

Spousal Abuse, Children and the Legal System

Final Report

For

Canadian Bar Association, Law for the Futures Fund

March, 2001

By

Linda C. Neilson

Presented on behalf of the members of the

Spousal Abuse, Children and the Legal System Research Team

Of the

Muriel McQueen Fergusson Centre for Family Violence Research,
University of New Brunswick

Spousal Abuse, Children and the Legal System Research Team Members and Contributors:

Barbara Baird

Cynthia Davis

Timothy Gallagher

Susan Gavin

Michael Guravich

Susan McAllen

Linda Neilson

C. James Richardson



Table of Contents

Acknowledgements	i
Executive Summary	ii
PART I - Research Goals and Theoretical Orientation	1
PART II - Research Methods and Data Collection	5
A) The Research Team	5
B) Methodology and Sources of Data	6
(1) Analysis of Reported Cases	6
(2) Court File Analysis	7
(3) Collection of Interview Data	8
(4) Survey of Lawyers	10
(5) Summary	11
C) Dissemination of Data and Future Plans	12
PART III - Situating the Research in Social, Political and Legal Context	
A) Social Context	14
B) Law in the Context of Research on the Interests of Children	18
C) Political Context	21
PART IV - Assessing Abuse	
A) Introduction	24
B) Gender and Reporting	24
C) Conceptual Issues: Objective Acts v Social Context	30
D) Expert Evidence	40
E) False Claims	44
F) Summary	49
PART V - Why Does Abuse Matter in Child Custody and Access Determinations?	
A) Introduction and Discussion	51
B) Continuing Exposure of the Children to High Levels of Conflict - The Patterns	

1) Continuing threats and intimidation	56
2) Continuing attempts to monitor and control	
3) Children becoming the targets of redirected abuse	
4) Involvement of the children in the conflict between the parents	
5) and 6) Multiple Applications to the Courts and, or Child Protection Agencies	
C) Conclusions	68

PART VI - Law in Theory/Law in Practice

A) Introduction	70
B) Custody	70
C) Denial and Restrictions on Access	78
D) Supervised Access	83
E) Restraining Orders and Exclusive Possession of Marital Home	86
(1) Restraining Orders	86
(2) Police	87
(3) Marital Home	89
F) Child Protection	90

PART VII - Law in Theory/Law in Practice: The Legal Agents (Lawyers, Mediators, and Judges)

A) Introduction	99
B) Lawyers	
(1) Introduction	99
(2) Partner Abuse Siphoning Process	103
(3) Lawyers as Generic Settlement Brokers	108
(4) Lawyers Delay and Jurisdictional Issues	112
(5) Lawyers as Advocates	117
(6) Final Stages of the Partner Abuse Siphon	119
(7) Comments about Judicial Perspectives	124
(8) Lawyers Discussion and Concluding Comments	126
C) The Mediators - Theory and Practice	
(1) Mediation and Abuse: Discussion of issues	132
(2) Mediation and Abuse: Conceptual Issues	137
(3) Mediation and Current Standards of Professional Practice	139
(4) Mediation Practices in New Brunswick Theory and Practice	142
(5) Abuse Screening - Mediation Services in New Brunswick	146
(6) Private Non-Department of Justice Family Mediation	147
(7) Mediation Research Findings New Brunswick	149
(a) Research Findings Court Files	151
(b) Research Findings Interviews	155
(8) Mediation and Abuse - Recommendations	171

(9) Court Social Worker, Non Mediation Settlement Services	173
(10) National Consultation Settlement Standards	175

D) Concluding Comments, Legal System: Lawyers and Mediators	176
--	------------

PART VIII - The Subjects of Law: Parents and Children

A) Introduction	181
B) Rights, Responsibilities and Joint Custody	181
C) Access and Denial of Access in Partner Abuse Cases	198
D) Exercising Access Responsibly	215
E) Enforcement of Responsible Access	224
F) Parents and Children - Conclusion and Discussion	232

PART IX - DISCUSSION AND RECOMMENDATIONS

A) Introduction	236
B) Lawyers Respond to Bala et. al. Recommendations	236
C) Report Recommendations With Respect to Legislation	240
D) Legal Practice Issues:	249
E) Collateral Issues:	251
(a) Experts:	
(b) Mediation:	
(c) Supervised Access:	
(d) Counselling and Treatment Programs:	
(e) Parent Education:	
(f) Research and Monitoring:	
F) Recommendations Specific to the Province of New Brunswick:	256

References	259
-------------------	------------

Appendices

Appendix 1: Abstract, book chapter

Appendix 2: Financial Report

Appendix 3: Indicators of Danger

Appendix 4: Depiction of Partner Abuse Siphon

This report is dedicated to children who have witnessed or experienced family abuse and particularly to Pauline Gallant in memory of her sons, Andrew and Lukas

Acknowledgements

Of the multiple sources of data utilized to prepare this report, none were more important than the experiences and perceptions of the parents. Parents shared their legal experiences and discussed with us the impact of legal decisions on their own and their children's lives. We owe much to the men and women who participated in this study and shared freely with us painful and intimate aspects of their lives.

Special thanks are due also to Michel Carrier and the Law Society of New Brunswick for its assistance to the research team in the distribution of questionnaires and also to the 145 lawyers who took time to respond to our questionnaire survey on abuse issues.

The Province of New Brunswick, Departments of Justice and Health and Community Services, allowed professional employees to contribute time to this project as research team members. Moreover, Department of Justice regional managers and family court staff in each of the three jurisdictions visited made us feel welcome and contributed office space and the use of office facilities.

The Muriel McQueen Fergusson Centre for Family Violence Research at the University of New Brunswick (Rina Arseneault, Deborah Harrison, Mary Lou Stirling, and Ann Cameron) contributed organizational assistance, meeting rooms and facilities, and, generally, provided information and organizational support.

Special thanks are due to particular research team members: Timothy Gallagher, who conducted many of the interviews with male interview participants; Susan Gavin, who assisted with public presentations and in the preparation of this report; Alison Charnley, who helped us to understand child welfare issues associated with partner abuse cases and who took the lead in developing research protocols; Cynthia Davis who managed communications within the Department of Justice; C. James Richardson, who contributed guidance and assisted with collection of data, particularly in the early stages of the project; and Michael Guravich who translated questionnaire responses and answered questions about the evolution of the Domestic Legal Aid Program.

Thanks are due also to Peggy English for editorial suggestions.

We also received valuable help from students, more particularly:

Judith Begley, then a law student at the University of New Brunswick, provided assistance with the collection of data from reported family law cases. Tina Oates and Kiran Pure, who at the time were psychology students, working at the Muriel McQueen Fergusson Centre for Family Violence Research, prepared an annotated bibliography of psychological research; Tina Smith (Petors), a PhD student in Sociology, attended

research team meetings and recorded minutes; Roanne Thomas-MacLean, a Ph.D. student in Sociology, and Korinda McLaine, a law student, transcribed a number of the interview tapes; Elaine Jones, a Masters Student in Sociology, organized research team meetings, prepared minutes of meetings, conducted interviews with participants and assisted in collection of court file data; Suzanne Blaney-Tremblay, a BBA/Law In Society graduate, now a law student and Cathy Rogers, MA in Sociology, assisted with the collection of court file data; finally Lynn Gunn, a Ph.D. student in Sociology, conducted interviews and assisted with the entry of court file data.

Finally and in closing, all members of the Spousal Abuse Research Team collaborated on the design of the study, attended meetings, assisted with the development of this research study and the research instruments, helped with analysis of data and made policy decisions.

Research Team members:

Project coordinator:

Dr. Linda C. Neilson, Lawyer and Sociologist, Department of Sociology, University of New Brunswick, P. O. Box 4400, Fredericton, New Brunswick, E3B 5A3 458-7437.

Research Team Members:

Barbara Baird, Barrister and Solicitor, Private Practitioner

Alison Charnley, Lawyer and Social Worker, Child Protection Services, Health and Community Services, Province of New Brunswick

Cynthia Davis, Lawyer, Director Research and Planning, Department of Justice, Province of New Brunswick.

Timothy Gallagher, Counsellor, Individual and Family Counselling Services, Fredericton, New Brunswick.

Susan Gavin, Family Court Social Worker and Mediator, Department of Justice, Province of New Brunswick.

Michael Guravich, Operational Consultant, Program Support Branch, Family Court Social Worker and Mediator, Department of Justice, Province of New Brunswick

Dr. C. James Richardson, Sociologist, Department of Sociology, University of New Brunswick

Susan McAllen, Sociologist, lecturer University of New Brunswick until 1999.

Executive Summary

Despite years of professional, academic, public education and discussion about family abuse and its dangers for women and children, little seems to have changed for the better in the legal system, in practice. Indeed the weight of the evidence suggests that the dangers for children are increasing with increasing politicisation of rights claims associated with parenting. While, theoretically, reported cases suggest increasing awareness among at least some judges of partner abuse and the implications for children, closer examination reveals that such understandings are not always mirrored in legal praxis. We found limited, albeit some, evidence of gender bias or discrimination in child custody and access cases and much evidence that responsible parenting during access visits is more an exception than a rule in partner abuse cases. Custodial parents are reporting that their children are being harmed by contact orders and agreements; they ask for a mechanism to protect their children, and the children of others, from further harm.

In connection with partner abuse generally, we found some evidence of false or exaggerated claim in isolated cases but little evidence to support the notion that exaggerated or false claims of partner abuse are common in child custody and access cases. Interview data - about patterns and details of partner abuse in former relationships - were consistent in their entirety with allegations and statements about partner abuse found in court files. And reported cases, court files and lawyers all disclosed lower rates of claims of partner abuse by separating and divorcing couples than researchers report for the same population.

In terms of legal assessments of abuse, reported cases, court files, lawyers and clients all indicate conceptualisations of abuse that focus on action and intention with incomplete analysis of social context. Although assessments of social context do not preclude the experiences of abused men, failure to assess context (history of the dynamics of the relationship, including the patterns and severity of prior abusive behaviors and the psychological and physical consequences to the recipient) will commonly produce false interpretations and assessments - in favor of abusive partners. This issue is particularly important in light of another finding: that survivors of long-term abuse commonly report incidents of their own violence at the point they decide to separate from abusive partners.

All data sources indicate limited understandings, within the legal system, of the dynamics and implications, especially for children, of partner abuse. While, theoretically, experts are able to advise lawyers and judges about these matters, the involvement of experts in partner abuse cases is rare and indeed financial information in court files indicates that most families involved in such cases do not have the resources necessary to hire experts.

While reported cases, court files, lawyers, clients all indicate that lawyers and judges do in fact consider partner abuse relevant and important when making child custody decisions, the same data indicate it is considered far less important in access or contact matters. Instead, maximum contact seems to be considered a right. Thus it is assumed that access is in all children's best interests. The result is that there is often little enquiry or scrutiny of the benefits and or dangers of access for the individual child. Presumably, it is assumed that spousal/partner abuse will stop with separation and that separation will protect the child from continuing conflict between the parents, thereby

enabling her or her to enjoy the benefits of positive relationships with both parents. Yet data from this and other studies suggests this may be more a myth than a reality in partner abuse cases. Instead, parenting practices, conflict patterns and abusive behaviours prior to separation tend to continue after separation or divorce. Although not every parent who has abused his or her spouse will abuse his or her children and, or will fail to parent responsibly, the study illustrates dangers, for children, of assuming this will be the case without scrutiny and enquiry.

It is important to note that contact agreements and orders in partner abuse cases are more commonly the result of parental agreement than judicial decision, after a contested hearing. Parents involved in partner abuse cases agree to provisions they do not consider beneficial for their children. Why?

We have identified a number of factors that seem to be preventing the legal system from always responding to the needs and interests of children in partner abuse cases as effectively as one might hope. First is that parents (both men and women) report feeling pressured (by limited access to financial resources or by professionals) to abandon claims falling outside that usual for most families. Thus survivors of abuse, primarily women, spoke of pressures to abandon allegations of abuse and claims for denial and or restrictions on access - claims falling outside that usual for the 'average' family. Similarly, men spoke of pressure to abandon claims for joint and or full custody. Data in the court files were consistent with these claims.

Related to this is the finding that information about abuse and irresponsible parenting is excluded or omitted at each stage in the legal process: during lawyer-client interviews, during legal interpretations of those interviews, during preparation of court documents, during negotiations between lawyers, and during the presentation of evidence to judges. Thus, by the time cases reach judges, for decision or confirmation of 'consent' orders, much of the evidence of abuse and irresponsible parenting has been screened from the legal process.

Yet we found glimmers of hope too. Parents, whose lawyers offered individual advocacy and support, valued and appreciated those services. When parents were critical, they complained of being stigmatized by gender, of not being offered individual support

or advocacy, of deal making and trading or abandonment of rights and entitlements. Parents sought instead to feel heard and respected as individuals, they sought individual, partial support, both personal and legal, and rigorous pursuit of entitlements, particularly with respect to the best interests of their children. When those services were offered, parents reported appreciation. Similarly parents were less apt to criticize more apt to value and appreciate mediation when it was facilitative and interest based not settlement driven and directive.

In connection with mediation, although the policy in New Brunswick is that Court Social Workers do not offer mediation in partner abuse cases, court files and interviews indicate the prohibition has not always been respected in practice. Survivors of abuse

who experienced face-to-face mediation were highly critical of the process. Yet non-mediation, shuttle negotiation processes may provide opportunities for non-adversarial settlement, with few of the risks of face-to-face facilitated mediation.

Essentially, men and women's complaints about lawyers and mediators were the same: complaints were of settlements that were standard rather than tailored to individual needs and interests, settlements that were imposed, not facilitated. The study illustrates the need for improvement in both legal and mediation services in partner abuse cases. Recommendations for change are discussed in Part IX.

Clearly children benefit from love and support of parents of both genders provided both parents are able and willing to offer responsible parenting and care. Thus, in the absence of continuing abuse when both parents provide responsible care, and are able to cooperate with each other without generating conflict, shared parenting and, or joint custody seem reasonable options. Our study indicates, however, that cases involving patterns of partner abuse require caution and careful scrutiny of the benefits and dangers of contact for the individual child.

Information for this three-year study was gathered from multiple, linked sources. First, we reviewed 5,170 reported family-law cases throughout Canada to ascertain judicial perspectives on partner abuse and the best interests of children. Next, because most family law matters are decided in private negotiation or mediation processes, not by judges, we examined the settlement practices of lawyers and mediators - from the perspectives of parents. To that end we examined 2,138 court files in three jurisdictions in New Brunswick, surveyed members of the Law Society of New Brunswick, and interviewed 74 fathers and mothers involved in such cases.

Spousal Abuse, Children and the Legal System

Final Report

**Muriel McQueen Fergusson Centre for Family Violence
Research, University of New Brunswick**

Funded by: Canadian Bar Association, Law for the Futures Fund

PART I

Research Goals and Theoretical Orientation

This project was designed collaboratively by a research team composed of academics and practicing professionals from the legal, social-work, psychology, mediation, and sociology disciplines, whose work with abused families lead them to be concerned about legal system responses to families, particularly children, in spousal/partner abuse cases. The project co-ordinator, Linda Neilson, is a lawyer and Sociologist. Other members of the Research team have included: Alison Charnley, Lawyer and Social Worker, Child Protection Services, Health and Community Services, Province of New Brunswick; Cynthia Davis, Lawyer, Director Research and Planning, Department of Justice, Province of New Brunswick; Timothy Gallagher, Counsellor; Susan Gavin, Family Court Social Worker and Mediator, Department of Justice, Province of New Brunswick; Michael Guravich, Operational Consultant, Program Support Branch, Family Court Social Worker and Mediator, Department of Justice, Province of New Brunswick; C. James Richardson, Sociologist; Barbara Baird, Barrister and Solicitor, Private Practitioner; and Susan McAllen, Sociologist. Research Team members Susan Gavin, Alison Charnley, Cynthia Davis, Timothy Gallagher and, more recently, Michael Guravich, played key roles and made major contributors to this project.

The Spousal Abuse, Children and the Legal System study has its foundations in an analysis of partner abuse cases involving dependent children conducted by Linda C. Neilson in 1997, funded by the University of New Brunswick Academic Development Fund. "Spousal Abuse, Children and the Courts: The Case For Social Rather Than Legal Change,"¹ discusses some of the findings from that analysis. More particularly, the article traces, in historic context, the tendencies of family law to reflect and reinforce

¹ L. Neilson (1997) "Spousal Abuse, Children and the Courts: The Case For Social Rather Than Legal Change," Canadian Journal of Law and Society 12 (1): 101-145.

social ideologies, structures, powers and gender relations that have dominated the social order from time to time. Historically, men and male perspectives have dominated the social, political and thus legal arenas but more recently women have acquired social and legal power too, primarily in the domain of family. Yet inequities remain. The article concludes, for example, that conceptualizations of abuse found in the discourse of reported cases discloses a lack of legal understandings of the dynamics of abuse in terms of gender and social context.

"Spousal Abuse, Children and the Courts" examined the evolution of law in family abuse cases as disclosed by the rhetoric of law in reported legal cases. The Spousal Abuse Research Team project, funded by the Canadian Bar, Law for the Future Fund, progressed beyond an examination of the rhetoric of law to an examination of the social practices of law. The legal system is composed, not only of law and legal principles, but also of people who perform social and professional functions. The contention is that, in order to understand the nature of law in practice, it is necessary to consider, not only law and legal principles, but also the attributes of legal system itself and relationships among those who participate in it. The relationships and experiences of parents with mediators, lawyers and judges may be as important as legal rules and principles to an understanding of the nature of law in practice in abuse cases. This study is not about legal discourse; it is about law in practice, law in action and result, from the perspective family law clients.

This type of inquiry is particularly important, when considering the performance of the legal system in abuse cases, because researchers have documented that law and legal practice in such cases do not necessarily operate in the same manner. For example,

the Nova Scotia Law Reform Commission concluded, in 1995, the failures of law to protect family members from abuse in Nova Scotia lay, less in faulty legal rules or principles, than in faulty or incomplete interpretation and delivery of law by lawyers, judges and court staff in practice.² In other words it is factors such as professional attitudes, social relationships among professionals, workload pressures and access to resources, not just formal law and legal principles, that produce legal results in practice.³ Consequently the focus of this study was law in social practice, as experienced by clients, juxtaposed with law in theory as disclosed in statute law and reported cases.

Despite the theoretical rhetoric of law, most family law matters are decided in private negotiation and mediation processes, not in public forums. Consequently, legal settlement processes were another major focus of this study. Indeed, one of the most powerful trends in family law today is encouragement of settlement. The Research Team thought it important, therefore, to discover if families were finding settlement processes helpful in resolving their conflicts or if they were finding, instead, that their needs and concerns were being brushed to one side in the interests of processing cases to resolution. Whose interests are being served by settlement? Do settlement processes benefit family members? Are the settlement interests of families and the legal system complementary or in conflict in abuse cases? What are the costs and benefits of settlement, from the perspectives of the parents of children?

The ultimate goal was to provide an empirical base from which to provide information to legal professionals about procedural and substantive changes in law that

² Law Reform Commission of Nova Scotia, From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (February 1995) - available also full text on the internet: <http://www.chebucto.ns.ca/Law/LRC/violence2.html>

³ These findings lend support to D. Black's theoretical analysis of the legal system. D. J. Black Sociological Justice (New York: Oxford University Press 1989). For similar findings, see also: H. Rhoades, R. Graycar and M. Harrison (1999) Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations, Interim Report (Sydney: Australian Research Council and Family Courts of Australia) also (2000) Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations Final Report. Interim Report: http://www.law.usyd.edu.au/Research_Family_Court.html Final Report: <http://www.familycourt.gov.au/html/fla1summary.html>

will help to safeguard the needs and interests of children and family members when partner abuse is alleged.

PART II

Research Methods and Data Collection

A) The Research Team:

Linda Neilson, the project co-ordinator and primary author of this report, collected, analyzed and presented most of the data collected during this project on a pro-bono basis. Moreover, research team members, particularly Susan Gavin, Timothy Gallagher, Michael Guravich, Alison Charnley, C. James Richardson and Cynthia Davis, offered freely their guidance, time and expertise. Research team member, Susan Gavin, actively participated in the preparation of this report. Although limited funds extended the duration of this project, these donations of time allowed the Research Team to extend the research funds far beyond what would ordinarily have been the case.

The project did, however, provide employment and research experience to a number of students. More particularly, Judith Begley, a law student at the University of New Brunswick, provided assistance with the collection of data from reported family law cases. Tina Oates and Kiran Pure, of the Muriel McQueen Fergusson Centre for Family Violence Research, prepared an annotated bibliography of psychological research; Tina Smith (Petors), a PhD student in Sociology, attended research team meetings and recorded minutes; Roanne Thomas-MacLean, a Ph.D. student in Sociology, and Korinda McLaine, a law student, transcribed a number of the interview tapes; Elaine Jones, a Masters Student in Sociology, organized research team meetings, prepared minutes of meetings, conducted interviews and assisted in collection of court file data; Suzanne Blaney-Tremblay, a BBA/Law In Society graduate and Cathy Rogers, a graduate student in Sociology, assisted with the collection of court file data; and Lynn Gunn, a Ph.D. student in Sociology, conducted interviews and assisted with the entry of court file data.

B) Methodology and Sources of Data:

Data were collected from multiple sources thus allowing comparison of linked data. More specifically, our coding system allowed the researchers to link interview data with interviewees' court file data. Stories told during the interviews could be compared to statements made in affidavits and other documents found in court files. Consequently, it is possible to document the extent to which the interview data were corroborated (or not corroborated) by court file data. A survey of lawyers provided information about the legal profession's perspective on various issues arising from analysis of court-file and interview data. When data from all three sources (lawyers, court file documents, and client interviews) corroborate each other, this increases the likelihood that the data accurately describe the matters under examination.

Few studies of abuse and family law have included analysis of linked data from multiple sources. Sources and connections among data within this study are discussed below.

B) (1) Analysis of Reported Cases:

As mentioned earlier, L. Neilson began these inquiries by reviewing 5,170 family law cases reported in the Canadian Reports on Family Law between 1983 and 1997 in order to identify judicial practice and reasoning when judges make child custody and access decisions in the face of allegations of abuse between parents or partners. Full discussion and analysis of those cases can be found in L. Neilson. (1997) "Spousal Abuse, Children and the Courts: The Case For Social rather than Legal Change" Canadian Journal of Law and Society 12(1): 101-145. Reported cases, however, provide but limited information about how family law is practiced and experienced by clients. Fewer than 4 % of Canadian divorces, involving dependent children, are finalized by

contested child custody or access hearing.⁴ The vast majority of legal disputes about the future care of children are decided, not by judges, but by the parents with or without the help of mediators and lawyers in negotiation processes. Although the rulings of judges set the parameters for legal advice and the negotiation tactics of lawyers, judges do not decide most legal cases; still fewer cases are of sufficient legal importance to be reported in case law reports. Thus the realities of families turning to the legal system for assistance cannot be understood merely by analyzing reported cases.

B) (2) Court File Analysis

Consequently, between 1998 and 2000, the research team expanded its inquiries to include an examination of 2,138 randomly selected court files from three legal jurisdictions in New Brunswick.⁵ Between 10.3 and 17 percent of the files surveyed in those jurisdictions involved dependent children and contained allegations of spousal or partner abuse.⁶ Thus detailed data were collected from 289 files. Court files are not limited to cases decided by judges; they contain information about families who settle

⁴ Department of Justice, Custody and Access: Public Discussion Paper (Ottawa: Minister of Justice, 1993).

⁵ Family court files opened between 1992 and 1999 were examined in one court jurisdiction. In the other two jurisdictions we examined court files opened between 1994 and July or September of 2000. The difference in start date was largely the result of storage practices in the three courts. For example, in one jurisdiction earlier files were stored in a separate location. But partly too this was a research decision. With limited time and resources, we decided to concentrate on the more recently opened cases. We selected and examined every sixth file. When court files were missing from court filing rooms (usually because court staff or judges were working with the file), in order to avoid disruption of normal family court business, we selected the file with next court file number.

⁶ Ten point three percent of the files in Moncton, 13.1 percent of the files in Saint John and 16.97 percent of the files in Fredericton involved dependent children and contained allegations of spousal or partner abuse. For a discussion of the criteria used for inclusion, see Research Proposal submitted to the Canadian Bar Association, Law for the Futures Fund. See also: L. Neilson (2000) "Partner Abuse, Children and Statutory Change; Cautionary Comments on Women's Access to Justice" 18 Windsor Yearbook on Access to Justice 115-152. It is likely that the variations in percentage are reflective, at least in part, of differences in Court Social Worker abuse screening practices. See: L. Neilson and C. James Richardson (1996) Evaluation of the Domestic Legal Aid Program (Fredericton: Department of Justice). However, there are other factors too that could account for these differences, such as judicial preference for inclusion or exclusion of evidence of abuse in affidavits and local variations in legal practice in abuse cases by jurisdiction.

legal matters by agreement or consent. Yet court files are also limited.⁷ They contain documents outlining legal claims, affidavits filed in support of claims, documents providing some social and psychological information about families, documents detailing the specifics of orders and agreements, expert assessments, and, occasionally, transcripts of hearings but limited information about the reasoning behind the claims made or the agreements reached. And we learn little or nothing from the court files about how agreements and orders affect family members' lives after they leave the legal system. For that information, we turned to family members and the professionals who assisted them.

B) (3) Collection of Interview Data:⁸

We conducted semi-structured, in-depth interviews⁹ with 74 men and women who recently had been involved in high conflict/abuse family law cases.¹⁰ While most of our participants were mothers, 20 were fathers. In four cases we collected interview data

⁷ Lawyers responding to a Spousal Abuse, Child Custody and Access Research Team questionnaire survey in New Brunswick report that they do not always record particulars of abuse in legal documents, particularly if abuse is not directly relevant to the relief sought or prior negotiations have resulted in settlement.

⁸ When quotations are used, identifying details are sometimes changed in order to protect participants.

⁹ Most of the interviews were, with the participant's permission, tape recorded. Interviews usually took between 1.5 and 3 hours. Cost and geographic distance did not permit live interviews in all cases. Eighteen 'interviews' (9 female and 9 male) were conducted by email or telephone. The latter were not tape-recorded. Participants responding by email were emailed interview questions and were invited to respond. We found that email 'interviews' saved costs of transcription but that they lacked the spontaneity and, occasionally, the breadth of face-to-face interviews.

¹⁰ It is very difficult in studies of this nature to obtain high rates of participation. The first difficulty is that these parents are difficult to reach. They tend to be very mobile. Most do not own homes; they change residences often. More than fifty percent of our invitations to participate in this study were returned by the post office with a notice that the potential respondent had moved. Another problem, peculiar to our study, was that, during the course of our study, the post office in New Brunswick changed many of the postal codes and thus postal addresses in the jurisdictions we were examining. A second hurdle is that men and women who have survived high conflict and abusive relationships and the legal system choose to move on with their lives. One cannot blame them for not wishing to revisit unpleasant issues. Finally, we do not know and have no way of assessing reluctance to participate produced by fear of retaliation and, or by reconciliation with the other party. There are indications in that the court files that some of these couples reconciled but we have insufficient data to comment on frequency.

from both parents. In all but 23 instances we were able to link court file and interview data.¹¹

It is important to mention at this point that data from the interviews are qualitative, not quantitative, in nature. What this means is that no conclusions may be drawn from these data about the extent or frequency of the matters discussed. Indeed common sense tells us that it is likely that people unhappy with the legal system were more inclined to participate in this type of study than those without complaint. This does not mean, however, that the stories told in the interviews may be dismissed as isolated illustrations or examples.

First, many of the comments in the interviews are corroborated by patterns found in reported cases, in court file data and, or, in survey responses of lawyers. Second, there were common patterns in the interview data: men and women interviewed had similar comments and complaints. Third, much can be learned from the narrative of family law clients. To quote from Austin Sarat:

‘Narrative provides then one device for the ongoing critique of law. It also provides a vehicle for law’s renewal and regeneration, since it is in stories that the aspiration to justice is maintained and revitalized.’¹²

Narratives tell us how family law clients make sense of (or fail to make sense of) their legal experiences. Lawyers and mediators who understand client interpretations and perceptions of law will be better prepared to provide services clients want and need.

¹¹ Data are stored by code, not name. The coding system, known only to the project co-ordinator and, temporarily, to research assistants working directly under her supervision, was based on the names of the parties to these actions. This allowed us to link and compare court-file and interview data. Normally, we solicited participation from parties whose names appeared in our random survey of court files. We did, however, on one occasion solicit participation by newspaper advertisement. Consequently, we do not have court file data for 23 of the respondents who sought to participate as a result of that advertisement.

¹² A. Sarat (2000) "Pain, Powerlessness, And the Promises of Interdisciplinary Legal Scholarship: An Idiosyncratic, Autobiographical Account of Conflict and Continuity" The Windsor Yearbook of Access to Justice 18: 187-212 at p. 206.

Fourth are the issues of social power and control. Many authors, particularly feminist scholars,¹³ have commented that lawyers act as gatekeepers of narrative in the legal system. Lawyers decide what stories and information will be disclosed and presented in support of legal claims. This is particularly relevant in the context of this study because one of the common complaints of both men and women is that their lawyers did not present fully facts in support of legal claims, resulting in orders and agreements considered inequitable.¹⁴ It is important to understand parents' perceptions of control of evidence and the implications for children of not presenting complete evidence to judges if the legal system is to be made more accountable to the interests and needs of children.

B) (4) Survey of Lawyers

Finally, our fourth source of data was lawyers. On Behalf of the Spousal Abuse Research Team, the Law Society of New Brunswick mailed approximately 1,200 questionnaires on abuse issues to members of the Society. The response rate from lawyers was disappointing. Only one hundred and forty five completed questionnaires (42.6% female, 57.4% male lawyers) were returned. It is important to note, however, that many of the 1,200 members of the Society do not practice much, if any, family law. It is likely that many of the non-family-law practitioner members of the Society choose not to respond.¹⁵ About one half of those who did respond (46.2%) reported appreciable

¹³ For example: K. Bumiller, "Fallen Angels: The Representation of Violence Against Women in Legal Culture" (1990) 18 *Int'l J. Soc. L.* 125; L. Beaman-Hall, L. "Abused Women and Legal Discourse: The Exclusionary Power of Legal Method" *Canadian Journal of Law and Society* 1996 11(1): 125-140.

¹⁴ For similar findings and assertions, see: N. Seuffert "Lawyering for Women Survivors of Abuse" http://www.waikato.ac.nz/law/wlr/special_1996/1_seuffert

¹⁵ Twenty-nine lawyers did take the time, however, to respond that they could not answer the questionnaire

amounts of family law practice (over 21% of total practice) including 29.7 % who reported most of their legal practices being devoted to family law cases. Given that only a small percentage of the Law Society's membership specializes in family law, it is likely that responses from family law specialists are represented in the survey results but this can not be verified, so conclusions drawn from these data should be considered tentative, unless corroborated by interview and court file data.

B) (5) Summary

The research report that follows is thus derived from an analysis of linked data, on spousal abuse, children and the legal system, drawn from four sources:

- 1) reported family law cases;
- 2) Court of Queen's Bench, Family Division, court files;
- 3) Parents involved in family law cases; and
- 4) Lawyers.

C) Dissemination of Data and Future Plans of Research Team

Before reporting on findings, we would like to comment on our activities and plans in connection with disseminating information from this study.

Two articles have been published in connection with this project. Both have been published twice. The first, Neilson, L. (1997) "Spousal Abuse, Children and the Courts: The Case For Social rather than Legal Change" was first published in the *Canadian Journal of Law and Society* 12(1): 101-145, and then republished in J. Banfield (ed.) *Readings in Law and Society* (North York: Captus Press 1999). The second, " Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to

because they had not practiced family law.

Justice," may be found in either Windsor Yearbook on Access to Justice (2000) 18: 115 - 152 or the National Judicial Institute (2000) in New Brunswick Social Context Education Seminar: Rendering Justice in a Diverse Society. Currently, the research team is writing a third article for a text on family violence edited by the Muriel McQueen Fergusson Centre for Family Violence Research at the University of New Brunswick. Attached, as Appendix 1, is the abstract for the book chapter.

The Research Team is also actively involved in the presentation of research results to practicing professionals. In March of 2000, L. Neilson presented findings from this study to Provincial Court, Court of Queen's Bench and Court of Appeal judges in New Brunswick as a member of a family law panel on abuse issues organized by the National Justice Institute. In October of 2000, Susan Gavin and Linda Neilson presented conclusions from this study to mediators and lawyers at Family Mediation Canada's national conference in Hull.

The Research Team's future plans, subject to receipt of the necessary resources, include a book, another project to elicit the views of children in partner abuse cases, and a professional handbook for family law practitioners on abuse issues. We shall continue to mention the financial assistance of the Canadian Bar, Law for the Future Fund in future endeavors.

Finally, also in connection with dissemination of these data, the Research Team has an obligation to those who participated in this study (lawyers and family members) to report on our findings. Attached as Appendix 2 is a financial report from the University of New Brunswick on expenditures from the Law for the Futures Fund grant.

Approximately \$100 of the grant remains. We are seeking permission to retain those

funds to pay for some of the costs of binding, reproducing and distributing copies of this report.

Research team members have had limited time to assess the data and to collaborate in the writing of this report. Errors and omissions should be attributed, therefore, to Linda Neilson, primary author of this report.

PART III

Situating the Research in social, political and legal context

A) Social Context

Prior to discussing findings from this study, it is necessary first to discuss the social and legal context of the study. Family abuse is a major and formidable problem for children growing up in Canada today. 'Approximately 690,000 women and 549,000 men in Canada experienced some type of violence by a partner during the previous five years.' 'One half a million children have heard or witnessed a parent being assaulted during the five year period.'¹⁶ Thirty nine percent of Canadian women, who report being abused by their partners,¹⁷ report that their children witness the abuse.

The actual number of children witnessing their parents' abuse is undoubtedly under-represented in such reports since, commonly, parents are not aware of or minimize or deny children's presence during violent family episodes.¹⁸ Most children do not witness their parents' violence directly.¹⁹ Instead, they hear the shouting, hitting, crying or they observe the consequences the morning after. Researchers and psychologists tell us that children exposed to abuse and violence in the home and children exposed, on a long-term basis, to high levels of conflict between parents (or adult caregivers) are psychologically damaged in much the same way as children subjected to child abuse.²⁰

¹⁶ Statistics Canada, Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile 2000 Catalogue no. 85-224-X1E.

¹⁷ Statistics Canada (1993) Violence Against Women Survey. The terms 'spousal' and 'marital' partner include common-law as well as marital relationships. See also Statistics Canada (2000) note 16 at p. 16.

¹⁸ P. Jaffe, D. Wolfe and S. Wilson, Children of Battered Women (London: Sage 1990) p. 20; A. Stewart and A. Copeland, N. Chester, J. Malley, N. Barenbaum (1997) Separating Together. How Divorce Transforms Family. (New York: Guilford Press).

¹⁹ Jaffe et. al. (1990) *ibid.*, p.16.

²⁰ Jaffe et. al. (1990) *ibid.* p.20; R. Emery, Marriage, Divorce and Children's Adjustment (London: Sage, 1987); A. Stewart et. al., Separating Together (New York: Guilford 1997); A. Hetherington, M. Cox, and R. Cox, "Family Interaction and the Social, Emotional, and cognitive development of children following divorce" in V. Vaughan and T. Brazelton, (eds.) The Family: Setting Priorities (New York: Science and Medicine Publishers, 1979); G. Jacobson and D. Jacobson "Impact of Marital Dissolution on Adults and

Moreover researchers say that abuse is intergenerational: children who witness their parent's abuse as children are far more likely, than those who do not, to become abusive themselves or to choose and become victimized by abusive partners as adults.²¹

Indeed patterns of intergenerational transmission of abuse were documented in court files and discussed in interviews during the course of this study. It was not uncommon to find evidence in court files of abuse continuing for generations. Mental health reports and affidavits cited parents' physical and sexual abuse as children, their abuse of each other and their children as adults, and their children's abuse of each other, their parents and others as they matured. Five parents participating in this study commented that former partners had failed to learn how to love, nurture and parent their children because former partners' parents had been abusive and had had few parenting skills they could pass on to children. One participant, a mother, explained the social context of her abusive relationship in the following terms:

When I was a child, my stepfather beat my mother so bad and the, as a young girl, my husband he beat me too. This is now three solid generations of abuse. My Mom was the first, I was the second now I have my daughter. I'm not saying that anything happened to her but she learned to accept that kind of behaviour and I wanted her out of that house [with the former spouse]. Now my son is going to court for assault. I want to write a letter down and read it to the Judge. [I want to say]: 'Until you people realize how kids grow up and what we do to children [you will never understand abuse]. Do you not realize what learned behaviour is? Well let me tell you, [this boy is abusive and violent] because of what this child has learned throughout his life. That is the reason he's like that. So if you want to put

Children: The Significance of Loss and Continuity” in J. Bloom-Feshback and S. Bloom-Feshback (eds.) The Psychology of Separation and Loss (San Francisco: Jossey-Bass, 1987); J. Johnston, R. Gonzalez and L. Campbell, “Ongoing postdivorce conflict and child disturbance” (1987) 15:4 Journal of Abnormal Child Psychology 493-509; J. Johnston, M. Kline and J. Tschann, (1989), "Ongoing postdivorce conflict: Effects on children of joint custody and frequent access" in American Journal of Orthopsychiatry 59(4): 576-592; M. D. Pagelow (1990) "Effects of domestic violence on children and their consequences for custody and visitation agreements" Mediation Quarterly 7(4): 347-363; E. Peled (1998) "The experience of living with violence for preadolescent children of battered women." Youth and Society, 29(4): 395-431; M. Shepard, “Child Visiting and Domestic Abuse” (1992) 71 Child Welfare 356-367.

²¹ D. Dutton “Witnessing Parental Violence as a Traumatic Experience Shaping the Abusive Personality” in R. Geffner, P. Jaffe and M. Sudermann (eds.) Children Exposed To Domestic Violence (New York: Haworth Press 2000) 59-67; P. G. Jaffe, D. A. Wolfe and S. K. Wilson. Children of Battered Women. (Newbury Park: Sage 1990); H. Johnson. Dangerous Domains Violence Against Women in Canada. (Toronto: Nelson, 1996); D. Pepier, R. Catallo and T. Moore “Consider the Children: Research Informing Interventions for Children Exposed to Domestic Violence” in Geffner, Jaffe and Sudermann, *ibid.*; Al. J. C. O’Marra, Chief Coroner’s Counsel, Ontario, “May/Illes Inquest: A Case of Domestic Violence, Tab 2 in National Judicial Institute, New Brunswick Social Context Education Seminar Workshop Papers, Educational Materials for Judges, March 1-2, 2000; Statistics Canada, 2000 and 1993 notes 16 and 17; . Forty-one of the court files included in this study were child protection matters initiated by the province as a result of abusive relationships between children's primary caregivers. Many of these court files contained evidence of abuse continuing for generations.

someone in jail, put me and his father in jail, then you better put my step-parents and my mother in jail and then you better put their parents in jail - because we're all guilty' [of producing his violence]. I am turning 30 now and I ask [myself] where is my life right now. Oh my. I stopped blaming my Mother for all the terrible things that happened to me when I was a child because she was just a female and she just didn't know how to get out.

Another commented:

In his defense, I hate to defend him, but he came from very abusive home. His father was terrible man and carried on through his adult life. And yes, the way he behaves is learned behavior. He learned it at home. So he really, in all honesty, probably doesn't think there's anything wrong with his parenting skills because that's what he was taught. He knows no different. I told them that at social services and that's when they said break the circle because that will be your children. I said, 'No way!' I want my children to respect women, I don't want this. That's pretty much where my position [decision to leave the abusive relationship] came.

Not surprisingly, statistics indicate that rates of abuse are higher among those who separate and divorce than among those whose relationships remain intact.²² Researchers report that between forty and fifty percent of partners who separate or divorce disclose abuse or violence in the relationships they leave.²³ Younger couples disclose higher rates of abuse than older couples²⁴ thus many of the children involved in partner abuse cases are young. Yet relief from spousal or partner abuse does not come with separation or divorce. Families experiencing high levels of hostility, conflict and abuse before separation tend to continue that pattern after separation and divorce.²⁵ Since couples commonly turn to the legal system for help during the separation and divorce process,²⁶

²² Statistics Canada (2000) *ibid.* note 16.

²³ Statistics Canada (1993), note 17; N. Bala et. al. (1998) Spousal Violence in Custody and Access Disputes: Recommendations for Reform (Ottawa: Status of Women), p. 5; D. Ellis, Family Mediation Project Final Report (1994); Neilson and Richardson (1996) note 6, p. 42.

²⁴ Statistics Canada (2000) *ibid.* note 16, p. 15; H. Johnson (1996) note 21.

²⁵ E. Maccoby, C. Depner and R. Mnookin, "Co-parenting in the second year after divorce" in J. Folberg (ed.) Joint Custody and Shared Parenting (New York: Guilford Press, 1991) 132-152; R. Nelson, "Parental Hostility, conflict and communication in joint and sole custody families" (1989) 13:2 Journal of Divorce 145-157.

²⁶ Parents do not always turn to the legal system. We know, for example, that children, particularly young children, from separating and divorcing families come disproportionately from common-law unions. It is not uncommon for common-law parents, and parents who separate without divorcing, to reach agreements about child custody and support on a de facto basis, without the help of lawyers, other professionals or the

the legal system is in a unique position to provide interventions to discourage continuing abuse and the inter-generational transmission of abusive behaviors.

In order to do so, however, lawyers, judges and mediators will need to understand the nature of abuse and its effects on children. Although most research studies and statistical reports²⁷ indicate that rates of abuse against women in intimate relationships are much higher than the rates of abuse against men - once factors such as seriousness, frequency and consequences are considered - gender debates continue. Research studies purporting to prove the social seriousness of woman abuse within intimate relationships are pitted against research studies purporting to prove the equal frequency of abusive acts by women and by men. Women claim mothers and children need more legal protection from abuse; men claim that women have far too much protection already and that the legal system is biased against men and fathers. Meanwhile judges and parents, with the help of lawyers and mediators, must make decisions about the future care of children on a daily basis in individual cases. Statistical trends of abuse by gender are not always helpful because the legal system is vested with the responsibility to do justice in the individual case. Individual men, women and children do not necessarily have the same characteristics as those statisticians associate with most men, women and children.

B) Law in the Context of Research On the Interests and Welfare of Children

When mediators, lawyers, judges assist parents in individual family law cases, they do so in the shadow of the law, more particularly the provisions of the Divorce Act

legal system. Researchers are reporting that approximately 30 percent of separated parents have no agreement, private or public, concerning child support: N. Marcil-Gratton and C. Le Bourdais (1999) Custody, Access and Child Support: Findings From The National Longitudinal Survey of Children and Youth (Ottawa: Child Support Team, Department of Justice, Canada).

²⁷ Statistic Canada (2000), note 16; W. DeKeseready Four Variations of Family Violence: A review of the Sociological Research (Ottawa: Health Canada, National Clearinghouse on Family Violence, 1993); L. Tutty, "Husband Abuse: An Overview of Research and Perspectives" (Ottawa: National Clearinghouse on Family Violence, Health Canada, 1998) National Clearinghouse web site, p. 19-20.

and provincial custody and access legislation. Canada's *Divorce Act* and many of the provincial statutes governing child custody and access decisions direct judges (and, indirectly, parents, lawyers and mediators) to make decisions about custody and access on the basis of the best interests of children.²⁸ Indeed the *Divorce Act*, section 16 (8) states that only the best interests of the child are to be considered, determined by reference to the condition, means and circumstances of the child.²⁹ Yet sections 16 (9) and (10) impose additional criteria. Those sections state that past conduct is not to be taken into consideration unless the conduct is relevant to an ability to parent and that 'a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.' Further, courts are asked to consider the willingness of the person seeking custody to facilitate maximum contact with the other parent.

The *Divorce Act* provisions reflect the findings of numerous research studies conducted in the 1970s and early 1980s. Consistently, those studies concluded that children able to maintain relationships with both parents after separation and divorce were less harmed by separation than those denied continuing contact.³⁰ The conclusions

²⁸ *Domestic Relations Act*, R.S.A. 1980, c. D-37; *Family Relations Act*, R.S.B.C. 1979, c.121; *The Family Maintenance Act*, R.S.M. 1987, c. F 20 s. 2; *Family Services Act* S.N.B. 1980, c. F-2.2, as amended by S.N.B. 1996, c.13, s. 129; *Children's Law Act*, R.S.N. 1990, c. C-13, as amended by S. N. 1995, c.27; *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8; *Family Maintenance Act*, R.S.N.S. 1989, c. 160; *Children's Law Reform Act*, R.S.O. 1990, c. C.12; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33; *Civil Code of Quebec*, S.Q. 1991, c.56; *Children's Law Act*, S.S. 1990, c. C-8.1.

²⁹ *Divorce Act*, R. S., 1985, c.3.

³⁰ The *Divorce Act* reflects professional 'knowledge' about families current at the time the Act was passed. Relationships between the evolution of 'professional' knowledge and the evolution of family law are discussed in L. Neilson (1997) "Spousal Abuse, Children and the Courts: The Case For Social Rather Than Legal Change," *Canadian Journal of Law and Society* 12 (1): 101-145. Research studies supporting the notion that it is in the best interests of children to have maximum contact with both parents following separation and divorce are listed here. A. Abarbanel, "Shared Parenting after separation and Divorce: A Study of Joint Custody" (1979) 4:2 *American Journal of Orthopsychiatry* 320-329; C. Ahrons, "The continuing coparental relationship between divorced spouses" (1981) 51(3) *American Journal of Orthopsychiatry* 415-428; M. E. Bowman and C. R. Ahrons, "Impact of legal custody on father's parenting post divorce" (1985) 47 *Journal of Marriage and the Family* 481-8C. S. Bruch, "Parenting at and after divorce: A search for new models" (1981) 79:1-4 *Michigan Law Review* 708-727; J. B. Grief, "Fathers, children and joint custody" (1979) 49:2 *American Journal of Orthopsychiatry* 311-19; R. D. Hess and K.

of later studies, equally important to the best interests of children, conducted in the context of high conflict and abusive families, are not reflected in the *Divorce Act* largely because most were conducted after 1985. The latter indicate that the best predictors of children's wellbeing after separation and divorce, in high conflict families, are the psychological well-being of the primary caregiver and the children's freedom from continued exposure to conflict and abuse.³¹ Indeed frequent contact with both parents is

Camara, "Post-divorce family relationships as mediating factors on the consequences of divorce for children" (1979) 35:4 Journal of Social Issues 79-96; A. Hetherington, E. Cox and R. Cox, "Divorced fathers" (1976) 25 Family Coordinator 417-248; F. Ilfeld, H. Ilfeld and J. Alexander Jr., "Does Joint Custody Work? A First Look at outcome data of relitigation" (1982) 139:1 American Journal of Psychiatry 62-6; M. B. Isaacs, "The visitation schedule and child adjustment: A three-year study" (1988) 27 Family Process 251-256; J. Kelly, "Examining resistance to joint custody" in J. Folberg (ed.) Joint Custody and Shared Parenting (New York: Guilford, 1991); D. Luepnitz, Child Custody: A Study of Families After Divorce (Lexington: Lexington Books, 1982); E. Maccoby, C. Depner and R. Mnookin, "Co-parenting in the second year after divorce" in J. Folberg (ed.) *ibid.*; V. Shiller, "Loyalty Conflicts and Family relationships in latency age boys: A comparison of joint and maternal custody" (1986) 9:4 Journal of Divorce 17-38 and one of the most influential books of the time: J. Wallerstein and J. Kelly, Surviving the Breakup: How Children and Parents Cope With Divorce (London: Grant McIntyre, 1980).

³¹ For studies on the effects on children of continuing exposure to conflict see, for example: C. Buchanan, E. Maccoby, and S. Dornbusch, "Caught Between Parents: Adolescents' Experience in Divorced Homes" (1991) 26 Child Development 1008-1029; N. Cahn (1991) "Civil Images of battered Women: The Impact of Domestic Violence on Child Custody Decisions" 44 Vand. L. Rev. 1041-1097; B. E. Carlson, "Adolescent Observers of Marital Violence" (1990) 5(4) Journal of Violence 285-99; L. Davis and B. Carlson "Observation of Spouse Abuse. What Happens to the Children?" (1987) 2(3) Journal of Interpersonal Violence 278-91; R. Emery, "Interparental Conflict and the Children of Discord and Divorce" (1982) 92:2 Psychological Bulletin 310-30; J. Fantuzzo and C. Lindquist, "The Effects of Observing Conjugal Violence on Children: A Review and Analysis of Research Methodology" (1989) 4:1 Journal of Family Violence 77-94; B. Forstrom-Cohen and A. Rosenbaum, "The Effects of Parental Marital Violence on Young Adults: An Exploratory Investigation" Journal of Marriage and the Family, p. 467-72; J. Grych and F. Fincham "Interventions for Children of Divorce: toward Greater Integration of Research and Action". Psychological Bulletin (1992) 111(3): 434-54; P. Jaffe, D. Wolfe, S. Wilson and M. Sluszarck, "Similarities in behavioral and social maladjustment among child victims and witnesses to family violence" (1985) 56 American Journal of Orthopsychiatry 142-146; J. Johnston, R. Gonzalez and L. Campbell, note 10; J. Johnston, M. Kline and J. Tschann, note 9; D. Shaw and R. Emery, "Parental Conflict and other correlates of the adjustment of school-age children whose parents have separated" (1987) 15(2) Journal of Abnormal Child Psychology 269-81; and M. Shepard, "Child Visiting and Domestic Abuse" (1992) 71 Child Welfare 357-67. Indeed Wallerstein and Kelly (note 30), whose work influenced the creation of the maximum contact provisions in the first place, endorsed maximum contact WHEN children were not exposed to conflict or family conflict levels were low. The qualification, since confirmed by other researchers, was overlooked in the 1980s. The notion that the psychological well-being of the primary caregiver is of utmost importance to the well-being of children was made some time ago in: J. Goldsten, A. Freud and A. Solnit, Beyond the Best Interests of the Child (New York: Free Press 1979). More recently, a number of research studies have asserted that primary caregiver well-being is as or more important to the well-being of children than maximum contact with both parents: J. Kelly (1993). "Current Research on Children's Postdivorce Adjustment: No Simple Answers". Family and Conciliations Courts Review. (1993) 31 (1): 29-49; F. F. Furstenberg et. al.. "Parental Participation and Children's Well-being After Marital

said to be damaging to children in high conflict families if, during or as a result of such contact, children are exposed to adverse co-parenting competition or conflicts between the parents.³² Duration and frequency of exposure to conflict are thought to be particularly important.³³ Later studies, therefore, have qualified the importance of maximum contact for children. Considered as a whole, the research indicates that maximum contact with both parents is beneficial to children if the contact does not expose the child to continuing conflict or abuse (directed at the child or parent) and the maximum contact does not adversely affect the health and well-being of the primary caregiver.

Data from this study indicate that these qualifications have yet to be incorporated into legal thinking. Instead, it seems that lawyers equate the best interests of children with maximum contact, even in partner abuse cases. Yet when lawyers and judges insist that children visit and spend time with parents who are abusive, they may be encouraging rather than discouraging the inter-generational transmission of patterns of abuse.

Dissolution" (1987), 52 Am. Sociological Rev. 695; F. F. Furstenberg and A. J. Cherlin Divided Families (Cambridge: Harvard University Press 1991). For a literature review on child custody and access issues, see: Research and Statistics Division, Department of Justice (Canada). The Effects of Divorce on Children (Ottawa: Department of Justice, October 1997). For discussion of best interests of children research in connection with primary caregiver mobility interests, see: Martha Bailey and Michelle Giroux Relocation of Custodial Parents Final Report (Status of Women Canada March 1998).

³² C. Buchanan, E. Maccoby and S. Dornbusch. "Caught Between Parents: Adolescents' Experience in Divorced Homes" Child Development (1991): 62: 1008-29; C. Buehler and B. B. Trotter (1990) "Nonresidential and Residential Parent's Perceptions of the Former Spouse Relationship and Children's Social Competence Following Marital Separation: Theory and Programmed Intervention" Family Relations 39 (4): 395-404; J. Dronkers. "The Effects of Parental Conflicts and Divorce on Average Well-being of Pupils in Secondary Education". Paper. American Sociological Association 1996; J. Johnston, M. Kline and J. Sschann. "Ongoing Post-divorce Conflict: Effects on Children of Joint Custody and Frequent Access" American Journal of Orthopsychiatry (1989) 59 (4): 576-92.

³³ J. R. Johnston, L. Campbell and S. Ayes. "Latency Children in Post-separation and Divorce Disputes. Journal of the American Academy of Child Psychiatry (1985) 24(5): 563-574; S. Bishop and G. Ingersoll. "Effects of marital Conflict and Family Structure on the Self Concept of Pre- and Early Adolescents". Journal of Youth and Adolescence (1989) 18 (1): 25-38; D. Mechanic and S. Hansell. "Divorces, Family Conflict and Adolescents' Well-being". Journal of Health and Social Behaviour, (1989) 13 (4): 69-85.

C) Political Context

It is particularly difficult to ascertain the best interests of children in the current social and political climate. Legal and social issues surrounding child custody and access matters have become highly politicized and divisive by gender. Women seek better enforcement of support obligations and more protection in abuse cases; men claim denial of access and seek recognition of the equal rights of men to parent children. In the midst of these controversies, during 1998, a Special Joint Committee on Child Custody and Access conducted hearings across the country on child custody and access issues. The hearings have been criticized for being sensitive to the concerns of men at the expense of sensitivity to the concerns of women.³⁴ The Special Joint Committee summarized its conclusions from the hearings in a report titled *For the Sake of the Children*.³⁵ That report recommends changes to the Divorce Act strengthening the presumption that children should have maximum contact with both parents after separation. Other factors affecting the health and well-being of children, such as freedom from abuse and conflict, are not given equal priority.³⁶

The Joint Committee report has done little to resolve social controversies surrounding parenting and gender. Indeed the report appears merely to have added fuel to the fire. Men's groups are exerting considerable political pressure on the federal government to adopt the Report's recommendations; women and women's groups are alleging gender bias and demanding more focus on abuse and the protection of women and children.

³⁴ See, for example: M. Bailey and N. Bala "Reforming the Definitions of Spouse and Child Related Laws" in A. Bainham (ed.) *The International Survey of Family Law 2000 Edition* (Bristol: Family Law) 69-76.

³⁵ Special Joint Committee on Child Custody and Access. *For the Sake of the Children* (Ottawa: Government Services, Canada, December 1999).

³⁶ See recommendations 2, 5, 6, 16.6, 16.10, 33, 35, and 39.

The Spousal Abuse Child Custody and Access Research Team (Research Team) attempted to find its way through these debates by focussing attention on the interests and needs of children. At the time this study was being conducted the legal system was attempting to operate equitably in the midst of intense, emotional, political and social power struggles between men and women attempting to gain the upper hand in custody, access and financial matters. These struggles were influencing the legal system and this study.³⁷ Our mandate was and is to try to enhance the health and safety of all family members (women, men and children) involved in legal proceedings in abuse cases. The Research Team has concluded, at the end of this project, that the interests and needs of children are getting lost in the current gender-based struggle for power. Consequently, this report challenges the legal and political systems to change the focus of the debates. The contention is that, if priority is indeed to be given to the needs and best interests of children, legal and political discussions will be about the safety of and responsibilities to children, not about rights.³⁸

³⁷ Men and women involved in these debates sought to participate in this study from across Canada, the United States and abroad. I was informed by one out-of-province contact that notice of the study was posted on the internet. While we welcomed out of province inquiries, our methodology, which allowed us to connect interview to court-file data, necessitated a provincial focus. Consequently, we accepted only five interviews from people whose cases did not originate within the province; three of the five cases had a provincial connection - in terms of subsequent hearings within the province and or a primary caregiver with children resident within the province.

³⁸ See also: Karen Munro (1992) "The Inapplicability of Rights Analysis in Post Divorce Child Custody Decision Making" 30 (3) Alberta Law Review 852.

PART IV

Assessing Abuse

A) Assessing Abuse - Introduction

The article "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice"³⁹ discusses Research Team findings with respect to under and over reporting of abuse by gender and with respect to legal interpretations of the meaning of abuse. Basically, the conclusions presented there are that abuse is still being under, not over, reported in family law cases and that legal conceptualizations of abuse continue to operate to the disadvantage of survivors of abuse, most, but not all of whom, are women. Similar conclusions are being reported elsewhere.⁴⁰ More specifically, legal conceptualizations of abuse based on incidents or action and, or intention are criticized in the article because, in absence of analysis of context (history of the relationship, pattern, frequency and severity of behavior, and the consequences for the victim) such assessments are apt to be misleading or wrong.⁴¹

B) Assessing Abuse – Gender and Reporting Rates

This report will not devote a great deal of attention to an analysis of the dynamics of domestic abuse by gender partly because knowledge of social trends is not particularly helpful in deciding individual cases and partly because this Report focuses attention on children. For an informative analysis of research studies on abuse in intimate adult

³⁹ Neilson (2000) note 6.

⁴⁰ Rhoades, Graycar and Harrison (1999), note 3.

⁴¹ In addition to the sources cited in the "Partner Abuse" article, see also: Canadian Centre for Justice Statistics. Family Violence in Canada: A Statistical Profile 2000 (Ottawa: Statistics Canada) publicly available on the web at WWW.Statcan.ca. Statistics Canada data indicate that the profile of abuse by gender changes once severity, patterns of behavior and context are considered. Similar conclusions are being reported in statistical data from the United States: P. Tjaden and N. Thoennes for the National Institute of Justice (2000) Extent, Nature and Consequences of Intimate partner Violence: Findings From the National Violence Against Women Survey (Washington: Department of Justice 2000).

relationships by gender, see: Leslie Tutty "Husband Abuse: An Overview of Research and Perspectives."⁴²

Some, limited discussion of the topic is important, however, in order to place discussion of data drawn from this study in social context. Generally, data collected in this project continue to support the notions that abuse is still being under-reported in child custody and access cases⁴³ and that women are most often the victims.

Many of those issues are discussed in Neilson (2000).⁴⁴ The following is an expanded discussion of earlier findings. In connection with reporting rates, lawyers were asked, in an open-ended question, to define abuse. With very few exceptions,⁴⁵ lawyers did not limit definitions of abuse to physical or sexual action. Control and emotional abuse were mentioned as was financial abuse, although less often.⁴⁶ It is interesting to note that, even though the lawyers defined abuse broadly, their estimates of rates of abuse among their divorcing and separating clients were considerably lower than the rates of abuse suggested by researchers for separating and divorcing couples. Lawyers were asked to estimate the percentage of separation and divorce cases they handle involving claims of abuse by their own client or the client's partner. Almost one half (49.3%) of the lawyers reported between 0 and 20% and another 29.3% reported between 21 and 40% of their clients' separation and divorce cases involved claims of abuse by either party. Yet, as previously mentioned, researchers suggest abuse rates in the range of 40 to 60% for this population. These responses lend support to conclusions drawn from case law analysis (Neilson, 1997) and from the court file analysis (Neilson 2000)⁴⁷ that if false or inflated legal claims are being made, they are infrequent. Researchers in Australia have

⁴² L. Tutty, note 27.

⁴³ See Neilson (2000) note 6. See also: H. Rhoades, R. Graycar, and M. Harrison (1999): 64-65 and (2000), note 3, for similar findings.

⁴⁴ Neilson (2000) note 6.

⁴⁵ Only three lawyers defined abuse merely in terms of physical (and, or sexual) violence.

⁴⁶ Failure to mention financial abuse does not indicate non-recognition of this form of abuse since controlling behavior will commonly include financial abuse.

⁴⁷ The percentage of court files involving dependent children and allegations of abuse was lower in all three jurisdictions than one would expect with over reporting of abuse.

reached similar conclusions.⁴⁸ Certainly, lawyers suggest reporting rates that are far lower than one would expect in the face of large numbers of false or inflated claims.

Although this study does not purport to identify all of the factors that may be contributing to lawyers underestimating rates of partner abuse among separating couples, suggested here are a number of possibilities.⁴⁹ Perhaps clients fail to report abuse to lawyers. Several interview participants mentioned lack of disclosure:

It's hard to describe - she is a real controlling person. I think she has [a mental illness]. I'd go home sometimes and things would be great, the next time she would be screaming and yelling. Some of the fights were physical, she would get physical. Not that she could do much, only 120 pounds. But she would fly at you, and kick. One fight in particular where she had a tantrum and my daughter was standing right there, she was less than four at the time. She backed herself into a corner, with a real scared look on her face. I said no, this is not the kind of home I want to have. It was my decision and that was it. Here it is five years later, I'm trying to get a custody reversal now. So up until now her outbursts haven't been brought up in court? What does your lawyer think? I haven't discussed that part with her. There has been so much since we separated that I probably haven't gotten around to going that far back. A lot of stuff I've pretty much forgot about until I started talking tonight - it all comes back.

Did you tell your lawyer about the abuse? Not in detail, no. I didn't discuss it with her. No, I was, I just felt like I couldn't put myself through that and I had no desire to air out the circumstances of our marriage in front of court, so I just sort of left that alone and concentrated on my, what was happening to my kids. I guess at the time, I just didn't feel comfortable discussing that with her. I basically said I felt that my husband was abusive, had some sexual deviation, and left it at that. I didn't, I didn't feel comfortable going into detail with her. And she didn't ask you to elaborate? No, not really.

But, while others too have found that women (and presumably men) downplay violence and abuse when discussing family issues with lawyers,⁵⁰ failure to report abuse to lawyers was not a common theme among survivor of abuse interview participants. While it was not uncommon for participants to mention individual incidents of abuse not reported to lawyers in the interviews, most indicated having made full disclosure of the nature of their abuse. Another possibility is that those who perpetrate abuse do not discuss and, or acknowledge such behaviors to lawyers and that lawyers have a tendency

⁴⁸ Rhoades, Graycar and Harrison (1999) and (2000) note3.

⁴⁹ See also Neilson (2000) note 6.

⁵⁰ See, for example: N. Seuffert "Lawyering For Women Survivors of Abuse"
http://www.waikato.ac.nz/law/wlr/special_1996/1_seuffert

to discount the validity of claims made by opposing parties. Finally, perhaps lawyers understand clients' stories of their relationships with former partners in terms of normal conflict, rather than in terms of abuse.⁵¹

Put differently, perhaps lawyers define abuse differently from researchers. Although lawyers know that abuse can be emotional or psychological, perhaps they impose additional criteria when distinguishing abuse from conflict. Certainly, as discussed in this Part, section C, the data suggest that legal conceptualizations of abuse tend to be based on intention and incidents of behavior rather than on context and result.⁵² Thus behaviors recipients may experience or researchers may define as abusive may not be classified as such by lawyers in the absence of action clearly intended to cause harm. A related possibility is that lawyers discourage claims of abuse. One of the more common themes among interview participants was a perception that lawyers were discouraging the presentation of evidence and claims of abuse in legal proceedings.⁵³

The issues of control over facts and siphoning of evidence in abuse cases⁵⁴ were central to many of the complaints of both men and women who participated in this study and are consistent with findings that lawyers fail to present particulars of partner abuse being reported elsewhere, by researchers in the United States, Australia and New Zealand⁵⁵ and by Canadian enquiries into the failure of the legal system to protect abused

⁵¹ Rhoades, Graycar and Harrison (1999) and (2000) notes 3.

⁵² See Section C of this PART. See also Neilson (2000) note 6.

⁵³ For further discussion of this issue, see Part VI.

⁵⁴ It is likely that the siphoning process being reported here is not exclusive to abuse cases.

⁵⁵ J. Murphy "Lawyering for Social Change: The Power of Narrative in Domestic Violence Reform" Hofstra Law Review (1993) 21: 1243; Rhoades, Graycar and Harrison (1999) and (2000) note 3, and N. Seuffert (1996) note 14.

women and or their children from death.⁵⁶ The siphoning of evidence of abuse process is discussed in more detail in Part VII.

