be applied to rural areas of Ontario. The amount of confidential information provided to the lawyer is, of course, relevant; but also relevant is the prejudicial effect on a survivor of abuse if she is unable to retain a local lawyer, given potential transportation issues (particularly if she has fled), the complexity of abuse cases (which may require frequent meetings), and the difficulties associated with locating childcare for long periods of time (since it may be inappropriate for the abuser to exercise long periods of unsupervised access). Each case will be a balancing act. The Law Society of Upper Canada may be in the best position to create a list of considerations for lawyers who are presented with situations in which survivors of abuse have been conflicted out of being able to retain a local lawyer.

2. Failure to Disclose

In *Cunha v. Cunha*,[133] Fraser J. called non-disclosure and delayed disclosure the "cancer of matrimonial property litigation."[134] Accurate financial disclosure is required in family law proceedings for calculations of child support, spousal support, and to determine what assets are owned and their value (when these arise as issues). More frequently, tactics such as this, intended to delay the case or adding costs, are referred to as "an abuse of the court's process," when they are also designed to abuse the other party. Where an abuser fails to produce financial disclosure, and the lawyer representing the woman asks the court to order disclosure, that lawyer should also seek to have a timetable imposed creating reasonable deadlines for that disclosure. Where deadlines are not imposed, the abuser is afforded "wiggle room" and may continue to delay for as long as possible. The imposition of timetables will not necessarily solve the problem immediately. In *Scurci v. Scurci*,[135] not the only case in which this has occurred, the party failing to disclose did not comply with the timetable that had been imposed by the Court.[136]

While the abuser may eventually be held accountable, the courts are sometimes reluctant to impose penalties for failure to disclose, particularly if the abuser is self-represented. This is highly problematic when viewed through the lens of the work done by Lenkinski, Orser and Schwartz, whose article postulated that legal bullies will be more inclined to engage in abusive behaviours when they feel that they can get away with it.[137] The following segment provides a non-exhaustive review of judicial responses to the problem of nondisclosure.

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[133] *Cunha v Cunha*, 1994 CarswellBC 509.
[134] *Ibid* at para 9.
[135] *Scurci v Scurci* 2013 ONSC 7199 [*Scurci*].
[136] *Ibid* at para 2. The Court recognized that breach of the order disclosed Mr. Scurci's strategy to minimize the support he was obligated to pay at para 47.
[137] Lenkinski *et al*., *supra* note 50.

Contempt

Rule 31(5) of the *Family Law Rules* describes the powers of the court when someone is found in contempt. As with all of the *Family Law Rules*, this rule is to be interpreted in light of Rule 2, which requires the court to deal with cases justly. According to the court in *Scurci*, contempt is not the appropriate sanction where non-compliance with an order for disclosure was not accompanied by any fraudulent or misleading tactics or where the non-compliance did not extend over many years.[138] The seriousness of a finding of contempt lies in its quasi-criminal nature, incarceration being the potential penalty.[139]

Ensuring that deadlines are included in the order for disclosure is important because bringing a motion for contempt entails proving the elements of contempt beyond a reasonable doubt.[140] This means proving that the abuser (1) had knowledge of the provisions of the order, (2) breached the order, and (3) did so wilfully.[141] "The foregoing elements demand that the provisions of the order must be clear and unambiguous as 'ambiguity in an order may be a complete answer to a contempt citation.'"[142] It is the lawyer's responsibility to request adequate specificity in the order, anticipating that the abusive former partner may seek to engage in this form of abuse and understanding that accepting vague terms could give the abuser an excuse for his conduct.

Even where the lawyer has requested the imposition of deadlines, as the Court noted in *Scurci*, it may be a number of years before a finding of contempt will be made.[143] Such was the case in *Griffin v. Eros*,[144] where the father did not comply with the disclosure deadlines that had been set for any of the years of 2010, 2011, 2012 or 2013.[145]

Another barrier to the success of contempt motions comes in the form of the Consolidated Practice Direction Concerning Family Cases in the Central East Region.[146] This Direction explains new filing requirements and scheduling procedures, and it supersedes the *Family Law Rules* where there is a conflict between the filing requirements of the Rules and the Practice Direction. One of these Directions states that no factum shall be filed for a short motion

[138] *Scurci supra* note 113 at para 87.
[139] *Griffin v Eros*, 2014 MBQB 165 [*Griffin*].
[140] *Ibid* at para 29.
[141] *Ibid* at para 30.
[142] *Ibid* at para 31, citing Jefrey Miller, *The Law of Contempt in Canada* (Scarborough, Carswell 1997) at 95.
[143] *Scurci supra* note 113.
[144] *Griffin supra* note 117 at para 42.
[145] *Ibid* at para 42.
[146] *Consolidated Practice Direction Concerning Family Cases in Central East Region*, online: Superior Courts of Justice <http://www.ontariocourts.ca/scj/practice/practice-directions/central-east/family/#Part_5_Motions>.

unless ordered.[147] Disallowing facta for short motions affects the arguments of counsel and the basis for judicial decisions. This is particularly problematic for complex cases involving abuse that require a well-informed court.

In regions affected by this Direction and where long motions can be held somewhat regularly, it may be best for counsel to schedule a long motion (for which facta can still be filed) if there is any possibility that it may take more than an hour of the court's time.

Striking the Litigant's Pleadings

Striking a litigant's pleadings is generally considered a "remedy of last resort,"[148] particularly in relation to custody and access matters,[149] where the prejudice caused to the other party cannot be addressed by an order for costs. Yet there have been instances where the courts have struck pleadings related to financial issues (because of non-disclosure), while allowing the custody and access issues to proceed.[150] Under Rule 10(5) of the *Family Law Rules*, a party whose answer is struck can no longer participate in the case, allowing the other party to proceed on an uncontested basis. In instances where there is nothing to strike because the abuser has filed nothing in response to the application, Rule 10(5) provides that these cases will also proceed uncontested. In determining whether or not this is an appropriate remedy for nondisclosure, the court must consider a total of 12 factors, including whether or not the order(s) for disclosure was/were clear and whether the time frame imposed was reasonable.[151] The woman's lawyer has a role in ensuring that these will not be reasons her motion is dismissed. This means not only that the deadline requested must be reasonable, but that the documents missing must be clearly itemized. The Ontario Court of Appeal set aside the trial judge's order striking pleadings in *Kovachis v. Kovachis*[152] because counsel for the moving party did not list what disclosure had not yet been provided. "On this ground alone," the court said, "the order striking Kovachis' pleadings cannot stand."[153]

As with contempt, the non-compliance must go beyond "imperfect compliance" so as to form a pattern of disregard for court orders.[154] However, in *Nashid v. Michael*[155] only nine months passed between the making of the original disclosure order and the non-disclosing party's

[147] Short motions are the motions scheduled for a regular motions day that are expected to take one hour or less of the court's time. A factum is the written argument submitted by a lawyer to the court that presents the relevant law for the judge to consider and apply.
[148] *Scurci supra* note 113 at para 88.
[149] Murano. ***Citation incomplete.***
[150] *Sleiman v Sleiman*, 2002 ONCA. ***Citation incomplete.***
[151] *Grenier v Grenier*, 2012 at para 21. The full list is set out in this paragraph of the case.
[152] *Kovachis v Kovachis*, 2013 ONCA 663.
[153] *Ibid* at para 30.
[154] *Nashid v Michael*, 2012 at para 26.
[155] *Ibid* at para 34.

pleadings being struck. This is a substantially shorter time frame than the "many years" requirement referenced in *Scurci*.[156] In fact, while the *Scurci* court denied the motion to have Mr. Scurci found in contempt, the motion to strike his pleadings on the financial issues was allowed after a year of non-disclosure.[157] Nevertheless, a delay of nine months in obtaining disclosure can have a serious impact on someone in financial difficulty who is unable to obtain an order for support in the interim. Where the woman has left an abusive relationship, this abuse not only prolongs the trauma and prevents healing, the financial strain may be enough to cause her to return to her abuser, putting her and her children's safety at risk.

The reasons for imposing these penalties sparingly are good, and this paper does not advocate for making findings of contempt or decisions to strike pleadings the norm. Yet, in cases where there is a history of abuse, not only is there a greater chance that these tactics will be employed, but more damage can be done when the abusive litigant is allowed to get away with his tactics for an extended period of time. This harm could be mitigated if there were a screening process in place that identified cases with a history of violence and treated these cases according to their needs. If one judge were to be assigned to these cases, that judge would be in a better position to recognize patterns of non-disclosure and exercise their discretion effectively. Since that case-managing judge would be aware of the history of abuse, they would also, ideally, appreciate the need to address these tactics at an earlier stage. This does not mean that one of the above responses will always be the appropriate answer, but where non-disclosure establishes itself as a re-occurring pattern in a case where abuse is a factor, it should not be a matter of many months or years before the court responds.

Imposition of Costs

An award of costs in family law serves three recognized purposes: to compensate successful litigants, to encourage settlement, and to discourage "bad behaviour."[158] In the pre-trial stage of family court proceedings, the latter two are main functions because no party has yet emerged as the "winner."[159] Maur, Bala and Adams advocate for more consistent use of costs as a sanction for inadequate disclosure.[160] This paper echoes their recommendation to counsel to always be prepared to make a brief submission on costs in such cases where there has been lack of preparation or disclosure.[161] This would strengthen the effect of Rule 24(10), which already requires judges to consider costs at every step (whether or not the matter is raised by counsel).[162]

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[156] In *Bourassa v Magee*, 2014 ONCJ 393 the pleadings were struck after a timeframe of eight months.
[157] *Scurci, supra* note 136 at para 99.
[158] *Serra v Serra*, 2009 CarswellOnt 2475.
[159] Mary Jo Maur, Nicholas Bala & Graeme Adams, "Re-Thinking Costs in Ontario Family Cases: Encouraging Parties to 'Move Forward'" (2014) 33 CFLQ 173.
[160] *Ibid.*
[161] Also that dispute resolution officers should be equipped with the ability to award costs for lack of disclosure. *Ibid.*
[162] *Ibid.*

The effect of these awards would be punitive, but the abusive litigant receives an earlier lesson on the importance of being cooperative. While the previous segment of this section argued for greater intervention in abuse cases, those severe penalties (striking pleadings and finding a litigant in contempt) may still be infrequently used if costs are more routinely awarded at an early stage.[163] The lawyer representing the partner refusing to disclose should inform the litigant early on that costs may be awarded against him for this behaviour.

Given the number of unrepresented parties proceeding through the system currently, this is a role that may need to be filled by the judge if the partner is not represented. This warning on its own may, in some cases, act as a deterrent.

It must be acknowledged, however, that these costs awards may be nearly meaningless where the party they are awarded against has no money to pay them.

Some family law judges have demonstrated an unwillingness to order costs at early stages because they view this as a barrier to settlement.[164] Yet, in the context of cases with an abuse history, it is not the imposition of costs that creates the atmosphere preventing settlement. Even generally speaking, judges have been commenting in case law for many years on the fact that "[j]udges who fail to penalize unreasonable spouses by ordering costs encourage rather than discourage litigation as the spouse who is not fearful of paying costs will be tempted to descend into the litigation arena."[165] Judicial commentary indicating that costs discourage settlement is typically limited to instances where an unrepresented litigant receives costs on other than an indemnity basis, where the costs exceed expenses, creating an anticipated windfall.[166]

Invalidity for Want of Disclosure

The woman may have already signed some form of domestic agreement with her former partner. Though that process may have taken place far from a courtroom, non-disclosure in this setting is still categorized as a legal bullying tactic since it remains a strategy to manipulate legal outcomes in a way that is detrimental to her interests. S. 56(4)(a) of the *Family Law Act* provides that a Court may say aside a domestic contract (or provision within) if a party fails to disclose significant assets, debts or other liabilities.

[163] Though, as Maur, Bala, and Adams advocate, the early stage cost awards can start off at a relatively small amount with that amount becoming greater as non-disclosure continues to occur. *Ibid.*
[164] Acknowledgement of anecdotal component.
[165] *Berdette v Berdette*, 1988 CarswellOnt 288 at para 15. See also *MacIntyre v MacDonald*, 1989 CarswellNS 205 at para 47; *Vautour v Vautour*, 1990 CarswellOnt 3348 at para 11; *Lynch v Lynch*, 1995 CarswellOnt 4460 at para 8; *Kerrigan v Herbert*, 1997 CarswellOnt 2376 at para 9; *Balcerzak v Balcerzak*, 1998 CarswellOnt 4256 at para 8.
[166] *Dechant v Stevens,* 2001 ABCA 81 at para 15.

According to *Butty v. Butty*,[167] a party to one of these contracts "cannot enter into it knowing of a shortcoming in disclosure and then rely on those shortcomings as the basis to have the contract set aside."[168] This phrasing is harsher than the phrasing of *Clayton v. Clayton*,[169] where it was said that a party can't complain of non-disclosure if they chose not to access financial information *that was available*. However, both cases appear to confuse the concepts of disclosure and discovery.[170] S. 56(4)(a) places an obligation on spouses to disclose. "No request or further inquiry or procedural steps should be needed."[171] When the relationship involved woman abuse, this requirement to engage in an active inquiry is particularly absurd.

A former partner who has engaged in economic abuse will have maintained control over the family finances and ensured that the woman remained financially dependent. The woman may be aware of his non-disclosure and may know generally what is lacking but, because of the financial abuse and his possible misrepresentation of their economic position, would not necessarily know the details of what information is missing or where to look for it. She may be afraid to look for this information herself or even to raise her concerns to him.

It may be particularly difficult for immigrant women who have experienced economic abuse to know what their former partner may be hiding and where, especially if assets are held in another country or his hiding of them has been facilitated by his family. Upon separation, where the former partner engaged in economic abuse, the woman is in a vulnerable economic position and may not feel able to refuse the offer he initially made. There is also the element of fear. She may not have investigated the shortcomings in disclosure or may have refrained from placing pressure on him out of fear that he will retaliate.

The recommendation here is nothing revolutionary. The rule should simply be followed as it is. In the words of Jay McLeod from *This Week in Family Law*, "[s]orry. Either it is a material non-disclosure/representation which renders the contract voidable or it is not material and has no effect."[172]

[167] *Butty v Butty*, 2009 ONCA 852.
[168] *Ibid* at para 54.
[169] *Clayton v Clayton*, 1998 CarswellOnt 2088 at parasl 24, 27-28.
[170] DA Rollie Thompson noted that this was a pattern in many cases. DA Rollie Thompson, "When is a Family Law Contract Not Invalid, Unenforceable, Overridden or Varied?" (2001) 19 CFLQ 399.
[171] *Ibid.*
[172] James G McLeod, "Jay McLeod's This Week in Family Law" Fam L Nws 2004-34.

3. Defective Disclosure[173]

The abusive party may disclose inaccurate information in an attempt to conceal income or property. This is still, technically, non-disclosure, but is separated for the purposes of this paper because the abuser may engage in the distinct tactics of not providing anything or providing only false information. In *Rick v. Brandsema*,[174] "the husband knowingly presented misleading financial information to his wife at the outset of negotiations."[175] The result was an equalization payment that was $649,680 below the woman's entitlement,[176] although this agreement was subsequently set aside for unconscionability.

If, during the court proceedings, the woman asserts that the abuser's income is different from what he has disclosed, once again, specifics are important. In *Younger v. Younger*[177] the applicant claimed that the respondent was misleading the court about his financials. The court did not consider her allegations to be founded, largely because they were general and lacked specifics.[178]

Imputing Income

Under Section 19 of the *Federal Child Support Guidelines*, the court is permitted to impute income to a party if it finds that party is earning more, or should be earning more, than they are claiming, giving consideration to the principles articulated in *Duffy v. Duffy*.[179] Considerable discretion is afforded to the courts in this area. (Note that this discussion is also relevant to non-disclosure situations.)

