Syrtash Collection of Family Law Articles
SFLRP/2004-005

Family Matters
The disposable divorce era

by John Syrtash, B.A. (Hon.), LL.B.

Posted March 19, 2004

¶ 1 A certain Rabbi was giving marital counselling in accordance with the most noble of Jewish Traditions. He turned to the wife and told her that she was overly emotional, unreasonable and unfair. He then turned to the husband and said: "Do what she says". Perhaps only a married person can understand this advice.

¶ 2 In the era of the disposable diaper, disposable marriages have become trendy. If you don't like something, get rid of it. So, if someone irks you, get rid of her/him. When's the last time you darned your socks? Since the Divorce Act was amended in 1985, divorce is virtually automatic after one year of separation even if the income earning spouse deserts his family.

¶ 3 At the time, many thought these amendments would herald freedom for women chained to their husbands. Unhappy spouses could leave their relationships and remarry after one year of separation, rather than the previous three year wait (or five years if you deserted your spouse). Indeed, there is no doubt that the divorce rate has increased dramatically since these changes helped fashion the disposable relationship. Moreover, recent Supreme Court of Canada decisions (such as Moge) have legally confirmed that women after divorce fare far worse than men economically. Indeed, the increase in divorce rates has given us new phrases such as "the feminization of poverty". The number of poor women and children has risen dramatically across Canada since getting divorced was made easier (Sorry, I hate the word "under-privileged": euphemisms cloud reality).

¶ 4 Please don't misunderstand me. No one who is the victim of spousal abuse or who truly needs to be free should have to wait three years just to remarry. (Indeed, in Jewish law, there is usually no waiting period when both parties consent to a divorce). That is not the type of case to which I refer. Rather, I mourn those relationships that ended because they were "boring" and someone didn't bother trying a little harder. Changes in law affect moral behavior, if only because the perception of moral reality changes. And the liberties we seek can create unforeseen hazards, once obtained. As Shakespeare said in Hamlet "Rich gifts was poor when givers prove unkind".

¶ 5 Fortunately, many lawyers take Section 9 of the Divorce Act very seriously. A lawyer must urge a spouse to seek marriage counselling, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on January 19, 1995 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

John Syrtash is a partner and family law lawyer with the Toronto firm of Beard Winter. Neither B'nai Brith Canada, Beard Winter LLP, nor John Syrtash is liable for any consequences arising from anyone's reliance on this material, which is presented as general information and not as a legal opinion. John Syrtash can be reached at (416) 306-1733, or e-mailed at jsyrtash@beardwinter.com. You can also visit www.beardwinter.com and www.spousalsupport.com.

Syrtash Collection of Family Law Articles
SFLRP/2004-004

Family Matters
The obligations of stepparents

by John Syrtash, B.A. (Hon.), LL.B.

Posted March 19, 2004

¶ 1 Under Canadian law, a stepparent may have a legal obligation to share in the costs of raising a child. This obligation could exist even if he never adopts the child or never marries the child's mother, but only lives with her. (For convenience I refer to the stepparent as the male and the child's natural parent as the mother since that is the most common scenario. The law, of course, is gender-blind.)

¶ 2 But what happens when such a stepparent separates from the child's mother? Traditionally, if both the child and the stepparent have mutually severed their psychological ties, then the stepparent may not be obliged to contribute to child support.

¶ 3 However, can a stepparent avoid having to pay child support by unilaterally withdrawing from his psychological relationship with a child after he separates from the child's mother? The Manitoba Court of Appeal has said yes, and so have many other Courts across the country. Other Courts have strongly disagreed.

In Loco Parentis

¶ 4 Recently, in the case of Chartier v. Chartier, [1998] S.C.J. No. 79 the Supreme Court of Canada appears to have cleared up the confusion by definitively ruling that a stepparent cannot withdraw unilaterally. In Chartier, the stepparent played an active role in caring for his wife's daughter from a previous relationship, and became a father figure to the girl. The parties discussed, but did not proceed with, the husband's adoption of the child. They also amended her birth registration to indicate, falsely, that the husband was the child's natural father and changed her surname to his. Sometime after the parties separated, the husband resisted a claim that he stood "in place of a parent" (in loco parentis) and argued that he should be able to unilaterally withdraw from such a role without paying any child support.

¶ 5 However, the Supreme Court ruled that a person cannot unilaterally withdraw from a relationship in which he stands in the place of a parent.

> The Court must look to the nature of the relationship to determine if a person in fact does stand in the place of a parent to a child. The policies and values reflected in the Divorce Act must relate to contemporary Canadian society. They must be given a meaning that is both independent of the common law concept of in loco parentis (which was developed in various contexts during the 19th century) and reflective of the purposive and contextual approach to statutory interpretation advocated by this Court.

¶ 6 The Court also ruled that whether a person is in fact a "stepparent" liable for child support depends on the facts of each case. The existence of a common law or cohabitation relationship does not automatically mean that child support will become a legal obligation in the event of separation. Rather, the Court ruled that many factors must be taken into account.

> ...the test for whether or not a person stands in the place of a parent should be not be determined exclusively from the perspective of the child ... is important but [is] only one of many factors to be considered. The Court must determine the nature of whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; and, the nature or existence of the child's relationship with the absent biological parent.

Stepchild support obligations

¶ 7 In short, if you're contemplating cohabiting with another person who has a child or children from a former relationship, understand that you may have to pay child support if the relationship fails to last. And any prenuptial or cohabitation agreement that pretends to limit one's liability for child support in such cases is just as useless as one that pretends to do so where the parent is "real" and biological. Such clauses in agreements were popular in the past but they have now become very weak in the shadow of this new ruling: "Once it is shown that the child is to be considered, in fact, a child of the marriage, the obligations of the stepparent towards his or her are the same as those relative to a child born of the marriage with regard to the application of the Divorce Act." As most lawyers will tell you, any premarital agreement that attempts to limit child support is legally questionable.

¶ 8 Finally, the Court does confirm that the stepparent gains rights as a result of its ruling. This is not a "one way street": in addition to incurring obligations, the stepparent also acquires certain rights, such as the right to apply eventually for custody or access.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on March 31, 1999 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

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Syrtash Collection of Family Law Articles
SFLRP/2004-003

Family Matters
Is there life after divorce?

by John Syrtash, B.A. (Hon.), LL.B.

Posted March 19, 2004

¶ 1 In a development a few years ago that will immeasurably help former spouses of retirees, an Ontario court ruled that a pension plan must pay survivor's pensions to divorced spouses. The ruling applies to all public and private pension plans and ex-spouses of pensioners who retired on or after January 1, 1987.

¶ 2 In the case of Smiley v. Ontario (Pension Board), [1994] O.J. No. 1674 (Ont. Gen Div.) Justice Christopher Speyer's ruled that someone who divorces his spouse can collect survivor's benefits, without that person still being married to the retiree prior to his or her death.

¶ 3 The case involved the former wife of an Ontario civil servant. On separation the couple agreed, in a separation agreement, the even if the retiree remarried or cohabited with a new partner, he would ensure that only the former spouse would be entitled to survivor benefits. However, the Pension Board would not permit the surviving former spouse's claim, notwithstanding the separation agreement. In overruling the Pension Board, the Court sets a critical precedent, giving former spouses the status of non-divorced spouses. In my opinion, it is now conceivable that the same principle could eventually be applied by the Courts to insurance plans, such as Extended Health Benefit Plans. I frequently have been asked by a spouse to delay a divorce because, by virtue of their spouse's employee health benefit plan, the client would be "cut out" of prescription drug/dental benefits once the divorce was finalized. Are we that far away from the Courts or the Legislature ensuring that former spouses continue to be covered by such plans? I think not. Of course, premiums for employers and some employees will escalate, particularly if claims from multiple spouses of the same survivor or employee begin pouring in.

¶ 4 For the moment, I advise anyone contemplating separation to look carefully at the terms of survivor's benefits in their employee/employer Pension plans and examine their limits carefully with the assistance of a competent lawyer and Pension consultant/accountant. Lawyers negotiating separation agreements must now also be very careful not to "give away" the right to survivor benefits by ignoring them. They must ensure this item is part of their "checklist" of goodies that form part of the non-pensioned spouse's rights in any separation agreement and ensure that the agreement confirms that the rights survive divorce. I would also include a provision putting the pension plan on formal notice of the rights of the recipient spouse to such benefits.

¶ 5 Needless to say, survivor's benefits should not be confused with the value of the pension itself (i.e. while the pensioner is still alive). Particularly after a long marriage, a pension often has a large value based on a prospective "stream of income". Actuaries are usually used to valuate lump sum values for these pensions for family law purposes, often considerably before the pension becomes payable. The value of the pension is then often split on a cash basis 50:50, or less, depending on the length of the marriage. The sale proceeds of many matrimonial homes on separation have not been split equally, precisely because one of the spouses is anticipating a large pension income on retirement. In many cases he is expected to share this pension with his spouse on a "present case" basis, and not when he retires.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on August 18, 1994 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

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Syrtash Collection of Family Law Articles
SFLRP/2004-002

Agreements Enforceable that Assign Pension Entitlements (Ontario)

Stairs v. Ontario Teachers' Pension Plan Board
Ontario Court of Appeal, February 10, 2004
[2004] O.J. No. 331

by John Syrtash

Posted February 16, 2004

¶ 1 In Ontario, if spouses agree in writing, or if a Court orders it, the Pension-holding spouse can assign a portion of certain types of pensions, such as his Teacher's pension, or death benefits, to his spouse, after his retirement or death. So, spouses can agree do this, but will Courts order such assignments when spouses do not agree?

¶ 2 Well, the 1999 case of Best v. Best, [1999] 2 S.C.R. 868, the Supreme Court of Canada ruled against Courts normally ordering such arrangements, even though the Court admitted that "it avoids exposing the pension-holder to the hardship of having to pay a lump sum immediately." What does all this mean in dollar and cents? The Court ruled that a current cash valuation and payment to the non-policy holder is what Ontario's Family Law Act intended and that it would not be practical to tie one spouse's future to another after divorce. They adhered to a "clean break" principle: in other words, pay the lady and go away. Strangely enough, the Courts have the opposite view when it comes to spousal support. They have consistently ruled in a number of cases that payments should be "periodic" or "monthly." This principle is sacrosanct. In our court system, one-time lump sum payments should be rare and against public policy when it comes to spousal support, but not pensions, for some reason.

¶ 3 By valuating the current future value of a pension with a view to the number of years married, Pension-holding spouses often are required to "equalize" their pension entitlements shortly after separation, even though they will not receive their pensions for several years later. In many "defined" pension plans this can mean a transfer of "current" cash in the tens of thousands of dollars. Often this "payment" takes the form of one's equity or part of one's equity in the matrimonial home. For instance, it is not unusual after a marriage in excess of 15 years to see Pension valuations equal well over $100,000 net after taxes. Then, half of that figure must be allocated today (not on retirement!) to the other spouse.