Returning now to discussion of abuse between intimate partners in social context, particularly in connection with abuse and gender, earlier we reported:⁵⁷

We know that allegations of abuse commonly surface when parents or partners contest each other's claims to custody or access to children. Yet studies of court files in disputed custody and access matters disclose claims of abuse by male partners, in the absence of claims of abuse by female partners, in only one to four percent of contested cases.⁵⁸ Mutual claims of abuse in contested child custody and access cases are more common. Claims by both parents that the other has been abusive appear in between nine and thirteen percent of contested child custody and access cases,⁵⁹ and in 19 percent of reported family law cases involving both dependent children and allegations of partner abuse.⁶⁰ Most contested child custody and access cases disclose allegations of partner abuse made by women only.⁶¹

Lawyers responding to the Spousal Abuse and Child Custody Access Research Team 1999 survey of members of the Law Society of New Brunswick (Research Team survey) reported similar perceptions of the dynamics of abuse in intimate relationships among their clients. Tentatively,⁶² their responses corroborate conclusions drawn from court files and reported cases. Lawyers indicate that, in their experience, men are more commonly the perpetrators of abuse than women in intimate relationships.⁶³ Although abuse of men in intimate relationships is as serious a

⁵⁶ See, for example: R. Davidson. 1994. Report of inquiry into family court proceedings involving Christine Madeline Bristol and Alan Robert Bristol (Auckland, New Zealand: Minister of Justice); P. W. Shulman. 1997 Report of Honourable Mr. Justice P. W. Shulman Commission of Inquiry into the deaths of Rhonda Lavoie and Roy Lavoie (Winnipeg: Department of Justice and Attorney-General); Chief Coroner of the Province of Ontario (1998) March 2000 Report "Inquest into the deaths of Arlene may and Randy Iles" in National Judicial Institute, New Brunswick Social Context Education Seminar Workshop Papers, Educational Materials for Judges, March 1-2, 2000.

⁵⁷ Neilson (2000), note 6.

⁵⁸ P. Jaffe and G. Austin, (1995) "The Impact of Witnessing Violence on Children in Custody and Visitation Disputes". Paper presented at the 4th International Family Violence Research Conference, Durham, NH – four percent of disputed custody and access cases involved abuse claims by men only. The Spousal Abuse and Children Research Team reviewed 5,170 cases reported in the Reports on Family Law between 1982 and 1997 and 2138 court files opened between 1992 and 2000. We found allegations of partner abuse claimed by men alone in 3 percent of the reported legal cases and in 1.4 percent of the court files involving children.

⁵⁹ P. Jaffe and G. Austin (1995) *ibid.* found that nine percent of contested child custody and access cases involving allegations of abuse. The Spousal Abuse and Child Custody Research Team found that one hundred and forty seven of 1,147 randomly selected court files in the first jurisdiction examined involved dependent children and contained allegations of abuse. Of these, 120 files contained only claims of woman abuse; 2 files allegations of male partner abuse in the absence of claims of abuse by women and 19 files claims of each parent that the other had been abusive. (The remaining files simply mentioned the existence of domestic violence).

⁶⁰ L. Neilson, (1997) note 1.

⁶¹ Eighty two percent of the court files and seventy nine percent of the reported cases disclosed allegations of abuse made by women only.

⁶² Response rates were low. For discussion, go to Part II, Section B) (4).

⁶³ One hundred and forty five questionnaires have been returned. Seventy-eight answered this question. Of these, 62 reported that, in their experience, men were more abusive than women in intimate relationships. Fifty-seven did not answer because they did not practice family law or were new to practice; four did not

matter as abuse of women, current findings suggest, at least circumstantially, that 'spousal' or partner abuse is primarily directed against women.⁶⁴

Court file data collected after these comments were written, from two additional court jurisdictions, disclosed similar trends. More particularly, only one court file (involving both dependent children and allegations of partner abuse) in region two contained allegations of partner abuse made by a father only; 22.2% of the files contained allegations of abuse by both parents against each other and 76.4% allegations of abuse made by mothers only. The comparable rates for region three were 6.3% abuse alleged by father only, 15.9 % abuse alleged by both parents, and 77.8% abuse alleged by mother only. While these figures are not conclusive, given that it is likely that men under-report abuse as much or more than women,⁶⁵ one would expect both men and women to raise abuse matters in proceedings about the future care of children. Thus, although the data do not allow us to pinpoint the extent to which fathers are more abusive to partners than mothers, the figures do corroborate claims of researchers that abuse in intimate relationships primarily is directed against women.

C) Assessing Abuse: Conceptual Issues - Objective Acts v Social Context

The abuse of men by women should not be ignored, however, when it does occur in

give a reason. Ten lawyers added the comment that men and women tend to abuse differently. They said that women tend to do so emotionally or psychologically while men are more apt to use physical force.⁶⁴ If family violence and abuse are to be eradicated, we must be sensitive to the fact that men as well as women report being victimized by abuse (N. Bala et. al. *ibid.* footnote 23; M. Straus and R. Gelles "Societal Change and Change in Family Violence 1975-1985" (1986) 48 Journal of Marriage and the Family, 465-479). It is important not to denigrate, trivialize or ignore the experiences of men. At the same time, however, it would be inequitable to ignore the particular vulnerabilities of women. (R. Dobash, E. E. Dobash, M. Wilson, and M. Daly, "The Myth of Sexual Symmetry in Marital Violence," (1992) 39 Social Problems, 71-91; J. Johnston "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1994) 3:2 Family Mediation 11; W. DeKeseredy "In Defense of self-defense. Demystifying Female Violence Against Male Intimates" in R. Hinch (ed.) Crosscurrent Debates in Canadian Society (Scarborough, Ont.: Nelson, 1992); D. Ellis Family Mediation Pilot Project Final Report (Oakville, Ontario, July 1994) p. 35.

⁶⁵ The responses of lawyers, for example, suggest a perception that the problem of under reporting abuse may be more pronounced among men than among women. While more lawyers reported that both women and men under-report abuse than reported that men and women inflate claims, more lawyers (23) suggested than men only under report than suggested that women or both women and men under report abuse (18).

individual cases. Instead the recommendation is that abuse claims of men and of women be assessed in the same manner - in context of the power dynamics of the intimate relationship and the history of abusive patterns of behavior. Already reported, in L. Nielson (1997) and (2000),⁶⁶ are criticisms of tendencies in the legal system to interpret abuse purely in terms of intention and assessments of isolated acts or behaviors. More particularly, when 'abuse' is conceptualized in terms of behavior, without consideration of social context or psychological damage, 'abuse' will appear to be symmetrical by gender. For example, evidence that a man and a woman struck each other repeatedly, with equal force, in an episode of mutual hitting, leads to a conclusion that both were equally abusive. Yet evidence that one partner's aggression was defensive and the product of psychological damage caused by past abuse in the relationship would lead to a different conclusion. If the adverse consequences of abusive and violent acts fall disproportionately on the shoulders of women, the application of an incidents-based conceptualization of abuse - with a focus on behavioral acts and not the experiential components of those acts - will be biased against the experiences of women.⁶⁷

Men and women experience abusive acts and behaviors, differently:⁶⁸ Thus Dobash, Dobash, Wilson and Daley argue:

Wives' and husbands' uses of violence differ greatly, both quantitatively and qualitatively... exclusive focus on 'acts' ignores the actors' interpretations, motivations, and intentions. ... Only through a consideration of behaviors, intentions, and inter-subjective understandings associated with specific violent events will we come to a fuller understanding of violence between men and women. Studies employing more intensive interviews and detailed case reports addressing the contexts and motivations of marital violence help unravel the

⁶⁶ L. Nielson (1997) and (2000), notes notes 1 and 6.

⁶⁷ See R. Dobash, R. E. Dobash, M. Wilson and M. Daley (1992), note 564 at pp 71-91; H. Johnson "Response to Allegation About The Violence Against Women Survey" in M. Valverde et. al. Wife Assault and the Canadian Criminal Justice System (Toronto: University of Toronto 1995); A. Doob "Understanding the Attacks on Statistics Canada's Violence Against Women Survey" in M. Valverde et. al. *ibid.*

⁶⁸ A. Doob (1995), note 67; A. Howe, "The Problem of Privatized Injuries: Feminist Strategies For Litigation" in (1990) Studies in Law, Politics and Society 10: 119-142; K. MacKinnon, (1984) "Not a Moral Issue." Yale Law and Policy Review 2: 321-345.

assertions of those who claim the widespread existence of beaten and battered husbands.⁶⁹

Although contextual assessments of abuse produce findings that women are far more often victimized by abuse in intimate relationships than men, consideration of context (history of the dynamics of the relationship, including the patterns and severity of abusive behaviors and the psychological and physical consequences to the recipient) does not necessarily preclude consideration of the experiences of men genuinely victimized by abuse. Contextual assessments require merely consideration of all elements of abusive relationships before judgements are rendered.

Grandin, Lupri and Brinkeroff (1997), for example, report that men and women, who are abused, report depression, anxiety and emotional distress.⁷⁰ Counselors, responding to an informal survey conducted by Leslie Tutty (1999), claim that men who are truly victimized by abuse:

Told stories that were strikingly similar to women victims of husband abuse. They tended to minimize their partner's behaviour, had low self-esteem, and admitted feeling both afraid of their partner's aggression and ashamed. They offered the same rationales for staying in the relationship as abused women. For example, some men did not wish to leave because they feared their children would be abused, or they stated that they loved their partners and simply want the abuse to stop.⁷¹

It is our contention that men and women will, if asked appropriate questions, disclose abuse when disputing child custody and access matters and that men and women truly victimized by abuse will, regardless of gender, disclose similar patterns of behavior and complaint.⁷² There is no reason to suppose that abused men will fail to report patterns of controlling and demeaning behavior and psychological injuries produced by those patterns. For example:

She is an alcoholic by the way. She would flip after a few drinks and assume a different personality almost - even in front of people at times - she would get abusive verbally - sometimes even physically. I found that very hard to deal with. How do you deal with somebody who becomes physically violent? It is difficult being a male. Were the police ever called? Yes. Once. After the people dissipated, she started on me. I just didn't want to get involved again - it was the same thing over and over. Because I was not responding, she punched me in the mouth and split my lip open. They [the police] said they had enough evidence to charge her with assault but would not do it. Did you have trouble of that sort before? It would get to the point of physical violence on occasion, but generally she would keep it to verbal abuse. Did that have an effect on you? You cannot suffer abuse and not have it affect you. I had trouble with self-esteem for a while. I still find it difficult to have

⁶⁹ See Dobash et. al., note 64 at pp. 256, 261 and 262.

⁷⁰ E. Grandin, E. Lupri, and M. Brinkerhoff (1997) "Couple Violence and psychological distress" *Canadian Journal of Public Health* 88 (6).

⁷¹ L. Tutty (1999) note 27 at page 19.

⁷² See also L. Tutty, "Husband Abuse: An Overview of Research and Perspectives" (Ottawa: National Clearinghouse on Family Violence, Health Canada, 1998) National Clearinghouse web site, p. 19-20.

any trust.

Similarly, in *Scullion v Scullion*⁷³ the father reported a pattern of abusive behavior with emotional consequences very similar to the patterns of abuse reported by women. He spoke of his female partner's volatile temper, her screaming at him (verified by independent witnesses), her domination, her extreme jealousy, her repeated accusations and grilling of him about his phone calls, her not allowing him to use her property, particularly her car, her limiting his showers and dictating his style of dress. Ultimately, the mother is reported to have assaulted the father physically (by grabbing his testicles) whereupon the father moved out of the home and sought therapy. Although, in *Scullion v. Scullion*, the father acknowledged occasional incidents of his own retaliation, as do many abused women, the pattern and consequences of behavior reported in this case is very similar to patterns of behavior and consequences reported by abused women. When domination and control patterns are absent it is questionable that what is being described in abuse as opposed to isolated incidents of violent behavior that may be retaliatory and, or defensive.

Yet none of the male interview participants and very few (at most 7) of the 289 court files and none of the 182 reported legal cases⁷⁴ involving partner abuse and dependent children, disclosed the high levels of control, terror, violence and abuse directed at men by women reported by women in the reported family law cases, in the court files or by a substantial minority⁷⁵ of the women participating in this study. For example:

To give an example, of what it was like - I found a hotel receipt in his pocket when I was doing the laundry. I asked him what it was for. He grabbed my neck, choked me, he threw a chair at me - not a little chair. Then he busted the kitchen chair beating me over the back of my legs. He would throw beer bottles at me. I did not want to charge him. Two weeks before our wedding I had a black eye. I have a lot of insecurities [about relationships] still - that has carried over into my current relationship. I still have a hard time believing that anyone

⁷³ *Scullion v. Scullion* (1995), 12 R. F. L. (4th) 421 (N.B. Q.B., Fam. Div.)

⁷⁴ When women were reported to be abusive in the reported cases, this was usually in connection with lashing out at the children, or allegedly encouraging other men's violence towards former partners and or isolated incidents of violence associated with separation. Women, who lost custody of children in partner abuse cases as a result of judicial order, usually lost custody as a result of drug and alcohol abuse, unstable lifestyles, promiscuous lifestyles, and or the violence of new partners, rather than as a result of a pattern of their own abusive or violent behavior.

⁷⁵ About twenty percent of the women who participated in this study reported abuse patterns similar to those quoted in the text; another 70 percent reported long-term patterns of controlling or demeaning behavior with periodic non life-threatening physical or sexual violence. The remainder reported patterns of domination and control with emotional abuse with no physical violence or an isolated incident of physical violence associated with separation. None of the male participants reported being subjected to life-threatening violence, none reported patterns of control; three male participants reported patterns of demeaning verbal abuse with occasional non-life threatening acts of violence, such as the father quoted in the text.

could ever love me. It was really hard. Nothing I ever did was right. I married young so I grew up with a man who told me constantly that I was fat, ugly, that no one would ever want me - either that of he called me the town slut - accused me of having sex with everyone. It was always one or the other. Or the time I found the sofa embedded in the wall and everything in the house smashed. I began to pick up all the broken furniture and dishes - so my daughter would not cut herself on them the next morning. Then, all of a sudden, he threw the television at me. Then he hit me. He held me down, hitting me with his fists, ripped the phone out of the wall. I was screaming asking for help. He stopped beating me when our daughter started to scream and cry. No one called; no one came. I slept on the floor in her room that night. But what happens when he snaps while she is there? Does she have to be subjected to that? I remember how violent he was. I am a firm believer if a woman is beat, maybe that is a private matter, but if children are involved it is everyone's business because they are the next ones out into society.

[The following quotation does not do justice to the life of horror this women described. The following are selections from 18 pages of transcript describing abuse]

I was abused. I left over twenty times. When I first met him, he was not abusive. He drank a six pack on the weekend; when I left him, he was drinking about 72 beer per day. We lived together for two years before we got married and he hit me once but I thought it was my fault. As the years went on, he beat me up really bad about every six months. So the night I left, he had been beating me up about once a week, for a couple of years. He was good at it: he never hit me in the face - until the last few months. I was never allowed to eat when he ate. I never talked back; I was scared of him. [One night] my ex husband got a hammer and started beating the door down, he said he would kill me with it. He had tortured me for so long, I said 'I can't stand this,' so I opened the door and said, 'Kill me, don't torture me'. He said, 'You better not have called your sister or I'll kill her when she comes.' I had marks all around my throat. My son was so used to the abuse that he did not even cry. He told me to put my son down or he would hurt him so I did. He hit me and knocked me onto the ground, on my back. They [the police] were scared of him although he is just a little guy. Constantly he said he was going to call social services and that they would come and get the kids and take them away from me. I went from about 155 pounds to 100 pounds in six weeks. I was eating, but not sleeping. I went to the Doctor and said 'I'm falling apart'. He said, 'You have withdrawal from adrenaline - I had never heard about that before. But he would beat me up the second I got in the door so the adrenaline was always pumping. When he was beating me up, he was comforting the children, saying, 'You can stay up late tonight. You don't have to go to school tomorrow. Don't listen to your mother. She is an old slut, a pig, crazy.' When I first left, my daughter called me all those names and she would beat me up - she doesn't now. [After leaving] I was stalked for four years. I had no vehicle. I had nothing. He had me believing that if I left him, or he left me, I would be on welfare because I would not be able to survive without him and I believed it. He had me believing that my family did not love me, that they hated me; he had me believing that I was a big fat, ugly pig. But he also thought I could have three men in the fifteen minute break if I did not answer when he called me at work. He told everyone at the court that I had all these affairs, absolutely silly. But he could say, 'I'm a wonderful father' therefore the judge said he has to see his children. She [his new partner] has had him thrown in jail for abuse. I heard that he beat several other women up before me but they said they didn't tell me because they didn't think I would believe them. His father is abusive, that's how it all started. If you met him sitting here and didn't know he was abusive, you would not believe it. He could be so sweet. Old people loved him. When I was married to him, he would say, 'I'm doing the cupboards at this lady's house' and he would say, 'She likes chocolate chip cookies. Would you make her some?' He would take me

*there for visit but then would come home and beat the crap out of me.*⁷⁶

We found little evidence anywhere of comparative levels and rates of abuse directed against male partners. Most of the women we interviewed reported that they had suffered from physical, occasionally sexual, and always patterns of demeaning, controlling, intimidating interaction.

As indicated earlier, abuse is not an action or several isolated actions, it is a pattern of behavior or conduct in the context of the power dynamics of an evolving intimate relationship producing psychological injury.⁷⁷ The same action can be abusive or not, depending on how it affects the victim. One participant, for example, explained the difference between emotional abuse and name calling in the following terms:

I understand that the emotional abuse is actually probably the worst. I feel that emotional and verbal is a lot worse than physical because at least you get smacked and it's over with. Being emotionally abused, it eats at you forever. Some days we have talked on the phone like normal human beings and the next week he'll be calling me a whore, slut. I don't even take it as abuse anymore; we just don't listen to it anymore. I think abuse in this situation, being that it's more emotional, it's the way I internalize what he's doing and if I don't internalize it, it isn't abuse, it's just him talking then.

Abuse has a reciprocal dimension; it is not merely behavior. Yet legal assessments of abuse tend to be based on observable acts. Consideration of acts and behaviors in the absence of inquiries into the context and results of those acts produce erroneous conclusions. Included here, by way of illustration, are portions of an interview with a female participant in an attempt to illustrate the point.

I told him he was not calling the police and I slammed the phone down. He started dialling again. The third time, I hit him in the head with the phone. When he came to, he grabbed me and ripped my shirt and bra off and was strangling me. He flung me on the floor. His neck happened to be near my throat, and I bit him, really hard. Then I bit him again. I tasted blood. He was bleeding bad.

⁷⁶ Parts of this interview are repeated later, during discussion of non-recognition of abusive partners, by mediators.

⁷⁷ One male participant reported his perception that contextual abuse assessment criteria are used to assess men but not women. He complained that women are classified as victims of abuse on the basis of minor isolated incidents, in the absence of former patterns of behavior causing emotional damage as follows: *For different reasons, all professionals, male and female alike, seem biased towards female versions of events where abuse and/or violence is alleged. They tend to denigrate, trivialise or outright dismiss men's experiences in favour of a blind support of women's allegations. Zooming on men as abusers while women are painted as victims and children disturbed only by men's terror will do little to advance knowledge.* This father recommended that the same, contextual assessment be used for men and for women. We support this recommendation providing that such assessments are thorough and take into account social and historic context, interpersonal context, including the power dynamics between the couple and emotional damage.

In the absence of information about the history and dynamics of this relationship, one might conclude, from the quotation above, that this was a case of mutual combat and, or even of a woman's abuse of a man. Yet, if we place the same behavior in the context of the relationship, as recited by the same participant, as follows, we view the same behavior rather differently:

I never thought I would leave him. I'd just let him cool off for awhile. So the night I left - he had been beating me up about once a week, for a couple of years, he was good at it, he never hit me in the face, until the last few months, then I got black eyes and stuff. He was drinking all day that day. I asked him what he wanted for supper and he flew into me - I was never allowed to eat when he ate - so when I was eating supper, he came up and slapped me across the face and knocked me on the floor. I said I'm out of here. Then he said he was going to call the police. I was scared of the police because he had brainwashed me over the years that everything was all my fault. I told him he was not calling the police and slammed the phone down. He dialled again, a third time, then I got it in the eye. Then I punched him in the head. When he came to, he grabbed me and ripped my shirt and bra off and was strangling me, he flung me on the floor I was going for my last breath, I could not breathe His neck was near my throat, and I bit him, really hard but I knew if I let go, he would start again. He let us go, but then started choking me, with both hands so I bit him again and tasted blood. He started to bleed bad. He went to the bathroom. I grabbed my son and locked us in the basement. My ex husband got a hammer and started beating the door down, he said he would kill me with it. He had tortured me for so long, I said 'I can't stand this,' so I opened the door and said, 'Kill me, don't torture me'. He said, 'You better not have called your sister or I'll kill her when she comes.' I had marks all around my throat. My son was so used to the abuse that he did not even cry. [see also the lengthy quotations on page 31 above, from the same interview]

Many survivors of patterns of long-term abuse reported isolated incidents of their own violence, usually at the point of separation.⁷⁸ Many said they initiated the violence at that time. Indeed this pattern was common among survivors of long-term abuse we spoke to, who otherwise described their own long-term victimization. Some said they were 'at the end of their rope' and did not care any longer if they were seriously injured or killed; others claimed that the decision to separate had given them, finally, the strength to fight back.⁷⁹ In the absence of an assessment of the history of the dynamics of the relationship

⁷⁸ Survivors of abuse commonly reported isolated incidents of their own negative behavior and a willingness to accept responsibility for their own actions.

⁷⁹ See also: M. A. Dutton, as edited by M. Gordon, "Validity of "Battered Woman Syndrome" in Criminal

and the social context, abusive partners are able to claim in courts, successfully, their own victimization and that their partners are equally or even more to blame.

While survivors of abuse were willing to disclose incidents of their own negative behaviours, a different pattern emerged in a handful of interviews we conducted with parents who were alleged to have been abusive to partners over a period of time.⁸⁰ These interviews were used to cast blame on the legal system and, or to denigrate ex partners. While isolated negative behaviours of ex-partners were described, these parents failed to acknowledge any behaviours at all, even single or isolated incidents, of their own that might have contributed to either the breakdown of relationships with ex partners and or their children. Blame and responsibility for continuing conflict, even conflicts clearly initiated by these participants, was attributed solely to ex-partners or to the legal system. The failures of primary care-givers and the legal system to give in to demands for equal time, equal rights, daily information about the children were alleged to be victimization. These interviews focussed far more on the evils of the legal system and or the evils of former partners than on the interests and needs of children. Although, given the small number of parents participating in this study who fit this profile⁸¹ these comments are exploratory only, the pattern is not surprising. Researchers have identified inability to

Cases Involving Battered Women” p. 13 of National Institute of Justice The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials (U.S. Department of Health and Human Services, May 1996).

⁸⁰ Many of the men who participated in this study were not alleged to have been abusive to former partners over an extended period of time. Furthermore, it is likely that allegations made against at least four of the male participants would not be classified as ‘abuse,’ using a contextual assessment of abuse.

⁸¹ About one half of the men who participated in this study: 1) were as much the recipients as the perpetrators of abuse or 2) were accused merely of isolated incidents, occasionally unsubstantiated, associated with or occurring after separation.

accept responsibility for actions and, or attributing blame and responsibility to others as an indicator of abuse.⁸²

Clearly, however, failure to accept responsibility is not merely a gender issue. Nor was it the sole pattern among fathers interviewed. Fathers with custody of their children, fathers accused only of isolated incidents of 'abuse' at the time of or after separation and fathers who spoke in terms of children's needs and their own parenting responsibilities, rather than in terms of rights, were far less apt to attribute sole blame and responsibility to others. Interview participants, both men and women, who discussed being subjected to patterns of abusive behavior, seldom focussed the interview on the denigration of former partners and were more inclined to accept partial responsibility for separation and, or for isolated incidents of their own violence or abuse.

But, when survivors of long-term abuse do disclose incidents of their own abuse or violence at the point of separation, criminal law becomes more an obstacle than protection:

We were both charged with assault but the Crown declined to proceed on the basis that the 'fight' was consensual (male respondent)

So when he charged me. He [police officer] said, 'Definitely, you want to charge him'. Did that go to court? No. Because he charged me and I charged him. They just looked at it and threw it out. Anything he did before, who cares? (female respondent)

The difficulty is that the *Criminal Code of Canada* defines crime in terms of prohibited acts yet abuse can be understood only as a pattern of behaviors set in social and relationship context. This is one of the reasons that legal scholars seek amendments to

⁸² D. Dutton "Witnessing Parental Violence as a Traumatic Experience Shaping the Abusive Personality" in R. Geffner, P. Jaffe and M. Suderman (eds.) *Children Exposed To Domestic Violence* (New York: Haworth Press 2000) 59-67; R. Lundy Bancroft (1996) "Understanding The Batterer in Custody and Visitation Disputes" Available from Resource Centre on Domestic Violence (800) 527-3223; Tutty (1998) note 27; W. DeKeseready *Four Variations of Family Violence: A review of the Sociological Research* (Ottawa: Health Canada, National Clearinghouse on Family Violence, 1993).

the *Criminal Code* to establish abuse in intimate relationships as an offense, separate and apart from other criminal code offenses.⁸³ In partner or spousal abuse cases, scrutiny of historic patterns of behavior, psychological patterns of domination and control is key to an understanding of the crime. Certainly it is essential in order to separate violent behavior that is abusive from violent behavior that is primarily defensive or retaliatory. Yet, normally, evidence of past behavior is not admissible to prove an offence. Thus, while there is always a danger that separating crimes within the family from crimes against strangers will result in crimes within the family being 'trivialized' (although one wonders why crimes affecting children are not considered even more serious than crimes against strangers), our data indicate that the alternative may be not having the 'crimes' dealt with at all. Consequently, we endorse the claims of others for separate criminal code provisions for family violence and abuse.

Non-contextual assessments of abuse also create injustice in civil, family law cases. The negative implications, for women and children, of 'objective' incidents-based, non-contextual assessments of abuse in family law (child protection and custody/access) cases are discussed in Neilson (2000).⁸⁴ Of particular concern are the implications for the health and physical safety of children, a topic to be discussed in more detail later in this report.

D) Assessing Partner Abuse: Expert Evidence

Theoretically, properly qualified experts may assist family court judges in assessing or interpreting

⁸³ See also: C. Boyle, "A Feminist Approach to Criminal Law Defences" and M. Eberts "New Facts for Old: Observations of the Judicial Process" in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery 1991);

⁸⁴ See note 6.

partner abuse.⁸⁵ Yet, in practice such assessments are rare. First, most partner-abuse cases are settled in negotiation processes, not by judges in courtrooms. Normally, non-lawyer experts are not involved in out-of-court legal negotiation processes. If fewer than 10% of cases are decided in contested hearings then, in practice, expert testimony will be a factor in a small minority of abuse cases. Second is that expert explanations of social and psychological context, of the dynamics of abuse and the consequences for the recipient are introduced infrequently in the few child custody and access cases involving partner abuse that are decided by judges. Evidence of such expert testimony was located in only a small handful of reported cases and court files examined. Only one of the survivors of abuse and three of the men we interviewed spoke of experts advising judges or their lawyers specifically on the nature, dynamics and effects of partner abuse. When expert opinion was introduced (as recorded in reported cases and in the court files) it was usually to provide information to judges about the circumstances of children to assist judges in making best interests of the child determinations. Only exceptionally did experts concentrate on the dynamics of abuse within the relationship or on the implications of abuse for survivors, usually mothers.⁸⁶ Instead, incidents of violent behavior were accepted as facts, and experts offered opinion on the best interests of children within the context of those facts. Perhaps the absence of expert evidence explains, in part, why contextual assessments of abuse appear infrequently in case law.

The lack of expert testimony in partner abuse cases is not surprising. Many abused parents do not have resources⁸⁷ to hire experts to testify on their behalf. Income levels of abused women disclosed in the New Brunswick court files were low; most, whose court files contained financial information, reported yearly incomes of under \$20,000. Yet, as indicated in "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice":

The reported cases reveal that, in the absence of expert interpretations, judges draw

⁸⁵ In *R. v. Lavallee* [1990] 1 S. C. R. 852, the Supreme Court of Canada specifically identified battering relationships as subject to lay myths and stereotypes and thus beyond the ordinary knowledge and understanding of average jurors and fact finders and thus admissible as expert evidence, albeit in that case to explain the psychological consequences of long-term battering.

⁸⁶ Similar findings have been made in the United States. See, for example: M. Jacobs "Requiring Battered Women To Die: Murder Liability For Mothers Under Failure to Protect Statutes" *Journal of Criminal Law and Criminology* (Winter 1998) 88 (2): 579-661.

⁸⁷ H. Johnson, note 21:153-155. See also: C. Freiler and J. Cerny *Benefiting Canada's Children: Perspectives on Gender and Social Responsibility* (Ottawa: Status of Women Canada, 1998); Family Violence Prevention Division, Health Canada *Breaking the Links Between Poverty and Violence Against Women* (Ottawa: Health Canada, 1996).

conclusions about human behavior derived from assessments of facts or incidents alone. In the context of spousal and partner abuse cases those conclusions commonly are incorrect from the perspectives of women. Indeed the Supreme Court of Canada has acknowledged the importance of expert testimony in abuses cases. In *R. v. Lavallee*, Justice Wilson commented: “Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship.”⁸⁸ Thus women without economic resources to hire experts to explain the dynamics of abuse to judges are particularly vulnerable to faulty judicial interpretations and assumptions.

The solutions to the problem are obvious: continuous education of judges, lawyers and mediators on the nature, dynamics and effects of abuse⁸⁹ and affordable, accessible family violence experts able to assess and offer expert opinions to judges in partner abuse cases.

Participants in this study commonly spoke of inadequate access to experts, of delay, of inaccessibility, and, occasionally, of expert evaluations that were inadequate, incomplete or not in accordance professional standards:

We had chosen the psychologist. There aren't very many - only one or two in [our jurisdiction] that will do child custody assessments. One has now moved. It takes 4-6 months before you are able to see someone. Meanwhile you've waited four months to get in, and then another 3-4 months before they decide issues. It is a long process, hard on the kids.

While experts can be of assistance to judges, particularly when allegations by parents are contested, disputed and, or appear to be unfounded:

The psychologist says the mother is manipulative and impulsive with a poor grasp of reality. She laid repeated claims of sexual abuse and mistreatment of the children; there were many investigations – all investigated and found unfounded. Then she laid three more charges of physical and sexual abuse – the psychologists resigned in disgust. She made 11 reports to child protection in one year - all investigated and found unfounded. The psychologist recommended termination of the mother's access as she keeps the children in a constant state of emotional turmoil.⁹⁰

It is also vitally important that experts who do indeed possess specialized knowledge of domestic abuse and children conduct evaluations in a thorough, even-handed manner.

Parents complained that:

⁸⁸ *R. v. Lavallee* note 85 at p. 882.

⁸⁹ Research evolves rapidly. Some mechanism is required to ensure that professionals offering services to the public in abuse cases are updated regularly on professional literature and research on family violence and abuse, particularly with respect to the effects on children.

⁹⁰ The comments in this case are corroborated by judicial findings in a reported case.

Later, at the Custody Hearing, it was done by judge's decision, based on a psychologist's report, that was later found to be biased and not objective. The psychologist concerned was reprimanded by the NB College of Psychologists for 'being in conflict with the rules of the Canadian Code of Ethics relating to integrity in relationships, and in particular, objectivity and lack of bias'.

The judge focused on the report by her psychologist who said that, having not met the child's father - the mother insisted that he was having problems every time he went to the house, that he would come back traumatized, clingy, that he was a shy little upset boy. The psychologist, who interviewed us with [the child] reported him to be sunshiny, outgoing, ready to go anywhere, be with him, having a 'ball' obviously well adjusted to his father and ready for overnight visits. The judge focused entirely on the first psychologist's report who said: not having met the parents, I cannot be sure, however I assume that visits with the father are causing a problem. They weren't in fact, but she had never met us.

Certainly, there is a need to increase the number of accessible mental health experts with specialized expertise in family abuse and children matters and to promote judicial and legal education on professional standards of practice for court evaluations. The best approach would be neutral, objective, specialized experts, employed by Departments of Justice or by both parents, rather than experts employed by individual parties on a partisan basis. This might help to ensure evaluations based of the circumstances of all family members. It would be helpful too if judges were to receive regularly information about acceptable professional standards of practice with respect to child custody/access evaluations in partner abuse cases, to enable judges to distinguish thorough from incomplete or inadequate assessments. Since the majority of families in New Brunswick involved abusive relationships have limited resources, it is likely that some level of public funding of experts is required.

E) Assessing Abuse: False Claims

At the moment a great deal of controversy surrounds partner or spousal abuse allegations. Men are claiming that many women are fabricating stories of abuse in order to prevent fathers from parenting their children. Indeed this was a common complaint to the Joint Committee in hearings on Custody and Access. It is important to note, however, that researchers have not been able to substantiate these claims.⁹¹ What do our data tell us about partner abuse claims? Did we find that women who participated in this study made false or inflated claims of abuse?

First, as discussed more fully in Neilson (2000), rates of abuse disclosed in court files, reported cases, and responses by lawyers are more consistent with under-reporting of abuse found in Statistics Canada studies than with claims that violence and abuse commonly are fabricated or exaggerated in family law matters.⁹² Second, whenever we were able to link interview and court file data - 42 of the 53 interviews with women -⁹³ the descriptions of abuse in interviews were consistent in their entirety with allegations appearing in affidavits and other documents - such as psychological assessments, home studies, Court Social Worker intake notes - found in the court files.

When considering this finding, it is important to note that at no time did interviewers review court file data prior to conducting interviews. Court file data were

⁹¹ See: N. Bala, (2000) note 23. Fathers rights groups in Australia made similar claims; these too have not been corroborated by research findings, See: Rhoades, Graycar and Harrion (1999) (2000) note 3.

⁹² Although the Report of the Special Committee on Child Custody and Access, note 35: "Unethical Practices by Family Lawyers and Flaws in the Legal System" asserts that fabrications of abuse are promoted by lawyers, researchers have found little evidence to support this assertion. See, for example: H. Rhoades, R. Graycar, and M. Harrison The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations? (University of Sydney: Interim Report April 1999) pp. 64-65.

⁹³ Most of our interviews were conducted with men and women whose names were selected from a random survey of court files. Others approached us, seeking to participate in response to a newspaper advertisement of the study.

indexed and stored by code. Names and addresses of potential interview participants were collected and stored separately from court file data. After the interviews were conducted, codes were substituted for names prior to transcription. Only after transcripts were coded could interview data be linked to court file data. Commonly, interviews were conducted months and years after documents found in court files were prepared. It is highly unlikely, in these circumstances, that detailed interview discussions of abuse would match consistently allegations in court file documents if the allegations were not true in the first place.⁹⁴

Although it is important to note that male interviews were linked with court file data in only 8 cases,⁹⁵ so the finding could be merely coincidental, we found far less similarity between the stories men told us in the interviews and the contents of the court files in four of the eight cases. (Four of the eight interviews were consistent with court file data.) Although it could be argued that incomplete disclosure (of evidence and claims found in the court files)⁹⁶ in the four interviews occurred because the documents in the court files were wrong or misleading, interviewers did ask respondents to discuss claims made by former partners. Those claims were also minimized or not disclosed. While this does not prove untruth or even lack of full disclosure, since it is possible that claims were forgotten, the non-disclosures, while curious, are consistent with tentative findings of others.⁹⁷ Clearly, in order to make any conclusions about fabrication on the one hand or

⁹⁴ Interview descriptions contained more detail, however, and commonly included discussion of continuing harassment and abuse not always documented in court files.

⁹⁵ Many of our male participants responded to an advertised notice of the study rather than to an invitation directed to them from the court file survey.

⁹⁶ Evidence and claims in the court files not disclosed in these male interviews included: non-payment of child support, failure to exercise access, failure to comply with marital property orders, and abusive behaviors.

⁹⁷ See also: L. Tutty, note 27; R. L. Bancroft (1996) note 82; and J. Johnson quoted by N. Bala, note 23.

non-disclosure on the other, there is a need for a good deal more research in partner abuse cases drawn from multiple parties and sources.

Obviously, however, the fact that we are not able to document many false claims in this study does not prove that false claims of abuse against men are not made. Indeed the majority of the men participating in interviews claimed that former partners had made false or exaggerated allegations against them and, or were giving erroneous information to the children. Only 4 of our 20 male respondents failed to make such a claim.

Unfortunately, this type of study does not allow us to verify or refute the majority of such claims. In any event, as N. Bala indicates, assessing validity of partner abuse claims is a fraught with difficulty:

There are substantial conceptual problems in trying to do research about false claims (or false denials) of abuse. One interesting study by Johnston found very substantial disparities in descriptions of divorced partners about the extent and initiation of verbal and physical aggression during their relationship, with men and women most commonly each reporting that their partner was the aggressor and minimizing their own role. She concluded that it is in general more likely men are refusing to acknowledge their violence, since women were offering 'more detailed and highly specific accounts, whereas men tended to be vague or dismissive of the event.'⁹⁸

In support of false claim arguments, we note that lawyers report a perception that false or exaggerated allegations do occur in a minority of cases.⁹⁹ Occasionally, false claims are verified by the legal system. For example, one participant reported (corroborated by other data) that the trial judge made a finding of fact in his case that his

⁹⁸ N. Bala, note 23. See also: R. Dobash, R. Dobash, K. Cavanagh and R. Lewis (1998) "Separate and intersecting realities: a comparison of men's and women's accounts of violence against women". Violence Against Women 4(4): 382-414 and M. Szinovacz and L. Egley (1995) "Comparing one-partner and couple data on sensitive marital behaviors: The case of marital violence." Journal of Marriage and the Family 57: 995-1010.

⁹⁹ 47.9 % of the lawyers said that, in their experience, fewer than 15% of separation and divorce clients make false or inflated claims; 31.5 % indicated that between 15 and 30 % of clients do so; 15.1% thought between 31 and 50 % of clients make such claims. A few lawyers suggested that false claims are made most of the time (in over 50 % of cases). It is important to note that it is more likely that lawyers over-estimate than under-estimate the frequency of false claims because they have little opportunity to assess, on an objective basis, the claims of both partners.

partner had lied about at least some of her allegations and had based his decision on a psychological report later found to be professionally inadequate and biased. And, in *Smith v. Smith*,¹⁰⁰ the mother made 11 reports of physical abuse against the custodial father, repeated allegations of sexual and physical abuse against members of the father's family, all investigated and found to be unfounded. Furthermore, a psychological assessment indicated that the mother suffered from a major personality disorder characterized by lack of good judgment, manipulative behavior, a steady level on a paranoia scale and questionable dealings with reality. Ultimately, as a consequence of her repeated allegations and disruptions of the children's lives, she was denied access to four of her children, but not before a number of psychologists resigned from the case in frustration, and all members of the children's extended custodial family suffered considerable turmoil, stress and expense.

Most often, however, it is difficult to distinguish claims that are false from claims that are true but lack corroborative proof. Consequently, at the moment, conclusions about the existence of false claims, on a quantitative basis, are highly speculative and unreliable. Generally, all that can be said is while we found indications of false claim in a number of cases, our research data did not corroborate allegations that false claims of abuse are common in custody and access cases.¹⁰¹

Moreover, it is difficult to make assessments that claims are true or false in family matters in part because individual perceptions of the same incidents differ. It is possible, as suggested by J. Johnston above, that those who engage in abusive behaviors genuinely

¹⁰⁰ For example: *Smith v. Smith* (1991) 117 N.B.R. 81-86. And one of the interview respondents reported that his former partner refuted allegations of abuse contained in her affidavit while giving oral testimony in court, under oath and that criminal charges have been laid against her for submitting a false affidavit. The final outcome is unknown.

¹⁰¹ Bala (1998), note 23; Rhoades, Graycar and Harrison (1999) and (2000), note 3; Neilson (2000) note 6.

do not appreciate the seriousness or effects of their behavior.¹⁰² For example, an abusive incident every four to six months over a period of five years may be viewed and understood by the actor as isolated events in an otherwise normal, happy relationship. The recipient, however, may experience the same behaviors as a pattern of behavior with cumulative psychological consequences. Certainly, we encountered comments in the interviews that suggested differences of perception and or possible minimization of abusive behaviors:

I know that's a total lie. Her idea of stalking is even today, I drive by her where her brother used to live to go to a restaurant - her brother hasn't lived there for over a year now, so I guess I must be stalking whoever lives there now. She made a statement in court saying I was stalking her and I told her at one point, yes I paid my taxes and I'll drive down any road I want to. The court believed that I was stalking her and basically made me kiss her butt. No evidence whatsoever.

Like the night that I put her out, I did put her out. We went out the door; we fell down the stairs. She was drunk and I was drinking a little bit. The next time I hear from her, she has black eyes and she is bruised and beaten and before that, she charged me with assault and she said I choked her. A friend of ours said she saw her later that evening and there were no marks on her but the next day when she came to the police, she had fingerprints on her neck. I didn't put them there or they would have been there the night before. I don't know, there was no trouble between her and I.

And we noted that assertions of false claim were often framed in terms of legal system acceptance of claims without corroborating evidence:

The whole system is going overboard looking for abuse. She has made all sorts of verbal accusations but the law is not fair; she has no proof. Now it is way over half for women's rights. She claims I threatened her, but she has no proof of that whatever. She has been downgrading me in front of the kids. Not all men abuse their kids. But he took the word of my wife, even though there was no proof at all.

Men expressed anger that judges preferred their wife's stories to their own in the absence of corroboration. This was viewed as proof of gender bias in the system.

Yet there may be factors, other than gender bias and, or fabrication, on the one hand or minimization and denial on the other, that are creating differences in perception

¹⁰² See also: D. Dutton and K. Hemphill (1992) "Patterns of socially desirable responding among perpetrators and victims of wife assault" *Violence and Victims* 7(1): 29-39.

in partner abuse cases. If, as suggested in "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice"¹⁰³ men tend to conceptualize abuse in terms of intention and behavior (hits, slaps, punches, name calling), while women tend to conceptualize abuse in terms of context (cumulative pattern of behavior in the context of the power dynamics of the relationship and the psychological effects of behavior), it is not surprising that men and women understand and present differently claims of abuse. It is possible, that at least some of the perceptions of false or inflated claim may be the consequence of conceptual differences creating differing perceptions, rather than fabrication on the part of either parent. What may, using an objective assessment of an incident of behavior, be or seem to be innocent, may be experienced, by a survivor of abuse as intimidating and, or dangerous, when assessed in the context of past behavior, regardless of the stated intentions of the actor.

Having said this, while the data as a whole fail to corroborate the argument that false claims are common, when false claims are made there is little doubt but that they have devastating consequences - both for family members, including children, and for other, genuine, victims of abuse:

Our health has been affected by this breakup especially the acceptance of proven false information by the Family Courts. Family Law is a jungle, and we have been totally shocked by the practices and devastated both emotionally and financially. The children's grandmother was forced to seek counselling on an emergency basis as a result.

I am a great believer in fairness in women's issues, and truly believe that women who lie in court, and make false accusations are hurting the cause of those women who are truly abused and victimized

F) Summary:

In conclusion, we found little evidence in reported cases, in court files, or in interviews in support

¹⁰³ L. Neilson (2000) note 6.

of the notion that men and women are equally victimized by abuse in intimate relationships or to suggest that false and exaggerated claims of abuse are common in child custody and access matters. What we did find, however, was evidence of conceptualizations of abuse that operate to the disadvantage of parents (women and men) victimized and made vulnerable by abusive relationships and limited access to experts able to explain the complexities of abuse in social and inter-personal context to judges and lawyers.

PART V

Why Does Partner Abuse Matter in Child Custody and Access Determinations?

A) Introduction and Discussion

Earlier, in Neilson (2000) we reported that many lawyers consider abuse of partners, in the absence of direct child abuse, of little importance in access determinations.¹⁰⁴ Similar findings are being reported in Australia.¹⁰⁵ Most of the male participants in this study endorsed this point of view. They argued that partner abuse, in the absence of direct child abuse, should not affect decisions about the care of children:

What happened between her and I, I don't think it's very relevant. We split up for whatever reasons. The issue comes down to the kids. Unless the father or someone is proven to be an abusive father and, in extreme cases, physically abusive to the children, then I can see it. But when the children want to see both parents and both parents want to see the kids, then there should be no reason for it [limiting a father's equal participation].

It is a pity that even enlightened people still advocate depriving a parent (against whom there is no allegation of wrong doing toward his/her child) of the right to co-parent this child, just on the basis of a spousal account of perceived or lived abuse, other than terror,¹⁰⁶ that was not at all directed at the child. The responsibility to avoid bad display of dysfunctional behaviours in front of the child falling on both should suffice to equally penalize both parents as opposed to the male parent alone. At least, please [only deprive parents of co-parenting rights when parents] demonstrate a disposition to continuously misbehave in the presence of the child even in the new separate environment before permanently severing the child from healthy interactions with the other parent.

Lawyers give high priority to ensuring that both parents have contact with children now. The Joint Committee Report, *For the Sake of the Children*, suggests even higher priority and a shared parenting presumption.

¹⁰⁴ L. Neilson (2000) note 6.

¹⁰⁵ Rhoades, Graycar, and Harrison (1999) note 3.

¹⁰⁶ Set in the context of this interview as a whole, it is likely that this father is saying that he would exclude from joint custody presumptions parents who have engaged in patterns of violent behavior directed against a partner or spouse producing terror in the other partner or children.

Yet, as previously mentioned, researchers, who study children, claim that maximum contact is but one of many factors affecting children's best interests after separation. Several other factors, some of them previously mentioned, come readily to mind. First is the interest of children in residing in safe environments, free from sexual, physical or emotional abuse, conflict and stress.¹⁰⁷ Second is the interest of children in the benefits of being cared for by primary caregivers not experiencing the stresses of sexual, physical and emotional abuse.¹⁰⁸ Third is the interest of children in being cared for by caregivers able and willing to honor adult responsibilities to children. Fourth is the interest of children in the benefits of adequate resources and financial support. And, last but not least, is the interest of children in maintaining positive relationships with adults who love, nurture and provide for them.

Analysis of case law and of court files and the perspectives of lawyers disclose priority being given within the legal system to contact over and above other considerations. (See Part VII for discussion of issues associated with degree of contact and settlement pressure.) Maximum contact is being equated with best interests. Specifically, reported cases, court files and lawyers indicate that, while some lawyers clearly made connections between spousal abuse and damage to children, other lawyers, the majority, tend to distinguish spousal and child abuse:

'Abuse between spouses often does not include abuse of the children' (female lawyer)

'Victims' of spousal abuse sometimes recognize that the other party has rights and may never have been abusive to the children.' (male lawyer)

'Abuse to women does not equate [with] abuse towards their children. Stresses are not

¹⁰⁷ For references, see notes 20, 21, 31 and 32. See also: M Sudermann and P. Jaffe *A Handbook for Health and Social Services Providers and Educators on Children Exposed to Woman Abuse/Family Violence* (Ottawa: Health Canada, National Clearinghouse on Family Violence, 2000) and the *United Nations Convention on the Rights of the Child* (1989), article 19.

¹⁰⁸ See discussion and citations near the end of note 31.

similar and the damage caused by the absence of access is probably worse than slight abuse' (not a justification). (male lawyer)

The vast majority of lawyers, who responded to the survey, both male and female, put forth the point of view that, in the absence of child abuse, contact with both parents is usually in the best interests of children, even in abuse cases.¹⁰⁹ Further, when asked to indicate circumstances in which they would encourage an abused parent to seek exclusive custody of the children, with no access to the other parent, most lawyers responded:

'Only if the children were sexually abused or in imminent danger of being abused by the abuser parent' (female lawyer)

'Never, unless the abuse is directed to the children' (male lawyer)

Yet abuse is relevant to custody and access inquiries, not because there is any benefit in assigning marital blame, but because researchers say that patterns of abusive behaviour often, although not always, indicate poor parenting skill and ability.¹¹⁰ Research studies indicate that at least between 30 and 50 percent of men who physically abuse their partners will also physically abuse their children¹¹¹ and that the rates increase with severity¹¹² and frequency of the pattern of partner abuse. Moreover, there is little evidence to indicate that parents who regularly demean, belittle and control their partners; parents who have poor impulse control and little ability to deal with conflict and anger are unlikely, in the absence of therapy, to change these patterns when spending time

¹⁰⁹ The point is not that these lawyers' conclusions were wrong. Indeed J. Johnston's research, note 64, indicates that different patterns of abuse predict different post separation outcomes with respect to continuation of abuse. Not all who abuse partners continue the abuse after separation. A minority of those who abuse partners will abuse the children after separation of the parents. Yet the figures - considered to be in the range of 30 to 50% - warrant concern. See, for example: M. D. Pagelow, "Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements" (1994) 7:4 *Mediation Quarterly* 347-363; D. Saunders, "Child Custody Decisions in Families Experiencing Women Abuse" *Social Work* 39(1): 151-159; E. Stark and A. Flitcraft, "Woman-battering, child abuse and social heredity: What is the Relationship?" (1985) *Marital Violence* 147-165, "Women and Children at risk: A feminist perspective on Child Abuse" (1988) 18:1 *International Journal of Health Services* 97-11.

¹¹⁰ P. Jaffe et. al. note 18; Sudermann and Jaffe note 107.

¹¹¹ See, for example: P. Jaffe, D. Wolfe and S. Wilson (1998) *Children of Battered Women* (Newbury Park, CA: Sage), M. D. Pagelow; D. Saunders; E. Stark and A. Flitcraft note 109.

¹¹² Severity is used here in terms of frequency and the extent of psychological damage to the recipient.

alone with their children.¹¹³ Moreover, parents who are suicidal and make death threats against former partners are at risk of killing the children.¹¹⁴

Indeed interview participants commonly spoke of their children's exposure to patterns of irresponsible parenting and abuse pre-dating separation but continuing after separation:

Would parent education programs have helped - explaining the damage being done to the children? *Again, that will only help those who want help. I've sat him down and told him and said this is what you're doing to your daughter. Your daughter thinks you hate her. 'No she doesn't;' 'yes she does'. [He said] 'Why won't she say anything to me?' [I explained], 'She is afraid of you. Think about it, the 3 year-old child was hiding in the bathroom crying. Do you really think she's forgotten that?' He keeps saying they don't remember. Yes they do. But you can't get it through his head.*

But getting back to my daughter. She went with him [for the weekend] and at 12:30 that night I heard somebody crying outside. [I think to myself] This sounds like my daughter and there she is getting out of his car. She was crying, vomiting. I don't know what's wrong. He takes off, so when she's calm, I ask her. She says, 'Him and his girlfriend were both drinking and got into fight.' She said, 'I knew he was going to hit her. You could see his temper and she was pushing him. . . I got between them a couple of times, but I finally said I want to go home and when I was leaving he grabbed her and threw her across deck and I think she hit her head. Can you call and make sure she's okay?' That took until 4:00 a.m. to get the story out of her. So the next day I called him and said, 'You brought her home extremely upset.' [He said] 'I did?' I said, 'yes.' He said 'Wasn't that bad'. [I said] 'She was just hysterical.' [He said] 'Well then you must have upset her.'¹¹⁵

Personally, I would prefer supervised. But getting it is a big problem. You have to prove all this reason for it. I've had the three kids in two years of counseling but there's nothing you can do. He has rights. And the way he treats his daughter is pathetic. Like what? His attitude. He's always yelling at her, she can't do anything right. Nothing pleases him. He's a fanatic. She's just a 14 year-old girl. She likes to have her nails a little bit long but he says you have to cut them down to nothing. They have to be spotless. Her hair has to be up.

¹¹³ See note 110.

¹¹⁴ During the course of this study, a father was alleged to have killed his two children, in Moncton, New Brunswick, in an apparent murder/suicide. (Summit News Service "Woman Feared Husband" Daily Gleaner, February 13, 2001, p. A4). Despite death threats against the mother, extreme jealousy and threatened suicide, the father, with the mother's consent, was granted, by consent order, joint custody of the children - on the basis that he had actively participated in the children's lives and abuse had never been directed against the children. Indicators of danger to the children were apparent in this case, before the father was granted joint custody. Similar indicators of danger (death threats, threatened suicide, extreme jealousy, monitoring) have been found repeatedly in judicial and coroner's inquiries into failures of the legal system to prevent deaths of women and children in Manitoba, Ontario and Alberta, note 56. A copy of an assessment tool that may help judges and lawyers assess when parents will kill partners and children is included in Appendix 3.

¹¹⁵ This quotation is an illustration of an inability to accept responsibility, attributing responsibility to others.

He demands: 'They are to be in clean, neat clothing, not looking like slobs.' My children have never looked like slobs, but this is the way he talks to her all the time, every single time. He says: 'If your nails aren't cut, you're not going.' How does he discipline them? He screams. That's all he has to do. They've seen him beat on me. He doesn't have to make a move. If his voice raises, that's it. As far as I'm concerned, he abuses those kids. Not physically, but emotionally, especially my daughter. I've had her in counseling. They've [the counselors] sat with her and they agreed with me.

Separation of abusive partners may simply serve to replace partners with children as the targets of abuse:

I lacked the skills to stand up for myself, which were my own issues. I have to learn how to set better boundaries. I left him because I had a good family upbringing and was able to recognise that this was an unhealthy situation. I wanted to alter the course of family violence but I could only deflect it; I'm doing damage control now. I am fearful that my children will not have the skills to defend themselves against it adequately. When I was in the household, I acted as the buffer, particularly between him and my oldest child. It's interesting because I've read since then, usually it's the birth of the first child that starts this abusive cycle, and sure enough it was. There was always a great deal of conflict between my oldest and my ex-husband because he attempted to control everything. And now I'm not there to be the buffer between them.

Moreover, abuse does not have to be experienced directly in order to cause damage. A growing body of research is documenting the negative consequences of children observing or hearing one parent being abused by another.¹¹⁶ The negative effects are compounded with continuing exposure to high levels of conflict between the parents.¹¹⁷ The argument being made here is that all factors concerning the health, welfare of children ought to be taken into consideration when determining the best interests of children. Maximum contact or the benefits of being loved and cared for by both parents is but one, albeit important, factor but parents say that children's health and safety are jeopardized when any one factor is given priority and considered in isolation.

¹¹⁶ M. D. Pagelow, "Effects of Domestic Violence on Children and their Consequences for Custody and Visitation Agreements" (1990) 60 (2) Mediation Quarterly 347; E. Peled, P. Jaffe and J. Edleson, eds. Ending the Cycle of Violence (London: Sage 1995); P. Jaffe, D. Wolf and S. K. Wilson, Children of Battered Women (Newbury Park: Sage, 1990); Sundermann and Jafee (2000) note 107; J. Johnston "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1994) 3:2 Family Mediation 11. See also references cited in notes 31, 32 and 33.

¹¹⁷ Ibid.

B) Continuing Exposure of the Children to High Levels of Conflict - The Patterns

As previously mentioned, the research indicates the importance to children, from abusive homes, of being freed from exposure to continuing parental conflict. Yet data from all sources indicate problems with continuing post-separation harassment and conflict in partner abuse cases. Court files indicate high to extremely high rates of continuing litigation in such cases.¹¹⁸ Both the case law and the court files indicate high rates of threatened and actual child abduction,¹¹⁹ repeated breaches of peace bonds and restraining orders. Lawyers say that access frequently is used as an opportunity to continue to control, intimidate and abuse. Female interview participants complain of continuing harassment, stalking and intimidation, albeit usually decreasing in frequency with time.

More specifically, only 11.3% of lawyers indicated that access is not used to continue patterns of abuse and control; 28.2% said that this pattern occurs but is infrequent; 43.7 % indicated that the occurrence is frequent; 16.9 % said that the pattern occurs but declined an invitation to comment on frequency.¹²⁰

¹¹⁸ See also: Rhoades, Graycar and Harrison (1999) (2000) note 3.

¹¹⁹ For example, 24 % of the 147 partner-abuse files in jurisdiction one contained evidence that an abusive partner had threatened and or had actually absconded with the child or children.

¹²⁰ Several lawyers commented that both parents use the children to continue their 'fight'. And certainly there were comments indicating such patterns in several interviews:
I tried - I bent over backwards. Tried to agree on a lot of the issues. For example, one time when I had joint custody, the kids left a couple of storey books - when the kids returned Sunday. Tuesday night she called me up and said the books were missing. I said they were left here by mistake and the kids will have them when they come back. She wanted them returned that night or she was going to call the police. So she called the police. They called me on it. I said I was not going to return them that night. I would in the morning. These were all issues that my ex tried to discourage me. No need for her to call police over a couple of books. These were the things that I had to battle. Many things like this. This quotation also provides an illustration of the importance of contextual assessments. It is possible that the parents involved in this dispute may have had different perceptions of this interaction. It is possible that the mother experienced this incident as the father's attempt to exert continuing control over her and or the children,

Basically, participants, court files and reported cases disclosed 6 patterns of continuing post-separation harassment and conflict: a) threats and intimidation, b) surveillance, c) abuse through or of the children, d) involvement of the children in the conflict, e) multiple applications to the courts, and f) child abuse allegations against primary caregivers. Commonly access provided the means that allowed such harassment and abuse to continue. The patterns are illustrated and discussed below.

Pattern 1 - a - Continuing threats and intimidation:

Then he was still drinking and coming to my house, banging on the door at three in the morning, drunk, crying, wanting to see my daughter. I had to call the police, four times. I don't have the records cause they just put it on file. The police were great; they came right over. I didn't want to press charges or whatever. I felt we still had a chance to get back together but I was afraid because he threatened to kill me on the phone (that's on the police file). Yes, he threatened to kill me just that one time. He said, 'I'm going to slit your throat.' He thought I had a boyfriend at that time, which I didn't. He said he would slit his throat too. The second time was on my brother's birthday when he threatened to kill me. [The police didn't want to proceed with a charge on that?] They didn't encourage me and I didn't want to, I felt sorry for him, I wanted to help him. I just didn't get it. Then I had to call the police again. He was drunk out of his mind. He was calling me all night. He was supposed to come over to see our daughter, but he called drunk. I had to call my brother over because I was petrified. He threatened to kill my brother on the phone, threatened to kill me, I had to call the police again that night. Then he moved away.

I lost my job because of the abuse. Because he was calling there and making threats and showing up looking for me and they were afraid he'd go in and start shooting people at random, so they let me go.

It is important to mention here that continuing intimidation and abuse is not always as obvious as the circumstances recited above. Instead, abuse can continue, from the perspective of the survivor, in the absence of objective, observable abusive acts.¹²¹ This is because, as discussed previously, abuse may only be understood in context and in

particularly if the books were the mother's property and the incident was part of a pattern of similar behavior. Or it is possible that the incident was not part of a pattern of behavior and that, from the father's point of view, the children simply forgot the books and he had no intention of retaining control of them at his residence. Perhaps the mother - possibly as a consequence of previous patterns of behavior - attributed motives the father did not have. In the absence of a pattern of similar behaviors by the father the incident could be considered trivial or harassment of the father by the mother. If part of a pattern of behavior by a father, however, the same incident could be indicative of a continuing harassment and control. Patterns of behavior can only be assessed and understood in context.

¹²¹ See: M. A. Dutton, note 79.

consequence. It is well known among family violence experts that men and women subjected to repeated abuse by intimate partners learn to detect and respond to subtle signs of imminent danger and that the appraisal of threat and danger is based more on patterns of prior violence and abuse than on current behavior.¹²² Indeed psychologists report that heightened sensitivity to danger is a consequence of abuse.¹²³ A whistle, a raised eyebrow, the use of a certain word may be abusive, therefore, if understood in context - once it is understood that those behaviors preceded violent or abusive attacks in the past. Objective, incidents-based assessments devoid of information about context and consequences may make complaints about these sorts of behaviors appear trivial and the parents who mention such incidents appear vindictive or irrational. Indeed partners who engage in such behavior may not appreciate fully the effects of these behaviors and may not classify such action as abusive thus concluding that the claims of ex partners that abuse is continuing are false. Yet an examination of the patterns and consequences of abuse over a period of time leads to an appreciation that such acts trigger high levels of fear and anxiety in victims and thus may be experienced as abusive by recipients.

Pattern 2 - Continuing attempts to monitor and control:

He was on phone continually. That was one of the hardest things was phone calls, nobody could stop him from calling me 20 times day or night. I had an answering machine and just didn't answer the phone, but it took me 6 months to get smart enough to do that. It's not easy and when you've got someone calling you 20 times a day and when lawyers speak to him and he says, 'I'm just calling my daughter.' Well, you don't call your daughter at 3:00 a.m., at 4 a.m., at 5:00 a.m.

Last year at Christmas time, he hadn't seen the children about 3 weeks and Christmas day was pretty rough. On Christmas day they phoned him and he agreed to see them. It was just tortuous that day for them. He was doing a lot of damage to them because he was questioning them so much about me. Drilling them one by one in the bathroom. He took them in the bathroom, one at a time and just grilled them about what I was doing, who my friends were. I don't think that he does that anymore. Maybe that's why he doesn't see them

¹²² M. A. Dutton, National Institute of Justice (1996) note 79; *R. v. Lavalee* [1990] 1 S. C. R. 852.

¹²³ *Ibid.*

that much. They haven't spent a night with him in months. [When the children do see him] My daughter has all this anger and she doesn't want to talk about it. She goes out there and then acts it out, by being totally rebellious; won't come in from the street and calls me dirty names - until I go out and physically bring her into the house and tell her that's wrong. Then she starts crying saying, 'Do you know what it feels like to have a Father that doesn't love you?' That's when it comes out.

Pattern 3 - Children becoming the targets of redirected abuse:

He doesn't allow them to call when they are with him and he won't spend money on food. He tells them he can't afford to feed them because he gives all his money to me. He makes them wear old clothes. He holds them down and tells them I am evil. The children are terrified of him. My daughter is having nightmares about him.

See my oldest daughter is still in therapy because he was really hard on her. Not physically, but mentally and that does more damage. He would feel free to berate her. She's a husky girl, beautiful girl, but she's big-boned. And he would take every opportunity to call her a fat cow, stupid, terrible names. His attitude was you stupid bitch: you're stupid, this and that.

He always makes snide remarks about me to the kids. Christmas dinner - I asked, 'Did your dad want you up for dinner?' I wanted to know if I'm having mine Sunday or Monday. There was no word by Friday, so I said, 'I'm going to have mine on Sunday, so if he happens to call.' Well, he did call 8:00 Saturday night to say he wanted to have his meal on Sunday.' Daughter said, 'Well mum has already got the ham thawed, so can we come Monday?' I don't know what was said, but I guess it was agreed to, so I took children up there and an hour later they came roaring in and I said, 'How was supper?' [They said] 'Well, we didn't eat. Dad said he had his meal yesterday.' He didn't feed them because they didn't go Sunday, like he wanted.

Although the nature of this study does not allow quantification and thus comments on frequency of occurrence, it is important to note that other researchers claim that 30 to 50 percent of parents who abuse partners prior to separation will transfer those abusive behaviors to children after separation.¹²⁴ Many of these researchers have focused attention on continuing physical abuse. It is likely that the patterns of continuing emotional abuse are even higher as it is likely that patterns of emotional response to others are even more resistant to change than are patterns of physical violence.

Pattern 4 - Involvement of the children in the conflict between the parents:

¹²⁴ See earlier discussion under heading: Why Does Abuse Matter?

[When my ex partner has them] he has to let them call me from a pay phone occasionally. He said [when they called me, on the phone], 'The judge doesn't listen to you!' He was laughing. Then he said, 'You're going to jail'.¹²⁵ The kids started screaming. They were frightened. He hung up the phone. A by stander called the police. The police called me back to tell me they were ok.

When my son came in [after visiting his father], he was belligerent, rude and nasty with me. His only remark was that he had just spent two and one half hours in the car with his father being berated and yelled at. All he was allowed to tell me was that my daughter was next. And all of this came from me asking him [former husband] if he would help pay to bring our oldest daughter home for Christmas. I don't know how to explain it. He left really nasty messages on phone. What he did was yelled and screamed, your mother is doing this and this, and all I did, without the children's knowledge, was ask him, 'Would you like to help me pay for bringing the older child home for Christmas.' And this is how he vented his anger.

She tells them all the time, 'I don't get any money from your father.' They always come out and say, 'Dad could you send mom some money'. I said, 'I do', [they say] 'Well, she said you don't'. I said, 'It goes up to the court and they send it to her.' They said, 'Well somebody must have stolen it out of the mail because mom doesn't get it'. [My daughter] said, 'Well, mom said you haven't sent any money for months.' You know, your little girl is looking at you like you're some kind of loser and I said I sent the money. I didn't want to take the receipts and show them to her.

I had to put in a month with him knowing he had to go [leave the marital home - because of the abuse]. He had taken the children outside and had thrown my wedding dress out on the lawn. I came home, they were all crying and carrying on. He took that opportunity to tell them that I was throwing him out on the street with nothing, no place to live. He omitted to tell them that I had agreed to give him money for rent. (This survivor of abuse was also the sole wage earner in the family)

Daughter came home from her dad's and was upset. Is something wrong? Yes, but can't talk about it. I heard her crying herself to sleep. She said, 'Just give me a couple of weeks I'll talk to you, but I can't talk now.' So the other day, she came home and asked if I got the mail. When the letter came, I thought, I know what's wrong with her. I said, 'Your father still doesn't know how to spell my name.' She said, 'You got it, I'm so relieved. Did you get a letter from Dad's lawyer?' How did you know? [She said] 'He was drunk and he was crying and said if I needed anything, he would give it to me, but he was going to lose his house and he was saying, 'Talk your mother into letting me keep house and you can come and swim in the pool.' So I ended up being the bad guy mom [for claiming child support].