The woman, when requesting that income be imputed, must establish, using the balance of probabilities standards, the evidentiary basis upon which the Court would make this decision.[180] The woman should be encouraged to offer information if she knows, for example, that he used to take money "under the table" or if she can approximate his income during the relationship. Her knowledge about his past employment and potential future opportunities is helpful, although, of course, not sufficient on its own. The woman should be told what kinds of things she can look out for: for instance, his spending habits. He may be posting images of his newest purchases on social media (where she can take screenshots) while also claiming that his

[173] Another note should be made on the organization of this paper and particular on the sections relating to disclosure. The lines are not clear-cut. Elements of each section are relevant to other sections.
[174] *Rick v Brandsema,* 2009 SCC 10 [*Brandsema*].
[175] *Ibid* at para 27. He placed values on assets that were not based on independent valuations, he exaggerated the company's corporate debt figure, he claimed an inappropriate tax liability in connection with the company and he underrepresented the value of two additional properties.
[176] *Ibid* at para 28.
[177] *Younger v Younger*, 2008 CarswellOnt 7938.
[178] *Ibid* at para 35.
[179] *Duffy v Duffy*, 2009 NLCA 48.
[180] *Homsi v Zya*, 2009 ONCA 322.

employment has changed to being part time. The question is whether his expenditures seem out of line with what he claims is his income.

She can also be encouraged to begin thinking of the names of people willing to give affidavit evidence as to what they knew of his income and/or to look for job advertisements to see if there are postings similar or identical to the position he used to hold.

While evidence is important to the request for imputation of income, the potential effects of *Jones v. Tsige* should be considered and the concept of "intrusion upon seclusion" briefly

outlined for the client.[181] While in *Chand v. Chand,* the Court proved willing to admit "stolen" emails that described a financial picture different from what the husband had painted, exposure to liability is still not desirable and, as this paper has indicated, abusers can be particularly litigious if they recognize this as a method of continued control.

As she begins her search for evidence, the woman should be advised to consider, primarily, two questions: 1) Do I still have legal access to this place? and 2) Is it safe for me to be in this place? In these types of cases, the woman's safety is always a concern that cannot be forgotten. In relation to question one, if the "place" is a physical residence, factors to consider include whether or not she has a key and her name is still on the title/lease. If it appears that she does still have a legal right of access, then she should be encouraged to photocopy relevant documents rather than taking the originals. The originals should be returned to their proper place immediately and the woman should be forthcoming to the Court about this venture.

If the parties have a joint bank account, the woman might well be entitled to take half of its contents, but she should be open and honest with the court about what she did, the concerns that led her to make the decision and how she still had a legal right to engage in the activity.

Claims for Third-Party Financial Disclosure

A claim can be made for third-party financial disclosure in the face of inadequate or misleading disclosure under Rule 19(11). *Ontario (Attorney General) v. Ballard Estate* set out factors for the court to consider when third-party disclosure has been requested pursuant to Rule 30.10 of the *Rules of Civil Procedure*, which factors have also be used in family law cases considering Rule 19(11).[182] One of the relevant factors is the adequacy of the disclosure already made. "Courts have denied requests for disclosure from third parties in cases in which the moving

[181] Katherine Cooligan & Daniel Hohnstein, "'Intruding Upon the Seclusion of Personal Email' - What the Common Law Tort for the Invasion of Privacy Might Mean for Snooping Spouses and the Electronic Evidence that they Obtain" (2014) 34 CFLQ 135.
[182] *Bennie v Tersigni*, 2011 ONCJ 626 at para 17.

party could not point to serious deficiencies."[183] The note on evidence in the previous section is applicable to this exercise.

Moving away from evidentiary concerns, these motions are problematically expensive and time consuming.[184] Jennifer Mackinnon has recommended that the system should better facilitate requests for third-party disclosure in the face of non-disclosure; more specifically, that the legal bully should be deemed to consent to the third-party release of the document(s) in their possession and should bear the costs of production.[185] The general idea is that this will promote voluntary submission of the documents, reducing the frequency of the motions themselves.

However, this recommendation could only be effective in non-disclosure instances because it is the failure to provide any information that would let consent be deemed.

In situations of defective disclosure, if the woman is able to demonstrate the deficiencies in the material, it would be more cost efficient if courts simply drew the adverse inferences, thus avoiding the expense of a claim for third-party financial disclosure. Not only would this help thwart the legal bully's plan to drain her resources, it would also send a message to him that it is best to cooperate.

Common Law Grounds for Invalidity

An agreement based on misinformation is not entitled to judicial deference.[186] *Miglin v. Miglin*[187] was, according to *Brandsema*, the case that reformulated the contractual concept of unconscionability for the family law arena.[188] The evidence required in family law to demonstrate a power imbalance does not need to meet the same high evidentiary standard as it does in the law of contract.[189] "[A]ny circumstances of oppression, pressure, or other vulnerabilities"[190] will suffice where the agreement also deviates substantially from the legislation.[191] In the context of misinformation, *Brandsema* (having seemingly incorporated considerations of informational asymmetry and requirements for fair negotiation into the test for unconscionability)[192] outlined three relevant factors, the first of which is the extent of the

[183] *Ibid* at para 23.
[184] Jennifer Mackinnon, "Family Law Rules: 'Fixing a Hole' and Other Affordable Reforms" (2013) 32 CFLQ 81.
[185] *Ibid.*
[186] *Brandsema, supra* note 175 at para 48.
[187] *Miglin v Miglin*, 2003 SCC 24.
[188] See s. 56(4)(c) of the *Family Law Act* which gives the courts the authority to set aside an agreement on common law grounds. Note that while this is the interpretation that *Brandsema* attributed to *Miglin*, some have argued that this was a misrepresentation.
[189] *Ibid* at para 82.
[190] *Ibid.*
[191] *Brandsema, supra* note 175 at para 44.
[192] Carol Rogerson "Spousal Support Agreements and the Legacy of Miglin" (2012) 31 CFLQ 13.

defective disclosure and the degree to which it was deliberately generated.[193] There is no onus placed on the receiving party to test the accuracy of what was disclosed to them,[194] though judges have, on occasion, improperly shifted the burden of proof in this way.[195]

In *G.(G.C.) v. T. (M.J.)*[196] it was recognized that abusive relationships are characterized by a power imbalance that can fulfill stage one (part one) of the *Miglin* inquiry focussed on the presence of vulnerability.[197] Where the circumstances are emotionally oppressive, and the woman signs the document in order to avoid a perceived threat of harm, this can also satisfy the element of duress[198] even if the oppressive conduct did not occur at the time the agreement was being signed, according to the British Columbia Supreme Court.[199] Yet, in Ontario, *McKenna v. McKenna*[200] took from *Ludmer v. Ludmer*[201] the phrase stating "there can be no duress without evidence of an attempt by one party to dominate the will of the other at the time of contract" and applied to a situation where a history of woman abuse was alleged. Because other Ontario cases such as *B.(S.M.) v. B.(K.R.)* have willingly set aside separation agreements citing the history of abuse, it seems that *McKenna* must have been based upon the court's appraisal of the evidence of abuse (being dismissive of it) and of the substantive outcome of the agreement (neither party was suffering undue hardship) rather than on whether the abusive conduct occurred at the time of signing.

While in *McKenna* the outcome of the agreement was, more or less, substantively fair, a note should be made on how evidence of abuse is often treated. In *McKenna*, the court noted that the woman reported that there had been sexual abuse, but also stated that she had provided no details other than making the claim.[202] At the same time, it was noted earlier in the decision that the couple had a strict schedule for intercourse, and that if she did not abide by it her partner would take out his anger on the children.[203] In another paragraph, the court described an incident where the woman was "required" to engage in sex with him upon her return from a

[193] *Ibid* at para 49. The second factor is the deliberateness of the non-disclosure and the third is the extent to which the negotiated terms differ from the goals of the relevant legislation.
[194] *Virc v Blair*, 2014 ONCA 392 at para 58.
[195] *Virc v Blair*, 2012 ONSC. Note that this was overturned by the Court of Appeal. However, note that the motions judge in *Roberts v Miller* also placed an onus on the recipient to test the information's veracity, though this came after *Virc v Blair, 2014 ONCA 392*. Luckily, this decision was also overturned in *Roberts v Miller*, 2015 ONCA 500.
[196] *G(GC) v T(MJ)*, 2016 BCSC 1277.
[197] *Ibid* at para 102.
[198] *Ibid* at para 101.
[199] *Ibid* at para 106.
[200] *Mckenna v McKenna*, 2015 ONSC 3309 at para 180.
[201] *Ludmer v Ludmer*, 2013 ONSC 784 at para 53.
[202] *McKenna, supra* note 201 at para 20.
[203] *Ibid* at para 13.

trip.[204] After this, the woman began sleeping in her car in the Walmart parking lot. Neither this pattern nor this incident were recognized as sexually abusive conduct in the decision.

Training on this topic should be made available for all persons working in the family court system, so that judges and other persons interacting with these cases are able to recognize instances of abuse and understand the dynamics of abuse.[205] Law schools themselves should incorporate such training into their curricula.[206] One of the challenges, of course, with training is that there is no assurance of participation if it is not mandatory, which raises its own problems.

Another way to promote an understanding of woman abuse in family court is to allow experts in domestic violence to testify at long motions and trials about abuse and its effects. There are at least two anticipated barriers to the use of experts in this way. The first is money. To benefit from the testimony of an expert, the woman must be able to afford the expert in addition to being able to afford the trial, which is rarely possible. The second issue is determining who qualifies as an expert in domestic violence. These are challenges. Linda Neilson has provided a

list of questions that can be used in order to identify an expert,[207] although this does not solve the issue of cost.

Until judges and lawyers in family court have a better understanding of abuse, "women will continue to be profoundly let down by lawyers and judges who downplay or completely ignore their stories of violence."[208]

4. "Document Dumps"

While non-disclosure and defective disclosure are frequently adopted tactics, the abuser might engage in excessive disclosure. Perell J. noted in *Boyd v. Fields*[209] that "it can confuse, mislead or distract the trier of fact's attention from the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial."[210] It is an abusive practice that results in cost and confusion for the woman.[211] In *Manchanda v. Thethi*,[212] the Court commented that if the counsel producing the material cannot navigate it, it is unsuitable for the court's purposes.[213]

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[204] *Ibid* at para 15.
[205] Cross, *supra* note 114 at 8.
[206] *Ibid* at 7.
[207] Linda Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection): A Family Law, Domestic Violence Perspective*, 2nd ed (Ottawa: Department of Justice, 2013) at 55.
[208] Cross, *supra* note 114 at 28.
[209] *Boyd v Fields*, 2006 CarswellOnt 8675.
[210] *Ibid* at para 12.
[211] *Manchanda v Thethi*, 2016 ONSC 3776 at para 27.
[212] *Ibid.*
[213] *Ibid* at para 49.

Manchanda essentially treated the dump as an incident of non-disclosure because the material did not allow the other party to learn much about her former partner's assets, liabilities, income or expenses. The court considered these documents undisclosed in any comprehensive and organized fashion and ruled that the respondent was in breach of the previous order for disclosure, striking his pleadings.[214]

5. Meritless Motions

It is already well known that the bringing of continuous, frivolous motions can be a strategy to drive up costs and gradually wear the other party into submission.[215] Connected strategies listed under this heading, are abandoning a motion and intentionally waiting to resolve the matter on consent until the other party has expended resources on preparing for the motion date.

Costs

While in *Radcliff v. Radcliff*,[216] the court stated that some tactical uses of the option to abandon are "most improper and would call forth the strictest sanctions,"[217] it was also noted that the right appears to be absolute.[218] However, according to Rule 37.09(3) of the *Rules of Civil Procedure*, the responding party is entitled to costs where a motion is abandoned.[219] This rule exists to discourage the bringing of unnecessary motions.[220] Even so, the woman will still have to expend resources on attending court to obtain the costs order, and the order if granted may not cover all of the costs incurred.[221] The preference for cost orders on a partial indemnity basis continues to exist in the arena of abandoned motions; yet there is justification for awarding costs on a substantial indemnity basis if the motion was a deliberate move designed to "raise the stakes,"[222] or if the motion is for an injunction.[223]

In *Murphy v. Murphy*,[224] the Applicant claimed that the Respondent's abandonment was an act of bad faith and sought to recover the full costs of the withdrawn motion, an amount of $79, 650.33, pursuant to Rule 24(8). She was unsuccessful in her request for full recovery because she was able to demonstrate no more than suspicious timing,[225] yet she was not limited to partial indemnity costs (though there was no finding of bad faith) because the Respondent knew that the motion raised a serious issue and the Applicant would raise substantial costs

[214] *Ibid* at para 78 and Appendix "A".
[215] See, for instance, *Wood v Evans*, 2017 ONSC 891 at para 12. See also *Dyce v Lyons-Batstone*, 2012 ONSC 490 at para 66.
[216] *Radcliff v Radcliff*, 2000 CarswellOnt 2855.
[217] *Ibid* at para 22.
[218] *Ibid* at para 24.
[219] *Ibid.* Applied to family law motions in *Radcliff*.
[220] Halsbury's Laws of Canada (Online), *Civil Procedure*, "Notice of Abandonment" (VII.5.(2)) at HCV-156.
[221] James C Morton, *Procedural Strategies for Litigators* (LexisNexis Canada, 2015) [Morton].
[222] *Bywater v Toronto Transit Commission*, [1999] OJ No 2361, cited in *Wilson v Wilson*, 2003 CarswellOnt 1264 at para 13.
[223] *Yang v Mao*, [1995] OJ No. 1323 at para 37.
[224] *Murphy v Murphy*, 2010 ONSC 6204 at para 9 [*Murphy*].
[225] *Ibid* at para 34.

resisting it.[226] She was awarded $27,000, on a substantial indemnity basis, for a lawyer's bill that came to $73,333.90 (without GST).[227]

Many women are reliant on the coverage of their legal aid certificate for court appearances. This status should not affect the matter of costs.[228]

Keeping Her Grounded in the Issues:

One reason for the great disparity between the costs awarded to the Applicant in *Murphy* and the costs she paid (though this was a substantial indemnity award), was that her responding materials addressed a multitude of issues that were not related to what was actually a recusal motion.[229] "[T]here is an implied qualification that the costs incurred must be reasonable"[230] and

she and her counsel attempted to address, in her responding materials, the 90 "irrelevant"[231] excerpts that she took issue with in his materials. In the end, she was only awarded the costs of the material that was truly responsive to the motion.[232]

While the abuser may lie in court documents as another tactic of legal abuse, discussing with the woman at the beginning of the process that he may do this can help her anticipate and prepare emotionally to deal with his statements. Certain excerpts may be particularly triggering, and it can be useful to provide her with strategies for coping with the content of what she is served with. Since time with a lawyer is expensive, knowing where to refer a woman for support is, again, stressed as important. Providing her with information about the court process may also be helpful; she may feel comforted to know that not every one of his false statements will make a legal difference.

Her lawyer will have to understand that this will take time. It may take her a while to recover from the impact of the trauma and it may take time to learn what strategies work best for her to manage the triggers. Again, every woman and every woman's story is unique. As time passes, she may become familiar enough with court process to realize that the court will not dwell on every minor controversial detail.

The legal bully attempts to wear his former partner down by engaging in strategies that will cause her stress and financial ruin. In this setting, failing to keep the woman grounded in the issues, or not (yourself) staying grounded in the issues, can amplify the abuser's effect by

[226] *Ibid* at para 45.
[227] *Ibid* at para 64.
[228] *Trudel v Trudel*, 2010 ONSC 5177 for instance.
[229] *Murphy supra* note 199 at para 66.
[230] *Ibid* at para 70, quoting *Sepiashvili v Sepiashvili*, 2001 CarswellOnt 3459 at para 20.
[231] Referred to by the judge as such.
[232] *Ibid* at para 66.

increasing his financial impact.[233] Even where it is not the woman dwelling on the smaller issues, a lawyer should be careful not to needlessly run up costs, particularly where a legal bully is doing the same.