¶ 4 The influence of Best on negotiating separation agreements has been formidable, even though the case only deals with how Courts make orders when parties can't agree on splitting pensions, and not on whether courts will enforce such agreements if the parties make them. In addition, a much earlier circular delivered by the Law Society of Upper Canada several years ago warned lawyers not to negotiate a separation agreement that was based on the recipient getting her share of the pension or death benefit when the Pension holder retired or died. Many lawyers ever since have been careful to tell their clients that this has not been possible, fearing that they could be sued for negligence.

¶ 5 Well, changes in family law never cease to amaze me.

¶ 6 The Court of Appeal of Ontario in early February 2004 clarified the law that permits spouses to split a Pension or death benefit entitlements in a realistic way that many lawyers, until now, thought was

too complicated and therefore legally impossible. It also appears to contradict that old Law Society warning, at least in those cases of "defined" pensions, such as Teacher's pension plans.

¶ 7 In the case of Stairs v. Ontario Teachers' Pension Plan Board, [2004] O.J. No. 331, the Court ruled against the Teacher's Board that attempted to ignore the separation agreement signed by a teacher who died before he could collect his pension and had remarried. In the agreement, under a formula based on lengthy marriage, a large percentage of his death benefit was assigned to his former wife. The new wife refused to give up her rights to the entire death benefit. The Teacher's Board refused to honour the agreement. After years of litigation, the Court of Appeal agreed with Ms. Stairs that under the Ontario Pensions Benefit Act, the Board was obligated to pay her pursuant to the formula in the separation agreement. They based their ruling upon section 51 of this Act that directs plan administrators to follow the formulas for division (up to 50 percent). The Court has ruled that this section directs the administrator to follow such formulas because the spouses have entered into such agreements. However, a close reading of the section also empowers the Courts to make such orders for division, whether or not the parties have agreed, even if only one spouse requests such a division. The legislation gives the Courts such powers even though the Supreme Court has ruled that the Courts should not normally split pensions this way.

¶ 8 Interestingly, the Stairs' agreement, although enforceable, is precisely what the Supreme Court of Canada in Best ruled that Courts should not be normally ordering if asked to do so by spouses who can't agree. The Court of Appeal in Stairs, when quoting approvingly from Best in its decision, only quotes those parts of the Supreme Court's comments about the "if and when" method that help the Court of Appeal make its policy decision. The Court of Appeal respectfully fails to remind the reader that the Supreme Court in its decision ultimately decided against allowing Pension plans to pay on retirement or death and also fails to quote the Supreme Court's negative comments about this approach.

¶ 9 None of this applies to employees of certain federally-regulated pension holders, such as R.C.M.P. employees or Members of the House of Commons and Senate or certain other federal government employees. They are very lucky. Under the federal Pension Benefits Division Act, the non-Pension holding spouse receives her own pension based on a formula either contained in a separation agreement or in a Court order. If the agreement or Court order fails to specify a formula then the Minister administering the Act bases the division on the number of years the spouses was married or cohabiting. The other spouse then gets her own pension plan. She is not tied to her former partner's plan in any way. In other words, the legislation for certain federal employees provides the "clean break" with which the Supreme Court in Best was so concerned.

¶ 10 To conclude, we are currently left with the following inconsistent state of Ontario law in the tradition of Monte Python. 1. Ontario spouses who agree to divide the Pension Plan holder's pension or death benefit entitlements may do so in a domestic contract. It will be enforced by a court if the Plan refuses to pay a former spouse the money under the formula stipulated in the contract. 2. However, if the other spouse refuses to agree (in writing) to wait until the Pension holder retires or dies and insists upon her half of its current future value now, then the Supreme Court will not permit any lower court to force the non-Pension holder to wait. This is true even though the Court clearly has the power to make such an order under Ontario's Pension legislation. 3. If you or your spouse are one of the comparatively few who are covered under the federal Pension Benefit Divisions Act, then because of the "clean break" under which the Act provides an independent pension to the other spouse, a Court will likely order such a division if the other spouse fails to agree. Accordingly, matrimonial lawyers are relieved when they have such federally regulated clients and simply send a letter to the Minister to effect such a division. Moreover, they have the Minister do the calculations because they know it will be based on some neutral formula fashioned around the number of years the parties were cohabiting or married.

¶ 11 Many people of both sexes have "defined" pensions, such as teachers, fireman and Ontario or municipal employees. If separated, many become forced to value the future value of pension or pre-pension death entitlements and pay out half their benefit well before they actually retire and are obliged to give up their homes (or equity in their homes) or other assets in return shortly after separation. This often leaves them with a significant shortfall of immediate cash they currently need.

¶ 12 Imagine a hypothetical case of a municipal employee with the care of two children who is obliged to pay out half of the current future value of her pension entitlement from the sale proceeds of her home. In such a case, she could then be left with insufficient savings to purchase a new home for herself and her children, even though she could be many years away from retirement. By contrast, the federal Pension Benefits Division Act makes sense. The Act creates a separate plan for the Pension holder's spouse without having to create the hardship of interfering with the Pension holder's use of other monies for often pressing current expenses.

¶ 13 The other problem with assessing the future value of pension entitlements and forcing spouses to pay out half their portions now is the hassle and legal expense involved. With every such Pension actuaries are retained to calculate this figure on an "after tax" basis using "different presumptions" as to when the Pension holder will "likely" retire. Sometimes litigation abounds over such issues as (a) when the person will likely retire; (b) what tax rates to use (c) the 'method' of valuation employed. In cases of extreme hardship, the Pension holder may argue that he pay out his share of the pension over a period of up to 10 years (which is permitted under Ontario's Family Law Act) and this presents yet another issue to fight over.

¶ 14 We need legislative change in Ontario. Several family law lawyers have lobbied for such change from the Province for many years. It's so simple and requires little money from the Ontario government, just a sense of Justice. For "defined" pensions, the Legislature should be adopting the federal Pension Benefits Division Act for all Ontario employees.

Syrtash Collection of Family Law Articles
SFLRP/2004-001

Surprising New Developments on the Law of Retroactive Child and Spousal Support

Walsh v. Walsh
Ontario Court of Appeal, February 2, 2004

by John Syrtash

Posted February 6, 2004

¶ 1 Two questions: 1. Can a person deduct retroactive spousal spousal support payments after he and his ex-wife have agreed to a retroactive increase? 2. How will an Ontario court treat a parent who has primary care for a child who asks for a retroactive increase in child support from a payer if (a) the parent can't prove that she asked him to disclose his income to her in writing from year to year and (b) there was nothing in their separation agreement or Court order obliging him reveal his income periodically?

Retroactive Spousal Support

¶ 2 The Income Tax Act allows a taxpayer to deduct spousal support payments from one's income going back as far as the beginning of the calendar year before the year in which a court order or separation agreement was signed that permits such retroactive deductions. For instance, say separated spouses have signed a separation agreement or have become subject to a court order on June 1, 2004 and the husband has been paying the wife $2000 monthly spousal support since January 1, 2003. If the agreement or court order provides for monthly ("periodic") support going back that far (or earlier), then the payments going back as far as January 1, 2003 will be considered "tax deductible" under the Income Tax Act and taxable in the wife's hands. Up until recently, many lawyers and accountants assumed that divorcing clients could sign such agreements or consent to a Court order and even if the amounts had not actually been "paid" during this time period, the payer spouse (usually the husband) could simply write one cheque to cover the "arrears" and still benefit from the tax deduction. At a recent Family Law lawyers gathering convened by the Ontario branch of the Canadian Bar Association, Professor James McLeod of London, Ontario shocked us all with the following clarification. After consulting with leading tax experts it turns out that according to the Income Tax Act the monies had to be actually paid during the period of time covered. A taxpayer could not simply write a cheque "for arrears" after signing such an agreement for retroactive support; if he tried to do so his payment would likely be disallowed. People that make settlements based on such arrangements should be careful. Unless they had actually been making such periodic payments regularly prior to signing separation agreements or consenting to Court orders, they may not benefit from any retroactive spousal support payments they plan to deduct, even if they now pay them as "arrears."

Retroactive Child Support

¶ 3 Ever since the Child Support Guideline legislation became law, many lawyers have assumed that one only had to show a change in the payer's (usually the husband's) yearly income to obtain an increase in child support. Section 3 of the Guidelines has something called a "presumptive rule" that says that the amount of child support can only be determined with reference to a grid or table related to the payer's income. One did not have to show a "material change in circumstances", i.e. in the material needs of a child or of the recipient spouse's ability to pay. Well, guess what? The Ontario Court of Appeal seems to

be saying that this is no longer the law: see Walsh v. Walsh, decided February 2, 2004 by Mr. Justice Laskin, [2004] O.J. No. 254). The Court has decided that unless the receiving spouse has been asking for financial disclosure each year, that is, for a copy of the payer's tax returns every year, then the receiving spouse cannot normally claim an increase in child support retroactively based on an increase in the payer's increase in income over the past few years, unless the receiving spouse can demonstrate a compelling case for "need" by the children. Even then, the receiving spouse can only make such a claim after a trial, and not at something called a motion (a preliminary procedure which is a lot less expensive). In Walsh, the wife had not made any written requests for financial disclosure each year and after a few years found out that the children's father's income had increased dramatically from year to year. A lower court increased the child support retroactively for each year and ordered a large payment to "catch up" on child support "arrears" based on his increased income in excess of $40,000. However, the Court of Appeal found that there was no court order, legislation or separation agreement that obligated the father to disclose his income every year. Unless the wife had requested the information about his income each year, which she hadn't, the Court of Appeal found that it would be an unfair "transfer of wealth" to surprise Mr. Walsh with a court order that would compel him to pay retroactive child support for all these years retroactively unless there was evidence that the children needed the money. The lower court thought that the Child Support Guideline legislation did not require such evidence because of this "presumptive rule", meaning the Guideline tables. However, Mr. Justice Laskin ruled that it was not enough merely to show that Mr. Walsh's income increased.

¶ 4 As a result, every spouse receiving support should be careful to send registered letters insisting upon tax returns and other proof of income from the person responsible for paying child support under a separation agreement or court order shortly after tax season each year (say July 1, since businesspersons do not have to file until June 1). If their income has increased the recipient can request increased child support or at least be in a legal position to request it from the courts, without necessarily having to go through an expensive trial to demonstrate the needs of their child.

¶ 5 In addition, estranged spouses who receive child support and especially their family law lawyers should ensure that as a result of Walsh, they should insist upon a clause to make it mandatory for parents paying child support to disclose their incomes yearly in the form of tax returns and any other documents required of them under the Child Support Guidelines in their particular career. Otherwise, I fear that the Court of Appeal has now made matrimonial lawyers who fail to include such clauses negligent since they make it more difficult for their clients later to claim retroactive child support.

¶ 6 The Court of Appeal's decision in Walsh has many legal problems, especially since it appears to contradict section 3 of the Child Support Guidelines. However, if it is not appealed to the Supreme Court of Canada, it remains the law of Ontario and will influence the courts across the country.

Syrtash Collection of Family Law Articles
SFLRP/2000-008

Net Family Property and the Use of Constant Dollar Values*

by Blair L. Botsford, B.A., LL.B., M.A.
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Posted June 19, 2000

* Posted by John Syrtash with permission of the author.