This pattern - involving the children in the conflict - was mentioned often. Yet

researchers tell us that high levels of contact are particularly damaging to children when

parents involve them in parental conflicts.¹²⁶

¹²⁵ This mother reported being pressured to force the children to visit the father.

¹²⁶ Buchanan, Maccoby, Dornbusch (1991) notes 31 and 32.

Patterns 5 and 6: Multiple Applications to the Courts and, or Child Protection Agencies

The fifth and sixth patterns, appearing in court files in all three jurisdictions as well as emerging from interviews, were attempting to maintain conflict and control through the legal system and, or child protection agencies. Researchers have documented an association between the duration and frequency of legal battles between parents and behavioural problems in children.¹²⁷ Yet court files and interview data indicate very high rates of litigation in a substantial minority of the partner abuse cases. Repeat applications to the courts were made: to enforce child support payments, to reduce child support payments, to seek increasing amounts of time with the children, to claim custody, to enforce access and to enforce detailed provisions relating to the exchange of information. One parent mentioned 40 hearings in a single case. With the exception of applications to enforce child support - initiated automatically, often by the province - court file data and interview data indicate that most repeat applications to courts, in partner abuse cases, are initiated by non-custodial (allegedly abusive) parents against parents with primary responsibility for the children. Researchers in many jurisdictions are reporting similar trends in partner abuse cases.¹²⁸

¹²⁷ J. Healy, J. Malley and A. Stewart. "Factors Related to the Social Competence of Children in Single Parent Families". *American Journal of Orthopsychiatry* (1990) 60 (4): 531-543; G. Saayman and R. Saayman "The Adversarial Legal Process and Divorce: negative Effects Upon the Psychological Adjustment of Children" *Journal of Divorce* (1989) 12 (2/3): 329-48.

¹²⁸ S. Goundry *Final Report on Court-Related Harassment and Family Law "Justice"* (Ottawa: National Association of Women and the Law, 1998); J. Dewar and S. Parker "The Impact of the new Part VII Family Law Act 1995" (1999) 13 *Australian Journal of Family Law* 96; L. Walker and G. E. Edwall, "Domestic Violence and Determination of Visitation and Custody in Divorce" in D. Sonkin (ed.) *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (New York: Springer, 1987; *Report of the British Columbia Task Force on Family Violence: Is Anyone Listening?* (1992); N. Sueffert (1996) note 14; K. Waits "Battered Women and Their Children: Lessons from One Women's Story" *Houston Law Review* 35: 29- 103; Rhoades, Graycar and Harrison (1999) (2000) note 3.

Non-custodial parents say that they have no choice but to return to courts if they are to increase their time with the children and or if they are to ensure that primary caregivers comply with court orders:

I think he enjoys the time he has with me and I know he's verbalized to me on many occasions that he would like to spend more time with me. It's impossible right now unless I go back to court.

Perceived primary caregiver reluctance to encourage contact was said to be a particular concern. One non-custodial parent commented that litigation provides a safe alternative to violence or abuse:

My daughter has just started to deny me access herself, saying she doesn't want to see me because I keep taking her mom to court. My daughter doesn't realize that I have only the one choice. Amazingly, courts are my only choice. I am not prepared to use domestic violence.

Primary caregivers, on the other hand, complain of exhaustion, loss of time from work, financial and emotional strain from continuing litigation.¹²⁹ Several mentioned, sometimes sadly, their children's eventual rejection of fathers in the face of continuing conflict:

I have a daughter who won't speak to him. And she's expecting my first grandchild. And my other daughter has no respect for him at all and it's nothing I've said though he accuses me of that. And I said, 'You've made my job very easy if that's what my job in life is.' Like when he keeps taking me back to court to lower his payments. Kids say, well I'll go in and tell them what you're paying, because they see me struggling you know. I sit down with my books. I'm doing creative banking on a regular basis and they understand that I don't buy anything for myself. I will do without meals if it means that I can pay for after school activities.

Duties to exchange information pertaining to the children are reported as being particularly troublesome in these cases:

He was saying he felt I should call him every Sunday and tell him how children are doing in school and any concerns I might have. I said, 'No. I won't do that.' First, when we separated, I called the school and told them I am now separated. I have custody, so if it's something that needs to be addressed immediately I am to be called. I gave them both of my numbers. I made that effort so that I was completely informed about the kids. [I said], 'They

¹²⁹ See also: P. Chesler *Mothers on Trial: The Battle for Children and Custody* (Toronto: McGraw-Hill, 1991).

are your children and you too could call and say, I'm a father still, and I would like to be informed at this number.' I said, 'You have never done that.' Parent-teacher night, the first one he ever attended, was when we separated. He saw one teacher. Since then, he's never been to another parent-teacher meeting.

He took me back to court repeatedly because I didn't send out weekly medical, school and sports reports and he took me back to court because he said I was not making the children phone him as often as he wanted, and because the children were not sending him letters as often as he wanted. Anything. You name it: he filed it.

Basically, one of the patterns emerging from the interviews was that non-primary caregivers claimed the right to be informed by ex partners about their children's day-to-day lives, while primary caregivers reported experiencing such demands as efforts to monitor and maintain control. Researchers in Australia, investigating the implications of the *Family Law Reform Act 1995*, are reporting similar data and have concluded that such 'rights' to be kept informed become tools formerly abusive partners use to continue harassment and control.¹³⁰ Yet it is important too not to prevent parents from staying involved in their children's lives.

One way to resolve this issue is to adopt an interest-based approach and refocus the discussion. Rights claims are not interest based. If we focus on rights, this issue is understood as non-custodial parents' rights to be kept informed about the children. The result is polarization; non-custodial parent rights create obligations enforceable against primary caregivers. If, however, rights (non-custodial parent, fathers' rights, mothers' rights) claims are abandoned in favor of a focus on interests of and responsibilities to children, it becomes immediately apparent that the interest of children is that both parents make efforts to keep themselves informed about and involved in their lives. Children have no interest in enforcement or in polarization. Children have no interest in having one parent enforce rights against the other. The parental responsibilities connected to this

¹³⁰ Rhoades, Graycar and Harrison (2000), note 3.

issue include a responsibility to make efforts to obtain such information and to do so in a way that does not generate conflict. Clearly a number of the non-custodial fathers who participated in this study understood fatherhood in terms of their responsibilities to their children, rather than in terms of rights. These men expressed an involvement and interest in their children's activities; their interviews indicated that they took the initiative to be involved with and informed about their children. These non-custodial parents had little need to demand regular reports from ex partners. Parents of both genders might demonstrate responsibilities to children, by making efforts to be kept informed - by contacting schools, doctors, coaches, and the children directly - without involving the other parent. In the absence of rights-based thinking and polarization, there would seem to be little need to demand regular contact and reports when such demands produce tension and conflict for the other parent.¹³¹ Acceptance of responsibility to stay informed without involving the other parent reduces the need for enforcement of rights against the other parent, it helps to eliminate the need for extensive contact between former partners in high conflict cases and thus it reduces children's exposure to the effects of continuing conflict between parents.

And what of the costs of continually waging legal battles, from the perspective of the children:

I have been unable to perform the duties of my job for over two years as a result of the stress. [This case has] required over 40 Court appearances in 27 months. The protracted conflict and litigation has had serious implications on the children. My eldest son (5 1/2 years) has experienced psychological and physiological symptoms of anxiety and depression. A child therapist worked with him for about six months after he witnessed an attack on me by my ex wife's father. A psychiatrist prescribed him with anti-depressants at age four. The children have been given false and emotionally alienating information about their father, the divorce and the on-going conflict. The children have repeated criticisms of

¹³¹ Private email connections enabling non-custodial parents and children to stay in touch through regular communication without involving the other parent might be a reasonable option for parents with the necessary resources.

me and false accusations they have overheard their mother tell other adults. They have been subjected to my ex-wife's histrionic outbursts at transitions. They are afraid of her anger and the repercussions of being disloyal to her. My youngest has recently begun asking questions that reveal she is confused about the misinformation she has been given by her mother. The psychological report that was conducted on my ex-wife indicated that she does not appreciate the affects her behavior is having on the children and that they will be developmentally at risk if the situation is not soon corrected. The Court stated that it was 'deeply worried about these children'

Researchers have documented a correlation between high litigation rates in families and psychological damage to children.¹³² Irrespective of the merits of any parents' rights or claims, regardless of who is right and who is wrong in such cases, could the benefits of continuing litigation at this level ever be worth the stress and emotional costs for the children?

Another pattern, observed relatively frequently, although in a minority of partner-abuse cases, (in reported cases, in court files and in interviews) was a pattern of unsubstantiated child abuse allegation. Child abuse allegations in partner-abuse cases commonly surfaced after separation and after partner abuse allegations have been made.

For example:

The Ministry of Children and Families has refused to investigate the father's report of a child protection issue surrounding the emotional abuse of the children as a result of the mother's false allegations and access denials.

Yes. The night that I witnessed her - she pulled him out of the highchair or car seat, dropped him off, I forget exactly - he was in the chair. She slammed the door in my face and when I left, I looked in the window and a heard a screech come out of him. I even taped it. You can hear it. She had hauled him out of the chair by his two arms. There was a question of weight loss too. I had concerns about bruising on him and when I questioned her, she would break down and cry, get defensive. This was brought to the attention of the community services.

In several cases, primary caregivers made unsubstantiated child abuse allegations against the other parent after separation in the context of an access dispute. More commonly, non-custodial parents made such claims against the primary caregiver and complained that allegations of child abuse against primary caregivers were not pursued. Fathers connected to father's rights groups are now claiming that restricting

¹³² See note 128.

children's access to fathers is a form of child abuse.¹³³ For discussion of denial of access issues, see Part VIII of this report.

On the one hand, it is possible that partners, who are abusive, make such claims in efforts to have the other parent punished for the decision to leave the relationship or for the decision to claim partner abuse or in order to gain the upper hand. On the other hand, family violence researchers tell us that mistreatment of children is often a consequence of and thus an indicator or spousal of partner-abuse.¹³⁴ Partners may react to stresses produced by their own abuse by mistreating their children. Perhaps child protection authorities are reluctant to proceed in these cases in the face of scepticism when claims are made against former partners after separation in the absence of claims prior to separation, but it is not possible, in the context of this study, to verify this. Moreover, treatment and parenting education may be better options than punitive or investigative measures when child maltreatment is the product, rather than the producer, of abuse. In terms of this study, all that can be said at this point is that child abuse claims were common in the partner abuse cases examined and that there was little evidence in the court files that such claims warranted legal child protection proceedings.¹³⁵

¹³³ Internet sites for fathers are mushrooming. Dominating discussions now are claims that denial of access and or limitations on access constitutes child abuse and that parent alienation is a serious social phenomenon. For further discussion of the latter, see Part VII.

¹³⁴ J. Edleson, "Mothers and Children: Understanding the Links between Woman Battering and Child Abuse" (1995) <http://www.mincava.umn.edu/papers/nij.htm>; M. Jacobs, "Requiring Battered Women to Die: Murder Liability For Mothers Under Failure to Protect Statutes" (1998) 88 *J. L. Crim.* 579; D. Saunders, "Child Custody Decisions in Families Experiencing Women Abuse" *Social Work* 39(1): 151-159; E. Stark and A. Flitcraft, "Woman-battering, child abuse and social heredity: What is the Relationship?" (1985) *Marital Violence* 147-165, "Women and Children at risk: A feminist perspective on Child Abuse" (1988) 18:1 *International Journal of Health Services* 97-11.

¹³⁵ Excluded from this analysis are child protection cases initiated by the Province of New Brunswick, Health and Community Services. Previously, in "Partner Abuse" it was reported that: "Twenty-two of the court files examined in New Brunswick involved interventions of child protection authorities as a result of abuse and violence between the parents. The affidavits filed with the court in these cases were framed in gender-neutral language, making the dynamics of the abuse between parents difficult, sometimes impossible, to interpret. Commonly the affidavits stated merely: "the parents deal violently with each other" or "there were more than 22 official reports of domestic violence, many with police involvement". Even so, documents in nine files made it clear that mothers lost, by agreement or judicial order, custody or guardianship of their children to the state as a result of their partner's violence. In two of these cases, the mothers agreed to grant guardianship of their children to the state because they feared for the children's safety upon the father's release from prison. In both cases the fathers had been imprisoned as a consequence of abuse of the mother. In seven of these cases women lost custody of their children to the state as a consequence of their partners' abuse; the reports did not include discussion of abuse by mothers. A similar pattern emerged in the reported cases and in court file cases in the other two jurisdictions.

Complaints of surveillance (repeated telephone calls and stalking), involvement of the children in the parental conflict and harassment through the courts were the forms of continuing conflict and or harassment mentioned most often. Parents commented that continuing ties (emotional and legal) between children and former partners made it difficult to break patterns of continuing conflict and abuse. Yet, as previously indicated, researchers claim that continuing exposure to conflict harms children. Moreover, data collected in Ontario by Dr. Desmond Ellis, not yet published, indicate that it is statistically provable that one of the strongest predictors of continuing abuse and violence, even danger, is 'attachment-dependency' or an inability to 'let go' of former relationships with ex partners.¹³⁶ Thus insistence on continuing reports from and or contact with ex partners invites critical scrutiny. High levels of continuing litigation in partner abuse cases may indicate an inability to let go of former relationships with partners and continuing efforts to harass and control.¹³⁷ Certainly continuing litigation suggests the continuation, in the lives of the children of high levels of conflict. Perhaps courts, when deciding whether or not to entertain repeat applications in partner abuse cases, ought to consider the burden being imposed on the children by continuing litigation and conflict in these cases. Moreover, judges, lawyers and mediators may wish to consider provisions in agreements and orders that limit or reduce opportunities for partners to insist on continuing contact with former partners in high conflict and abuse

¹³⁶ Telephone communication (July, 2000) Desmond Ellis, Judy LaMarsh Research Centre, York University; D. Ellis "Assessment Screening For Violence and Power Imbalances: A New Millennium Model" Resolve Summer/Fall 2000 (Kitchener, Ontario: Family Mediation Canada).

¹³⁷ See also: S. Goundry, note 128.

cases. Provisions requiring regular reports about children appear particularly troublesome in such cases.¹³⁸

C) Conclusion

In conclusion, patterns of continuing conflict in the lives of children already damaged from living with their parent's abuse, indicate that the best interest of these children require considerations other than, or in addition to, maximum contact. Failure to consider factors such as continuing conflict and continuing exposure to abuse may be compounding damage already done to these children. Certainly insisting that children spend appreciable amounts of time with abusive role models does little to prevent the inter-generational transmission of abusive behaviors.

How is the legal system responding to these issues? In order to explore this question fully it is necessary to consider both legal principles and rules (law in theory) and law as it is practiced. Thus Part VI is a discussion and comparison of law in theory, as disclosed in case law and statutes, with law in practice, as disclosed in court files and in clients' accounts of legal experiences. Part VII is a closer look at components of the legal system, in order to provide an explanation of how and why legal principles and practices differ.

¹³⁸ Similar conclusions have been reached in Australia. See: Rhoades, Graycar and Harrison (2000) note 3.

PART VI

Law in Theory/Law in Practice

A) Introduction

Earlier it was suggested that law is composed, not only of law and legal principles, but also of procedures implemented by people fulfilling social and professional roles. To quote from a Judge of the Chancery Division in England: ‘Substantive law is merely the skeleton - it is the procedure that is the flesh, blood and above all, the nervous system [of law].’¹³⁹ Procedure, or law in practice, is not merely process or action, it is action embedded in social as well as legal context. The social context of legal procedure or action - the social attributes of the participants, (clients, lawyers, judges, mediators) the relationships among them, and the attributes of legal system itself - all play a part in shaping both the delivery and receipt of law and legal services. The contention is that the demands of the legal system and the relationships among mediators, lawyers, judges, court staff and family law clients are as important to an understanding of law in practice in abuse cases as are legal rules, principles or procedures. Thus this section is a brief comparative examination of the legal system in theory (case law) and in practice (as disclosed in data drawn from practicing lawyers, court files and clients) in partner-abuse cases involving children.

B) Law in Theory/Law in Practice: Custody

In *Spousal Violence in Custody and Access Disputes: Recommendations for Reform* N. Bala et. al. state:

¹³⁹ Sir Robin Jacob, Judge of the Chancery Division, "Standing Alone" Case Notes, Criminal Courts Review Newsletter (Spring 2000) 1.

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

The federal *Divorce Act* and legislation in most provinces specifies that in assessing a child's 'best interests,' the court shall not take account of a person's 'past conduct unless that conduct is relevant to the ability of that person to act as a parent of a child.' While this statutory provision may exclude evidence of such marital 'misconduct' as adultery, there is now a significant body of Canadian case law in which judges have held that spousal abuse is relevant to custody and access and given it significant weight as a factor in deciding about these issues.

One of the first reported Canadian cases dealing with the effects of spousal violence on children was *Young v. Young*, decided in 1989.... Since *Young* there have been many reported Canadian cases in which mothers who have been victims of emotional and physical abuse have called expert witnesses to testify about the negative effects of this abuse on the children, and hence explain why the father should not get custody. These experts have also explained how the abuse has affected the victim, for example causing loss of self esteem and depression, and how counselling can (or has) helped the victim to recover and be an effective parent. At least some Canadian judges are aware of the effects of spousal abuse on children. In some more recent cases, abused women have been able to obtain custody without calling expert evidence, even in the face of an assessor's report favourable to the father. At least some judges are now prepared to accept the harmful effects of spousal abuse on children without the testimony of an expert in domestic violence. ... For example, in the 1995 British Columbia case of *Stewart v. Mix*, ..An assessor recommended that the father should have custody, in large part because the mother had moved and formed a new relationship and had a young baby, and the assessor felt that the older boy had bonded to the father's extended family. The judge rejected the assessor's recommendation that the father should have custody and observed that the 'father has a history of a violent temper, was consistently jealous of his [former] common law wife, used violence when aroused...It is difficult to see how he can be considered a good role model.' The judge awarded custody to the mother, with specified access to the father, including a provision for supervision of the exchange of the child.

While many judges are aware of the significance of spousal abuse in custody and access cases, clearly others are not.

There are Canadian judgements which recognize that where there is a history of significant disagreement and argument, let alone abuse, joint custody is not likely to be appropriate, though it would be preferable to follow the example of several American states and have a statutory prohibition against joint custody if there is a significant history of domestic violence, as there have been Canadian cases in which judges have imposed joint custody despite a history of spousal abuse.¹⁴⁰

¹⁴⁰ N. Bala, L. Bertrand, and others (1998) Spousal Violence in Custody and Access Disputes: Recommendations for Reform (Ottawa: Status of Women Canada) pages 26 –28.

Similarly, in "Spousal Abuse, Children and the Courts: The Case For Social Rather Than Legal Change" L. Neilson found that Canadian judges do indeed consider evidence of partner abuse in custody determinations and that the case law does not indicate a pattern of judges awarding custody of children to abusive parents. However, Neilson also concluded:

Judges also employ the use of technical, gender-neutral language, which tends to sterilize and trivialize women's experiences. For example: 'The Respondent left the marital home apparently as a result of alleged assaultive behaviour towards the Petitioner which attracted the attention of the police authorities'¹⁴¹ The relationship was characterized by physical and emotional violence, by the respondent towards the appellant... The respondent was arrested and charged with having committed a number of offences against the appellant.'¹⁴² The offences referred to in the last quotation, extracted from an earlier report involving the same parties included: '7 charges of uttering threats to cause death, 2 charges of assault, one charge of threatening to cause serious bodily harm and one charge of breach of probation.'¹⁴³ It is not possible to tell, from the reported cases, whether this neutralization and trivialization is entirely the fault of judges; lawyers may be contributing to the problem.

And she noted that the case law indicates the use of objective, non-contextual assessments of abuse.

Yet as one moves from an investigation of law in theory - as reflected in reported cases - to law in practice - as reflected in court files, in survey data and in interviews, other patterns begin to emerge. In connection with non-child protection, custody and access cases, as reported in "Partner Abuse",¹⁴⁴ not only do abusers obtain unrestricted access to their children, they also obtain custody in appreciable numbers. Returning to the court files: joint, split or full custody was granted to or obtained by allegedly abusive parents in 23 (16 %) of the non-child-protection,¹⁴⁵ partner abuse court-files in jurisdiction one, in 20.6 % of the court file cases in jurisdiction two, and in 26.7 % in

¹⁴¹ *McCull v. McCull* (1995), 13 R.F.L. (4th) 449.

¹⁴² *Savidant v MacLeod* (1992), 40 R.F.L. (3d) 443 at p. 445.

¹⁴³ *Savidant v MacLeod* (1991) 32 R.F.L. (3d) 266 at p.266-7.

¹⁴⁴ L. Neilson (2000), note 6.

¹⁴⁵ This discussion relates only to private family law actions: public child protection proceedings are excluded from these discussions.

jurisdiction three. Commonly, the abused partner agreed to these provisions, often after having initially been awarded custody of the children by the court. Less often abusive parents were awarded custody or joint custody as a result of judicial decision. Judges clearly granted custody to fathers, who had abused their partners and or spouses, at the request of a child in six of the court-file cases. For example:

File 62: The father was granted custody of the daughter by court order because the daughter wanted to reside in the community where she grew up. Allegations of abuse: extreme violence against mother leading to repeated police involvement, hitting with a baseball bat, death threats, beatings of the mother leading to criminal code convictions for assault.

Without information about the current circumstances of this child, we do not know the consequences of the court endorsing the child's request, yet this case and other cases like it are worrying. Nicholas Bala argues that judicial reliance on children's wishes in abuse cases is fraught with danger. He notes the possibilities of manipulation and of children siding with the "stronger" parent and concludes that the wishes of children to live with an abusive parent should be given but limited weight. He recommends also that children's reluctance to visit an abusive parent never be dismissed as fears transferred to the child by the mother.¹⁴⁶ As earlier mentioned, the Joint Senate Committee Report, For the Sake of the Children, suggests the opposite.

Seven of the partner-abuser, joint of full custody files included allegations of child abuse or neglect by mothers victimized by the partner abuse, three files indicated that formerly abusive partners applied for custody after survivors of abuse with custody of children established new relationships with abusive men and, in one case, a formerly abusive father was awarded day to day care because the child had become abusive to the mother. Most of the files, however, contained more serious allegations against parents who ultimately obtained custody, for example:

¹⁴⁶ N. Bala (1998) note 23, p. 16-17.

File 30: The mother had custody of the children initially then agreed to joint custody, primary residence with the father. Allegations of abuse: father absconded with children twice, the mother had to take proceedings to obtain their return; high levels of violence against the mother, evidence of criminal convictions of father for assaulting her. One on occasion he was said to have held a knife to her throat; on numerous occasions he uttered death threats against the mother leading to criminal convictions.

File 221: The mother alleged several physical assaults in front of the children and that criminal charges had been laid for physical and sexual assault against the father. The father did not return the children after exercising access. When the mother refused an offer to reconcile, the father was reported to have told her to say goodbye to the children for the last time as he would fly them out of the country. He is also reported to have told her she was lucky to be alive and that if she showed up at his house to see the children, he would break every bone in her face, that he would hunt her down and bury her six feet under. The mother alleged that he refused to allow her to speak to the children and got an unlisted telephone number. The father alleged that the mother used drugs and initiated abuse (by shouting and flailing her arms) and that she had a boyfriend while staying at Transition House. Initially the father had custody of the children with the mother's consent. She claims that her consent was produced by his threats. A home study was ordered. The case was not yet decided when data were collected.

File 273: Initially the parties consented to an order that the mother would have custody and the father access to the children. Ultimately, four years later, the parents (and their private lawyers) signed a consent order for joint custody. The court file indicates physical abuse, death threats, directed at the mother by the father, repeated separations followed by reconciliation.

File 310: Initially the parents consented to the father having custody of the children with access to the mother. Finally the parents (with private lawyers) agreed to joint custody, primary residence with the mother. The court file indicates a pattern of separation and reconciliation, verbal and many instances, over a long period of time, of physical abuse (kicking and punching) of the mother, corroborated by her doctor and other witnesses, as well as police involvement. The file indicates that the mother had been diagnosed as suffering from a bipolar illness.

In considering data indicating that, in an appreciable number of cases, abusive partners ultimately obtain custody of the children, it is important to keep in mind that, when parents alleged to have abused the other partner obtained custody, it was usually by virtue of an agreement or consent order. Rhoades, Graycar and Harrison are reporting similar trends in Australia.¹⁴⁷ Why?

¹⁴⁷ (1999) and (2000), note 3.

One possible explanation is that, when lawyers advise clients during settlement negotiations, they give advice in accordance with perceptions, reported in "Partner Abuse", that partner abuse has little relevance to parenting. We asked lawyers (in an open ended question) to explain survivors of abuse frequently agree to abusers obtaining joint or full custody of children. Sixteen and 12 lawyers respectively stated that bad spouses do not necessarily make bad parents or endorsed 'the need for children to have regular access with both parents':¹⁴⁸

The relationship between the partners and the relationship between the parent and children are very different. (female lawyer)

Generally the opposite party has never been abusive to the children and can be termed a good parent with good parenting skills. Often the abused partner will blame themselves for the abuse, .. particularly if the abusing partner shows no sign of abuse or violence in his/her other relationships. (male lawyer)

However incapable an abusive spouse may be at appreciating the needs and respecting the rights of his former spouse, he is still a parent; a child separated from a parent needs to see, feel and appreciate this half of who he or she is. The need of the child is overwhelming. Furthermore single parents are often 'swamped' by the daily needs and necessities of raising children. They can't do it alone and hope that the abuse will not continue with the kids. They know that they don't own the children and they children need to know the other parent. (female lawyer)

Although there may have been abuse to a spouse, often they are good to the children. (male lawyer)

Other lawyers mentioned social factors and control issues:

Many times that abuse is long term and the abused party is so relieved not to be abused by the abuser, they will give concessions. (male lawyer)

*Occasionally the abused spouse is too depressed or afraid to say 'no'. (male lawyer)
Personal circumstances or tired of fighting [so they] will bend over backwards to accede to the wishes of the abuser in the hopes of 'smoothing' matters over. In this sense the abuse continues. (male lawyer)*

On the one hand, it is difficult to imagine survivors of abuse agreeing that abusive parents should have custody of their children. On the other hand, in most cases involving

¹⁴⁸ Other answers, given less frequently, included: abuser control over the victim (9 lawyers), the victim's fear of the abuser (9 lawyers) and the victim's wish to save costs and get the matter over with (6 lawyers).

partner abuse, abusers are awarded access.¹⁴⁹ Protections such as prohibitions on the consumption of alcohol during access, third party exchanges of the children and supervision of access are said to offer little or no protection.

One of the court rulings was that he was not to drink around my daughter, no liquor to be involved. I'd ask: every time she came home. 'Oh yeah, he was drinking'. So she still goes down there and he gets drunk. I don't know what to do. Who do you call? What do you do? I'd like to keep her home.

Perhaps parents confronted by an inability to protect their children or threatened by continuing abuse as a result of having to maintain contact in order to comply with access orders give up by giving custody to the other parent. Indeed many of the lawyers, who responded to the Spousal Abuse, Child Custody and Access survey, indicated that it is common for abusers to use access to their children as an opportunity to continue the abuse of the other parent.¹⁵⁰ Perhaps in other cases the children became abusive themselves. Alternatively, perhaps abused women who give their abusers custody of their children face psychological, social and economic barriers preventing them from properly caring for their children. Certainly, the incomes of the women involved in these cases were low and the level of child support documented in the court files was minimal; indeed no child support at all was ordered in approximately fifty percent of the abuse cases.¹⁵¹ Sometimes no support was ordered because the parents without custody were

¹⁴⁹ N. Bala (1998) note 23; L. Neilson (1997) note 1.

¹⁵⁰ Thirty-two indicated that the practice is frequent; 12 indicated it occurs but did not assess frequency; two indicated that it occurs 'sometimes'; 20 said the practice occurs but is infrequent; 8 indicated that access is not used as an opportunity to abuse.

¹⁵¹ In part this may be a reflection of government policy. Normally, the Minister of Human Resources Development in New Brunswick will encourage recipients of income or financial assistance to take action against the other parent or partner for child support. Indeed the Minister can take action on the recipient's behalf. Victims of abuse may be excluded from this policy. Moreover some of the abused women involved in these cases said that they had no wish for any support from these men, either because they wished to sever all connections or because they wished to establish their own independence.

considered too poor to pay. Occasionally, survivors said that they refused to accept child support because they feared the fathers and sought to sever all connections with them.¹⁵²

Perhaps, over time, mothers unable to locate economic resources to raise their children simply give up trying. Perhaps too some survivors of abuse convince themselves that abuse will not reoccur. Other possibilities are that: some of these formerly abusive parents received help and became responsible parents or the allegations of abuse were not true in the first place.¹⁵³ The last explanation is the least likely. Indeed there was corroborative evidence of parents' claims of abuse (in the form of references to criminal convictions, psychological assessments, affidavits of independent witnesses) in over sixty percent of the court files. Moreover, allegations of abuse were strongly contested in a legal document filed with the court by an alleged abuser in only a handful of cases.¹⁵⁴

Although court files and reported cases do not tell us why parents agree to abusive parents having unrestricted access to, sometimes custody of, their children,¹⁵⁵ agreements reached in these cases should be enforced with caution. Nicholas Bala recommends that judges should have express legal authority to reexamine parental agreements when abuse continues.¹⁵⁶ The recommendation may be too narrow. Earlier, it was noted that abused parents, particularly women, possess limited financial resources. They also have limited access to safe, affordable housing, limited access to parent education and therapy and

¹⁵² Interviews with abused mothers. A handful of the reported cases and of the court files contained statements that the mothers were not claiming child support because they were frightened the father would retaliate.

¹⁵³ Three lawyers responding to the Research Team survey suggested this possibility.

¹⁵⁴ For example, the allegations were strongly contested in only three (2 %) of the cases in jurisdiction one. It is possible, however, that alleged abusers contested mothers' allegations of abuse during hearings in other cases.

¹⁵⁵ All but one of women interviewed during the Spousal Abuse and Child Custody project had retained custody of their children.

¹⁵⁶ Note 23.

they are said to suffer from the inability of the legal system to protect them from what they perceive to be continuing danger.¹⁵⁷ When agreements and consent orders in abuse cases are reviewed, it will be important to consider, not only the implications of incidents of continuing abuse but also the broader social and psychological contexts of these parents' lives when they entered these agreements.

In summary data collected from court files indicate that, over a period of time, abusive parents obtain joint or full custody of their children in appreciable numbers of cases. Usually, however, this is a consequence of parental agreement,¹⁵⁸ not of judicial order after a contested hearing. Thus, while in theory, legal discourse indicates that granting custody and joint custody to abusive parents is not justified in partner abuse cases, it is occurring regularly in practice.

C) Law in Theory/Law in Practice: Denial of and Restrictions on Access

In connection with law in theory, as reflected in the decisions of judges and in statutes, N. Bala et. al. reported that:

Although the legislation and case law create a presumption that continued contact between a non-custodial parent and child is in the child's best interests, a significant number of reported Canadian decisions have recognized that in situations where there has been a history of serious spousal abuse or violence, access may not be in the child's best interests and should not be permitted. If a court has initial concerns about access and orders supervised access, the court may consider abusive conduct or a failure to regularly visit as a reason for terminating supervised access. Similarly, if it is acknowledged at the time of the original access order that the man has an anger problem and must take part in a counselling program, the failure to complete a program or the completion of a program but the continuation of harassment and threats against the mother, may justify termination of all access. Although the situations will be "rare," there have been cases involving abusive spouses where the courts have refused access without any attempt to try access, even on a supervised basis.

¹⁵⁷ Perceptions of abuse may be present when objective behaviour is absent.

¹⁵⁸ Consent orders, filed agreements negotiated by lawyers or with the assistance of mediators.

There are a growing number of cases in which access has been denied to an abusive spouse. They are situations of repeated physical violence and emotional abuse by a man, directed at his female partner, and sometimes at the children as well, and almost all have involved some form of post-separation spousal abuse. Although in most of the cases the custodial mother relied on expert testimony to support the application to deny access, there are cases in which access has been denied without such testimony.¹⁵⁹

Yet, a systematic review of reported cases in "Partner Abuse" revealed that, even in reported cases, partner abuse seemed to have little effect on legal decisions about access:¹⁶⁰ Instead the reported cases indicate that Canadian courts award parents who abuse their partners access to their children most of the time. Nor did severity of the abuse or violence appear to be a determining factor; Cases denying abusers access to their children do not differ markedly from cases awarding access.¹⁶¹ Further, there is little evidence, in court files or in the interviews, to suggest that access is often denied in abuse cases. Instead, data from all sources indicate that, in practice, survivors of abuse infrequently seek denial.

Thus, in "Partner Abuse" we reported that lawyers, who responded to the Research Team Survey, reported that judges seldom deny access to abusive parents unless the abuse is severe or directed against the children. Indeed access was temporarily or ultimately denied in only fifteen percent of the court-file abuse cases, usually on the basis, not of the health and well-being of the primary caregiver, but on the basis of proof of danger or lack of benefit to the child. Moreover, lawyers responding to the Research Team survey suggested that access is in the best interests of children, even in abuse cases. They reported seldom advising parents to seek denial or restrictions on access in the

¹⁵⁹ Bala (1998), note 23 at pages 31-32.

¹⁶⁰ See also: M. Rosnes "The Invisibility of male Violence in Canadian Child Custody and Access Decision Making" *Canadian Journal of Family Law* (1997) 14 (1): 31-60.

¹⁶¹ Neilson (2000) note 5.

absence of child abuse.¹⁶² The documents in the court files reflect similar thinking. Further, the documents provide a possible explanation for the absence of judicial reasons with respect to the granting of access in reported abuse cases. As previously mentioned, the Research Team's examination of 2,138 family court files in the Province of New Brunswick disclosed documented claims of partner or 'spousal' abuse in 289 files involving dependent children. Very few of these cases (less than ten %) involved claims of emotional abuse or controlling behavior standing alone. Most files contained documents claiming multiple forms of abuse (usually psychological abuse with one or more types of physical abuse indicating a physical as well as emotional danger to the mother).¹⁶³ Yet, despite allegations of dangerous levels of abuse in many of the documents in the court files, survivors of abuse (usually mothers) did not seek to restrict abusers' access to the children in most cases. Perhaps judges do not give reasons for granting access to abusive parents or partners in reported cases because the granting of access seldom is contested.

Thus it appears that evidence of partner abuse is considered important when making decisions about which parent should have primary care of the children, but is considered unimportant in access or contact disputes. How can this be? A partial explanation was offered earlier. If maximum contact is viewed as the same as best

¹⁶² For similar findings, see Sueffert note 14 and Australian Law Reform Commission, note 164.

¹⁶³ Generally, researchers and survivors of abuse report that emotional abuse causes more harm on a long-term basis than many types of physical abuse. In order of frequency, the following types of claims were made in jurisdiction one: slapping, pinching or kicking - 75 files; punching - 61 files; mental abuse (name calling, belittling, controlling) - 54 files; criminal code convictions or proceedings with respect to violence against the other partner - 39 files; death threats - 34 files; unspecified assaults - 27 files; child abuse - 23 files; threats to abscond with the children - 23 files, claims that the abuser actually absconded with the children were made in 13 files; use of weapons to intimidate or control - 16 files; stalking - 16 files; suicide threats or attempts - 15 files; repeated verbal harassment - 13 files; threats to cause bodily harm - 12 files; break and enters into the mother's residence - 9 files; sexual abuse - 7 files; unreasonable jealousy - 6 files; other (attempts to strangle 4; abuse of pets 2; attempt to kill 4; repeated unsubstantiated complaints to Social Services about mother's care of the children 2; whipping 1; stabbing 1)

interests, or as a right, rather than as merely one factor among many in determining the best interests of children, there is no need for scrutiny or complete inquiry. It is assumed that rights are beneficial. Once a legal right is established, the next steps are implementation and enforcement. There is little need to consider whether or not contact is the best interests of the particular, individual child for it is assumed that child rights (to maximum contact) are beneficial for all children. Thus, when viewed as a right, maximum contact presumptions may be refuted only by proof of considerable harm to the child.

Although, in theory, the sole consideration in child custody and access determinations is the best interests of the child, in practice (as disclosed in survey responses of lawyers, interview responses of primary caregivers, and in court files) parental rights thinking, albeit sometimes presented in terms of child rights, predominates. As indicated earlier, lawyers report that maximum contact is in the best interests of children. Moreover, they claim that they seldom, if ever, encouraged survivors of partner abuse to seek denial of access - in the absence of abuse directed directly at the children.¹⁶⁴ Court files corroborate survey data from lawyers in that very few files disclosed claims by survivors of abuse to deny access. When access was denied by the court - in a handful of cases - the court files disclosed: child abuse, extended periods of non-contact, the absence of a parent's relationship with the child, or escalating patterns of violent conduct combined with repeated, and unsuccessful, efforts to control such behaviors through the use of peace bonds, restraining orders, criminal penalties and

¹⁶⁴ See also: The Australian Law Reform Commission Report No. 69, Part 1 Equality before the Law: Justice for Women (1994) which found that lawyers rarely made arguments in support of denying access; K. Waits (1995), note 128; N. Seuffert (1996) note 14; Rhoades, Graycar and Harrison (1999) and (2000) note 3

supervised access. Seldom was access denied on the basis of inappropriate, irresponsible parenting, after scrutiny of the benefit or lack of benefit of such contact for the child. Thus, while in theory, it is possible to obtain restrictions and or denial of access in a partner abuse cases, in practice denial is rare. In practice, contact has first priority, best interests of the child second priority in access determinations. The result, discussed and illustrated in more detail in Part VIII, is a contrariety between legal rights and the best interests of individual children in partner abuse cases. Researchers studying the implications of family law reforms in Australia are reporting similar tensions and contradictions. They too report that ‘child right to contact’ principles result in lack of scrutiny of the best interests and welfare of children.¹⁶⁵ It seems that, in practice, the interests of individual children, are pitted, in practice in partner-abuse cases, against enforcement of generic rights of all children to contact. It is the contention here that the current focus on rights (in practice, if not in theory) is diverting attention from examination of the interests and needs of individual children.

A focus on children’s interests and parental responsibilities to children, results in a more comprehensive level of inquiry. Indeed a focus on parental responsibilities to children, rather than on parent or child rights, might have protected children from some of the situations described in Part VIII of this report.

Why do abused partners not seek to limit or restrict the other partners’ access to the children in partner abuse cases? One explanation, discussed earlier, is that, for the most part, survivors of abuse want their children to have continuing relationships with the other parent. They seek merely some mechanism to ensure that such contact is beneficial, not harmful or dangerous for their children. Another is that the professionals

¹⁶⁵ Rhoades, Graycar and Harrison (2000), note 3

advise survivors not to claim restrictions on the other parent's access. Certainly evidence of both explanations emerged from the interview data. Primary care-giving parents commonly reported feeling pressured by some lawyers, mediators and judges to agree to unrestricted access. Settlement pressure and client relationships with lawyers and mediators are discussed in Part VII. There it is suggested that the legal system, possibly as a consequence of being overburdened by limited resources, is 'processing' family law cases, less in accordance with individual client interests and needs, than in accordance with lawyers' perceptions of legal 'norms' for children, fathers and mothers.

D) Law in Theory/Law in Practice: Supervised Access

In Spousal Violence in Custody and Access Disputes: Recommendations for

Reform N. Bala et. al. state:

While the legal precedents indicate that courts are unwilling to award access where it is shown to be harmful to the child, there may be a tendency for some judges to order supervised access as a "compromise" rather than make the difficult decision of terminating all access. Given its intrusive, expensive and artificial nature, supervised access should not be seen as a permanent arrangement when a parent is too much of a risk to be alone with a child, but rather should be a "temporary measure...to help resolve a parental impasse over access." Preferably during the period of supervised access, the abuser will be taking steps, such as participation in counselling, that will reduce the risk to the child and permit unsupervised access at some future time.¹⁶⁶

Yet reported cases throughout Canada indicate reluctance among at least some Canadian judges to order supervision of access. In *Sherry v Sherry*, for example, despite the father's: "failure to share in parental responsibilities, obvious lack of compassion toward the respondent, punching and slapping of the respondent's buttocks and legs, slapping and squeezing of her stomach on occasion during her

¹⁶⁶ Bala (1998) note 23, page 34.

two pregnancies” and despite two home assessments both recommending that the father’s access to the children be supervised, McQuaid, J. ruled as follows:

Because of the very clear, direction provided by subsection 16(10) of the Divorce Act, it is my view that a custodial parent requesting the court to impose unnatural conditions on the child’s right to develop a meaningful relationship with the access parent, bears a heavy onus to establish that the imposition of such a condition is in the best interests of the child. The evidence does not establish that the risk of harm to the children .. outweighs the benefits of this free and open relationship with their father¹⁶⁷

Supervised access was ordered in only nine of the 182 Canadian partner abuse cases involving children examined in “Spousal Abuse, Children and the Courts”¹⁶⁸

Examination of court files in New Brunswick reveals three possible explanations for the limited number of supervisory orders in partner abuse cases. First is that survivors do not make such claims in the first place. Court files indicate that, in practice, survivors of abuse, at least in New Brunswick, seldom claim supervision of access. Such claims were limited to cases involving allegations of extreme violence, child abuse and or dangerous levels of alcohol or drug abuse. Second is that, in the minority of cases in which survivors of abuse do make such claims, the claims are abandoned in favour of unrestricted access as the case proceeds through the legal process. Third is that, even when such claims were made, in contested hearings before judges, supervision was granted only about one half of the time and then commonly briefly, graduating into unsupervised access.¹⁶⁹

Lawyers responding to the Spousal Abuse survey were almost equally divided on this issue: only a bare majority indicated a use of supervised access provisions in consent orders or agreements. Comments that third party supervision is cost prohibitive for most clients and that such orders are difficult to enforce were common. Very few of the

¹⁶⁷ *Sherry v Sherry* (1994), 1 R.F.L. (4th) 146 at 155.

¹⁶⁸ Neilson (1997) note 1.

¹⁶⁹ For discussion of a partner abuse siphoning process, see Part VI.

primary caregivers participating in this study reported orders for supervision of their children's access. Those who did have such orders reported difficulties with enforcement.

Part of the difficulty in New Brunswick is caused by a lack of affordable, accessible, and accountable supervision services or facilities. Parents who lack resources reported having few choices but to abandon claims for supervision, even when they considered supervision necessary to protect the health and well being of their children:

*She [the psychologist] did suggest, because of the allegations, that my husband have supervised visitations for a period of a year, but she checked into supervising agencies and she felt that they were too expensive for us to afford. She suggested that my husband's social worker might want to supervise, but he didn't want to get involved that way. He said he'd do anything he could to help me and my son, but he did not want to become a supervisor, because the psychologist said that reports should be filed after every visit and then after a year, it should go before a judge and then he should decide from these reports what should happen. But that never happened. You know. I went far as asking *** to be the supervisor and when he refused, it just sort of stopped. So he just took the kids. And that's where it was left. And that's probably my fault. I probably should've been pushier, but I, I was so unaware of what my rights were, of what I could do. And the fact that I didn't have a whole lot of money and I felt like my lawyer was being very fair with me as far as even taking the case knowing that, I was willing to pay her, but it might only be \$10 a week, so I didn't really feel like I could push my weight too much with those things.*

In the absence of affordable professional supervisory services, parents concerned about the safety of their children, give in to unsupervised visits against their better judgement. The other alternative, used often, is supervision by relatives of the non-custodial parent but this option is reported to be difficult to monitor or enforce. Consequently, in practice, provisions that access must be supervised are said to offer children little or no protection:

Nothing I could do about it, just let her go anyway. It was supposed supervised visits, but he would never have anybody around him. Did you ask for supervised visits? Oh yes. I asked. We recommended supervised visits. We were willing to bring out his rap sheet and everything on that date and judge did order supervised visits but they would not be supervised, he would come to my house and pick her up alone. Or bring her back alone. I would see his sister in the mall and she would not have been around him. Was she supposed to supervise? Pretty much. Yeah, she was one of the closest. She can still come and pick her up and take her out with her daughter and stuff. She's one of the better ones of the family.

Many parents recommended the creation of supervised access centres, particularly for young children requiring protection from parents unable or unwilling to parent responsibly. Supervision seemed to be of less concern to participants as children grew older and were thus became better able to protect themselves from irresponsible parents.

E) Law in Theory/Law in Practice: Restraining Orders and Exclusive Possession of the Marital Home

E) (1) Restraining Orders

In theory, survivors of abuse may claim section 132 protections under the New Brunswick *Family Services Act* and exclusive possession of the marital home under the *Marital Property Act*. In practice, however, lawyers (55%) reported infrequent use of section 132 provisions. They report, instead, encouraging clients to seek peace bonds in criminal court. The perception is that section 132 orders are of little use, because police forces in New Brunswick will not enforce civil orders. One difficulty with this perspective is that criminal evidentiary rules may be inappropriate in such cases (particularly in the face of mutual violence at the point of separation) and many women are reluctant to proceed against former partners in criminal courts. We did not collect data on the number of survivors of abuse who fail to proceed in accordance with such advice from lawyers and who thus fail to obtain any protective order at all in partner abuse cases but do note that it is likely that parents and children requiring protection are falling through the cracks between civil, family law and public, criminal-law proceedings. This topic warrants further enquiry. Certainly, in terms of practice, on a practical level, it seems apparent to us that a civil protective order is better than no protective order at all. In any event, the court files indicate that claims for protective

orders under section 132 are made infrequently and that, when made, frequently are not granted, occasionally because judges refuse, more commonly because the claims are abandoned or withdrawn in consent orders and agreements.

E) (2) Police

While interview participants complained of continuing harassment, stalking and monitoring, only a few mentioned having obtained orders to prevent continuing harassment or assistance from police:

The first time after we split, he broke into my house and started destroying furniture. Daughter was about 6 and he said, 'If you don't like what I'm doing, call the police.' So I did. I called the police. I said 'I'd like an officer'. I said, 'I want him to leave. He doesn't live here.' By the time the police came, he [former partner] was out in garage. [Police officer] said, 'You called?' I said, 'Yeah. I'd like him to leave.' The police officer was no help at all. He said, 'This is his home, his name is on the mortgage too.' I said, 'Are you going to let me go into his apartment - where he lives with his girlfriend?' The Police officer said, 'No'. I said, 'I want him to leave. I have my daughter here. Everybody's fighting and screaming and I want him to leave.' He said, 'Well, did he hit you?' I said, 'No.' And that was the end of that.

They [the police] wouldn't remove him because his name was also on deed. [The attitude of the police is] Tough luck, you and kids are out so I went to [named] shelter for battered women.

The comments suggest that, sometimes, more priority is given, by individual officers, to abuser's property rights than to the welfare of women and children. Clearly illustrated is the need for family abuse education and training and also re-examination of police policies and procedures with respect to responsibilities to honor and enforce civil restraining orders. Comments of participants suggest that police cooperation in abuse cases varies by individual officer - rather than by region or force:¹⁷⁰

¹⁷⁰ Generally, interviews with abused women throughout the Province of New Brunswick in connection with this study and in connection with the Domestic Legal Aid evaluation (Neilson and Richardson, 1997, note 6) indicate that police cooperation and lack of cooperation varies by individual officer more than by region or police force. Yet limited data have been collected on this issue. Additional assessment and scrutiny are warranted.

Actually I did call the police -the time he stopped me on the street. They said they could not do anything, unless something else happened. They kept saying that. I told them I don't want to turn out to be one of those bad Sunday night movies, so what can I do? He said we could go through the process, we could file a harassment charge, but if this guy has a lawyer he is going to know that it's pretty hard to get a harassment charge to stick. He said to keep a record and [for me to] tell him that I had opened up a file on him. So I e-mailed him and told him that there was a file opened up on him but it [the harassment] still continued. A friend of my brother's was a police officer. He said he would take care of it for me. He wanted to make sure that if I called, I would get the right person. He came and took my statement and opened up file on harassment.

And relationships with police are complicated by the fact that survivors of abuse are ambivalent about, sometimes even resentful of police involvement:

I told the cops I knew she [my daughter] was safe there. We stayed there and they [the police] wanted me to fill out all these forms and take pictures. I said, 'No! Leave me alone; it is none of your business! I did not call you!' They asked me questions and I would not answer. I was very mad because I did not want to go there. I thought it was a place you went when you are crazy - I don't know what I thought. My ex husband had brainwashed me over the years - to be scared of the police. A few days after this my father started bugging me: 'You better fill out a report' I said, 'No. I just want my ex husband out of my life.' He said, 'This is abuse, it should not be going on'. So I agreed. Then the police told me if I filled out this report, that it was not to charge him, that it was an incident report. He promised. He said in 99.9% of cases, it does not go to court. So I agreed. He asked me a lot of questions. Next thing I knew, the cops arrived at a Transition House with a subpoena. They said you are going to court. I asked, 'Why?' They said, 'You are a witness for the prosecution.' You did not want to proceed? No. I never charged him. I could have charged him a thousand times; I just wanted to be left alone. Why did you not want him charged? I was scared. I would have had the guilt if he went to jail.

Data from this study do not allow us to comment on the frequency of positive or negative police assistance. Complaints from men and women about police inaction or bias were evenly balanced with comments about helpful assistance. Most lawyers (56 %) reported finding police helpful in abuse cases, though they did complain about reluctance among police officers to offer assistance in the absence of criminal charges and or a court order directing police assistance. Six lawyers added comments that police forces dislike having to deal with family abuse and violence cases. While this report cannot document frequency, the data do indicate a need to monitor individual police responses to family violence and abuse cases in order to monitor compliance with New Brunswick's Woman

Abuse Protocols¹⁷¹ and Government policy. Abuse protocols and policies are of little consequence to vulnerable families if they are ignored by those vested with responsibility to carry them out. Pinpointing problems would encourage additional education and training and, or disciplinary action if necessary.¹⁷²

E) (3) Marital Home

Lawyers indicated frequent use of exclusive possession of the marital home provisions yet this was not corroborated by court file data. There were fewer applications for orders for exclusive possession of the marital home in the court files than might be expected, given that 71.2%, of the lawyers responding to the survey, indicated frequent use of exclusive possession in partner abuse cases. Such legal claims were found in only a minority of court files. It is possible, however, that primary caregivers with children are offered exclusive possession of marital homes in abuse cases more often than court files indicate. Perhaps these arrangements are made informally - on a temporary basis - without application to a court. Certainly, exclusive possession of the marital home is often the least disruptive alternative for children and abused parents when that option is economically feasible as long as it can be accomplished safely. It is important to note, however, that exclusive possession of the marital home is a dangerous option in the face of escalating violence, extreme jealousy, death threats, threats to commit suicide, and in the face of a continuing dependency attachment (a psychological belief that the two

¹⁷¹ The Protocols may be viewed at the Province of New Brunswick's web site.

¹⁷² The Muriel McQueen Centre for Family Violence Research, University of New Brunswick, offers an academically credited certificate course in family violence issues. Classes are scheduled during the evenings and on weekends in order to accommodate working professionals.

parents, or the abusive parent and the children cannot survive independently.)¹⁷³ It is better and safer in such circumstances for children and the custodial parent to vacate the marital home.

F) Law in Theory/Law in Practice: Child Abuse and Child Protection Cases

New Brunswick child protection legislation specifically refers to domestic violence as an indicator that a child is in need of protection. More particularly, section 31(1)(f) of the *Family Services Act* states: ‘the security or development of a child may be in danger when the child is living in a situation where there is severe domestic violence.’

Detailed data were collected from forty-two child protection court files initiated as a consequence of partner or spousal abuse during the court file survey.¹⁷⁴

When discussing partner-abuse in the context of child-abuse protection cases a number of complications warrant due consideration. First is the issue of non-contextual, incidents-based assessments of abuse operating in the legal system. In "Partner Abuse" we noted that experts tell us that incidents-based assessments, without consideration of historic relationship patterns and the psychological consequences of those relationship patterns on women, will cause false impressions that abuse is a mutual activity of women and of men:

One consequence of the negative and social sequelae to battering is that victims sometimes engage in patterns of behavior that may be misinterpreted if not considered within the context of a battering relationship. Among such behavioral patterns are continued involvement in an abusive relationship, use of physical aggression toward an abuser, and

¹⁷³ See also note 56 and prior discussion of the Gallant case. P. Gallant was granted exclusive possession of the marital home in the face of evidence of death threats, threats of suicide, extreme jealousy, all indicative of a high level of danger to the former partner and the children. Two children died in an apparent murder-suicide.

¹⁷⁴ Parents involved in these cases were not, however, contacted for interviews, primarily because we did not collect identifying information from child protection files.

lack of cooperation in the prosecution of an abuser. These behaviors may be misinterpreted in legal proceedings as indicating that the alleged abuse was not serious or that the abused woman is primarily or partly responsible for the abusive behavior that occurred.¹⁷⁵

Indeed the reported cases revealed judges (in 19% of reported cases involving dependent children and allegations of partner or spousal abuse) characterizing abuse a mutual activity.¹⁷⁶ Moreover, fifteen of the lawyers who responded to the Spousal Abuse, Child Custody and Access survey (18.75 percent of those who answered the question) indicated that, in their experience, women and men are equally abusive in intimate relationships. (Most lawyers (62, 77.5 %) reported men to be more abusive, the other three indicated that men and women participate in different types of abuse.)¹⁷⁷ Thirteen of the fifteen (2 female, 13 male) who perceived abuse to be symmetrical by gender, defined abuse in terms of behavioral acts and or abuser intention.¹⁷⁸

When abuse is understood in terms of mutual activity another problem emerges: the danger that requiring judges to consider abuse, when making decisions about children, will encourage judges to award custody of children to the state rather than to either parent.

Child Protection legislation in some jurisdictions and notably in the province of New Brunswick (*Family Services Act*, section 31) specifically refers to domestic violence as an indicator that a child may be in need of protection.¹⁷⁹ Many other jurisdictions also take into account violence between parents in child protection proceedings.¹⁸⁰ Nicholas Bala cautions that mandatory reporting of woman battering could pose

¹⁷⁵ M. A. Dutton as edited by M. Gordon, "Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women" p. 13 of National Institute of Justice (1996) note 79.

¹⁷⁶ L. Neilson (1997) note 1.

¹⁷⁷ Generally, the three lawyers reported that men tend to engage in physical abuse, while women engage in emotional or mental abuse.

¹⁷⁸ For example: *Mental or physical control of another for self-gratification (male lawyer)*; *Tortuous behavior towards spouses or children - domination - malevolence - bad faith (male lawyer)*; *physical violence or threat of violence or persistent verbal or emotional harassment (male lawyer)*. The other two respondents mentioned consequences of abuse as follows: "either physical or emotional aimed at the other partner which results in negative/hurtful responses, issued deliberately or not" and "Any emotional, physical, mental, financial, etc. action that creates a dominant- subservient relationship". One of these respondents was male, the other female. Two of the fifteen were female.

¹⁷⁹ *Family Services Act*, Chapter F – 2.2 section 31(f).

¹⁸⁰ J. Edleson (1995) "Mothers and Children: Understanding the Links Between Woman Battering and Child Abuse" <http://www.mincava.umn.edu/papers/nij.htm> 2. For examples of Canadian cases, see: *C.A.S. Peel v. D. D. (1987) 8 R. F. L. (3rd) 15*; *Catholic Children's Aid Society of Metro Toronto v. D. (A.) 1 R. F. L. (4th) 268-281*; *Catholic Children's Aid Society of Metro Toronto v. K. H. et. al (187) 5 R. F. L. (3rd) 1*; *Central Winnipeg Child and Family Services v. S. W. (1988) 11 R. F. L. 289*; *Dakota Ojibway Child and Family Services Inc. v. M (M. J.) 4 R. F. L. (4th) 421*; *Family and Children's Services of London and Middlesex v. G. G. and J. R. (1985) 20 R. F. L. (3rd) 429*; *Re H (A) F. L. R. 33*; *Minister of Health and*

a serious threat to abused women because they might be deterred from seeking help for fear of losing their children.¹⁸¹ Similar consequences could flow from requiring judges to consider abuse in all child custody and access matters. Women who have lashed out at their husbands or who have struck their children as part of the pattern of their own abuse, may fear turning to the courts for assistance in custody and access matters, particularly if they perceive courts unsympathetic to contextual assessments of abuse. Potential loss of children in child protection proceedings could be more worrying for some of survivors of abuse than acceding to abusers' custody or access demands.

Earlier, in Neilson (2000), we reported that:

Twenty-two of the court files examined in New Brunswick involved interventions of child protection authorities as a result of abuse and violence between the parents. The affidavits filed with the court in these cases were framed in gender-neutral language, making the dynamics of the abuse between parents difficult, sometimes impossible, to interpret. Commonly the affidavits stated merely: 'the parents deal violently with each other' or 'there were more than 22 official reports of domestic violence, many with police involvement'. Even so, documents in nine files made it clear that mothers lost, by agreement or judicial order, custody or guardianship of their children to the state as a result of their partner's violence. In two of these cases, the mothers agreed to grant guardianship of their children to the state because they feared for the children's safety upon the father's release from prison. In both cases the fathers had been imprisoned as a consequence of abuse of the mother. A similar pattern emerged in the reported cases. At least thirteen of the reported partner abuse cases involved child protection proceedings.¹⁸² In seven of these cases women lost custody of their children to the state as a consequence of their partners' abuse; the reports did not include discussion of abuse by mothers.

Similar patterns were apparent in another two court jurisdictions examined after the article was written.

Presumably, when women lose custody of their children as a result of their partners' abuse, it is because courts consider them inadequate parents by virtue of their failure to protect the children from the other abusive parent. Their in-ability to do so in social context or in the context of their own abuse seldom is examined. Researchers in the United States have made similar findings. For example, after examining legal responses to women charged with murder in the United States, Michelle Jacobs states:

'Critical interconnections between violence against the mother and violence against her children have not been fully understood by our courts. No consistent theory has been developed for the defense of mothers that is based on the connection between the abuse that a mother is receiving at the hands of a violent partner and her ability to prevent harm to her

Community Services v. V. B. & D. C. (1987) 6 R. F. L. (3rd) 180; *New Brunswick (Minister of Health and Community Services) v. M. (R. M.)* 50 R. F. L. (3rd) 191; *Saskatchewan (Minister of Social Service) v. E. (S.)* (1992) 41 R. F. L. (3rd) 405; *Brigante v. Brigante* (1991) 32 R. F. L. (3rd) 299.

¹⁸¹ N. Bala, note 23 at 39.

¹⁸² L. Neilson (1997), note 1

children.’¹⁸³

Moreover, Jacobs found that child protection workers and courts considered the best interests of children, commonly to the exclusion of consideration of the social contexts and consequences of woman abuse. Her conclusion was that:

‘Blaming the mother avoids the necessity of examining the ways in which the courts, police and public unwillingness to address the issue of violence within the home contributes to the ongoing empowerment of the abuser.’¹⁸⁴

An unspoken assumption in child protection cases is that women are able to stop abuse by leaving abusive relationships. But this excludes consideration of social realities of abused women. That reality may include continuing abuse after separation when the children are exchanged, economic and social pressures such as lack of safe, affordable housing, lack of financial resources coupled with an inability of the legal system to protect women from continuing harassment and abuse.¹⁸⁵

The second complicating factor is the frequent occurrence, in practice, (discussed in Part V, Section B) of child abuse allegations being made by non-custodial parents against primary caregivers, in partner abuse cases, after separation. Thus in Neilson (2000), we noted that, in connection with child protection matters, another question emerged: would parents who have been abused severely themselves, who lashed out at their children, lose custody of their children on that basis? And we noted that the answer to the question would depend, in part, on whether or not courts assess abuse on the basis of facts or incidents of behavior or on the basis of facts as set in inter-personal and social context. On the one hand, child abuse is a serious matter, not to be considered lightly. On the other hand, researchers tell us that, when people involved in abusive relationships do not receive appropriate help, they are at risk of lashing out at their children.¹⁸⁶ For example, M. Straus and R. Gelles found that 50 % of men who frequently

¹⁸³ M. Jacobs “Requiring Battered Women to Die: Murder Liability For Mothers Under Failure to Protect Statutes”(Winter1998) Journal of Law and Criminology 88 (2): 579-82. See also: E. Pualani (1996) “Prosecuting Battered Mothers: State Law’s Failure to Protect Battered Women and Abused Children” 19 Harv. Women’s L. J. 299.

¹⁸⁴ Ibid.

¹⁸⁵ R. Langer, “Male Domestic Abuse: The Continuing Contrast Between Women’s Experiences and Judicial Responses” (1995) 10 (1) Canadian Journal of Law and Society 65-90note 47 at p. 71-2; J. Zorza, “The Criminal Law of Misdemeanor Domestic Violence 1970-1990” (1992) 83 Journal of Criminal Law and Criminology 57.

¹⁸⁶ J. Edleson, (1995) note 134; D. Saunders (1994) and E. Stark and A. Fitcraft (1988) note 134.

assaulted their wives also physically abused their children.¹⁸⁷ Abused women too are at risk of neglecting or abusing their children.¹⁸⁸

When incidents of a mother's neglect or abuse of the children are considered separate and apart from context and consequence, evidence that a mother has neglected or been abusive to the children will lead to the conclusion that the children should be removed from her care. If, however, the behavior is understood in context of psychological and social harm caused by abuse, therapeutic assistance may better be a better option in a number of these cases.

Do survivors of abuse lose custody of their children as a consequence of allegations of child abuse? The simple answer is yes. In Neilson (2000), in connection with child abuse cases, we commented that court files in five cases made it clear that fathers who abused mothers ultimately obtained custody of the children on the basis of evidence of the mothers' neglect or abuse of the children. Similarly, in seven of the reported cases, judges accepted evidence that fathers had been abusive to wives or partners but also considered evidence that the mothers had lashed out at the children. For example, in *Minister of Health and Community Services v. V. B. & D. C.*, the trial judge reports:

'The evidence clearly demonstrates a history of serious domestic violence... the Newcastle police force told of answering complaints at the household approximately 12 times over a four-year period. .. [the mother] was the subject of frequent assaults .. culminating in a serious assault .. as a result of which the father was sentenced to jail for 9 months. The evidence indicates that on some occasions the children were present and witnessed the violent assaults of the father against the mother. There is no question in my mind that the continued history of domestic violence .. is seriously detrimental .. to the mental, emotional and physical health of the children... The mother hit the child with a belt producing noticeable bruises. The evidence showed that the mother struck the child, knocking him off a stool, and then 'continued kicking him in the ass'.¹⁸⁹

¹⁸⁷ M. A. Straus and R. J. Gelles (1990) Physical Violence in American Families (New Brunswick NJ: Transaction Publishers).

¹⁸⁸ See note 134.

¹⁸⁹ *Minister of Health and Community Services v. V. B. and D. C.* (1987), 6 F. L. R. (3d) 180. 182-4. Although the judge did not make a finding of child abuse, guardianship of the child was awarded to the state as a result of the violence in the home.

Guardianship of this couple's four children was granted to the state. The argument here is not that the decision was wrong. Indeed, when parents are unwilling or unable to leave relationships involving severe abuse, courts have no other alternative but to remove the children if they are to protect them. But, while the case report provides information about incidents of abuse, we learn little from the reported case about the social dynamics and context of the abuse within this family, particularly in terms of effects on the mother. It is not possible to tell if the mother's behavior towards the children was a consequence of her own abuse or part of a pattern of her abusive behavior. Indeed, as mentioned earlier, few cases disclosed expert analysis of child neglect or abuse in the context of consequences for mothers of prior or ongoing partner abuse. Certainly incidents of partner abuse were mentioned but usually in the context of the effects on the child.

Theoretically, expert evidence is admissible in such cases to inform judges of the causal relationships between partner and child abuse. Yet, as discussed previously, in practice, consideration of expert evidence is rare. (First, survivors of abuse do not have the economic resources necessary to hire such experts. Second, most cases are settled in negotiation processes conducted without the benefits of expert advice on abuse issues.)

The absence of expert advice is particularly troubling because, while in the vast majority of cases, lawyers conduct settlement negotiations, many lawyers responding to the survey had what appeared to be limited understandings of the dynamics and consequences of abuse. While a minority of lawyers discussed reciprocal relationships between partner and child abuse, most lawyers insisted that there is no connection. For example:

Abuse between spouses often does not include abuse of the children (female lawyer)

Often times the abusive party has a very good non-abusive relationship with the children. (female lawyer)

Abuse to women does not equate with abuse towards their children. The stresses are not similar and the damage caused by absence of access is probably worse than slight abuse (though not a justification). (male lawyer)

My experience indicates most (not all) victims of abuse are the only victims, i.e.: there is generally no genuine concern for the children's welfare. Abusers of spouses are often loving and capable parents in all other aspects. (male lawyer)

Custody of children is intended to provide for the children's best interests. The victim of abuse is not necessarily the best custodial parent. Parties sometimes recognize that fact. (male lawyer)

In these circumstances, in the absence of considerable education on the dynamics of abuse, the danger is substantial that lawyers conducting negotiations in such cases will consider child neglect and or child abuse, produced by long-term patterns of partner abuse, more serious a matter than the originating - partner abuse - cause. There is a need to address perceptual problems and misunderstandings with continuing education programs.