These strategies are not only important for managing costs and being an effective litigant; they are also important for managing the impact of the process on children of the relationship. One suggestion is that she read the material after the children have been put to bed, and after she has taken the time to herself to prepare herself emotionally, so that she is protecting the emotional well-being of both herself and her children. Taking these measures to protect the children is of the utmost importance. The anxiety of the mother is often cited as an area of

concern where it is affecting the child, though more rarely is this anxiety actually attributed to the abuse she endured (where abuse is a factor).[234]

Costs against Counsel:

Rule 24(9) grants the court jurisdiction to award costs against counsel, if that lawyer has run up costs without reasonable cause or has wasted costs, and if that lawyer has the opportunity to make submissions on the matter.[235] However, "[c]osts against counsel should only be made in the clearest of cases,"[236] so that bold advocacy is not discouraged. A two-step analysis is employed in assessing the appropriateness of such an order. At the first stage, the question is whether the lawyer wasted money or ran up the costs without reasonable cause. The second stage is more contextual, considering (paraphrased) to what extent the lawyer's conduct involved fault, whether the conduct affected the integrity of the administration of justice, whether it was reasonable to think the conduct was a proper though vigorous defence, whether it is within the realm of what should be tolerated in high-conflict litigation, whether the costs award would chill resolute advocacy, and considering finally the interests at stake and the importance of solicitor-client privilege.

This paper is not necessarily advocating for these costs to be more frequently awarded, but James C. Morton has noted that not many lawyers will continue to engage in this policy once such an order is made.[237] In actuality, these awards would be more relevant to situations where the lawyer is the legal bully and not when the abuser is giving the instructions. As said in *Bridlepath Progressive Real Estate Inc. v. Unique Homes Corp.*,[238] "I would not wish it to be

[233] It is not being suggested that the Applicant's lawyers in *Murphy* necessarily failed in this regard, or that she was the one pressing the focus on these issues. The details of the relationship are unknown and there may have been some other reason for the focus on these excerpts. The case is used as an illustration.
[234] *Halton Children's Aid Society v T(J)*, 2017 ONCJ 267 at para 41; *Kroll v Kroll*, 1976 CarswellBC 589 at paras 23-25.
[235] *Children's Aid Society of the Regional Municipality of Waterloo v L(A)*, 2017 ONCJ 194 at para 21.
[236] *Ibid* at para 17.
[237] Morton, *supra* note 222.
[238] *Bridlepath Progressive Real Estate Inc v Unique Homes Corp*, [1992] OJ No. 2661.

thought that if a solicitor accepts instructions in good faith from an arm's length client he does so at the risk of being made liable for costs if the instructions turn out to be wrong."[239] The problem is that Morton referenced only four main ways to avoid being "motioned to death," and all of these are unlikely orders.

Security for Costs:

Where a party continues to file frivolous motions, that party can be ordered to put up security for costs in advance of being able to file.[240] This was considered an appropriate order in *Dykun v. Odishaw*[241] because of the lengthy history of proceedings and because the Plaintiff had not paid any of the previous cost orders awarded against him.[242] The figure the Plaintiff was

ordered to deposit as security prior to commencing action was $20,000.00[243] (a conservative estimation of the costs he already owed).[244]

Setting the Matter for Speedy Trial[245]

In a previous section of this paper, setting a matter down for a speedy trial was discussed as one way judges have attempted to deal with "high-conflict" cases. Understanding that a speedy resolution is desirable, trials are expensive. As mentioned before, focussed hearings may be a more desirable way of resolving contested issues. Of course, if this is to be effective at all in preventing legal abuse, matters requiring speedy resolution actually need to be speedily resolved. In the case of *Lee-Chin v. Lee-Chin*,[246] two years passed after one party moved for summary judgment, yet the parties were still awaiting speedy resolution of their case. Numerous motions were brought in the interim. Gordon J even noted that "the framework of the present system … is not conducive to a speedy resolution of such disputes."[247] This is further exemplified in the number of months that now exist between an application and a case conference date.

Order Prohibiting Further Motions without Leave[248]

At a certain point, a litigant bringing seemingly endless meritless motions will lose the right to use the courts for motions without first obtaining leave.[249] This order is based on Rule 37.16 of the *Rules of Civil Procedure*. Lenkinski, Orser and Schwartz identified this as the most frequent

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[239] *Ibid*.
[240] *S(ME) v S(DA)*, 2001 ABQB 1041 at para 45.
[241] *Dykun v Odishaw*, 2000 ABQB 548.
[242] *Ibid* at para 47.
[243] *Ibid* at para 54.
[244] *Ibid* at para 49.
[245] Another of the four strategies referenced by Morton.
[246] *Lee-Chin v Lee-Chin*, 2005 CarswellOnt 4749.
[247] *Ibid* at para 12.
[248] Another of the four strategies referenced by Morton.
[249] *Levely v Levely*, 2013 ONSC 1026.

order made in cases where one litigant was labeled vexatious.[250] However, the survey also indicated that it took eight years, on average, before a party would be labeled a vexatious litigant.[251]

6. Seeking Repeated Delays/Adjournments

The abuser may make repeated attempts to delay the proceedings to cause hardship for the woman and because the court system represents a venue for exerting continued control. Non-disclosure is one delay tactic and frequently seeking adjournments is another. In *Warner v. Warner*,[252] one party filed a consumer proposal only to stay the family law proceedings so that he could avoid the equalization payment. Luckily, as Jay McLeod noted, judges "are not keen on adjourning a motion where the parent seeking the adjournment sat back and did nothing, but now wants time to get organized," particularly in custody and access proceedings.[253]

> The best interests of the child require that a decision be taken without delay. Unless there are valid reasons for doing so, the court must not bend to the repeated requests of the parents to postpone the decision, because the best interests of the child are not served under such circumstances.[254]

Of course, this does mean that lawyers representing survivors of abuse must learn strategies for working with clients affected by trauma and PTSD. Where trauma is a factor, the woman may have a hard time concentrating, listening to her lawyer, retaining their advice and/or acting on it.[255] She may also fail to show up for appointments or complete her paperwork.[256] A judge unfamiliar with the effects of PTSD or who does not take the abuse allegations seriously may be unwilling to grant adjournments when she arrives unprepared. It is fundamentally important that lawyers understand trauma and accept it as real so that they can work with woman abuse survivors effectively in family court proceedings.

A lawyer who understands trauma is better prepared to support their client and can create a relationship wherein she comes to trust the lawyer and the lawyer's advice, hopefully allowing lawyer and client to work more efficiently together. The foundation for this relationship is laid at the very first meeting. Lawyers should be prepared to adapt their approach to interviewing in response to the presence of signs of trauma, keeping in mind that the abuser may have provided the woman with misinformation about the family law process which could interfere with her ability to understand legal issues.

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[250] Lenkinski *et al*, *supra* note 50.
[251] *Ibid.*
[252] *Warner v Warner*, 2013 CarswellOnt 4036. The Court stated that he had been capable of managing his financial affairs.
[253] Jay McLeod, *This Week in Family Law*, FAMLNWS 2002-48 (December 3, 2002).
[254] *New Brunswick (Minister of Social Services) v S(C)*, 1983 CarswellNB 466 at para 13.
[255] Cross & Conlin, *supra* note 1 at 41.
[256] *Ibid.*

At the first appointment, there is usually no need for the conversation to become overly complex. Lawyers can gather what they need immediately without using legal jargon and without doing all the talking. It involves patience, learning the client's communication style and recognizing when she has reached her information saturation point. Lawyers can give structure to the interview by telling her from the beginning how much time is available for the appointment and what will be covered. They can develop checklists in advance that can be filled out at the end of appointments, indicating what was discussed and what tasks the woman should complete before the next meeting. It may also be helpful to suggest that she bring written notes documenting her abuse history.

When providing legal advice, lawyers working with abuse survivors should be prepared to meet resistance, especially in relation to topics such as the possibility of joint custody or extensive access. Being prepared for this resistance in advance will permit a better response. Validating her anxieties will help to create that relationship of trust.[257] If the woman is working with a legal advocate, it can be suggested that she meet with her advocate for support. Inviting the support worker to meetings and court dates can ensure that someone with the proper training is present to meet the woman's emotional needs.[258] It is best to provide the legal advice in writing to the woman to avoid possible misunderstandings.

Taking instruction from a client experiencing trauma can be challenging. Lawyers will need to ensure that the instructions provided are clear. To this end, lawyers can put the instructions the woman provides into written form and subsequently have her sign the document.

7. Repeatedly Change Lawyers/Last Minute Change of Counsel

Repeatedly changing lawyers can be a tactic of adjournment, as was recognized in *Duffy v. Poirier*,[259] for instance. In this case, the delays had effectively created a status quo situation that was shown not to be in the best interests of the child.[260] The effect is the same as many of these other legal bullying tactics. The process is extended, placing extreme emotional and financial pressure on the woman, and, in this context, increasing the chances that she will return to her abuser.

Litigants should be afforded opportunities to find a lawyer they can work with. Changing lawyers is problematic once it is being used a reason for frequent adjournments (and it has been already been used in this way multiple times) and with the purpose of stalling the process

[257] This can mean making sure she feels she was heard, telling her it is understandable that she finds the advice unappealing, acknowledging the limitations of the court system and the unfairness of some outcomes, helping her understand the difference between law and justice, and acknowledging the gaps in family law responses to intimate partner abuse.
[258] Understanding that some lawyers have concerns about the impact of this on confidentiality.
[259] *Duffy v Poirier*, 2014 NSSC 297.
[260] *Ibid* at para 66.

and creating expense for the other side. In *Wen v. Li*,[261] the woman had to have a lis pendens on her property for eight and a half years because her former spouse stalled by applying for adjournments on the basis that he no longer had a lawyer retained.[262] The woman's lawyer in these cases can oppose the adjournments or consent to them indicating that consent is given reluctantly. After this practice has been repeated a few times, the judge may indicate to the abuser that he will be granted only one more adjournment before he must choose to either remain with his current lawyer or proceed unrepresented.

8. Tactical Self-Representation

While many who represent themselves in family court would prefer to have a lawyer speaking on their behalf (these are often referred to as the "unrepresented" as opposed to "self-represented"), in a survey conducted by Saini, Birnbaum and Bala, some litigants indicated that they believed the other party was not hiring a lawyer in order to stall the process.[263] In *Hokhold v. Gerbrandt*,[264] the court noted that the self-represented father had told a friend, "that he liked to represent himself in court as it allowed him to keep going in and going in, keeping his opponents in court until they ran out of money and could not continue with the case."[265]

The presence of one self-represented party can drive up the costs for the represented party.[266] The court should be assisting these parties by ensuring that they are aware of their fundamental rights.[267] They should also be made aware of what is at stake. For example, since focussed hearings have appeared somewhat recently in family court, there is not yet a widespread understanding of what they are. Litigants should, at least, be put on notice to the possibility of a final order being made at a focussed hearing. However, litigants such as the father in *Hokhold* should not be accommodated to such an extent that they are allowed to completely drain the other party's resources. Clarification on what constitutes "reasonable accommodation," and the provision of guidelines, would be helpful in this area.

As noted above, there is no mandatory case management of family court files in Ontario. There is little doubt that the introduction of a case management system could be beneficial for many reasons. If a new judge explains the procedural steps of family court at every appearance, the costs for the represented party will run up. Where one judge is familiar with the case and knows that the *Family Law Rules* have already been explained to the self-represented litigant,

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[261] *Wen v Li*, 2014 ABQB 195.
[262] *Ibid* at para 60.
[263] Michael Saini, Rachel Birnbaum & Nicholas Bala, "Access to Justice in Ontario's Family Courts: The Parents' Perspective," (2016) 37 Windsor Rev Legal & Soc Issues 1.
[264] *Hokhold v Gerbrandt*, 2012 BCSC 1313.
[265] *Ibid* at para 52.
[266] Carol Cochrane, "A Family Law Practitioner's Guide to Dealing with the Self-Represented Litigant" (2006) 25 CFLQ 131 [Cochrane].
[267] *Lister v Gould*, 2000 NBCA 33 at paras 18-19.

perhaps this will be reflected in the woman's bill.[268] These judges may also come to discern the pattern in the abuser's behaviour.

A number of articles have appeared in recent years outlining best practices for lawyers who have to deal with self-represented opposing parties.[269] Regarding procedural matters, these articles consistently recommend that lawyers insist the *Rules* be followed.[270] Where judges place pressures on the lawyer to provide this procedural information to the self-represented party, Thompson and Reierson suggest resisting this pressure except where these duties can serve their client's own interests (drafting some orders, for instance).

9. Malicious & Unfounded Reports/Allegations

In *Vermette v. Nassr*,[271] the court noted that Mr. Nasr spent an "inordinate amount of time viciously attacking Ms. Vermette's credibility and that he was strident and abusive in his attempts to discredit her." These attacks included allegations of social welfare fraud, allegations that she had used drugs when she was young (although it was found that this was irrelevant to the custody issue), and attempts to discredit her new boyfriend. The abuser may make false allegations against not only the woman, but other parties involved in the process. This can include support workers, lawyers, court staff, and even judges themselves (as was the case in *Broda v. Broda*).[272]

Allegations against Her

This section is devoted specifically to deliberate, unfounded fabrications originating from the abuser which should be distinguished from unproven allegations emerging from genuine concern or misunderstanding. The Ontario Incidence Study of Child Abuse indicated that, in 1993, child protection workers considered 21% of the allegations made by fathers against custodial mothers to be malicious.[273]

These types of reports are sometimes viewed by family court as instances of non-cooperation that would make an order for joint custody inappropriate.[274] In *Children's Aid Society of Ottawa v. Y.(P.)*,[275] the continued unfounded allegations also constituted the material change necessary to alter an original order for joint custody to one of sole custody. As a final note on this topic,

[268] DA Rollie Thompson & Lynn Reierson, "A Practicing Lawyer's Field Guide to the Self-Represented" (2001) 19 CFLQ 529 [Thompson & Reierson].
[269] *Ibid*. See also Cochrane, *supra* note 267.
[270] *Ibid*. See also The Honourable Madam Justice Jennifer Blishen, "Self-Represented Litigants in Family and Civil Law Disputes" (2006) 25 CFLQ 117.
[271] *Vermette v Nassr*, 2015 ONSC 2450 at para 24.
[272] *Broda v Broda*, 2000 ABQB 948.
[273] Nicholas Bala & John Schuman, "Allegations of Sexual Abuse When Parents Have Separated" (1999) 17 CFLQ 191.
[274] Martha Shaffer, "Joint Custody Since Kaplanis and Ladisa" (2007) 26 CFLQ 315.
[275] *Children's Aid Society of Ottawa v Y(P)*, 2007 CarswellOnt 2635 at paras 40-41.

inappropriate allegations can be a reason for departing from the general rule that a successful party is entitled to costs.[276]

The allegations may not always be made to child protection authorities. The abuser may simply insert accusations within his documents. It is possible under the *Family Law Rules* (Rule 1(8.2)) to strike any portion of a document if it may delay or make it difficult to have a fair trial or if it is inflammatory, a waste of time, a nuisance or an abuse of the court process. These accusations may relate to the conduct of the mother in her childhood/younger years or could be uncorroborated accusations pertaining to her mental health. In *Norris v. Norris*,[277] paragraphs were struck that questioned the competence of Mrs. Norris's counsel.[278]

Allegations against Third Parties

Judges:

As has already been noted, case management of family court files is not mandatory. However, it is a practice in some regions, and claims of judicial bias may be more common as a result.[279] There is also a regional difference in the impact of complaints. In small or rural communities, the progress of a case is more drastically affected if officials must be brought in from another community.