1. INTRODUCTION

¶ 1 The preamble to the Family Law Act [See Note 1 at end of document.] reads as follows:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.

¶ 2 This preamble sets out not only the overall purpose of the FLA, which is to encourage and strengthen the role of the family, but also the means by which this goal is to be achieved. Two of the key elements in the preamble are the recognition of marriage as a form of partnership, and that in support of this recognition, the breakdown in the partnership is to be dealt with in an orderly and equitable manner. Generally, the partnership analogy is seen as a requirement for equal treatment of the parties. However, the real significance of the partnership comparison is that it focuses attention on the fact that marriage is an economic union as well as a spiritual one. Economic entities are not static and the equitable dissolution of any economic enterprise requires recognition of this reality. In the family law context, nowhere is this truer than when dealing with the division of property. A static approach to property equalization, such as the one currently employed in Ontario, by its very nature prevents the equitable settlement of a couple's financial affairs contrary to the stated intention of the FLA.

¶ 3 The current approach to equalization in Ontario is to calculate the Net Family Property ("NFP") for each spouse by comparing property valuations obtained at two different points in time with no allowance for the effects of inflation. The equalization payment is then determined as one half of the difference between the two NFPs. The spouse with the lower NFP is entitled to this equalization payment. There is a significant problem with this approach when the calculation is performed for a marriage that has lasted for more than a couple of years. The problem is inflation, which erodes the purchasing power of money. Subtracting 1975 dollars from 1995 dollars is similar to subtracting American dollars from Canadian dollars when the exchange rate is other than one. The only way to compare the two currencies in a meaningful way is to apply an exchange rate first so that you are comparing apples to apples instead of apples to oranges.

¶ 4 The same principal applies when you are dealing with the value of a given item of property at two

different points in time. Before the two values can be compared in a meaningful way, a sort of exchange rate, or indexing factor, must be applied to account for the effects of inflation. The most common indexing factor, and the one prescribed by the FLA for indexing support, is the Consumer Price Index ("CPI"). It is the aim of this article to demonstrate that Ontario's current method of calculating equalization payments is not required by the Act, nor is it as equitable as it could be and, therefore, it does not comply with one of the FLA's main objectives.

2. NET FAMILY PROPERTY

¶ 5 The beginning point for determining any equalization payment is the definition of NFP, which reads as follows:

> "net family property" means the value of all property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,
>
> (a) the spouse's debts and other liabilities, and
> (b) the value of property, other than a matrimonial home, that the spouse owned on the date of marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of marriage. [See Note 2 at end of document.]

¶ 6 Central to the definition of NFP is the concept of "value." The reason this concept is so critical is that the FLA does not equalize property; it equalizes net family properties that are stated in dollar terms. Therefore, before equalization can even be contemplated, each item of property a spouse owns must be valued in monetary terms. In order for this to be done, it is necessary to agree on what it means to "value" property.

¶ 7 One of the definitions of "value" that can be found in the Oxford Dictionary of Current English [See Note 3 at end of document.] is "the amount for which a thing can be exchanged in the open market." A similar definition of value can be found in economics, which frequently deals with the concept of value. Actually, economics has two definitions of value: one is "value in use" and the other is "value in exchange." The most common example of the difference between the two definitions is water. Water has a high value in use but usually a low value in exchange. The important distinction between the two definitions is that the "value in use" definition is subjective while the "value in exchange" definition is objective.

¶ 8 For family law purposes, clearly the most equitable approach is to adopt the "value in exchange" definition, otherwise, property valuations would be entirely subjective rather than objective. It should be noted that the "value in exchange" definition is essentially the meaning of value that can be found in Black's Law Dictionary. [See Note 4 at end of document.] Regrettably, the FLA does not define value and, therefore, its meaning must be derived from other sources. The value in exchange definition is objective and widely accepted; therefore, it is a logical choice.

¶ 9 Related to the concept of value are the concepts of appreciation/depreciation and inflation/deflation, which are often confused and taken to mean the same thing. Depreciation describes the situation where an item of property with a certain exchange value on one date has a lower exchange value at a later date. This means the value calculated based on market conditions in existence of the first date is higher than the value calculated based on market conditions in existence at the later date. Appreciation exists where the reverse is true. While appreciation and depreciation affect the value of property across time, inflation and deflation affect the purchasing power of money across time. Inflation erodes the purchasing power of money while deflation has the opposite affect. Therefore, depreciation is

not synonymous with deflation, nor is appreciation equivalent to inflation or vice versa. It is also important to note that property can depreciate during a period of high inflation or during a period of deflation just as property can appreciate in value during a period of deflation or inflation. Currently inflation in Canada is relatively low; however, a new car still depreciates as soon as you drive it off the lot and a Van Gogh can still be expected to appreciate. This is true even in periods of deflation.

¶ 10 This having been said, it becomes clear that correcting for inflation does not affect the value of a given item of property. As will be demonstrated in a later section, when indexing for inflation is incorporated into the net family property calculation, it is the final result of the calculation that is affected not the value of individual items of property. Consequently, interpreting the term "calculate" as implying that no consideration for inflation should be taken into account is unwarranted and inequitable. It misses the entire point of the NFP calculation, which is presumably to determine the true economic growth that has taken place over the course of a marriage.

¶ 11 Relevant to interpreting the NFP definition is subsection 4(4), which states that when section 4 requires a value to be calculated as of a given date, it is to be calculated as of the close of business on that date. Subsection 4(4) makes it clear that the phrase "calculated as of the date of the date of marriage" sets a time or date for the calculation rather than specifying a method for valuing property or the currency in which the value is to be stated. Viewed in this way, it can be seen that the FLA's requirement that the value of property owned on the date of marriage be valued as of the date of marriage does not preclude inflationary considerations.

¶ 12 While it is important to agree on the appropriate definition of value, it is not sufficient to stop here. A meaningful way of comparing values across time is also required. It is not possible to ascertain the real economic improvement or decline in an entity's financial position by comparing two sets of static numbers unless of course the world is truly static, which we know it is not. Inflation is to economics what friction is to physics and neither disturbance can be ignored if you wish to determine the true state of affairs. This is why understanding the distinction between appreciation/depreciation and inflation/deflation is so vital. As a property's value changes over time so does the value of money. To determine the real change in the value of property and, therefore, the real change in a spouse's economic position over time, inflationary effects must be removed.

¶ 13 This of course assumes that the objective of the NFP calculation is to determine the real advantage or benefit that has accrued to each spouse during the marriage so that the difference in the relative advantages, if any, can be equalized. If this is indeed the objective, then the most equitable method of calculating the advantage that may have accrued to a particular spouse over the course of the marriage needs to be determined. One potential method would be to calculate the value of property owned as of the date of marriage in date of marriage dollars and subtract it from the value of property owned on the valuation date in valuation date dollars. This is essentially the current method employed. Coincidentally, this method compares values stated in what is referred to as "current dollars." However, as will be demonstrated, this method can result in an arbitrary redistribution of wealth rather than the equalization of real economic gains that have accrued over the course of a marriage.

¶ 14 An alternative method for calculating a spouse's NFP would be to determine the value of property owned as of the date of marriage but stated in valuation date dollars and subtract it from the value of property owned on the valuation date also specified in valuation date dollars. This approach uses constant dollar values instead of current dollar values and it is the approach commonly used in economics when prices are being compared across significant periods of time. It is also the more equitable approach since artificial changes in wealth solely attributable to inflation are removed. Equalizing a purely inflationary increase in a spouse's wealth can hardly be seen as equitable. The numerical examples set out in a later section will demonstrate the difference between the current dollar

approach and the constant dollar approach.

3. PROBLEM

¶ 15 While the FLA requires a spouse's NFP to be calculated as of the valuation date, it does not explicitly state how to compare values across time. As already indicated, the practice has been to compare values at two different points in time with no allowance for inflation. Unfortunately, it is not possible to determine a spouse's NFP as of the valuation date by subtracting date of marriage dollars from valuation date dollars. This calculation will yield an arithmetic result but nothing more and definitely not a figure upon which a legal entitlement to an equalization payment should be based.

¶ 16 The figure obtained under the current method does not represent the spouse's NFP calculated as of the valuation date. Further, performing the NFP calculation in this manner is neither required by the Act nor does it comply with the objective of equitable treatment of both spouses. In fact, a careful reading of the NFP's definition demonstrates that constant dollars are to be used. In other words, the net value of property owned and calculated as of the date of marriage must first be converted to valuation date dollars before it is subtracted from the value of property owned as of the valuation date. This allows a spouse's NFP to be calculated as of the valuation date.

¶ 17 The NFP definition requires each spouse to calculate the value of all of their property owned on the valuation date, then subtract debts and liabilities, and then subtract the value of property owned on the date of marriage, excluding the matrimonial home and subtracting debts and liabilities, calculated as of the date of marriage. It is these last few words that have lead to the misunderstanding about how the calculation should be performed. The phrase "calculated as of the date of marriage" has mistakenly been assumed to require the parties to essentially prepare an accounting of their positions on each of the valuation date and the date of marriage and then subtract the date of marriage value from the valuation date value with no allowance for the effects of inflation. However, closer examination of what it means to correct for inflation will reveal that the phrase does not preclude consideration of the effects of inflation particularly in light of the fact that each spouse's NFP is to be determined as of the valuation date.

4. CONSTANT VERSUS CURRENT DOLLARS

¶ 18 Stating the value of property owned on the date of marriage in constant dollars refers to the process of correcting for inflation so that the value is stated in terms of the same dollars as the value of property owned on the valuation date. This correction does not alter the value of property owned on the date of marriage. The figure obtained still represents the value of property owned on the date of marriage and calculated as of the date of marriage. All that has changed is the currency in which the figure is stated. It is similar to going to the bank and exchanging US$10 for CDN$15. Ceteris paribus, you are in the same financial position. If someone owes you one Canadian dollar but only has a Canadian two-dollar coin and all you have is an American one-dollar bill, you are not going to give them the American dollar bill as change and consider it a fair resolution to the matter. You cannot compare apples to oranges and hope to get a meaningful and equitable result. However, this is exactly what is expected when the current method of subtracting date of marriage dollars from valuation date dollars is used.

¶ 19 To demonstrate that correcting for inflation does not alter the value of property owned on the date of marriage and calculated as of the date of marriage, the following simple illustration is offered. More detailed examples will be provided in the next section. Assume that a person gets married on June 1, 1975 and separates from his/her spouse on May 30, 1995. Therefore, the person has been married for

exactly 20 years. On May 30, 1975 the individual bought a widget for $10. Clearly, as of the date of marriage, the widget had an exchange value of $10 assuming no depreciation in the intervening 24 hours. On the date of separation (valuation date) a new widget costs $30. Assuming the individual still owns the same 1975 widget on the valuation date and that inflation has on average been greater than zero for the period 1975 to 1995, consider four possibilities:

(i) the exchange value of the 1975 widget in 1995 is $5 (the 1975 widget can be sold for $5 in 1995);
(ii) the exchange value of the 1975 widget in 1995 is $10;
(iii) the exchange value of the 1975 widget in 1995 is $30; and
(iv) the exchange value of the 1975 widget in 1995 is $50.