Yet this report does not suggest that evidence of partner abuse should be conclusive in all child custody cases. Certainly, as lawyers indicate, there are other factors, such as ability and willingness to parent responsibly, warranting due consideration. But the survey data do suggest that lawyers require more knowledge of the dynamics and or consequences of abuse for survivors and for children. Many of the lawyers responding to the survey seemed to be assuming that abuse stops with separation in partner abuse cases, leaving abusers free to parent responsibly. Yet data from this and other research studies suggest otherwise. More specifically, as discussed earlier, the data indicate continuing: harassment and abuse of partners, albeit usually decreasing with time; lack of responsible parenting during access visits; exposure of children to continuing abuse (direct or indirect as new abusive relationships are formed). It is highly

unlikely that exposure to these behaviors is in children's best interests. While no doubt some parents, who have abused partners, may indeed be or become effective, responsible parents, the data indicate the dangers to children of assuming this to be true without further inquiry.

PART VII

Law in Theory - Law in Practice: The Legal Agents (Lawyers, Mediators, and Judges)

A) Introduction

It would appear, from discussions in the previous section, that law in practice commonly is at odds with law in theory (legal rules and principles) in abuse cases. Law, as families experience it, may bear little resemblance to legal discourse in reported cases. Factors other than, or in addition to formal law, appear to be influencing both process and outcome. A number of additional, external factors, such as access to economic resources and experts, already have been mentioned. The section examines components of the legal system itself, particularly the roles and behaviors of lawyers, judges and mediators in partner abuse cases, through the eyes of parents. Once again theory (this time in terms of Codes of Conduct with respect to professional roles and responsibilities) is contrasted and compared to professional practices, as perceived by family law clients.

B) (1) The Lawyers - Introduction

Theoretically, family law proceedings are embedded in an adversarial legal system grounded in liberal ideology and in the notions that parties to disputes will present all facts and arguments in support of claims and will have an opportunity to test and refute facts and arguments presented by opposing parties.¹⁹⁰ Although increasingly parties to legal disputes are choosing to represent themselves, more often they hire lawyers to conduct negotiations, to ensure full disclosure and to assess and weigh facts. Professional Codes of Conduct require lawyers to encourage clients to compromise or

¹⁹⁰ N. Brooks "The Judge and the Adversary System" in Carleton Department of Law *Introduction to Legal Studies* (North York: Captus, 1991) 214-226.

settle disputes.¹⁹¹ Presumably, however, the duty to encourage settlement is qualified by an obligation to ensure that the facts of the case have been fully disclosed, presented and considered in the context of legal rights and appropriate remedies. In the absence of opportunities for settlement honoring individual rights and appropriate remedies, theoretically, lawyers are to advocate on behalf of their clients.

Opponents of settlement processes not controlled by lawyers complain that such processes remove legal cases from the adversarial process and thus from public scrutiny thereby potentially disadvantaging vulnerable disputants. The argument is that, in the absence of opportunities for public scrutiny, it will no longer be possible to monitor (or to appeal) decisions that fail to ensure social justice for vulnerable peoples. Thus social inequalities could be replicated and reinforced. Another claim is that non-lawyers will fail to protect individual rights and entitlements.¹⁹² Yet court file data, data from lawyers and data from those who use legal services to be discussed in this section, all indicate that the legal system offers, in practice if not in theory, a process that is private, not public, that is based on settlement and compromise, not on advocacy, individual entitlement and judicial decision.

Indeed there is little empirical evidence of opportunities for public scrutiny of family law cases. Eighty to 90 percent of family law cases are settled, not by judges, but by lawyers in negotiation processes, or by parents themselves, with or without the help of mediators and lawyers.¹⁹³ Little public information is available about these processes in

¹⁹¹ Law Society of New Brunswick (March 1999) Professional Conduct Handbook (Fredericton: Law Society of New Brunswick). Although the specifics of the rules of professional conduct vary from province to province, the duties expected of lawyers in each province are similar.

¹⁹² S. Goundry, Y. Peters, R. Currie *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) pp. 34-5.

¹⁹³ C. James Richardson, for Department of Justice, Evaluation of Divorce Act, Phase II: Monitoring and Evaluation (Ottawa: Bureau of Review, 1990), Custody and Access: Public Discussion Paper (Ottawa:

part because they are conducted privately and in part because solicitor-client privilege prevents collection of comprehensive data by researchers.¹⁹⁴ Mothers' and fathers' experiences, disclosed in this study, discussed in more detail below, indicate that rigorous pursuit of claims or rights gives way in legal negotiations, in practice, to expediency and to systemic pressures to process family law cases through the legal system, using as few resources as possible. The testing and weighing of evidence in pursuit of individual rights and entitlements is said to give way to pressure to accept settlement falling within the range of that considered, by lawyers, to be 'normal' or acceptable for mothers or fathers. Parents report feeling that they had little agency or control over legal decisions made in their case.¹⁹⁵

Moreover there is evidence that information about partner abuse is removed from public scrutiny at each stage of the legal process. This finding is consistent with a multitude of research studies and inquiries into legal system failures to protect women and children in abuse cases,¹⁹⁶ yet the pattern seems highly resistant to change. The data

Minister of Justice, 1993).

¹⁹⁴ For exceptions, researchers who have studied legal negotiations, see: W. Felstiner and A. Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" Cornell Law Review (1992) 77: 1447; G. Davis, Partisans and Mediators (Oxford: Clarendon, 1988); G. Davis, S. Cretney and J. Collins, Simple Quarrels (Oxford: Clarendon 1994); H. Erlanger, E. Chambliss and M. Melli, "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context" (1987) 21:4 Law and Society Review 585ff; P. H. Gulliver, Disputes and Negotiations: A Cross Cultural Perspective (New York: Academic Press, 1979) p. 223; R. Ingleby, Solicitors and Divorce (Oxford: Oxford University, 1992) p. 32-3, 169-77; W. Felstiner and A. Sarat, "Negotiation between Lawyer and Client in an American Divorce" in R. Dingwall and J. Eekelaar (eds.) Divorce Mediation and the Legal Process (Oxford: Oxford University, 1988); R. H. Mnookin and L. Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale Law Journal 950-97

¹⁹⁵ See also: Felstiner and Sarat (1992) note 194; N. Seuffert (1996), note 14.

¹⁹⁶ See also inquiries into the abused womens' and, or children's deaths in Ontario, Manitoba, Australia, Alberta note 56. See also: Rhoades, Graycar and Harrison (1999) (2000) note 3; N. Seuffert "Lawyering For Women Survivors of Domestic Violence" Waikato Law Review note 14. Sueffert's participants also complained that lawyers failed to understand and to present evidence of partner abuse in their family law cases.

suggest, at least tentatively, that rigorous pursuit of claims and rights may be more the exception than the rule for family law clients in abuse cases.¹⁹⁷

It is important to keep in mind, when reading quotations from interviews in this section, earlier comments about these data. More particularly, data from interviews are qualitative, not quantitative, in nature. Thus, while patterns of behavior are identifiable, it is not possible to pinpoint the frequency of their occurrence. Moreover, studies of this nature are apt to attract participants who have complaints about their experiences. Thus parents' criticisms of lawyers do not prove that all lawyers or even the majority of lawyers behave in the manner identified. Nor do these experiences prove that individual lawyers, criticized by participants in this study, behave in a similar manner with other clients. Instead, the data illustrate patterns of service delivery clients considered helpful, on the one hand, or objectionable and harmful, on the other.

While it is not possible to pinpoint frequency, it is possible to identify attributes of the legal system and patterns of its performance. Many of the types of experiences recited by participants in this section were corroborated by patterns found in the court files and, or, in survey responses of lawyers. And, although the substance of comments and complaints of men and women were different (for example, men complained about delay in enforcement of access while women complained about delay in enforcement of child support), men and women reported similar experiences in terms of legal process.

¹⁹⁷ See note 196.

B) (2) Lawyers – The Partner Abuse Siphoning Process

Basically, participants in this study tell us that social and legal information about abuse, relationships, income, property and children passes through five stages in the legal process. At each stage, lived experiences are translated into legal categories, claims and rights recognized by law. Experiences and perspectives not amenable or relevant to legal categorization are discarded and omitted as the case proceeds through the legal process. At the end of the siphoning process, stories and legal claims may bear little resemblance to prior lived realities.¹⁹⁸ First is the disclosure of information about social and legal problems to lawyers. Second is the stage during which lawyers interpret, evaluate and categorize the information they have been given. Third is the selection of claims and 'facts' to be presented in documents in support of those claims. Fourth is the decision to pursue or abandon claims during negotiation processes. Fifth is the presentation of evidence to judges in contested hearings. Our data indicate that information about partner abuse is siphoned continuously from the legal process, and thus from public scrutiny, as cases pass through the legal process towards settlement, particulars follow. For a graphic depiction of this process, see Appendix 4.

Statistics Canada data indicate that information about incidents of partner or spousal-abuse seldom form part of a public legal record; most incidents of partner abuse are not reported to police or lawyers.¹⁹⁹ Qualitative data from the survey of lawyers are consistent with the statistics in that lawyers estimate much lower rates of abuse in their separation and divorce cases than researchers indicate is the case for this population.

¹⁹⁸ For the time being mediation services are excluded from this discussion. See also: L. Beaman-Hall (1996) note 13 and W. Conklin "A Contract" in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery: 1991) at 217.

¹⁹⁹ Refer to notes 16 and 17.

Several possible explanations have been suggested earlier. Another is that lawyers do not regularly use standardized interview protocols that could help them identify abuse cases. (It is well known that survivors of abuse fail to disclose abusive behaviors unless asked appropriate questions.²⁰⁰) The low rates of abuse estimated by lawyers may also be a product of conceptualizations of abuse that differ from those of researchers. Certainly, as discussed earlier, reported cases, court files, and survey responses of lawyers indicate that understandings of abuse, based on action and intention, rather than context, dominate the legal system. Be that as it may, the difference between research indicating a 40 to 60 % abuse rate among separating and divorcing couples and the 20 % rate reported by lawyers suggests that information about abuse is being lost during the client to lawyer disclosure stage of the legal process.

The next stage is the decision whether or not to include evidence of abuse in public legal documents in support of legal claims. Data from all sources indicate that, in practice, information about abuse is omitted from legal documents. Only 29.2% of lawyers responding to the Spousal Abuse survey reported recording full particulars of partner abuse in legal documents (unless directed not to do so by the client). Nineteen (18.7) percent indicated that they do not record particulars of abuse in public legal documents, when matters have been settled or resolved; 14.9 percent said that they do not record particulars of partner abuse in legal documents because it inflames conflict - in the absence of serious concerns about safety. Thirty-seven point five percent indicated recording only particulars necessary to obtain relief sought. The latter is important, given that lawyers indicated that they did not consider partner abuse important in access

²⁰⁰ K. Waits (1995) "Battered Women and Family Lawyers: The Need for an Identification Protocol" Albany Law Review 58: 1027; N. Sueffert (1996) note 14.

determinations. Instead they report assumptions that access is in children's best interests in the absence of child abuse.²⁰¹ When asked when it is appropriate to introduce detailed evidence of abuse between parents in a hearing or trial about access, the most frequent answer was: only if there are serious concerns about a child's safety. Lawyers were also asked when they would encourage a parent, who had been abused by the other parent, to seek exclusive custody with no access to the other parent. The vast majority of lawyers indicated that they would only encourage such a claim in the face of indications of direct child abuse.²⁰² Very few lawyers mentioned issues such as the transfer of abusive attitudes and behaviors to children, exposure of the children to continuing conflict or irresponsible parenting. Presumably, then, the 38 percent of lawyers, who said that they include only those particulars of abuse necessary to obtain relief, would see little need to include details of partner abuse in legal documents pertaining only to disputes about access. When information about partner abuse is omitted from legal documents filed with the court, that information does not become part of the public record.

Interviews with parents illustrate these exclusionary practices. Parents complained that information about their own abuse was not included in documents filed with the court. They said that sometimes this was because lawyers were over-burdened with other cases, sometimes it was the result of misunderstandings, and sometimes it was because lawyers considered the evidence unimportant or unnecessary:

Yeah. He [my husband] didn't want the divorce under abuse. I guess he didn't want people to know. Everybody knows, but fine. So at the time, I said, 'Yeah, no problem.' About 4 or 5 months later, I did contact my lawyer to say, 'Look, no I want abuse mentioned.' But she said, 'Bring me your marriage contract.' But the state I was in, and with him breaking in all

²⁰¹ Researchers are reporting the same findings in Australia: Rhoades, Graycar and Harrison (1999) and (2000) note 3.

²⁰² These data are consistent with data and findings elsewhere. See, for example: The Australian Law Reform Commission Report (1994) note 164; Rhoades, Graycar and Harrison (1999) and (2000) note 3; N Seuffert (1996) note 14.

the time, I didn't do it. So instead of her contacting me or me contacting her, she just assumed I had changed my mind yet again and she never did it. So, when I did finally file for the divorce, two and half years later, it was too late to file it under the grounds of abuse. So the divorce was under irreconcilable differences. There was no record of abuse.

He deals with family law. He dabbles into everything, but a lot of family law. We had a good conversation on the phone. I went in to see him. He said, 'Just sign [the agreement]; we'll send it back to other law firm for signature.' I told him about what was going on with my husband. He wrote everything down. He said, 'I don't think a man who is going to be a worker in this town is going to want us to go to court, knowing that you have proof of physical abuse, so I can see this being settled.' He said, 'Listen, the only bad thing that I'm going to tell you now, is [if you claim the abuse] the judge is going to look at you and say 'does she have all her marbles, why would she go back to him after the initial abuse'. So he didn't say it didn't happen, just if you put it in, what the judge is going to think.'²⁰³ He handed me the consent order. That was it. I said, 'what are you talking about, what about the drugs, what about the abuse?' I said, 'I am not comfortable with that. I want the abuse on paper.' He said, 'You are getting everything you want here'. I said, 'No, I think I'm being pushed under the rug here.' He said, 'They're never going to sign off on something like that; that could be the end of his career.'²⁰⁴

The point is not that these lawyers were wrong in law. Perhaps, in the circumstances, inclusion of information about partner abuse would not have assisted these particular clients. This study does not purport to make any conclusions about this, one way or the other. Yet the comments do disclose patterns of professional practice resulting in information about partner abuse being siphoned from the public record and thus shielded from public and judicial view.

The next stage in the legal process, sometimes occurring, as in the second case quoted above, simultaneously with the preparation of court documents, is negotiation. Parties' lawyers negotiate with each other and, or with the opposing client, in an effort to obtain settlement of the case without trial. When thinking about lawyers' negotiation

²⁰³ The quotation demonstrates lack of understanding of the dynamics of abuse. Repeated reconciliation is the normal pattern in abusive relationships: National Institute of Justice [The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials](#) (U.S. Department of Health and Human Services, May 1996); H. Johnson [Dangerous Domains](#) (Scarborough: Nelson Canada 1996).

²⁰⁴ The matter concluded with a consent order.

processes, it is important to recall that the lawyers seemed to consider maximum contact a right rather than merely one factor in determining the best interests of children.²⁰⁵

Lawyers indicated that, in the absence of concerns about a child's safety, they did not generally consider evidence of partner abuse, in the absence of child abuse or risk of harm, important in access determinations. One would expect, therefore, to find evidence of partner-abuse and claims for restricted or limited access abandoned as negotiations proceed and indeed court files disclosed this pattern. Access was not opposed initially in the majority of the partner abuse cases.²⁰⁶ Ultimately, when a restriction on time or supervision of children was sought, in the remaining cases, the claim was abandoned as negotiations proceeded, in about 60 % of the cases,²⁰⁷ usually by agreement or with the 'consent' of the parents. Presumably, some of these parents abandoned such claims because they genuinely believed that to be in the best interests of their children. Others, however, report experiencing pressure from lawyers to abandon such claims, to accept compromise, and arrangements considered 'normal' for mothers and fathers, for example:

She just called me up and told me basically what I needed to do, not what had been discussed or what my options are. Just, you know, this is what you have to do. I was saying I don't want the restraining order lifted and that day she might've called me 2 or 3 times to say, I just contacted your husband's lawyer and this is what you have to do or the judge is not going to look favourably upon you. So was she attempting to dissuade you from the restraining order? Yes. She got it put into place in, in the first place, but then she, when my husband hired a lawyer, and it happened to be someone that she was friends with, things started to change. It was put in place, then three months later, she was wanting it lifted and like, really trying hard to persuade me to let go, to give him at least supervised visits to the kids. I didn't want to and, and my dad didn't want to either, he kept saying no. Even in court that day he was saying no, that's not what we want. And I did say to her no just leave the restraining order. And when she stood before the judge and he asked her why she just said it's just my client's wishes. She never tried to defend me at all. My father said, said I could've defended you better than what she did - because, you know, that day in court, she wasn't really speaking on my behalf. That first lawyer said it was his parental rights and as far as she was concerned, no matter what

²⁰⁵ See also: S. Boyd (2000) S. Boyd (2000) "Can Child Custody Law Move Beyond the Politics of Gender?" University of New Brunswick Law Journal.

²⁰⁶ Neilson (2000) note 6 at p.141.

²⁰⁷ This figure is based on analysis of court files from two of the three jurisdictions.

the father had done (alleged partner abuse as well as possible sexual abuse of a child), he had parental rights to have access to his children. Other things were mentioned and considered, but not the actual abuse. That was sort of left behind when the divorce proceedings took place. When we went to court concerning getting the restraining order lifted, only my husband's parental rights were the issue, not my child's rights, not the alleged abuse of my child, but only my husband's parental rights.

B) (3) Lawyers as Generic Settlement Brokers

The latter was a common theme among research participants. Thus, for example, men reported being pressured to abandon custody claims in favor of accepting the 'norm' for fathers of every second weekend and one half of the holidays:

The first few sessions with my lawyer, he told me, that because I had been the primary caretaker during infancy when they were toddlers, I didn't have to fear losing custody. In the end, I was told that because courts are prejudiced against men in these cases, I should not take a chance and anything I could settle, give her what she wants or asks for, is the safe route.

They [my lawyers] were both men and they just - it was basically just pay them and get it over with and we'll go to court and you go home and see your kids every second weekend and have a nice life.

The first lawyer said, 'I'm a lawyer myself if I went to court all I would get is every second weekend.' I didn't mind that so much but there were things I told that happened in our relationship that should have been said in court and he didn't bother. No, they were never brought up in court. Actually when we first separated, I talked to that first lawyer about going for custody right then and there. At one point he said he would do that, then the next thing I knew, he was making the deals. Divorce is a hard thing and your mind is not in the right frame it should be and I guess I was too trusting of my lawyer. I should have been more firm and told him no, this is not what I want. He talked me out of going for custody and I think my best chance would have been to get custody right at the start.

I wanted the day-to-day care of my children – but was advised that it would be extremely costly to convince the court that I would be a better choice than their mother (remember I spent \$35,000.00 and never made it to a final custody hearing). I was informed that precedent in New Brunswick leans towards custody being granted to the mother.

What is not known is frequency or extent of this type of settlement pressure. What is known is that mothers usually assume primary care of children following separation and divorce. Most often this is a consequence of lack of opposition, or of the father's agreement or consent, not judicial decision. It is not known how often men fail to oppose

custody claims by mothers because they are told they have little choice by lawyers and how often they fail do so as a result of genuine agreement. Certainly the men who participated in this study reported experiencing settlement pressure from a lawyer at some point in their case. But we do not know how representative these men are of divorcing and separating fathers in general. And it is not possible to assess how often pressure from lawyers is a justification rather than the cause of such agreements. Moreover, it is not possible to assess whether or not settlements were or were not in the fathers' interests. Possibly it became clear to the lawyers in a number of these cases that the children would be better off in the care of the mothers. Yet, regardless of the equity of result, the data do provide evidence that male clients perceive considerable settlement pressure from lawyers to abandon custody claims. Fathers interpret such pressure as gender bias within the legal system and, or as inadequate legal attention to the particular circumstances of their individual case.

Yet mothers also report settlement pressure from lawyers. But, instead of pressure to abandon claims for custody or expanded access, mothers report being pressured to abandon partner abuse claims, claims for protection such as restraining orders, and restrictions on access in favor of acceptance of every second weekend and one half of the holidays access - lawyers' perception of the 'norm' for fathers:

If I could go back again, I would have charged him [my partner] with assault, refused to give him access to the kids until I was before a judge. And I would have hired another lawyer.

But he [the lawyer] said, 'The child is two...the overnights are going to start...every second weekend. You have to be prepared for that' I said, 'The mediator told me that they are changing that now to being not until the child is four or five for the overnight.' He said, 'Oh no. I'm in the courtroom every day and I'll tell you right now, even if you brought up all the drug issues, the physical abuse issues and how the child is showing up with soiled diapers and not being fed properly - the worse scenario for the father is that the judge would say: 'abstain from drug use.' And he might say, 'Okay, you go take this parenting course for a

week; once that is completed, you can have the child overnights.' My main source of comfort was that my child was not going to go into the apartment where drug activities were going on. I'm frustrated. It is a horrible process. And they say they put the child's best interest first!

My first lawyer was young and inexperienced. She was a very nice person, had my best interest at heart, but was going totally by the book; she was not willing, until I put my foot down and insisted, to try anything out of the accepted practice. I insisted and got what I wanted and what was best for the kids in the end, but I know that if I had just gone along with her, the father would have had regular access to the kids. He would have been able to do what he wanted. Even though I got him to agree to only supervised visitation, she didn't feel that the judge would sign that and she tried to talk me out of it. Even though I agreed and he agreed, she thought the judge was going to turn around and say, 'You can't have that.' That is what she thought and she didn't think we should ask for supervision. But it went through the courts, with no problem at all...

I told him what I wanted [to change the child's name]. He started to laugh and called me 'honey' which ticked me off. He said fathers have rights too and you can't do that [change the child's name] without his consent. I said, 'If I need his consent, you will be seeing me in a coffin.' [I asked] 'Why isn't my safety more important than his rights?' He said, 'You can have a restraining order.' Then I laughed. I know all about restraining orders; they are useless, a joke, just a piece of paper.

Interestingly, although the particulars of their situations are different, both men and women are reporting similar perceptions of the family law process. They say that lawyers encourage settlement and acceptance of standardized rather than individualized justice. Both report disappointment at being offered standard settlements rather than individual advocacy and partisan support:

I don't really feel that he was listening to me. He is so busy because he is such a high profile lawyer that he sort of half listens to you. What really cheeses me off is that after you tell him what you would like, he never takes a note. Once in a while he will jot something down. So you're sitting and talking. It's as if he knows everything you are supposed to say or you are going to say and he has heard it a million times. So it really doesn't matter what you as a person feel or have to say.

He never took a professional interest in the case or in what were the best interests of the children. The females [this father changed from a male lawyer to a female law firm] were more compassionate to the children's situation and took the time to get to know me as a father.

I was of the opinion it was just another case. He'll go and make his argument sort of like a standard procedure. He never put any personal interest in any thing. Sure he filed the documents but as far as anything above that, advising his client and looking after his client's best interest, I don't think so.

And both men and women reported difficulty withstanding the financial pressure to accept standardized results:

He basically told me, if I wanted to spend thousands and thousands of dollars, I might win the case but that my case is just one of many and was it really worth it? The assets we had, although substantial for our income level, were not sufficient to warrant that kind of legal bill.

Right up to this point now, we've spent about \$15,000 just to try to see my son. You're talking to a taxi driver. That's a lot of money, I have to drive a lot of miles to make \$15,000 and yet this is something that should have been settled for nothing. And it's not settled yet.

About access, lawyers just say they don't want to handle it. They just say you're going to have these problems the rest of your life. He said, 'You may as well save your money.' I accepted that for a little while but then I found another lawyer more specialization in family court.

The way they treat people. If you have no money for a lawyer, you don't exist. It's like you're non-existent if you have no money. That's the way I felt. I felt betrayed by the legal system. I did get custody and that was the main thing, but it should have been over and done with. I just want to live my life and my son shouldn't have had to go through this.

This study does not purport to judge or assess the professional practices of individual lawyers. Client perceptions of legal advice and legal practices of individual lawyers may not be entirely accurate. And, in the absence of legal aid (except for survivors of abuse) in custody and access matters, these men and their lawyers may have had few financially viable alternatives.

It is important to note, however, that the perceptions of men and women were consistent, in terms of process. Both reported seeking partisan support and advocacy, assessment of evidence and judicial decision; both men and women said that they encountered settlement pressure instead.²⁰⁸

Yet parents critical of legal services and settlement pressure were complaining less about settlement per se than about a particular type of settlement. Participants were particularly critical of 'one-size-fits-all' sorts of settlements, based on compromise and acceptance of the 'norm,' rather than reconciliation of individual family interests. Court files suggest that this type of settlement process may be more the rule than the exception in family law cases. While one would expect as much diversity among families after separation as before, there is little variation to be found in the terms and conditions of custody

²⁰⁸ See also: N. Seuffert (1996) note 14, Rhoades, Graycar and Harrison (1999) (2000) notes 3.

and access agreements or orders in court files. The 'norm' is still custody to the mother (or, increasingly, joint custody with primary residence to the mother) and reasonable access (usually every second weekend, one-half of the holidays and, increasingly, one evening per week) to fathers. Thus, although the data do not allow assessment of individual lawyers, they do suggest, consistently, that, in practice, families commonly are offered a legal negotiation and settlement process, not partisan support or advocacy.

B) (4) Lawyers – Delays and Jurisdictional Issues In Settlement

Moreover parents, both men and women, complain that legal negotiation processes are slow, with serious implications for families and children:

We need a judge to say what is going to happen. The lawyer said that if I give your name to the lady that books the appointments for the court, your wait will be so long, that you are better off to wait. So they haven't even filed for a court date or anything. Is your husband paying child support? No, that's something I don't understand about the Family Solicitor. See, I work part time, 3 days per week but I make too much money to receive any kind of assistance from Social Services, not even health benefits, nothing. But with the legal system, they don't have to give me any money. It takes them so long to get a court date. It's just like I feel that I'm still at the beginning and it's been over one year.

My lawyer was telling me that they probably won't go back any more than a year [to collect arrears of child support]. I said, 'But it's not my fault that it's taken four years to get to court.' That makes no sense. It's not right that someone should be able to drag it out for years, leaving the family waiting. There is no responsibility to the family left. Now it's no fault, no responsibility and no commitment as well.

When we first split up, it [access] started out with six hours a week. I had a hard time getting that because I was denied access every time I turned around and then, after some time with lawyers, it ended up that I get 24 hours a week. Even that didn't resolve a lot of problems with her denying me access but then about two years ago now, three years after we split up, I'm finally getting an arrangement that kind of closes some of the loopholes that she was using for denying me access.

It took 6 months for him to get the information and then, when he appeared before the judge, he [the judge] forgave \$1500 of the arrears because it took so long to get into court. Forgiveness of his arrears because it was so long to get to court! So the women and children pay! Never mind that it was my ex husband's fault, initially, for taking so long, but the judge he didn't care. He didn't feel he should be penalized for it. I thought, 'My God, this is unbelievable!' And it's been like that ever since. I have no faith in the family law at all now. None

Parents report settlement negotiations going on between lawyers for months, even years, without hearing or court resolution. Court files confirm this. Despite the child support

guidelines, which most lawyers responding to the Spousal Abuse survey indicated have made child support matters easier to negotiate, primary caregivers wait months, even years for child support orders, while financial information is collected and settlement negotiations are proceeding, and or court ordered child support is enforced:

So because I don't have my back child support, I have to come up with an extra \$1,200 by September to make sure my house doesn't get foreclosed. And I'm not working and what am I supposed to do, when he makes \$42,000-43,000 dollars a year? It's all his money. It's all money, that's all it is. He found another way to control me.

Fathers wait similar periods for resolution of access disputes. Collection of child support and enforcement of access in cases involving more than one legal jurisdiction were reported to be particularly cumbersome and slow. One mother reported being informed that it would take approximately six years for her to obtain child support payments:

Because he is out of province, I am just beating my head against the wall. I have been trying for three years. I am told it will take at least another three years before I get anything: 2 years to get an order in [the province where the father resides] and another two years to have the order confirmed and enforced in [the Province where he works]. The only reason we survived is that we could live with relatives. I cannot believe the legal system just leaves people hanging. Those justice people are not sitting where I am sitting. Those are federal guidelines; there should be a federal collection process, not provincial processes, not with the transients we have in Canada.

Another mother reported the legal system's inability to track a father to collect child support due for more than fifteen years and finally giving up:

You left British Columbia and came back home? Yes I left everything. Picked up and left. We went to proceed to start a divorce and my ex husband, who was in Kamloops, had already started a divorce proceeding out there. He started but left it hanging, didn't finish it. So I retained a lawyer in British Columbia. Then months and months went by- five months. Then it was transferred to Saskatchewan because my husband travels all across Canada. He was very hard to track down and not in one place for any length of time. I retained another lawyer in Saskatchewan. My son was born in 1984, I left in 1986, this would have been 1991, after seven years, I got custody and an order for child support. Now, every couple of years, I get this cost of living increase that says now I'm supposed to be getting \$300 + [But you have never received any child support?] No. They [his family] are travellers also, gypsy inter-provincial people. When I was trying to fight for child support, being a single mom on my own, I called social assistance because one of the girls at work suggested I call them for help. I called and told them my husband's social insurance number, I told them I knew where he was but that he was not paying support. She said, 'Oh great, we'll find him.' She asked for my claim number. I said, 'I'm not on assistance, I'm working - not making much

money though.' They said, 'Sorry then, there is nothing we can do for you'. Then I found him again in Ontario. This was two years ago. She [the enforcement officer] said it would be about a year for me to start receiving cheques. That was two years ago. I called her a little while ago but she said that he's moved again. By the time the paper work is done, fathers are gone again. Everything takes too long. I think the day we located him, they should have sent a sheriff right over there. Here is a guy who has been withholding fifteen years of child support. My daughter wants to go to University now but we have no money. I left an abusive home when my daughter was two, to make a better life for her. We've done that but it's like he is still abusing me for years and years ever after. Now I've given up. She'll be 18 soon.

Similarly, a father reported being forced, by inter-provincial jurisdictional problems, to give up having a relationship with his child:

My ex wife lived here. We went through all the steps and we felt that each of us got an equal share of everything. Shortly after that, probably within six months, she moved to Alberta. That was the end of access. So she's gone and you are still paying child support? Absolutely. [Were you exercising your access at this time?] Yes. Over the next couple of years, I thought we were coming to an agreement. I saw my daughter for very short periods of time if she [my ex wife] happened to be coming to the city. Her family were here. The access agreement said I was to have access one week at Christmas, alternate Spring breaks and one full month in the summer. But I had not had access for over a year so the judge ordered that I could put the child support in an account in her name until I received access. I flew up one time and got her and flew back with her that one time. The next summer we drove to Alberta and I saw her for about an hour before my ex wife dragged her away. Any court order issued here has no strength in Alberta. She can absolutely ignore it and short of me getting a lawyer and a judgement there, there's no way that the court decision here works. I have not seen my daughter in five years. Now I pay the child support to the court of Queens Bench every month, the first day - and for no access. I have no problem paying child support, absolutely no problem at all. However, I think, on the other hand, I should get some access. I don't have a lawyer now. And the reason is, we've had several orders but my ex wife just ignores them. I feel that somebody should be able to enforce that access agreement, Canada wide. I think it hurts my daughter and it definitely hurts me. It's a no win situation. I can't afford to go to court every single year to have a judge order that I can put the child support into an account until I get access. I don't keep in contact with her now - probably for over a year.

Clearly these situations are not acceptable; children should not bear the brunt of jurisdictional complexities. Why are child support and access considered rights of the child, but only with respect to his or her parents? What about the obligations of the provinces to provide accessible, affordable legal mechanisms for inter-provincial

collection of child support and enforcement of access?²⁰⁹ Parents tell us that the inter-provincial reciprocal enforcement mechanisms in existence now are cumbersome, slow and expensive so that, in practice, they fail to provide assistance to children (and parents) in need. It seems unfair to insist that children pay the costs of delays caused by inter-jurisdictional inefficiency. And, while it is unfair for the courts to waive support that should have been paid to primary caregivers and children in such circumstances, it may be equally unfair, and often impossible, for courts to order non-custodial parents to pay years of past arrears in a lump sum payment. Perhaps some fiscal responsibility ought to attach to the federal government to provide federal legal-aid to families with limited resources involved in inter-provincial family matters and, or perhaps provincial governments ought to bear some responsibility to children for the failure to finance and implement effective processes to collect and enforce child support payments and access orders across provincial boundaries. Certainly there seems to be a need for inter-provincial and federal cooperation in the creation of a national collection and enforcement system.

In connection with child support matters more generally, it seems unconscionable for lawyers to be taking six months to four years to negotiate child support payments. Certainly, it would be highly unusual and professionally questionable if mediators were to involve parents in negotiations about child support for such periods of time. Yet Family lawyers are frustrated too. They complain that they cannot obtain financial information required to proceed to trial or to properly to advise their clients in connection with settlement offers from opposing lawyers or parties. In one telephone conversation, an exasperated lawyer recommended the creation of new ethical rules

²⁰⁹ The United Nations *Convention on the Rights of the Child* (1989), article 27 (4).

requiring lawyers handling family law matters to obtain financial information from clients, face disciplinary action or withdraw from the case. Indeed such ethical rules may be operating now, among some lawyers, on an informal basis. Certainly one of the patterns observed in both court-files and in interviews was for parents, alleged to have been abusive, to have employed as many as five or six lawyers in succession, albeit causing yet more delay:

I think he had 4 lawyers and every lawyer would say he was the nicest man and wants to give her whatever she wants and it would take that lawyer several months to get the picture and that lawyer would get rid of him or he'd get rid of the lawyer and we'd start again: 'Nicest man'. I think that's why it took years.

Each time the other side changes lawyers, there are huge delays while the other lawyer gets up to speed. (family law practitioner, telephone conversation)

Perhaps, formal practice guidelines obligating family lawyers to obtain financial disclosure from clients would be of some assistance in abuse cases. Certainly delays should not result in waived arrears of child support payments when delays are caused by evasion or non-disclosure of financial information.

B) (5) Lawyers as Advocates

Not all participants reported negative experiences with lawyers, however. Some reported high levels of trust and respect:

She was like a lawyer, friend, psychologist all rolled into one. I think she's wonderful, just wonderful. She fought very hard and was real strong fighter for children. I think that was her main thing: that the children's lifestyle didn't change. She was like my right arm. I would never have got through that year without her. Especially dealing with other lawyers along the way. She was one in a million. I lucked out.

I felt like he was going to take care of me. He was very comforting. He was a big burly man. I'm usually intimidated by that sort, but he was just like a grandfather - even though he was probably my age. He just knew how to make you feel comfortable.

He made one deal after another and I didn't know anything. I thought he was acting in my best interest so I just signed everything that he said that I should. I pretty much got screwed. [You said your last lawyer is helpful. What makes her helpful and the others not?] I think

she knows the family court system better. I think my original lawyer didn't specialize in family law. The one I have now, she could see the problems I was having and she knew how to fix them. She seemed to know right away what I was entitled to.

I wish I had gone to him in the first place: younger gentleman, small practice. Both of the others had large practices. When he tells me something, I can trust him and I can talk to him. And he follows through with what he tells us. The other lawyers would not follow through on what they told us. So far he is by far the better one, for us anyway.

There was a lady I knew who was a lawyer. We had a good rapport. I called her. We met and I asked her if I could do what I had planned, she said, 'Sure and while we are at it, why don't we have all his parental rights removed.' She said, 'The judge can only say no.' I was happy with her. She was very professional and understanding of my situation, of what he [the father] could potentially do to me.

The lawyers gave me nothing but success and confidence. They said, 'Yes you're doing the right thing.' The lawyers went above and beyond. Your experience with your lawyer has been positive? Excellent! They listened to what I have to say. They don't say this sounds a little far fetched, you know this sounds like it's right out of the Looney tunes. They have never been judgmental. I would say. 'I don't know, maybe I'm the crazy one here.' They would say, 'Maybe you are but perhaps you're not.' They've always made a joke and made me feel that what I'm doing is for the best, that I'm not trying to be vindictive. The lawyers have always said, 'He doesn't want to let you go. He might not love you anymore but he doesn't want to lose that control that he had over you.'

I've got a female lawyer this time. I heard [from a friend] that she didn't give in at all. She fought for his rights.

A comparison of complaints and positive comments about lawyers reveal important differences.²¹⁰ Parents appreciated lawyers who offered partisan support and, if necessary, advocacy. Parents appreciated feeling heard and respected as individuals; they sought partisan support, both personal and legal, and rigorous pursuit of rights and entitlements. Criticisms of lawyers in this study represent the negative side of positive comments. When parents were critical, they complained of being stigmatized by gender; of not being offered partisan support; of lack of power and control over deal making, resulting in trading or abandonment of rights and entitlements; of being offered standard

²¹⁰ Comments as a whole suggested more satisfaction with female than male lawyers. It is not known if this is significant or merely coincidental. When asked specifically if gender was a factor, parents suggested that their preference for female lawyers was less a matter of gender than of specialization, sensitivity to child issues and, or style of practice.

rather than individual justice; of being pressured into generic settlements. Researchers in England, Australia and the United States have made similar findings.²¹¹

B) (6) Lawyers – Final Stages of the Partner Abuse Siphoning Process

At each stage in the legal process, parents, particularly parents with limited resources, say they experienced pressure to abandon individual claims and to accept standard justice. They report lack of public hearing or scrutiny of facts associated with partner abuse or responsible parenting, particularly when cases are settled without trial; they report that these matters are siphoned from the legal process by ‘successful’ settlement negotiations.²¹²

It is only when settlement negotiations and settlement pressures fail to produce settlement or agreement, at the final stage of the legal process, that one can claim, even theoretically, public scrutiny of the legal process. Yet, even at this stage, parents reported incomplete presentation or consideration of facts about partner abuse, parenting and children. Several participants reported a perception that judges were not receptive to evidence of abuse when considering child issues:

The abuse to me - when we went to court for the custody and access arrangements, the judge threw that out. He said that was not relevant anymore, that that happened in the past, that now it's a new ballgame. I was disappointed with that. I don't think he [ex husband] finished the anger management course. It was just waste of time. I think that whole legal process was a waste of time.

²¹¹ See Rhoades, Graycar and Harrison, note 3; W. Felstiner and A. Sarat “Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions” Cornell Law Review (1992) 77: 1447; G. Davis, Partisans and Mediators (Oxford: Clarendon, 1988); G. Davis, S. Cretney and J. Collins, Simple Quarrels (Oxford: Clarendon 1994); H. Erlanger, E. Chambliss and M. Melli, “Participation and Flexibility in Informal Processes: Cautions from the Divorce Context’ (1987) 21:4 Law and Society Review 585ff; W. Felstiner and A. Sarat, “Negotiation between Lawyer and Client in an American Divorce” in R. Dingwall and J. Eekelaar (eds.) Divorce Mediation and the Legal Process (Oxford: Oxford University, 1988).

²¹² Rhoades, Graycar, Harrison, *ibid.*

Other participants reported their own confusion, lack of education, and or lack of self-esteem, resulting in a failure to present fully the circumstances of their cases to judges in courtrooms:

I felt confused by it and uneducated, not really prepared - to know what was going to happen or what I should expect to happen. My first lawyer kept saying: you have to go along with this or you're going to be in big trouble. So I, I was confused about what exactly the judge was going to do and why the judge would react negatively towards me. And the judge didn't really - I didn't feel like the judge reacted negatively towards me. When I switched lawyers, I felt a little less confused, but by that point, I also felt that I had screwed up so much that I should just be happy with the fact that I was going to get legal custody of the children and he was only going to get visitation because people were throwing things at me like why didn't you stay with Child Protection Services, and why didn't you get a lawyer through Legal Aid, and, you know, why didn't you do this and if you had of done this, you wouldn't be in the place you are today. I did call Legal Aid several times but I had already hired a lawyer and they said if you already hired a lawyer, we can't help you. Child Protection Services said that they only step in and take over if the parent doesn't seem to be showing the due amount of concern and, and taking action themselves and I was. The RCMP told me that I should immediately get temporary custody of the kids or nobody would have custody and he could freely take them. So that prompted me to start things with my own lawyer instead of maybe slowing down a bit and seeing what Legal Aid or what Child Protection Services could do. So by the time my current lawyer took over the case, I felt like things had gone too far [to seek supervision of access].

A number of participants reported not having presented full particulars of partner abuse and or the circumstances of their children to judges - because they were frightened and intimidated by court proceedings, because they were not asked the right questions by lawyers, and, or because too little time was allotted to the trial or hearing. For example, quoted below are one mother's perceptions of the limited information presented to the judge in her custody and access hearing:

There were so many other things he (the lawyer) could have brought up that might have helped us from even letting that child go. His cousin lives next door to him. He's been in prison for long period of time. He's out. He loves young girls. And he showed me, when I used to live with ex, what he said was a 13 year old's pubic hair. And so that scared me. If this man's like that, what's he going to do to my daughter when she's out there? But my lawyer never even mentioned that. He mentioned that ex had problems with alcohol, but he never brought up how many times he actually got into trouble with law due to liquor, how many times he's been charged with assault. [So he has a criminal record as well?] Yeah. Speeding, drinking and driving, assault. And that stuff wasn't brought up. There wasn't an argument for that little girl's safety to go out there. I know fathers have rights too, but I would have preferred her not going at all. Maybe if the lawyer would have told the judge

more about what he's really like, then maybe she wouldn't have gone. [Did you go on stand then?] Yes. I went on the stand. But the questions that my lawyer was asking, he didn't go anywhere near all other stuff. I was scared and didn't speak unless spoken to, unless question was asked me and it was very short. We were only in there for 20-25 minutes at most. I'm sure if they'd given me the opportunity to tell how it was from day one to the end, then he might have looked at it and said, 'No you're right. Maybe when she's 6 years old.' It's not bothering me as much now because she can tell me, but when she was an infant and couldn't talk! You have no idea. For probably the first 10 or 12 times, I didn't know if I was going to get her back alive or not. It wasn't judge's fault because he just based on what he heard and lawyer could really have backed me up a lot more than what he did.

Parents, who were critical of themselves and, or of their lawyers for failing to present fully evidence to judges, were critical of the legal system, though not necessarily of judges. They were critical of judges, however, when they perceived a reluctant to hear or consider evidence:

The children's psychologist said that [the father] should have only supervised or restricted access. The judge didn't want to read the affidavits or hear the expert evidence. [The father] says your mother is this, your mother is that; he's alienating the kids but the way the judge sees it is that if I really wanted them to go, they would. I wasn't happy with the judge at all.

Survivors of Abuse reported that judges were reaching conclusions about the benefits of access without adequate scrutiny of evidence of social circumstances of the parents and their past and present parenting practices:²¹³

He [former husband] would not allow her to call home while she was there, because it was not written in the court order. She was not even allowed to call to say that she had arrived there [another province] safely. There is no benefit to her at all from the visits. There is a lot of stress. They have a hard life. He has a step-son and a new daughter from his new relationship. She has no bed, has to sleep with the other girl. He is verbally abusive to the children, verbally abusive to his new wife. He drinks and curses a lot. My mother called my daughter while she was there. But his response was: 'it is my time; she has no right to call and speak to her on my time'. He yells, he doesn't communicate. He drinks and drives with the children. My daughter tells me – she says she doesn't know why they haven't been in a car accident. But it doesn't hold any water – the judge says it is my doing – putting ideas into her head. He has a new relationship now and he is still an abuser and so she's exposed to it still, that is what I have a problem with. [The mother reported that the father has two criminal convictions, one for death threats against her and one for assaulting the new wife] But the judge says, 'Here is a man who wants to be involved in his daughter's life' because he has heard only one side of the story. We have come to terms with it. She [daughter] realizes that she only has to go there for three more visits – until she is twelve. She has agreed to tolerate it until she is twelve.

²¹³ See also: Rhoades, Graycar and Harrison (2000) note 3 for presentation of similar data and similar concerns after an analysis of the performance of family courts in Australia.

Fathers had similar procedural complaints:

As soon as it went to court, her lawyer got up and said we would like to have a trial and the judge said. 'I don't care, you have a trial or don't have a trial but before we go any further, this man is going to see his son, starting immediately' - because there was no reason for me not to see him.

The second judge, before the court even started, he asked me why was in court, why should I think that I would have the right to see my son more than I was. I was pre-judged before the court started. For some reason he seemed to know all about the whole thing and he gave a ten-minute speech of why I was wasting my time being in court before we even started. He said we will proceed if you want to, but you'd better be prepared for my judgement. My lawyer just melted. He was shaking, I was thinking, 'well this is real good'. He said to me, right after the opening, 'We have two strikes against us for some reason' before it even started. Up to that point I used to think that our legal system was great - I put my whole faith in it but after going through this, I don't have any faith at all in lawyers, courts and judges, I really don't. I was judged before the case even started.

Fathers tended to be particularly critical of decisions being made on the basis of affidavit evidence. Fathers considered it unfair that judges consider affidavit evidence without hearing oral evidence from both parties:

When a judge reads all these things automatically this guy is a bad fellow. It's a woman's prerogative to say what she wants in there and I guess according to the judge and lawyer, a woman is always right. I think it's very, very unfair in court when it comes to affidavits. If you are in court, you should be able to speak and ask questions or talk to the judge. Otherwise the judge is only reading the affidavits and taking the face value of what it is. He does not know if it is true or not. I was never given a chance to say anything about my side of the story to the judge.

Yet failure to consider such evidence can be equally damaging:

I went, told him (a lawyer offering services in a legal clinic) everything. He did up my affidavit and said you won't have a problem. He said the judge will help you. [In your affidavit, did you mention the assaults, the times the police came, the kicked in doors?] Yes, everything. I had everything written down that I was going to say. [Did you talk about calling the police - those incidences?] The judge had it in the affidavit. [Did anybody ask you about that?] No. He didn't ask me anything about his previous criminal violent history and being sentenced to jail or his criminal record but the judge had that in the affidavit. His old girlfriend is mortified; she said you can't let him take her [daughter]! She went out with him longer than I did. She knows. [So you didn't go through the particulars in the affidavit?] No. I thought the judge would ask him about those things. [So when you went into the courtroom, you concentrated on what you wanted rather than on what happened in the past?] Yes. A lot of people say what is in the past, is the past. [If the past doesn't matter, why are you concerned?] Because it matters to me - I haven't seen a change in him. I want some proof that he isn't violent anymore. I was concerned about his drinking and drug use. I don't want her around that stuff and I told the judge: I don't think a child should have to grow up like that if she doesn't have to. [Tell me what happened in the courtroom.] He [the judge] just ignored everything I said or had smart remarks. I threw up my hands and sat down. I couldn't believe it; my head was spinning! I was thinking what does this have to do with the safety of my child? [Daughter] has seen him being violent; he doesn't try to stop screaming when she is around. And to have her go that far for whole weekends! I've lost all faith in the justice system. When we first did this, the lawyer said the judge would be very sympathetic towards me but he had no idea.

It is important to note that parents' complaints about the lack of presentation and or acceptance of evidence of abuse in individual cases may be incorrect in law - in terms of accepted legal practice. Parents may not always have understood evidentiary and or procedural rules preventing the admission and, or consideration of such evidence. Furthermore, parents are not unbiased assessors of judicial performance as they have partisan, individual interests in outcome. Nor can these comments be taken as representative of parents' experiences in court rooms generally - for two reasons: it is likely that parents who were unhappy about their experiences were more apt to participate than those who had positive experiences, and many of the participants had but limited contact with court rooms and judges, because their cases were settled by consent order or agreement. Nonetheless, taken as a whole, data from reported cases, from court files, from lawyers, and from parents (both men and women) disclose a procedural pattern warranting attention. Parents report that, in practice, legal processes result in evidence about partner abuse and irresponsible parenting being discarded and, or ignored; they complain of insufficient scrutiny of the circumstances of children in access or visitation disputes, particularly with respect to partner abuse and parenting skills. Taken as a whole, the data support the validity of parents' perceptions.

B (7) Comments About Judicial Perspectives

During the course of this study L. Neilson was told that judges consider affidavit evidence of partner abuse unreliable. A number of explanations were offered. First is that, when abuse cases are scheduled for trial, lawyers representing 'survivors of abuse' appear before judges with agreements or consent orders for unsupervised and unrestricted access to children, despite preliminary affidavits filed with the court disclosing horrific allegations of partner abuse. Judges are assuming that lawyers would not allow such agreements, if the horrific allegations of abuse disclosed in the affidavits were true in the first place. Second is that serious allegations of abuse disclosed in affidavits are omitted in oral testimony. One judge commented that criminal court judges, particularly, are finding that, when complainants offer oral testimony under oath, serious allegations become minor grievances. Thus judges are concluding that women are withdrawing false statements in affidavits, when placed under oath and the scrutiny of judges in courtrooms. No doubt such conclusions may be warranted in some cases. Yet this study offers a number of alternative explanations for the same phenomenon.

More particularly, the data indicate that information about abuse is excluded or omitted at each stage in the legal process: during lawyer-client interviews, during legal interpretations of those interviews, during preparation of court documents, during negotiations between lawyers, and during presentation of evidence to judges. Survivors of abuse report considerable pressure to abandon evidence of abuse and claims for restrictions on access.²¹⁴ As a result of this siphoning process, judges commonly view only part, sometimes a very small part, of the actual evidence of partner abuse. A graphic depiction of this 'siphoning' process is presented in Appendix 4. Moreover, it is clear²¹⁵ that evidence of abuse is abandoned entirely when survivors of abuse are persuaded to abandon claims for supervision or restrictions on access. It is thus probable that it is commonly the nature of the legal process, not the untruth of statements in affidavits,

²¹⁴ See also: N. Sueffert (1996) note 14; Rhoades, Graycar and Harrison (2000), note 3.

²¹⁵ Data collected from lawyers, court files, and parents were consistent on this point.

preventing evidence of partner abuse from being presented to judges. This siphoning of evidence process in abuse cases has been documented in a multitude of studies and inquiries into the failure of the legal system to protect survivors of abuse and their children from being harmed, even killed.²¹⁶ This is not merely a socio-legal phenomenon peculiar to the Province of New Brunswick.

Occasionally too, as in the case described above, affidavit evidence may not be led in oral hearings, when such evidence is part of the court record already. In connection with criminal law, the reluctance of survivors of abuse to testify and the reasons for that reluctance have been documented by researchers:²¹⁷ fear of retaliation, fear of deportation, embarrassment and shame, undetected intimidation by abusers in court rooms, lack of faith in the ability of the courts to provide protection, a desire to protect the children from knowledge of the abuse or from retaliation, a desire for reconciliation, a desire for treatment rather than punishment, fear of courts and judges, inadequate or

²¹⁶ See, for example: R. Davidson. 1994. Report of inquiry into family court proceedings involving Christine Madeline Bristol and Alan Robert Bristol (Auckland, New Zealand: Minister of Justice); Chief Coroner Report for the Province of Ontario (1998) note 56.; Report of Honourable Mr. Justice P. W. Shulman Commission of Inquiry into the deaths of Rhonda Lavoie and Roy Lavoie (Winnipeg: Department of Justice and Attorney-General)..

²¹⁷ American Bar Association, ABA Commission on Domestic Violence, "Multidisciplinary Responses to Domestic Violence" at <http://www.abanet.org/domviol/mrdv/identify.html> ; Department of Justice, Law Courts Education Society Domestic Violence and the Courts: Immigrant and Visible Minority Women full text is available on the internet: <http://www.acjnet.org/docs>; Drumble, M. A. "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform" in N. Larsen and B. Burtch Law in Society Canadian Readings (Toronto: Harcourt Brace 1999); Law Reform Commission of Nova Scotia, From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (February 1995) - available also full text on the internet: <http://www.chebucto.ns.ca/Law/LRC/violence2.html>; D. Martin and J. Mosher, readings from "Unkept Promises: Experiences of Immigrant Women With Neo-Criminalization of Wife Abuse" in CJWL/RFD 8 (1995): 3-44; L. MacLeod "Policy Decisions and Prosecutorial Dilemmas: The Unanticipated Consequences of Good Intentions" in Valverde et. al. Wife Assault and the Canadian Criminal Justice System (Toronto: University of Toronto 1995); Women's Research Centre Listening to the Thunder (Vancouver: Women's Research Centre, 1995); National Institute of Justice The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials (U.S. Department of Health and Human Services, May 1996); Leighton, B. (1989) Spousal Abuse in Metropolitan Toronto: Research Report on the Response of the Criminal Justice System (Ottawa: Solicitor General Canada); National Institute of Justice and American Bar Association (1998) Legal Interventions in Family Violence: Research Findings and Policy Implications Research Report, <http://www.ojp.usdoj.gov/nij/pubs.htm>

rushed questioning by crown prosecutors. Sometimes other considerations, such as an urgent financial need to obtain an abuser's cooperation with respect to finances and child support, become far more important to survivors than a criminal conviction. In the interests of the health and safety of survivors of abuse and their children, it is vital that judges consider and test alternative explanations, before concluding that affidavit evidence or preliminary claims about abuse are false or misleading.

Both men and women were highly critical of legal proceedings that lacked procedural balance - in terms of presentation time or judicial demeanor – towards the parties. And parents were highly critical of judicial pressure to settle, particularly when judges indicated a preference for a particular result prior to hearing oral evidence. Complaints made most often were that judges were exerting settlement pressure or were making decisions on the basis of limited facts. Yet parents, both men and women, expressed appreciation of judges who listened respectfully and attentively to the evidence of both parties, particularly judges who focused attention on the the welfare of children.

B) (8) Lawyers – Discussion and Concluding Comments:

Basically, two procedural issues and one resource issue emerge from the data. The first procedural issue is associated with the nature of legal processes. Vulnerable family members, particularly parents unable to participate effectively in mediation and abusive parents unwilling to do so, require advocacy, partisan support and, often, judicial decision. Yet this was not always the legal process vulnerable parents were offered. Complaints from parents in partner abuse cases were less about law or legal process than about settlement pressures diluting the delivery of law and legal process. Parents receiving individual partisan support and advocacy from lawyers were appreciative;

parents reporting pressures to accept generic, average settlements were critical.

Consistently, researchers have found that consumers of legal services value lawyers who provide individual support and advocacy and are critical of those who do not.²¹⁸ Yet such settlement practices continue.

The second procedural issue is connected to the nature of settlement. When parents' comments are scrutinized carefully, it seems that it is not settlement per se that is being criticized but a particular type of settlement. The objection is to feeling pressured to abandon or trade individual entitlements and interests and to accept, instead, settlements merely acceptable in law. One might compare, for example, one participant's comments about the settlement practices of her two lawyers by way of illustration:

What about your first attorney? Did she involve you? Not really, no. She just called me up and told me basically what I needed to do, not what had been discussed or, you know, what my options are. Just, this is what you have to do. I think the only time I remained in constant contact with her was when I was saying I don't want the restraining order lifted and that day she might've called me 2 or 3 times to say this is what you have to do or the judge is not going to look favourably upon you. So was she attempting to dissuade you from the restraining order? Yes. She got it put into place in the first place, but then she wanted it lifted. That first lawyer as far as she was concerned, no matter what my husband had done, he had parental rights and the right to have access to his children.

But my second attorney has involved me right from the beginning of her taking up my case. She's kept me very well informed, has never pushed me, has only guided me through this and helped me to decide things. Yeah, she's been really helpful.

Settlements negotiated by lawyers, based on professional support, reconciliation of individual family interests are appreciated:

To be honest, I was worried about the children's welfare. I felt she was not looking after them properly. She would get her welfare cheque and hit the bars. She got into the wrong crowd right off the bat and things went from bad to worse. I found a law firm, went in talked to one lawyer and he said, 'oh just let it go - don't bother.' I let it go for a couple of weeks

²¹⁸ Perhaps the legal system cannot, in practice, offer individual advocacy or justice, to the general public. Perhaps, despite the rhetoric of law, but in accordance with the claims of family law clients, such services are, as a general rule, reserved for the wealthy. The legal system is overburdened now. Perhaps the only way it can continue to operate is by processing or settling cases in accordance minimal acceptable results. If indeed this is the case, it becomes clear that attention ought to be devoted to defining standards of acceptable practice for families who are vulnerable as a result of abuse and limited resources.

then I knew in all conscience I could not walk away from it. I went to another lawyer and she told me that if I was worried about my children's safety, then I should do something about it. I told the lawyer I thought the children would be better off with me...and if my wife wanted visitation rights, that was fine with me also but I wanted children in my house. Then both lawyers 'haggled' it out between the two of them and came out with something that was acceptable to both of us. Did you find the lawyer sympathetic, listened to you? Yes I did. But not the first lawyer I spoke to. My second lawyer was more sympathetic to the human side as opposed to only the legal side.

Parents seek professional support and negotiated settlements that incorporate individual family needs and interests, including the health and safety needs of the children, not just settlements resulting from compromise or assumptions about parenting based merely on gender or what is appropriate for the 'normal', average family.

Both men and women presented illustrations of pressure from lawyers to accept compromised settlements as proof of gender bias operating within the legal system. Considered as a whole, however, the fact that men and women report similar experiences suggests that pressures to accept generic settlements may be less a product of gender bias than a reflection of limited resources allocated to the system. For example, under the Province of New Brunswick's Domestic Legal Aid Program, survivors of abuse are offered free legal services from family solicitors. Although the program has been evaluated positively, complaints were been made, from the beginning, that family solicitor services were under funded and under staffed.²¹⁹ And demand for legal services under the Domestic Legal Aid Program appears to be increasing, not decreasing. Province of New Brunswick, Court of Queen's Bench, Family Division, Statistics²²⁰ for example indicate a seven percent increase in the number of clients referred to family solicitors from 1998-1999 to 1999-2000, and increasing numbers of clients being referred to

²¹⁹ Neilson and Richardson, (1997) note 6

²²⁰ Province of New Brunswick (October 2000) Court of Queen's Bench Family Division and Family Support Services Annual Statistical Report April 1 1999 to March 31, 2000 (Department of Justice: Fredericton) p. 28 and xxxii.

alternative solicitors,²²¹ including increasing numbers of victims of spousal abuse.

Fathers and mothers were reporting that the system is overloaded, for example:

Like me wanting child support and nothing happening. But they are understanding. My lawyer [family solicitor, Domestic Legal Aid Program] says I am sitting here with 100 files on my desk. So I think that they have to hire more Family Solicitors. He is really helpful but he is busy and overworked. I have called and not been able to reach him for 2 to 3 weeks. I phoned his office Sunday afternoon at 2:00 in the afternoon and he answered the phone. He was there, at the Justice Building, on the weekend and I know he's doing all he can and he really has a heart for it. He's human. He was really good too at what he does.

Furthermore, recently, lawyers in New Brunswick²²² have started to make public complaints about inadequate access to family courts. Province of New Brunswick, Court of Queen's Bench Family Division Statistics indicate a 15 percent increase, from 1998-1999 to 1999-2000, in the number of family court actions filed.²²³ Family lawyers are calling for the appointment of more family court judges so that they can give their clients access to judicial hearings. And parents are saying that:

The judge should take more time and listen to the cases properly and I feel that the judge should stop, like when one lawyer is cutting out the other. Sometimes you can get the story wrong. Every family matter should have its time to be dealt with properly not: 'Hey, we've got 22 cases to deal with today so hurry up, get out the door!' 'I've got another one coming in after you and I don't want to be here until 10 o'clock tonight!' That's the attitude that I was hearing. Maybe putting more judges on the bench, because to me it sounds like maybe there's a lack of judges. So you didn't think the judge was very sensitive? Definitely not! How could we change that? I don't know, maybe slack off their workload!

Without such access to judicial time, systemic pressures may offer lawyers few alternatives to processing cases and to exerting settlement pressure on clients. Although parents complained about individual judges and individual lawyers, the more frequent complaints were systemic in nature: lack of time and individual attention, lack of investigation and scrutiny of parenting practices and the needs and interests of children,

²²¹ Alternative Solicitors are private lawyers retained to provide legal services normally offered by the Family Solicitor when: the Family Solicitor is ill, on vacation, double-booked, the Family Solicitor has a conflict of interest, there is a backlog of case, or there is a Family Solicitor vacancy in the Judicial District. (Province of New Brunswick (October 2000) *ibid* at p. xxxii.

²²² It is unlikely that this problem is unique to the Province of New Brunswick.

²²³ Province of New Brunswick (October, 2000), note 220, at page ix.

lack of affordable and accessible experts, delay, lack of access to judges and settlement pressure to accept generic solutions. For the most part, these comments are indicative of a legal system that is overburdened, that lacks the resources necessary to allow advocacy, partisan support and comprehensive investigation and scrutiny of individual cases.

Theorists agree that legal systems reflect the fabric, dominant ideology, morality, power and gender relations found in any given society.²²⁴ Thus, while it is likely that problems in family law are less a product of gender bias than inadequate time and resources, on a broader, social level, one might ask why it is that, despite considerable rhetoric in Canada about the importance of children, legal, social and economic services associated with families and children have been consistently under-funded. If indeed families and children have genuine social priority and importance, we might expect an allocation of financial resources to enable effective operation of the family law system. In the absence of such resources legal precedent, legal principles, legal procedures become mere rhetoric of little relevance, in practice, to the legal experiences of many families. Clearly, additional judicial and legal resources are required to enable the legal system to operate in practice as it is intended to operate in theory. Also evident is the need for lawyers to augment, change and improve negotiation and settlement methods. More specifically, participant comments suggest that pressured settlements based on compromise are unacceptable but that settlements, negotiated by lawyers acting as advocates, that reconcile individual interests, rights and entitlements are appreciated.

²²⁴ For more complete discussion see: L. Neilson (1997) note 1 at 106-111.

C) The Mediators - Theory and Practice

C) (1) Mediation and Abuse: discussion of issues

Mediators also provide assistance to family law clients. Prior to discussing the findings of this study with respect to mediation, it is important to discuss the context of the study - in terms of mediation and abuse issues, professional standards of practice for mediators, and mediation practices in the Province of New Brunswick.

The question of whether or not mediation is advisable in abuse cases prompts considerable debate. Research on the use of mediation in abuse cases does not provide clear answers in part because analysis is complicated by a number of factors: differences in what is meant by the term 'mediation', differences in mediator training, differences in mediation services offered and differences in the nature and meaning of outcome measures. Mediators themselves are divided on the issue. Generally, legal academics, lawyers,²²⁵ abuse victims (including those who represent them)²²⁶ and feminists²²⁷ oppose mediation and are pitted against professionals who offer mediation in abuse cases.²²⁸

²²⁵ American Bar Association, ABA Commission on Domestic Violence, "Multidisciplinary Responses to Domestic Violence" at <http://www.abanet.org/domviol/mrdv/identify.html>; N. Bala et. al. (1998) note 23; A. Bottomley "What is Happening to Family Law? A Feminist Critique of Conciliation" in J. Brophy and C. Smart (eds.) Women in Law: Exploration in Law, Family and Sexuality (London: Rutledge and Kegan Paul 1985); S. Goundry et. al. Family Mediation In Canada: Implications for Women's Equality (Status of Women Canada: Ottawa 1998); Law Reform Commission of Nova Scotia, From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (February 1995); L. Lerman "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women (1994) 7 Harvard Women's Law Review 57.

²²⁶ G. Taylor et. al. (1996) Women and Children Last (Vancouver Custody and Access Support and Advocacy Association); Women's Research Centre Listening to the Thunder (Vancouver: Women's Research Centre, 1995).

²²⁷ See, for example, Goundry et. al. note 225 above, R. Mandhane "The Trend Towards Mandatory Mediation In Ontario: A Critical Feminist Legal Perspective" (Ontario Women's Justice Network and Metropolitan Action Committee on Violence Against Women and Children, July 1999).

²²⁸ B. Davies and S. Ralph (1988) "Client and Counsellor Perceptions of the Process and Outcomes of Family Court Counselling in Cases Involving Domestic Violence" Family and Conciliation Courts Review 36(2): 227-245; B Davies and S. Ralph et. al. "A Study of Client Satisfaction With Family Court Counselling in Cases Involving Domestic Violence" Family and Conciliation Courts Review (1995) 33(3): 324-341; D. Ellis (2000) note 23, 64 and 229 and Family Mediation Pilot Project - Final Report, Hamilton,

Research support for and against the use of mediation in abuse cases is split along professional lines. And the research is inconclusive, which is not surprising, given differences among mediation practices and practitioners. Although there is little documented statistical evidence of physical harm to survivors as a consequence of mediation, and some support for the notion that mediation may, at least in some circumstances, reduce incidents of post-separation abuse as much or more than legal proceedings,²²⁹ fears and concerns about mediation in abuse cases are well known and well documented in qualitative studies.²³⁰ Basically, concerns are about process and consequence. Feminists fear that mediation will create two-tiers of justice and will privatize family law. Lawyers criticize the absence of legal rules for disclosure and appeal, the absence of provisions to ensure that legal rights and entitlements will be honored. Both are concerned about the potential consequences of mediation for women, in terms of possible intimidation and lack of safety, possible joint custody settlements, possible acceptance of less than full legal entitlements and, perhaps most importantly, possible coercion or manipulation to return to abusive homes.