Judicial continuity is valuable particularly where the interests of a child are concerned and where abuse is a factor.[280] LeBlanc J., in *Marshall v. Marshall,*[281] observed that judges may too often accede to requests for recusal simply to ensure that an outcome is not questioned.[282] By too readily acceding to these suggestions, judges "encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."[283]

Lawyers:

While the abuser may lash out at his own lawyer, the woman's lawyer (perceived as the one acting on her side) may more likely become a target. The appellant of *Reilly v. Johnson and*

[276] *H(CL) v S(RJJ)*, 2012 BCSC 1196 at para 15.
[277] *Norris v Norris*, 2016 ONSC 7077.
[278] *Ibid* at para 60.
[279] Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26 Can J Fam L 395.
[280] *Ibid*. See also the comments of Kitely J. in *Percival v Percival*, 2000, 7 RFL (5th) 400 at para 11 saying "[t]o introduce another judge for the purposes of hearing the motion for interim relief would be inconsistent with the goal of moving matters forward in an expeditious manner, particularly where, as here, there have been persistent issues involving financial disclosure on the part of both spouses.
[281] *Marshall v Marshall*, 2008 NLUFC 13.
[282] *Ibid* at para 39.
[283] *R v Giroux*, 2001 CarswellOnt 4689, cited in *Ontario (Director, Family Responsibility Office) v Samra*, 2008 ONCJ 465 at para 31.

Junger Law Firm,[284] for instance, made complaints against both the current and former lawyers of his former spouse, alleging that the former lawyer had misled the court and make threatening telephone calls.[285] Where these claims truly are frivolous and an abuse of process, the respondent can bring a motion to strike under Rule 21 (which was successful in the case of *Reilly*). In *Reilly,* the appellant made subsequent allegations of bias against the judge who struck the claim. These claims were also not entertained.[286]

Advocates:

Both individual and systemic advocacy are of critical importance in promoting the safety of women while they proceed through family court and in attaining family court outcomes that reflect the safety needs of both the woman and her children. Advocates, by supporting the woman, may themselves become targets of the abuser's anger.

While it may be less likely that advocates will be subjected to formal complaints, abusers have informally complained about the presence of the advocate on court dates so as to prevent the advocate from supporting the woman while she is in the courtroom.[287] They may also claim the advocate is influencing the woman's legal choices or is "putting ideas" into her head. At Luke's Place, advocates are encouraged to stay as far away from the abuser as available space will allow (for instance by sitting with the woman in an interview room while waiting to be called in to the courtroom), and to walk away if he approaches. Advocates should not participate or act as "witnesses" if a client wishes to approach or have a conversation with her former abuser, nor should they accept documents from or deliver them to the abuser.

10. Outrageous Requests

The expectations of family court litigants are often unrealistic.[288] However, the abuser may have an exaggerated sense of entitlement if he perceives that wrongs have been committed against him. Retaliation for real or perceived wrongs is one of the three primary motivations driving post-separation violence.[289] The list of "wrongs" might include the act of her leaving, her reporting the abuse, her surviving without him, the act of taking the children (or possessions or money).[290] The divorce itself may be seen by him as a violation of his rights as a father.

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[284] *Reilly v Johnson and Junger Law Firm*, 2016 ONCA 768.
[285] *Ibid* at para 2.
[286] Even this did not deter the appellant who applied for leave to appeal to the Supreme Court. This application for leave to appeal was dismissed. See *Paul Duncan Reilly (Applicant) and Johnson and Junger Law Firm (Respondent)*, 2017 CarswellOnt 6489.
[287] At times the abuser will simply state that they do not want an additional party present. At other times, abusers have alleged to the judge that the advocate verbally assaulted them in the hallway or was heard to make disparaging remarks while passing by.
[288] In *S(ME) v S(DA)*, 2001 ABQB 1041 at para 10 the Judge characterized certain requests made by the Defendant as being "outrageous and sarcastic."
[289] The second is the reestablishment/reassertion of power and control and the third motivation is reconciliation.
[290] Cross & Conlin, *supra* note 1.

Unfortunately, where the woman is unrepresented, she may be more easily coerced into giving up her legal rights.[291]

Very likely, the abuser has provided the woman with false information about the legal system. As a result, hearing and/or reading the requests he makes can be stressful and anxiety-inducing. Assisting her to understand the truth about family court may help to alleviate some of her stress and anxiety. At the same time, the challenges that she herself will face within the system should be explained. Counsel should be realistic with the woman, rather than giving false hopes and expectations that could lead to future disappointments.

11. Failure to Comply with Pre-Trial Orders

Non-disclosure issues can be treated as a subcategory within this topic. Another subcategory is the failure to pay support that has been ordered. There are mechanisms in place for the enforcement of court orders for support, although these do not always act as a deterrent for the determined abuser. By the time these mechanisms are activated, the woman may already have been suffering under extreme financial hardship for years. In *Anderson v. McWatt*,[292] the husband was in default of his support obligations for four years before a judge from the Ontario Court of Justice ordered that he be committed to jail for seven days if he did not pay. In spite of being presented with the option of paying his arrears to avoid jail time (and having a net worth of $2,380,800.00), he did not comply with the order and continued to build up arrears after being released. It was not until four years after this that his driver's license was suspended by the Family Responsibility Office. The husband entered into a consent order in response to the suspension yet continued to be in default afterwards. By 2010 (the first order was made in 2000), he owed arrears in the amount of $54,985.00. The effectiveness of the available enforcement mechanisms was essentially summarized by Nevins J. who indicated concern that the husband's "obvious obsessive behaviour would frustrate any attempts to get these arrears and would make it impossible, if not very, very difficult for the recipient to get the support that she and the children are entitled to."[293]

Unfortunately, where the abuser is self-employed and does not have "garnishable" wages, it is difficult to ensure that payments are actually made in accordance with an Order.[294]

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[291] Sanda A. Goudry's, *Final Report on Court-Related Harassment and Family Law "Justice"* references a Philadelphia study that surveyed 129 women. 30% of the women indicated that they were fearful when negotiating child support payments, causing them to abandon their claim or to accept an amount lower that they believe they were entitled to. Sandra A Goudry, *Final Report on Court-Related Harassment and Family Law "Justice"* (FREDA Centre for Research on Violence Against Women and Children, 1998).

[292] *Anderson v McWatt*, 2010 ONSC 2984.

[293] *Ibid* at para 56.

[294] The solution to this problem may involve more than just legal strategies. There is hope that new services, programs and platforms designed to tackle the other complications caused by the gig economy could also play a role in ensuring that people fulfill their legal obligations.

In particular instances, where the breaches are calculated and deliberate with the goal of causing psychological and emotional harm to the woman and controlling her behaviour, these actions can be interpreted as family violence. In the British Columbia case of *P.(J.C.) v. B.(J.)*,[295] Merrick J. said the following:

> While I am of the view that the failure to pay child support will not often constitute an act of family violence, when the failure is the result of a determined decision not to pay, knowing the impact it would have … this was designed to inflict psychological and emotional trauma to [her] and is therefore an act of family violence.[296]

While this proposition was affirmed in *N.(S.) v. C(E.)*,[297] the Court here asserted that in order for non-payment to constitute family violence, the abuser must know that the result will be the infliction of psychological and emotional trauma and must intend to inflict it.[298]

In *P.(J.C.)*, the finding of the existence of family violence was relevant to the consideration of the child's best interests (under s. 38 of the *Family Law Act*), which thus affected Merrick J.'s order with respect to the parenting arrangement. In British Columbia, the "best interests of the child" test (BIC) is outlined in s. 37 of the *Family Law Act*. S. 38 of the *Act* creates "family violence" as a factor that must be assessed as part of the BIC analysis. In Ontario, the *Children's Law Reform Act* does not indicate that the presence of violence is a BIC consideration. Rather, consideration of family violence is a subsidiary reference in s. 24(4). Additionally, the *CLRA* does not contain the same expansive definition of "family violence" as is included in Part I of the *FLA*. Since *N.(S.)* indicates that findings of family violence as a result of non-payment are a rare thing under this expansive definition, it is unlikely that such an argument could be successful in Ontario.

12. Pursuit of Custody as an Abusive Tactic

An abuser may pursue custody in order to have a way to continue to exert control over his former partner, in order to punish her for perceived wrongs committed against him or because he is attempting to generate leverage to convince the woman to abandon other claims. In *G.(B.J.) v. G.(D.L.)*,[299] Martinson J. dismissed an application to vary an existing custody order because she determined that the father was only following through on threats made in an email to bring a claim for custody if the mother pursued a claim to increase support. The father's claim for sole custody was denied because Martinson J. was of the opinion that joint custody

[295] *P(JC) v B(J)*, 2013 BCPC 297.
[296] *Ibid* at para 18.
[297] *N(S) v C(E)*, 2014 BCPC 82.
[298] *Ibid* at para 132.
[299] *G(BJ) v G(DL)*, 2010 YKSC 33.

would give the father an opportunity to continue to treat the mother in a disrespectful and controlling manner.

Presumptions of Custody

There is no formal starting presumption of joint custody in the law of Ontario, unlike in Saskatchewan where "absent a claim under the *Divorce Act* for custody, there is virtually a presumption of joint custody."[300] Nevertheless, joint custody is ordered even where there is a history of abuse,[301] sometimes making it appear as though, in fact, a presumption of joint custody does exist that must somehow be overcome.

In the United States, certain jurisdictions have created a rebuttable presumption against awarding joint custody where abuse is a factor, although the court requires credible evidence of the abuse.[302] Access is to be supervised and courts are to direct the abuser to complete a program on domestic violence if such evidence can be provided.[303] These presumptions in American law can be rebutted by findings of no new violence, by evidence that the abuser has completed the relevant programs, and/or evidence as to whether the safety of the other parties can be assured (for instance through restraining orders).[304] Bala *et al* advocated for a similar approach to be adopted in Canada in their "Recommendations for Reform."[305]

If this approach were to be adopted in Canada, it would have to be accompanied by a change in the court's understanding of and reaction to violence against women, lest any protection offered by this measure be rendered illusory. Martha Shaffer's review of case law revealed that courts still struggle to identify relationships as abusive, impeding the effect of progress made in custody law. "If courts are unable to identify relationships as abusive, they will award custody to abusive men in some cases, despite a conscious desire to refrain from doing so."[306] This paper, therefore, echoes its previous recommendation that training be provided to the judiciary by the appropriate bodies.

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[300] Philip Epstein, *Epstein's This Week in Family Law*, Fam L Nws 2015-31 (Aug 3, 2015).
[301] *Boothby v Boothby*, 1996 CarswellOnt 4734; *Smith v Smith*, 1997 CarswellSask 735; *Anderson v Anderson*, 2003 CarswellBC 475.
[302] See the *Louisiana Code* La Rev Stat Ann 9:364A.
[303] S Grace Kerr & Peter G Jaffe, "Legal and Clinical Issues in Child Custody Disputes Involving Domestic Violence" (1999) 17 CFLQ 1.
[304] Margaret F Brinig, "Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases" (2014) 52 Fam Ct Rev 27.
[305] Nicholas Bala et al., *Spousal Violence in Custody and Access Disputes: Recommendations for Reform* (Ottawa: Status of Women, 1998).
[306] Shaffer, *supra* note 8.

Agreements Relating to Custody

The original custody arrangement may be the result of an agreement made on consent. The question in *Smith v. Smith*[307] was whether a joint custody arrangement created on consent should be varied to sole custody based on the father's abusive conduct during the relationship.

One problem in these scenarios, where past abuse is referenced as the sole reason for variation, is that there has not necessarily been any material change in the circumstances since the order on consent was made. This was the reason for denying the mother's request for variation in *Humes v. St. Croix*,[308] even though, according to the court, the father "has a temper which he is unable to control and is abusive to the women with whom he has a relationship."[309]

In *Stillman v. Stillman*[310] the mother was successful in acquiring sole custody even though the separation agreement of the parties indicated joint custody and primary residence with the father. However, the comments of the court indicate that this decision to vary was not made based on the degree of abuse suffered by the mother (though this was severe), but was based on the father's poor ability to continue caring for the children while they resided with him.

Duress and Undue Influence:

In Alberta, the case of *Hearn v. Hearn* dealt with whether or not the *Miglin* test, typically applied to the variation of support agreements, applies in the same way to custody agreements when there has been no material change in circumstances but duress or undue influence is alleged. The Court concluded that the *Miglin* test is applicable to these circumstances. *Hearn* was relied upon in the Ontario decision of *Chin Pang v. Chin Pang*.[311] The first step of the first stage (of the *Miglin* test) is to consider whether there were circumstances surrounding the negotiation of the agreement that could give the court reason to discount the agreement (ie. unconscionability, undue influence or duress). According to *Ashmore v. Ashmore*,[312] where abuse and intimidation are real issues, a finding of duress can be supported.

If there is evidence that a custody agreement is not working and is not in the child(ren)'s best interests, this can be treated as the material change and a court may determine that it is unnecessary to consider whether the agreement is actually valid and binding.[313]

[307] *Smith v Smith*, 1997 CarswellSask 735. The request from the mother in *Smith* was also denied.
[308] *Humes v St Croix*, 1991 CarswellNB 308.
[309] *Ibid* at para 9.
[310] *Stillman v Stillman*, 1991 CarswellNS 407.
[311] *Chin Pang v Chin Pang*, 2013 ONSC 2564.
[312] *Ashmore v Ashmore*, 1996 CarswellOnt 3676.
[313] *Patrick v Taylor*, 2011 ONCJ 729 at para 56.

Emergency Motions for Sole Custody

According to the *Family Law Rules*, a party is able to bring a motion prior to a case conference in situations of urgency, hardship, or where it is in the interests of justice.[314] If the woman leaves the abusive home, taking the children with her, the abuser may bring an emergency motion claiming she has abducted them and seeking their return to him; and on an *ex parte* motion, where the judge hears only the evidence of the abuser, he may be successful.

S. 20 of the *CLRA* states that both parents are equally entitled to custody in the absence of a court order or separation agreement. When a woman leaves an abusive relationship, it is important that she establish legal custody quickly lest the abuser claim that she has abducted the child(ren) or he may simply take the child(ren) and prevent her from seeing them.[315] There is additional risk where there is a likelihood the abuser will remove the children from Canada.[316] When assessing the likelihood of removal from Canada, lawyers should consider:

- Whose hands the children's passports are currently in
- Whether the passports are Canadian or from another jurisdiction
- Whether he has the ability to acquire passports from another country for the children without the mother's knowledge or consent
- Whether the abuser has abducted the children before
- Whether he has ties to a foreign jurisdiction
- Whether he has poor or nonexistent ties to this jurisdiction, and
- Whether he has been planning activities consistent with leaving the area

The threshold for an "emergency" is high and these orders are rarely made. Independent evidence that can be attached in the form of exhibits is valuable to the woman's claim for temporary sole custody. This may be in the form of police reports, CAS reports, medical reports, pictures of injuries, screen shots of relevant messages, letters from the child(ren)'s school, or copies of any criminal charges, bail conditions or undertakings.

The filing counter itself sometimes represents another barrier. In some regions, the counter will not permit an emergency motion to be filed if it has not been "vetted" by a lawyer.[317] This can pose a problem, for instance, where a woman's lawyer is away on vacation and neglected to set up an appropriate response infrastructure in their absence. She will be unable to access summary advice centres because she is represented, meaning the filing counter may refuse to accept her emergency motion material since it has not been prepared on the advice of a lawyer. This practice is not part of any Direction nor does it form part of the Rules. It simply should not

[314] *Family Law Rules*, O Reg 439/07, Rule 14(4).
[315] Cross & Conlin, *supra* note 1 at 103.
[316] *Ibid* at 104.
[317] Anecdotal evidence suggests that this has happened at the Durham Region Courthouse.

be happening. For their part, lawyers must establish the appropriate infrastructure for dealing with emergencies while they are away or if they are busy with another matter when an emergency arises. Likewise, court staff need to be educated to understand that a client who is represented but has been temporarily abandoned by a vacationing lawyer may need access to an emergency motion.

When a lawyer determines that an emergency motion is the appropriate route, it is important that the woman be referred to agencies that can assist her prepare for the different possible outcomes. Her safety plan will be affected by the outcome and must be tailored to the circumstances whether the *ex parte* motion is granted in full, in part, rejected or proceeds as an urgent motion on notice.