¶ 20 Each of these four examples represents the exchange value of the 1975 widget calculated or determined as of the valuation date in 1995. The original exchange value of $10 is the same in each example. In comparing the examples, it is important to determine in which instance or instances the individual is clearly better off, the same, or worse off. Even without a precise correction for inflation, it is possible to recognize that the individual is worse off in at least the first two of the four possibilities. Any positive value for inflation means that even if the individual could sell his or her 1975 widget in 1995 for what he or she paid in 1975, the individual is still worse off because $10 in 1995 has less purchasing power than it did in 1975.

¶ 21 The fact that a new widget costs $30 in 1995 is misleading. The 1995 widget might be ten times better than the 1975 widget which would seem to suggest that our individual is better off, or at least no worse off, despite inflation. However, this is an apples and oranges comparison. A common form of property, money, must be used in order to make a meaningful comparison. The reason the 1975 widget might fetch $30 in 1995 is not necessarily related to the 1995 price of widgets. The 1975 widget might be a limited edition collector's item. What is important is the relative purchasing power of $30 in 1995 as compared to $10 in 1975. Even if the individual could get $50 for his or her widget in 1995, buy a new and improved widget for $30, and still have cash left over, does not necessarily make the person better off. Once the value of an item of property has been expressed in dollar terms, what is relevant is the purchasing power of money in general and not which specific items of property that money could buy. If the same basket of goods that cost $10 in 1975 now costs $100, our individual is worse off in 1995 compared to 1975 even if he or she can get $50 for the original widget.

¶ 22 If no comparison of values was required for equalization, which would be the case if property items themselves were being equalized, it would not matter whether the value of a 1975 widget, determined as of 1975, was expressed as ten 1975 dollars or twenty 1995 dollars, assuming that the two currencies are equivalent. Whichever currency is used to represent the value of the property, the value of that property has not changed nor has the calculation date. Correcting for inflation is an adjustment for the change in the purchasing power of money across time, not an adjustment in the value of the underlying property. Stating that the 1975 value of a 1975 widget is twenty 1995 dollars does not necessarily mean you could sell the widget for $20 in 1995 or even buy a widget for $20 in 1995. You could express the 1975 value of a widget determined as of 1975 in pesos (1975) instead of Canadian dollars if you wanted. You still have not changed the value calculated for the widget or the date as of which the value is determined. How the value of property is expressed only becomes important once you set about to compare it across time or to values expressed in a foreign currency. Correcting for inflation does not affect the exchange value of property determined as of a particular point in time.

¶ 23 Of course the foreign currency analogy can only be taken so far. While you might be able to exchange one American dollar for $1.50 Canadian, the cost of living in Canada compared to that of the United States may result in a smaller basket of goods being available to an individual in Canada for

$1.50 than would be available for one dollar in the United States. One American dollar is only equivalent to $1.50 Canadian when the money, regardless of currency, is going to be spent on the same side of the border or when two economies are identical.

5. NUMERICAL EXAMPLES

¶ 24 It is time to consider some numerical examples using the Consumer Price Index ("CPI") for Canada. These examples will illustrate the difference between correcting for inflation and changes in the value of property that are attributable to appreciation or depreciation. The examples will also demonstrate that the combined impact of inflation and depreciation can have a substantial affect on an individual's economic well being. By way of contrast, the examples will show that appreciation mitigates the ravages of inflation.

¶ 25 Unless stated otherwise, the following common set of facts will be used in each example:

1. Mr. and Mrs. X were married on June 1, 1975;
2. Mr. and Mrs. X separated on May 30, 1995 with no reasonable prospect of resuming cohabitation;
3. On June 1, 1975, Mr. X owned property with a 1975 exchange value of $10,000 stated in 1975 dollars;
4. On June 1, 1975, Mrs. X owned property with a 1975 exchange value of $5,000 stated in 1975 dollars;
5. On May 30, 1995, Mr. X owned property with a 1995 exchange value of $20,290 stated in 1995 dollars;
6. On May 30, 1995, Mrs. X owned property with a 1995 exchange value of $10,145 stated in 1995 dollars;
7. Neither spouse had any debts or liabilities on either the date of marriage or the date of separation;
8. None of the property is excluded property;
9. The matrimonial home, if any, was purchased after the date of marriage; and
10. The CPI [See Note 5 at end of document.] for 1975 and 1995 is 34.5 and 104.5 respectively.

(a) Example 1-Inflationary growth

¶ 26

(i) Current dollar values

Husband's NFP = $20,290 - $10,000 = $10,290

Wife's NFP = $10,145 - $5,000 = $5,145

Equalization payment = 0.5 x ($10,290-$5,145)
= $2,572.50 (from husband to wife)

(ii) Constant dollar values

Husband's NFP = $20,290 [$10,000 x ((104.5-34.5)/34.5)] = $20,290 - $20,290 = $0

Wife's NFP = $10,145 [$5,000 x ((104.5-34.5)/34.5)] = $10,145 - $10,145 = $0

Equalization payment = $0

¶ 27 This example demonstrates that people whose net worth just keeps pace with inflation can end up paying an equalization payment under the current dollar approach even though they are no better off in real terms. The result is an arbitrary redistribution of wealth.

(b) Example 2-No growth

¶ 28

New facts:

1. The exchange value of the property owned by Mr. X on May 30, 1995 is $10,000.
2. The exchange value of the property owned by Mrs. X on May 30, 1995 is $5,000.

(i) Current dollar values

Husband's NFP = $10,000 - $10,000 = $0

Wife's NFP = $5,000 - $5,000 = $0

Equalization payment = $0

(ii) Constant dollar values

Husband's NFP = $10,000 [$10,000 x ((104.5-34.5)/34.5)] = $10,000 - $20,290 = $0

Wife's NFP = $5,000 [$5,000 x ((104.5-34.5)/34.5)] = $5,000 - $10,145 = $0

Equalization payment = $0

¶ 29 This example demonstrates that each spouse is left to bear the burden of his or her own losses. While this appears somewhat unfair at first, it is consistent with the first example where there is no sharing of purely inflationary gains using the constant dollar approach. In this example there are purely inflationary losses.

(c) Example 3-Depreciating assets

¶ 30

New facts:

1. The value of the property owned by Mr. X on May 30, 1995 is $5,000. This property is the same item of property owned by Mr. X on the date of marriage and is the only item of property owned by him on either date.

(i) Current dollar values

Husband's NFP = $5,000 - $10,000 = $0

Wife's NFP = $10,145 - $5,000 = $5,145

Equalization payment = $2,572.50 (from wife to husband)

(ii) Constant dollar values

Husband's NFP = $5,000 [$10,000 x ((104.5-34.5)/34.5)] = $5,000 - $20,290 = $0

Wife's NFP = $10,145 - $10,145 = $0

Equalization payment = $0

¶ 31 This example emphasizes the unfair treatment of losses under the FLA. Some assets owned on the date of marriage will depreciate over time, which erodes a person's financial position. Further compounding the problem is inflation. However, the requirement that a person's NFP not be less than zero prevents them from being properly compensated for their real or non-inflationary losses. If the FLA is truly intended to promote equitable treatment, both real gains and real losses over the marriage need to be taken into account. In this example, the loss to Mr. X over the course of his 20-year marriage due to depreciation is $5,000 in nominal terms. In real terms, the loss is $15,290. The real irony here is that the current dollar approach at least provides some relief. The restriction on non-negative NFPs prevents the constant dollar approach from working effectively. Correcting for inflation is not the only obstacle for equitable equalization calculations.

¶ 32 This example is somewhat unrealistic in that it is unlikely that an individual would own only one item of property on the date of marriage and that they would still only own this same item of property on the date of separation. However, it does illustrate that losses suffered over the course of the marriage are aggravated by inflation. Where the mix of assets changes over the course of the marriage, it is more difficult to see the effects of inflation in relation to depreciation. The important point to take away is that as some of the property a spouse owns declines in value over the course of a marriage in an inflationary economy, the loss suffered is larger than if there were no inflation.

(d) Example 4 - Appreciating Assets

New facts:

1. The exchange value of property owned by Mr. X on May 30, 1995 is $25,290.
2. The exchange value of property owned by Mrs. X on May 30, 1995 is $15,145.

(i) Current dollar values

Husband's NFP = $25,290 - $10,000 = $15,290

Wife's NFP = $15,145 - $5,000 = $10,145

Equalization payment = 0.5 x ($15,290 - $10,145) = $2,572.50 (husband to wife)

(ii) Constant dollar values

Husband's NFP = $25,290 [$10,000 x ((104.5-34.5)/34.5)]
= $25,290 - $20,290 = $5,000

Wife's NFP = $15,145 [$5,000 x ((104.5-34.5)/34.5)] = $15,145 - $10,145 = $5,000

Equalization payment = 0.5 x ($5,000 - $5,000) = $0

¶ 33 While initially it looks like the husband's assets have appreciated more than the wife's, closer examination reveals that they have both experienced the same real growth in their respective net worth just as they have both experienced the same proportionate effects of inflation. Therefore, no equalization payment should be made. The Act does not require that both spouses have the same capital resources upon the breakdown of the marriage. The preamble simply states that spouses are to be recognized as holding equal positions as individuals within marriage and marriage is to be recognized as a form of partnership. It also says that the affairs of the spouses are to be dealt with equitably upon the breakdown of the partnership. It is not equitable to alter the relative positions of individuals simply because they were married. If one spouse contributes one third of the equity of the partnership initially, that proportion should not be altered without proper justification. Unfortunately, by not correcting for inflation, it is possible for one spouse to receive a disproportionate share of the assets of the partnership upon dissolution.

¶ 34 The rules of the FLA apply to spouses equally just as spouses equally experience the effects of inflation. Surely it could not have been the intention of the legislature to give spouses with less equity an automatic capital windfall upon marriage especially when there are support provisions in the Act. A spouse who has insufficient assets upon the breakdown of a marriage to adequately provide for him- or herself can be compensated with support.

6. JUDICIAL OPINION

¶ 35 Despite the significant difference in the results achieved when using the constant dollar approach as opposed to the current dollar approach, the debate as to which approach is the correct one has seldom been the subject of litigation. It is generally accepted without question that the current dollar approach is the correct method. What little judicial opinion exists on the subject has favoured the current dollar approach based primarily on a misunderstanding of the constant dollar approach and an overly stringent interpretation of the word "calculate."

¶ 36 One of the only cases that has considered the possibility of using constant dollars when calculating NFP is Mittler v. Mittler. [See Note 6 at end of document.] However, in Mittler McKinlay J. rejected the constant dollar method based on the perception that the Act requires the use of current dollars. It is very clearly stated in Mittler, and well understood in general, that a person's net family property is to be calculated as of the valuation date. Therefore, as discussed above, NFP is required to be calculated using constant dollars. Unfortunately, this was not the conclusion reached in Mittler.