Ontario (July 1994), "Marital Conflict Mediation and Post-Separation Wife Abuse" (1990) 8 Law and Inequality 317; "Theorizing Power in Divorce Negotiations: Implications for Practice" Mediation Quarterly (1998): 1-23; H. Magana and N. Taylor "Child Custody Mediation and Spouse Abuse A Descriptive Study of a Protocol" Family and Conciliation Courts Review 31(1) (1993): 50 – 64; Maine Court Dispute Resolution Service (1997) "Screening for Domestic Violence and Abuse in Domestic Relations Mediation"; Maine Court Mediation Service (1992) "Mediation in cases of Domestic Abuse" and "Screening for Maybe" in the Final Report of the Domestic Abuse and Mediation Project; Mediation Quarterly (1990) 7(4) Special Issue: Mediation and Spousal Abuse; N. Thoennes, P. Salem, and J. Pearson (1994) "Mediation and Domestic Violence, Current Policies and Practices". Report of the Association of Family and Conciliation Courts.

²²⁹ D. Ellis and N. Stuckless. Mediating and Negotiating Conflict (Thousand Oakes, California: Sage, 1996), Chapter 6.

²³⁰ For example, several unpublished community-based reports on mediation in Nova Scotia and in Newfoundland "Keeping An Open Mind" contain illustrations of difficulties some abused women have experienced in mediation and or other types of settlement processes. See also: Taylor, G. et. al., Women and Children Last: Custody Disputes and the Family "Justice" System (Vancouver: Vancouver Custody and Access Support & Advocacy Association 1996); Goundry et. al. (1998) note 192; Law Reform Commission of Nova Scotia (1995), *ibid.* note 2.

Certainly, emotional and financial dependencies created by abusive relationships make separation difficult. Much courage and strength are required to leave abusive relationships and even more to remain separate. Requiring victims to negotiate with their abusers on a face-to-face basis during the separation process would appear to be counter-productive to these efforts.

Even those who do endorse a role for mediation in abuse cases suggest the need for extensive mediator education on family abuse issues, specialized security, specialized screening tools, and the development of specialized settlement processes, to protect survivors of abuse who are vulnerable, prior to the implementation of such services.²³¹ Indeed many of those who endorse mediation in abuse cases are not talking about mediation in terms of neutral third parties facilitating face-to-face negotiations between abusers and survivors. Instead, they are talking about settlement processes, that utilize mediation skills and techniques, but that incorporate protective measures such as: a pre-condition that abusive partners have accepted responsibility for the abuse and have received therapeutic assistance, special conditions such as the separation of the parties in time and place, with no face-to-face meetings and shuttle negotiations conducted by the mediator; inclusion of advocates or partisan supporters in the process (lawyers, financial advisors, therapists, friends, family members - depending on the particular needs of the mediation participants); consideration of detailed, safe rules for exchanging information and children; consideration of facilities for supervision or monitoring of access; special

²³¹ Symposium on Standards of Practice (US) Model Standards of Practice for Family and Divorce Mediation (August, 2000); Thoennes, Salem and Pearson, note 208.; B. Landau and P. Charonneau et. al., Report from the Toronto Forum on Woman Abuse and Mediation 1993; B. Landau "Report from the Toronto Forum on Woman Abuse and Mediation" 1996, Training Materials and Client Questionnaires on Screening for Abuse in Mediation Cases.

rules and procedures for terminating mediation safely; and discussion and consideration of the imposition of protective measures such as no contact and restraining orders.²³²

Mediators and service providers (lawyers, academics, social workers, and therapists) who oppose mediation in abuse cases are less concerned about mediation outcome, in terms of objective legal result, than about process and the effects of that process on participants. Critics of mediation in abuse cases point out that settlements can be achieved quickly in these cases as a consequence of vulnerabilities created by abuse.²³³ The argument is that survivors of abuse are particularly vulnerable during the separation process, and thus are willing to accept settlement offers, with little analysis of the consequences, in order to complete the separation process as quickly as possible.

It is important to distinguish between compromised settlements discussed previously and agreements produced by facilitated reconciliation of individual entitlements and interests. Theoretically, mediators offer the latter. Yet mediators operate in the shadow of law. Parents are encouraged to obtain independent legal advice during mediation so that parents are aware of their respective legal entitlements during the process; mediators offer parents legal information (although not legal advice). Thus, when settlements are reached quickly and under pressure, with little exploration of individual entitlements or interests, we might expect agreements to approximate settlement 'norms' in law suggested by the professional advisors. When, however, agreements reflect a reconciliation of individual entitlements and interests, we might expect a variety of agreements reflective of differences among families. Therefore a

²³² See, for example: Symposium on Standards of Practice (US) Model Standards of Practice for Family and Divorce Mediation (August, 2000) Collaborative project Association of Family, Court and Community Professionals, American Bar Association and National Council of Dispute Resolution.

²³³ See: Neilson and Richardson Domestic Legal Aid Evaluation Report, note 6, p. 81.

finding that mediators and lawyers obtain similar types and rates of settlement in abuse cases may be a negative, rather than a positive finding, particularly if agreements reached in mediation are uniform, not diverse, and are a product of survivor of abuse vulnerabilities.

Settlement outcomes and client satisfaction are two distinct measurements of mediation 'success'. Interestingly, client satisfaction is linked more to perceptions of procedural fairness than to outcome. Thus quantitative comparisons of outcomes in adversarial and mediation processes may have little meaning, from the perspective of the participants. For example, an outcome achieved in mediation that resembles the legal 'norm' will be little consolation to a woman who feels she has been re-victimized as a result of contact with an abuser in a mediation session. Similarly, an outcome in mediation that is within the range of legal acceptability may not be a measure of success if the agreement is a product of a failure to propose other solutions as a result of fear or vulnerability.

Positive comparisons of mediation and legal outcomes in abuse cases may indicate, therefore, merely that mediation is preferable to an adversarial process that is not working in practice as it is intended to work in theory. In other words, comparisons of good mediation practices with poor settlement practices of lawyers may not tell us very much about partisan, adversarial law. A discussion of these issues follows.

Examination of court files and client perceptions of legal practices in abuse cases disclosed little evidence to indicate the predominance of partisan support, advocacy or protection of individual rights within the legal system. Yet it is those aspects of the legal system that are offered by lawyers in contraposition to mediation. This study indicates

limited legal understanding, scrutiny or assessment of partner abuse or parenting responsibilities. Instead, survivors of abuse report pressure to abandon claims and to accept settlement 'norms'. Further, the claim that law is open to public scrutiny is simply, on an empirical basis, wrong. Lawyers negotiate the settlement of most family law matters in private offices. There is no public and little research scrutiny of such processes. Key to parents' dissatisfaction with lawyers and judges was perceived lack of time and individual attention, incomplete consideration and analysis of facts, and pressure to accept generic solutions that were thought to fail to take into account individual factors, such as safety and parenting concerns. Independently of complaints about individual result, most of the complaints were not about the legal adversarial process but about perceived failures to deliver that process and the offer of generic settlement instead. As shall be seen shortly, similar complaints are made about mediation when mediators begin to adopt practices that focus more on legal settlement than on true mediation or facilitation of the parents' own agreements.

C) (2) Mediation and Abuse: Conceptual Issues

Lawyers responding to the Spousal Abuse, Custody and Access Survey were divided in opinion about whether or not mediation is appropriate in abuse cases. More lawyers (48) commented that mediation is seldom or never appropriate in cases involving abuse than commented it often or usually is appropriate (27). Interestingly, male lawyers were more apt than female lawyers to consider mediation appropriate. Only 9 of the 27 lawyers condoning mediation in abuse cases were female; 20 of the 48 lawyers who opposed mediation in such cases were female. It is possible that the difference in perspective is related to differences in lawyers' conceptualizations of abuse by gender.

Earlier it was noted that male lawyers tended to conceptualize abuse in terms of action and intention, while female lawyers tended to conceptualize abuse in terms of context and result. When abuse is understood in terms of action and intention, a controlled negotiation process between the parents with a third party present, appears relatively safe. If abuse is understood in terms of intentional action, mediators have merely to ensure that abusive people are prevented from acting abusively towards each other (in or outside the sessions) during the mediation process. Once abuse is understood in terms of context and result or consequence, however, the situation becomes more complicated. Then the mediator must do more than ensure a lack of abusive actions during or between sessions. The mediator will also ascertain: whether or not the survivor's fears and apprehensions about safety and well-being will affect ability to participate fully; whether or not such fears, apprehensions can be addressed while mediation is being conducted; whether or not abuse, that occurred in the past, has affected the survivor's ability to communicate and negotiate with the former partner on an equal footing; whether or not the survivor's ability to obtain, assess and analyze information pertinent to the matters being discussed has been affected; and whether or not the survivor's ability to withstand settlement pressures and delays has been affected.²³⁴ Once abuse is understood in context, it becomes clear that it is not only continuing abuse but also the consequences and results of past abuse that affect mediation. Earlier it was mentioned that survivors of abuse become hypervigilant to indicators of danger. Thus what may appear to an untrained

²³⁴ There is no one correct way to deal with such issues. Usually face to face mediation will be inappropriate. In other cases mediators be able to balance negotiations by using shuttle negotiation, with or without additional personal or professional support for vulnerable participants. When abuse has not affected the ability of participants to negotiate effectively in the presence of the other, the process may include professionals to offer partisan support during the sessions. Sometimes participants will require professional, therapeutic support outside of the session. Special rules for communication in and outside the mediation session may be necessary. This is not intended to be a complete list of settlement models but merely an indication of some of the options mediators consider.

observer to be ordinary behavior on the part of one parent during a mediation session may provoke intense fears and anxiety in survivors of abuse. Effective negotiation is difficult if not impossible in the face of high levels of fear or anxiety. These are some of the reasons that Family Mediation Canada promotes specialized training and screening for abuse.²³⁵

C) (3) Mediation and Current Standards of Professional Practice

Family Mediation Canada (FMC) requires mediators seeking certification to acquire at least 21 hours of specialized education on abuse matters.²³⁶

AT LEAST 21 hours of training on abuse and control issues including instruction on power imbalances, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and information about sources of help for abused family members in communities;²³⁷

Article 5, subsections 2 and 3 of Family Mediation Canada's Members Code of Professional Conduct (October 1996) requires all practicing mediators to acquire similar training.²³⁸ We know of no similar educational standards in place for family-law

²³⁵ L. Neilson and P. English for Family Mediation Canada. Family Mediation Canada Practice, Certification and Training Standards (Kitchener, Ontario: Family Mediation Canada, 1999) sections 2(4)(14) and 3(3)(a).

²³⁶ Ibid.

²³⁷ FMC is considering amendments to this section now (March, 2001). Proposed amendments, if adopted will specify that such training should include education on the dynamics and effects of abuse on children; knowledge of (including strengths and limitations of) criminal and civil procedures and protection orders that may be of assistance in abuse cases; knowledge of ethical rules and Standards of Practice for mediators in abuse cases; knowledge of protective procedures and methods that can be used to adapt mediation processes involving power imbalances or abuse; knowledge of how and when to adapt mediation processes to protect the vulnerable in abuse cases; knowledge of special provisions in parenting plans for use in high conflict and abuse cases.

²³⁸ Specifically section 5 subsections 2 and 3 say: "It is the obligation of a member acting as a family mediator to ensure that he or she is qualified to deal with the specific issues involved. Mediators shall have acquired substantive knowledge and procedural skills as defined by the Standards and Certification Committees and adopted by the Board of Directors of Family Mediation Canada." (The 21 hours of training criterion set out in the text of this article has been approved by the Board of Directors.) "A family mediator

practitioners in Canada. Perhaps such standards ought to be considered. Indeed a number of parents recommended on-going specialized training in family abuse for all family court judges, family law practitioners and mediators, further that such training be made a prerequisite for the practice of family law and or mediation. It is likely that specialized training would have improved legal and judicial responses to survivors of abuse discussed in the last section of this report.²³⁹

Standards of Practice require all FMC member practitioners to assess for abuse and generally for the appropriateness of mediation at the beginning and throughout the mediation process. Abuse cases are complicated. Sometimes it takes a series of sessions with survivors of abuse to elicit disclosures of abuse. Commonly, in the absence of careful screening with appropriate questioning, abuse is not disclosed at all.²⁴⁰ Perhaps non use of standardized interview protocols among family lawyers explains in part why lawyers, who responded to the Spousal Abuse Survey, assessed the frequency of abuse among separating and divorcing couples at lower rates than researchers. It is likely that thorough use of such interview protocols and assessment tools would have prevented some of the negative experiences with lawyers discussed earlier and with mediators to be discussed in this section of the report.

Current Family Mediation Canada practice guidelines state that mediators are to refer clients to other services when prior or current abuse would affect, negatively, a participant's ability to engage effectively in negotiations during mediation. And members

must refrain from rendering services outside the limits of his or her qualifications."

²³⁹ Family lawyers and judges are somewhat at a disadvantage in terms of educational requirements. Unlike other civil litigants, most family law clients have inadequate economic resources to hire experts to advise lawyers and judges. This places an additional burden on family law practitioners and judges to become highly specialized and conversant with research and literature on families and children extending far beyond the normal parameters of law.

²⁴⁰ B. Davies and S. Ralph studies, note 228.

of Family Mediation Canada have a professional duty to ensure that no one is exposed to emotional or other abuse as a result of participating in mediation.²⁴¹ Mediation Associations elsewhere impose similar obligations.²⁴² National consultations, in order to provide more direction and support to mediators in connection with guidance on screening for abuse and processes to use in abuse cases, are being contemplated by FMC now.²⁴³ Mediators seeking certification from Family Mediation Canada (FMC) must pass procedural and substantive-knowledge evaluations of their responses to partner abuse issues.²⁴⁴ Mediators who fail the abuse/power imbalance section of Family Mediation Canada's four-stage evaluation process are denied certification.²⁴⁵

In connection with professional responsibilities more generally, FMC's Code of Professional Conduct states:

3 (1) The goal of family mediation is a fair and workable agreement that meets the participants' mutual needs and interests, not a settlement at any cost.

3 (2) The primary responsibility for the resolution of the dispute rests with the participants. At no time shall a mediator coerce participants into an agreement or make a substantive decision for any participant.

3(3) The mediator's role is that of a facilitator, i.e., to assist the participants to reach an informed and voluntary agreement that meets their mutual needs, interests and concerns, and those of other persons affected by the dispute.

²⁴¹ L. Neilson and P. English (1999) note 235, section 3 (3) (a).

²⁴² Symposium on Standards of Practice (US) (August, 2000) note 232.

²⁴³ Although mediators applying for certification are assessed for their ability to respond to and screen inappropriate abuse cases from mediation, L. Neilson, S. Gavin and P. English recently have proposed amendments to FMC Standards of Practice. If adopted, these will clarify mediator obligations to use abuse assessment screening tools developed by family violence experts, to assess participants for abuse separately, before beginning mediation and to continue to assess for abuse throughout mediation, to obtain specialized knowledge, to implement safety precautions, and to terminate mediation and refer participants to other services, when mediation is inappropriate. Also recommended is a presumption that face-to-face mediation is ordinarily inappropriate in partner abuse cases.

²⁴⁴ See: English, P. and Neilson, L in collaboration with Wendy Hacking (1999) *Family Mediation Canada National Certification Implementation Pilot Project Report 1997-1999* for Department of Justice, Canada (Kitchener, Family Mediation Canada, (June 1999).

²⁴⁵ This is a recent amendment to the process accepted by Family Mediation Canada's Board of Directors in October of 1999. Family Mediation Canada's certification process was designed by P. English and L. Neilson in consultation with hundreds of mediation practitioners and trainers. The process was pilot tested throughout Canada and evaluated by an independent researcher, Dr. Desmond Ellis of York University, who recommended national implementation. See, L. Neilson and P. English (2001) "The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience" *Mediation Quarterly*, in press.

This is mediation practice in theory, if not always in practice. As we shall learn, from participants' perceptions of their experiences with mediators in abuse cases, mediators abandon facilitative roles and the focus on individual needs and interests when confronted by systemic pressures to process large numbers of cases through the legal system. Participants in this study complained of settlement pressure. Some described processes that were highly directive and adjudicative. Interestingly, complaints about mediators were very similar to complaints about lawyers.

C) (4) Mediation Practices in New Brunswick – Comparisons of Theory and Practice

It is not possible fully to understand this study without some appreciation of 'mediation' practices in New Brunswick. A discussion follows. In 1983 New Brunswick became the first province in Canada to adopt a province-wide unified family court. In recognition that family law matters involve social and psychological as well as legal issues, Social Work services were made an integral part of the family-law process. Court Social Workers, employed by the Department of Justice, offer information about separation, divorce and children and procedural options; brief crisis counseling; screening assessments for abuse; and mediation services. Court Social Workers mediate support, custody, access and uncomplicated marital property matters to a maximum value of \$20,000 in equity in non-abuse cases. Many (12 out of 17) have been certified by Family Mediation Canada and adhere to Family Mediation Canada Practice, Training and Certification Standards²⁴⁶ and Code of Professional Conduct. Court-connected mediation is described in the Department of Justice, Province of New Brunswick, New Brunswick Mediator/Consellor Policy Manual (August, 31, 1990) as neutral third party facilitation of

²⁴⁶ L. Neilson and P. English for Family Mediation Canada (1999) note 235.

parents' self-determinism and joint decision-making about family reorganization, support, and (within limits) division of marital assets and liabilities.

The Domestic Legal Aid Program Policy of the Province of New Brunswick is that victims of abuse are offered family solicitor legal services, not mediation.²⁴⁷ In other situations, mediation and other self-help remedies are encouraged. Court Social Workers are assigned the task of assessing family court clients for abuse in accordance with assessment criteria set out in the Domestic Legal Aid Policy and Procedural Manual:

'Individuals who have experienced serious physical or psychological abuse and/or who feel intimidated or are otherwise unable to bargain freely and without duress will not be considered for mediation but will be referred to the Family Solicitor, who can represent them to obtain certain legal remedies' ... 'Thus, the key issue in intake screening is whether a prospective client is a victim of abuse' 'Whenever the Court Social Worker is in doubt as to whether the client is a victim of spousal abuse, the benefit of such doubt is to be afforded to the client' ... 'The Women Abuse Protocols .. are to be used as a tool in the screening process... and ultimately the best professional judgement of the Court Social Worker. ... The Court Social Worker will look to the nature of the spousal relationship as a whole. ... (Physical violence is not a necessary component .. [nor is] the passage of time since the most recent instance of abuse ... Child abuse may constitute spousal abuse.' Mediation is to be offered only when control was not a central feature of the client's relationship and there NEVER was a PATTERN of abusive behavior (emotional, physical, sexual, or economic).'

The policy in New Brunswick is that court-connected mediators do not offer mediation to families that have experienced a pattern of (emotional, psychological, physical or sexual) abuse.

Yet, as in the traditional adversarial legal system, theory or, in this case mediation policy, and mediation practice do not always coincide. An evaluation of the Domestic Legal Aid Program conducted in 1996 disclosed large variation in Court Social Worker abuse screening practices.²⁴⁸ And court files in a number of the jurisdictions revealed

²⁴⁷ Ibid.

²⁴⁸ Screening practices remain inconsistent across the province with two jurisdictions assessing only 6 and 17 percent respectively of family court clients as victims of abuse. The other six jurisdictions assess between 27 to 48, an average of 38, percent of clients as victims of abuse: Province of New Brunswick (October 2000) note 220, Table 1, page 30. It is worrying to note that the two jurisdictions reporting the lowest rates of abuse assessment are the two busiest jurisdictions in terms of the number of clients handled during intake screening: Table 2, page 21. Although one might expect some degree of variation between jurisdictions, the magnitude of the difference suggests that screening practices are still inconsistent.

'mediation' services being offered in cases where the affidavits in court files indicated patterns of physical and mental abuse. Further investigation revealed a number of factors producing these results.

First were directions from judges. More particularly, in an effort to promote out-of-court settlement, judges in some jurisdictions have been ordering parties to attend mediation from the bench during court hearings. Court Social Workers in these circumstances had limited opportunities to screen parents individually for abuse or for appropriateness of mediation before the parents appeared jointly for a 'mediation' session.²⁴⁹ Presumably, in contravention of Department of Justice policy, some parents involved in these abuse cases participated in joint mediation sessions. Related to this issue is that, on their own initiative, Court Social Workers had begun to experiment with offering short-term, shuttle negotiation settlement services in abuse cases. Although variations in practice existed among the jurisdictions,²⁵⁰ basically, parents do not meet on a face-to-face basis in shuttle negotiation processes. Instead, Court Social Workers meet with the parents separately and conduct all negotiations between them.

No reliable quantitative data exists on how many parents in partner abuse cases participated in one as opposed to the other process. Until very recently (1999-2000) forms used by the Department of Justice to collect statistical data from Court Social Workers did not distinguish between the two processes. Both were recorded as mediation. Moreover court files contain limited or no information about the process of

Although purely speculative, the data indicate too that careful complete assessments for abuse may be less likely if Court Social Workers are confronted by large numbers of cases. The hope is that a recent proposal to require mandatory use of abuse screening tools will help to remedy continuing screening inconsistencies.

²⁴⁹ One would hope that individual assessments for abuse were completed prior to joint mediation or shuttle negotiation sessions but the presence or absence of such practices cannot be ascertained from court records.

²⁵⁰ Neilson and Richardson, note 6.

settlement. All that can be found in court files are mediated agreements, if they are filed with the court²⁵¹ and consent orders endorsed by judges following court-connected mediation.²⁵² Usually Separation Agreements and Domestic Contracts resulting from agreements reached in court-connected mediation are indistinguishable in the court files from agreements and contracts negotiated by lawyers unless mediation is mentioned specifically in such documents.²⁵³ Parents who reach agreements in court-connected mediation, who are unable financially or who are unwilling to consult lawyers, may, in some jurisdictions,²⁵⁴ sign consent orders which are then forwarded to judges for scrutiny and signature.

C) (5) Abuse Screening - Mediation Services in New Brunswick

In 1998 and 1999, the Department of Justice engaged L. Neilson, with M. Guravich, to work collaboratively with Court Social Workers to design screening tools and interview protocols with a view to standardization of Court Social Worker abuse

²⁵¹ Pursuant to section 134 of the *Family Services Act* agreements containing provisions for support may be filed with the court as long as they meet minimal requirements with respect to formality. Upon being filed such agreements have, for the purposes of enforcement, the same force and effect as a court order. The section leaves open the question of whether the whole agreement - for example with respect to custody, access and marital property provisions - becomes enforceable by either party against the other as a court order or only specific provisions with respect to support. Certainly only the support provisions are enforced by the Family Support Orders Service. Although members of Family Mediation Canada have professional duties to advise disputants to obtain independent legal advice prior to signing agreements, independent mediators may not be aware of such obligations. Moreover regulations under the *Family Services Act* do not require evidence of independent legal advice prior to signing such agreements.

²⁵² Practices vary from court to court. A number of the family court judges have taken the position that they will not sign agreements reached in court-connected mediation unless both parties have had independent legal advice, even if the parties have been advised to seek legal advice, have refused to do so and have signed a waiver. Other family court judges endorse such agreements as consent orders.

²⁵³ This is because Court-Social-Worker mediators have a professional duty to advise clients to obtain independent legal advice and do not draft Domestic Contracts or Separation Agreements. Parents, who reach agreements in court-connected mediation, who agree to retain lawyers, are provided with a memorandum of agreement. Court Social Workers specify that such documents are not legally binding. Parents take the memoranda to their lawyers, who draft the legal agreement. Consequently, it is lawyers, not court-connected mediators, who draft, sign and file Domestic Contracts and Separations Agreements based fully or partially on agreements reached in mediation with the court. Unless mediation is mentioned specifically in such documents, the agreements are indistinguishable from agreements negotiated by lawyers.

²⁵⁴ See note 252.

screening and non-mediation, shuttle-negotiation practices.²⁵⁵ Province of New Brunswick, Department of Justice Statistical data for the year April 1, 1999 to March 31, 2000 and a recent internal survey conducted by Susan Gavin, one of the research team members indicate, however, that many Court Social Workers had not adopted the screening tools in practice as they have yet to be adopted as official policy.²⁵⁶ Subsequently, as this report was being written, the use of such tools to assess for abuse and danger in abuse cases was in the process of becoming mandatory for all court-connected mediators. This should help to prevent the reoccurrence of some of practices reported in section 7, below. The current accepted practice in New Brunswick is that, after clients are assessed for abuse, danger and appropriateness of mediation, Court Social Workers will offer mediation in non-abuse cases only and may²⁵⁷ offer shuttle negotiation in other cases, but only if danger is not a factor and the survivor of abuse consents to the process. All other abuse cases are referred to lawyers.

C) (6) Private Non-Department of Justice Family Mediation

Private mediators also offer 'mediation' services to the public. The latter are not required by law to obtain accreditation, to assess for appropriateness of mediation and, or to belong to any professional association. Little is known about the nature or quality of services offered. Presumably, some are highly skilled and knowledgeable, while others

²⁵⁵ L. Neilson and M. Guravich (1999) *Abuse Screening Criteria and Settlement Option Project Final Report* (Fredericton: Department of Justice) 36 pages. Proposed Abuse Screening Tools and Procedures for Court Social Workers with new non-mediation settlement process with protections for survivors of abuse. Court Social Workers were already offering shuttle negotiation processes in practice. The goal was to standardize the process, create guidelines for practice and obtain formal recognition of the process.

²⁵⁶ Non-use of particular abuse assessment and screening protocols does not indicate, necessarily, that assessments for abuse are not being done or that they are not being conducted properly, yet variations in practice continue. A policy change mandating the use of the abuse screening tools is imminent. It is anticipated that this will help to reduce variations in screening practice.

²⁵⁷ The service is optional. Court Social Workers may decide to offer the settlement process, but only if the survivor of abuse consents. Court Social Workers are under no obligation to do so.

have limited experience and training. In connection with family abuse and violence, there is no requirement in New Brunswick that private mediators obtain specialized education on abuse matters, or that they assess for abuse and thus the appropriateness of mediation, or that they have knowledge of legal protections for survivors of abuse. While some private mediators²⁵⁸ belong voluntarily to professional associations, such as Family Mediation Canada, and thus have an obligation to adhere to professional standards, there are no requirements in the Province requiring professional affiliation. Potentially, the lack of regulation of the discipline is a threat both to members of the public and to the mediation discipline.²⁵⁹

²⁵⁸ This study is not focussed on mediation per se. Consequently, we did not collect data on this issue. Data on the qualifications of private mediators and the nature and quality of the services they offer are needed, however, because it is imperative to distinguish between mediation properly conducted and settlement practices that do not meet professional standards, when assessing the merits of the mediation discipline.

²⁵⁹ For example, we encountered indications of: joint mediation sessions with both participants in abuse cases and no abuse screening assessment; reports of mediator pressure on survivors of abuse to agree to joint custody, equal time provisions in abuse cases, lack of neutrality or facilitation and property settlements seemingly in breach of FMC Professional Codes of Conduct, which states that mediators must: ensure informed participant consents to agreements; ensure that each party has had an opportunity to understand the implications of available options; advise participants of the desirability and availability of independent legal advice. Family Mediation Canada's Code of Conduct, section 12, states that draft agreements or resolutions are not to be signed by participants in the mediator's presence except where required by law or court practice. The section goes on to state that mediators must inform clients that any written summary of mediation is not intended to represent a legally binding document. The reasons for such provisions are obvious: to ensure fair processes with full disclosure of information in order to prevent harm to participants. Yet documents in court files in jurisdiction two indicated that a number of private mediators have been having mediation clients sign agreements, with respect to support and division of marital property, without the benefit of independent legal advice. Pensions are often among the most valuable of all marital assets. Yet three court files contained agreements mediated by private mediators, signed in the mediator's presence, in which parents gave up all claim to the other's pension. In two of these cases, on the face of the documents filed, it appeared that mother had no pension plan of her own, yet the filed agreements contained no provision for unequal division of the remaining assets. And there was nothing in the file to indicate that any of the marital assets, including the pensions, had been appraised or valued. Although clearly parents are entitled to waive property entitlements, if they understand fully what those entitlements are and the financial and legal implications of such action, the documents in these files suggest, but does not prove - since supplementary valuation and independent legal advice documents may be in existence that were not filed with the agreement - professional practices that may be in breach of Family Mediation Canada's Code of Professional Conduct. More specifically, when mediated agreements are reached without property valuations and independent legal advice, it is unlikely that such agreements reflect informed consent based on participant understandings of the implications of available options. Worse, these agreements were signed by parties, witnessed by the mediator, and filed with the court pursuant to section 134 of the *Family Services Act*. That section states that agreements containing provisions for support may be filed with the court as long as they meet requirements with respect to

It is important to ensure that mediators have the knowledge and skills necessary to provide mediation services. One option is Mediation Canada's certification process. In 1999 Family Mediation Canada (FMC) developed, pilot tested a national certification process to assess and certify family mediators. The process was implemented, on an experimental basis throughout Canada, and assessed by an independent evaluator Dr. Desmond Ellis. National implementation has been recommended.²⁶⁰ We recommend provincial recognition of FMC accreditation processes throughout Canada. This can be accomplished in one of two ways: provincial legislation regulating the discipline or the creation and regulation of public mediation rosters. In the Province of British Columbia, for example, all lawyer and non-lawyer mediators, who wish to be considered as Family Justice Counselors or who wish to be listed on the Family Mediation Roster must first obtain FMC certification. Certainly mediators employed by Departments of Justice and, or working in connection with the courts ought to be accredited.

formality set out in the regulations. The regulations impose minimal requirements with respect to formality. For instance, the regulations do not require evidence of independent legal advice as a condition of filing. Yet section 134 states that, upon being filed, such agreements have, for the purposes of enforcement, the same force and effect as a court order. The wording of section 134 leaves open the question of whether or not the whole agreement - for example provisions with respect to custody, access and division of marital property - becomes enforceable as a court order or only those specific provisions with respect to support.

Although no quantitative conclusions can be drawn from these incidents about the frequency of such mediation practices, the fact that any mediators are enabling parents to sign and file such agreements with the courts suggests, rather strongly, the need for legislation governing professional standards and qualifications, if alternatives to the adversarial process are to be promoted that do not harm vulnerable family members. Perhaps consideration ought to be given to requiring evidence of independent legal advice before 'mediated' agreements can be filed under section 134 of the *Family Services Act* or, in the absence of independent legal advice, to limiting expressly the automatic legal enforceability of such agreements to child support matters. Another problem arises in connection with mediators drafting, witnessing and filing agreements with courts, without ensuring that such documents have been approved by a judge (as is the case with court-connected mediated Consent Orders) or that the parents have had the benefits of independent legal advice. Such practices may overstep boundaries with the practice of law. See: *R. v. Boldt* [1996] O. R. 4773.

²⁶⁰ Neilson, English and Hacking, note 244.

C) (7) Mediation – Research Findings – New Brunswick

Returning now to discussion of mediation services more generally, a number of the lawyers (34) responding to the Spousal Abuse survey contributed comments about their perceptions of mediation services in New Brunswick. The comments were far more commonly critical than complementary. With respect to private mediation, complaints were primarily about cost, rather than quality of service:²⁶¹

‘Cost is a barrier to mediation - private mediation can be expensive.’
Court-connected mediation is available without charge in New Brunswick. Thus complaints about court-connected mediation centered on accessibility and the nature of the service, not on cost. More particularly, lawyers complained that:

‘Sometimes these mediators try to perform quasi judicial functions and when [they] obtain final agreement; [they] draft usually unenforceable orders.’

‘It takes too long to get in. Extreme dissatisfaction with court-connected’

‘I find this is seldom successful. Often one of the parties feels they were pushed into or coerced into an agreement. Then they go to their lawyer to make a different deal. One result is that by the time the lawyers are involved the parties are more polarized in their positions.’

Lawyers' perceptions are corroborated, in part, by findings of the Domestic Legal Aid Evaluation conducted in 1996,²⁶² quoted below and by data collected during the course of this study discussed below. The Domestic Legal Aid Evaluation found:

There was consensus among Internal Key informants that the implementation of the DLA [Domestic Legal Aid] Program has had a negative impact on Court Social Worker abilities to provide mediation, particularly in the busiest courts. Key Informants are of the view that DLA caused an appreciable increase in Court Social Worker workload and DLA statistics confirm this. When the DLA Program was introduced, Court Social Workers were asked to assume a number of new duties and responsibilities: para-legal support services for the Family Solicitor, intake screening for abuse, additional secretarial responsibilities, and a higher volume of clients with more social and legal needs asking for information and advice. The statistics bear this out. Mediators in each of the three busiest courts in the south of the Province report waiting periods of four to eight weeks for mediation and non-emergency Court Social Worker appointments compared to one to three weeks prior to DLA. They also report that mediation can not work unless it can be offered within a reasonable time:

²⁶¹ Presumably, lawyers refer clients to private mediators they trust.

²⁶² Neilson and Richardson, note 6.

What suffered was mediation. We stopped doing them. There were no openings for one to 1.5 months and with mediation there are no guarantees. After 4 to 6 sessions we might settle some of the issues, so why wait, then wait again? The clients don't want to wait. They need mediation in a reasonable time. We lost a lot of cases. Only this year are we beginning to pick up mediation again.' (Internal Key Informant)

Internal Key Informants also complained that additional para-legal and screening responsibilities requested of the Court Social Workers under the DLA Program have forced the social workers to change the nature of settlement services they offer:

'We had to chop it down to bare bones mediation. We don't have the luxury of 8 to 10 sessions anymore. Now we have to resolve it in 4 sessions or less. We learned to be more efficient. It affected our style and people have to wait more than they used to. Prior to DLA the waiting period for anyone was under 2 weeks. Now there has been an enormous increase in our workload and people wait 6 weeks, unless it is an emergency. So now we are doing these quickie negotiations and we are settling a lot of cases that way.' (Internal Key Informant)

A number of the mediation clients interviewed had complaints about this aspect of the mediation service. Although we had more positive (18) comments - such as 'great service', 'very satisfied', 'helped us to understand each other' - than negative ones (10) the negative comments that we did receive had to do with feeling pressured or rushed and being given inadequate time in mediation. Negative comments from DLA clients included: 'there was too little time .. It was pressured ... by the mediator,' 'the mediator was proposing his own solutions', 'rushed, the mediator pressured me to accept to avoid going to court', suggesting that there are problems with scheduling and time pressure, at least in individual cases.

There is a danger that mediators, even highly qualified mediators, will begin to adopt styles of practice that begin to resemble arbitration when faced with limited time and resources and settlement needs of the legal system. Earlier it was suggested that, facilitated parental agreements will contain diverse details and terms and conditions but that, agreements produced professional settlement pressure will reflect legal norms rather than individual interests and thus will be similar in terms and conditions. Yet consent orders negotiated by court-connected mediators, filed in court files in two of the three jurisdictions, resembled generic settlements reached by lawyers (custody to the mother, every second weekend access to the father) with little variation in detail. While no firm conclusions can be drawn from this - since few mediated consent orders were filed in one of the three jurisdictions and since many mediated agreements are not filed with the court and or, if filed, are indistinguishable from agreements negotiated by lawyers - the pattern is consistent with complaints about settlement pressures documented below and in the previous Domestic Legal Aid Evaluation.

C) (7) (a) Mediation Research Findings – Court Files

Turning now to more detailed discussion of data from this study in partner abuse cases, most (between 66 and 87% of)²⁶³ court files involving dependent children and allegations of partner abuse contained no record of mediation. This does not prove that mediation did not take place in these cases, however, since ordinarily there is no record of mediation in a court file in absence of a consent order or agreement. Although, in theory, the policy in New Brunswick is that court-connected mediators do not mediate in

²⁶³ No record of mediation could be found in 66% of the files in jurisdiction one, 86.5% of the files in jurisdiction and 71.9% of the files in jurisdiction three.

cases involving abuse, the court files made it clear that judges in some (not all) jurisdictions have been ordering parties to attend court-connected mediation in appreciable numbers of abuse cases. For example, in jurisdiction one, judges ordered parents to attend mediation in 44 of the 147 partner abuse cases²⁶⁴ examined. No record could be found in the court file to indicate whether or not the parents did in fact attend mediation in 29 of these cases. In 9 cases the file contained a mediated consent order or agreement, in 6 cases the file made it clear that the parents attended mediation but that mediation was unsuccessful. It is not known how many parents attended mediation, without a court order requiring attendance, in the other 103 abuse cases since a record of attendance will not always appear in a court file.

While documents found in the court files indicated that a number of these abuse cases involved minor, isolated incidents of violence (emotional, physical or sexual) connected with separation, other cases appeared, on the face of the documents filed, to involve long-term patterns of abuse and, occasionally, high levels of danger. For example, court-file 19,265 the judge ordered both parents to attend mediation to resolve custody and access issues yet the court file disclosed mutual allegations including death threats, threats with guns and knives, an allegation that the father had held a knife to the mother's throat and considerable police involvement.²⁶⁶ It is not known whether or not the parents attended 'mediation' in accordance with the court order. Parents involved in file 39 were ordered to attend mediation to resolve access issues despite the fact that the case involved allegations, largely corroborated by mental health evidence in the court file, of the father's threatened suicide, his death threats, his bi-polar illness, his attempts to abscond with the children, his destruction of property, his intense jealousy, police involvement, repeated breaches of no contact orders, and his criminal convictions for assault of family members and a third party. A letter in the file indicates that Court Social Workers responded to the court order by offering shuttle negotiation, not mediation. It is not clear, from the file, whether or not either party attended.²⁶⁷ Similarly, in jurisdiction two, parents were ordered by a judge to attend private mediation after court-

²⁶⁴ Detailed data were collected from files disclosing claims of abuse if dependent children were involved in the case.

²⁶⁵ Court or case file numbers have no relationship to court file numbers or to family names. Numbers were assigned merely to enable the researchers to organize and analyze the data.

²⁶⁶ The facts disclosed in documents in this court file indicate a high level of risk of death for the mother and children involved in this case. See Appendix 3, Indicators of Danger.

²⁶⁷ Ultimately, the mother disappeared with the children after the father attended several anger management courses and the judge ordered supervised access. Subsequently, the court ordered police and social service agencies to apprehend the mother and children and to bring them before the court to enforcement of the access order. The final outcome is unknown. One hopes that this mother and children are not found, as the file contains a multitude of indicators of danger,

connected mediators indicated in writing that mediation was not appropriate, presumably on the basis of abuse.²⁶⁸ Court files suggest that judges in jurisdiction three seldom, if ever, order parents to attend in mediation in abuse cases.

Judges are able to exert considerable influence on court processes and both legal and social and practices in family courts. On the one hand, much is to be gained by family law processes that integrate mediation with settlement and decision, and social work with law. On the other hand, mediators, who work closely with judges as part of an adversarial process, risk becoming settlement supports for an over burdened adversarial process.

While occasionally, court-connected mediation is offered in New Brunswick after a judicial hearing, pursuant to a judicial order, the more common practice is for court-connected mediation to occur prior to legal proceedings. Court files contained evidence of parents' attendance in 'mediation' sessions in 21 of the 147 partner abuse cases examined in jurisdiction one and evidence of Court Social Worker offers to 'mediate' in 14 of a sample of 57 court files involving partner abuse in jurisdiction three. Court files in jurisdiction two disclosed no evidence of mediation or shuttle negotiation in abuse cases but this is partly a function of filing practices in this court not merely an indication that such services were not offered.²⁶⁹ Indeed it is known that, while face-to-face mediation in abuse cases was seldom offered in jurisdiction two, non-face-to-face shuttle negotiation services were offered in partner abuse cases for a period of about two years.²⁷⁰

A number of patterns appear in the court files involving abuse and mediation or settlement. First is that Court Social Workers were offering two very different processes: shuttle negotiation and joint mediation. Second is an absence of protective provisions - for survivors of abuse and their children - in mediated consent orders, and third is the lack of variation in details and provisions. Court files do not, however, tell us much about process or parents' perceptions of that process. It is not possible to tell, from court files

suggesting a high risk of death for this mother and her children should they be found and access enforced.

²⁶⁸ Court Social Workers do not usually file the reasons for decisions not to mediate in court files. The term 'at least' is used in the text because court files will only contain a record of Court Social Worker determinations that mediation is not appropriate when parties attend mediation as a result of a court order. It is far more common for participants to attend mediation voluntarily, without court order.

²⁶⁹ Court Social Worker notes, files and records are stored separately in jurisdiction 2.

²⁷⁰ Comments of Court Social Workers during provincial meetings 1998 to 1999.

alone, why such patterns appear. Perhaps parents genuinely come to be reassured and convinced in mediation that details and protections are unnecessary. Alternatively, perhaps parents experienced settlement pressure. For qualitative, explanatory data, it is necessary to turn to the comments of parents.

C) (7) (b) Mediation Research Findings – Interviews

It is important to keep in mind that the following discussion is not about Court Social Worker Services or mediation generally. Discussed here are participant perceptions of their experiences when mediation and settlement services were offered in cases involving patterns of abuse. This is a select group of clients with special needs and vulnerabilities. These men and women are not representative of mediation clients in general. It is important also to keep in mind earlier comments about the interview data.

More particularly:

Data from interviews are qualitative, not quantitative, in nature. Thus, while patterns of behavior can be identified, it is not possible to pinpoint the frequency of their occurrence. Moreover, studies of this nature are apt to attract participants who have had negative experiences. Thus parents' criticisms of mediators do not prove that all mediators or even the majority of mediators behave in the manner identified. Nor does criticism prove that the individual mediators discussed in this study behave in the same manner with other clients. Instead, the data illustrate patterns of service delivery within the legal system that clients either appreciate or experience as objectionable.

The interview data corroborate the court file data discussed above. The majority of women, who participated in this study, did not participate in mediation, most were represented throughout the legal process by private lawyers or family solicitors.²⁷¹ It

²⁷¹ Family Solicitors are lawyers employed by the Department of Justice to offer legal services free of charge to victims of abuse. Most survivors of abuse in jurisdiction one, the jurisdiction with the highest rate of mediation or shuttle negotiation in abuse cases, were represented by private lawyers not by a family solicitor after screening for abuse by a Court Social Worker. Specifically, survivors of abuse (primarily women) were represented by private lawyers rather than a family solicitor in partner abuse cases in jurisdiction one at a rate of approximately 2 (69 victims of abuse represented by private lawyers) to 1 (37 victims of abuse represented by the family solicitor). Others were represented by duty counsel or represented themselves. Parents represented by private lawyers often have little contact with Court Social Workers.

appears safe to conclude, therefore, at least tentatively, that most partner abuse cases were not mediated in any of the three jurisdictions examined. Thus the comments that follow detail the experiences of a minority of participants in this study who did experience Court Social Worker or private mediator 'mediation' or settlement services in situations involving abuse.

Very few of the twenty female participants who had experienced abusive relationships and mediation had anything good to say about the process. Only four mothers offered positive comments, such as the following:

I'm happy with it. We had a mediator who was very good. We sorted things out - some rough things where we just couldn't do it ourselves. So through the mediator, it was sorted out but a lot of the time it was not to my satisfaction but then again, when I looked at it, I thought it's fair.

The judge didn't want to see us back in court. He said, 'I don't want to see you back here, I want you to go to mediation.' Mediation is easier, you just meet with the mediator, you don't have that panic of going to court and testifying, which is stressful. I wouldn't want to go through that again.

I was very comfortable with it but the father was not. It seemed as though he thought the mediator was taking my side. He [the father] did not want to talk about money; he did not want to pay [child support]. He said he was a student and should not have to pay. The mediator reminded him that he was working in the summers.

And two of the four mothers, who offered positive comments, balanced the positive comments with criticisms of other mediation sessions. Male participants viewed mediation more positively;²⁷² very few were critical:

I always preferred to mediate. I believe the lawyers I used were acting as my champion and were not interested in managing our specific set of disputes or the best long-term interests of the child. I was most unhappy with the judge's response, I was mostly happy with the mediators response. A lawyer's job is to champion your specific case, this is usually based on the subjective story they receive from the client. That may not be the appropriate forum for the majority of family disputes.

I think the courts should appoint mediators that are good and you could almost do away with the judge. Like you two are going to have to sit here and mediate with me whether you like it or not.

It is important to attempt by all means to mediate in cases where alleged abuse, violence or terror is not properly substantiated and both parties agree to work things out at their own pace based on informed decisions and deep understandings of the challenges ahead.

When survivors of abuse offered positive comments about Court-Social-Worker services, the comments were usually about information and or support offered in non-mediation contexts:

The family court mediator was worth her weight in gold. I mean she's heard his side of the story, she's heard my side of the story, she's heard his ranting; she knows how his mind works. She says, 'What does he want from you now? What more can you give him!' She tells me to please let her know how I make out (in the court hearings).

²⁷² Some authors are critical and skeptical of fathers' groups' interest in mediation. See, for example: C. Bertoia and J. Drakich, (1993) "The Fathers' Rights Movement: Contradiction in Rhetoric and Practice" J. of Family Issues, 606-10; C. Bertoia, (1998) "An Interpretive Analysis of Mediation Rhetoric of Father's Rights: Privatization versus personalization" Mediation Quarterly Vol. 16

I found her [the court social worker] to be fine, helpful. She helped me in areas where I didn't quite understand the forms - things like that.

I found the mediator was excellent. He was very good, went out of his way to help, to reassure and do whatever he could. (This comment was not about mediation; it was about information and support. This participant's partner resided in another jurisdiction.)

Occasionally women talked about the benefits of mediation for others, in non-abuse situations:

My brother and his ex girlfriend went through mediation and it was great, for both of them, they got a good agreement. It was through the family court and totally opposite of what I went through.

Indeed Court Social Worker services with respect to intake, information and assessment have been positively evaluated elsewhere:

DLA clients commented favourably on this aspect of the DLA service. Most said that they appreciated the help even when they did not proceed with the service further. Comments that the Court Social Workers were 'interested', 'easy to talk to', 'very helpful' 'interested in the children' were common. In contrast, only five complained about insensitivity or impersonality. Complaints, when they did occur, usually had to do with workload problems: difficulty reaching Court Social Workers by telephone or difficulty finding a mutual time to meet, rather than with the service delivered. Generally, with the exception of some difficulties with too high a workload, which might fully or partially be remedied through reallocating some of the Court Social Worker's para-legal duties, this part of the Program appears to be functioning well.²⁷³

Participants in this study suggest, however, that difficulties arise when Court Social Workers and private mediators offer face-to-face 'mediation' in cases involving partner abuse. Parents who were offered such services described four types of 'mediation' service:

1) shuttle negotiation (in which the third party mediator negotiates with the disputants separately, without having the parents

meet together for a face to face meeting):

[Did you go in together?] No, separately. Two of us in a room together is not a good plan when there is a problem. [So she saw you and then saw him?] Then saw him and called me back in.

2) separate sessions with each disputant followed by a joint 'mediation' session:

That was before when I was trying to get access to the children and they thought it could be done through a mediator first but it didn't work. My ex wouldn't agree to anything. [Were both of you seeing the mediator?] I went once myself and then she was supposed to go and I went back. We were supposed to meet and she cancelled. We finally did get together.

3) joint mediation sessions:

²⁷³ Neilson and Richardson note 6 p.64.

It's the same scenario every time. I went to mediation [in the family court]. I have to sit in the same room as my ex husband.

[You informed the mediator about the abuse?] Yes. And it was quite apparent to him. I told him earlier that the physical abuse had diminished. There was always the threat there that he would do it. But it was more mental and verbal abuse in the latter part of my marriage. And I told him that. I said - it was very apparent to him what I was saying. And I needn't have said one word. It was my ex during mediation. He had to stop him two or three times to say, 'I wouldn't call you either, you're just too angry, too nasty'.

4) and combined joint and separate sessions:

We went to [private mediation] The initial meeting was with [named mediator] and that was with both ex and myself. And I pretty much laid it out that I'm sorry, I can't deal with this [the abuse] anymore. And at that point in time mediation was set up so that we went together, but they met us separately. But in between that, this was when they [child protection] removed the children and I called this private mediator and explained to her what went on and she said, 'Here's what we're going to do. We're going to bring you in and we're not going to tell him [about the decision to separate] unless there are people around and that's when she pretty much told him he had to leave the house because she was afraid for me to tell him unless there was somebody around to mediate.

We found no association between frequency and severity of abuse and the structure of the settlement process offered.

The policy in New Brunswick is that court-connected mediators do not mediate in abuse cases.

Theoretically, Court Social Workers are to assess for abuse and refer survivors of abuse to family solicitors for legal services:

[When you first decided to seek help for your family law problems, who did you see?] It was one of the social workers. You need to go through them to be screened before you get Legal Aid and they decide whether you need a mediator or a lawyer. She told me five minutes after I sat down and started talking that a mediator was ruled out.

Thus the mediation services of Court Social Workers and other mediators, who screen for abuse and do not offer mediation in abuse cases, are not discussed in the following comments.

Despite Department of Justice policies on the non-use of mediation in partner abuse cases, twenty female participants did experience 'mediation', in apparent contravention of government policy - because thorough assessments for abuse were not carried out prior to joint sessions, because judges ordered such services, or because, as private mediators, they were not bound by government policies on mediation and abuse.

Survivors of abuse were highly critical of these services. Moreover, the criticisms mirror the complaints about mediation found in the feminist literature and in other qualitative studies. Specifically, participants complained of: settlement pressure to accept

fathers' rights; adjudication without trial; non recognition of abusive partners; partners' use of mediation to intimidate, harass and abuse, to continue contact and control, to delay legal proceedings; mediator pressure to abandon claims in order to obtain settlement, lack of investigation of the best interests of the children.

Basically, survivors of abuse report their own susceptibility to enter agreements in order to speed the separation process:

At the time you're signing that - you're leaving a man who's been beating up on you, insulting you. You name it, he's done it. You don't care. You will agree to anything. It says you sign this under no stress, no threat, whatever - Yeah, Right! You sign it, you don't care. But once things calm down and you get your feet back under you, it's not the same thing.

He said, I'll let you take the children with you to live in Ontario as long as you agree that I don't have to pay any child support for ten years. I would have signed anything to get away.

And they comment on partners' use of 'mediation' sessions to maintain contact and or control, to delay legal proceedings, and or as an opportunity to harass:

The mediator always sent me the appointments and I was scared not to show because I was scared of losing the child. It was mainly her (the mediator setting the appointments) but I said, 'If he starts [to abuse me in the session] I'm gone' and he started in her office. I got up and said, 'I'm better than this!' He started yelling and screaming in front of her and she let him. [I said] 'I don't need this, I'm not the one that left. I didn't put us in this predicament and I'm not going to settle for this.' I got up and walked out. That was the last mediation we had.

He [the father] warned the mediator that it's been three weeks now that we've been trying to deal with summer access issue because it was supposedly going to be resolved by [late spring]. There were these airline tickets that were inexpensive then. All we wanted was the same access as last year - no big problem. I talked to her on the phone. But then the mediator was phoning back and forth. The mother wanted the names of the babysitters, she wanted to know the itinerary, she told me my daughter wanted to go to camp and asked what camp was I sending her to. That was the way the mother was able to have the [long distance by phone] mediation sessions go on and on without arriving at anything. Everything was delayed.

That [mediation] was the beginning of a nightmare. We tried to use a mediator. Went to family court. The mediator was trying to draw up a mutual consent but he would never come to the end. The mediator sent me a draft of the consent order and him a copy. I wanted a couple of changes, one basically was wording. He didn't want this and he wanted that added and he wanted her to add that I was abusive to him, verbally. He said I was insulting him or using bad words when I was talking to him. When I called the mediator to see how it was going, the mediator had met with him and he said he wanted [more changes]. [When you met with the mediator, did you meet separately or together?] I met first with the

mediator, then the mediator met with him alone and then we met together. [How many meetings, do you remember?] I had one with her and one together. The one we had together was not good. What happened? He was aggressive. The mediator told him, 'Your attitude is not going to help.' He said other things about the kids. He didn't want me to take them to church. He was putting in all sorts of restrictions. I said, 'I don't think he is going to allow this to end' and the mediator said, 'That's what I think too.' I said, 'I'm going to take it to court and the mediator agreed. The mediator knew that we would never come up with an agreement. [In your meeting with the mediator and he was aggressive and difficult, did you feel that the mediator handled the case appropriately?] Well the mediator told him that his attitude would not help. He stopped being aggressive to me but he was not there to come up with a consent; he was not there for that. He was there for saying that, even though he was wrong, he was not the only one - he wanted to prove that. And that's what the mediator told him: 'We are not here for that.' After that we didn't have any other sessions together.

The context of this mediation session, in terms of abuse allegations, drawn from interview and court-file data was as follows: several attempts to strangle, pushing, hitting, shoving; the mother was allegedly forbidden to eat until chores were done to his satisfaction; forced sex; reports that the children were afraid of him, having witnessed some of the beatings; one possible death threat.

Another participant reported:

We had 8 mediation sessions together. It was awful. He had so many issues. Then it was [the mediator saying], 'What do you want, what do you want? Is this what you agree on? Is this what you agree on? This is what I'm going to send to your lawyers.' Then two months later, [the mediator contacted him to say] 'We haven't got your signed agreement back yet.' [He said] 'Well, I really don't like this part and I think that this should be changed and I want this.' So she calls me and she tells me. I say, 'Well he can have that, that's no big deal, no I'm not going to go for that one.' [Then he had more objections and more objections]. I said, 'I can't do it anymore.' [Finally, the mediator] said, 'It wouldn't matter, he would find something else.' She said, 'He doesn't want mediation to end. He wants to keep in contact and if he agrees, he won't have a reason to be in touch again.' (allegations: primarily a long-term pattern of control)

Mothers also reported settlement pressure to give up claims for supervision or restrictions on access and to accept the 'rights' of fathers:

First we went to mediation. And I was misled there by [the mediator] who made up this story about unhappy differences had arisen between us and that I will have custody and my ex will have reasonable access and it will be biweekly from Fri. at 4 until Sun. at 4 and alternate weekends. And then for special occasions the father shall have the child from noon on Christmas Day until 6:00 Boxing Night. I didn't agree with that but the mediator said that if I don't sign it then there'll be a whole big thing and I might not get custody. I didn't agree with this at all and I didn't want this because I don't think this is fair, noon on Christmas

Day. By the time child got up and had breakfast where's the time to - there's no Christmas. [Did you try to argue that?] I tried but the mediator said either sign it or we'll go to court. I was scared. My husband had just left me. I just didn't know which way to turn.

The context of this case, in terms of abuse allegations, was as follows: physical assaults during marriage, throwing property at the mother and at the walls, stealing money for drugs and alcohol, threats of physical violence, misuse of alcohol, irresponsibility, emotional abuse of the children (berating, belittling, involving the children in parental conflicts), manipulation and control and emotional abuse of mother during and after separation)

Yet another parent commented:

The mediators are rigid. They say if he wants this, he will get this. They say, 'If he goes back to court, this is what the judge is going to say.' This is what the mediator would always tell me: it was always what the judge would say. I felt like my hands were tied...helpless. Different things would come up that I wouldn't agree with - things about what happened. I felt helpless there too. What is the point in calling the mediator? The mediator is going to say the father has got to see the son, that is his right. Nothing you can do about it. It does not matter if he is drinking [in contravention of the court order] in front of child, partying all the time. This is just not right.

The context of this case, in the words of the mother was as follows:

Putdowns, verbal abuse. It started that way...hair pulling...my possessions - things that I owned, he would throw them in the garbage or he would give away things that belonged to me, if I was not there, things of mine that were expensive. I was watching mending some socks one morning. He ordered me to come to kitchen to get him breakfast. Then he came in and he had an exhaust pipe in his hand, had it over his shoulder, ready to throw it. At that point, I decided that if anything else happens again, I would call police. And he would throw things: dinner plates across room, furniture. For example, we were having dinner, there was some commotion - my son spilled something - and he got upset and started calling me names. I said something, I don't remember what. He picked up a candlestick. He said, 'Say that again!' I did and he threw it at me. It hit me in the stomach. I got up and called police. When I met him, I looked great, felt good and I had a good job, everything went down hill to the point where at the end of the marriage, I didn't feel good about myself. I was a wreck. I think it's something that people don't understand, how repeated patterns like that - sort of this mirror thing and the mirror is not quite right - but everybody who has been involved in an abusive relationship, always gets to think negatively about themselves. The more you give, the more he wants to take. I'm a giving person. I have to be careful. I know I need to be more assertive in dealing with him. I need to work on that and the confidence. I need to have my confidence built up even to deal with every day life - like getting a job - that's a major mountain for me.²⁷⁴

(The following is an experience with a private 'mediator') *Well, because of what he told her, she actually yelled at me over the phone. She listened to his side of the story and said to me that*

²⁷⁴ This woman is describing an imbalance of power that clearly ought to contraindicate face to face, facilitative mediation.

*I was something to the tune of that I was money grubbing and petty and I should let him have more access to the children. I said, 'excuse me!' I said, 'You obviously don't have all the facts here.' She said, 'You're not playing by the rules!' She yelled at me. I had never, ever been into her office. She just phoned and said, 'this is what he wants'. I said, 'excuse me?' So she didn't even listen to you? No.*²⁷⁵

The mediator jumped on me about something that he had told him, about my not letting my son go out, just keeping him to myself - which was totally untrue. I didn't like that. I didn't think the mediator should have done that. One thing that bothered me - the mediator did not know either of us. It's wrong for him [the mediator] to attack me. He should not be the judge. I was upset by that. Afterwards, I got thinking, 'He [the mediator] listened to him; my ex told him those things and then this guy [the mediator] judged me and jumped down my throat about it .A mediator should not do that.' That's a real problem - for the mediator to judge. I didn't have the opportunity to say what was what.

And survivors of abuse report that mediators failed to detect abusive partners:

That [mediation] was worthless too. The mediator met [with my husband] before me. [The mediator said] he was such a wonderful man; he was so concerned about the children! I said, 'He is full of shit!' He was using the children to get to me. He threw everybody out of our house, threatened to kill us. He never went to church in his life and all of a sudden he accepted Christ...which is wonderful...but it was all to pull the wool over everyone's eyes. He was playing a game. I went from loving him, to liking him, to hating him. Now I don't care anything about him. I would not wish him dead but I hope he never forgets what he did to all of us: my family and his family too. The mediator got tired of listening to me say he was doing this and doing that - I was not lying, because he was - I didn't make it up. The mediator thought he was wonderful...him and his girlfriend went in there. She's had him thrown in jail twice for abuse. [So he has gone on to abuse her?] And the first time that he beat me up after we were married, I heard that he beat several other women up before me. They [told me later] but they said they didn't think I would believe them. His father was abusive, that's how it all started. People say, 'Well he is an alcoholic.' He is very intimidating but if you met him sitting here and didn't know he was abusive, you would not believe it! He could be so sweet. Old people loved him. When I was married to him, he would say I'm doing the cupboards at this lady's house and he would say, 'She likes chocolate chip cookies, would you give her some?' He would take me there for visit - he loved old ladies - but then would come home and beat the crap out of me. Threatened to burn our house down, threatened to steal the kids. He told me he was going to hire a couple of men to kidnap me in my car, take me somewhere and rape and kill me.

We tried mediation to work out our separation agreement. This was after [a stay in a Transition House for battered women] Family services also said we can provide you with a mediator. [Did anybody say that because there had been abuse in the relationship that that might not be the best option?] Yes. The girls at [named Transition] House did. The people there seemed to be the only ones who understood my situation. Because both my husband and I are professional people, I have a feeling that the legal system and even family services, gave him more credibility. He's one of these people that can put on a really professional looking front and I think they were snowed by his ability to convince them that he's reasonable. He's not reasonable. We went to mediation. The mediator was very good,

²⁷⁵ Clearly this is not mediation, though it may be harassment.

stopped mediation because he was so abusive in the session. He was sitting behind the mediator. As the mediator was interviewing me and he was making faces and shouting, calling me names. [How many sessions did you have?] A couple. (Abuse - pattern of emotional abuse - before and after separation - substantiated by mental health experts, one incident of serious physical violence)

And survivors of abuse reported problems with non-disclosure and non-enforceability of agreements and orders in mediation:

When we went in to mediation that day, it was so he could lower them [child support payments] and all he brought was his UIC stub. He was working but he never presented that. At one point, he was casual - at first of year you don't get a lot of hours - but as time went on, he was working full-time but he would present a letter that said he was still considered casual employment and that's all it would say. There would be no figures presented. I know what he was making - not a dollar value because the person who does the payroll could only say, 'Isn't he paying you?' I'd say, 'no.' 'Well, I'm telling you he's making good money and that's all I can say' - because her job would be in jeopardy if she said any more. What's the point? I can call and tell them that, but they sort of adopt attitude that I am harassing him.

[So she saw you and then saw him?] Then saw him and called me back in, yeah. [Were you satisfied with the way that was dealt with?] Not really because it doesn't get you anywhere. It doesn't solve anything. He knows he is not allowed to drink [when the children are with him, pursuant to the court order]. That means not even two or three beer. It does not matter; he's an alcoholic. You cannot trust him to have 2 or 3 beer. But he does it. There is nothing any of them [the mediators] can do to enforce it. Why take my time to go all way into town? Then she calls him up and sits there and says, 'Now be a good little boy.' It is a waste of time.

I don't even bother with that [mediation] anymore. That's a waste of time too. [Would it have been about access?] Probably with the drinking and all that. Then the mediator called him in and talked to him and he told the mediator that his concern was all these men that I was having into the house! Wish I could have seen them, but anyway, it's ridiculous. They [mediators] call you in. You have a legitimate complaint. He comes in, lies through his teeth and they don't know what to do. They can sit there and tell him, [the court order says] no drinking with the children. The mediator knew he was lying, right? The mediator was smart enough to see through that. It was a waste of time.

Finally, reported here are several detailed accounts of three women's perceptions of their 'mediation' experiences:

And when I told them that, I was told that I should file a motion [to increase support and collect arrears]. So I got all papers, paid for the copies, came home. Before I know it, this man [ex partner] decides he's going to take me back to mediation. He says he has issues about children. I'm thinking, 'Oh my God, what could he possibly have issues about? I don't go anywhere, I don't have a life per se, what could he possibly have exception to?' It was because he knew he might have to pay more money. So we went in and the mediator says that my husband was told to bring financial information. Of course he [my ex] did not. The

way that mediation came out, it was probably the most taxing session I had. I came out of there feeling, 'Oh my God'. I had asked that maybe he address the arrears only to be told that, a couple of times, rather than pay \$100, he would pay \$105 and the extra \$5 should be applied to arrears. That was how he was going to address them! I had suggested to the mediator that he could apply some of his bonus at work so that I could bring my daughter home from school out west, only to be told that that was my doing, that I pushed the kid, and if I was so hell bent on her going, that the onus should fall on me. And the mediator said, 'what do you think of that?' I said, 'First, I made her go and show her dad the papers because she was so excited and pleased about getting a good scholarship.' So he [my ex] knew where she was going but he said, 'I never heard of this!' He was yelling and shouting that that was the sort of stuff he had tolerated in our marriage. It was just like being back there. And the mediator said it probably would have been cheaper to have kept her in the province and pretty much agreed with my ex. And I thought, 'What are you talking about?' I said, 'Who am I to stand in my daughter's way?' And I said, 'Okay, for the record, I will take total responsibility for my daughter's finances. My daughter is 18 and she's not living at home, never mind she's still a student and I'm still supporting her. So when I came out of that mediation, I could barely walk. It was just as if I had been pounded out again. I had trouble dialing the phone. [Did the mediator know your partner had been abusive?] Certainly did because I told the mediator everything that I had gone through and I thought that it was understood. But again, this last session I felt that this man was making these accusations and the mediator was buying it, you know. And it made me feel that, 'Oh my God,' I felt as and the mediator even so much as verbalized, 'She just has her hand out for money,' like I was being greedy or one of those vicious, vindictive women. That's what I felt like. I couldn't wait to get out of there. I just said, 'I'll wash my hands of this. I will never approach the courts again.' The mediator even saw how ex behaved. The mediator said quite honestly, I wouldn't approach him either and said to him [in the session]: 'You're a scary, angry man!' But I still couldn't stop the feeling that perhaps I was making it more difficult for my children, I was defeating my purpose in leaving him because I was made to feel that my efforts to get support were vindictive moves. I came home and thought of things mediator said - about 'you're doing more damage to the children by continuing the conflict' - not me personally, 'you as a couple are' [damaging the children]. It will never be an amicable relationship because of the anger there and I can't even bear to be near him [my ex partner]; he scares me so. I'm not able to function well when he's around. So the mediator called me the next morning and I said, 'Look, I'm going to stop you right there. I want nothing more to do with mediation, family court, nothing! If it means I have to work 3 jobs, I will do that. If ex wants to pay, fine. If ex doesn't want to pay, fine.' That's how I feel about [mediators and the] family court.