Language

In 2015, the Ontario Court of Appeal recognized how highly charged the language of "custody" and "access" had become, "[t]hese words denot[ing] that there are winners and losers when it comes to children."[318] The association between acquiring custody and the concept of "winning," may be one reason abusers seeking to retain control are more likely to pursue custody than non-abusers.[319] Nicholas Bala notes that many judges, mediators and parents are already starting to use different language in orders and agreements. This paper will not weigh in heavily on the language discussion, except to note that judges should be hesitant to use new language in orders where there is an abuse history before there is widespread and settled meaning to the language. A new term without a well-established meaning may be open to manipulation, and institutions that are not court-related may not keep up with the latest phrases. Some institutions may require the consent of the abuser to enroll the child in activities[320] if they do not see that well-recognized term: sole custody. Abusers may then withhold consent as one more tactic to retain control. While it may be beneficial to someday alter the language of "custody" and "access," before this change has been formalized and institutions have been apprised of the changes, the use of creative terms may enhance rather than diminish conflict.[321]

13. Pressure to Mediate Followed by Abuse of Mediation/Arbitration Process

The inappropriateness of mediation for most cases involving woman abuse has been discussed above. Nevertheless, the woman may feel pressured from various fronts to engage in mediation. This pressure may come directly from her abuser. An example is the case of *Stillman v. Stillman*. While this was not, strictly speaking, a mediation case, the parties had seen one

[318] *M v F*, 2015 ONCA 277.
[319] Rita Smith & Pamela Coukos, Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations, (1997) 36 Judges' J 38 at 40.
[320] The woman may wish to enroll the child in counseling for instance, though some counselors will require the consent of the abuser for this if there is any question as to whether she actually has sole custody.
[321] It is worth noting that the British Columbia *Family Law Act* has eliminated the terms of custody and access, replacing them with language that describes the responsibilities of the parents.

lawyer together who was to draft their separation agreement. The mother described feeling "terribly pressured" by her abusive partner (who had contacted the lawyer) to resolve things quickly, and she believed that he "would only grant her access if she cooperated."[322] The result was an agreement very unfavourable to the woman, which was subsequently set aside for being unconscionable.

While few decisions indicate whether one party was pressured to engage in mediation to begin with, many deal with the pressures that can be placed on one party throughout the mediation process where there is a power imbalance.[323] In *Wainwright v. Wainwright*,[324] the Court concluded, after analyzing the case law, that there was justification for ignoring a mediation clause in a domestic contract if it could be demonstrated that its enforcement would be contrary to the best interests of a child caught at the centre of a custody or access dispute. *Wainwright* was decided in the context of a relationship where there was a history of woman abuse and a corresponding power imbalance between the parties.

Section 9 of the *Divorce Act* describes the duty of a legal advisor to inform parties of the option of mediation. Where woman abuse was present in the relationship, lawyers should take care to ensure the woman is fully aware that mediation is entirely voluntary, meaning that she does not need to engage in the mediation process and that she can end the process if she is unhappy with it. She should also be made aware of the different types of mediation and that shuttle mediation is available as alternative to face-to-face. Linda Neilson has recommended that a provision be included in the *Divorce Act* that explicitly cautions lawyers not to recommend the use of face-to-face mediation in cases involving abuse.[325] Face-to-face mediation will often be inappropriate for woman abuse cases even where the mediator has been trained in the dynamics of domestic violence. The woman knows her abuser and his signals better than any other person. The impact of some of these signals may not be discernable to new and unfamiliar, even if well-trained, eyes.

The lawyer should also tell the woman to seek legal advice before anything is signed. Finally, because the woman's physical and emotional safety is always a concern in these scenarios, she should be encouraged to reach out to the appropriate agencies for safety planning, especially if both parties are still living in the same home.

[322] *Ibid* at para 46.
[323] *Kaplan v Kaplan*, 2015 ONSC 1277; *IBM Canada Ltd v Kossovan*, 2011 ABQB 621; *Spry v Esteves*, 2016 ONSC 2841. These are only examples.
[324] *Wainwright v Wainwright*, 2012 ONSC 2686 at para 156.
[325] Linda C Neilson, "Putting Revisions to the Divorce Act Through A Family Violence Research Filter: the Good, the Bad and the Ugly," (2003) 20 Can J Fam L 11.

At times, courts have included requirements to mediate future disputes as part of court orders. In *Wainwright*, a mandatory mediation clause was included in the Minutes of Settlement meant to be turned into a final order. This was in spite "of Mrs. Wainwright's obvious ambivalence about the mediation process"[326] and the presence of a history of abuse. The trial judge in this case noted that Mrs. Wainwright's fear of Mr. Wainwright was also obvious at trial and declined to include this paragraph of the Minutes in the final order, finding it was not in the child's best interests.[327]

14. Use of the Parenting Coordinator Role to Harass

The assessor used in the case of *Gauthier v. Gauthier*[328] said on cross-examination that, unfortunately, a parenting coordinator "works best on those who do not need it and works worst with those who need it most."[329] Dr. Butkowsky was expressing the view that a parenting coordinator can potentially be used by the abuser to continue the abuse.[330] This view was also expressed in *Gauthier* by Dr. Jaffe, who stated that parenting coordinators only work where there is a foundation of mutual trust and respect.[331] This perspective was adopted by the judge in *Gauthier* who foresaw "all kinds of unreasonable requests being made through the parenting co-ordinator to have Ms Gauthier modify the access schedule."[332] It was not mentioned by this judge, but it should also be noted that parenting coordinators are expensive and may give the abuser yet another forum for financial abuse. The hourly rate for a parenting coordinator varies, but typically ranges from $125 to $350 per hour, which is generally shared between the parents.[333]

As noted earlier, it is important for orders to be specific and detailed where abuse was or is present in the relationship. The judge in *Gauthier* quite rightly noted that the purpose of introducing a parenting coordinator runs counter to the goal of being highly specific in these cases. The order should be written so as not to give rise to the disputes a parenting coordinator would be appointed to address.

The Requirement for Consent to Use a Parenting Coordinator

Courts do not have the jurisdiction to appoint parenting coordinators where the parties do not consent. There are numerous decisions supporting this statement, one of them being *Reid v.*

[326] *Wainwright, supra* note 325 at para 135.
[327] *Ibid* at para 167.
[328] *Gauthier v Gauthier*, 2011 ONSC 1230.
[329] *Ibid* at para 93.
[330] *Ibid* at para 93. Though Dr. Butkowsky had yet recommended the appointment of a coordinator in this case.
[331] *Ibid* at para 103.
[332] *Ibid* at para 154.
[333] Barbara Jo Fidler, "Parenting Coordination: Lessons Learned & Key Practice Issues" (2012) 31 CFLQ 237 [Fidler].

Catalano,[334] a decision written in 2008 by Durham Region's own Justice Scott. Yet there are also a number of decisions where coordinators were appointed absent consent. Justice Zisman commented on these cases in *Imineo v. Price*,[335] noting that none of these decisions included an analysis of the jurisdiction of the court to make such orders, nor did they consider the

impact of *Kaplanis v. Kaplanis*.[336] *Kaplanis* was an Ontario Court of Appeal decision that overturned a trial judge's order requiring the parties to direct their disputes to a counselor. The Court of Appeal noted, first of all, that there is no legislative authority to make such an order. The second point made by the Court was that the usefulness of a parenting counsellor depends upon the parties' ability to cooperate.

Women should be informed of the fact that coordinators cannot be appointed without their consent, otherwise some may relent in the face of pressures from the bench (subtle or not) and/or the abuser.

Setting Aside the Decision of an Arbitrating Entity

The procedural options for parties unhappy with the decisions of any arbitrator can, largely, be designed for themselves. These are only two typical methods for dealing with such a situation. In addition to these, an award can be declared invalid under s. 48 or the courts can intervene using their *parens patriae* jurisdiction for matters relating to a child.

Appeal:
A decision made by a coordinator can be appealed by way of s. 45 of the *Arbitration Act*. Parties can contract out of their right to appeal questions of fact and/or mixed law and fact.[337] Keep in mind that if these rights of appeal are preserved, the abuser may attempt to appeal the decisions of a coordinator/arbitrator when they are not in his favour. Consider whether it is worthwhile to leave this option open to the abuser. It may not actually be beneficial to the woman considering what Barbara Jo Fidler noted in her article on parenting coordination … that there is no record of these appeals being successful.[338]

Setting Aside an Award:
This request is made under s. 46 of the *Arbitration Act*, and the parties cannot contract out of their right to apply for this remedy; although the Court can decline an application for judicial review. The list of grounds on which an award can be set aside is provided in s. 46(1).

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[334] *Reid v Catalano*, 2008 CarswellOnt 1268. See also *Bozin v Bozin*, 2010 CarswellOnt 1492.
[335] *Imineo v Price*, 2011 ONCJ 584.
[336] *Kaplanis v Kaplanis*, 2005 CarswellOnt 266.
[337] Philip M Epstein & Sheila R Gibb, "Family Law Arbitrations: Choice and Finality under the Amended Arbitration Act, 1991 and the Family Law Act" (2006) 25 CFLQ 199. Parties cannot contract out of the ability to appeal questions of law.
[338] Fidler, *supra* note 334. This article was written in 2012.

In *Duguay v. Thompson-Duguay*,[339] the mother expressed her desire to withdraw from the mediation/arbitration process the parties had agreed to because she could no longer afford the process and because she felt the mediator/arbitrator was not impartial. The mediator/arbitrator proceeded to arbitration and made a decision without her input, which favoured the father. The mother applied under s. 46 to have the award set aside. The court agreed with the mother, commenting only that the proper procedure would have been to object formally to the continuation of the process.[340] This case may be useful to women who enter these mediation/arbitration agreements only to find that mediation with their former partner is not possible; but ultimately, alternative dispute resolution methods will likely be inappropriate for abuse cases. If the parties select this route, this note from Philip Epstein should be kept in mind:

> The parties and counsel need to carefully review the terms of a mediation/arbitration agreement before it is signed so that they can be assured, not only of what their rights for review or appeal are, but to ensure that the other side is not able to drag out the matter after a result has been obtained from an arbitrator.[341]

The Trial

15. Requests to Admit

Requests to Admit can be a valuable tool in litigation because they allow the Court to narrow down the disputed issues and focus on these at trial. However, lawyers representing women who have survived abuse may have to closely consider the potential consequences of serving the abuser with a Request to Admit. The abuser, who may already have a non-communication order in place against him, could come to see Requests to Admit as a new tool for continued harassment.

In *Milani v. Milani*,[342] the wife had to apply for an order striking her partner's Request to Admit, which was the fifth one she received in less than two months. Altogether, the Requests contained 576 questions, though only one-third of these were relevant. Some of these questions related to the previous sexual behaviours of the parties, the sexual abuse the woman had experienced as a teenager, the woman's menopause, and her use of her maiden name.[343] The court recognized that this tool, meant to expedite the fact-gathering process, had become

[339] *Duguay v Thompson-Duguay*, 2000 CarswellOnt 1462.
[340] *Ibid* at para 38.
[341] Philip Epstein & Lene Madsen, *This Week in Family Law*, 2008-16 (February 14, 2006).
[342] *Milani v Milani*, 2005 ONSC 693.
[343] *Ibid* at para 11.

a "weapon" that was being used to run up costs and both hurt and embarrass the woman.[344] In this case, the woman was successful in having the Request to Admit struck and the respondent was prohibited from delivering any more Requests to Admit pending the trial.[345] Cases since *Milani* have followed it and struck inappropriate Requests to Admit.[346]

Costs are considered here as a potentially appropriate remedy. *Carroll v. Stonhard Ltd.*[347] is not a family law case, yet it demonstrates how the trial process can be extended when one party does not respond properly to a Request to Admit. "When [a prompt and full response] does not occur … then the court … should consider fully indemnifying the disadvantaged party by awarding costs on a solicitor-client basis."[348]

As noted above, every woman's story is unique. One abuser, when becoming aware of the existence of this tool, may use it for harassment; another abuser, who prefers to ignore what is served on him, may end up having his admission to the contents of the Request deemed. According to Rule 22(4) of the *Family Law Rules*, if a party served with a Request to Admit does not serve a response within 20 days, this party is considered to have admitted to the facts of the Request. In *Shoukralla v. Shoukralla*,[349] the Respondent did not respond to the Applicant's Request in spite of being given multiple opportunities to file his own material. As a result, the Applicant's net family property statement was used for calculating the equalization payment and the Respondent was deemed to admit his income by not responding to the Request to Admit. This "admitted" income was then used to calculate child support.

The strategy employed by the woman's lawyer should be informed by her experiences and her knowledge of her abuser. It may be necessary to have a discussion with the woman where the lawyer seeks her insight in anticipating what her abuser's response will be to receiving a Request to Admit.

16. Cross-Examination

Many of the tactics listed so far have been focussed, or at least focussed in large part, on draining the woman's resources both financially and emotionally. The abuser may also decide to represent himself so as to conduct, personally, the cross-examination of the woman at trial. In the previously cited case of *Vermette*, after Mr. Nassr was warned during trial that he had to

[344] *Ibid* at para 12.
[345] *Ibid* at para 13.
[346] See *Slate Falls Nation v Canada (Attorney General)*, [2005] OJ No 5228; see also *Gualtieri v Canada (Attorney General)*, [2008] OJ No 698.
[347] *Carroll v Stonhard Ltd*., 53 OR (3d) 175.
[348] *Ibid* at para 9. Refer also to the previous segments of this paper dealing with the issue of costs and noting that many parties may be unable to pay the costs awarded against them.
[349] *Shoukralla v Shoukralla*. 2014 ONSC 4209.

"temper his vitriol and not misquote her evidence," Rogin J. found that the purpose of Mr. Nassr's cross-examination of Ms. Vermette was to insult her, have her charged with welfare fraud, and to engage in a collateral attack against a previous order for criminal harassment.[350] Allowing the woman to be cross-examined by her abuser could have an incredible emotional impact on her, which, in turn, could affect her presentation, her testimony and her case.[351]

In criminal law, Section 486.3 of the *Criminal Code* operates to prevent a self-represented accused from conducting the cross-examination in certain circumstances by allowing the prosecutor or victim to apply for the appointment of counsel to cross-examine. There is no such protection in family law. That being said, in 2015, *Morwald-Benevides v. Benevides*[352] became the first family law case where a trial judge of the Ontario Court of Justice[353] made an *amicus curiae* order, this judge stating that:

> The Attorney General should not view family law in a hierarchical structure compared to criminal justice. The family law value and the criminal justice value are equally important and should be viewed on an integrated basis, each interwoven with the other.[354]

The *Benevides* case was highly complex. The mother indicated that she was fearful of the children's father and alleged that the father had abused both her and the children. She feared that he would abduct the children and take them to Bermuda. The trial judge appointed an *amicus curiae* for the woman on the first day of trial after she collapsed in the courtroom, commenting that "[b]eing alone in the courtroom with the father was beyond what she could bear."[355] This judge also appointed *amicus* for the father in order to stabilize the proceeding. The duties that these lawyers were charged with in this case went far beyond mere engagement in the cross-examination process.

The *amicus* appointments of *Benevides* were contested by the Attorney General, yet it should be noted that when Attorney General counsel was asked what could have been done to manage the problems they perceived, the suggestion of counsel was that *amicus* can be used for the sole purpose of cross-examination.

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[350] *Ibid* at para 25.
[351] It also creates an atmosphere of fear and intimidation.
[352] *Morwald-Benevides v Benevides*, 2015 ONCJ 532.
[353] This 2015 decision was affirmed in 2016 by the Ontario Superior Court of Justice. See *Morwald-Benevides v Benevides*, 2016 ONSC 3505.
[354] *Ibid* at para 145.
[355] *Ibid* at para 68.