McKinlay J. summarized the net family property calculation as follows:

> The first step in calculating net family property is to determine the value of all property owned on valuation date, and to deduct therefrom all debts and liabilities as of that date. The next step is to deduct the value of property, other than the matrimonial home, that the spouse owned on the date of the marriage, after deducting therefrom the spouse's debts and other liabilities, all calculated as of the date of marriage. [See Note 7 at end of document.]

¶ 37 Further in the decision, Madame Justice McKinlay discussed the possibility of adjusting for inflation in the net family property calculation. McKinlay J.'s comments read as follows:

> Counsel for Mr. Mittler, however, argues that the effect of inflation alone, and not the effect of other types of changes in the value of assets, should be taken into consideration, and there is some logic and fairness in such an approach. The legislature obviously intended that assets owned by a spouse at the time of marriage should be exempt, at some value, from the effect of the statutorily imposed "partnership". The question is, what is the "value" to be exempt? Growth in the value of assets in excess of that attributable to inflation alone must surely have been intended to form part of net family property. To hold otherwise would lead to importing impossibly complicated problems into an already complicated procedure, and would often lead to gross inequities. However, such consideration would not arise if only the purely inflationary element were considered.
> But what does the statute say? Paragraph (b) of the definition of "net family property" in s. 4(1) of the F.L.A. requires the deduction of:
>
> > ...the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage. [emphasis added]
>
> It is argued that the above definition only requires that the calculation (that is, the deducting of debts and other liabilities from property) be done as of the date of marriage, and that the calculation does not determine the value to be deducted. I have difficulty accepting that argument. On a grammatical reading of the definition, it is clear that what is being calculated is the "value of property", and that the value is calculated as of the date of marriage. There is no suggestion anywhere in s. 4(1) that the result of that calculation should be altered to reflect the effect of inflation.
> I conclude with some reluctance that the legislature has directed the court, in deducting the value of property owned at the date of marriage, to deduct only the value based on the date of marriage dollars. Although proceeding thus will often create apparent inequities, I consider that this practice is required by the text of s. 4(1). [See Note 8 at end of document.]

¶ 38 Madame Justice McKinlay is correct in saying that on a grammatical reading of the definition of net family property what is being calculated is the value of property calculated at of the date of marriage. Respectfully however, McKinlay J. was not correct in saying that there is no suggestion anywhere in subsection 4(1) that the calculation should be altered to reflect the effect of inflation. As already indicated in this article, converting date of marriage dollars to date of valuation dollars does not change the "value of property calculated as to the date of marriage." Once an item of property has been valued based on market conditions in existence as of the date of marriage and that value has been expressed in dollar terms, it is no longer appropriate to talk about value in terms of property. We are

now concerned with the value of money, which is a different consideration altogether. The exchange value of an item of property and the purchasing power of money are not the same thing. Correcting for inflation changes the result of the overall net family property calculation, which the legislation requires be determined as of the valuation date. It does not change the exchange value of an item of property owned and calculated as of the date of marriage. Therefore, it is possible to interpret the definition of net family property as requiring, or at least permitting, the calculation to be done all in valuation date dollars, or constant dollars in other words.

¶ 39 It should be remembered that the value of property owned as of the date of valuation and as of the date of marriage are not being calculated in the abstract. These values are being calculated in the context of the definition of net family property, which is to be assessed as of the valuation date. This alone should be sufficient to necessitate the use of constant dollars and resolve any dispute about the use of constant dollars versus current dollars. However, the fact that the net family property calculation is being done for the purpose of determining an equitable entitlement on the part of the spouse with the lower net family property further buttresses the argument that the most reasonable and equitable approach to calculating net family property is to use constant dollars. To hold otherwise will often lead to gross inequities as demonstrated in the numerical examples above.

¶ 40 Professor McLeod, in his annotation to the Mittler case, compares the subtraction of date of marriage dollars from valuation date dollars to the situation where the obligation to pay a set amount of money is discharged by paying the specified amount without regard to any devaluation or change in currency. Respectfully, the two situations are not the same. The NFP calculation is being performed for the purpose of determining an obligation to pay a sum of money: an equalization payment. There is no obligation to pay or divide the value of property a spouse owns on the date of marriage. Once the equalization payment has been determined, usually a considerable length of time after the valuation date, it is open to argument whether the obligation to pay this amount is satisfied upon paying the original sum or whether the affects of inflation should be considered. However, before one gets to this point, the equalization payment, which is based on a comparison of NFPs, must be determined in as equitable a manner as possible. More importantly, each spouse's NFP must be calculated as of the valuation date, which is not possible when date of marriage dollars are subtracted from valuation date dollars.

¶ 41 Another decision that has touched on the subject of correcting for inflation is the Supreme Court of Canada's decision in Best v. Best. [See Note 9 at end of document.] While the court was not called upon to determine the issue, the majority decision shows clear support for taking into account the decreasing value of money over time. Major J., writing for the majority, had the following to say about the problem of constant dollars in relation to pension valuation:

> On a similar note, the value-added method's subtraction of two present values raises the added problem of constant dollars. It is fairly plain that, owing to inflation, a dollar in 1976 purchased substantially more than a dollar in 1988. As a result, amounts having the same real value in constant dollars will have a smaller numerical value when expressed in 1976 dollars than in 1988 dollars. The value-added method does not appear to account for this difference; instead, it subtracts the 1976 figure directly from the inflated 1988 figure. The result is that all the inflation occurring between 1976 and 1988 on the pension's total value-even on the portion earned prior to 1976-is treated as a "gain" in value during the period of marriage. This "gain" is another consequence of the value-added method's use of capitalized values, and does not reflect any real change in the value of the pension benefit over the time that the appellant and the respondent were married. [See Note 10 at end of document.]

¶ 42 This passage suggests that purely inflationary gains should not be subject to equalization.

7. ADDITIONAL CONSIDERATIONS

¶ 43 The FLA, in subsection 34(5), permits the indexation of support orders. The indexing factor to be used is specified by subsection 34(6) to be the Consumer Price Index for Canada. The purpose of indexation is obvious. It is intended to prevent the erosion of the value of the original support order. Indexing for inflation keeps the value of the original order constant across time; it does not increase the value of the support order calculated at a specific point in time. The result is that a support order calculated at time X, based on considerations relevant at time X, has the same real value at time Y but still based on considerations that existed at time X. The dollars being paid for support in time Y might be twice what was originally ordered, but the real value will be unchanged due to inflation eroding the purchasing power of money.

¶ 44 Exactly the same argument applies with respect to the net family property calculation. Stating constant dollars does not change the value of date of marriage assets. The only thing that changes is the value of the overall net family property of an individual. The value is reduced to eliminate inflationary considerations so that one spouse does not receive an equalization payment based on anything other than real economic growth. It is grossly inequitable to base the legal entitlement to an equalization payment on a calculation that contains inflationary factors and cannot have been the intention of the legislature. Consistency with support calculations further emphasizes the need for the net family property calculation to be done in constant dollars.

8. CONCLUSION

¶ 45 The FLA permits the indexation of support orders. The Supreme Court of Canada recognizes the importance of correcting for inflation in the context of property valuation and lower courts have admitted the inherent inequity that results when the effects of inflation are not removed from the NFP calculation. Add to this the fact that the definition of NFP in the FLA requires each spouse's NFP to be calculated as of the valuation date and it becomes clear that the only equitable and appropriate method of calculating a spouse's NFP is to use constant dollars. Unfortunately, at the present time current dollars are used to calculate NFP thereby subjecting inflationary gains to equalization and redistributing wealth arbitrarily. This static approach to property equalization is inequitable, and contrary to the stated intentions of the FLA, which include recognizing marriage as a form of partnership and providing for the equitable settlement of the spouses' affairs upon marriage breakdown.

Endnotes:

Note 1: R.S.O. 1990 c. F.3 [hereinafter "FLA" or "the Act"].

Note 2: Ibid., at s. 4(1) [emphasis added].

Note 3: Della Thompson, ed. (New York: Oxford University Press Inc., 1996).

Note 4: Henry Campbell Black, M.A., Black's Law Dictionary, (St. Paul: West Publishing Co., 1979).

Note 5: Statistics Canada, Consumer Price Index, 1996 Classification, annual average all-items indexes, Canada, historical summary.

Note 6: (1988), 17 R.F.L. (3d) 113 (Ont. H.C.).
Note 7: Ibid., at 143.

Note 8: Ibid., at 151-152 [emphasis added in first paragraph].

Note 9: (1999), 49 R.F.L. (4th) 1, 174 D.L.R. (4th) 235 (S.C.C.).

Note 10: Ibid., at 267-268, para. 73 [D.L.R.].

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Reforming the Children & Family Services Act: Is The Pendulum Swinging Back Too Far?*

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I. INTRODUCTION

¶ 1 The Canadian media has been filled with reports that the child welfare system is "in crisis," with stories of child abuse deaths and recently completed or on-going public inquiries in several provinces into child abuse and the child welfare system. Canadian politicians are promising swift action to deal with this "crisis" in child welfare. In early May of 1999 the Ontario Legislature responded with a virtually unprecedented display of unanimity, enacting a broad set of amendments to the Child and Family Services Act (Bill 6) without any public hearings. [See Note 1 below] These amendments are intended to increase protection to children from parental abuse and neglect. While no date has been set for implementation, it is very likely that these amendments will come into force in the Fall of 1999.

Note 1: Child and Family Services Amendment Act (Child Welfare Reform), 1999. Bill 6, Third Session, 36th Legislature, third reading May 3, 1999, enacted as S.O. 1999, c. 2.

¶ 2 This paper discusses the context of the present problems in Ontario's child welfare system, with a particular emphasis on analysing the effect of legislation and the court system in dealing with child welfare problems. Part II of the paper discusses the historical and social context for the child welfare system. Part III analyses in detail the amendments to the C.F.S.A. in Bill 6. The paper concludes by recognizing the limits of legislative reform and the dangers of over-intervention. The paper does not address the changes to the Family Law Rules that are scheduled to come into effect on September 15 1999 and that will also affect child protection proceedings. [See Note 2 below]

Note 2: Ont. Reg. 114/99

¶ 3 I argue that in the understandable effort to increase the protection afforded to children, we must also keep in mind the costs of intrusion and the risks of over-intervention. The amendments were enacted without public hearings or real public debate. I worry that the politicians may be looking for a relatively simple legislative solution to a complex set of human problems. While there was undoubtedly a need to amend some provisions of the Act, it is regrettable that there was not more consideration of the implications of the changes. I am concerned that the Legislature may have overreacted to some problems, and that some provisions in Bill 6 may create new problems.

¶ 4 I argue that given the broad language of some of the amendments, the courts should take an approach to their interpretation which ensures that the changes truly improve the welfare of children. The courts face the difficult challenge of protecting children from situations of abuse and neglect while minimizing the risks of over-intervention for children.