[So they ordered supervised access and he wasn't complying with that. Did you attempt to go back and have that dealt with?] We did go see a mediator before we had to go to court and it was funny because the mediator said [to my ex partner], 'You have visitation rights. If you want to, you can take her out of province and nothing could be done about it because you have visitation rights.' Like [the mediator] was filling his head with a whole bunch of ideas. So then I was scared that on a weekend he would take her, that he would actually take her. And the mediator treated me like garbage, was not for me at all, only for the other party and that was it. One of the court rulings was that he [my ex] was not to drink around daughter, no liquor involved. I'd ask. Every time she came home, oh yeah, he was drinking. So she still goes down there and he still gets drunk. There's no help, there is no one to help. I don't know what to do. Who do you call? What do you do? I'd like to keep her home. She's getting to point now where she doesn't want to go. I just felt I was totally ignored. Treated like garbage. The mediator focused more on father, less on me, and filled his head

with things he could do to hurt me like take my daughter away from me. One time the mediator said, 'Maybe you need your head examined' the mediator spoke to me like that. My ex tried to say I was promiscuous in my past, stuff like that. I walked out of there, I was so mad. I was just so mad, I couldn't believe it. My mother was just mortified with how I was treated. It's like you're all wrong. [The mediator suggested], 'You could have settled out of court by giving him what he wanted, you didn't and you still didn't get what you wanted.' So it was all about him. He [my ex] walked out of there with big grin on his face saying, 'See, there you go!'²⁷⁶

(The mother's reports of the implications of continuing contact for the child are reported elsewhere in this report: the father's repeated non- appearances for access when passed out drunk, driving while inebriated with the child, exposure of the child to inappropriate adult activities, failure to care for the child during access visits.

The context of this case, from the perspective of the mother are as follows:

The only people who were involved were the police a couple of times where he did get a little violent and scared me. I never ever did press charges, like a lot of women won't. But he always threatened me: 'If you ever press charges against me, I'll get you', you know, so. But I remember going out to a bar and he would show up and pour liquor all over me and the girls I was with and upset tables. I tried to get away from him one night and he ripped a sign off a door, trying to get into the building at me. Things like that. If [the judge only] knew. I could have brought, even had people in there with me to say how bad he really was. His niece is scared to death of him, he's threatened to kill her so many times! He's just an awful person. His parents both died from being alcoholics and I tried to make him see that but he would never listen to me. During the relationship, he was very jealous, very jealous. I couldn't talk to anybody. What I wore, how I wore clothes; he just treated me like I was a prostitute then. He pretty much raped me 4 times because I would say no and he didn't care and that was when I was 8-9 months pregnant. But it was more verbal abuse than physical when I was pregnant. He always called me a slut and whore and I was no good for nothing. The time he did physically hurt me and I ended up going to hospital and stayed that night. So I went in and they kept me for night and of course I said I fell and things along that line. It was basically - violence revolved around because I said no. And there were quite a few days I couldn't go to work because he kept me up from the time he got home from work. I wasn't allowed to sleep. He would stay up and verbally abuse me all night. I remember sitting on floor just rocking because I was so tired and all the abuse he said to me and I tried to get out a couple times throughout the night to get to my sister's and he wouldn't let me go. He kept locking the door. He wouldn't let me near a phone, so I remember just rocking, almost in a zombie state, thinking, 'I've got to get out of here!' Eventually, the phone rang so I got out. Got in car, and drove to my sister's and slept. My first son was already out there. He spent a lot of time there because he knew what was going on. I just couldn't handle it anymore.

Another participant commented:

²⁷⁶ Therapists say that one of the most common tactics abusive partners use in legal proceedings and in mediation is to attempt to gain the upper hand by claiming survivor of abuse promiscuity: R. L. Bancroft (1996) note 82.

I first called family court mediation. No appointments were available so I went to a lawyer. There were no appointments available for three weeks. So, when you went to mediation, how did you find that process? I was very comfortable with it but the father was not. It seemed as though he thought felt the mediator was taking my side. [Can you tell me anything that the mediator might have said that would make him feel that way?] Money. He did not want to talk about it, did not want to pay. The mediator reiterated that he was working on the weekends. In the end he did agreed to pay on guidelines. But he said, 'I'm not going back to mediation because the mediator does not believe anything I have to say'. I wanted him to go back to mediation. That was the first time, when everything was settled. After the final split up, he did not want to see the child, he wasn't paying support and I wanted to get back into mediation to get it resolved but he would not go. [Was the issue of abuse ever brought up in mediation?] It was between the mediator and myself a lot. When I left my friends knew, I never told the mediator but the mediator could see marks all over me and when I left an RCMP officer saw the marks on me and wanted to take me to the police station but I just wanted to get out of there. I had a one-on-one consultation with the mediator before he was brought back him in and she came right out and asked him. He got nasty about it.²⁷⁷ [Did you feel comfortable talking to the mediator about it?] Oh yes. Initially I sought overnight access, despite the abuse, to get some parenting assistance. The mediator was the one to talk me out of it. The mediator asked, 'Are you sure you want him to take child overnight after all you told me about him?' I said, 'Well I don't have anybody else. I don't have a sitter and I need a break' and the mediator told me that I should surround myself with people who could provide support and help. It was positive I was very impressed. But I had run-ins with other mediators afterwards. [You had occasion to see another mediator?] Yes, I was served by the father supposedly because he wanted more access but what he really wanted was for the court to do away with his arrears and to not have to pay child support. Then I got a call from a mediator's office, from another mediator. [The mediator] says, 'Hi this is so and so. Your husband was in to see me today regarding getting access to said child. He told me that you have not been permitting him to exercise his access. He wants to know if he can see her.' I just blew up. I had already tried the mediation road with him for months! Now I get this phone call: 'This is the mediator.' I said, 'Well did Mr. happen to tell you that I was served just served with court papers?' And I just lost it. I said, 'Did he tell you that he kicked my window in, did he tell you that he kicked my office door closed on me, did he tell you he did all this stuff with the child there?' The mediator told me to hold on. Then the mediator said, 'Oh Mr. is here in the office with me right now and he is willing to get all this taken care of now without the lawyers.' I said, 'No, no, no! Why don't you phone the other mediator's office and ask to look at the mediation files. The mediator said, 'Well you know there are two versions of every story' - probably thought I was some hysterical woman. I made sure at the end of it, I said, 'I am very sorry for putting you [the mediator] through this. You caught me at the wrong time, after a very stressful period. Then I was thinking, 'Why do I have to worry about how I look in this case; I haven't been the one getting drunk around my child, I haven't been the one being abusive around my child, why should I have to worry about how I act?' So I called my sister and told her about it. She said, 'Well don't just call the mediator and agree. We'll write a letter up and put in our conditions, times, dates.

Before proceeding, a few comments about these quotations are in order. The first quotation, above, suggests non-adherence to Domestic Legal Aid policy, since it appears

²⁷⁷ Professional standards require mediators to screen for abuse in separate sessions. Even this was not done in this case, the participant valued the first mediator's assistance.

that the mediator had knowledge, although perhaps incomplete knowledge,²⁷⁸ of the pattern of abuse in the relationship. The second and third quotation indicate inadequate or no attention to screening for abuse, resulting in false, inaccurate or incomplete assumptions about the nature and inter-personal dynamics of the case. It is likely that, at least in part, inadequate attention to screening is a product of systemic pressures produced by excessive Court Social Worker caseloads. For example, the mother, quoted in the first detailed account above, also commented:

I tried to call the mediator but the mediator was away for two weeks. They said, 'you might as well wait until the mediator gets back; there are so many files on the desk, I wouldn't know where to look.' That's just how it goes there.

Perhaps time pressures in the busiest court offices have prevented or discouraged mediators from conducting thorough assessments for abuse. Certainly, Department of Justice Statistics for the Province of New Brunswick, April 1, 1999 to March 31, 2000, reveal much lower rates of assessment for abuse (6 and 17 percent of family court clients) for Court Social Workers in the two court jurisdictions handling the largest number of cases.²⁷⁹ Other jurisdictions report assessing between 27 and 48 percent of family court clients as having been involved in abusive relationships, with an average of 38 percent. The latter figures are in line with the research since, as previously mentioned, researchers say that between 40 to 60 percent of separating and divorcing couples have experienced abuse in the relationships they leave.²⁸⁰

²⁷⁸ This participant minimized her ex partner's abusive behaviour at the beginning of the Spousal Abuse Research Team interview; disclosures of serious conduct came much later, after she began to have confidence in and trust the interviewer. It is possible that incomplete information was provided to the mediator, who did not appreciate fully the context or effects of abuse on settlement discussions.

²⁷⁹ Province of New Brunswick, Department of Justice (October 2000), note 220.

²⁸⁰ Thirty eight percent is not necessarily lower than the rate of abuse for this population suggested by researchers, since both survivors of abuse and their former partners may approach Court Social Workers for assistance, information and assessment. One might expect jurisdictions in which Court Social Workers commonly are approached by both parents to report lower rates of abuse assessment than Court Social

In fairness to the second mediator discussed in the third quotation above, other interview comments suggest that the mediator had had some, limited, prior social contact with this father and thus probably assumed, on the basis of that contact, that the case was an ordinary, non abuse dispute about holiday access. Yet what these circumstances make clear is the importance of not making assumptions, of conducting thorough abuse screening assessments in every case, and of adhering to Domestic Legal Aid Policies.

It is worthy of note that the complaints were more about mediation process than about outcome. More particularly, the women complained of feeling uncomfortable, intimidated and pressured during the mediation process;²⁸¹ they reported a perception that Court Social Workers took the abusive partner's side so that it appeared to them that they had no option other than to agree to abusers' demands. It is important to consider that research comparisons of mediation and law, particularly quantitative comparisons of legal and mediation outcomes and, or qualitative studies that fail to consider perceptions of process, will not necessarily capture the drawbacks and dangers posed to survivors of abuse by face-to-face mediation. Moreover, as previously discussed, legal agreements and orders commonly fail to offer much protection to women and children. Thus the fact that mediation outcomes are similar to outcomes negotiated by lawyers may not be a particularly positive finding. Worse is that survivors of abuse indicated a reluctance to return to the courts for assistance with outstanding issues (such as fears about their children's safety during access visits).

Worker offices approached by survivors of abuse only.

²⁸¹ Abused women labeled Court Social Worker services 'mediation'. Some may have been offered non-mediation settlement services - although, certainly, there were some reports of joint sessions with an abuser.

It is important to introduce here a number of qualifying comments. This discussion is not about the implications of mediation or other settlement services for women. It is a discussion only of the perspectives of survivors of abuse, who reported negative experiences in face-to-face mediation sessions. While these complaints can and should inform future mediation policies and practices, the complaints may not be viewed as objective proof of usual mediator behavior. Many mediators will not offer mediation in partner abuse cases. Abused women are vulnerable. These women were in highly charged emotional states when they engaged in mediation. It is possible that Court Social Worker behaviors and intentions may have been misunderstood or misinterpreted in these circumstances. Nonetheless the comments do indicate considerable dissatisfaction and discomfort. The complaints indicate too a predisposition among survivors of abuse to indicate consent during settlement discussions in the absence of true agreement. Indeed this is one of concerns about the use of mediation in abuse cases. While it is likely that the experiences discussed here were partly a product of non-disclosure, of non-assertiveness and of susceptibility to suggestion and settlement pressure on the part of survivors, this does not absolve professionals of responsibility since recognition of disputant vulnerabilities in abuse cases is one of the keys to equitable process.

These women's comments tell us that vulnerabilities produced by abuse affect both process and outcome. More particularly, it seems that survivors of abuse cannot express fully their own views, perceptions or needs in mediation when in the presence of former abusive partners. Women's comments suggest that they fail to make proposals in such circumstances in opposition to partners, even proposals considered important for the protection of their own children. And the comments suggest that victims of abuse are

particularly vulnerable to criticism and or suggestion from mediators. Survivors of abuse participating in this study report abandonment of claims in order to avoid continuing conflict and high levels of susceptibility to settlement pressure.²⁸²

C) (8) Mediation and Abuse - Recommendations

The experiences illustrate some of the reasons New Brunswick's Domestic Legal Aid Policy prohibits Court Social Workers from 'mediating' in abuse cases. Thus immediate recommendations, for the Department of Justice, in New Brunswick are: 1) specialized education and training for mediators on abuse matters; 2) enforcement of existing Domestic Legal Aid Policies prohibiting Court Social Workers from conducting face to face 'mediation' in abuse cases; 3) insistence on the use of abuse interview protocols and screening assessments, and 4) periodic assessments of Court Social Worker mediation practices to assess a) compliance with government policy and b) client perceptions of the service. Post-mediation satisfaction questionnaire results may offer Court Social Workers valuable insights into how mediation services may be maintained and improved.

Some steps already have been taken: Court Social Workers recently received additional mediation training; Court Social Workers are reporting use of shuttle negotiation,²⁸³ albeit in a minority of alternative dispute resolution cases. Although the Department of Justice has always required the use of standardized abuse screening assessment tools, an earlier evaluation of the Domestic Legal Aid program, disclosed the

²⁸² It is probable too, although not documented in this study, that abusive partners also have vulnerabilities that will contraindicate the ability to engage effectively in mediation, in some circumstances. For example, parents facing potential criminal charges and parents seeking reconciliation after abusive behavior may not, temporarily, be in a position to engage in equitable negotiations on their own or their children's behalf.

²⁸³ Province of New Brunswick, Department of Justice (October 2000), note 220, Table 2, page 21.

need for improved and expanded protocols and assessment tools. Revised assessment tools have been created and are about to be adopted. Adoption of the assessment tools (designed to assess abuse in social context) should help to prevent face-to-face mediation in inappropriate cases and may help also to diminish concerns that assessment for abuse do not take context into account and are invariably biased against men:

This so called counsellor elected to shoot down all the arguments I submitted and downplay the evidences I presented to the point where I had to demand and fight for his supervisor intervention to consider my application for [domestic] legal aid. That earned me an opportunity to consult another counsellor in another city to ensure a fair re-evaluation of my case. This second counsellor (a female one by the way) confirmed my status of victim of violence and abuse. Court counsellors must demonstrate extra open-mind in considering and evaluating assistance application from both plaintiffs and respondents independently of their gender. The use of a questionnaire type tool, as utilised by my out-of-town counsellor, should be promoted to facilitate fair evaluation of [abuse] allegations in legal aid applications. (father)

Yet the processes women described above are not mediation, but something else. Court file documents indicate and interview comments commonly described settlement services in aid of speedy legal processing of cases, processes that more resembled arbitration than mediation. A number of participants, usually men, described settlement discussions conducted in a more even-handed manner. The frustration among male participants, perhaps ironically, was that the mediators did not have or exercise the power to impose a resolution:

I think mediation would be good for certain cases but not with us. This woman will not show herself at the door, will not speak. She agreed to things and then when we get there, they [the mediators] wouldn't follow through. The mediator can only talk she can't force.

One of the difficulties you had in mediation was somebody who was not going to co-operate, your partner. Now mediators can't make decisions. The mediator looks at me and says, 'What can I do? It takes two to tango.' If she [my ex partner] doesn't want to, nothing happens. If I don't want to, she still maintains custody, she is still supported by the system. If I don't want to go on with the dance, I have no child, no system supporting me, nothing. I know when I'm in mediation the balance is in favour of preserving the custody arrangements that exist. I've said this to a mediator before and had them agree with me, that essentially I, as a non-custodial parent, am in the situation of having to accept. That's the way it is. Mediation is not really helping. It's like damage control.

Although, in the absence of partner abuse, and, or irresponsible parenting, one would hope that mediators facilitate post-separation parenting negotiations from a gender neutral perspective, other considerations apply, in our view, when a pattern of partner abuse has been established.

Nicholas Bala suggests considerable caution in the use of mediation when domestic violence is present.²⁸⁴ We would extend that caution - in connection with face-to-face, facilitated mediation - to include patterns of control and psychological abuse. Yet shuttle negotiation processes seem to cause fewer problems for women in partner abuse cases and it is questionable that survivors of abuse and their partners ought to be denied opportunities for assisted conflict resolution. Several survivors of abuse indicated a preference for settlement and for choices other than lawyers and the adversarial process. Moreover, the settlement services of lawyers, described by women earlier in this report did not appear to offer much improvement.

C) (9) Court Social Worker, Non Mediation Settlement Services

Consequently, the Department of Justice in New Brunswick is considering an amendment to Domestic Legal Aid policies that would both standardize and formally recognize a shuttle negotiation process. More particularly, Court Social Workers would, subject the consent of the survivor of abuse, have the option of offering a shuttle-negotiation settlement service in abuse cases, after a thorough assessment to determine that survivors and children are in no continuing danger.²⁸⁵ Essentially, the Court Social

²⁸⁴ N. Bala (1999) note 23.

²⁸⁵ Abuse screening and assessment tools for indicators of danger were developed with Court Social Workers in 1998. See: Neilson and Guravich L. Neilson and M. Guravich (1999) *Abuse Screening Criteria and Settlement Option Project Final Report* (Fredericton, Department of Justice) 36 pages. Proposed Abuse Screening Tools and Procedures for Court Social Workers with new non-mediation settlement process with protections for survivors of abuse; Neilson, L. and Guravich, M. (1998) *Interim Report -*

Worker's role would be to present the survivor's legal claims to the other party to see if the other party would accept such claims without the necessity of a formal hearing. Issues would be limited to matters such as: custody/access, child support, exclusive possession of the marital home and contents, orders under sections 128 and 132 of the *Family Services Act* (if appropriate), and other 'quick fix' remedies. Court Social Worker would have a duty, in such cases, to provide information to survivors about protective orders available under the *Family Services Act*, the *Marital Property Act* and the *Criminal Code* and to present all reasonable requests, for protective orders to former partners or spouses for potential inclusion in final consent orders or agreements.²⁸⁶

Comments made by survivors of abuse during the course of this study suggest the need for amendment. Specifically, in addition to thorough screening and assessment for abuse, is a need for Court Social Workers to ensure that survivors are given adequate time and assistance in considering the implications of options, for themselves and their children. It is important too that Court Social Workers ensure that proposals for settlement communicated to former partners are reflective of genuine survivor agreement and are not the result of fear, surrender or an emotional need for settlement at any cost. Moreover, participants in this study have identified the importance of court-connected mediators being sensitive to the fact that their roles and connections to court processes enhance vulnerabilities to Court Social Worker criticisms and suggestions. This imposes an extra duty on Court Social Workers to take extra precautions to prevent appearances of

Court Social Worker Consultation on Abuse Assessment Processes - Policy and Practice (Fredericton, Department of Justice) 19 pages. See also note 255. They have since been modified slightly. Currently it is proposed that the assessment screening tools become mandatory.

²⁸⁶ Neilson and Guravich (1999) note 285.

settlement pressure. Thus another recommendation is that such Court Social Worker duties be mentioned specifically in shuttle negotiation²⁸⁷ policies.

C) (10) National Consultation – Settlement Standards in Partner Abuse Cases

More broadly, however, is the need for a national consultation process, involving judges, lawyers, mediators, men and women representing a variety of cultures, communities and sexual orientations, as well as child advocates to seek improvements in the settlement practices of both lawyers and mediators in partner abuse cases and to develop educational standards, Standards of Practice and Codes of Conduct for all practitioners. The ultimate goal is to design, test, and amend settlement models and methods in order to create safe, protective dispute resolution processes for vulnerable families.²⁸⁸

²⁸⁷ Referred to in New Brunswick as the Settlement Option.

²⁸⁸ Certainly, a great deal of academic and professional work has been conducted on this issue at the local level yet a national response is required.

D) Concluding Comments on the Legal System – Lawyers and Mediators

Returning to discussion of this study, it is important to state again that the processes women criticized and described in this study were not mediation, but something else. Court file documents indicate and interview comments describe a settlement service in aid of speedy processing of legal cases; a process that seemed to be promoting 'settlement at any cost'. There was little in the negative interview comments to suggest facilitation of parents' decision-making or to suggest exploration of individual needs and interests. If such descriptions are accurate, and the practices are a form of mediation, they would appear to be in breach of many of the provisions of Family Mediation Canada's Code of Professional Conduct.

Yet it is important to appreciate also that this is as much a systemic as a professional problem. It is unlikely that attending to professional mediation education alone will address the problem, in the long term. Earlier, participants in this study complained of generic settlement pressures by lawyers. Scrutiny of those complaints revealed that what participants were complaining about was not so much professional legal services to individual clients, as lawyers' failure to deliver such services. The complaint was about legal processes watered down by settlement. Close scrutiny of participant complaints about mediators reveals, in essence, the same criticism: pressure to accept generic settlements in accordance with legal norms, with little facilitation or attention to individual circumstances. This is the same complaint made about lawyers. Participants were, therefore, not complaining about mediation but about legal processing of their cases - essentially the same process criticized when offered by lawyers.

What we have here is a meshing of the boundaries between mediation and legal practice - on the part of both mediators and lawyers - in response to the systemic needs of the legal system as a whole. More particularly it seems that both lawyers and mediators are responding to a need to find solutions to caseloads that cannot be handled with existing resources. The implications, in both cases, are negative. Regrettably, the situation is likely to get worse before it gets better. The Civil Justice Reform of the Canadian Bar Association report recommends a change in the corporate culture of law such that conflict prevention and resolution are preferred to the adversarial process in legal practice.²⁸⁹ Yet this study documents the importance to vulnerable peoples of retaining partisan, adversarial legal services and, if necessary access to judges for judicial decision. It is extremely important not to lose sight of what is valuable in law and the legal system in the search for new solutions to current problems. That is the first issue.

The second is the importance of mediators, both lawyer and non-lawyer mediators, being very clear about the distinction between the process of mediation and the practice of law. These data suggest that the worst of all worlds is lack of clarity and combining the two processes. Professor Simon Roberts, London School of Economics, Department of Law, is questioning the advisability of developing connections between mediation with legal adversarial processes in England. He suggests, theoretically, that distinctions in values, assumptions and methods are lost when such processes are

²⁸⁹ Canadian Bar Association, Joint Multi-disciplinary Committee on Legal Education, chaired by Moira McConnell (2000) Attitudes Skills Knowledge Recommendation for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century (Canadian Bar Association web site).

combined, thus weakening the nature and effectiveness of both law and mediation.²⁹⁰

Data collected during this study would seem to corroborate his claims.

More particularly, vulnerable peoples require and value advocacy and support from lawyers. They seek partisan support, partisan advocacy, settlements that reconcile individual needs and interests and, or judgment (provided that complete evidence is presented during hearings) from the legal system. And, for the most part, they do not want or value adjudication from mediators. Instead, they seek, require and value facilitated disputant resolution processes that honor and respect individual agency, needs and interests. What no one wants is a legal system that partly adversarial and partly settlement driven, that is neither mediation or adjudication, on the one hand, or mediation that is part settlement, part judgement but not true facilitation of parental agreements, on the other. In terms of the legal system as a whole, it would seem that a better mediation/law model would be to keep mediation and adversarial processes closely linked but separate, as is the case in the province of British Columbia.

In connection with the last point, a number of judges in New Brunswick have adopted a practice, observed in the court files in one jurisdiction, of deciding custody in partner abuse cases, then ordering parents to attend mediation to resolve particulars of access and all future debates about access. This practice is fraught with danger, particularly in the current legal climate. More particularly, the data discussed earlier indicate a legal presumption in favor of maximum contact, indeed, in practice, a legal assumption that access is a right. Consequently, the normal practice is to order or to mediate access, even in partner abuse cases, until such time as there is evidence that

²⁹⁰ Simon Roberts, "Mediation And Public Justice," oral presentation, Third World Mediation Forum Conference, W.M.F. Chia, Italia 2000.

access is causing direct harm to the child. Yet ordering parents to submit all disputes about access to mediation is having the effect of preventing parents from bringing evidence of such harm back to court. Thus women, quoted above, made comments such as the following:

I felt helpless there too. What is the point in calling the mediator? He is going to say the father has got to see the son, that it is his right. Nothing you can do about it. It does not matter if he is drinking [in contravention of the court order] in front of child, partying all the time. This is just not right

Every time she came home, oh yeah, he was drinking. So she still goes down there and he still gets drunk. There's no help, there is no one to help. I don't know what to do. Who do you call? What do you do? I'd like to keep her home.

When custodial parents perceived that access was harming their children in such circumstances, they turned to mediators for help. When they did so, they found that mediators were unable to assist them - because mediators have no power to enforce court-ordered provisions such as prohibitions on the use of alcohol or drugs, and have no power to vary or amend court orders for access. Consequently, these parents are being left with only two options: breach a court order or comply with the court order and place the children in jeopardy. Those with financial resources have a third option: hire a private lawyer to bring the matter back to court. But, as discussed earlier, this is not a realistic option for the majority of abused parents in New Brunswick. These parents simply do not have adequate resources to exercise this option. Moreover, there is limited Domestic Legal Aid coverage in New Brunswick to assist them – because the current program does not officially offer legal services to survivors of abuse who are repeat clients, particularly in the absence of continuing partner abuse. Amendments to the program - to include coverage for repeat clients who continue to be victimized by abuse - are being discussed now. But at the moment, custodial parents who find that former abusive partners are

harming the children during access visits - by not caring for the children, drinking and taking drugs while having the care of the children, exposing the children to continuing violence and abuse of other partners or criminal lifestyles, using the children to monitor and harass, emotionally abusing the children – have no recourse, in practice. The report writers wish to encourage the Province of New Brunswick to amend the Domestic Legal Aid Program as quickly as possible to rectify this situation. The data, discussed in more detail in the following section of this report, indicate that in the absence of such Domestic Legal Aid services, children are being placed at risk.

PART VIII

The Subjects of Law: Parents and Children

A) Introduction

Presented earlier was the hypothesis that law in practice, or law as most clients experience it, cannot be explained or understood merely by analysis of legal cases or principles, that law is as much a product of interactions and reciprocal relationships among participants as the application of formal rules and principles. Thus Part VI contrasted law in theory with law in practice and Part VII discussed client perceptions of their interactions and relationships with lawyers, judges and mediators, the agents of law. Missing from that discussion is an analysis of reciprocity in legal relationships, particularly parents' perceptions and interpretations of themselves and their relationships to children, as the subjects of law. Thus we turn now to a discussion of parents and children in relation to law and the legal system.

B) Parents and Children: Rights, Responsibilities and Joint

Custody

Male participants in this study said that the legal system is biased against fathers. Proof was offered in the form of professional pressure exerted on fathers to abandon claims for joint or full custody and the seeming preference of governments to devote resources to enforcement of child support but not access. Fathers claim that law is denying them the right to participate equally in the post separation parenting their

children. Most male participants recommended a joint-custody, split-equal-time legal presumption.

Female participants also claimed that the legal system is biased – but against mothers and children. In support of their claims, mothers complained that priority is given to the rights of fathers to have contact rather than to the health and safety of themselves and their children in connection with access. Mothers complained also of inequities in the collection and distribution of support and marital property.

Before examining the polarized claims of mothers and fathers, it may be helpful to restate the conclusions of research studies about the best interests of children after separation and divorce discussed earlier in Part III. Basically, the research indicates that maximum contact with both parents after separation and divorce is highly beneficial for children, but only if: such contact does not expose children to continuing conflict or abuse (directed at children or a parent) and does not adversely affect the health and well-being of the child or the primary caregiver. Thus the Research Team endorses the principle of maximum contact and some sort of shared parenting regime in low to moderate conflict, non-abuse families, provided the parents are able to cooperate with each other and both are equally willing and able to parent responsibly.²⁹¹ The argument to be made here, however, is that factors in addition to maximum contact ought to be considered in abuse and high conflict cases, particularly in cases where one or both parents is unable or unwilling to fulfill responsibilities to children.

²⁹¹ After researching the social and legal effects of the implementation of *Family Law Reform Act 1995* in Australia, Rhoades, Graycar and Harrison (2000) note 3 have concluded: that shared parenting regimes work well after separation and divorce only among parents with an established history of voluntary, cooperative co-parenting; that parents tend to continue pre-separation parenting practices and roles after separation/divorce; and that shared parenting regimes in partner abuse cases merely increase opportunities to control, abuse and harass without leading to any increased acceptance of parental responsibilities.

Recently, the federal Department of Justice passed Divorce legislation standardizing child support payments and strengthening their collection. At the same time statistics indicate that, in the vast majority of cases, children continue to reside primarily with mothers following separation and divorce. Usually this is the result of parental 'agreement', not court order.²⁹² Participants in this study encourage us to consider whether or not this phenomenon is the product of genuine agreement or settlement pressure. Be that as it may, the result is that, for the most part, mothers retain daily care of children and fathers acquire visiting rights; mothers receive and fathers pay child support payments. Men, including the majority of the male participants in this study, consider this an injustice. Fathers are hurt and angry:

A more efficient and less harmful way of accomplishing the political agenda would be to simply change the laws to enshrine mother's rights to full custody and father's rights to a life of servitude. At least then we would all know where our government really stands on the protection of our children's rights, despite Canada's ratification of the United Nations Convention on the Rights of the Child, which enshrines the principle that 'both parents have common responsibilities for the upbringing and development of the child'.

You hear guys, who get divorced, and say, 'Man I lost it all!' You do lose it all, literally: you lose your kids, your house, your livelihood. For the most part fathers, because they are not organized and don't have any groups or political voice, they've been ignored - ignored for ages. From what I was told, there was a time when men got custody and then it was biased and it seems like it's swung totally the other way. Although you hear everybody scream equality, it seems things are only equal when it benefits whoever is screaming.

Custody of children is often considered an aspect of power and control:²⁹³

The children have two parents, and deserve to be raised by both of them. The fact that mom and dad don't like each other any more is irrelevant. Giving all the power (sole custody) to either Mom or dad only encourages the abuse of that power to control the other parent.

²⁹² L. Neilson (2000) note 6; Department of Justice, Custody and Access: Public Discussion Paper (Ottawa: Minister of Justice 1993).

²⁹³ Changing legal terminology alone does not appear to solve the problem. Rhoades, Graycar and Harrison (1999) (2000) report that shared parenting and responsibilities designations are still interpreted in terms of issues of power and control in Australia. See note 3.

It's been an ongoing battle ever since. I just want more time with my kids. For that reason, I've been fighting for three years to get an even relationship with my kids. I feel both parents need to be involved with kids in this day and age where there is so much going on out there in the world that I think a man needs to be involved with his kids and I am. I do as much as I can. It is only fair that it is even.

Male participants (and their supporters) were universally of the view that lawyers, courts and the justice system generally are pre-disposed to awarding custody of children to mothers:

I'm come to realise after three years, there is not much I can do until the kids turn of age. I'm just lucky that my kids are all between 10 and 15, but coming to an age where they can speak for themselves. Other than that, when the kids are young, a man doesn't have a fighting chance in hell in getting his kids. He [the lawyer] would listen to me but I don't think he believed a lot. I don't think he believed it when I said I was the caregiver of the kids when I was in my relationship. I did a lot of housework, I took care of the kids, I sent them to school, helped with homework, fed them, took care of them at night. I did a lot of those things, 80% of the things in the household and I don't think he actually believed that a man would do these things. But I did. It's very hard to prove this because men just don't do it.²⁹⁴

It's better, but not much. Everybody says you get used to it after awhile - seeing your children every second week - but I don't get used to it. If somebody sends their child off to camp, they are gone for a week and they miss them, they call and say, 'Oh I haven't seen them for a week.' But it's all right for guys like me to go for two weeks.

We know now that Family Law is totally gender biased and that fathers rarely get custody regardless of the facts. Mothers do all they can to prevent fathers having any access to children - its a fact of life these days.

The politicians are listening to the screamers and whiners. The majority of the population gets burned for it. That seems to be the way it works. My case wasn't the best interest of my child whatsoever. It was in the best interest of what the judge wanted and the mother - nothing to do with the child at all. He was nothing more than an equation of what a dollar figure it was for me to pay each month.

There is some degree of support for this perspective in custody and access statistics.

Women do obtain custody of the children most of the time, although, as stated earlier, this is usually the result of parental agreement rather than judicial determination. Maybe fathers believe that children are better off with mothers. Alternatively, perhaps fathers are pressured by legal professionals to abandon custody claims in favour of assurances of

²⁹⁴ This is another example of an interview in which a father focuses attention on parental responsibilities to children.

access. Certainly there is some evidence of the latter, as discussed earlier, in Part VII.

It is difficult to pinpoint with certainty judicial decisions about child custody by gender because reliable data are lacking.²⁹⁵ Certainly judicial custody decisions in abuse cases examined in New Brunswick were not predictable by gender. Four of the men who participated in this study were primary custodians of their children, as a result of a judicial order, following a contested hearing. Fathers were granted full or joint custody of children after a contested hearing by judicial order in twenty-four of the partner abuse court file cases. Yet judges did not award custody to mothers in the remaining cases. Documents in court files indicate that most litigation about children revolves around the terms and conditions of access; custody seldom is contested. Judges awarded custody or joint custody with primary residence to mothers after a contested hearing in only 11 abuse cases in jurisdiction one. The comparable figure for judicial awards of custody or joint custody to fathers in the partner-abuse cases in the same jurisdiction was also 11. Similarly, in jurisdiction two, contested custody awards were made to mothers in 8 of the partner-abuse cases and to fathers in 5 partner-abuse cases. Although, given limitations in the total number of cases examined, conclusions drawn from these figures are speculative, they do lend support to conclusions reached by others that, when fathers contest custody, they obtain it roughly one-half of the time.²⁹⁶ In any event, the court files fail to corroborate claims of judicial bias in favour of mothers and are consistent with similar findings of lack of judicial gender bias in favour of mothers reported after a

²⁹⁵ N. Bala (1999) "A Report From Canada's Gender War Zone: Reforming the Child related Provisions of the Divorce Act" <http://www.familylawcentre.com/ccbaladivpap.html> at p. 6; Department of Justice Canada "Selected Statistics on Canadian Families and Family Law November 1997" <http://canada.justice.gc.ca/en/ps/sup/stat.htm> p.16.

²⁹⁶ C. Bertoia and J. Drakich "The Fathers' Rights Movement: Contradiction in Rhetoric and Practice" (1993) 14 (4) *Journal of Family Issues* 592.

comprehensive review of family court activity in Australia.²⁹⁷

Would equality in the number of custody orders by gender indicate lack of gender bias? Probably it would not, at least not yet. In part the argument in support of the claim of bias is that, in the absence of gender bias, the legal system would award custody of children as often to men as to women and, or that it would award custody equally or jointly to men and to women. But the claim has yet to be supported by social science data. Although women in Canada report increased labour force participation, this has not, as M. Eichler indicates, been accompanied by substantial increases in men's contribution to child-care and household management.²⁹⁸ While no one disputes that many men are nurturing, caring fathers and thus that they should be centrally involved in their children's lives, social science data continue to show that, in intact families, more mothers than fathers are the primary caregivers of children, particularly of young children. For example, a recent statistical analysis of General Social Science Survey data on intact families in which both parents were employed full time, by Cynthia Silver, indicates that working mothers spend far more time with young children, under the age of five, than do working fathers. Silver notes that the pattern changes as children grow older so that, by the time children are 13 to 14 years of age, working mothers and working fathers spend roughly equal amounts of time with children. She notes too that working mothers continue to assume primary responsibility for housework and devote more of their leisure time to children than fathers.²⁹⁹ If bonding and nurturing and caregiving are important considerations, when making determinations about children's best

²⁹⁷ Rhoades, Graycar and Harrison (1999) and (2000) note 3.

²⁹⁸ M. Eichler (1997). Family Shifts: Families, Policies, and Gender Equality. Toronto: Oxford University Press.

²⁹⁹ C. Silver "Being There: The Time Dual-Earner Couples Spend With Their Children" Canadian Social Trends (Statistics Canada, Summer 2000) 26-29.

interests, one would expect, in a gender-blind environment, that decisions about custody and access or the post-separation care of children would mirror social trends in child care. If so, we might expect mothers, including working mothers, to be awarded custody of young children more often than fathers but that, all else being equal, custody determinations would approach begin equality by gender for children over the age of 12.

Indeed recent statistical data from the National Longitudinal Survey indicates that men do obtain custody more often as children grow older, although still not as often as mothers.³⁰⁰ And data from this study indicate that, over time, appreciable numbers of fathers, including fathers alleged to have been abusive to former partners, do gain sole or joint custody of their children, though more commonly with the consent of mothers than by judicial order.³⁰¹

It is not known why mothers are consenting, although a number of possible explanations have been suggested.³⁰² Perhaps financial, social or legal pressures leave mothers little choice; perhaps, as children grow older, they increasingly seek to reside with fathers; perhaps mothers weaken in the face of continuing harassment; perhaps children become abusive themselves and perhaps, in some abuse cases, fathers are responsible parents able to offer a great deal to the children as they grow older. This study does not provide conclusive answers on this issue, in part perhaps, because only one of the female participants in this study was a non-custodial parent. It may be interesting to note, however, that several mothers expressed a worry that the children would be 'manipulated by' former partners into changing primary residence at the age of

³⁰⁰ N. Marcil-Gratton and C. Le Bourdais, note 26. This report does not distinguish between court orders granted on consent or by parental agreement and court orders made by a judge in contested proceedings, after hearing evidence.

³⁰¹ See Law in Theory, Law in Practice - Custody.

³⁰² L. Neilson (2000) note 6.

twelve and indeed that many of the fathers spoke of plans to acquire custody or primary care of their children at that time, once courts would allow their children to make or influence decisions about primary residence.

The discourse of fathers participating in this study, concerning gender bias in the legal system and the equity of equal parenting of children, discloses some interesting patterns. For example, comments quoted above, at page 183, are framed in terms of rights of fathers and, collaterally, rights of children. Legal rights are connected to legal power and control. Rights are enforceable against others. Thus perceptions that law does not recognize rights create feelings of hurt, despair, powerlessness and loss of control. One cannot help but have an empathetic response to the pain and sense of loss of these parents.

Yet, as previously discussed, a focus on rights deflects attention from analysis of parenting responsibilities to children and thus away from scrutiny of the best interests of children. Parents with primary care of children argue that legal recognition of rights is less important, in terms of the welfare of children, than allocation of responsibilities:

I do feel that more emphasis should be put on the children instead of the parental rights, I really do. I was told that this was all about children and protecting the children, but when it came right down to it, it was about protecting his parental rights and his ability to access the children. If only something could be done that would not take away from parental rights, but would put more emphasis on making sure the children are protected.

You feel helpless in a lot of ways when someone is drunk and teaching your child that he should do all the wrong things. There is nothing you can do. Should there be something that you could do? Yes. I think there should be. I think if somebody is giving a child beer to drink, I think it's wrong - if they don't care about the child. I see that – there is a lot of not caring, about his [son's] welfare, schooling and things like that. It's like [my ex spouse] thinks, 'These are my rights and I am going to use them; I don't care a hoot about the child.' I know he loves the child but he does not know how to care [parent responsibly]. He said he wants him [son] to be a member of the Legion - when the child was very young. For a father to think that way! He should be thinking about his future education and his welfare. There is none of that. My son comes home upset. He says, 'My Dad does not care for me; he just takes me here and there - from one house to another - drinking and smoking'. That's not a caring, loving father. [Son] is just being used. He [my ex spouse] thinks that this is his right; he will take the child because he

thinks it is his right. But it should be about privilege with obligations and responsibilities, not just rights.

I've read papers and books about women below poverty level after they separate. Of course they are because they're not being helped. They're being punished for backing out of bad situation and they're [the courts] so concerned with father's rights and I don't say they don't have rights, but I say it has to be equal. Don't I have right to say to father of 4 children, 'You've got to help. I'm sorry you can't take your trips but in black and white, you have to help to support your children'?

The current social and legal focus on rights, on men against women and women against men, is not helpful. Although it is impossible not to be saddened by the pain of any parent cut off from his or her children, absent in rights claims is a focus on the needs and interests of children as children, separate and apart from the rights and needs of parents. During the course of this study, we found that parents who concentrated on rights claims typically focused on their own needs and interests - to have equal time with the children, to have equal say in decision-making, to have more control over the collection or expenditure of support - rather than on the needs and interests of children. Parents, however, including fathers, who spoke in terms of obligations and responsibilities to children, focused on the needs and best interests of the children:

I'm very involved with baseball, basketball, track and field, - sports. I do a lot with my kids. Four days a month is not very much. That's the reason I've been going to court, seeing lawyers, psychologists, although I'm very sick of it, this is my only recourse if I want to get more time with my sons.

I know that my children depend on my alternating weekend access for a mental break. I also provided them the certainty/dependability/reliability and structure they required in their life. They also receive my undivided attention, when in my care, unlike in their mother's home where there are children from other relationships. They tell me in no uncertain terms. Also, it is very easy to observe their transition from highly active/stressed to a more content and calm demeanor after a period of 3-7 days. I know my situation is much better for the children, as my character, moral values, lifestyle, home, nutritional considerations, work ethic and extended family are [in the best interests of the children]. Their best interests were not put first by their mother and her legal counsel. I was very hurt. My children are the most important things in my life (always have been and always will be).

Money is not the problem; somebody has to look after them. They need clothes and food. The judge asked if I was working at the time, I said no, but I will still pay the \$373 and paid it

whether I work or I don't. If you are on unemployment you can go and get it reduced but those children still have to eat. They need food and clothes so I never had a problem with it

In connection with child support and parental responsibility, one might contrast the comments of the father quoted above, which focus on his responsibilities to children, with the comments of others, in connection with child support, which focus on rights:

I pay too much, and I don't have enough money for my access costs or long distant lawyers' costs.

He didn't want to pay. He told me point blank: 'they can't make me. I'll quit my job if I have to. Not quite in those words mind you. He said, 'No fucking judge can tell me what to do' and the whole bit. He's told me that my family and friends can support those children since I was the one that left him. My reasons for leaving don't matter.

It is very unfair for fathers. There are no rights, you just pay this money. Until recently he had her (his daughter) about 30 to 40 % of the time so we decided to have support reviewed. Went to family court. Lots of filling out forms - stupid financial information - about RRSPs, the value of the furniture, mutual funds, then those documents are given to her. Now that is an invasion of privacy. Why should information about my debts go to his ex wife? She doesn't need to know how much we've got invested. It is wrong. It feels like she comes out the winner every time. So we dropped it. I come from a divorced family and my mother never asked my father for anything.

Certainly child support payments to former families do take resources away from second families and family law proceedings are intrusive. And without doubt there is a need to consider the needs of all children – in second families as well as first. But the quotations above were included for another reason: to illustrate that rights claims focus on parental needs and interests rather than on the needs and interests of children.

Although mothers participating in this study were more apt than fathers to express primary concern for parental responsibilities to children, and fathers were more apt than mothers to focus on their own rights and their own needs, a number of the fathers participating in this study clearly shared with mothers a belief that the primary concern of law ought to be responsibilities and obligations to and thus the best interests of children, not parental rights. Responsibilities do not, necessarily, depend on gender – except to the

extent that men and women fail to participate equally in the responsibilities and obligations of parenting.

There was another pattern in the interview data on children and law. Interview comments proposing joint custody/split time often were presented in terms of parents' rights juxtapositioned with support obligations.³⁰³ For example:

I'm giving her roughly \$200 per month, which increases her income. But it takes a lot of money out of my pocket, it all comes around to money issues. But if the courts were able to give joint custody more often, a lot of this wouldn't happen. It's all money. What needs to be changed I believe is access. When one parent wants custody and the other parent also wants custody, this should be looked at and I think joint custody should be more accessible unless one is proven to be abusive or something really wrong. I think it's only fair to both parties and especially the children, they are the only ones who get hurt in this issue. They don't understand anything about money, all they understand is both parents are not together any more and they want to see both parents. To me there's always a big emphasis on money and no one will admit it. I believe it comes down to a point of custody and what is best for the kids... If I'm seeing the kids two weeks on and two off, to me that is joint custody and no reason for money issues. That's fair, the kids aren't property. All they understand is that they want to see both parents. When both parents are stable, there is no reason for not getting joint custody.

About a year and a half after we were divorced, one night the ex called me and gave me custody of the two children saying she was not able to handle them. I had to pick them up - September, the first day of school and kept them for a period of two months. I went to a court appointed mediator and, at the end of the two months, all was in agreement: the ex, the kids, myself and [named mediator] all said that the kids would remain with me and everything was fine. The ex also agreed to that – until [named mediator] explained to her that she would have to pay child support payments (the same as I did). She said that she would not and immediately exercised her custody rights and wanted the children returned immediately.

His first priority was his son. Both parents should have rights. The woman [has a good job], why should we have to pay her every month? We could provide the same for him if he was here 1/2 time. Both should have rights, equal rights.

The legal system is being asked, as was King Solomon, to split children in half in the interests of fairness and equal parental rights. One survivor of abuse spoke of her

³⁰³ After an extensive review of family court practices, researchers in Australia are reporting: “The research suggests the desire to reduce child support liabilities is frequently a motivating factor for seeking and making shared residence arrangements.” Rhoades, Graycar and Harrison (2000) note 3. This study neither confirms nor contradicts those findings. While our interviews certainly suggest that parents do indeed consider financial implications, in terms of child support obligations, of seeking joint or 40% plus shared parenting time, non custodial parents differed in the extent to which they emphasized support issues as opposed to child care issues. We are hesitant to claim that child support was the sole or predominant motivating factor among non-custodial parents seeking equal time with their children, although it was clearly a motivating factor for some.

perception that the legal system had indeed split her children in half:

I can see my children still having adjustment problems going back and forth between the two households. There are two aspects of divorce - there is the legal and the emotional. The legal aspect that we had is fairly cut and dried: they chopped those children in half. They gave one half to the father and one half to the mother and they gave the father the top half. Because he was keen enough to stay involved with his children so they [legal system] saw that, and said, 'Oh here's at least one father who is involved'. They took everything that we had and split it 50% down the middle including our children. It's probably the inherent conflict of divorce but you can't cut a child in half. You want to hope that both parents are educated, intelligent and emotionally secure enough to be able to raise the children properly. But we have deficits in this case. From what each of us brings from our family backgrounds, we both have a deficit. I can't stand up enough for my children against an abusive ex husband and he can't [as a consequence of his own upbringing in a severely abusive home] nurture them. So the children end up the losers.

I know of no better response to equal parental rights, splitting the child in half claims, than from the mouth of a child and her mediator albeit in a non-partner-abuse case, involving two responsible, caring parents:

'Well, it is like I just go round and round and I go faster and faster. I never know where I am going but I just always have to keep going. I can't be happy because my mom and dad broke up but I can't be sad because everyone wants me to be ok. I just keep going around and around and it goes too fast.'

In a quiet, hesitating voice, Jenny tells me how frightening and confusing it is to have your parents caught up in legal battles. She is very clear about how squeezed she feels when legal posturing leaves her stuck between her parents. Jenny is typical of children who are caught in the middle of their mom and dad's divorce. Jenny works hard at keeping everyone happy. It is a sunny afternoon in July and you can hear the kids yelling down at the beach but it is quiet and cool in my living room as Jenny munches on a cookie and talks about her seven year old world. Jenny has come to talk to me about her problems. I have been mediating with her parents who are trying to sort out a parenting plan while at the same time prepare for a court date for a division of their assets. Jenny's poignant description of being 'stuck inside a computer game' gives me an amazing opportunity to try to understand how it feels to be seven years old and have your whole world fall into disarray. When I ask how her life could be better, that one little tear rolls slowly down her right cheek again as she describes her dream that mom and dad will get back together. But, after over a year of her parents living apart, she knows that that is just a dream, but she secretly wishes it were so. Jenny's world has become full of schedules and rules that really don't make any sense to a seven-year old. She lives with parents who now shrewdly count the hours of time they 'get' with the children and this seems silly to Jenny who just wants to run over and see dad or mom for a little while even though she is supposed to be 'on mommy's or daddy's time'. Her vivid description of 'life inside a computer game' tells us about her experiences of lack of control, of frenzied patterns of scheduling and her overwhelming need to regain her role of 'just being a kid' and not the over-burdened child trying to please both mom and dad. As a mediator working with parents, I often see the rights of children to 'just be kids' lost in the struggle. How can family mediators assist families who are caught in this quagmire? The voices of the children speak the loudest. I believe that we ought to put those powerful little

*voices on the table. We should help parents hear their children so that they can work out 'how the children will spend time with their parents', rather than 'how much more time either dad or mom will get over the other'. The goal is to help parents see the children as separate and distinct from possessions. ... Judges, lawyers, mediators and counsellors need to remind parents that while the legal battles rage, the Jennys of the world are growing up with a hunger and longing for peace in their families. Jenny is watching all of us -- her parents and their 'helping professionals'. She needs to see us settling disputes with respect and dignity with our highest attention focused on meeting the needs of the children. We need to remember Jenny and think about how Jenny can have both of her parents without having to check their respective percentage of time on a schedule.*³⁰⁴

As interview participants told us, it is undoubtedly not in the best interests of children to sever them from the protection, care, love and guidance of concerned parents of either gender. And it was clear, in the interviews, that a number of fathers who participated in this study were more concerned about their children's welfare and responsibilities to children than in equal 'rights':

I don't want to make it so frequent that he's bounced back and forth all the time. In some ways I think it is and in some ways, it isn't. It depends on each individual child. I know there's friends of mine who have joint custody arrangement that they set up on their own without lawyers and it was beautiful for them. But I don't know what the answer is when there's only one person agreeable and one person is against it. Well when you have one party that wants to see their kid as much as they can and the other party wants to restrict it as much as they can, it creates a lot of problems for the child.

Certainly the Research Team does not condone, in the absence of evidence that mothers have assumed most of the responsibility for the children,³⁰⁵ assumptions in custody and access matters based merely on gender. Male participants were particularly concerned

³⁰⁴ P. English, FMC Certified Family Relations Mediator, Vancouver, British Columbia. I quote from her comments at length, because in my view these comments are invaluable.

³⁰⁵ Consistently, research has shown that, in practice, parenting practices of most couples after separation and divorce mirror parental responsibilities and practices prior to separation and divorce. Thus fathers who participate actively and responsibly in the lives of their children before separation are likely to continue that pattern after separation; fathers who have not participated actively or responsibly continue that pattern. Normally, mothers assume most day-to-day responsibility for children both before and after separation. Research studies show that joint legal custody offers equality of power and rights but does little to equalize the allocation of day-to-day childcare responsibilities: N. Marcil-Gratton and C. Le Bourdais (1999) Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth (Ottawa: Child Support Team, Department of Justice) pp. 20-21; S. Goundry (1998) note 128; C. James Richardson Research on Family Law: Issues for the 1990s (Department of Justice, March 1990); Rhoades, Graycar and Harrison (2000) note 3.

that decisions about parenting not be based merely on assumptions about parenting by gender:

I think it's very unfair when men go into court, it's an uphill battle and it doesn't take much to discredit the man when he wants the children. Maybe there is a big percentage of men who don't want to see their kids or just not interested. But for some of us who do want to, it's very hard and very discouraging.

I found that, in the mediation process, as well as when discussing things with my attorney, much less with her attorney, I had to 'prove' I was a good father. There was never a need for her to prove she was a good enough mother.

The Courts are supposed to be apolitical and they should be instructed that research has shown that gender has no bearing on one's ability as a parent and that children need the benefit of what both parents have to offer. They should also be instructed that to use gender as a criterion for determining custody perpetuates gender-based stereotypes and myths that violate individual's constitutional rights that guarantee a judiciary that is free from such biases.

So what is the answer? If splitting the children in half is wrong, if a focus on rights and gender is wrong, how are the best interests of children to be protected in partner abuse cases? Mothers and fathers suggest abandonment of the current focus on rights in favour of analysis and assessment of parental responsibilities, for example:

We went about two years ago and she wanted to get shared custody back, I did not have a problem sharing responsibility of the children, or authority of who does/says what, but along with authority comes responsibility and you can't have one without the other... That's a recipe for disaster. (father, primary caregiver)

We might contrast claims for equal time and equal rights, discussed earlier, with primary caregiver concerns about responsibilities to children:

She was just an infant, every second weekend. I wanted no visitation rights. I hated the thought of her going to his house over night. I hated the thought because you didn't know who was going to be at his house. He's single, he's into drugs. And he's into liquor and she was only a baby. Nothing I could do about it, just let her go anyway. It was supposed supervised visits, but he would never have anybody around him. [Now that she is older] She'll come home and say I had a terrible visit. He never paid any attention to me. She's come home not fed, dirty, tired, very irritable. We dread Sundays when she comes home after staying weekend with him. Mondays are terrible day at school for her because she's so tired and that's first thing teacher would say, 'Did she go to her father's this weekend? Yeah. [She'd say] 'That explains why she's having such difficult week.'

[When he drove my daughter home after access] She said bottles were driving me crazy, rolling out from under seat [of the car]. Backed out of our driveway and got stuck in broad daylight. He couldn't even back up he was so loaded. Didn't dare come in, but when x went to help him with the car, he couldn't even stand. Different things like that. He'll never be responsible parent. Never. But there's nothing I can do about it. Yeah. I'm worried about her because of the fact that he still - He'll say he'll pick her up at certain time, won't show up for hours on end. Doesn't appear on time - He has no parenting skills. She's not getting fed properly down there, not getting proper rest. She had nightmares for week because he let her watch a very scary show that upset her tremendously. If she was going there, having a great time and if he's really showing her a lot of love and affection and right from wrong, then not a problem [her spending time with him]. Then she would be okay and she wouldn't be as hard to handle when she comes home here, but he won't do that.

Parents who placed their children's interests first, tended to frame discussions in terms of responsibilities to and the needs and interests of children, rather than in terms of the rights, responsibilities such as: participating in age-appropriate activities with the children; meeting children's basic needs for rest, nutrition, and cleanliness; refraining from the use of alcohol and drugs; providing adequate income, resources and child support; parenting consistently; appearing for scheduled access visits on time; meeting children's basic safety needs (i.e. not driving with children in the car while under the influence of alcohol or drugs). Although concerns about parenting responsibly were raised primarily by mothers in this study, this is not to say that fathers, by virtue of gender, are incapable of considering children's interests and placing children's needs and interests first. But when such concerns are central, comments and concerns will be framed in terms of responsibilities to children, not exclusively in terms of rights. The following comments were offered to the Research Team by a father from the southern United States in response to notice³⁰⁶ of this research study. Although not a Canadian participant, his comments are included here in order to illustrate that a focus on parenting responsibility is not exclusive of fathers:

³⁰⁶ We do not know how he received notice. The only public advertisement of this study was a notice placed for three days in the *Telegraph Journal* newspaper in Saint John, New Brunswick, Canada yet we had offers to participate from as far away as Ghana.

I think most men can do fine with children if they felt societal permission to be less than macho. (I also don't think that a man needs to be effeminate, or act like a female to do the tasks women do with children) Everyone needs a hug but - sometimes the dads I read about who take care of children at home while the mom works seem to want to go on with 'I never realized how hard it is.' Just as women needed training and experience to move into men's jobs, men also need the same. I found taking care of one child a pleasure, and taking care of - extremely hard. But, at the end of my life, I will always respect myself and appreciate what we shared for spending those years together. I will always thank my former wife for allowing this to happen, and I know she missed some things that can't be replaced. There is no job I have ever valued more. I wish I could say I felt ... at this point - my daughter is 11 and son 14 - that I was close to being the type of father I wished I was. I am not. But I try hard.

It is our contention that a focus on parental responsibility and the abandonment, not only in legal rhetoric but also in legal practice, of rights based thinking, would help to move the legal system through the 'gender wars' without losing sight of the needs and best interests of children. A participating father, with primary care of his three children, put it this way:

Fairness straight across the board: treat everybody with respect, with the same rights and privileges. Two people with children, they don't want to live together. Let's put them in a room, let's talk this out, let's figure out what is the best solution here. Let's not say okay, this person happens to be female, this person happens to be male, so we are going to judge them that way. Possibly 80% of families, the mother is the primary caregiver and if that is the case, probably she should get custody. But in situations where that is not the case, when things are a little bit off the socially accepted norms, [there is a need to] analyse the case and see what should be done for the children.

Rights battles are about parental power and control; fulfilling the needs and interests of children (as opposed to the needs of a parent) are not central to those debates. When child rights are mentioned in rights claims, those rights are connected to parental rights and needs (to participate equally in parenting, to have more contact with the children, to have more influence and power in decision-making, to pay less money). A focus on responsibilities, however, would ensure that the needs and interests of children are given first priority.³⁰⁷

³⁰⁷ Responsibilities legislation in England and in Australia has failed to achieve this effect. In part, however, this may be because rights discourse remains central and key in the statutes. More particularly, in

Parental responsibilities suggests an examination, during custody hearings, of matters such as: participation in age-appropriate activities with the children (games, movies, sports, household chores), guidance and assistance with homework and preparation of school lunches, attendance at parent-teacher meetings, shopping, preparation of meals, meeting children's health, cleanliness and nutritional needs, establishing age appropriate behavioural rules, using age appropriate conflict-management, resolution and correction methods, offering quality time and attention, nurturing the children, listening to their concerns, putting the children's needs and interests first. Do both parents spend quality time with their children; do both parents provide nurture and support or is one parent more responsible for the children than the other? Do both parents put the interests of the children first, or do the parents insist that the children meet parental needs and interests? In the absence of abusive behaviour, directly or indirectly affecting the children, shared parenting would appear to be a reasonable option provided that both parents have adequate parenting skills, have participated and do participate actively in the care of the children, are able to put the interests and needs of their children first, are able to co-operate and communicate with each other without high levels of conflict and are able to participate in the children's care

England the *Children Act 1989*, replaced the concepts of custody and access with the concept of parental responsibilities but defines responsibilities in terms of rights and powers. Section 3 states: "parental responsibilities means all the rights, duties, powers, responsibility and authority...." Thus the statute continues to emphasize aspects of power and control. Similarly, the *Family Law Reform Act, 1995* of Australia discusses the allocation of parental responsibilities, but lists as best interests of the child criteria: "the child's right to know and be cared for by both parents" and the child's "right of contact, on a regular basis with both parents"(Sections 60B(2)(a) and 60B(2)(b). Rights remain key legal concepts within both statutes. Although both statutes include some discussion of obligations, rights based thinking prevails: C. Smart and B. Neale "Arguments Against Virtue: Must Contact Be Enforced?" (1997) 27 Family Law 332; Rhoades, Graycar, and Harrison (1999) (2000) note 3 Perhaps this should not be surprising. Analysis and allocation of responsibilities and obligations requires time and detailed assessment of evidence; dealing with rights is faster and easier. No time consuming detailed assessment of facts is required, all that is required is implementation and enforcement. This study and research in England and Australia mentioned above all suggest that, in the face of choice – detailed assessment of evidence or simple enforcement of rights – the legal system, particularly an overburdened legal systems, will gravitate to rights.

on an equal basis. If, however, one parent has assumed and does assume most of the responsibility, custody with access would appear to be the better option, particularly in high conflict cases.³⁰⁸ After separation, indicators of responsibility to children include matters such as a willingness to provide economically for the children, to exercise scheduled access, to refrain from drug and alcohol abuse when with the children, to engage in age-appropriate activities with children, to nurture and provide for their care, to refrain from demeaning the children or the other parent, and to refrain from initiation of continuing conflict. We turn to those issues now.

C) Parents and Children: Access and Denial of Access in Partner Abuse Cases

Discussed in Neilson (2000) are conclusions drawn from reported cases, court files, and lawyers all indicating that, although it is not true that judges have been awarding custody of children to abusive parents, it is true that parents who abuse the other are granted access to children most of the time. More specifically the case law discloses a presumption that contact with both parents - even abusive parents - is in children's best interests.³⁰⁹ In practice, the presumption places an onus on survivors of abuse to prove that access is not in the best interests of the children rather than on parents who have been abusive to prove access safe and beneficial. In the absence of expert testimony to explain the dynamics and consequences of abuse and in the absence of provable incidents of behavior directed against the children, the onus may be difficult for survivors of abuse to meet. Forty of the reported cases revealed judges insisting on

³⁰⁸ See also: Rhoades, Graycar and Harrison (1999)(2000) note 3.

³⁰⁹ D. Bourque, (1995) "Reconstructing the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" Canadian Journal of Law & Society 10 (1): 1-24; L. Neilson (1997) note 1.

abusers having access to children when abuse against the custodial parent (almost always the mother) was continuing, commonly in the face of evidence that the abuser was using contact with the children to provide an opportunity for continuing abuse.³¹⁰

Stories of abuse, when they were accepted, had little or no effect on abusers' access to children in the reported cases. Severity of abuse did not appear to be a determining factor.³¹¹ Access to children was conceded to parents who used weapons against their partners,³¹² men who: 'on one occasion he tried to choke her to death. On another occasion he threatened to take his own life, but after an unsuccessful search to shells for his gun, he gave a graphic description of how he was plunging a knife into his chest. This bizarre performance took place while the petitioner and the three children hid in an upstairs bedroom.'³¹³

Access was not denied in reported cases to parents whose abuse of the other included incidents of physical and sexual abuse after separation,³¹⁴ or to parents who repeatedly uttered death threats.³¹⁵ Courts awarding or endorsing access in these circumstances may be creating grave dangers for women and children. A number of

³¹⁰ L. Neilson (1997), note 1; see also N. Bala, note 23.

³¹¹ Cases denying abusers access to their children did not differ markedly from cases awarding access.

³¹² See also: *Barrett v Barrett* (1989), 18 R.F.L. (3d) 186; *Brigante v Brigante* (1991), 32 R.F.L. (3d) 299; *Burk v Burk* (1991), 34 R.F.L. (3d) 27; *Ellert v Ellert* (1983), 30 R.F.L. (2d) 257; *Fanning v Fanning* (1990), 24 R.F.L. (3d) 135; *Foggo v Foggo* (1984), 40 R.F.L. (2d) 129; *Fullarton v Fullarton* (1995), 7 R.F.L. (4th) 272; *Howe v Howe* (1988), 16 R.F.L. (3d) 387; *Reid v Reid* (1985), 45 R.F.L. (2d) 173; *Whiffen v Buckoltz* (1987), 7 R.F.L. (3d) 77.

³¹³ *Barrett v Barrett* *ibid.* at p. 197.

³¹⁴ *Young v Young* (1989), 19 R.F.L. (3d) 227. The father was granted liberal access.

³¹⁵ *Cairns c Cairns* (1994), 3 R.F.L. (4th) 397; *Savidant v MacLeod* (1991), 32 R.F.L. (3d) 266; *Whiffen v Buckoltz* (1987) 7 R.F.L. (3d) 77; *C. (R.M.) v. C (J. R.)* (1995), 12 R.F.L. (4th) 440; *Deane v. Deane* (1995) 14 R.F.L. (4th) 55.

similar situations have resulted, ultimately, in murder-suicides of family members.³¹⁶

Yet, commonly, no reasons for granting access were given by judges in reported cases.³¹⁷

The comments of lawyers and the contents of court files in New Brunswick both corroborate and explain this finding. Lawyers responding to the Research Team Survey reported that judges seldom deny access to abusive parents unless the abuse is severe and directed against the children. Indeed access was temporarily or ultimately denied in only fifteen percent of the court-file abuse cases, usually on the basis, not of the health and well-being of the primary caregiver, but on the basis of proof by the mother of danger or lack of benefit to the child

Lawyers responding to the Research Team survey suggested that access is in the best interests of children, even in abuse cases. And, as indicated earlier, they reported that they seldom advise parents to seek denial or restrictions on access in the absence of child abuse. The documents in the court files reflect similar thinking. Further, the documents provide a possible explanation for the absence of judicial reasons with respect to the granting of access in reported abuse cases. As previously mentioned, the Research Team's examination of 2,138 selected family court files in the Province of New Brunswick disclosed documented claims of partner or 'spousal' abuse in 289 files involving dependent children. Very few of these cases involved claims of emotional abuse or controlling behavior standing alone. Most files contained documents claiming multiple forms of abuse (usually psychological abuse with one or more types of physical abuse indicating a physical as well as emotional danger to the mother).³¹⁸ Yet, despite

³¹⁶ Inquests and Commissions: R. Davidson (1994); Shulman (1997); Chief Coroner Ontario (1998) – see note 56.

³¹⁷ L. Neilson (1997), note 1.

³¹⁸ See note 163.

allegations of dangerous levels of abuse in many of the documents in the court files, survivors of abuse (usually mothers) did not seek to restrict abusers' access to the children in the majority of these cases. Perhaps judges do not give reasons for granting access to abusive parents or partners in reported cases because the granting of access seldom is contested.