The decision of *Benevides* was appealed and at this point the decision of the Ontario Court of Appeal is not yet available. However, the British Columbia decision of *D.(J.E.S.) v. P.(Y.E.)* indicates that the matter before the Court of Appeal concerns the funding for *amicus* from the Attorney General, and does not relate to the general question of whether *amicus* can be appointed for this role. The judge in the B.C. case appointed *amicus* but withheld judgment on the matter of funding to await publication of the Court of Appeal's judgment.[356]

After the Trial

17. Continuing to Bring Repeated Motions

Even after a trial, the abuser may still bring motions. In the cases of *Purcaru v. Vacaru*[357] and *Roscoe v. Roscoe*,[358] the motions to change were about decisions made after the litigants' pleadings were struck because of their engagement in abusive litigation strategies. Mr. Purcaru brought two motions to change in succession, which affected the mother's ability to enforce the decision made in trial. The judge in this case felt compelled to ask, "[d]oes the right to bring motions to change include the right to subject a former spouse to perpetual litigation by a spouse who refuses to obey the rules or to respect the legal outcome?"[359]

Motion to Strike (Pleadings) Under Rule 2.1

The Rules of Civil Procedure have been referenced throughout this paper with little explanation as to how they become applicable, this being beyond the scope of the paper. An explanation is offered in part here, focused on the topic of truncated motions to strike. An application can be struck under Rule 2.1 of the *Rules of Civil Procedure* if it appears, on its face, to be frivolous, vexatious or an abuse of process. Rule 2.1 finds a place in family law through Rule 1(7) of the *Family Law Rules,* which allows the court to give directions with reference to the *Rules of Civil Procedure*.

The cases of *Purcaru* and *Frick v. Frick*[360] discussed the relationship between Rule 1(8.2) of the *Family Law Rules* (granting the court the ability to strike a document) and Rule 2.1 of the *Rules of Civil Procedure*. Rule 2.1 allows for dismissal of the proceeding while Rule 1(8.2) does not require the pleading itself to be frivolous etc., only the document(s). Also, Rule 1(8.2) sets out no procedure for striking the document(s) while Rule 2.1 sets out more of a process for striking

[356] See *Ibid* at para 48. "I will appoint amicus. The question remains whether funding can be obtained for this appointment; it may be that there may be someone at the bar who will act pro bono."
[357] *Purcaru v Vacaru*, 2016 ONSC 1609.
[358] *Roscoe v Roscoe*, 2005 CarswellOnt 7083 at para 13.
[359] *Ibid* at para 27.
[360] *Frick v Frick*, 2016 ONSC 359.

pleadings. For example, Rule 2.1(3) directs that dismissals be made based on written submissions unless the court orders otherwise.

On the appeal of *Frick*, the Ontario Court of Appeal commented that the motions judge had erred because there was no basis to apply jurisprudence under Rule 2.1 where the motion was brought under Rule 1(8.2). This does not mean Rule 2.1 is irrelevant to family law entirely. The motion in that case had been focused on striking a specific portion of the document and not the pleadings overall. The standards and tests of Rule 2.1 simply cannot be automatically applied to those instances.

The Court can adopt the process outlined in Rule 2.1(3) of the *Rules of Civil Procedure*, requiring written material from the parties as opposed to an oral hearing when the pleadings themselves are the issue. This has been done, for instance, in *Children's Aid Society of Toronto v. V.D.*

The use of Rule 2.1(3) in family courts is important for the reasons outlined by Myers J. in *Purcaru*:

> Rule 2.1 aims at preventing abuse of the system and the parties opposite a vexatious litigant who would likely misuse an opportunity to participate in a formal, oral motion to strike or dismiss the proceeding. Some parties may abuse the procedural rights associated with oral motions such as the right to submit evidence, to cross-examine, to serve a summons to witness on third party witnesses, and thereby cause all the harms of vexatious proceedings even on a motion designed to determine if the proceeding ought to be terminated because it is frivolous, vexatious or an abuse of process.

Rule 2.1 is another one of those measures of last resort. In the words of Myers J. from *Gao v. Ontario (Workplace Safety and Insurance Board)*,[361] it "is not for close calls," due to the fact that no evidence is submitted on the motion. According to *Raji v. Ladner* case, there are two requirements for resort to Rule 2.1 (although the second is not "hard and fast"). The first requirement is that the abusive nature of the proceeding be apparent on its face. The second "requirement" (referred to as a guideline in *Raji*) is that there be some basis for resort to Rule 2.1.

Requirement One - Apparent on its Face:
That "the abusive nature of the proceeding be apparent on its face" is a phrase that seems to have a meaning both apparent and difficult to articulate. It is like asking "how do you know a

[361] *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6100.

proceeding is vexatious" and receiving as the only answer, "it will be obvious." There is no checklist of factors that indicate when a motion is vexatious; although in *Beatty v. Office of the Children's Lawyer*[362] a list of factors that may be indicia of a vexatious claim was set out. This list contained the common attributes of a vexatious litigant and her/his documents. If the abuser's legal bullying tactics are nothing new and he has been engaging in these strategies for the entirety of the process, these qualities may be easily demonstrable. The list in *Beatty* included the following attributes of content, form and litigant (which may now seem familiar):

Litigant:

- Bringing multiple proceedings to re-determine issues already determined by a court of competent jurisdiction
- Rolling forward grounds and issues from prior proceedings to repeat and supplement them, including bringing proceedings against counsel who have acted for or against them in earlier proceedings
- Persistently pursuing unsuccessful appeals
- Failing to pay costs awarded at prior proceedings
- Bringing proceedings for purposes other than to assert legitimate rights (such as to harass and/or oppress others)
- Bringing proceedings where no reasonable person would expect the relief sought

Form:

- Using curious formatting
- Including many, many pages
- Including odd or irrelevant attachments
- Using multiple methods of emphasis (highlighting, underlining, capitalization)
- Repeatedly using "???" or "!!!"
- Inserting numerous foot and marginal notes

Content:

- Containing rambling discourse characterized by repetition and a pedantic failure to clarify
- Using rhetorical questions
- Repeatedly misusing legal, medical and other technical terms
- Including inappropriately ingratiating statements
- Using ultimatums
- Including threats of violence to self or others
- Including threats of violence directed at individuals or organizations

[362] *Beatty v Office of the Children's Lawyer*, 2016 ONSC 3816.

It is stressed again that the presence any of these factors would not mean that the motion is necessarily vexatious, although they may help to indicate that it is.

"Requirement" Two - Some Basis for Resort to Rule 2.1:
The presence of a history of abuse should be a recognized basis for engaging the process allowed by Rule 2.1. In *Horzempa v. Ablett*, Mr. Ablett pressed, through his counsel, to be allowed to give oral evidence during the proceedings relating to whether his motion should be struck. O'Connell J. said that allowing Mr. Ablett to give oral evidence in the presence of someone so stung by his conduct (referencing his past legal bullying) would constitute the antithesis of justice. This was not a Rule 2.1 case, but it demonstrates the harm a woman could be put to when forced again to face someone in court who has repeatedly wronged her.

18. Re-Litigation

The previous discussion on Rule 2.1 of the *Rules of Civil Procedure* is also relevant to this segment, as it is to any subtopic (under the heading of "abuse of process") where a motion to strike may be an appropriate option. The previous section is an adequate explanation of Rule 2.1 for the purposes of this paper. This section is focused on attempts to re-litigate matters that were or should have been already decided.

Abuse of Process

In broad terms, judges have inherent and residual discretion to control the process of the courts to prevent abuses of process.[363] Abuse of process is the flexible and overarching doctrine within which both *res judicata* and the concept of collateral attack operate to prevent harm to the justice system.[364] The doctrine of *res judicata* is part of the general law of estoppel and contains the components of issue estoppel and cause of action estoppel.[365] While litigants must raise *res judicata* if they wish to rely on an estoppel argument, judges should consider the doctrine of abuse of process regardless;[366] but where *res judicata* has already been made out, Perell J in *Martin v. Goldfarb* said consideration of abuse of process would be redundant. A matter can at the same time be barred by *res judicata*, be an impermissible collateral attack and be an abuse of the court's process.[367] The result is the same.

Donald Lange, in his book *The Doctrine of Res Judicata in Canada* described the primary policy difference between these concepts in this way: "A consideration of issue estoppel or cause of

[363] *Toronto (City) v Canadian Union of Public Employees, Local 79* [2003] SCJ No 64 at para 35.
[364] See *Hendry v Strike*, (1999) 29 CPC (4th) 18 at 21. "[*res judicata*] is one of the weapons in the common law arsenal to prevent abuse of process." See also *Toronto (City) v CUPE, Local 79* at para 22, "both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process."
[365] Donald J Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: Butterworths, 2015).
[366] *Gough v Newfoundland and Labrador*, [2006] NJ No 6 (CA) at para 50.
[367] *K(T) v Alberta (Director, Child, Youth & Family Enhancement Act)*, 2012 ABQB 330 at para 85.

action estoppel focuses upon the interests of the litigants. A consideration of abuse of process by re-litigation or collateral attack focuses upon the justice system."

This paper has in many ways attempted to categorize topics that are not bound by categories. This section on re-litigation stands as no exception. The doctrine of abuse of process is not something that can be reduced to a step-by-step analysis. This paper seeks to simplify discussion of these topics in order to raise awareness of the problem posed by legal abuse.

Cause of Action Estoppel:

Res judicata has a specific set of requirements that must be met, whether it is cause of action or issue estoppel. *Grandview (Town) v. Doering*[368] identified the criteria that must be present for cause of action estoppel to bar a claim. There must be a final decision of a court of competent jurisdiction in the prior action. The parties to the new litigation must have been parties to the prior action (or in privy with those parties). The cause of action in the prior action must not be separate and distinct. Finally, the basis of the cause of action and subsequent action was argued or could[369] have been argued in the prior action if the parties had exercised reasonable diligence. According to *Danylkiw v. Danylkiw*,[370] the test for cause of action estoppel is the same in family litigation as it is in civil litigation.

Issue Estoppel:

Issue estoppel will bar re-litigation if three conditions are satisfied: the issue is the same as one decided in the previous decision, the prior decision was final, and the parties are the same (or their privies). Some points on the topic of *res judicata,* that can be supported with case law, are listed here because of their particular relevance to family law:

- A final judgment made on consent is considered a binding judgment for the purposes of satisfying the criterion of "final and binding."[371]
- Interim orders do not meet the test of "final and binding" for *res judicata*.[372]
- "[A]n enforceable family arbitration award has the same finality as a court order."[373]
- Most[374] family law matters are not subject to *res judicata* where there has been a material change in the circumstances unless the material change was known to the litigant at the time of the original proceedings and was left unraised.[375]

[368] *Grandview (Town) v Doering*, [1976] 2 SCR 621.
[369] Some cases have used the word "should." Some cases have used both the words "could" and "should." This paper will not dwell on semantics. See *Danylkiw v Danylkiw*, 2003 CarswellOnt 3066 at para 10.
[370] *Danylkiw v Danylkiw*, 2003 CarswellOnt 3066 at para 11.
[371] *Bell v Bell*, 1998 CarswellOnt 4722 at paras 6-7.
[372] *C.(K.) v B.(S.)*, 2008 CarswellOnt 370.
[373] Philip M Epstein & Sheila R Gibb, "Family Law Arbitrations: Choice and Finality Under the Amended Arbitration Act, 1991 and Family Law Act" (2006) 25 CFLQ 199.
[374] Excluding, for instance, claims regarding the constitutionality of a statutory provision.
[375] *Lefebvre v Strilchuck*, 2007 CarswellOnt 1534 at paras 22-24. See also *Upper v Upper*, [1933] 1 OR at 7.

- A change in the law is not enough to constitute an exception to cause of action estoppel.[376]
- A change in the law can constitute an exception to issue estoppel, unlike cause of action estoppel.[377]
- Financial hardship alone is not sufficient to grant an exception to the effect of *res judicata*.[378]
- The criterion of mutuality can be satisfied if a third party ought to have been joined to the matrimonial litigation (ie. a bank that should have been added as a party when mortgage liability was determined in the family law proceedings).[379]
- Tort claims are barred by *res judicata* if the causes of action should have been raised in the matrimonial proceedings.[380]

There has been confusion and inconsistency in decisions concerning whether an individual is permitted to re-apply for spousal support if the initial claim was dismissed. Southin J.A. in *Gill-Sager v. Sager*[381] stated that only the Supreme Court can provide a definitive answer to this question. In the meantime, Southin J.A. recommended that orders dismissing claims for spousal support be written expressing that there is liberty to apply again upon a change of circumstances.[382]

Collateral Attack:

The two techniques encapsulated by the concept of res judicata require that the parties between the actions, or their "privies," be the same. There is no such requirement for something to be found to constitute a collateral attack.[383] In *R v. Wilson*,[384] the Supreme Court described a collateral attack as "an attack made in proceedings other than whose specific object is the reversal, variation, or nullification of the order or judgment." Subsequent case law indicated that a proceeding does not necessarily need to seek the reversal of an order to constitute a collateral attack, but need merely call that former decision into question. Yet,

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[376] *J.(S.M.) v W.(R.H.C.)*, 2003 BCSC 1870 at para 57. The trial judge's decision on maintenance was reversed by the BCCA, though the BCCA allowed the trial judge's decision on res judicata to stand.
[377] According to *Arnold* and *J.(S.M.)*, the reason for this difference between CAE and IE is that the underlying principles on which estoppel is based have greater force in cause of action because the subject matter is identical.
[378] *Beninger v Beninger*, 2007 BCSC 1306. In this case, the father's arrears had been cancelled when he appeared to be no longer able to work. The woman fell into financial hardship as a result. The father subsequently returned to work but the woman's attempt to re-activate the arrears was barred by *res judicata* and her financial hardship was not a sufficient reason for barring its effect.
[379] *DeFaveri v Toronto Dominion Bank*, 1998 CarswellOnt 2910 at paras 11-17.
[380] *Lee v Lee*, 2010 CarswellOnt 6080.
[381] *Gill-Sager v Sager*, 2003 BCCA 46.
[382] *Ibid* at para 26.
[383] *Grenon v Canada (Attorney General)*, 2007 ABQB 403 at paras 10 & 11.
[384] *R v Wilson*, [1983] 2 SCR 594 at 599.

Toronto (City) v. C.U.P.E., Local 79 currently stands as the most definitive (being the most recent) description of the concept of "collateral attack" from the Supreme Court. This case said

that the rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum.[385]

The rule against collateral attacks is not absolute.[386] The focus is on whether or not harm will be brought to the justice system.[387]

Abuse of Process by Re-Litigation:

In *C.U.P.E., Local 79*, the matter was determined to be an abuse of process because it was a re-litigation of the material facts that had supported the man's criminal conviction. This was not a matter of issue estoppel because there was no mutuality of the parties. This was not a collateral attack because the new proceeding did not seek to overturn the conviction. Yet this was an abuse of process because it called into question the criminal conviction and thus sought to undermine the integrity of the criminal justice system.[388]

Accepting that there is no true test for abuse of process by re-litigation, the Supreme Court has indicated that if the same question is raised that was previously decided and this question was fundamental to that decision, the second action is barred.[389] While the Supreme Court has not ruled on questions that could have been raised in the initial proceedings, appellate courts have found that abuse of process will bar the litigation of questions that could have been determined in the initial proceeding.[390]

These re-litigation attempts may not necessarily occur in the post-trial, and they may even occur before a final order on the family law issues has been made. In *Murano v. Murano*,[391] Mr. Murano was found in contempt of an interim order in the family court proceedings. At a subsequent motions date before a different judge, Mr. Murano was unable to demonstrate that he had complied with the order of the judge who found him in contempt, but sought to introduce the reasons he had for not obeying the orders he had been found in contempt of. In this way, Mr. Murano had sought a new hearing on the issue of contempt. This was found to be

[385] *Ibid* at para 33.
[386] *R v Domm*, (1996) 31 OR (3d) 540 at para 22.
[387] *Tokaleh v Hassan*, 2014 ONCJ 57 at para 24.
[388] See *Skender v Farley*, [2007] BCJ No 2703 at para 40.
[389] *Altobelli v Pilot Insurance Co*, (1991) 6 CPC (3d) 13 at 14.
[390] *Aba-Alkhail v University of Ottawa*, [2013] OJ No 4709 says "abuse of process bars issues that could have been determined" at para 12. Leave to appeal this decision was denied by the Supreme Court. See also *Hamelin v Davis*, [1996] BCJ No 109, Donald JA (concurring) says that "an action should not be barred for abuse unless the point in question was squarely raised, or could properly have been raised" at para k51.
[391] *Murano v Murano*, 2002 CarswellOnt 3079.

a collateral attack, and it was not open to the motions judge to reopen the finding of contempt that was previously made.