¶ 5 While taking a legal focus, I recognize that legislation and the legal system alone have only a limited impact on the child welfare field, and that the decisions made by child protection workers and agencies about apprehension and placement often affect children more than those decisions made in court. However, what happens in the family courts has a significant impact on what happens in the broader child welfare system. Improving the legal system and the decision making that is its central function can only have a limited role in improving the child welfare system. Ensuring that there are adequate resources for training and service provision in the child welfare field, and in the related parts of health, child care, education, and social service sectors, is crucial to ensuring the protection and nurture of Ontario's children. One has to hope that the present focus of the politicians on the relatively inexpensive process of legislative reform is not a short-sighted or cynical effort to distract the public from vitally important issues that will involve greater resource expenditures. While the Ontario government has announced an increase in spending in the child welfare field, resource issues remain of critical importance in the broad field of children's services. [See Note 3 below]

Note 3: In 1998 the Ontario government announced an additional $170m over three years to hire more staff and provide more training and support for agency workers.

II THE CONTEXT FOR THE PRESENT REFORMS

The Political Context

¶ 6 Unfortunately, while the heightened media attention and political interest in the child welfare field is a recent phenomenon, the documenting of fundamental problems is not new. Over the past quarter century there have been a number of major inquiries in Ontario into the inadequacies of the child welfare system. [See Note 4 below] While some of the current proposals to increase the effectiveness of the child welfare system in responding to cases of abuse and neglect are sound, other proposals create a risk of having a system that is overly intrusive. Further, some of the most fundamental problems in the child welfare system will require more complex solutions than enacting new laws; these problems are receiving relatively little public attention.

Note 4: See e.g. C. Greenland, Child Abuse in Ontario (Toronto: Ontario Ministry of Community and Social Services, 1973); Ontario Ministry of Community and Social Services, Report of The Task Force on Child Abuse (1978); and W. Allen, Judicial Inquiry into the Death of Kim Anne Poppen (Toronto: Ontario Queen's Printer, 1982).

¶ 7 If we are to truly improve how our society deals with children whose parents are unable to adequately care for them, it is important to understand the context of the present crisis and avoid systemic overreactions that may create as many problems as they solve. The failure to adequately address systemic issues in the child welfare field is not limited to Canada. An American scholar commented: [See Note 5 below]

> Child welfare systems are marked, usually, by poor, chaotic management, with any institutional change simply superimposed on existing layers. Typically... the state agency which administers the child welfare system also includes most other poor people's programs, usually income maintenance and day care. Often it is the state agency least favoured by the legislature... there is little political pressure to have these agencies well run, with the exception of eliminating welfare fraud....

Note 5: Mushlin, "Unsafe Havens: The Case for Constitutional Protection of Foster Children from Child Abuse and Neglect" (1988) 23 Harv. Civil Rights-Civil Liberties Rev. 199 at 207. In the United States lawyers and advocates for children are making use of civil rights class action suits to improve the protection and level of care provided to children by the state; see e.g S. Preston, "Can You Hear Me?: the United States Court of Appeals for the Third Circuit Addresses Systemic Deficiencies of the Philadelphia Child Welfare System" (1996) 29 Creighton L. Rev. 1653. While a discussion of the difficulties of bringing this type of suit in Canada are beyond the scope of this paper, it is an alternative that advocates for children in this country may want to consider.

¶ 8 In Canada, the child welfare system has often lacked strong political support. In the present time of fiscal restraint, other child related services such as education and child health have a broader constituency and have tended to have greater public support. At least in part, the traditional lack of public concern with child welfare issues reflects the reality that the child welfare system tends to deal with those with little or no political power: children, especially those from lower socio-economic groups, female headed families, and aboriginal and visible minority communities. Further, the child welfare system deals with problems that have a complex interrelationship to other seemingly intractable social issues such as child poverty. Politicians are often slow to react to child welfare problems, sensing that there are unlikely to be fast, easy or inexpensive solutions to problems in the child welfare field.

¶ 9 The present public attention to the inadequacies of the child welfare system is at least in part a result of media efforts to publicize tragic, sensational child abuse deaths. [See Note 6 below] It may also reflect a collective sense of guilt at the failure to protect our most vulnerable citizens. The increased public attention to child welfare issues is welcome, but one can only hope that this interest will be sufficiently sustained and that it will bring the necessary resources and systemic change neede within the system. One reason for cautious optimism is that there is a growing recognition that failing to deal adequately with problems of child abuse and neglect has enormous long term social costs in terms of future costs for the welfare, correctional and social service systems. Children who are victims of abuse and neglect and who do not receive proper intervention in childhood will likely be a burden on the economy in the future.

Note 6: See e.g. Toronto Star series on child abuse in the Spring of 1998, concluding with Moira Welsh and Kevin Donovan, "Special Report: How to Save the Children" The Toronto Star (21 June 1998) A1.

¶ 10 There are steps that can be taken that will reduce the risks of child abuse and neglect and more effectively intervene with those children whose parents cannot care for them adequately. But there is no simple or certain way to prevent abuse and neglect of children. Intervention in families where parents are perceived to be caring inadequately for their children will always involve difficult balancing, as removal of children from parental care comes with its own risks and costs. Intervention also raises fundamental value and political questions about the relationship of children and families to the state. Present knowledge and research about the effects of different child care arrangements is limited, and decisions about a child's future care will always have elements of uncertainty due to their predictive nature.

The Origins of Ontario's Child Welfare System

¶ 11 Until the latter part of the nineteenth century, there was little social or legal recognition of the special needs and vulnerabilities of children. Child abuse and neglect were common, and at a young age children began work in factories, mines and farms. In Canada, religious orders established orphanages for infants without a family to care for them, but it was common for children whose parents and relatives were dead or unable to care for them to be "apprenticed out" to work on farms and in shops, often in exploitative conditions.

¶ 12 Towards the end of the nineteenth century there was a growing awareness of the psychological and social importance of "childhood" as a distinct and formative stage of life. Reformers began to advocate for compulsory school attendance for children and abolition of child labour, as well as for the establishment of juvenile courts and training schools to deal with older children who were neglected, orphaned or delinquent. In 1893 the first Canadian legislation was enacted to allow for the establishment of Children's Aid Societies; judges were given the authority to commit to Society guardianship young children who were "dependent and neglected," as well as older youths who were "immoral or depraved." [See Note 7 below] These Societies were responding to children who were dislocated by industrialization and urbanization; the Societies were primarily involved with immigrant children, orphans, vagrant children and youth, and "illegitimate children." While there was at least nominal judicial control over the process of the placing of children in the custody of a Society, in practice the agencies had very broad discretion to assume guardianship and make decisions for the care of children. Many of the judges who dealt with these cases lacked legal training; most of the children had no parental figure involved in their lives when taken into care, or their parents were poor and lacked the educational, financial or social resources to challenge the agencies in court. There was at that time in Canada little or no government support for the poor, and the primary way that the government financially assisted in the care of children was through the Children's Aid Societies.

Note 7: Protection of Children Act, S.O. 1893, c. 45, s. 14.

¶ 13 By the middle of the twentieth century, provincially regulated child protection agencies were operating throughout Canada. [See Note 8 below] The welfare state was slowly developing. Unwed mothers, who in the past rarely had the option of keeping a child, began to be eligible for public

financial support; while this support was limited, it gave these woman a choice about keeping their children. [See Note 9 below] In the mid 1950's the Supreme Court of Canada considered a case where a single mother was seeking custody of her child and articulated as guiding principle that: [See Note 10 below]

> prima facie the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that fundamental relation be severed.... the welfare of the child can never be determined as an isolated fact... as if the child were free from the natural parent bonds entailing moral responsibility, as if for example, he were a homeless orphan wandering at large.

Note 8: However, until the 1960s, child welfare agencies were only providing services to aboriginal children on reserves in "life and death" situations since these children were viewed as a federal responsibility.

Note 9: See John Richards, Retooling the Welfare State:

What's Right, What's Wrong, What's To Be Done (Toronto: C.D. Howe Institute, 1997) for an argument that too much has been given to single women and not enough to two parent families.

Note 10: Hepton v. Maat, [1957] S.C.R. 606 at 607-08

¶ 14 Until the middle of the twentieth century, child welfare agencies were rarely involved in removing children from the care of parents who were expressing an interest in caring for them or challenging agency action in the courts. [See Note 11 below]

Note 11: One of the first reported cases in Canada of parents challenging child protection agency involvement was Re Perepolkin (1957), 11 D.L.R. (2d) 417 (B.C.C.A.) where the agency had removed a child from the care of parents who were Doukhobors, a small religious group in British Columbia that was viewed as "outside the mainstream." Hundreds of children were removed from their parents and placed in institutions. A report released in 1999 documented the long term emotional trauma that these children suffered as a result of their removal from their families. According to a recent report of the British Columbia Ombudsman almost all of them [the adult survivors of this forceful removal from parental care] still suffer from some form of post-traumatic stress syndrome. See Rod Mickelburgh, "Doukhobor children wronged, B.C. told," The Globe & Mail (9 April 1999) A3.

¶ 15 In the early 1960s physicians became aware of the "battered baby syndrome" and the problem of physical child abuse was "discovered." [See Note 12 below] Doctors and agencies became aware that abusive parents would lie about the cause of injuries to young children, and that child protection workers had to carefully investigate parenting practices; this required agencies to take a more investigative and adversarial role with parents.

Note 12: Kempe et al, "The Battered Child Syndrome" (1962) 181 J. Am Med. Assoc. 17-24

¶ 16 In response to the "discovery" of the child physical abuse problem, the first child abuse reporting legislation was enacted in the mid 1960s. At the same time, there was a growing recognition of the importance of civil rights and that individuals had the right to restrictions on state interference in their lives. [See Note 13 below] The first legal aid programs were being established to represent low income individuals facing intrusive state action, first in the criminal context and then in the child protection field. Child welfare legislation began to reflect concerns with protection of due process and parental rights. [See Note 14 below]

Note 13: See e.g Ontario, Royal Commission Inquiry into Civil Rights (1964) [The McRuer Report]

Note 14: See e.g. Ontario Child Welfare Act, S.O. 1965, c. 14; and Ex Parte D, [1971] 1 O.R. 311 (H.C.).

1970s & 80s: Judicialization of Child Welfare & Family Preservation

¶ 17 The 1970s and 80s saw a number of related legal and social work and judicial developments that changed the child welfare system throughout North America, supporting the concept of "family preservation" and placing greater emphasis on the legal rights of parents and children.

¶ 18 One important dimension of change in that period was the development of a more "legalized" and rights based society. In Canada the trend of giving individuals greater rights in their relationship with the state was both reinforced by and reflected in the introduction of the Canadian Charter of Rights in 1982. In the context of the child welfare system, parents and children were afforded greater legal rights, while agencies and child protection workers had to devote greater attention and resources to satisfying the requirements of the court system and justifying involuntary intervention.

¶ 19 The child welfare regimes of the first half of this century gave agencies broad discretionary powers, and made little attempt to distinguish between the child in need of protection and the child having behavioural difficulties or engaging in delinquent behaviour. [See Note 15 below] The growing recognition of legal rights for children involved in protection proceedings was one of the most obvious aspects of the legalization of the child protection process. While there was significant variation between North American jurisdictions, the trend in late 1970s was towards the establishment of programs for legal representation of children involved in protection proceedings, though there was controversy over the exact role that these lawyers were to play in court.