On the one hand, the paramount duty of judges is to promote and protect the best interests of children. On the other hand, the legal system encourages parents to settle custody and access matters by mutual agreement. The result is that judges seldom question matters that are uncontested. The reported cases and court files suggest little judicial scrutiny of parental agreements in partner abuse cases. Indeed it is questionable that judges have the time or tools necessary to do so.

Why do abused 'spouses' not seek to limit or restrict their partners' access to the children in partner abuse cases? One possibility, documented in Part VII, is that the professionals who assist them advise them not to claim restrictions on fathers' access to the children. Certainly another is that women want their children to have continuing relationships with fathers.

Access was rarely denied in abuse cases in any of the three court jurisdictions examined in New Brunswick.³¹⁹ Furthermore, supervised access seldom was requested and, when requested, was granted by agreement or court order only about one half of the time, normally for a limited period. Moreover, when supervision was granted, access commonly was to be supervised by a member of the alleged abuser's family.

Occasionally access was suspended pending anger management or mental health treatment. Restrictions more commonly imposed were third party exchanges of the

³¹⁹ Access was denied by the court in 8% of the cases in region one, in 3% of the cases in region two and 15.4% of the cases in region three. Child protection files are excluded from these calculations. In part the variation in figures can be explained by the fact that the abuse allegations in the files in region two were generally less life threatening than the abuse allegations in the files in the other two jurisdictions. And it is possible that the figures for region three may be somewhat misleading as proportionately more files from that jurisdiction were excluded from the calculations because they were initiated by the state and the focus here is on claims of survivors of abuse. Consequently, it is not possible, without further investigation, to conclude, from these figures alone, that judges in region three are more protective of children than judges in regions one and two.

children³²⁰ and or ordering parents not to consume alcohol or drugs during access visits.

Parents reported, almost universally, that the latter is unenforceable and offers little protection to children.

While access is seldom denied in law, however, fathers claim it is denied commonly in practice:

I had a hard time getting that because I was denied access every time I turned around and then after some time with lawyers, it ended up that I get 24 hours a week, even that didn't resolve a lot of problems with her denying me access but then about two years ago now, three years after we had split up, I'm finally getting an arrangement that kind of closes some of the loopholes that she was using for denying me access. What were some of the loopholes she was using? She would say he was sick or just the usual excuses, some of them were you are just not getting him and that's it. It's smoother now. I know when I go to get him that I'm going to get him.

Mothers, on the other hand, claim that fathers do not exercise the access they have. For the most part, mothers who participated in this study did not wish to deny children relationships with their fathers, but they did want the relationships to be beneficial to the children:

I think children need both parents, I think that's so important, but they don't need parents they can't depend on, that doesn't show up, that is putting their life in danger. I think she would have been better off with no parent. That's a terrible thing to say, somebody will strike me down, but she almost would have been better off. She said today, 'You know when I have kids, I'm not going to see dad. I'm not taking them there. They're not going to be brought up in that situation.'

As previously mentioned, this type of study does not allow us to comment on frequency of the occurrence of denial of access in part because it is unlikely, in the absence of formal litigation, to be recorded in court files. Further, denial often occurs after court proceedings are over. While a number of researchers have concluded that there is limited research support for the notion that non custodial parents are in fact unjustly denied

³²⁰ Australian researchers are reporting the same results: Rhoades, Graycar and Harrison (1999) (2000) note 3.

contact with their children and a great deal of data to suggest non-exercise of access,³²¹ collection of reliable data on frequency of denial is problematic.

Certainly we encountered many complaints from mothers about non-exercise of access by fathers and of their children's pain when fathers did not come to see the children as promised:

He's back [after several years] But it's still been the same thing. I'll never forget the second day he came back, daughter was really anxious to see him, he hasn't seen her in so long, so he called and said, 'I'm going to come and pick you up.' And she sat here from 8:00 a.m. until lunchtime sitting by window waiting for him because he never came and picked her up. So she cried and was so upset so I said, 'Okay, we'll jump in car and go see what he's doing.' He was drunk, passed out in his room. His hands all cut up because he smashed a mirror in the bar or something the previous night, crying and carrying on. It was just awful and he did that 3 or 4 times afterwards too until I warned him it's not going to happen again.

The most important thing I would change is if fathers are supposed to pick up child and don't, that there be some consequences because it's the child that pays. If those fathers want access, and in my case, it wasn't set, but he was allowed to give notice and I never stuck to this 48 hours notice if he called and said could daughter come with me tonight, unless we had plans or tickets to something, it was: yes. And then not to show up, with her standing in window at nine o'clock at night and I say, 'Let's run up and get pizza,' [but she said], 'I can't my dad's coming.' He was supposed to be there at noon and that kid won't budge from window with her little suitcase in her hand because her dad might come. He promised. There should be some consequences for him. That's the thing I'd like changed most. To me that's main thing: drinking with children and not showing up. I wish fathers knew. And what's going to happen when we hit that courtroom? Judge is going to say to me, 'He has rights, you give that child to him.' I have to follow what judge has told me. [I can't say] 'No, because he's drunk.' They'll say I just want to be miserable. Last weekend was his weekend, but he never showed. That's a double standard. That's my big problem. Drinking was most traumatic, but I will never get over her standing in window with her little suitcase, 5-6 hours at a time and her saying, 'My Dad called.' Why isn't there some punishment? Why can't something be done?

He picks him up when he wants to, drops him off when he wants to. There's nothing I can do about it. I'm supposed to stay home and wait to see when he's going to bring him back. There was one Sunday after my father died when I wanted to go out, but I had to stay home. No phone call, no nothing. Child was dropped off at noon. He was supposed be dropped off? At four. Does that happen often? Yep. If he doesn't have a car, he won't bother with him. There was a month and a half straight when he didn't have his access. I asked, 'Why don't you take a bus?' But he only wants him when he wants him and he tries to hurt me through him.

Many of the parents with primary care of the children reported that formerly abusive partners' needs (for alcohol, drugs, entertainment, sexual relationships) came ahead of

³²¹ P. Chesler, "Mothers on Trial: The Custodial Vulnerability of Women" (1991) 1 (3) *Feminism and Psychology* 409; C. James Richardson *Research on Family Law: Issues for the 1990s* (Department of Justice, March 1990); Rhoades, Graycar and Harrison (1999) (2000) note 3.

their children's needs for dependable contact. They said that these parents exercised access only when convenient, that children were often returned early from access visits early and without warning, that frequency of contact depended on the presence or absence of new intimate relationships in former partners' lives. They spoke of the disappointment and sadness of their children and of the need for therapeutic assistance.

Yet it is true too that the majority of the fathers participating in this study³²² commented that they had been denied court ordered access at some time. And mothers sometimes acknowledged avoidance of access, particularly when concerned about the safety of their children:

There wasn't supposed to be liquor involved. I'd ask and every time she came home, oh yeah, he was drinking. So she still goes down there and he gets drunk. The courts don't help - there is no one to help. I don't know what to do. Who do you call? What do you do? I'd like to keep her home. I've made excuses where she can't go: we're going to my aunt's, she's real sick, so we're going out to visit her and he'd be fine with that. Now she's getting to point now where she doesn't want to go.

He usually sees her, if not every second weekend, it's every - he'd see her one weekend, then two weekends go by and he'd call her up and she'd refuse to go, doesn't want to go or we were doing something that she wants to be with us. That's what we're trying to do, find something very exciting that we're going to do, so she'll choose to stay with us instead of going with him. It's been working out pretty well.

It is difficult to get to the bottom of claims of access denial because often there is no clear pattern. Participants in this study spoke of temporary denial combined with a pattern of non-exercise:

Some of the visitations were going poorly, I wanted a third party named, I didn't feel comfortable with him coming. He said he didn't have anyone to come. [You were looking for someone to do what?] To be the go between - because I wanted my daughter to see her father but I didn't want to have to deal with all the shouting. I remember looking down at her and she was just standing there holding onto her father's leg while he screamed at me. So then I stopped the visitation. I said you get a third party I don't care who it is, family or friends, [you can have access as long as you find] anybody to come to my door to get her. He refused. I said then let's go to the minister and name one. No, he would not do it. [So at

³²² Four male participants were primary caregivers. It is also important to note that, with the exception of four cases, the men who participated in this study were not former partners of the women who participated in the study.

this time he was still coming to get her?] *Oh no, I would not be there. But he didn't even come - only once, when I didn't answer the door. [How long did that go on for?] Only once - when he tried to get access and I never heard from him after that. [How long a period of time?] Probably three months. He would come into my apartment, demand entrance, search my apartment, take items, demand use of this and that. He kicked out my window while holding my child. [Did you ever think about calling the police?] No, because I would not hear the end of it.*

It is difficult to know in such situations if, from a rights perspective, one is talking about access denial or non-exercise. Indeed claims of denial of access are often proven by evidence of non-exercise.

Simple rights based analyses, without scrutiny of the circumstances of parenting practices or responsibilities, leads to enforcement of 'children's rights to access' against mothers seeking protections for children. Such analyses, as we shall see, may operate to the detriment of children. The argument here is that if the issue is examined, not in terms of rights, but in terms of interests and responsibilities, it may not be all that important to make the distinction between non-exercise and denial of access. The issue becomes responsible conduct toward the child in the circumstances of the case. The latter requires, however, careful analysis of what those circumstances are.

Sometimes it is difficult to distinguish between denial of access and children deciding that they do not wish to have contact as often as a non-custodial parent would like. Primary caregiver comments suggest that occasionally children protect themselves from continuing discomfort and or conflict by taking action to stop or reduce the contact:

I would say since separation I bet he's had children out for dinner three times. They go up at 4:00 and they're home at 4:40. They don't want to be there. I'll be perfectly candid. He frightens them. They're really frightened of him.

He has trouble relating to the kids or knowing what their needs are. He talks a lot about me. We have asked him to go to a therapist to learn how to relate to them. He gets angry every time they make a normal request - for things like a bath or a towel. They called me [while they were with him]. They had a plan to run away. They had it all worked out for me to come pick them up; I told them I couldn't do that. Then they said they would go on a hunger strike because, if they got sick, he would have to send them home. I explained that it wouldn't

work, it would only mean they'd be sick there where I couldn't help them. When they don't hear from him they are fine. If they know they have to go, they get tense and upset. They tell me they wish school would never end.

They were getting to an age anyway where it was their own choice... [Did they see him during this period?] I never stopped them from seeing him. He didn't see them for months at a time, then he would call. He would call and the kids didn't trust him, they had no relationship with him - never had. They did go out on the rare occasion.

Generally, children will not hurt parents intentionally, if they can avoid it. It is unlikely that children will tell a parent directly that they do not wish to see him or her. Yet, in these circumstances, it is likely that children's failure to participate in access will be interpreted or perceived as denial of access by the non-custodial parent. It is important to distinguish carefully between cases in which children seek to avoid continuing conflict or poor parenting, by withdrawing from a non-custodial parent, from cases in which children are being denied beneficial contact they desire. Children will not always make the distinction clear to either parent. It may be less painful for a parent, whose children have become alienated, to blame the custodial parent than to examine what he or she might have done to contribute to the problem.

For example:

In my court order it stated that, during a period of access, the father will refrain from drinking and if any incident comes to the attention of the court where he has been drinking during the periods of access, visitation will be terminated. I did notify the courts of him drinking and told them that I had terminated the visits. They said that was fine. [Then the father claimed denial of access and sought reinstatement of access through the courts.] He did call me this summer. He was drunk, said he wanted the kids. He admits [in his filed affidavit with the court] he is an alcoholic and attends AA, but does not say that he still drinks and is abusive. He has not changed at all. [So the mother responded, representing herself] 'I have not seen a change in [named father] and I will not subject my children to this sort of torture to their minds'. I could not send my innocent children to their father's home. [The mother went on to discuss people who had seen the father driving with the children while inebriated. Then she spoke of the contents of her daughter's affidavit about drinking, continuing emotional abuse of the children, abuse of a new partner, concluding] 'I don't want to go back. He makes me sick to my stomach. I hide from him when he drives by. He bugs me at school.'

Similarly, it may be difficult for a partner harmed physically or psychologically by the other parent to accept evidence that the other parent is a positive influence in their children's lives.

Much has been written about parent alienation 'syndrome'.³²³ And certainly a number of parents participating in this study, both mothers and fathers, complained that the other parent was alienating the children. For example:

The children were visibly distraught at times and confided in me their fears of their mother's anger. Their physical symptoms combined with the frequent access denials and false allegations raised my concerns about Parental Alienation Syndrome. I provided the doctor with an article on the subject to help express my concerns. I was interviewed by a Social Worker at the Ministry of Children and Families and invited to participate in a Parental Capacity Assessment. A prominent forensic psychologist concluded that I am a fit parent with a repertoire of parenting skills who understands the needs of my children.

My husband didn't take it too badly, until he found out that I had been seeing someone, then he went absolutely crazy. He called me at work, screaming and hollering, threatening me. It was first thing in the morning the children hadn't even gone to school. He told them everything. He found some letters in the house. Called me every name in the book in front of the kids: I was a slut, whore, no good. And right from day one, the kids have been involved in this messy split. Every time the kids went there, it was: your mother is a slut, your mother is a whore. Even after the restraining order was put on him, I allowed him to come to the house to pick the children up, I let him call the children. I said, 'These are your kids, I'm not trying to keep your kids from you, this is not about the kids. It's about us.' I was trying to be the mature one about it but he never did see it. I have interim custody of our daughter. But the oldest child is in Saskatchewan with the father. My lawyer said, when we were going through the custody issues, there isn't any real point, she wants to stay with his father. You're wasting the courts time and money by trying to ask for custody of the oldest: she was 13. And she did ask to stay with the father. Since then it has been nothing but head games on the phone played with my youngest daughter: 'Oh you will be home with us soon.' He even went so far as to tell her that my new partner could be a child molester; she was scared to death. She is 10 now. She's one that's probably been hurt the most with it all. If she doesn't call every day, he says he was at work crying and had to leave work because he missed her so much. If she doesn't call, she is made to feel very guilty about it. And she does call him: every day. But my oldest is totally alienated from me. I left Saskatchewan in 1996, moved down here. I called her daily, but no matter what time of day or night I called, they would not answer the phone. Then, after years, my oldest daughter finally got on the phone and she said, 'I don't want anything to do with you any more.' I said, 'So you are basically saying as far as you're concerned I'm dead' and she said, 'yes, I don't want anything to do with you.' I haven't seen her for four years. I know the problem is their father. He is a controlling, manipulating, angry man. I have sent gifts and cards; they are returned unopened. The first time I went to get my daughter, after an access visit, my oldest

³²³ For example: Cartwright, G. F. "Expanding the parameters of parental alienation syndrome" American Journal of Family therapy, 21 (3): 205-215; Clawar, S. and Rivlin, B. (1991) Children Held Hostage (Chicago: American Bar Association); Gardner, R. (1998) The Parental Alienation Syndrome 2nd ed. (Cresskill, NJ: Creative Therapeutics), (1999) "Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect" American Journal of Family Therapy 27(2): 97-107; Johnston, J. R., and V. Roseby. 1997. In the name of the child: A developmental approach to understanding and helping children of conflicted and violent divorce. New York: Free Press; Lowenstein, L. F. "Parent Alienation Syndrome: Two Step Approach Toward A Solution" Contemporary Family Therapy (1998) 20 (4): 505-520; Major, J. "Parents Who Have Successfully Fought Parental Alienation Syndrome" <http://www.livingmedia2000.com/pas.htm>; Vestal, A. "Mediation and Parental Alienation Syndrome" Family and Conciliation Courts Review Vol. 37, No. 4, October, 1999, p 487-503.

called me every name in the book. She told me to get the f--- out of the yard, that I was unwelcome; she tried to spit on me. I still send gifts, because I am the adult here, she is my child and I'm not giving up on her.

Complete discussion of parental alienation is well beyond the scope of this study, yet it is important to introduce here a few words of caution. Survivors of abuse were more apt to report being accused by former partners and judges of alienating children, on the ground that children were reluctant to visit the other parent, than to offer comments suggestive of attempts to alienate. For example:

He says to them, 'your mother is this and that' – trying to alienate them. He tells them I am evil. He sent them letters at Christmas claiming denial of access, saying evil divorce, birthday letter about evilness of divorce, Valentine's Day the same. The children say they wish school would never end [so they wouldn't have to see him]. But the way the judge see it, I am at fault, because if I really wanted them to go, they wouldn't object.

He is emotionally abusive to the children, verbally abusive to his new wife. He drinks a lot and curses a lot. He yells at her [daughter], doesn't communicate. When she is there, he says it is his time and she has no right to call and speak to me. He has convictions for death threats and one for assaulting his current wife. He has the right to call here at certain times. When we've had to go away, we've left messages that she can't be reached on her cell phone on particular dates, leaving other numbers he can call. Instead, he goes down to the police station and gets them to call the cell phone, then applies to hold me in contempt. I sent in an affidavit with copies of the telephone bills but the judge just said I am denying him the right to be involved in his daughter's life. There is not enough focus on children, it is all about the mother.³²⁴

Researchers in England and Australia are reporting similar reactions from judges in those countries.³²⁵ It is likely that much of the difficulty is caused by workload pressure and by viewing access as a right – of the parent or the child – rather than as a responsibility or obligation. Non-custodial parents appear before courts with court orders or agreements claiming that on a particular date or dates the child was denied his/her right of contact, by the other custodial parent. Since the benefits of rights are

³²⁴ Bancroft (R. L. Bancroft (1996) note 82, at p. 5) calls this 'tactic', common among abusive partners, the "preemptive strike: "the batterer accuses the victim of all of the things that he has done. If he has been denying her phone access to the children during their weekend visits with him, he will likely complain to the court that she is preventing *him* from calling the children during the week. These tactics can succeed in distracting attention from his pattern of abusiveness; in the midst of a cross-fire of accusations, court representatives are tempted to throw up their hands and declare the couple equally abusive and unreasonable".

³²⁵ Rhoades, Graycar and Harrison (1999) (2000) note 3; Smart and Neale (1997) note 307.

assumed, there is no need to scrutinize whether or not the contact is beneficial to the individual child, or to inquire whether or not it has been exercised responsibly. The next step is enforcement, sometimes, as in the cases discussed above, when such contact is harmful and against children's wishes.

Fullarton v Fullarton is another example. The trial judge held the mother in contempt of court for refusing the father's access to the children. She did this despite a history of abuse of the mother including on various occasions, in years past, the father's breaking of the mother's jaw, his holding a knife to her throat, striking her across the head breaking her eardrum, and his criminal convictions for assaults against her. And the judge did this in the face of evidence that the children had witnessed many of these assaults, were having nightmares about them, and were beginning to become violent themselves, also despite the finding that the most recent assault against the mother had occurred when she attended at the father's residence to pick up the children following an access visit.³²⁶ Similarly, in *Metz v Metz* we learn that, after Mrs. Metz separated from her husband, he damaged her property, broke into her house, caused her boyfriend serious injury and verbally continued to harass Mrs. Metz despite numerous court orders purporting to offer her protection. The father was simply ordered not to enter the mother's home for the purpose of exercising his access rights.³²⁷

When such matters are assessed in terms of father's rights or children's rights, as the judges did in these cases, there is no need to assess the implications of access for the child; access is presumed beneficial. When it is denied, the next step is enforcement and punishment for denial. If, however, we were to view the same circumstances from

³²⁶ *Fullarton v Fullarton* (1995) 7 R.F.L. (4th) 272.

³²⁷ *Metz v Metz* (1992), 35 R.F.L. (3d) 437

another perspective, solely from the perspective of children's interests and parental responsibility to meet those interests, such as the responsibility not to expose children to continuing conflict and abuse, the cases appear quite different. More particularly, if we examine these cases, solely from an interest of the child perspective, we might ask whether or not it is truly in a child's interest to be placed regularly in the care of an adult who repeatedly is violent.³²⁸

Despite its current political characterization, it is important to note that parent alienation is not gender specific.³²⁹ Both custodial and non-custodial parents engage in such behaviors. Indeed, our data indicate that alienating behaviors, such as interrogating the children and denigrating the custodial parent during access visits, sometimes are the cause of children trying to withdraw from non-custodial parents. It is vitally important to distinguish genuine parent alienation cases from cases involving partner or child abuse and, or irresponsible parenting:

An important point is that in PAS (parental alienation syndrome) there is no true parental abuse and/or neglect on the part of the alienated parent. If this were the case, the child's animosity would be justified.³³⁰

³²⁸ More complicated still are cases of emotional abuse and neglect, particularly when emotional abuse is redirected at the children. One of the parents participating in this study, for example, was reporting the father's limited participation in childcare prior to separation, resulting a lack of parenting skills. The mother reports having forced her children to visit with the father on one occasion - in order to avoid exposing the children to the trauma of having the police pick them up pursuant to a judge's order but the children are reported to express a reluctance to spend appreciable periods of time with him. One hopes, that, ultimately, the children will have a chance to have their voices and views heard and considered in accordance with Articles 3 and 12 of the United Nations *Convention on the Rights of the Child* (1989) and that the best interests of these children will prevail over and above all other considerations in this case.

³²⁹ See references, note 323.

³³⁰ Major, J. (2000) note 323 at p.4.

Moreover Richard Gardner himself, the founder of the parent alienation concept, cautions:

There is no doubt that some abusive-neglectful parents are using the PAS [parent alienation syndrome] explanation to explain the children's campaign of alienation as a cover up and diversionary maneuver from exposure of their abuse-neglect.³³¹

Most of the parents participating in this study, including survivors of abusive relationships, indicated a desire for positive relationships between their children and the other parent, although they also wanted those relationships to be responsible and safe. None of the survivors of abuse we interviewed sought to focus interviews on denigration of the other parent,³³² as one might expect from an alienating parent. Negative behaviors affecting children's welfare were reported but personal aspersions and attributions of malicious intention were non-existent. Indeed far more commonly excuses were offered for former partners' abusive behaviors (in terms of abusive family of origin, alcoholism, drug addiction, poor parenting role models in the family of origin, personality disorder or mental illness, low self esteem). Yet five of these parents reported having been accused of attempting to alienate children, when they sought conditions on access to protect their children from harm.

Part of the difficulty, once again, lies in conceptualizing access as a right rather than a responsibility - since a rights focus makes it seem that custodial parents, who seek restrictions on access, are obstructing their children's rights to have relationships with the other parent. Yet parents who seek therapeutic assistance to enable the other parent to learn responsible parenting skills, parents who seek to protect their children from exposure to continuing abuse and conflict, or irresponsible and neglectful care, are very

³³¹ Gardner, R. (1999) note 323 at page 97.

³³² Personal denigration is different from discussion of negative behaviors affecting the children. All of the survivors of abuse we interviewed focused discussion on the children rather than on the other parent; complaints about the other parent's behaviors were connected to concerns about the children.

different from parents enmeshed with their children, from parents unable to see their children as separate from themselves, who involve their children intimately in the details of parental conflicts and brainwash the children against the other parent. Although, in practice, the distinction may be difficult, even for trained professionals to make, since parent alienation syndrome (PAS) assessment tools are said to be unable fully to discriminate between alienating behaviors and actual victimization,³³³ the distinction is vital to child custody and access decisions. The health and safety of children require judges and lawyers to scrutinize very carefully the parenting practices of both parents, prior to and during the separation process, in cases involving both allegations of partner abuse and parent alienation in order to distinguish genuine parent alienation from child alienation caused by emotional abuse, irresponsible parenting, neglect, continuing conflict and unsuccessful efforts of non-custodial parents to alienate the children from the custodial parent.

A focus on responsibility to and interests of children helps to maintain a child-centered focus when these sorts of debates arise. Partisan adversarial decisions about which parent is interfering with the other parent's rights ought to be abandoned in favor of examining the situation from the point of view of the needs and interests of the child. Then, the questions become: are the parents' concerns about the other parent reflective of concerns about abuse and, or irresponsible or neglectful child-care or are they reflective merely of personal hurt, anger and vindictiveness?³³⁴ What is the history of the responsibility for parenting in the relationship? Is either parent actively involving the

³³³ Danrnall, D. Divorce Casualties: Protecting Your Children From Parental Alienation (1998 Taylor Publishing), "The Debate page" <http://www.parentalalienation.org/debatepage.htm>

³³⁴ The latter is most likely to surface in situations involving adultery and or rejection of a partner in favor of another partner.

children in the adult conflict? Does one parent seek to deny the children all contact with the other parent, on the basis of fault (for example, blame for leaving the relationship), or is the parent seeking merely therapeutic intervention and, or conditions to protect the children from harm? Is there evidence of past behavior that would justify fears that the other parent might cause harm to the primary caregiver or the children? Can the formerly abusive parent demonstrate that negative behaviors of the past have been overcome by treatment? Do the children benefit from contact?

When a parent claims denial of contact, the questions become: in the circumstances, as understood by the custodial parent, was the custodial parent acting responsibly towards the children when limiting or denying access? Were the children expressing a desire to see the other parent or were they asking not to be forced to visit? If the latter, do the children's requests for limited or no access have a basis - in abusive, neglectful, or irresponsible behavior past or present, in a lack of emotional bonding - or does the request appear to be merely an alignment with one parent against the other? Is the parent claiming denial of access able to demonstrate prior responsible care (for example, non use of alcohol and drugs while with the children; providing appropriate nutrition, cleanliness, behavioral rules and boundaries; participating with the children in age appropriate activities; providing parental nurture and emotional support; providing economic resources and paying child support; attempting to resolve rather than inflame conflict; refraining from repeated, unnecessary applications to courts and or authorities in an effort to 'get' the other parent; refraining from engaging the children in parental disputes; refraining from using the children to obtain information about the former partner; refraining from demeaning and denigrating the other parent).

D) Parents and Children: Exercising Access Responsibly

When parents accept and fulfill responsibilities to children and children enjoy positive relationships with both parents, there is no question but that such benefits ought not to be denied. Yet participants in this study claimed that responsible parenting during access visits was more the exception than the rule. Complaints about inadequate levels of parenting responsibility during access visits permeated the interviews with custodial parents. Basically, five patterns emerged from the interview data:

- 1) continuing the abuse and, or conflict by manipulating or abusing the children, the legal system or child protection services;
- 2) involving children in adult conflicts;
- 3) exposing children to abuse and violence in new relationships;
- 4) exposing children to danger or harm; and
- 5) subjecting children to inappropriate or inadequate parental care-giving.

Patterns 1, 2, 3 were discussed earlier, under the heading: continuing exposure of children to conflict. Patterns 4 and 5 are discussed below.

Custodial parents complain that the legal system's insistence on the rights of children to maximum contact - in abuse cases - is placing their children at risk, occasionally of being killed.³³⁵ A multitude of studies have demonstrated the dangers to children of assuming that partner abuse has no connection to child abuse.³³⁶ Children

³³⁵ Researchers in other jurisdictions are also reporting that children are being damaged as a result of inappropriate contact orders in partner abuse cases: J. Dewar and S. Parker "The impact of the new Part VII Family Law Act 1995 (1999) 13 *Australian Journal of Family Law* 96; Rhoades, Graycar and Harrison (1999) (2000) note 3; Smart and Neale note 307. See also Gallant case and inquiries in Ontario, Alberta and Manitoba into the deaths of women and children in family abuse cases mentioned earlier.

³³⁶ Ibid. See also Part IV.

have died as a consequence of this assumption. Fifteen mothers reported being terrified that their children would not make it home safely from access visits:

My daughter always carried a quarter in her shoe and if they were some place and he got drinking, then she could call me. You just – you're torn, because you don't know if your child's going to make it home alive, and you don't want her to go, with everything you believe in, but she wants to go. Daughter and I made agreement. I said, 'I'm not going to allow you to go anymore. He'll have to hire a lawyer and make me go back to court. We've always talked openly. I said, 'you're not going; you're going to end up dead. And I'm going to blame myself forever.' (She said) 'Can I go if I promise never to get in car?' I said, 'If you promise and speak up to him about those things.' And from that day forward, she doesn't get in the car. But in meantime, she'd go; they'd get drinking and she'd call from friend's house to come and get her. You try to explain to him: 'What happens if something happens and you think she's gone home and I think she's with you? Something's got to change!' But you could never get anywhere. You're not trying to be unreasonable, you're trying to protect. And she wouldn't say, 'I'm calling mom'. She'd say she changed her mind and was going to friend's house to spend the night. I want her to live to grow up. And you're torn. I know I should have put my foot down: 'You're not going, you're not seeing him', but she was so hurt and she was a little girl who just idolized her father, wanted his attention and love so bad.

He has a criminal record. I think it would be OK if he can prove to me that he no longer has those violent tendencies. I think it's very important that she knows who her father is, but he has to prove himself first. Now I'm trying to get used to the fact that she might have to go there. I try to make myself get used to it, but there's something - I just don't think I can do it.

I'm sure, if they'd given me the opportunity to tell how it was from day one to the end, then he [the judge] might have looked at it and said, 'No you're right - maybe when she's 6 years old and able to tell you what's been going on.' That's why it's [access] not bothering me as much now - because she can tell me - but when she was an infant and couldn't talk, I had no idea. I remember her coming home and stripping her right off and checking her and throwing her right in tub - fears like that, not knowing. For probably first 10 or 12 times, I didn't know if I was going to get her back alive or not, so I would go through whole weekend out of my mind. We used to drive by his house, back and forth, to see who was there. I used to drive myself nuts. I'm surprised I didn't end up in hospital because I used to be so upset. It wasn't judge's fault because he just based his decision on what he heard and lawyer could have really backed me up more than what he did.

Custodial parents, both men and women, report that alcohol and drug addiction is a serious concern with respect to the safety of their children but that, when they raise the issue, the concerns are viewed as interference in their former partner's life or as lack of cooperation with respect to access:

He was told not to drink with my daughter. He drank with her non-stop and would drive with her drunk as a skunk. You'd call people for help. Nobody would help me or do

anything about these things. I would follow everything and would follow the law, but I bet if I did something I wasn't supposed to, they'd do something!

I hated the thought of her going to his house over night. I hated the thought because you didn't know who was going to be at his house. He's single, he's into drugs and he's into liquor and she was only a baby. Nothing I could do about it; just let her go anyway.

She wanted to get shared custody back, I did not have a problem sharing responsibility of the children or authority of who does/says what but along with authority comes responsibility and you can't have one without the other - that's a recipe for disaster. The subject of smoking came up at that time and she said, 'I am a smoker and I will smoke whenever I want!' [one child has asthma]. But she says, 'You can't stop me from smoking in front of my kids!' She was there with the attitude that she had total rights, that things should be all her way. I could not enforce [the provisions in the court order that she not drink and smoke while with the children] and the whole thing was a farce. The part that is difficult, in terms of enforcement, are things like the smoking and drinking. The court order said - visitation rights would be given every second weekend providing no alcohol or tobacco. But there was no way of making sure that she would stay off while they were there. How could I monitor it? [Were you ever concerned about the children's safety?] Yes at times - though I think she is starting to come around now.

He should tell the truth and deal with it. There is no reason he can't be a father - kids need fathers - but he has to make an effort as a father. She is going to be a screwed up kid because of all of this. For months she wondered why he would come over when she was not at home. He couldn't face her. Alcoholics don't take responsibility for anything. Even the therapist was angry.

When access is characterized as a right, rather than as a responsibility, complaints about alcohol and drug misuse, non-exercise of scheduled visits may be characterized as 'lifestyle' issues or as a custodial parent's interference in the life of the other parent.

Primary caregivers who complain about alcohol consumption, poor parenting, lack of supervision, inappropriate activities seem to be making claims in opposition to the rights of their children. When, however, access is understood as a responsibility to children, it becomes clear that inability or failure to refrain from alcohol and drug abuse while having the care of children and failure to exercise scheduled access are failures to fulfill responsibilities. Then custodial parent concerns become understandable and it becomes clear that primary caregivers are asking merely that the legal system protect the interests of children. Although a number of primary caregivers in this study had given up all hope

that the other parent could ever learn to parent responsibly, most did not seek to prevent the children from having a relationship with the other parent. Time and time again they pleaded, however, for some sort of legal mechanism to ensure safe, responsible contact:

I would like her to have a relationship with her father but I would like it to be a positive one... At first I didn't want her to see her father; I didn't feel good about it. When we went to court for the custody and access arrangement the judge wouldn't listen to the abuse; he threw it out. He said it was not relevant because it had happened in the past. He said 'No, this child has got to see her father'. I did not like it at the time but I came to realize after awhile that it was right. I wouldn't want my daughter growing up saying, 'You kept him from me'. I want what is right for my child. I think it is important for her to have a relationship with her father even though there are many things I disagree with. His standards are not my standards but there is nothing you can do, you feel sort of helpless. There is a lot of not caring about the child, her schooling. [From his perspective] It is more about my legal rights and I am going to use them. My daughter comes home upset. She says, 'My Dad doesn't care about me. We just go from one house to another where they are drinking'. It is hard because he doesn't have the child's best interests at heart. Maybe he doesn't know how to be a father; he didn't have a good relationship with his parents. He needs parenting education. If your parents didn't teach you [how to parent], how is it going to happen? Parents should meet children's needs. I believe that he needs something that tells him what he can and cannot do: 'No, you can't go out drinking with the child'. I could go [back to the court] but what is the point? He [the judge] will only say that as long as he [the father] is complying with the order, there is nothing I can do. There needs to be something else.

I do feel that more emphasis should be put on the children instead of parental rights. I really do. I know that I was told that this was all about children and protecting children but when it came right down to it, it was all about protecting his parental rights, about his ability to access the children. I think that there could be something that could be done, something that would not take away from parental rights but would put more emphasis on making sure that the children are protected.

Primary caregivers spoke of being forced, by the terms of court orders and by legal agreements, to allow their children to spend time in the care of former partners unable or unwilling to provide responsible care:

She'll come home and say, 'I had a terrible visit. He never paid any attention to me.' She's come home not fed, dirty, tired, very irritable. We dread Sundays when she comes home after staying weekend with him because she's just miserable. Mondays are terrible day at school for her because she's so tired and that's the first thing teacher would say: 'Did she go to her father's this weekend?' Yeah.[And the teacher says] 'Well that explains why she's having such difficult week.'

So he has a criminal record as well? Yeah. Speeding, drinking and driving, assault. I was so upset, I was crying and everything knowing that she had to go that next weekend, right at that court date. I went to work crying and I had to leave because I just was a mess. She had to go with all those men hanging around and partying until 2-3:00 a.m. and her up and around that. It's not healthy for her, it is just not healthy.

He has no parenting skills at all. She came home one day from his place with a g-string, one of those men's g-strings and it was shaped like an elephant with ear and trunk and stuff. She came home with that, wearing it on her face, saying it was a mask.

When he would drop him off, he would not be fed and soiled through his pants on a few occasions. He would take him [an infant] out for a rugby game. He showed up early and started kicking the door trying to get me out. People on the street were going to call the police.

The kids have a lot of problems going with [former husband]. He should not have them for two hours let alone seven days. His treatment of the kids, the things he says, the way he treats my oldest daughter! He says your mother is this, your mother is that. They [the children] are very frightened. They are high achievers. When they don't hear from him, they are fine. When they know they have to go, they get tense and upset. He doesn't understand – he has trouble relating to the kids or knowing what their needs are. He talks a lot about me to them. We asked him to go to a therapist to learn how to relate to them. It is a continuing thing. My oldest child is not there anymore to act as a buffer. He gets angry every time they make a normal request, like asking for a towel.

And, parents spoke of contact orders, requiring them to force their children to spend time with former partners who exposed their children to criminal lifestyles, continuing threats and intimidation, surveillance, abuse, and involvement in parental conflicts. Some of these examples have been discussed previously:

She went with him [for the weekend] and at 12:30 that night I heard somebody crying outside. [I think to myself] This sounds like my daughter and there she is getting out of his car. She was crying, vomiting. I don't know what's wrong. He takes off, so when she's calm, I ask her. She says, 'Him and his girlfriend were both drinking and got into fight.' She said, 'I knew he was going to hit her. You could see his temper and she was pushing him. . .I got between them a couple of times, but I finally said I want to go home and when I was leaving he grabbed her and threw her across deck and I think she hit her head. Can you call and make sure she's okay?' That took until 4:00 a.m. to get the story out of her. So the next day I called him and said you brought her home extremely upset. [He said] I did? [I] Said yes. He said 'Wasn't that bad'. [I said] 'She was just hysterical.' [He said] 'Well then you must have upset her.'³³⁷

I've had the kids 2 years in counseling and there's nothing you can do. He has rights. And the way he treats his daughter is pathetic. Like what? His attitude. He's always yelling at her, she can't do anything right. Nothing pleases him. He's a fanatic. She's just an 11yearold girl. She likes to have her nails a little bit long but he says you have to cut them down to nothing. They have to be spotless. Her hair has to be up. He demands: 'They are to be in clean, neat clothing, not looking like slobs.' My children have never looked like slobs, but this is the way he talks to her all the time, every single time. He says: 'If your nails aren't cut, you're not

³³⁷ This quotation is also an illustration of inability to accept responsibility, attributing responsibility to others.

going.' How does he discipline them? He screams. That's all he has to do. They've seen him beat on me. He doesn't have to make a move. If his voice raises, that's it. As far as I'm concerned, he abuses those kids. Not physically but emotionally, especially my daughter. I've had her in counseling. They've [the counselors] sat with her and they agreed with me.

Last year at Christmas time, he hadn't seen the children about 3 weeks and Christmas day was pretty rough. On Christmas day they phoned him and he agreed to see them. It was just tortuous that day for them. He was doing a lot of damage to them because he was questioning them so much about me. Drilling them one by one in the bathroom. He took them in the bathroom, one at a time and just grilled them about what I was doing, who my friends were. I don't think that he does that anymore. Maybe that's why he doesn't see them that much. They haven't spent a night with him in months. [When the children do see him] My 11 year old, because she has all this anger and she doesn't want to talk about it. She goes out there and acts it out, by being totally rebellious and she won't come in from the street and calls me dirty names - until I go out and physically bring her into the house and tell her that it's wrong. Then she starts crying saying, 'Do you know what it feels like to have a father that doesn't love you?' That's when it all comes out.

He told them everything. He found some letters and things in the house. Called me every name in the book in front of the kids - I was a slut, whore, no good. And right from day one, the kids have been involved in this messy split. Every time the kids went there, your mother is a slut, your mother is a whore. My oldest daughter finally got on the phone and said, 'I don't want anything to do with you any more.' I said, 'So you are basically saying as far as you're concerned I'm dead' and she said, 'yes, I don't want anything to do with you.' I know the problem is their father. I know because he is a controlling, manipulating, angry man. My daughter called me every name in the book, she told me to get the f--- out of the yard, that I was un-welcome; she tried to spit on me.

A number of issues and questions came readily to mind during interviews with these primary-care-giving parents. The first was that a focus on mothers', fathers' and indeed the legal systems' responsibilities to children, rather than on rights, might have prevented some of the situations described to us during the course of this study. Lawyers, mediators and judges might consider asking themselves different questions. For example: is it responsible for primary caregivers to allow, and for courts to order, children into such circumstances? Is it really in the best interests of children to be ordered to have maximum contact with parents unable unwilling to parent responsibly? Is it in the best interests of children to have maximum contact with parents who expose children to continuing conflict and abuse? Finally, how many lawyers and judges would allow their own children or grandchildren to spend weekends in such conditions, much less order

them to do so? Finally, where, in the situations described, do we find the interests of children?

Maximum contact presumptions should be limited to non-abuse cases and to parents able to demonstrate an ability and desire to provide responsible care for their children. The current focus on rights to contact and the onus to prove continuing and or additional harm appears, in such cases, to be grounded less in concerns about the welfare of children than in concerns about parental rights.³³⁸ Once partner abuse³³⁹ (and or irresponsible parenting) is established, the onus ought to be on the parent with primary responsibility for the abuse or irresponsible parenting to demonstrate how they can ensure that contact will be safe and beneficial for the children. Children have an interest in freedom from being exposed, directly or indirectly, to continuing conflict and abuse. Once abuse is established, therefore, it seems appropriate to seek assurances that children will be protected from further injury. Why is it that primary caregivers, in partner-abuse cases, must prove the existence of abuse and, or irresponsible parenting prior to separation, and then must wait until they can prove that their children have been harmed again before protective measures may be sought? Harm can be proven only after its occurrence, after children in these cases have been damaged for a second time. How, as a responsible parent, does one do nothing while waiting for one's child to be harmed? Parents report helplessness and despair.

³³⁸ S. Boyd (2000) "Can Child Custody Law Move Beyond the Politics of Gender?" *University of New Brunswick Law Journal*.

³³⁹ This recommendation is subject to the qualification that, if such provisions are operate equitably, it will be vital to provide specialized education to judges, lawyers and mediators on the dynamics and consequences of abuse. In the absence of such education, legal assessments of abuse produce injustice. See L. Neilson (1997) and (2000), notes 1 and 6 for further discussion.

The situation in New Brunswick is compounded by two factors: 1) the practices of judges in ordering parents, in abuse cases, to resolve all continuing disputes about access in mediation and 2) the Domestic Legal Aid Program - a government program offering settlement and legal services to survivors of abuse – which does not, at the moment, offer repeat legal services to clients seeking variation of custody and access orders obtained under the program.³⁴⁰ The result is that primary caregivers, unable to afford private lawyers, are not able to have contact orders changed, even in the face of considerable evidence that their children are being harmed by court-ordered access. Recommendations that this aspect of the program be changed have been made repeatedly³⁴¹ and are endorsed again here. And indeed discussions about such changes are being conducted now.

Placing the legal onus on those responsible for proven abuse, continuing conflict or irresponsible parenting to establish that the access will be beneficial might have additional advantages. The onus would encourage parents with abuse, addiction, attachment, mental-health and other parenting problems to seek help thus reducing the potential for harm and the inter-generational transmission of abusive behaviors. It would also encourage parents to assume the responsibility for making arrangements for the

³⁴⁰ Neilson and Richardson (1997) note 6; L. Neilson and M. Guravich (1999) *Abuse Screening Criteria and Settlement Option Project Final Report*, (1998) *Interim Report - Court Social Worker Consultation on Abuse Assessment Processes - Policy and Practice* note 285.

Practices with respect to repeat clients vary by legal jurisdiction. At least one jurisdiction has entertained repeat Domestic Legal Aid clients when the abuse was continuing on the basis that these are new cases. Other jurisdictions adopt the view that survivors of abuse, seeking to vary orders or agreements reached while they were Domestic Legal Aid Clients, are repeat clients and as such are not covered by the Domestic Legal Aid Program. The reports cited above have all called repeatedly for clarification and the adoption of a policy that would allow assistance under the Domestic Legal Aid program to survivors of abuse, not only when abuse is continuing, but also when orders and agreements obtained under the program are causing harm or damage to children. Changes to the Domestic Legal Aid Program are being discussed now.

³⁴¹ Ibid.

responsible care of their children. Clearly children, custodial parents, and even courts may react to but cannot create responsible parenting. Responsible parenting requires a voluntary assumption of responsibility. A reversal of the onus in abuse cases merely recognizes that responsibility for parenting after separation resides independently within each parent and places the onus of proof on the parent best able to prove acceptance of that responsibility.

While it is important to acknowledge that, in a minority of cases, parents may be forced to respond to unsubstantiated, unproven, occasionally false claims of abuse or irresponsible parenting, first priority ought to be given, in our view, to the health and safety of the children. There is a need to ensure that parents unwilling or unable³⁴² to act responsibly towards their children have limited opportunity to cause further harm. In any event, a reversal of the onus to prove access beneficial ought only to occur when prior abuse and or irresponsible parenting have been established, because the research is clear that, in the absence of such factors, children benefit from regular, frequent contact with both parents.

E) Parents and Children: Enforcement of Responsible Access

When both parents offer responsible parenting to children,³⁴³ then one can talk about the interests of children in maximum contact and the benefits of shared parenting arrangements. Certainly children who enjoy positive relationships with both parents have no wish to be severed from either parent:

³⁴² Personality disorders, addiction and mental disability may limit the ability of some to parent responsibly despite good intentions.

³⁴³ Responsible parenting includes matters discussed earlier, such as: providing support and nurture, participating in age appropriate activities, providing resources and financial support, refraining from exposing the children to continuing contact or abuse, overcoming alcohol and drug addictions, refraining from continuing conflict with and or abuse of the other parent.

They loved both parents dearly as would be expected. They were shattered by the separation.

I know [he benefits from his visits here] by the way that he shows that he wants to be here more is that he gets very quiet when it's almost time to go home. A lot of times when I take him home, his eyes will fill up and he doesn't want to show that he is crying, he tries to hide it but there has been times that he's cried. And he said he wanted to hide in the closet so that he wouldn't have to go home. Generally he has a good time when he is here and you know your kid loves you and I love my kid so how could he not benefit?

In the absence of abusive or controlling behaviors or exposure of children to continuing conflict, parents who deny children positive relationships with other responsible, caring adults may be failing to consider the needs and interests of their children, separate and apart from their own. For example:

The mother is not complying with the court order at all, as far as the psychologist and that. I will show you a copy of the psychologist's report as of last week. The psychologist told both of us that he seems happier in our household than where he is living. He is more relaxed and has blended in here really well. He has his own room here and his camp down back, it is very comfortable for him. I would like to have joint custody of my son. I never lived with his mother, I had an affair with her several years ago and he is the result of it. Do you pay child support? Yes I do. I pay a fair amount - the scheduled amount plus [extra for] babysitting. I pay at the top end of the scale. But knowing what it costs for kids nowadays, we don't mind. (father and step mother)

Children, whose parents enjoyed long-term relationships, usually wish that their parents would reconcile. In the absence of that, and in the absence of abuse and continuing conflict, children seek continuing intimate, frequent involvement with both parents.³⁴⁴ Parents, both mothers and fathers, recommended more attention, not only to the needs and interests, but also to the views and perspectives of children:

Children should be consulted. My children are old enough to ask. Somebody could ask them, in a roundabout way, is your father drunk or does he act funny on drugs or something when you were out there? Let them tell. The mediator should be able to come out to your home when the children are there maybe. Of course not talk about it in front of the children, but watch them play around the yard and see if they are comfortable there instead of somebody saying that the children are terrified of their father and he's a drunk.

My views aren't important, it is how [my daughter] feels. She has agreed to tolerate [access] until she is twelve. We need to get a court order so that I am not involved anymore – because it is a control issue.

³⁴⁴ See sources cited in note 30.

I want someone to interview the kids. Children are little people and their feelings count too but when parents play games – I wish more stock was taken of what the kids say. Parents should be taught not to say things like ‘I hate your dad’. I don’t tell the children I hate him because that is the same as saying, ‘I hate you.’

Indeed much can and should be learned from children. Yet there are dangers too. For example, Nicholas Bala warns that children's wishes should be considered cautiously and, presumably, in the context of assessments of responsible parenting in abuse cases:

Children's wishes can be very problematic in spousal abuse situations because the abused parent may be seen as weak and ‘ineffectual,’ and children may wish to align themselves with the ‘stronger,’ more powerful, abusive parent. An abusive spouse can be very manipulative and the denigration of the other parent may influence a child's relationship with a victim of abuse, or the abusive parent may coerce or threaten the children to express views favourable to himself.

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

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

However, a child's wishes can be an important factor favouring a parent who abused a partner, but appears to pose no risk of direct abuse to a child. On the other hand, if a child expresses a reluctance to see a parent who has been abusive, judges should not ignore the child's concerns and fears. Unfortunately, there are cases in which assessors and judges have given little weight to a child's understandable reluctance to visit a father who has abused their mother, dismissing the child's fears as being ‘transferred’ from the mother.³⁴⁵

Taken as a whole, the conclusions of parents and the findings of academic scholars, such as N. Bala quoted above, lend additional weight to an earlier comment about the need for highly trained, accessible independent evaluators and assessors, with specialized

³⁴⁵ N. Bala et. al., note 23.

knowledge of abuse and child welfare matters, able to illicit and evaluate the views of children in such cases and to advise lawyers, mediators, and judges on the best courses of action.³⁴⁶

The Joint Committee report, *For the Sake of the Children*, suggests a very different approach from that suggested in the Bala report, discussed above. That Joint Committee report states: ‘This Committee recommends that professionals who meet with children experiencing parental separation recognise that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention.’ Our data suggest the need for extreme caution and for thorough inquiry in these circumstances. When children wish to avoid contact in order to protect themselves from continuing conflict, continuing abuse, emotional neglect, irresponsible parenting, it would seem counterproductive to their children’s interests to employ therapists to encourage such contact. If, however, the Joint Committee recommendation is intended to suggest that therapists work with parents having difficulty with responsible parenting to help resolve those issues before attempts are made to establish maximum contact, then this report supports that recommendation. We endorse the recommendation of Bala et. al. that law ought to err on the side of caution with respect to the safety and wellbeing of children. More particularly, intensive intervention to encourage maximum contact and enforcement of access in partner-abuse cases should occur only when it is clear that:

- 1) each parents is able to establish a realistic plan for responsible parenting;
- 2) the children desire such contact and do not have fears, based on past or present conduct, that the parent seeking contact will harm them or the other parent;

³⁴⁶ See also P. Jaffe, notes 18, 21, 31, 58 and 82.

3) the parent seeking maximum contact has accepted responsibility for former abuse, has obtained treatment and is not using contact with the child to continue the conflict, to abuse or to control any family member; and

4) the contact is beneficial to the children and does not place any family member in emotional or physical jeopardy or danger. We agree with N. Bala that the primary goal in abuse cases ought to be designing parenting plans that give children the benefits of safety, security and responsible parenting. Only within those parameters should priority shift to the benefits of maximum involvement of both parents. In the absence of careful scrutiny of parenting responsibilities, assumptions about maximum contact may place children at risk and indeed may contribute to, rather than limit, the inter-generational transmission of domestic violence and abuse.

When, however, formerly abusive parents are able to overcome abusive and controlling behaviours and are able to demonstrate responsible parenting, children will benefit from more frequent, unsupervised contact and, or a shared parenting regime (provided that the parents are able to cooperate).

But parents report that they have little legal recourse, even when specified agreed or ordered contact is denied:

I think it was Boxing Day, it fell on my visiting weekend and I wasn't going to get them so I contacted the city police and they said there was nothing they could do about it, you have to get a hold of your lawyer and go to court, which takes 5-6 months.

Parents complained of the expense of hiring lawyers and of the futility of repeat applications to the courts to enforce access:

I think the court should take access seriously. They [ex partners] can deny you access time and time again - which she has done - and the courts have never reprimanded her or threatened her in any real way.

Delay was of particular concern. Participant comments suggest that delays are caused by systemic problems such as: limited access to experts, scheduling problems caused by unrealistic case loads in the family courts and, or priority being given to the needs and interests of professionals:

The initial court appearance was an interim court. It was getting up to Christmas and they [Court Social Workers] wanted to get us some access because we were having none. The mediations fell through and they wanted to get us some access for Christmas, so what he [the Judge] did was he said we will give you this build up, do anger management - both people - do parenting education and have a psychological analysis. By the time we got to court with another Judge- between the lawyers and the court dates - it was a six-month wait. By the time we got a decision it was over a year after that. That's much too long when children are young.

We went to court one day and her lawyer or somebody in her lawyer's family passed away and they said, 'We'll have to cancel court today.' It is not a good thing that somebody dies but now I have to wait another two months to see my children because somebody died. There should have been somebody else to cover. They could come in and say: 'Any reason why this man can't see his children? Well no not really: Has he beat them? No. Has he abused them? No. Does he look after them? Yes. Well alright.' Not put it off another two months down the road. Meanwhile your children are suffering because of other people's circumstances.

And, as mentioned earlier, jurisdictional issues make matters worse:

The access agreement said I was to have access one week at Christmas, alternate Spring breaks and one full month in the summer. At that time, I had not had access for over a year. So the judge ordered that I put the child support in an account in her name and hold it there and continue to put it there until I received access. I flew up one time and got her and flew back with her. The next summer, we drove to Alberta and I saw her for about an hour before my ex wife dragged her away. It's the distance in a way, because any court order issued here, has no strength in Alberta. She can absolutely ignore it and short of me getting a lawyer in Alberta and getting a judgement there, there's no way that the court decision here in New Brunswick has any weight. I have not seen my daughter in five years. I can't afford to go to court every single year to have a judge order that I can put the child support into an account until I get access. I don't keep in contact with her now.

By the time legal proceedings to assess access disputes are scheduled, heard and decided, the passage of time makes remedies meaningless for children and their non-custodial parents: birthdays, holidays or scheduled events are over, never to be replaced. Repeat applications become futile and, in some cases, non-custodial parents have no option other than to abandon contact.

Yet current methods used to enforce access are controversial – and questionable - from the point of view of the needs and interests of children. Police intervention to enforce access may seem appropriate when access is viewed as a right; it seems less so, when considered from the perspective of the child. We might contrast, for example, the first two parents, whose behaviors, as recited here, suggest a focus on parental rights, with the perspective of the third father reported below, whose discourse indicates a primary concern for the children:

Even when the children were crying to the police officer, 'please don't take us!' the police officer said, 'this man has a legal right!' My ex husband had the paper in his hand so that he could wave it at the police and say, 'This is what I've got; take these children!'

It's a very difficult emotional situation because, as the children were being dragged by the police to his truck, my ex husband was standing at the bottom of the driveway in his uniform applauding.

What do I do? I can go to the police station but like the mediator said, 'What are you going to do, go to the police?' She doesn't have to let those kids go, if she doesn't want to. So what are you going to do, get the police to go up and handcuff the mother and take her away with the kids all standing there screaming and crying? You're not going to do that. So you get back in your car and go home.

Although researchers elsewhere are reporting findings that court applications to enforce contact are commonly, upon investigation, found to be without merit, and that: many denial of contact claims are pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact,³⁴⁷ and although this study indicates that automatic enforcement, and police intervention, particularly in the absence of careful scrutiny of abuse matters, parenting practices and the perspectives of children, can place children at risk, it would be unfair, in our view, to suggest that all such claims are unfounded. Clearly, there is a need for some sort of process to hear and resolve access disputes about responsible parenting quickly – in order to reduce children's exposure to unresolved conflicts and promote the health and welfare

³⁴⁷ Rhoades, Graycar and Harrison (1999) (2000), note 3.

of children. Otherwise, children may be denied contact with parents who are responsible and caring, to their detriment.

Yet courts do not seem to be the answer; they are overburdened now. Moreover, many access disputes are not serious matters affecting anyone's health or safety:

I think there should be something, instead of always having to go see a judge about problems, why can't you have a mediator only that they have a bit of power. For example, my job at work has changed and I am going to have every second weekend off now, instead of Monday to Wednesday. Why can't I go to a mediator [this father is describing arbitration, not mediation] and tell them my schedule has changed at work? I know if I go to my former partner, she will say: 'Too bad!' But why can't you go in and just state your case? Obviously the mediator is going to say, 'well your schedule is changed at work; you don't want him to have his access while he's working.' I think that would be a much simpler way of dealing with a simple problem. There is no reason why a judge should have to get involved with something like that.

We are mindful too of earlier comments and findings - with respect to the use of litigation to retain contact, to harass and, or maintain control in partner abuse cases. Perhaps an alternative, much like the one described by the father quoted above, might offer relief - to parents and courts. A shuttle negotiation/arbitration process (not requiring parents to attend together, with inbuilt procedural safety mechanisms) could limit the need for direct contact between former partners, yet offer a mechanism to resolve quickly denial of access matters. Since an arbitrator would not, necessarily, have authority to determine or change child custody or access agreements or orders, but authority only to attempt to help the parents resolve conflicts over pre-existing legal arrangements, there would be little need for hearing officers to have legal expertise. This might be an appropriate role for Court Social Workers, or for mental-health experts, with specialized knowledge of domestic abuse and child psychology. Subject to designing appropriate models and methods of collection, analysis and presentation, perhaps, in appropriate cases, children's views and perspectives could be considered in such proceedings. It would be necessary, however, to design procedures to protect vulnerable participants from opportunities for

continuing harassment, while providing an opportunity for safe, speedy resolution of legitimate complaints. Over time, patterns of attempted parent alienation, on the one hand, or irresponsible parenting, abuse, and harassment on the other, would become evident to properly trained experts³⁴⁸ hearing such matters. Hearing officers could refer parents back to lawyers and courts, with recommendations when warranted, for variations of original agreements or orders.

Not every parent who has abused a partner will continue to be abusive, will fail to parent responsibly and will continue to create conflict and exert control after separation.³⁴⁹ Undoubtedly some formerly abusive parents, who have adequate parenting skills and who offer responsible care, will be able to overcome such behaviors. This study suggests, however, that children are placed in jeopardy when it is presumed, without question or scrutiny, that, in the absence of child abuse, parents who have abused former partners will in fact offer responsible care.

F) Parents and Children - Conclusion and Discussion

Examined in this section were the perceptions of fathers and mothers of themselves and their children as the subjects of law. Generally, parents who participated in this study, both male and female, reported dissatisfaction with legal process, in terms of pressure to accept standard, generic settlements with respect to children. Fathers and mothers alike concluded that such pressures are the product of gender bias.

Is the legal system biased against mothers and fathers, men and women or are other explanations in order? Missing, from parents' interpretations of their legal experiences, are explanations grounded in social and economic influences operating upon and within the legal system. If, as suggested in Parts VI,

³⁴⁸ It would be important for panel members to have specialized knowledge in the fields of domestic abuse and child welfare.

³⁴⁹ J. Johnston (1994) note 64.

the interests of professionals and the dynamics of the legal system as a whole shape professional practices and thus parents' experiences in law, it is likely that parents' experiences are as much a product of adjustments by the legal system to social change and limited time and resources as they are a reflection of bias against either gender.

For example, in terms of social change, it is apparent that, historically, law (legal rules and principles in family law matters) has tended to reflect, even reinforce, evolving conceptions of gender and family that have dominated the social order from time to time.³⁵⁰ Similarly, when offering legal services in practice, lawyers are guided, in part, by evolving legal conceptions of gender and family and, in part, by their own personal, social and professional experiences and 'knowledge' of the social parenting practices of men and women.³⁵¹ Dominant social practices, or at least professional perceptions of those practices, will thus influence law, both in theory and in practice. Consequently, legal decisions collectively will tend to reflect dominant legal perceptions of social practices by gender. If the dominant perception is that it is predominantly mothers who assume social responsibility for children, both before and after separation, we can expect this social 'fact' to be reflected, if not in the individual case, then in legal decisions about custody and access more generally. And indeed this seems to be the case now.

Social demands placed on the legal system and the allocation of resources to meet those demands will also influence family law although, perhaps, more in practice than in theory.³⁵² The legal system, lawyers, mediators and judges are being called upon to respond to ever-increasing numbers of family law cases with finite professional and legal resources. Lawyers report high caseloads and falling revenues. When families, themselves, do not have access to resources, some professionals seem to be responding, in practice, by abandoning or neglecting individual, partisan advocacy in law and individual facilitation in mediation and adopting instead settlement practices designed to produce quickly large numbers of 'good enough' settlements within a range considered adequate or acceptable for 'average' mothers and 'average' fathers.

³⁵⁰ Neilson, L. (1997) note 1.

³⁵¹ See also: Rhoades, Graycar and Harrison (1999) note 3.

³⁵² Presumably, long-term adjustments to social demands in the face of limited resources will begin to affect law in theory as well as in practice. Perhaps this is one of the reasons the legal system currently is searching for new settlement paradigms. See: Canadian Bar Association, Civil Justice, note 289.

Such settlement practices may allow the legal system to function, but at a cost. Taken together the two trends – first, the legal system’s reflection of social beliefs and practices in terms of gender and parenting and second, the systems’ abandonment of individual advocacy and scrutiny - operate to the disadvantage of parents, both men and women, whose circumstances or childcare practices fall outside the social norm. Thus fathers, who assume primary or equal responsibility for children, are confronted by pressures to accept settlements considered acceptable for ‘fathers’; mothers (and less often men) victimized by partner abuse as well as parents concerned about partners with inadequate parenting skills experience pressure to abandon claims and restrictions outside the norm for the average family, the average child. It is likely that, in partner abuse cases, such practices are the product, in part, of limited legal understandings of the social dynamics of abuse and the connections between partner abuse and irresponsible parenting. It seems that partner and family abuse cases have yet to acquire separate socio-legal status in law. Thus, lawyers and mediators tend to ‘process’ these cases in accordance with norms for family law cases generally, rather than in accordance with legal norms for partner abuse cases specifically. The result is legal system responses that appear to be discriminatory, unfair and seemingly biased in the individual case. Theoretically, these sorts of discriminatory practices should not find reflection in law as law purports to offer justice in the circumstances of the individual case.

Theoretically, such practices should not find reflection in mediation either, since mediation purports to offer facilitated, conflict-resolution generated by reconciliation of individual needs and interests. Yet such practices were reported part of both processes, in practice. When attempts are made to meet the needs of the legal system, through settlement, the result is replacement of individual with average justice. This may be reasonably equitable for average families but may result in inequitable consequences for vulnerable or unusual families. Vulnerable parents and children are not average parents and children; vulnerable families both value and require many of the protections offered by law in theory: partisan support and scrutiny of the circumstances of the individual case - as do parents and children, whose social practices fall outside ‘average’ social norms. Children suffer the consequences. Parents are reporting that children are being required to comply with standard, average access arrangements. The consequences are that law is subjecting children, already damaged by abuse between parents, to: continuing exposure to high

levels of conflict, abuse, neglect, danger, criminal lifestyles and inadequate parenting in partner abuse cases. Children's interests and needs are thus sacrificed for legal expediency.

PART IX

DISCUSSION AND RECOMMENDATIONS

A) Introduction

Despite years of professional, academic, public education and discussion about family abuse and its dangers for women and children, little seems to have changed for the better in the legal system, in practice. Indeed the weight of the evidence suggests that the dangers for children are increasing with increasing politicisation of rights claims associated with parenting. While, theoretically, reported cases suggest increasing awareness among, at least some judges, of partner abuse and the implications for children, closer examination reveals that such understandings are not being mirrored in legal praxis. We found limited, albeit some, evidence of gender bias or discrimination in child custody and access cases and much evidence that responsible parenting during access visits is more an exception than a rule in partner abuse cases. Custodial parents are reporting that their children are being harmed by maximum contact orders and agreements; they ask for a mechanism to protect their children, and the children of others, from further harm.

B) Lawyers Respond to Bala et. al. Recommendations

Discussion of suggestions and possible solutions generated by this study, follows a discussion here of lawyers' responses to selected recommendations proposed by N. Bala³⁵³ in connection with legal cases involving spousal abuse and children. Specifically,

³⁵³ See note 23. Limited space and concerns specific to New Brunswick necessitated slight modifications of some of the recommendations. The source of the original set of recommendations was indicated on the questionnaire.

lawyers were asked to indicate agreement, disagreement or neutral response to the following proposals and were invited to add additional comments.

a - legislation should require judges to take into account abuse between parents when making child custody and access decisions

b - the safety of abused parents and children should be the paramount concern in law (should have more importance than a child's continuing relationship with both parents)

c - there should be a presumption against awarding full or joint custody of children to parents who have abused their former partners

d - the friendly parent presumption should not apply in cases where there has been domestic abuse or violence

e - legislation should allow a court to order treatment or counselling as a condition of access

f - explicitly, legislation should recognize continuing domestic violence or abuse as a circumstance justifying a change in a custody or access order

g - legislation should provide explicitly for expeditious granting of interim custody and access orders in cases of domestic abuse and violence

h - governments should create and fund safe facilities where parents can exchange their children and where access can be supervised

i - court staff and family court judges should have more specialized training on the dynamics of family violence and abuse

j - practicing lawyers should have more specialized training on the dynamics of family violence and abuse

Lawyers were also asked the following open-ended question: If you could make three changes in New Brunswick that would be of benefit family members in abuse situations, what would you propose?

As indicated at the beginning of this report, the response rate among lawyers was low. Consequently, comments and responses discussed here should be considered tentative - in terms of generalization.

The three changes or wishes proposed most often by lawyers responding to the survey were, in order of frequency: courts should become more receptive to denial of access in partner abuse cases; judges, lawyers and mediators should obtain more specialized education and knowledge of family abuse matters; and accessible supervised access centers should be created. Other suggestions mentioned frequently were (in order of frequency): judges should order therapy and counseling, increase the speed of judicial resolution and increase funding for civil legal aid. One lawyer commented:

The no fault provisions in the Divorce Act tend to make the courts less patient with hearing evidence of spousal abuse and delegates the settlement of all issues to more of a financial settlement. Judges tend to be somewhat callous the longer they remain on the bench hearing this (abuse) type of evidence. I recommend more training for judges and lawyers.

Although a few lawyers offered comments suggesting lack of sensitivity to abuse issues:

Grant men the same legal help granted to women through domestic legal aid or eliminate violence as a basis for denial of access

Most lawyers, who offered additional comments, expressed concern for family members'

health and safety; some offered interesting suggestions:

Make abuse a ground to make an unequal division of marital assets; make abusers show beyond a reasonable doubt that he/she will not abuse again; create abuse as an offense in family law with mandatory counseling, educational sessions and no access until completed.