19. Appeal of Decisions without Chance of Success

The abuser may appeal decisions of the court even if there is no merit to the appeal. The negative impact on the woman is not in the risk that he will be successful, it is in the traumatic impact that is caused by continuous appearances in court and continuous exposure to her abuser. In *Kawaguchi v. Kawaguchi*,[392] the Court noted that the practical effect of the meritless appeal had been to permit the appellant to continue living in the matrimonial home (rent free) in contravention of the parties' agreement. In *McDermott v. McDermott*,[393] the appeal of an Interrogatories Application outcome was found to be part of a plan to deny Mr. McDermott summer access. If the abuser has already been labelled a vexatious litigant by a judge of the Superior Court of Justice, he is required to first obtain leave to appeal in respect of most matters; although such a finding will not preclude the abuser from appealing the finding that he was a vexatious litigant.[394]

As a side note, the 2001 Supreme Court decision of *Van de Perre v. Edwards*[395] confirmed that there is a narrow scope of appellate review in custody cases. Quite simply, "[t]he Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence."[396]

Security for Costs

If the abuser still has costs orders outstanding, it is possible that a claim for security for costs can be made under Rule 61.06 of the *Rules of Civil Procedure*. Under Rule 61.06(1)(a), this order can be made if there is good reason to believe the appeal is frivolous and vexatious and if the appellant has insufficient assets in Ontario to pay the costs of the appeal. In *Baker v. Rego*,[397] the appellant had still not paid the costs that were previously awarded against her and she had very little chance of success on the appeal. In response to her appeal, the other party brought a successful motion for an order that she pay security for the costs of the appeal. It was clear here that the appellant did not have sufficient resources in Ontario, fulfilling the second requirement of Rule 61.06(1)(a). It was clear also that there was little chance of success for the appeal; however, this is not the same as the appeal being frivolous and vexatious. "[T]here must be something more than a low prospect of success."[398] Instead, the order for

[392] *Kawaguchi v Kawaguchi,* 1989 CarswellOnt 1772.
[393] *McDermott v McDermott*, 2014 BCSC 1740 at para 27.
[394] *Kalaba v Bylykbashi*, 2006 CarswellOnt 749.
[395] *Van de Perre v Edwards*, 2001 SCC 60.
[396] *Ibid* at para 12.
[397] *Baker v Rego*, 2013 ONSC 3309.
[398] *Ibid* at para 22.

security for costs was made under 61.06(1)(c), which allows the court to consider any other good reason for making the order. The appellant insisted that her father could pay for the appeal while simultaneously insisting that her financial situation was too dire for her to pay the previous costs orders. The court was under the impression that this allowed the appellant to litigate with impunity, "her legal costs being covered, yet with no liability for the consequences of that litigation should she be unsuccessful."[399] The Court concluded that if her father could pay the costs of appeal, he could also afford to pay the award for security of costs.

Szpakowsky v. Kramer[400] is a case where an argument under 61.06(1)(a) was successful (relied upon in *Baker*) because the appellant had brought multiple meritless actions and had a history of non-compliance with costs awards. The Court further indicated that a determination need not be made that the matter is frivolous and vexatious for the purposes of 61.06(1)(a), but it is sufficient if there is good reason to believe it has these characteristics.[401]

Summary Judgment Pending Appeal

If it appears that an appeal has no merit, the respondent can bring a motion for summary judgment under Rule 38(28) of the *Family Law Rules*. The successful motion must show that the appeal raises no genuine issue requiring a hearing before the Divisional Court panel. According to the Court in *Children's Aid Society of Simcoe (County) v. T.(S.)*,[402] "[c]ircumstances where it can be said that it is plain and obvious that an appeal can not [*sic*] succeed will be rare."[403]

In other circumstances, the Court is able to exercise its discretion to refuse to hear an appeal from an individual who has not complied with court orders, or the appeal can be stayed until this person has at least purged their contempt.[404] In *Aalbers v. Aalbers*[405] for instance, the Saskatchewan Court of Appeal refused to entertain the appeal in what the court referred to as "one of the most flagrant cases of disregard for court orders for child and spousal support"[406] until Mr. Aalbers had paid his arrears and any court-ordered costs.[407]

[399] *Ibid* at para 28.
[400] *Szpakowsky v Kramer*, 2012 ONCA 77.
[401] *Ibid* at para 14.
[402] *Children's Aid Society of Simcoe (County) v T.(S.)*, 2009 CarswellOnt 6433.
[403] *Ibid* at para 39.
[404] *Dickie v Dickie*, SCC.
[405] *Aalbers v Aalbers*, 2016 SKCA 1.
[406] *Ibid* at para 24.
[407] *Ibid* at para 25.

20. Failure to Obey Court Orders

The woman may still face difficulties in the enforcement of the order even if she obtains a favourable outcome at trial (or a favourable final order on consent).[408] The Law Reform

Commission of Canada commented in 1974 that "for all practical purposes, a court order (for maintenance) is often worth no more than the paper it is written on."[409] This, like many of the other tactics, can cause the woman a great deal of financial hardship, potentially enough to force her to return to her abuser. These women must have access to remedies when the abuser refuses to obey final court orders. Only the topics of support and custody are discussed in this paper, though the enforcement of orders dealing with other family law issues – in particular, restraining orders, can also be problematic.

Support Orders

Family Responsibility Office:

"The FRO is an underfunded, under resourced organization that is chasing support payors for hundreds of millions of dollars."[410] FRO is able to use a variety of tools to enforce payment. These include garnishment of wages, suspension of a driver's licence, passport or other licence, and the ability to initiate a default hearing. If the abuser has a typical employment arrangement, support amounts can be deducted from his paychegue through arrangements with his employer; but even so problems can arise when an abuser is determined to evade his support obligations.

The Annual Report of the Office of the Auditor General of Ontario engaged in an audit in 2010 and found that FRO was not successfully fulfilling its mandate.[411] In spite of the recommendations provided at that time, in 2016, the Office of the Ombudsman of Ontario listed FRO as the most complained-about provincial body.[412] This Office noted particularly that FRO responded inconsistently to arrears, drawing attention to one case where FRO did not take additional action for several years even though the payor owed more than $300,000 in

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[408] R Finnie, "Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993) 30(2) Canadian Review of Sociology and Anthropology 205 at 205-08, 231. See also D. Galarneau & J Sturrock, "Family Income After Separation" *Perspectives on Labour and Income 75-001-XPE*, Vol 9, No 23 (Ottawa: Statistics Canada, 1997) at 18-26; M. Gordon, "What, Me Biased? Women and Gender Bias in Family Law" (2001) 19 CFLQ 53 at 56-68, 76-81; *Dickie v Dickie*, 2007 CarswellOnt 606 (Factum of the Intervener, Women's Legal Education and Action Fund (LEAF)) at para 21.

[409] Law Reform Commission of Canada, The Family Court Working Paper 1 (Ottawa: The Commission, 1974) at 51.

[410] Philip Epstein, *Epstein's This Week in Family Law,* Fam L Nws 2014-44 (November 3, 2014).

[411] Ministry of Community and Social Services, ***Family Responsibility Office*** (2010) at 333, online: <http://www.auditor.on.ca/en/content/annualreports/arreports/en12/403en12.pdf>.

[412] Office of the Ombudsman of Ontario, Annual Report 2016 (2016) at 21, online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/AR%202015-2016/1718-OmbudAR-ENG-Web_1.pdf>.

arrears.[413] There is a clear need for greater reform within this agency, including the commitment of more resources to effecting these reforms.

Ashak v. Ontario (Director, Family Responsibilities Office)[414] raised the question of whether or not FRO owes the recipients of support a duty of care. The motion for summary judgment in this case was dismissed because application of the *Anns* test at least indicated the presence of a *prima facie* duty of care (although this finding would not bind the trial judge) and a trial was required to determine the issue. Regrettably, the trial outcome is unknown.

While this was not a final determination of the issue, it is interesting to note that counsel for FRO dedicated their effort not to refuting the existence of a *prima facie* duty of care, but to arguing that there are policy considerations that should negate the *prima facie* duty.[415] The argument was that recognizing a duty of care would raise the spectre of indeterminate liability. Grace J., who dismissed the motion for summary judgment, did not find this argument convincing. The words of Cardozo C.J. are frequently used, which describe this problem as being liability in an indeterminate amount for an indeterminate time to an indeterminate class.[416]

If the duty conceived of here was owed to the public at large, perhaps the class would be indeterminate. This is not the case if the focus is on whether or not a duty is owed to an individual whose order has been filed with FRO, who is meant to be receiving support payments through FRO, and whose order has not been adequately enforced in accordance with FRO's mandate. That number of persons is not indeterminate. Further, one decision relating to an individual finding that FRO breached a duty would not necessarily expose FRO to indeterminate liability because the other elements for a claim in negligence would still have to be satisfied in any other cases.

The case of *Ashak* is at least a sign of progress towards ensuring that FRO, a body which has been the source of so many complaints, is held accountable. In the words of Grace J.:

> FRO employs personnel for the specific purpose of enforcing support orders. They have - or should have - expertise in that area. Those in the private sector who enforce monetary orders owe their clients a duty

[413] *Ibid* at 21.
[414] *Ashak v Ontario (Director, Family Responsibility Office)*, 2012 ONSC 1909.
[415] *Ashak v Ontario (Director, Family Responsibility Office)*, 2013 ONSC 39 at para 15.
[416] *Ultramares Corp v Touche*, 255 NY 170 at 444.

> of care. Absent a statutory provision to the contrary, should the Crown be immune because the service is publically funded?[417]

Contempt:

There is the option to withdraw a case from FRO and manage it personally, as Ms. Dickie did in *Dickie v. Dickie*.[418] In this case, an order was made for child support and an interim order for spousal support in 2001. One year later, Dr. Dickie relocated to the Bahamas without notice, taking his remaining assets with him. Justice Laskin noted (dissenting), "[u]nfortunately, but hardly coincidentally, Bahamas does not have legislation permitting reciprocal enforcement of judgments."[419] This meant that the woman had no way to enforce the order that entitled her to support. The same year (2002), Greer J. made an enforcement order requiring Dr. Dickie to providiean Irrevocable Letter of Credit in favour of Ms. Dickie and to provide her with security for costs. This order also was simply ignored. In 2004, Ms. Dickie was finally successful in having Dr. Dickie found in contempt. Dr. Dickie attempted to appeal this contempt order rather than purge it.

The Supreme Court determined that a person could be found in contempt for failing to obey an order to post security (because this is not an order for the payment of monies to the other party). Dr. Dickie spent 45 days in jail for contempt and still did not make the payments ordered. Philip Epstein, in his annotation of this case, commented on how it proves that there is little that can be done, absent an ability to seize assets, if a person is truly determined not to pay. It should be noted that Dr. Dickie was a plastic surgeon who was completely able to pay the amounts order.

Epstein also commented that the recipients of support now, it seems, can follow a rather roundabout method to having their former partner held in contempt (which would not typically be possible for nonpayment of monies). The recipients can ask the court to order the payer to post security if they are in default. According to the Supreme Court, an individual can be held in contempt for the breach of this order. Of course, this is only a workable strategy if the abuser actually has the resources to post the security at once.

Access Orders

The woman may have justified reasons for withholding access where the father is abusive. However, an abuser may use an access arrangement to retaliate and/or re-establish control. In a survey conducted of Ontario family law lawyers, the following enforcement mechanisms were

[417] *Ashak, supra* note 415 at para 86.
[418] *Dickie v Dickie*, [2006] OJ No 95.
[419] *Ibid* at para 75.

ranked as the most effective: police enforcement, contempt proceedings, and the use of supervised access and/or supervised access centres.[420]

Police Enforceable:

In the same survey referenced above, a dominant theme emerging from the feedback was that police are unwilling to intervene in family affairs, and the exercise of their discretion in this area may render the police enforceable order meaningless. Sometimes, the abuser may even desire an order to be police enforceable so that this element of the order can be used as a tool for harassment. In *N.(R.J.) v. N.(L.J.M.)*,[421] an Alberta case, the father attempted to have a police enforcement clause added to the order even though he had been the one who was inconsistent in exercising his access over the previous five years. Some abusers have even approached law enforcement agencies with family court access orders that are no longer current, seeking to have these enforced simply as a method of harassment.[422]

Price J. included a lengthy commentary in the decision of *Ward v. Ward* detailing the reluctance courts should show towards including a police enforcement clause. Pazaratz J. included the same in *Patterson v. Powell*.[423] Both judges neglected to comment on cases with a history of abuse. Where there is a history of abuse, these are more than simply "just in case" clauses.[424] The concerns raised by Justices Pazaratz and Price are valid, but when there is a history of abuse, this history should be treated as an indication of high risk (particularly if the abuser has threatened to remove or not return the child(ren)).

If a police enforceable order is made, it must be clearly written. If the terms of the order are unclear, the police may have to bring a motion to Family Court to seek direction.[425] This means, for instance, the order should state specifically when and where the child is supposed to be picked up.[426] It may also be beneficial to specifically name the law enforcement agencies having jurisdiction.[427] If it is possible that an abuser may seek to have an old access order enforced, it may be helpful to ensure that other agencies involved with the family possess the most current family court orders (for example, the Children's Aid Society if it is involved).

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[420] John-Paul Boyd, "Enforcing Orders for Access: The Views of the Family Law Bar" (2013) 32 CFLQ 173.
[421] *N(RJ) v N(LJM)*, 2003 CarswellAlta 970.
[422] Acknowledgement of anecdotal component.
[423] *Patterson v Powell*, 2014 ONSC 1419.
[424] *Ibid* at para 18.
[425] *Allen v Grenier*, 1997 CarswellOnt 934 at para 11
[426] Nicholas Bala & Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" (2004) 23 CFLQ 1 [Bala & Bailey].
[427] Such as in *McGowan v McGowan*, 2008 ONCJ 243 at para 18: "Officers of Peel Regional Police Service, Metropolitan Toronto Police Service, Ontario Provincial Police and of any other law enforcement agency having jurisdiction, are hereby directed to enforce the terms of this order relating to access and non harassment."

Contempt:

Contempt for a breach of an access order may be punished by a fine or by a term of imprisonment up to 90 days (or both) according to s. 38 of the *Children's Law Reform Act*. However, Bala and Bailey noted in their article on enforcement of access that some judges seem to require almost overwhelming evidence to establish contempt.[428] Unlike the rest of family law proceedings, the standard of proof for contempt is "beyond a reasonable doubt." The reluctance of the court to make findings of contempt can prevent them from being an effective recourse for the woman whose abuser is not abiding by the terms of the access order.

Even if they are not successful, abusers may bring unfounded contempt motions in order to harass the woman. At other times, the woman may have denied access out of fear for the children's safety.

It is not truly about whether or not the motion is successful, but the traumatic impact that bringing the motion will have on the woman as it brings her back to court and forces her to be in close proximity to her abuser once again. The court has the discretion to excuse these justified breaches.[429] In *Salloum v. Salloum*, Viet J. said that the court will be reluctant to sanction a parent's behaviour where it is in the child's interests. Viet J. said further that if the parents did promptly move to modify the order, this is an indication of such honest concern.