Note 15: An important aspect of the legalization of child welfare was the development of a clear distinction between the concept of the child in need of protection and the young offender. While in theory the Juvenile Delinquents Act, in force from 1908 to 1984, required a juvenile offender to be dealt with as a child "needing aid, encouragement, help and assistance," in practice protection of the public and notions of punishment heavily influenced Juvenile Court judges and abuse was a significant problem in juvenile correctional facilities. In Canada the proclamation into force of the Young Offenders Act in 1984 introduced a regime that emphasized due process and legal rights for youths, and restricted responses to offending behaviour that were premised solely on the "welfare" of the child offender. The legal separation of child welfare and youth offending in 1984 marked an important philosophical divide and also had practical ramifications.

¶ 20 Reinforcing the trend towards legalization and the granting of rights to children and parents was

a growing recognition that too many children were being taken into state care, often with harmful long term consequences. There was also a growing awareness that some children and adolescents in state care were victims of abuse, most obviously in the large child welfare institutions that were slowly being closed, but also in foster care. Many children removed from parental care and placed in the care of a state agency were not being placed in stable, supportive environments, but would often "drift" through a series of unsatisfactory placements in foster care or institutions.

¶ 21 In the early 1970s there was also a growing challenge to the practice of removing children from parental care based on arguments that the process of separation of children from parents was often emotionally damaging to children who were "attached" to their parents, even if the parents were far from ideal. There is a still a lack of good empirical research on the long term effects of supporting children in the care of parents who have been neglectful or abusive as opposed to removing them from parental care. [See Note 16 below] However, arguments in favour of leaving children in parental care in all but the clearest cases of abuse or neglect were forcefully articulated in the 1970s by the influential American scholars Goldstein, Freud and Solnit who advocated preservation of "continuity of relationships." [See Note 17 below] Their ideas came to be reflected in the "permanency planning" theory. Permanency planning advocates favoured "family preservation" - leaving a child with parents whenever supports could be provided to minimize risks - and making decisions as early as possible in life to remove children from inadequate parents and place the child in another "permanent" home. In practice, however, at least in the 1980s, the family preservation aspects of permanency planning were emphasized while the making of early removal decisions was not. [See Note 18 below]

Note 16: See e.g. J.D. Moorehead, "Of Family Values and Child Welfare: What Is in the 'Best' Interests of the Child" (1996) 79 Marquette L. Rev. 517.

Note 17: J. Goldstein, A Freud, A Solnit, Beyond the Best Interests of the Child (1973); and J. Goldstein, A Freud, A Solnit, Before the Best Interests of the Child (1979)

Note 18: See A.N. Maluccio, E. Fein & K. Olmstead, Permanency Planning for Children: Concepts and Methods (New York: Tavistock, 1986).

¶ 22 Reinforcing other trends was a growing recognition that too often the decisions of social workers and judges to remove children from parental care reflected biases of class or race. In an Ontario child protection case in 1973 the judge commented: [See Note 19 below]

> In a hearing such as this there is danger in over-reliance upon any group of witnesses self-conscious respecting their professionalization. I resolved not to fall victim to the bias of the profession, the group psychology of the social workers....It was manifest from the opening that this was a contest between the right of a subsocioeconomic family to subsist together and the right of the public, represented by the Children's Aid Society, to insist upon higher standards of parental care than the couple ... were capable of offering. Many witnesses called for the Society were persons of superior education.... One could not listen to their testimony with all the sombre implications of this application without resolving that this Court must not be persuaded to impose unrealistic or unfair middle-class standards of child care upon a poor family....

Note 19: Re Warren (1973), 13 R.F.L. 51 at 52, (Ont. Co. Ct.) per Matheson J.

¶ 23 In Canada the issue of systemic bias was most apparent in regard to aboriginal children. As the aboriginal residential schools began to close in the 1960s, provincial child welfare agencies began to provide services on reserves, but often in a culturally insensitive fashion. This resulted in as many as one third of the children in some aboriginal communities being removed from their homes, and often placed in white foster homes or adoptive families. The removal of large numbers of aboriginal children from their communities has been criticized as "cultural genocide" with concerns being raised about the difficulties and identity problems experienced in adolescence by aboriginal children who have been adopted by white families. [See Note 20 below]

Note 20: See e.g. P. Monture, "A Vicious Cycle: Child Welfare and the First Nations" (1989), 3 C.J. W.L. 1.

¶ 24 In the 1970s and 80s the concerns about the need to respect legal rights and the desirability of preserving families led to pressures on law makers to change the legal regimes that govern child welfare in Canada. [See Note 21 below] The changes affected child welfare legislation, judicial decisions and issues related to the administration of justice such as requiring legal training for child welfare judges and giving parents and children access to legal aid. While the nature and pace of change varied across the country, and some jurisdictions moved further away from early interventionist approaches, the broad trend was to increase legal regulation of the child welfare system, emphasize family preservation, and have a greater sensitivity to the concerns of aboriginal communities. The move towards a "family autonomy" model was perhaps most clearly apparent in the Ontario Child and Family Services Act of 1984. [See Note 22 below] This Act included statements of principle that favoured "support for the autonomy and integrity of the family" and the "least disruptive alternative" for agency intervention. The definition of "child in need of protection" was narrowed. Vague grounds for agency intervention, like "parental unfitness," were eliminated, and the basis for state intervention was restricted to situations where there was a clear risk of serious harm to the child. If state intervention was sanctioned by a court, there was an onus on the agency to justify removal of the child from the home rather than providing support in the home. There was encouragement for the involvement of aboriginal communities in child welfare decision-making and service provision; for aboriginal children removed from parental care there was a strong statutory preference for placement in aboriginal homes.

Note 21: For a summary description of child welfare legislation and services as of the early 1990s, see Child Welfare in Canada (1994, National Clearinghouse on Family Violence, Health Canada); and Barnhorst & Walter, "Child Protection Legislation in Canada" in Bala, Hornick & Vogl, Canadian Child Welfare Law (1991, Toronto, Thompson Educational)

Note 22: S.O. 1984, c. 55; see also the Alberta Act, S.A. 1984, c. C-8.1. The philosophy behind these reforms is well articulated in The Children's Act: A Consultation Paper (1982, Ontario Ministry of Community and Social Services)

¶ 25 Accompanying this type of legislative reform were profound changes in the cases being dealt with by child welfare agencies and in the services being provided. For example over the past thirty years there has been a steady and dramatic decline in the extent to which single mothers look to these agencies to place their newborn infants for adoption; single mothers now typically keep custody of their children, perhaps with agency support.

¶ 26 Agencies also developed an expectation that in child abuse and neglect cases that were assessed as "low risk" the child would remain with the family. Cases were increasingly dealt with on an "informal" or voluntary basis, with court proceedings and removal from parental care seen as a "last resort." Thus in Ontario from 1971 to 1988 while there was a 160% increase in the number of families receiving child welfare services (reflecting population growth, more stress on families and identification of more child welfare problems in the community), the number of children in care was cut by almost half and the ratio of children in care to total caseload fell by 80%. [See Note 23 below]

Note 23: Barnhorst & Johnson, The State of the Child in Ontario (Toronto: Oxford University Press, 1991) at 69-82.

¶ 27 While the number of children coming into agency care was falling, those children who were taken into care tended to be older and often more troubled than in the past. Changes in family structure and increases in labour force participation by women made it harder to find foster homes. Because of the recognition of the problem of abuse of children in state care, supervision and regulation of out-of-home placements was increased, and children in care were given greater access to advocates.

¶ 28 A significant development of the 1970s and 80s was the "discovery" of child sexual abuse. While children have been victims of sexual abuse and exploitation throughout human history, it was only in the late 1970s that professionals and the public began to be aware of the extent and effects of sexual abuse. The growing awareness of the widespread extent of child sexual abuse can be attributed to work with adult survivors of sexual abuse, first by feminists in the community and then by therapists and other mental health professionals. It became clear that victims of childhood abuse were often too frightened or guilty to disclose their abuse during childhood, or if they did disclose they were too frequently dismissed as lying or fantasizing. With the release of the Badgley Report in 1984, it became clear that child sexual abuse was drastically unreported in Canada. [See Note 24 below] Increased professional and public awareness led to programs to help children to disclose and as a result there was a massive increase in the reporting of childhood sexual abuse during the 1980s and early 1990s, both from children and from adult survivors reporting "historic abuse." Although there is little reason to believe that there is more child sexual abuse now than in the past (and perhaps reason for some optimism that increased awareness and reporting are leading to a reduction in the actual incidence of sexual abuse), the rising number of sexual abuse cases has sometimes overwhelmed an already stretched child welfare system. [See Note 25 below]

Note 24: Report of the Committee on Sexual Offences Against Children and Youth [chaired by Robyn Badgley] (Ottawa, Ministry of Supply and Services, 1984)

Note 25: Amendments to the Criminal Code in 1988, 1993 and 1997 as well as the evolution of common law evidentiary rules facilitated children giving evidence in criminal court, and there has been a dramatic increase in the number of prosecutions for child sexual offences. Adult survivors have also begun to pursue civil actions against perpetrators of childhood abuse to receive compensation for their long term psychological trauma and their consequent loss of employability and income as adults. While it is apparent that childhood sexual abuse is often perpetrated within the family, it is also clear that too many children who were removed from parental care in earlier times and placed in child welfare institutions, like the Mt. Cashel orphanage in Newfoundland, became victims of childhood abuse while wards of the state. While a socially aggressive response to child sexual abuse is very important, sometimes the interest of the child victim is lost in the court process, especially in the criminal process. Sometimes the legal response is too intrusive and further victimizes the child who has already suffered abuse. This was recently remarked upon in a criminal case in Ontario where Justice Humphrey expressed concern about the prosecution of child sexual abuse cases where there is "no chance of conviction" out of a desire

to be "politically correct." This results in the child being "victimized" again by the criminal process. [R v. Brooks, [1998] O.J. No. 1726 (Gen. Div.)]. Child victims need support if they are to be witnesses in the criminal process, and in intrafamilial sexual abuse cases their interests should be fully considered by prosecutors and judges. Sometimes this will mean that an abuser will not be prosecuted.

Trying to Achieve a Balance in the 'Nasty' 90's

¶ 29 The past decade has been a difficult period in the public sector in Canada, with budget cuts and consequent morale problems for child welfare agencies, as well as for a range of related services including health, social services, welfare, education, justice and legal aid. Some of the resource cuts have directly affected the ability of child welfare agencies to provide services. Other cuts, for example to welfare payments in provinces like Ontario and Alberta, have indirectly affected these agencies, by placing poor families under greater stress and making it even more difficult for them to care for their children, thereby increasing demands for agency help.

¶ 30 At least in part the "family preservation" policies of the 1970s and 1980s were premised on the expectation that it would be possible to provide a range of preventative and support services in the community for high risk parents and children. All too often these are the first services to be cut in times of financial restraint, raising concerns about the viability of some "family preservation" policies in the 1990s. The family preservation policies of earlier decades were also premised on a set of political and social beliefs in the importance of social supports for "the family." The 1990s have been a conservative time, with more emphasis on individual responsibility and accountability, and less on societal support and responsibility. "Family values" remain important, but society may be prepared to be more judgmental of parents who are seen to be inadequate and more prepared to intervene in the lives of children and remove them from parental care.