Change police policy toward domestic violence to force them to give effect to [civil] court orders. Create government funded access centers. Require judges to consider termination of access in cases where there is clear evidence of spousal or child abuse.

In terms of N. Bala's recommendations, items one to ten listed above, items c and d were the most controversial. More lawyers opposed (37) a legal presumption against awarding a parent, who had abused his partner, full or joint custody than supported (25) the presumption. Twelve lawyers indicated a neutral response. Although more lawyers (32) supported abandonment of 'friendly parent' assessments in partner-abuse cases than opposed abandonment (15), a large number (21) lawyers indicated a neutral response.³⁵⁴

It is not possible to assess, from questionnaire responses, the reasons for the difference of opinion. It is interesting to note, however, that the responses mirror legal practices disclosed in court files, particularly

³⁵⁴ The recommendations section was on the last page of the questionnaire. Some respondents, presumably because they ran out of time they could devote to the matter, did not complete the last page.

the relatively common practice, in New Brunswick, of abused parents signing consent orders or agreements, giving formerly abusive partners joint custody or full custody of the children.

All other recommendations were endorsed by a majority of respondents. Least controversial were items e, f and g: *legislation should allow a court to order treatment or counseling as a condition of access; explicitly, legislation should recognize continuing domestic violence or abuse as a circumstance justifying a change in a custody or access order; legislation should provide explicitly for expeditious granting of interim custody and access orders in cases of domestic abuse and violence.* Each was endorsed by over 85 percent of responding lawyers. The remaining recommendations were endorsed by more than 70 percent of lawyers.

The Spousal Abuse, Child Custody and Access study as a whole lends support to most of Nicholas Bala et. al. recommendations set out above, including the recommendations against awarding full or joint custody to abusive parents and in favour of abandoning ‘friendly parent’ assessments in partner abuse cases, albeit with a number of qualifications and additional recommendations discussed below.

C) Recommendations With Respect to Legislation

In response to *recommendation 1): that legislation should require judges to take into account abuse between parents in child custody and access decisions - the study endorses the need for such a change but only IF attention is devoted to collateral matters discussed below.* Legislative changes designed to respond to social problems often produce negative, unintended, unanticipated consequences. Perhaps, however, systemic analysis of the legal system, not only in theory but also in terms of how it operates in practice, may allow anticipation and thus prevention of such occurrences.

Legal principles and rules, including statutory provisions, affect but seemingly do not determine actual legal practices in abuse cases. Other factors, such as legal ideology; local legal practice; professional attitudes, relationships and practices also affect the operation and delivery of law. Thus these too will have to be addressed in order to produce intended results. This study makes clear incomplete understandings of partner abuse and its effects on children among lawyers, judges and mediators. Thus, as N. Bala suggests, if legislative changes are to operate as intended, 2) *specialized education on the dynamics of abuse and the implications of abuse for children* will be necessary for all professionals and judges handling such cases.

In the absence of such education, provisions requiring judges to consider partner abuse in child custody matters are apt to do more harm than good.³⁵⁵ Yet legislative change and education, while vital, are still insufficient if the goal is positive change in the legal system, since it is likely that legal ideology (rights based thinking) and legal settlement practices (pressures to accept compromise and generic family law settlements) will continue to operate in opposition to the intentions of legislative change. We turn to these matters now.

As previously mentioned, this study indicates the importance of abandoning rights-based thinking. Legal rights create polarization and deflect attention from thorough examination and scrutiny of the best interests of the children.³⁵⁶ Thus, not only is it important that judges consider partner abuse in child custody and access cases, it is also important that they assesses child issues ONLY in terms of the best interests of children and the responsibilities of parents to satisfy those interests and NOT in terms of rights. A discussion follows.

Legislators in England and in Australia attempted to shift attention from a focus on parental competition over the allocation of parental rights and powers to a focus on parental cooperation by abandoning the legal concepts ‘custody and access’ in favor of the concept of parental responsibilities. Yet researchers say that both have failed to achieve the desired result, particularly in partner abuse cases. Instead, it seems that that right-based thinking has prevailed; that the legislation has done little, in practice, to promote the mutual exercise of responsibilities of both parents. In practice, researchers in both countries report that, in matters of access or contact, the benefits of maximum contact are assumed with little scrutiny of parental responsibilities or children’s welfare. And researchers in both jurisdictions are reporting, as is this study, that the focus on parental or child rights (to contact) is placing children in jeopardy.³⁵⁷ Yet closer

³⁵⁵ Neilson (1997) and (2000) notes 1 and 6.

³⁵⁶ See also Rhoades, Graycar and Harrison (1999) and (2000) note 3

³⁵⁷ Smart and Neale note 307; Rhoades, Graycar and Harrison (1999) (2000) note 3; J. Dewar and S. Parker (1999) “The impact of the new Part V11 Family Law Act 19995” Australian Journal of Family Law

examination of both the English and Australian legislation reveals that rights have not been abandoned in the statutes at all; they remain central and key. More particularly, in England the *Children Act 1989*, replaced the concepts of custody and access with the concept of parental responsibilities yet defined responsibilities in terms of rights and powers. For example, section 3 states: ‘parental responsibilities means all the rights, duties, powers, responsibility and authority....’ Thus the statute continues to emphasize matters of parental power and control. Similarly, the *Family Law Reform Act, 1995* of Australia discusses the allocation of parental responsibilities, but lists as best interests of the child criteria: ‘the child’s right to know and be cared for by both parents’ and the child’s ‘right of contact, on a regular basis with both parents’ (Sections 60B(2)(a) and 60B(2)(b). Moreover, although both statutes, the first as a result of amendments to the *Children Act* by the *Family Law Act 1996* and the second within the *Family Law Reform Act, 1995*, discuss the need to protect children from psychological and physical harm, rights based thinking prevails. For example, the *Australia Family Law Reform Act, 1995*, s. 68(f) states specifically the need to protect the child from physical and psychological harm, caused by being subjected to abuse or by being directly or indirectly exposed to abuse, ill treatment, violence or other behavior. Section 68(t) states that a court may make, vary, revive, discharge or suspend an order under the Family Law Act authorizing or requiring contact. The purpose of this provision was to resolve inconsistencies between family violence orders and Family Law Act orders: specifically non-exposure to family abuse and the right of the child to have contact, on a regular basis, with both parents. Yet, as this study indicates, reconciliation of these matters is often not possible in partner abuse cases. Rhoades, Graycar and Harrison report that the result, in practice,

is that judges in Australia are giving priority to rights first and welfare second – the same approach found in this study in New Brunswick, Canada, in the face of very different legislation.³⁵⁸ Why?

An examination of law in practice provides some answers. First is that law in theory and law in practice are not necessarily the same or similar. It seems that, in practice, lawyers and judges respond to social attitudes and legal pressures operating at the social and local level as much as they do to legal rules and principles. Although Rhoades, Graycar and Harrison attribute findings concerning the practices of judges and lawyers in abuse cases to changes in Australian legislation, findings in New Brunswick mirror findings in Australia, despite very different legislation. Although speculative, the similarity of data suggest that both legal systems are responding, less to legal principles enshrined in statutes, than to non law issues, such as, at the macro level, social parenting practices by gender, political power struggles between men and women, and at the organizational level, to similar settlement practices of lawyers and judicial practices of judges in partner-abuse cases at the local level.³⁵⁹

Moreover this study indicates that lawyers and judges (and mediators) have a tendency to adopt ‘shortcuts’ to settlement. One such shortcut is offered by the concept of legal rights. Assessment and allocation of parental responsibilities and obligations takes time and detailed examination of parenting practices in individual cases. Legal decision-making on the basis of rights lacks complexity, takes fewer resources: it is simple and fast. For example, it much easier and less time-consuming to insist that all children have a right to see each parent at least once a week, than it is to examine and assess parenting practices with respect to the individual child in order to develop the best parenting arrangement, in the circumstances of his or her individual case. Similarly, there is less complexity involved in responding with enforcement to a claim that a parent was unable to obtain a child on a particular date set out in an agreement or order, than in examining, from the perspective of the best interests of the particular child, whether or not such contact would have been harmful or beneficial. Rights require merely a mechanical, technical response from law. All that is required is knowledge of the applicable right; there is no need for

³⁵⁸ Rhoades, Graycar and Harrison (1999) and (2000) note 3.

³⁵⁹ N. Sueffert (1996), note 14 reports settlement practices among lawyers in New Zealand, for example, that are very similar to those reported in this study. See also: Rhoades, Graycar and Harrison (2000) note 3.

complex analysis, rights are assumed to be beneficial. Since rights claims are faster, simpler, easier, this study, research in England and Australia mentioned above all suggest that, in the face of choice, the legal system, particularly an overburdened legal system, will gravitate to processing cases in accordance with generic rights rather than more time consuming, complex process of assessing the particulars of the individual case. Although beneficial, from the point of view of professionals and the legal system - in terms of an ability to handle large numbers of cases - individual children pay the price.

Consequently, unless rights-based thinking is abandoned and the settlement practices of lawyers are changed, legislative amendments and education alone will accomplish little.

*Thus recommendation 3) is to do away with the concepts of rights entirely in child matters in favor of family legislation that recognizes only children's best interests and parental obligations or responsibilities to respond or to satisfy those interests.*³⁶⁰

Forth, also in connection with legislation, is the importance of courts considering all factors affecting the needs and interests of children after separation and divorce. While maximum contact is important to children, it is important not to overlook other factors that affect the interests and well being of children. *4) All factors identified by researchers affecting children's best interests (such as freedom from abuse and conflict, health and welfare of the primary caregiver(s), responsible parenting, access to adequate financial resources) ought to be accorded legal status.*³⁶¹

The research makes clear the dangers to children of applying maximum contact provisions to partner abuse cases. *Thus this report endorses 5) N. Bala's recommendations that the friendly parent and maximum contact presumptions not apply in domestic abuse cases.*

³⁶⁰ We found that parents who concentrated on rights typically focused on their own needs and interests - to have equal time with the children, to have equal say in decision-making, to have more control over the expenditure of support - rather than on the needs and interests of children. Parents, however, who placed their children's interests first, tended to frame discussions in terms of responsibilities to and the needs and interests of children, rather than in terms of the rights. Rights battles concern parental power and control; fulfilling the needs and interests of children (as opposed to the needs of a parent) are not central to those debates. It is our belief that, in the absence of rights, a focus on best interests and parenting responsibilities might help to ensure that the needs and interests of children are given first priority.

³⁶¹ Although clearly other criteria, besides maximum contact may be considered now, in practice, because maximum contact is articulated specifically in the *Divorce Act* (and in provincial legislation), it is given priority over and sometimes operates to the exclusion of other factors, in practice.

Also in connection with legislation, this study suggests the importance of *creating a separate socio-legal category for assessment of family law cases involving partner abuse*. This is particularly important in the context of current legal settlement practices. At the moment lawyers attempt to resolve family law cases in accordance with norms for most families, for most parents, for most children. This study demonstrates the importance of lawyers settling partner abuse cases in accordance with the needs and interests of vulnerable families having experienced abuse, rather than in accordance with the needs and interests of ‘average’ families.³⁶² Consequently, *recommendation 6) is for partner abuse cases to be characterized and treated in legislation as a separate socio-legal family law category. A separate legal category might also prevent the inappropriate application of concepts such as ‘parent alienation’ to domestic abuse cases.*

One of the patterns observed in this study, and elsewhere, is an inordinate number of applications to courts in partner abuse cases. Researchers have documented a correlation between high family litigation rates and psychological damage to children. Thus another *recommendation 7) is the adoption of legislation directing judges to consider the possible need for orders prohibiting excessive numbers of applications to the court in partner abuse cases.*

For the sake of the health and safety of children, another suggestion is that the onus, in partner abuse cases, with respect to access or contact change. More specifically, *the recommendation 8) is that, once partner abuse³⁶³ (and or irresponsible parenting) is*

³⁶² It is, of course, questionable that an ‘average’ pre or post separation family exists as a social phenomenon

³⁶³ This recommendation is subject to the qualification that, if such provisions are operate equitably, it will be vital to provide specialized education to judges, lawyers and mediators on the dynamics and

established, the onus ought to be on the parent with primary responsibility for the abuse or irresponsible parenting to prove and demonstrate how contact can be made safe and beneficial for the children. Many survivors of abuse say that they want their children to have positive relationships with the other parent, but express despair at their inability to ensure their children's safety. Reversing the onus would provide tools to enable courts and parents to implement such protections.

Although, as previously mentioned, researchers claim that non-exercise of access is far more common than denial, it does occur and seems to be a legitimate concern in individual cases.

9) There is a need to establish non-face-to-face, conflict resolution processes to help parents resolve disputes about agreed or court-ordered access, without resort to the courts.

In addition to the recommendations discussed above, the study also endorses recommendations in the N. Bala report,³⁶⁴ with a few modifications, as follows:

10) - Safety of the abused parents and children should be a paramount concern.

11) - There should be a presumption that custody should not be awarded to the perpetrators of domestic abuse. This study suggests some degree of caution with respect to this provision. It will operate equitably only if lawyers, judges and mediators receive on-going, specialized education on contextual assessments of abuse, the social and inter-personal dynamics of abuse, and the implications of abuse for children. In the absence of such education, this type of legislative provision has the potential to create injustice, particularly in child abuse cases.³⁶⁵ This report endorses the Bala et. al. recommendation that such a presumption ought to be rebuttable, since there are important factors in addition to abuse that affect the interests and welfare of children.

consequences of abuse. In the absence of such education, legal assessments of abuse produce injustice. See L. Neilson (1997) and (2000) notes 1 and 6 for further discussion.

³⁶⁴ N. Bala et. al. note 23.

³⁶⁵ See L. Neilson (1997) and (2000) notes 1 and 6.

12) - *The 'friendly parent' presumption should not apply in cases where there has been domestic violence/abuse.*

13) - *Legislation should make explicit provision for supervised access and exchange.*

14) - *Legislation should allow a court to require perpetrators of domestic violence to undertake counselling or treatment as a condition of custody or access.*

15) - *Legislation should allow for non-disclosure of the abused spouse's residence.*

16) - *Legislation should recognize that family abuse and irresponsible parenting as well as domestic violence and abuse may justify a variation to a custody or access order. We agree with N. Bala et al. that legislation should specify that domestic violence perpetrated since the making of a custody or access order is a material change of circumstance often justifying a variation of an order but we do not believe that the original recommendation is comprehensive enough to deal with the problems uncovered during this study. Very few of the primary care-givers who participated in this study expressed primary concern for their own safety, they were far more concerned about damage and danger to their children, less in terms of physical abuse, although this was a factor in several cases. Parents were concerned about: emotional abuse, neglect, continued involvement of the children in conflict, irresponsible parenting, attempts at alignment, involvement of the children in the parental disputes, driving with and otherwise having unsupervised care of the children while incapacitated, exposing the children to inappropriate activities and lifestyles, exposing the children to abuse in new relationships. Thus our recommendation is that any and all factors affecting the welfare of children in such cases be recognized as justification for a variation in custody and access orders. And we suggest also that the term 'violence' be changed to 'abuse' since psychological damage is usually more important, in the long term, than physical damage.*

17) - Flight from the matrimonial home for fear of safety should not be a factor in custody and access disputes

18) - There should be a presumption against joint custody in cases of domestic violence. We also endorse the notion that joint custody is not in children's best interests when there has been a history of domestic abuse or where there is a high level of conflict, the parents are unable to co-operate on parenting issues or refrain from initiating continuing conflict.

19) - Courts should be allowed to set aside previous agreements consented to because of domestic abuse. Again, this study suggests that the Bala et. al. recommendation does not go far enough. Survivors of abuse report their own vulnerability to professional suggestion to accept agreements they do not believe to be in the best interests of their children, not so much as a consequence of direct threats from abusers, as much as a from lack of knowledge and the psychological need to escape from these relationships as quickly as possible. Our suggestion is that Courts be allowed to set aside agreements consented to as a result of vulnerabilities produced by abuse.

20) - Provincial and territorial legislation should provide for expeditious granting of interim custody and access orders in cases of domestic violence.

D) Legal Practice Issues:

Discussed in the previous section are proposed amendments to legal rules and principles. Yet changing legal rules and principles and legal ideology, changing law in theory, will produce positive changes only if accompanied by adjustments to law in practice. This study demonstrates that, in the face of scarce resources, legal processes discourage parents, particularly parents with few resources, from advancing evidence and claims outside the normal or 'usual'. All parents report pressure (financial and professional) to accept generic settlements considered 'good enough' or normal for most

fathers and mothers. Several suggestions to deal with these issues were suggested earlier: *offer specialized domestic abuse education and create a separate socio-legal category so that lawyers negotiate and help parents settle abuse cases in accordance with norms for vulnerable, abused families rather than in accordance with norms for families in general.* In connection with settlement, more generally, another suggestion is: *21) provide conflict resolution training to lawyers to enable them to replace settlement processes that depend of compromise and acceptance of generic solutions, criticized by clients throughout this study, with settlement processes that respect individual needs and interests, rights and entitlements.*

*22) Recognize that vulnerable parents unable to participate effectively in mediation and abusive parents unwilling to do so, require advocacy and partisan support from lawyers and judicial decisions from judges, not settlement. Retain and keep separate the practices of law and mediation.*³⁶⁶

The study also makes clear the importance of lawyers heeding Jane Murphy's advice in 'Lawyering for Social Change: The Power of Narrative in Domestic Violence Reform'³⁶⁷ of the *23) importance of lawyers presenting full, complete and detailed evidence of partner abuse and parenting practices to judges (whether judges want to listen to the evidence or not).* This study indicates that legal siphoning processes in abuse cases prevent judges from being able to assess the nature and implications for children of partner abuse, both in the individual case and, more generally, as a socio-legal phenomenon.

³⁶⁶ Certainly lawyers may offer mediation, but as a service separate and distinct from advocacy.

³⁶⁷ Hofstra Law Review (1993) 21: 1243.

Demonstrated also is a need for 24) *judicial education on the dynamics of partner abuse, both before and after separation, indicators of danger, and the implications of conflict and witnessing partner abuse for children.*

In terms of legal process, it is important too that 25) *judges, lawyers and mediators acquire an understanding of the importance of contextual assessments of abuse (considerations of the history of dynamics of relationship, including the patterns and severity of abusive behaviors and the psychological and physical consequences to the participants over time).*

26). *Create interview protocols and assessment tools to enable lawyers, mediators and judges to conduct contextual assessments of partner abuse.*

27). *Increase the number of family court judges to reduce caseloads and thus enable thorough scrutiny of the best interests of children and parenting responsibilities in partner abuse cases*³⁶⁸

This report endorses N. Bala's recommendation that: 28) *Cases involving domestic violence should have priority for legal aid representation* but adds another recommendation that 29) *federal domestic legal aid be developed to assist parents with family law matters that cross provincial boundaries.*

And this report endorses the N. Bala recommendation that: 30) *Legislation and programs dealing with domestic violence need to be monitored and evaluated* except that this report adds to that suggestion a recommendation that 31) *family courts implement some sort of 'follow-up' process to monitor, periodically, the effects on children of contact orders in partner abuse cases.*³⁶⁹

³⁶⁸ It is likely that the financial costs of responding to the inter-generational transmission of abuse, violence, conflict, mental health problems, child protection matters, far outweighs the costs of allocating additional resources to the legal system to enable judges to protect children in such cases.

³⁶⁹ Perhaps the use of interim orders with periodic review dates might allow judges to fine-tune contact orders periodically in accordance with children's interests and needs.

E) Collateral Issues:

(a) Experts:

Clearly demonstrated also is the need to 32) *increase the number and financial accessibility of experts with specialized knowledge of partner abuse and child welfare matters.*

33) *keep judges informed about acceptable professional standards of practice with respect to partner abuse and child custody evaluations, to enable them to distinguish thorough from incomplete or inadequate evaluations.*

(b) Mediation:

This report endorses the notion that legislation should place restrictions on the use of face-to-face, facilitated mediation, in partner abuse cases, in accordance with recommendations in the N. Bala Report, as follows, but with a number of additional comments and reservations.

N. Bala et. al. recommend that:

34) *Legislation should place restrictions on the use of mediation in cases of domestic violence.*

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

the victim is not subject to coercion, and is in a position to voluntarily choose mediation, and voluntarily requests mediation; and

the mediator has training in dealing with domestic violence, *and* adequate measures are in place to protect the safety and interests of the victim of domestic violence and the children.³⁷⁰

This report endorses this recommendation, except that the term mediation should be qualified by the terms ‘face-to-face’ and ‘facilitated’ to make clear the scope of the recommendation. In addition, such legislation ought to specify that:

35) *mediators are to use partner-abuse assessment screening tools, and*

³⁷⁰ N. Bala et. al., note 23, recommendation 11.

36) screening for appropriateness of mediation in cases involving past or present patterns of abusive behavior (psychological, emotional, sexual, financial, physical) must be conducted separately with each potential participant.

In connection with mediation practice, it is clear that 37) mediators require specialized education and training in the field of partner abuse and the effects on children of witnessing abuse.

We note also, however, that survivors of abuse and vulnerable families ought not to be denied freedom of choice or the right to chose settlement options offered by non-lawyers. Mediation-like, conflict-resolution processes that do not include or that limit contact and face-to-face negotiation between the parties, that offer support, protection and continuing evaluation may in fact be preferable, in many cases, to settlement services offered by lawyers in partner abuse cases. Indeed survivors of abuse not uncommonly recommended such processes:

I know they want to develop some sort of counseling for when people are getting divorced with kids, a settlement process before the legal process so that this is decided before you get into a court room because I don't necessarily think a court is a place to decide the child custody. Maybe there should be something for divorce that's mandatory that you have to attend so that you can iron out. OK let's leave the money part which is most people's problem, let the courts decide the money part, but when it comes to the kid part, let's mediate, let's negotiate, let's see how the kids interact with both.

While lawyers and mediators engage in raging debates about which process and which profession better protects women and children, an examination of practices of both, from the perspective of parents in partner abuse cases, reveals these debates to be theological and doctrinaire, grounded more in professional control interests than in the lived legal realities of men, women and children in partner abuse cases. It seems to us that lawyers, judges and mediators, all professionals, could offer improved services in partner abuse cases. Resources ought to be devoted to creating and implementing improvements for all professionals, rather than to debating professional control issues.

Consequently, we recommend:

38) *a national consultation process, research and evaluation with a view to designing safe, effective, appropriate settlement procedures and models for use by lawyers and by mediators in partner abuse cases;*

(c) Supervised Access:

This report endorses N. Bala et. al. recommendation that 39) *Provincial and territorial governments should provide programs for supervision of access and exchange.*³⁷¹ Lawyers endorsed the recommendation as did a number of parents.

(d) Victim Witness Programs

Earlier it was mentioned that participants reported not having presented full particulars of partner abuse and or the circumstances of their children to judges - because they were frightened and intimidated by court proceedings, because they did not feel properly prepared, or because they were not asked the right questions by lawyers. Thus another recommendation is 40) *that victim witness programs be extended to family law proceedings.*

(e) Counselling and Treatment Programs:

This report endorses N. Bala et. al recommendation that: 41) *The importance of treatment and counselling programs should be recognized in provincial and territorial legislation.* This notion was endorsed very highly by lawyers. Parents participating in this study were particularly concerned about the lack of therapeutic assistance for children who have witnessed partner abuse:

It was crazy trying to find somebody to help the kids. I went through one agency. They had a little program, which was fairly good, helped with learning about alcoholism that sort of thing, but it didn't actually deal with their emotional problems. About two years we separated, my son was throwing temper tantrums and stomping his feet and shoving me. So I finally found a counselor for the children and then spent two years running with them to another city for sessions. It took a long, long time but it helped. It made a big difference, but it was a delayed reaction, because until then he had no help other than me. There is a need for counseling assistance for kids from abusive families [so that the children do not become abusive themselves] So far as children, who have witnessed their father attacking their mother, there is

³⁷¹ N. Bala, note 23, recommendation 21.

absolutely nothing that is specifically for children of domestic violence. And of course it does affect them. One of the things I was worrying about is that children, particularly girls, might be susceptible to being attracted to those kinds of guys.

One would hope that counseling for children from abusive homes will become a priority. Clearly demonstrated too in the need for therapeutic crisis intervention services to assist parents having difficulty adapting to separation or divorce and thus engaging in continuing harassment, stalking, death threats or threatening suicide.

(e) Parent Education:

One of the dangers of parent education programs is that lawyers, judges, mediators may use these programs as another 'short cut' to resolution: there is a danger that such programs will encourage judges, mediators, lawyers to endorse agreements or grant orders in partner abuse cases, subject to completion of parent education programs, that are inappropriate or unsafe for children. Such orders and agreements will merely add to existing problems for vulnerable children. Children from abusive homes require judges, lawyers and mediators to scrutinize and assess fully the circumstances of abuse and parenting practices and to give first priority to children's safety and welfare. It is extremely unlikely that short-term parent education programs alone would have protected children from most of the situations described in this study.

Yet parent education programs may offer a great deal of assistance in non-partner abuse cases, and, or when each parent offers responsible care and the abuse with attempts to control the other parent have stopped. And parent education programs have potential to offer assistance to survivors of abuse seeking help with their own parenting skills:

They say women fall into these relationships with abusive men because of what happened in their childhood with their own fathers: if the father was abusive, it's carried over. My father was a very harsh person, he never beat us or anything. I was terrified of him and I was resentful of the way he would yell and holler and just the way he treated us. So, when you have relationships, I think it has to do with how you were brought up. We need programs to help people overcome things they were not taught. It is so unfair, people who have been abused are also the people who get abused again. It goes on and on down through the generations. I know I'm a hollerer: I holler at my son. I don't believe he is abused in any way, but I will holler at him, because that is the way we learned. It's hard to overcome. My parenting skills too, are not what they should be. I need to learn positive parenting skills and I have taken courses, but you

have to change your mindset. We take these courses and then we are right back into our old routine. Maybe if there were parenting education courses that were ongoing, so that when you need a refresher, you can go back, it's not just stopped.

Thus, in our view, it is important to 42) *endorse parent education in partner abuse cases with caution and to heed this mother's recommendation for on-going parenting assistance for survivors of abuse.*

(f) Research and Monitoring

Certainly this report endorses the N. Bala et. al. recommendation that: 43) *Further research is needed on the effects on children of various custody and access arrangements in cases of spousal violence.*³⁷²

And we add a recommendation for 44) *Continuing Assessment and Follow Up in partner abuse cases after court proceedings to enable judges to assess the effects of judicial orders:*

I guess that on a periodic basis, it would help if people, for instance enforcement officer or mediator, periodically, would contact you. I realize they have cases and cases, but periodically - say every 6 months or once a year – just call and ask, 'Have things changed?' I don't assume that I was so important that I would take precedence over anyone, but it is just that I'd like to feel as if I have any importance at all.

F) Recommendations Specific to the Province of New Brunswick:

Finally we mention here several recommendations that are specific to New Brunswick:

45) offer specialized education and training for mediators on abuse matters;

46) enforce existing Domestic Legal Aid Policies prohibiting Court Social Workers from conducting face to face 'mediation' in abuse cases;

47) insist on the use of abuse interview protocols and screening assessments,
and

³⁷² N. Bala et. al. note 23, recommendation 23.

48) assess and monitor, periodically, Court Social Worker mediation and settlement option practices, police and family solicitor practices in partner abuse cases, to assess both consumer satisfaction and compliance with government policies

49) assess and monitor, periodically, client perceptions of court-connected mediation services;

50) modify the Domestic Legal Aid program to include family solicitor services for repeat clients.

51) create a non-court, non face-to-face settlement process to hear access disputes.

References

- Abarbanel, A. "Shared Parenting after separation and Divorce: A Study of Joint Custody" (1979) 4:2 American Journal of Orthopsychiatry 320-329.
- Ahrons, C. "The continuing coparental relationship between divorced spouses" (1981) 51(3) American Journal of Orthopsychiatry 415-428.
- American Bar Association, ABA Commission on Domestic Violence, "Multidisciplinary Responses to Domestic Violence" at <http://www.abanet.org/domviol/mrdv/identify.html>
- Australian Law Reform Commission Report No. 69, Part 1 Equality before the Law: Justice for Women (1994).
- Bailey, M. and Bala, N. "Reforming the Definitions of Spouse and Child Related Laws" in A. Bainham (ed.) The International Survey of Family Law 2000 Edition (Bristol: Family Law) 69-76.
- Bailey, M. and Giroux, M. Relocation of Custodial Parents Final Report (Status of Women Canada March 1998).
- Bala, N. et. al. (1998) Spousal Violence in Custody and Access Disputes: Recommendations for Reform (Ottawa: Status of Women).
- Bala, N. (1999) "A Report From Canada's Gender War Zone: Reforming the Child related Provisions of the Divorce Act" <http://www.familylawcentre.com/ccbaladivpap.html>
- Bancroft, R. Lundy (1996) "Understanding The Batterer in Custody and Visitation Disputes" Available from Resource Centre on Domestic Violence: (800) 527-3223.
- Beaman-Hall, L. "Abused Women and Legal Discourse: The Exclusionary Power of Legal Method" Canadian Journal of Law and Society 1996 11(1): 125-140.
- Bertoia, C. (1998) "An Interpretive Analysis of Mediation Rhetoric of Father's Rights: Privatization versus personalization" Mediation Quarterly Vol. 16.
- Bertoia, C. and J. Drakich "The Fathers' Rights Movement: Contradiction in Rhetoric and Practice" (1993) 14 (4) *Journal of Family Issues* 592.
- Bishop, S. and Ingersoll, G. "Effects of marital Conflict and Family Structure on the Self Concept of Pre- and Early Adolescents". Journal of Youth and Adolescence (1989) 18 (1): 25-38.
- Black, D. G. Sociological Justice (New York: Oxford University Press 1989).

- Bottomley, A. "What is Happening to Family Law? A Feminist Critique of Conciliation" in J. Brophy and C. Smart (eds.) Women in Law: Exploration in Law, Family and Sexuality (London: Rutledge and Kegan Paul 1985).
- Bowman, M. E. and Ahrons, C. R. "Impact of legal custody on father's parenting post divorce" (1985) 47 Journal of Marriage and the Family 481-8.
- Boyd, S. (2000) "Can Child Custody Law Move Beyond the Politics of Gender?" University of New Brunswick Law Journal.
- Boyle, C. "A Feminist Approach to Criminal Law Defences" and M. Eberts "New Facts for Old: Observations of the Judicial Process" in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery 1991).
- Brooks, N. "The Judge and the Adversary System" in Carleton Department of Law Introduction to Legal Studies (North York: Captus, 1991) 214-226.
- Bruch, C. S. "Parenting at and after divorce: A search for new models" (1981) 79:1-4 Michigan Law Review 708-727.
- Buchanan, C., Maccoby, E. and Dornbusch, S. "Caught Between Parents: Adolescents: Experience in Divorced Homes" (1991) 26 Child Development 1008-1029.
- Buehler, C. and Trotter, B. B. (1990) "Nonresidential and Residential Parent's Perceptions of the Former Spouse Relationship and Children's Social Competence Following Marital Separation: Theory and Programmed Intervention" Family Relations 39 (4): 395-404
- Bumiller, K. "Fallen Angels: The Representation of Violence Against Women in Legal Culture" (1990) 18 Int'l J. Soc. L. 125.
- Busch, R. and Robertson, N. (2000) "Innovative Approaches to Child Custody and Domestic Violence in New Zealand: The Effects of Law Reform on the Discourses of Battering" in R. Geffner, P. Jaffe and M. Sudermann (eds.) Children Exposed To Domestic Violence (New York: Haworth Press 2000) 269-299.
- Cahn, N. (1991) "Civil Images of battered Women: The Impact of Domestic Violence on Child Custody Decisions" 44 Vand. L. Rev. 1041-1097.
- Canadian Bar Association, Joint Multi-disciplinary Committee on Legal Education, chaired by Moira McConnell (2000) Attitudes Skills Knowledge Recommendation for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century (Canadian Bar Association web site).
- Canadian Centre for Justice Statistics. Family Violence in Canada: A Statistical Profile 2000 (Ottawa: Statistics Canada) publicly available on the web without charge at WWW.Statcan.ca

- Carlson, B. E. "Adolescent Observers of Marital Violence" (1990) 5(4) Journal of Violence 285-99.
- Cartwright, G. F. "Expanding the parameters of parental alienation syndrome" American Journal of Family therapy, 21 (3): 205-215.
- Chesler, P. *Mothers on Trial: The Battle for Children and Custody* (Toronto: McGraw-Hill, 1991).
- Chesler, P. "Mothers on Trial: The Custodial Vulnerability of Women" (1991) 1 (3) *Feminism and Psychology* 409.
- Clawar, S. and Rivlin, B. (1991) Children Held Hostage (Chicago: American Bar Association).
- Conklin, W. "A Contract" in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery: 1991).
- Danmall, D. Divorce Casualties: Protecting Your Children From Parental Alienation (1998 Taylor Publishing), "The Debate page"
<http://www/parentalalienation.org/debatepage.htm>
- Davidson, R. (1994) Report of inquiry into family court proceedings involving Christine Madeline Bristol and Alan Robert Bristol (Auckland, New Zealand: Minister of Justice).
- Davies, B. and S. Ralph (1988) "Client and Counsellor Perceptions of the Process and Outcomes of Family Court Counselling in Cases Involving Domestic Violence" Family and Conciliation Courts Review 36(2): 227-245.
- Davies, B. and S. Ralph et. al. "A Study of Client Satisfaction With Family Court Counselling in Cases Involving Domestic Violence" Family and Conciliation Courts Review (1995) 33(3): 324-341.
- Davis, G. Partisans and Mediators (Oxford: Clarendon, 1988)
- Davis, G., Cretney S. and Collins, J. Simple Quarrels (Oxford: Clarendon 1994).
- Davis, L. and Carlson, B. "Observation of Spouse Abuse. What Happens to the Children?" (1987) 2(3) Journal of Interpersonal Violence 278-91.
- DeKeseredy, W. Four Variations of Family Violence: A review of the Sociological Research (Ottawa: Health Canada, National Clearinghouse on Family Violence, 1993).
- DeKeseredy, W. "In Defense of self-defense. Demystifying Female Violence Against Male Intimates" in R. Hinch (ed.) Crosscurrent Debates in Canadian Society (Scarborough, Ont.: Nelson, 1992).

- Department of Justice, Custody and Access: Public Discussion Paper (Ottawa: Minister of Justice, 1993).
- Department of Justice, Law Courts Education Society Domestic Violence and the Courts: Immigrant and Visible Minority Women full text is available on the internet: <http://www.acjnet.org/docs>.
- Dewar, J. and S. Parker "The Impact of the new Part VII Family Law Act 1995" (1999) 13 Australian Journal of Family Law 96.
- Dobash, R. Dobash, E. E. Wilson, M. and Daly, M. "The Myth of Sexual Symmetry in Marital Violence," (1992) 39 Social Problems, 71-91.
- Dobash, R. Dobash, R., Cavanagh, K. and Lewis, R. (1998) "Separate and intersecting realities: a comparison of men's and women's accounts of violence against women". Violence Against Women 4(4): 382-414.
- Doob, A. "Understanding the Attacks on Statistics Canada's Violence Against Women Survey" in M. Valverde et. al. Wife Assault and the Canadian Criminal Justice System (Toronto: University of Toronto 1995).
- Dronkers, J. "The Effects of Parental Conflicts and Divorce on Average Well-being of Pupils in Secondary Education". Paper. American Sociological Association 1996.
- Drumbl, M. A. "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform" in N. Larsen and B. Burtch Law in Society Canadian Readings (Toronto: Harcourt Brace 1999).
- Dutton, D. "Witnessing Parental Violence as a Traumatic Experience Shaping the Abusive Personality" in R. Geffner, P. Jaffe and M. Sudermann (eds.) Children Exposed To Domestic Violence (New York: Haworth Press 2000) 59-67.
- Dutton, D. and K. Hemphill (1992) "Patterns of socially desirable responding among perpetrators and victims of wife assault" Violence and Victims 7(1): 29-39.
- Dutton, M. A. as edited by M. Gordon, "Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women" in National Institute of Justice The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials (U.S. Department of Health and Human Services, May 1996).
- Edleson, J. "Mothers and Children: Understanding the Links between Woman Battering and Child Abuse" (1995) <http://www.mincava.umn.edu/papers/nij.htm>.
- Eichler, M. (1997). Family Shifts: Families, Policies, and Gender Equality. Toronto: Oxford University Press.

- Ellis, D. (1994) Family Mediation Project Final Report (Oakville, Ontario, July 1994).
- Ellis, D. (2000) "Assessment Screening For Violence and Power Imbalances: A New Millennium Model" Resolve Summer/Fall 2000 (Kitchener, Ontario: Family Mediation Canada).
- Ellis, D. "Marital Conflict Mediation and Post-Separation Wife Abuse" (1990) 8 Law and Inequality 317
- Ellis, D. "Theorizing Power in Divorce Negotiations: Implications for Practice" Mediation Quarterly (1998): 1-23.
- Ellis, D. and N. Stuckless. Mediating and Negotiating Conflict (Thousand Oakes, California: Sage, 1996).
- Emery, R. Marriage, Divorce and Children's Adjustment (London: Sage, 1987)
- Emery, R. "Interparental Conflict and the Children of Discord and Divorce" (1982) 92:2 Psychological Bulletin 310-30.
- English, P. and Neilson, L in collaboration with Wendy Hacking (1999) Family Mediation Canada National Certification Implementation Pilot Project Report 1997-1999 for Department of Justice, Canada (Kitchener, Family Mediation Canada, (June 1999).
- Erlanger, H., Chambliss E. and M. Melli, "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context" (1987) 21:4 Law and Society Review 585ff.
- Family Violence Prevention Division, Health Canada Breaking the Links Between Poverty and Violence Against Women (Ottawa: Health Canada, 1996).
- Fantuzzo, J. and Lindquist, C. "The Effects of Observing Conjugal Violence on Children: A Review and Analysis of Research Methodology" (1989) 4:1 Journal of Family Violence 77-94.
- Felstiner, W. and A. Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" Cornell Law Review (1992) 77: 1447.
- Felstiner, W. and Sarat, A. "Negotiation between Lawyer and Client in an American Divorce" in R. Dingwall and J. Eekelaar (eds.) Divorce Mediation and the Legal Process (Oxford: Oxford University, 1988).
- Forstrom-Cohen, B. and Rosenbaum, A. "The Effects of Parental Marital Violence on Young Adults: An Exploratory Investigation" Journal of Marriage and the Family, p. 467-72.
- Freiler, C. and Cerny, J. Benefiting Canada's Children: Perspectives on Gender and Social Responsibility (Ottawa: Status of Women Canada, 1998).

- Furstenberg, F. F. et. al. "Parental Participation and Children's Well-being After Marital Dissolution" (1987), 52 Am. Sociological Rev. 695
- Furstenberg, F. F. and Cherlin, A. J. Divided Families (Cambridge: Harvard University Press 1991).
- Gardner, R. (1998) The Parental Alienation Syndrome 2nd ed. (Cresskill, NJ: Creative Therapeutics).
- Gardner, R. (1999) "Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect" American Journal of Family Therapy 27(2): 97-107.
- Goldstein, J. Freud, A. and Solnit, A. Beyond the Best Interests of the Child (New York: Free Press 1979).
- Goundry, S. et. al. Report on Court-Related Harassment and Family Law "Justice" (Ottawa: National Association of Women and the Law, 1998)
- Goundry, S., Peters, Y. and R. Currie *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998)
- Grandin, E. Lupri, E. and Brinkerhoff, M. (1997) "Couple Violence and psychological distress" Canadian Journal of Public Health 88 (6).
- Grief, J. B. "Fathers, children and joint custody" (1979) 49:2 American Journal of Orthopsychiatry 311-19.
- Grych, J. and Fincham, F. "Interventions for Children of Divorce: toward Greater Integration of Research and Action". Psychological Bulletin (1992) 111(3): 434-54.
- Gulliver, P. H. Disputes and Negotiations: A Cross Cultural Perspective (New York: Academic Press, 1979) p. 223.
- Healy, J. Malley, J. and A. Stewart. "Factors Related to the Social Competence of Children in Single Parent Families". American Journal of Orthopsychiatry (1990) 60 (4): 531-543.
- Hess, R. D. and Camara, K. "Post-divorce family relationships as mediating factors on the consequences of divorce for children" (1979) 35:4 Journal of Social Issues 79-96.
- Hetherington, A., Cox E. and Cox, R. "Divorced fathers" (1976) 25 Family Coordinator 417-248.
- Hetherington, A. Cox, M. and Cox, R. "Family Interaction and the Social, Emotional, and cognitive development of children following divorce" in V. Vaughan and T. Brazelton, (eds.) The Family: Setting Priorities (New York: Science and Medicine Publishers, 1979)
- Howe, A. "The Problem of Privatized Injuries: Feminist Strategies For Litigation" in (1990) Studies in Law, Politics and Society 10: 119-142.

- Ifeld, F., Ifeld H. and Alexander Jr., J. "Does Joint Custody Work? A First Look at outcome data of relitigation" (1982) 139:1 American Journal of Psychiatry 62-6.
- Ingleby, R. Solicitors and Divorce (Oxford: Oxford University, 1992).
- Isaacs, M. B. "The visitation schedule and child adjustment: A three-year study" (1988) 27 Family Process 251-256;
- Jacob, Sir Robin, Judge of the Chancery Division, "Standing Alone" Standing Alone Case Notes, Criminal Courts Review Newsletter (Spring 2000) 1.
- Jacobs, M. "Requiring Battered Women To Die: Murder Liability For Mothers Under Failure to Protect Statutes" Journal of Criminal Law and Criminology (Winter 1998) 88 (2): 579-661.
- Jacobson G. and Jacobson, D. "Impact of Marital Dissolution on Adults and Children: The Significance of Loss and Continuity" in J. Bloom-Feshback and S. Bloom-Feshback (eds.) The Psychology of Separation and Loss (San Francisco: Jossey-Bass, 1987).
- Jaffe, P. and Austin, G. (1995) "The Impact of Witnessing Violence on Children in Custody and Visitation Disputes". Paper presented at the 4th International Family Violence Research Conference, Durham, NH.
- Jaffe, P. Wolfe, D. and Wilson, S. Children of Battered Women (London: Sage 1990).
- Jaffe, P., Wolfe, D., Wilson S. and Sluszarck, M. "Similarities in behavioral and social maladjustment among child victims and witnesses to family violence" (1985) 56 American Journal of Orthopsychiatry 142-146.
- Johnson, H. Dangerous Domains Violence Against Women in Canada. (Toronto: Nelson, 1996).
- Johnson, H. "Response to Allegation About The Violence Against Women Survey" in M. Valverde et. al. Wife Assault and the Canadian Criminal Justice System (Toronto: University of Toronto 1995)
- Johnston, J. "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1994) 3:2 Family Mediation 11.
- Johnston, J., Campbell L. and Ayes, S. "Latency Children in Post-separation and Divorce Disputes. Journal of the American Academy of Child Psychiatry (1985) 24(5): 563-574
- Johnston, J. Gonzalez, R. and Campbell, L. "Ongoing postdivorce conflict and child disturbance" (1987) 15:4 Journal of Abnormal Child Psychology 493-509.
- Johnston, J., Kline M. and Tschann, J. (1989), "Ongoing postdivorce conflict: Effects on children

of joint custody and frequent access" in American Journal of Orthopsychiatry 59(4): 576-592.

Johnston, J. R., and V. Roseby. 1997. In the name of the child: A developmental approach to understanding and helping children of conflicted and violent divorce. (New York: Free Press).

Kelly, J. "Examining resistance to joint custody" in J. Folberg (ed.) Joint Custody and Shared Parenting (New York: Guilford, 1991).

Kelly, J. "Current Research on Children's Postdivorce Adjustment: No Simple Answers". Family and Conciliations Courts Review. (1993) 31 (1): 29-49

Landau, B. and P. Charonneau et. al., Report from the Toronto Forum on Woman Abuse and Mediation 1993.

Landau, B. "Report from the Toronto Forum on Woman Abuse and Mediation" (1996) Training Materials and Client Questionnaires on Screening for Abuse in Mediation Cases.

Langer, R. "Male Domestic Abuse: The Continuing Contrast Between Women's Experiences and Judicial Responses" (1995) 10 (1) Canadian Journal of Law and Society. 65-90.

Law Reform Commission of Nova Scotia, From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (February 1995): <http://www.chebucto.ns.ca/Law/LRC/violence2.html>

Leighton, B. (1989) Spousal Abuse in Metropolitan Toronto: Research Report on the Response of the Criminal Justice System (Ottawa: Solicitor General Canada).

Lerman, L. "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women (1994) 7 Harvard Women's Law Review 57.

Lowenstein, L. F. "Parent Alienation Syndrome: Two Step Approach Toward A Solution" Contemporary Family Therapy (1998) 20 (4): 505-520.

Luepnitz, D. Child Custody: A Study of Families After Divorce (Lexington: Lexington Books, 1982).

Maccoby, E., Depner, C. and Mnookin, R. "Co-parenting in the second year after divorce" in J. Folberg (ed.) Joint Custody and Shared Parenting. (New York: Guilford Press, 1991) 132-152.

MacKinnon, K. (1984) "Not a Moral Issue." Yale Law and Policy Review 2: 321-345.

MacLeod, L. "Policy Decisions and Prosecutorial Dilemmas: The Unanticipated Consequences of Good Intentions" in Valverde et. al. Wife Assault and the Canadian Criminal Justice System (Toronto: University of Toronto 1995).

Magana, H. and N. Taylor "Child Custody Mediation and Spouse Abuse A Descriptive Study of

a Protocol" Family and Conciliation Courts Review 31(1) (1993): 50 – 64.

Maine Court Dispute Resolution Service (1997) "Screening for Domestic Violence and Abuse in Domestic Relations Mediation"; Maine Court Mediation Service (1992) "Mediation in cases of Domestic Abuse" and "Screening for Maybe" in the Final Report of the Domestic Abuse and Mediation Project.

Major, J. "Parents Who Have Successfully Fought Parental Alienation Syndrome" <http://www.livingmedia2000.com/pas.htm>.

Mandhane, R. "The Trend Towards Mandatory Mediation In Ontario: A Critical Feminist Legal Perspective" (Ontario Women's Justice Network and Metropolitan Action Committee on Violence Against Women and Children, July 1999).

Marcil-Gratton, N. and Le Bourdais, C. (1999) Custody, Access and Child Support: Findings From The National Longitudinal Survey of Children and Youth (Ottawa: Child Support Team, Department of Justice, Canada).

Martin D. and J. Mosher, readings from "Unkept Promises: Experiences of Immigrant Women With Neo-Criminalization of Wife Abuse" in CJWL/RFD 8 (1'995): 3-44.

Mechanic, D. and Hansell, S. "Divorces, Family Conflict and Adolescents' Well-being". Journal of Health and Social Behaviour, (1989) 13 (4): 69-85.

Mediation Quarterly (1990) 7(4) Special Issue: Mediation and Spousal Abuse.

Mnookin, R. H. and L. Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale Law Journal 950-97.

Moyer, I. The Changing Roles of Women in the Criminal Justice System 1992.

Munro, K. (1992) "The Inapplicability of Rights Analysis in Post Divorce Child Custody Decision Making" 30 (3) Alberta law Review 852.

Murphy, J. "Lawyering for Social Change: The Power of Narrative in Domestic Violence Reform" Hofstra Law Review (1993) 21: 1243.

National Institute of Justice and American Bar Association (1998) Legal Interventions in Family Violence: Research Findings and Policy Implications Research Report, <http://www.ojp.usdoj.gov/nij/pubs.htm>

National Institute of Justice The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials (U.S. Department of Health and Human Services, May 1996).

Neilson, L. (2000) "Partner Abuse, Children and Statutory Change; Cautionary Comments on

Women's Access to Justice" 18 Windsor Yearbook on Access to Justice 115-152.

Neilson L. (1997) "Spousal Abuse, Children and the Courts: The Case For Social Rather Than Legal Change," Canadian Journal of Law and Society 12 (1): 101-145.

Neilson, L. and P. English for Family Mediation Canada. Family Mediation Canada Practice, Certification and Training Standards (Kitchener, Ontario: Family Mediation Canada, 1999).

Neilson, L. and P. English (2001) "The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience" Mediation Quarterly, in press.

Neilson, L. and M. Guravich (1999) Abuse Screening Criteria and Settlement Option Project Final Report (Fredericton: Department of Justice), and (1998) Interim Report - Court Social Worker Consultation on Abuse Assessment Processes - Policy and Practice (Fredericton, Department of Justice).

Neilson, L. and Richardson, C. James (1996) Evaluation of the Domestic Legal Aid Program (Fredericton: Department of Justice).

Nelson, R. "Parental Hostility, conflict and communication in joint and sole custody families" (1989) 13:2 Journal of Divorce 145-157.

Pagelow, M. D. (1990) "Effects of domestic violence on children and their consequences for custody and visitation agreements" Mediation Quarterly 7(4): 347-363.

Peled, E. (1998) "The experience of living with violence for preadolescent children of battered women." Youth and Society, 29(4): 395-431.

Peled, E., Jaffe, P. and J. Edleson, eds. Ending the Cycle of Violence (London: Sage 1995).

Pepier, D., Catallo R. and Moore, T. "Consider the Children: Research Informing Interventions for Children Exposed to Domestic Violence" in R. Geffner, P. Jaffe and M. Sudermann (eds.) Children Exposed To Domestic Violence (New York: Haworth Press 2000) 37-57.

Province of New Brunswick (October 2000) Court of Queen's Bench Family Division and Family Support Services Annual Statistical Report April 1 1999 to March 31, 2000 (Department of Justice: Fredericton).

Pualani, E. (1996) "Prosecuting Battered Mothers: State Law's Failure to Protect Battered Women and Abused Children" 19 Harv. Women's L. J. 299.

Report of the British Columbia Task Force on Family Violence: Is Anyone Listening? (1992)

Research and Statistics Division, Department of Justice (Canada). The Effects of Divorce on Children (Ottawa: Department of Justice, October 1997).

- Rhoades, H., Graycar R. and Harrison, M. (1999) Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations. Interim Report (Sydney: Australian Research Council and Family Courts of Australia)
- Rhoades, H., Graycar R. and Harrison, M. (2000) Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations Final Report. Interim Report: http://www.law.usyd.edu.au/Research_Family_Court.html Final Report: <http://www.familycourt.gov.au/html/fla1summary.html>
- Richardson, C. J. for Department of Justice, Evaluation of Divorce Act, Phase II: Monitoring and Evaluation (Ottawa: Bureau of Review, 1990), Custody and Access: Public Discussion Paper (Ottawa: Minister of Justice, 1993).
- Richardson Research on Family Law: Issues for the 1990s (Department of Justice, March 1990).
- Roberts, S. "Mediation And Public Justice," oral presentation, Third World Mediation Forum Conference, W.M.F. Chia, Italia 2000.
- Rosnes, M. "The Invisibility of male Violence in Canadian Child Custody and Access Decision Making" Canadian Journal of Family Law (1997) 14 (1): 31-60.
- Sarat, A. (2000) "Pain, Powerlessness, And the Promises of Interdisciplinary Legal Scholarship: An Idiosyncratic, Autobiographical Account of Conflict and Continuity" The Windsor Yearbook of Access to Justice 18: 187-212 at p. 206.
- Saunders, D. "Child Custody Decisions in Families Experiencing Women Abuse" Social Work 39(1): 151-159.
- Saayman, G. and Saayman, R. "The Adversarial Legal Process and Divorce: negative Effects Upon the Psychological Adjustment of Children" Journal of Divorce (1989) 12 (2/3): 329-48.
- Seuffert, N. "Lawyering for Women Survivors of Abuse" http://www.waikato.ac.nz/law/wlr/special_1996/1_seuffert
- Shaw, D. and Emery, R. "Parental Conflict and other correlates of the adjustment of school-age children whose parents have separated" (1987) 15(2) Journal of Abnormal Child Psychology 269-81.
- Shepard, M. "Child Visiting and Domestic Abuse" (1992) 71 Child Welfare 356-367.
- Shiller, V. "Loyalty Conflicts and Family relationships in latency age boys: A comparison of joint and maternal custody" (1986) 9:4 Journal of Divorce 17-38.
- Shulman, P. W. (1997) Report of Honourable Mr. Justice P. W. Shulman Commission of Inquiry

into the deaths of Rhonda Lavoie and Roy Lavoie (Winnipeg: Department of Justice and Attorney-General).

Silver, C. "Being There: The Time Dual-Earner Couples Spend With Their Children" Canadian Social Trends (Statistics Canada, Summer 2000) 26-29.

Smart, C. and Neale, B. "Arguments Against Virtue: Must Contact Be Enforced?" (1997) 27 Family Law 332.

Special Joint Committee on Child Custody and Access. For the Sake of the Children (Ottawa: Government Services, Canada, December 1999).

Stark, E. and A. Flitcraft, "Woman-battering, child abuse and social heredity: What is the Relationship?" (1985) Marital Violence 147-165, "Women and Children at risk: A feminist perspective on Child Abuse" (1988) 18:1 International Journal of Health Services 97-111.

Statistics Canada, Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile 2000 Catalogue no. 85-224-X1E.

Statistics Canada (1993) Violence Against Women Survey

Stewart, A., Copeland, A, Chester, N., Malley, J. and Barenbaum, N. (1997) Separating Together, How Divorce Transforms Family. (New York: Guilford Press).

Straus, M. and Gelles, R. "Societal Change and Change in Family Violence 1975-1985" (1986) 48 Journal of Marriage and the Family 465-479.

Straus, M. A. and R. J. Gelles (1990) Physical Violence in American Families (New Brunswick NJ: Transaction Publishers).

Sudermann, M. and P. Jaffe *A Handbook for Health and Social Services Providers and Educators on Children Exposed to Woman Abuse/Family Violence* (Ottawa: Health Canada, National Clearinghouse on Family Violence, 2000).

Summit News Service "Woman Feared Husband" Daily Gleaner, February 13, 2001, p. A4.

Symposium on Standards of Practice (US) Model Standards of Practice for Family and Divorce Mediation (August, 2000). Collaborative project Association of Family, Court and Community Professionals, American Bar Association and National Council of Dispute Resolution.

Szinovacz, M. and Egley, L. (1995) "Comparing one-partner and couple data on sensitive marital behaviors: The case of marital violence." Journal of Marriage and the Family 57: 995-1010.

Taylor, G. et. al. (1996) Women and Children Last (Vancouver Custody and Access Support and Advocacy Association)

Thoennes, N., Salem, P. and J. Pearson (1994) "Mediation and Domestic Violence, Current Policies and Practices". Report of the Association of Family and Conciliation Courts.

Tjaden, P. and Thoennes, N. for National Institute of Justice (2000) Extent, Nature and Consequences of Intimate partner Violence: Findings Form the National Violence Against Women Survey (Washington: Department of Justice 2000).

Tutty, L. Husband Abuse: An Overview of Research and Perspectives (Ottawa: National Clearinghouse on Family Violence, Health Canada, 1998) National Clearinghouse web site.

Vestal, A. "Mediation and Parental Alienation Syndrome" Family and Conciliation Courts Review Vol. 37, No. 4, October, 1999, p 487-503.

Waits, K. "Battered Women and Their Children: Lessons from One Women's Story" Houston Law Review 35: 29- 103.

Waits, K (1995) "Battered Women and Family Lawyers: The Need for an Identification Protocol" Albany Law Review 58: 1027.

Walker, L. and G. E. Edwall, "Domestic Violence and Determination of Visitation and Custody in Divorce" in D. Sonkin (ed.) Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence (New York: Springer, 1987).

Wallerstein, J. and Kelly, J. Surviving the Breakup: How Children and Parents Cope With Divorce (London: Grant McIntyre, 1980).

Women's Research Centre Listening to the Thunder (Vancouver: Women's Research Centre, 1995).

Zorza, J. "The Criminal Law of Misdemeanor Domestic Violence 1970-1990" (1992) 83 Journal of Criminal Law and Criminology 57.

Canadian Legislation Cited:

Domestic Relations Act, R.S.A. 1980, c. D-37.

Family Relations Act, R.S.B.C. 1979, c.121.

The Family Maintenance Act, R.S.M. 1987, c. F 20 s. 2.

Family Services Act S.N.B. 1980, c. F-2.2, as amended by S.N.B. 1996, c.13, s. 129.

Children's Law Act, R.S.N. 1990, c. C-13, as amended by S. N. 1995, c.27.

Domestic Relations Act, R.S.N.W.T. 1988, c. D-8.

Family Maintenance Act, R.S.N.S. 1989, c. 160.

Children's Law Reform Act, R.S.O. 1990, c. C.12; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33.

Civil Code of Quebec, S.Q. 1991, c.56.
Children's Law Act, S.S. 1990, c. C-8.1.
Divorce Act, R. S., 1985, c.3.
United Nations Convention on the Rights of the Child (1989).

Reported Family Law Cases Mentioned:

Barrett v Barrett (1989), 18 R.F.L. (3d) 186.
Brigante v. Brigante (1991) 32 R. F. L. (3rd) 299.
Burk v Burk (1991), 34 R.F.L. (3d) 27.
C.A.S. Peel v. D. D. (1987) 8 R. F. L. (3rd) 15.
C. (R.M.) v. C (J. R.) (1995), 12 R.F.L. (4th) 440.
Cairns c Cairns (1994), 3 R.F.L. (4th) 397.
Catholic Children's Aid Society of Metro Toronto v. D. (A.) 1 R. F. L. (4th) 268-281.
Catholic Children's Aid Society of Metro Toronto v. K. H. et. al (187) 5 R. F. L. (3rd) 1.
Central Winnipeg Child and Family Services v. S. W. (1988) 11 R. F. L. 289.
Dakota Ojibway Child and Family Services Inc. v. M (M. J.) 4 R. F. L. (4th) 421.
Deane v. Deane (1995) 14 R.F.L. (4th) 55.
Ellert v Ellert (1983), 30 R.F.L. (2d) 257.
Family and Children's Services of London and Middlesex v. G. G. and J. R. (1985) 20 R. F. L. (3rd) 429.
Fanning v Fanning (1990), 24 R.F.L. (3d) 135.
Foggo v Foggo (1984), 40 R.F.L. (2d) 129.
Fullarton v Fullarton (1995), 7 R.F.L. (4th) 272.
Re H (A) F. L. R. 33.
Howe v Howe (1988), 16 R.F.L. (3d) 387.
R. v. Lavallee [1990] 1 S. C. R. 852
McCull v. McCull (1995), 13 R.F.L. (4th) 449.
Metz v Metz (1992), 35 R.F.L. (3d) 437.
Minister of Health and Community Services v. V. B. and D. C. (1987), 6 F. L. R. (3d) 180-4.
New Brunswick (Minister of Health and Community Services) v. M. (R. M.) 50 R. F. L. (3rd) 191.
R. v. Boldt [1996] O. R. 4773.
Reid v Reid (1985), 45 R.F.L. (2d) 173.
Saskatchewan (Minister of Social Service) v. E. (S.) (1992) 41 R. F. L. (3rd) 405.
Savidant v MacLeod (1992), 40 R.F.L. (3d) 443 at p. 445.
Savidant v MacLeod (1991), 32 R.F.L. (3d) 266.
Scullion v. Scullion (1995), 12 R. F. L. (4th) 421 (N.B. Q.B., Fam. Div.)
Sherry v Sherry (1994), 1 R.F.L. (4th) 146 at 155.
Whiffen v Buckoltz (1987), 7 R.F.L. (3d) 77.
Young v Young (1989), 19 R.F.L. (3d) 227.
Young v. Young [1993] 4 S.C.R. 3.



The Partner Abuse Siphon

Actual Patterns of Partner Abuse in the Relationship

Partner Abuse Incidents Reported to Lawyers

Partner Abuse Incidents Recorded in Legal Documents

Partner Abuse Incidents Considered Relevant After Negotiation Processes

Partner Abuse Presented to Judges

Indicators of Danger

Family violence research has shown that cases with characteristics fitting **ANY ONE** of the following categories indicate appreciable risk of death or injury. Survivors of Abuse³⁷³ involved in such cases must be scheduled for hearing as quickly as possible.

1. _____ a partner is repeatedly stalking, harassing or threatening the other, following the other partner around, or has done so in the past;³⁷⁴
2. _____ a partner has murdered or attempted to murder;
3. _____ a partner has uttered one or more death threats against the other partner or one of the children; OR a partner has, since separation, uttered threats to cause the partner or any other family member physical or sexual harm IF the threats were uttered in an intimidating manner and, or in circumstances suggesting that the words were intended to be taken seriously;
4. _____ a partner recently has attempted (threatened and taken one or more steps to carry out) suicide OR a partner has threatened suicide as a consequence of the other partner's decision to leave AND any other indicators of danger are present;
5. _____ a partner is obsessed³⁷⁵ with the belief that the family should reunite, and, or indicates the impossibility of family members surviving in separate households;
6. _____ a partner's actions indicate an escalating pattern of physical and or sexual violence against the other partner or another family member;
7. _____ a partner has abused one or more of the children and there are fears about a child or the children's safety;
2. _____ a partner has committed AN ACT of extreme physical or sexual violence against another family member creating the need for hospitalization and there are indications that a family member's life or well-being are in danger;
9. _____ a partner has been involved in one or more criminal acts of violence against non family members if the acts and the circumstance of the case indicate that a family member's life or well-being could be in danger;
10. _____ a partner has a history of obsessive jealousy of the other (indications of obsession: a pattern of repeated allegations of infidelity, calling a whore or a slut, monitoring phone calls, limiting the other partner's contact with friends, family, employers and colleagues);

³⁷³ The term 'survivor of abuse' has the same meaning as victim of abuse. The term 'victim' has been criticized in the literature on the basis that the term evokes visions of vulnerability and helplessness while ignoring the courage it takes to leave abusive relationships. Thus many prefer the term 'survivor'.

³⁷⁴ When a survivor of abuse has left one jurisdiction or location for another, Court-Social-Workers should check to see if the move was the result of this type of behavior. Past as well as current behavior will satisfy this category if it appears that the reason the behavior is not continuing is because the abusing partner does not know the other partner's whereabouts.

³⁷⁵ Obsession as opposed to a desire that the family should reunite is indicated when the partner being left does not believe that he or she can live or survive alone without the other partner.

11. _____ a partner has sexually abused the other partner with violence;
12. _____ a partner has repeatedly violated peace bonds, no contact or restraining orders;
13. _____ a partner is depressed or mentally ill other indicators of danger are present suggesting that a family member's life or well-being could be in danger;
14. _____ a partner is or has killed or maimed a family pet with a view to intimidating or causing harm to another family member;
15. _____ a partner has, during or after the separation, destroyed family property in an effort to intimidate and control the other partner if the circumstances of the case suggest that any family member's life or well-being could be in danger;
16. _____ a partner has used or threatened to use a weapon or arson to intimidate or control the other partner or other family members;
17. _____ police have been involved repeatedly with the family in connection with family conflict, violence or abuse and the circumstances of the case indicate that any family member's life or well-being could still be in danger.

Although drug or alcohol abuse is not cited, it should be considered a contributing or compounding factor.

Note: a pattern of indicators indicates a high level of danger.

Application of index. Victims or survivors of abuse whose circumstances indicate danger on this list should be sent directly and as quickly as possible to a family solicitor or lawyer. Court Social Workers will not offer mediation or settlement services in such cases.

This list is not necessarily exhaustive.

Indicators of Danger - Points to Consider

(Amended extracts from: (1989) Barbara Hart, •Sample Protocol for Dangerousness Assessment. Pennsylvania Coalition Against Domestic Violence.)

3. Partners who assume ownership of the battered partner, who say “death before divorce” or “I’ll see her dead before I’ll see her with someone else or “she/he belongs to me and to no one else” should be considered dangerous.
 4. Partners who have threatened homicide or suicide should be considered dangerous.
 5. The more an abuser has developed fantasies of who, how, when, where to kill, the more dangerous he or she may be.
 6. Where an abuser is acutely depressed and sees little hope for moving on to a better life, he or she may be a candidate for homicide or suicide. Research shows that many people who are hospitalized for depression have fantasies of killing.
 7. When an abuser possesses weapons and has used them or has threatened to use them in the past, this increases the potential that he or she will kill.
 8. The risk that a female partner will be killed increases during the separation and divorce process; the risk that a male partner will be injured or killed decreases during this time.
 9. Consumption of alcohol or drugs increases the risk that an attack will be lethal.
 10. Few abusers are mentally ill and few mentally ill people are abusive. But an abuser who is having a psychotic episode may be more dangerous during the psychotic episode.
 11. Those who kill or mutilate pets are likely to kill or maim family members.
-