Professor Bailey points out that it is problematic that the threshold test for justified breach is the test for variation of a court order.[430] Bailey points to the presence of guidelines in Newfoundland's *Children's Law Act* that describe when a remedy is available and when withholding access is justified. Having this additional clarification in Ontario could be useful. It may prevent abusers from bringing vexatious contempt motions if a set of guidelines exists that describes the woman's decision as justified. It may also be a useful tool for the woman who is concerned for the welfare of her children and wishes to be aware of her rights as a concerned parent. Not only might these guidelines prevent the abuser from bringing meritless contempt motions, this set of guidelines may, in part, deter the abuser from using access exchanges as a method of legal bullying. Abusers may frequently appear late to access exchanges or neglect to appear, affecting the woman's schedule and disrupting her personal plans. The *Children's Law Act* states that access is not wrongfully denied where the access parent has, without reasonable notice and excuse, failed to exercise the right of access on numerous occasions during the preceding 12 months. In line with the recommendations provided by Bailey, "[a]ll provinces and territories should enact a provision that defines when access denial is wrongful and should

[428] Bala & Bailey, *supra* note 427.
[429] M Bailey, *Overview and Assessment of Approaches to* ***Access Enforcement*** (Ottawa: Canada, Department of Justice, 2001) (online at http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2001_8/can1.html) .
[430] *Ibid.*

provide remedies for access denial only when it is wrongful."[431] British Columbia's *Family Law Act* includes a section detailing circumstances in which it is justifiable for a parent to limit or deny access, including situations where there is concern for the child's safety or that the child might be exposed to abuse.[432]

Supervised Access:

Supervised access may be in the child's best interests if the father is an abuser,[433] and it may help avoid enforcement issues. Courts can order either supervised access or supervised exchanges pursuant to ss. 34(1) and 34(2) of the *Children's Law Reform Act*. This does not necessarily need to occur at a supervised access centre. Access can be informally supervised by a friend or family member, although the abuser may be more inclined to depart from the terms of the order in this setting and the friend/family member may be less inclined to intervene in inappropriate interactions or may themselves feel intimidated by the abuser (depending on their relationship to the parties).

While supervised access is recognized as an appropriate order if, for example, the access parent has a serious mental health issue, problems with addiction, has threatened to abduct the child or poses some other safety concern, these centres are not always available, particularly in rural areas. In many areas, access centres have backlogs, which can lead to lengthy delays, during which time the court may be reluctant to prevent access from occurring.[434] Further, courts do not tend to consider supervised access to be a permanent solution.[435]

Adequate supports need to be in place for women residing in rural communities who have safety concerns for themselves and their children or who worry that their abuser may not return the child(ren) after access. Where there are serious safety concerns for the woman and/or her child(ren), the safety of these parties should not be compromised in order to facilitate prompt access.

Some Ontario judges have recognized that long-term supervision is appropriate in certain circumstances.[436] In *Aguilera v. Reid*,[437] a final order was made for supervised access because of the severity of the abuse history and because of concerns for the children's safety arising from the father's conviction for possessing cocaine. In *M.(C.A.) v. M.(D.)*,[438] the Ontario Court

[431] *Ibid.*
[432] *BC Fam L Act, supra* note 164 at 62(1).
[433] M Bailey, *Overview and Assessment of Approaches to Access Enforcement* (Ottawa: Canada, Department of Justice, 2001) (online at http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2001_8/can1.html).
[434] Acknowledgment of anecdotal component.
[435] *Kozachok v Mangaw*, 2007 ONCJ 70 at 21.
[436] *MI v MW*, [2011] OJ No 1685 at para 139.
[437] *Aguilera v Reid*, 2006 CarswellOnt 1227.
[438] *M(CA) v M(D),* 2003 CarswellOnt 3606.

of Appeal upheld a trial judge's order for long-term supervised access, suggesting that it is the appropriate order if there is no other practical solution at the time and the alternative appears to be no access. The same was said in *Jennings v. Garrett*.[439] In this last decision, Blishen J. noted the existence of diverging opinions in case law on the topic of long-term supervised access, but sided with the view that if supervised access is appropriate it should remain an option even if the order would be for an indefinite or longer-term period. The rule is to consider what is in the best interests of the child, not to place undue weight on what are considered to be the rights of the access parent. Long-term supervised access may, indeed, be in the best interests of the child in some cases, as the decisions above demonstrate, and it should not be dismissed as an option if there are serious concerns.

Alternative Solutions:

Other jurisdictions have their own methods of enforcing access. Michigan has a statutorily created agency called "Friend of the Court" which operates to enforce child support obligations as well as custody and access orders. While this system has its own problems with funding and training, it is an organization that parents can complain to if a violation of an access order occurs. The Friend of the Court contacts the breaching parent and determines the appropriate response, which can include initiating contempt proceedings. Bailey recommended the creation of similar organizations in Canada's jurisdictions. This could reduce the necessity for police involvement, which the *Patterson* and *Ward* decisions note can have a negative impact on children. It would also take the burden off the woman to contact her abuser directly when he is breaching the access order because it would be the intervening agency contacting him upon receipt of a complaint. Since this agency would initiate the contempt proceedings where appropriate, it would reduce the availability of contempt motions as a forum for legal abuse. Even if the Michigan model is not followed precisely, it would likely be beneficial to the provinces to create these agencies (even if they are created as separate branches to Children's Aid Societies) which could reduce the need for parents to repeatedly turn to the court system in the face of access issues.

"No access" is not typically ordered, supervised access being preferable to the courts if it is practical. In *Jennings*, the Court distilled seven factors commonly considered by courts in terminating access:[440]

- Long-term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and/or fear.

[439] *Jennings v Garrett*, 2004 CarswellOnt 2159.
[440] *Ibid* at para 135.

- A history of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child and/or presents a risk to the child's safety and well-being.
- Extreme parental alienation which has resulted in changes of custody.
- Ongoing severe denigration of the other parent.
- Lack of relationship or attachment between noncustodial parent and child.
- Neglect or abuse to a child on the access visits.
- The expression of older children's wishes and preferences to terminate access.

21. Using Communication Tools and the Parenting Coordinator Role to Continue Bullying

As noted above, abusers may seek to use the parenting coordinator (or someone operating in a similar role) in a way that harasses the woman. Abusers may engage in this strategy before or after the trial. He may also use the communication tools put in place in a harassing and abusive manner.

In *Wreggitt v. Belanger*,[441] the Court noted that the father's tone and attitude in the communication book was controlling and argumentative,[442] becoming more angry and sarcastic over time.[443] Similarly, in *Sportack v. Sportack*,[444] the father used the communication book to write derogatory comments about the mother rather than to convey information about the children. In other situations, the abuser simply refuses to use a communication book, as the father did in *Gordon v Gordon*.[445]

In spite of these cases, a communication book might still be helpful because the woman will not have to receive repeated emails from her abuser, which can reduce stress. The book should be transferred in a locked pouch so the children cannot read what has been written in it. The woman should be advised to photocopy the contents of the book regularly in case the abuser removes pages or withholds it.

Although a communication book represents one option, email is still frequently used as the primary communication method. If the abuser is using email as part of his attempt to maintain power and control over the woman, this may be overwhelming for her. It can be helpful to provide her with some tips for managing this form of communication: [446]

[441] *Wreggitt v Belanger*, 2000 CarswellOnt 2665.
[442] *Ibid* at para 16.
[443] *Ibid* at para 19.
[444] *Sportack v Sportack*, 2007 CarswellOnt 449.
[445] *Gordon v Gordon*, 2015 ONSC 4468.
[446] These tips drawn from Luke's Place materials and resources.

- That she only communicate with her abuser when necessary, rather than engaging in casual email correspondence.
- That she always be professional and polite, regardless of the tone he takes with her. While she may be justifiably frustrated with something he is doing, her emails may later be taken out of context.
- That she always be concise and direct in her communication, setting out the reason for the email and indicating what response she is looking for. If time is a factor, this should be indicated to him.
- That she BCC herself on every email she sends to her abuser and save these emails in a particular folder so they are easy to find later.
- That she consider creating a separate email account which she either uses specifically for communication with him or to which she transfers all her other contacts. This will allow her to check her regular emails without the anxiety of potentially coming across an abusive email.
- That she turn off phone notifications for the email address used by her abuser.
- That she make a plan for how often she will check her email and at what time of day she will check it (potentially when there are no other distractions and her emotional state will not affect the children). She can let her former partner know how often she will be checking her email, which may influence how frequently he attempts to contact her. She can also create a plan for how often she will respond. Not responding immediately may give her the time to let her emotions settle and formulate the appropriate response.
- She can tell her former partner in a professional manner that she will not be responding to irrelevant matters and that she will be keeping a record of all communications.

A final tip is to never use the "reply" button in email communications. Using the reply function creates a thread of previous communications that can be edited by the abuser, who may then attempt to use this altered thread in court. A woman can protect herself against this tactic by creating new response emails with the subject of: "in response to your email of [date]."[447]

A lawyer should carefully consider any communication provisions before the woman consents to an order. If the woman finds herself obliged to respond to all of his communications within a certain time frame, without the restriction that communication be limited to matters related to the child(ren), the woman may find herself forced to respond to a multitude of harassing and abusive emails from her former partner.

[447] This tip also drawn from Luke's Place materials and resources.

Communication and Custody:
While these communication tips may help the woman manage communication, joint custody should not be ordered where the parties are incapable of communicating or cooperating.

> Joint custody requires a basic level of respect and civility between the parents so that meaningful communication regarding the child can occur. Both parents must have the opportunity to express their views and have meaningful input into the decisions that have to be taken. It is only in this way that the best interests of the child can be fostered. However, communication of this caliber will not occur in an environment of verbal abuse or intimidation. What happens is that the views of the bullying parent prevail, whether or not they are in the child's best interests. As well, the child learns that bullying and intimidation are valid forms of interaction that can produce the sought-after results. This is not good modeling for a child. Finally, no parent should be expected to subject himself or herself to the bullying of a former spouse in the name of joint custody. The integrity and dignity of both parents must be protected; not to do so jeopardizes their ability to parent effectively.[448]

Conclusion

Summary

Family situations change and the system itself is meant to be flexible in order to adapt to these changes that occur within the family over time. It is for this reason that family court proceedings are particularly open to be repeatedly litigated. Yet, as Lenkinski, Orser and Schwartz have noted, this flexibility can be used by the legal bully as a weapon of abuse. Not only is this more likely to occur when there is a history of woman abuse in the relationship, the effect of legal abuse can be more severe, potentially forcing the woman to return to her abuser, placing her in unsafe proximity to him during access exchanges, and repeatedly forcing her to face her abuser at the many court appearances. The court system must begin to respond effectively to deter legal abuse. The implementation of the following recommendations is suggested, hoping that their implementation will allow the system to better manage a legal bully.

Recommendations

Procedural

1. Identify cases involving woman abuse at an early stage of the proceedings, using a screening process developed and implemented by violence against women experts.

[448] *Cameron v MacGillivray*, 2005 CarswellOnt 8095 at para 48.

2. Avoid using the term "high conflict" as the category label for cases screened through this process.

3. Where an abuse history has been identified:
    a. Seek detailed and specific orders.
    b. Use focused hearings to deal with the issues expeditiously.
    c. Short page limits for conference briefs should not be imposed.
    d. Case management by one judge should be a requirement.
    e. The "friendly parent rule" should not be applied.
    f. The parties should not face pressures to mediate.
    g. The Court must respond promptly to abusive litigation strategies.
    h. Factums should be allowed for short motions as well as long motions.
    i. Judges should not easily accede to requests for recusal from an abusive litigant.
    j. The appointment of a parenting coordinator may be inappropriate.
    k. Joint custody should be presumed to be inappropriate.
4. Where the abuser is not represented, judges should inform abusive litigants of the potential for costs as a penalty early on in the proceedings.

5. The abuse survivor should not be made to bear any burden of discovery when there are/were shortcomings in the abuser's disclosure, nor should there be any burden to test the accuracy of what is disclosed.

6. The creation of barriers at the filing counter, that are not found in any Direction or in the Rules, should be discouraged particularly in relation to the ability to file an emergency motion when a lawyer cannot be accessed.

7. The role of *amicus curiae* should be more effectively and consistently used to prevent the abuser from directly cross-examining the woman during trial.

8. A history of abuse should be treated as an indication of high risk for noncompliance with a court order. This should be a factor considered by the judge if police enforcement is being contemplated.

Provincial

9. A clear legislative guide must be developed for judges, which details how the presence of an abuse history is relevant to determinations of the best interests of the child and how it affects the philosophy of maximum contact.

10. Legislation should be created in Ontario which specifically lists abuse as a factor which negatively affects the ability of the abuser to parent, and which mandates that this is a factor which must be taken into account in custody and access determinations.

11. A definition of family violence should be adopted in Ontario that is informed by research into the wide variety of abusive tactics employed by abusers, including emotional, psychological and legal abuse.

12. Reforms must be made to the Legal Aid program so that it is adequately funded and provides a number of hours to abuse files that reflects their complexity and also the tendency for abusers to engage in tactics of legal abuse.

13. Legal Aid assessments should only take into account what income and assets the woman is able to safely and readily access.

14. Law Societies in Canada should create lists of considerations meant to guide lawyers in exercising their discretion when deciding whether to represent an abuse survivor where the abuser has attempted to conflict out local lawyers.

15. Training on woman abuse should be made available by the Ministry of the Attorney General for all persons working in the family court system. Increased continuing legal education opportunities should also be made available for lawyers, developed with the input of violence against women advocates.

16. A set of guidelines should be created which clarifies what constitutes "reasonable judicial accommodation" to a self-represented litigant.

17. The use of new and creative terms for custody and access arrangements should be discouraged in these cases until there is widespread acceptance of the meanings of these terms amongst institutions (medical, educational etc.).

18. Reform legislation to caution Family court professionals against recommending face-to-face mediation in cases with an abuse history.

19. It must be reinforced to persons working in the family court system that parenting coordinators, counselors etc. cannot be appointed absent the consent of the parties.

20. A history of abuse should be a recognized factor for judges considering whether to resort to Rule 2.1 of the *Rules of Civil Procedure* in the face of frivolous motions.

21. Adequate funding and training must be provided to and within the Family Responsibility Office to help ensure that abusers are meeting their support obligations.

22. Guidelines should be created in Ontario which detail when it is justified to withhold access.

23. A court-connected agency or system should be created for the enforcement of access orders and which evaluates complaints of breaches of an access order.

24. The Family Court Support Worker Program and training initiative should be expanded and made permanent so as to provide reliable support to women who have survived abuse and are proceeding through family court.

25. Protocols should be developed within family court for working with Family Court Support Workers and supporting their advocacy.

Safety

26. Adequate supports for facilitating safe access need to be put in place for women residing in rural communities who have serious safety concerns.

27. Long-term supervised access should not be dismissed as an option where there are safety concerns if the only reason for dismissing supervised access is the proposed duration of it as a solution. The standard is the best interests of the child.

Family Court Professionals

28. Law schools should integrate curriculums that expose law students to the dynamics of abuse and violence against women.

29. Develop best practices to ensure safety is paramount for the woman and her children throughout the court process (for example, keep her address off court documents whenever possible if he does not know where she is living.

30. Be able to provide appropriate community referrals.

31. Discuss with the woman how the abuser is likely to respond to a certain legal action. She knows her abuser better than anyone and may be able to predict responses that no one else would be able to anticipate.

32. Learn strategies for working with clients affected by trauma and PTSD.

33. Take advantage of continuing education opportunities focussed on understanding abuse and the impact of trauma.

34. If the children are in the abuser's care, or access is being requested by the abuser, engage in a risk assessment focused on the likelihood of abduction and potential removal from Canada.

35. Stress the voluntariness of mediation and the requirement that she consent to the appointment of a parenting coordinator, counselor or assessor.

36. Carefully consider the communication provisions of a proposed consent order before it is signed, paying attention to whether or not the abuser would be able to manipulate them.