¶ 31 The notion of "children's rights" remains important, but these rights are now more likely to be defined to include "the right to protection and safety," as opposed to strictly legal rights. [See Note 26 below] In some provinces, reductions in funding have curtailed child representation programs, though in Ontario the provision of counsel for children in protection cases has remained a priority and has not been reduced. Counsel for children have important responsibilities, including to ensure that all the evidence is before the court, to attempt to reduce delay, and in appropriate cases to facilitate settlement. However, the courts have indicated that there are limits to that role. In its 1994 decision in Strobridge v. Strobridge [See Note 27 below] the Ontario Court of Appeal ruled that a lawyer appointed for a child "is not entitled to express his or her personal preferences on any issue including the children's best interests. Nor is counsel entitled to become a witness and advise the court about what the children's ... preferences are." Unless admitted with the consent of the parties, this type of evidence is to be introduced by the child's lawyer calling witnesses who can be subject to cross examination.

Note 26: The ambiguity of the concept of Children's Rights is reflected in the United Nations Convention on the Rights of the Child which Canada ratified in 1989. While written in the discourse of "rights", only one article (Art 12) refers to the role of children in decision making, and much of the Convention creates a set of state "obligations" to protect children and promote their welfare; these "rights" are more likely only to be effected through political advocacy in the "court of public opinion" than through legal remedies. In only one reported Canadian case, Francis v. Canada, [1998] O.J. No. 1791 (Gen. Div.) has a child successfully invoked the Convention. In Francis the Court invoked the Convention to help define rights under s. 7 of the Charter of Rights, and held that the failure to even consider the effect of the deportation of their mother on two young children who were Canadian citizens was inconsistent with their "best interests" and hence violated the Charter. While the children's interests were not determinative on the issue of the mother's deportation, the total failure to consider their interests affected their "liberty and security of the person" in a fashion not consistent with the "principles of

fundamental justice." A case that rejected this argument, Baker v. Canada, is under appeal to the Supreme Court of Canada.

Note 27: (1994), 4 R.F.L. (4th) 169 (Ont. C.A.)

¶ 32 The concept of "parents' rights" remains important in the era of the Charter, as the Supreme Court of Canada recognized in 1994 in R.B. v. C.A.S of Metro Toronto. [See Note 28 below] At least four judges of the Court accepted that the parent-child relationship is worthy of constitutional protection, as an important aspect of constitutionally protected rights of "liberty and security of the person." Justice Sopinka recognized that an aspect of parental religious freedom extends to directing their children's religious upbringing, while three other judges seemed to leave the door open to constitutional arguments on behalf of parents. [See Note 29 below] But that decision emphasizes the importance of procedural rights of parents in proceedings where their relationship with their child is threatened, and indicates that in the final weighing of evidence the concept of parental rights cannot be invoked to harm their child.

Note 28: [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 157. Another decision that could be interpreted as a "victory" for parental rights was the 1997 decision in Winnipeg C.F.S.A. v. G. (D.F.), (1997) 31 R.F.L. (4th) 165 (S.C.C.) where the majority of the Supreme Court of Canada refused to invoke a parens patriae jurisdiction to force a solvent sniffing pregnant woman to receive treatment to prevent harm to her fetus. However, it is submitted that rather than being a triumph for "parental" rights, this decision is better viewed as a case that turned on the reluctance of the Supreme Court to recognize the unborn as a "child" with any legal personality, consistent with the earlier decisions on abortion.

Note 29: Gonthier, McLachlin, L'Heureux-Dubé JJ. concurred with LaForest J. and explicitly recognized parental rights under s. 7 of the Charter; Sopinka J. expressed no opinion on the s. 7 issue, but recognized parental rights under s. 2(a) of the Charter; Cory, Iacobucci and Major JJ. were not prepared to recognize s. 7 rights for parents in the context of this case, where a child's health was at stake, but appeared to remain open to this argument in other contexts. Only Lamer C.J.C. seemed completely opposed to recognizing parental rights under s. 7 of the Charter.

¶ 33 I hope that the receptivity of some members of the Supreme Court to the rights of parents will be reflected in the soon to be rendered decision in New Brunswick (Minister of Health and Community Services) v. G. (J.). This is a case where an indigent mother has made a constitutionally based claim for legal representation where a child welfare agency is threatening to remove her child from her custody. [See Note 30 below] The cuts to legal aid funding have affected the ability of poor parents (who are those most typically involved in protection cases) to obtain legal representation, though the situation is not as bad in Ontario as in some other Canadian provinces. Giving parents procedural rights need not prejudice a child's welfare, since this type of right is consistent with getting the fullest information before the courts and having the best decision made. There cannot be a complete hearing of all the relevant evidence in a complex case between parents and a state agency about an issue of such fundamental importance as the parents' relationship with their child if the parents do not have counsel.

Note 30: New Brunswick (Minister of Health and Community Services) v. G. (J.) (1997), 145 D.L.R.(4th) 349 (N.B.C.A.). The New Brunswick Court of Appeal rejected the mother's argument for a constitutionally recognized right to legal representation in a child protection proceeding, Bastarache J.A. (as he then was) dissenting. The appeal was heard by the Supreme Court November 9, 1998.

¶ 34 While the procedural dimension to parental rights is being recognized, the courts have also been balancing this with increasing recognition of the importance of the emotional well-being of children. In its 1994 decision in Catholic CAS of Metro Toronto v. M.(C.) [See Note 31 below] the Supreme Court emphasized the importance of the psychological bonding of a child with foster parents. After a child was in the care of foster parents for several years and came to view them as her sole psychological parents, the Court considered the psychological harm that would result from removing the child from the care of the foster parents to justify a finding that the child was "in need of protection." This decision makes it substantially more difficult for a biological parent who has lost custody of a child for a period of years due to the parent's mental or emotional problems to regain custody of her child (provided that the agency has placed the child in a stable foster family), even if the parent has undertaken a course of treatment and regained the capacity to adequately parent. Similar decisions have held that even if the child is aboriginal, the courts will give precedence to psychological bonding after more than a year in care. [See Note 32 below]

Note 31: (1994), 2 R.F.L. (4th) 157 (S.C.C.)

Note 32: Sawan v. Tearoe (1993), 48 R.F.L.(3d) 392 (B.C.C.A.), leave to appeal to S.C.C. refused; and C. (J.M.N.) V. Winnipeg C.F.S.A. (1997), 33 R.F.L. (4th) 175 (Man. Q.B.).

¶ 35 A number of recent decisions reflect a similar trend to restrict the substantive custodial rights of parents who clearly pose a significant risk to their children. [See Note 33 below] In its 1997 decision in Catholic CAS of Metro Toronto v. O. (L.M.) [See Note 34 below] the Ontario Court of Appeal held that where parents had been convicted and jailed in criminal court for killing one of their children, a judge could dispense with an oral hearing of evidence and grant "summary judgement" to make their other children Crown wards with a plan for adoption. The children's interest in having a timely decision made about their futures took precedence to the parents' right to have a full trial where there were "extreme facts" and the outcome was certain.

Note 33: Other recent child protection decisions that emphasize the welfare of the child over relations with biological relatives include F. (P.G.) v. K. (R.K.) (1997), 3 R.F.L. (4th) 312 (B.C.C.A.); Catholic C.A.S. v. A.D. (1994), 1 R.F.L. (4th) 268, 111 D.L.R.(4th) 151 (Ont. Gen Div.); and C.A.S. of Metro Toronto v. S.R. (1993), 1 R.F.L. (4th) 223 (Ont. Gen. Div.). The recent Supreme Court of Canada decision in D.H. v. H.M.,[1999] S.C.J. 22 (full reasons to follow) rejected the claim of an aboriginal mother to regain custody of her child from the child's adoptive white grandparents, again emphasizing welfare over notions of parental rights and aboriginal culture.

Note 34: (1997), 30 R.F.L. (4th) 16 (Ont. C.A.)

¶ 36 In its 1998 decision in New Brunswick Minister of Health and Community Services v. L.(M.) [See Note 35 below] the Supreme Court of Canada upheld a trial judge's decision to terminate access rights to the parents of a permanent ward, emphasizing that "access is a right that belongs to the child, and not to the parents." Justice Gonthier wrote that "preserving the family unit only plays an important role if it is in the best interests of the child" endorsing the view that "the parents must be worthy of being 'visitors in their child's life.'" While this rhetoric must be understood in the context of the facts of the particular case, where there was significant evidence that the children were disturbed by visits with parents who had a history of marital violence and the children's lawyer was advocating termination of access, this decision clearly emphasized children's welfare over parental rights.

Note 35: (1998), 41 R.F.L. (4th) 339 (S.C.C.)

¶ 37 There are, however, also recent examples of Canadian appellate courts continuing to recognize the dangers of over-intervention and the need to find the right balance in the amount of state intervention. The Prince Edward Island Court of Appeal in W. (N.) v. Prince Edward Island (Director of Child Welfare) stated: [See Note 36 below]

> Legislators and courts have long ago abandoned the notion that children may be found to be in need of protection because a court deems it to be in the best interests of the child. There is a presumption children are to be left with their parents, and the autonomy and integrity of the family unit is to be maintained until such time as it is demonstrated that they are in need of protection...The autonomy and integrity of the family unit is to be maintained not because this is a right of parents, but because of a recognition that a child's ... interests are most appropriately served when they are raised by their parents....courts must be careful not to authorize state intervention only on the basis that it is believed that the state can do a better job of raising a child than the parent.

Note 36: (1997), 33 R.F.L. (4th) 323 (P.E.I.C.A.)

¶ 38 The appeal court suggested that the standard of proof in a wardship case is not the "'ordinary' civil standard of proof" but rather there must be "clear and cogent evidence, establishing with a high degree of probability" that the child protection agency has established its case. While other courts have not adopted this standard of proof, the decision reflects important judicial concerns about respect for familial autonomy.

¶ 39 In the past decade child development research work has emphasized the importance of the first years of life in terms of social, psychological and neurological development. This has led to a questioning of some "family preservation" policies that leave children, especially very young children, in homes where parental care is clearly inadequate. [See Note 37 below]

Note 37: See e.g. P.D. Steinhauer, The Primary Needs of Children; A Blueprint for Effective Health Promotion at the Community Level (Toronto: Caledon Institute of Social Policy, 1996)

¶ 40 At the same time, research also indicates that child welfare agencies often fail to provide good care for children who are removed from parental care, especially older children and those who may be hard to place for adoption. [See Note 38 below] A 1998 Ontario report based on interviews with adolescents in state care revealed a disturbing picture. [See Note 39 below] Perhaps most troubling were the stories that staff and foster parents were being physically and verbally abusive, including making racist insults to children in their care. Many of the youths experienced frequent moves and placement changes. As these youths come from disrupted home backgrounds, the frequent placement breakdowns reinforce their negative self image often in turn producing aggressive or self abusive behaviours; over half of the youths in young offenders facilities were previously involved in the children's service system. While the increased access to advocates for youth and increased supervision of placements in

the child welfare system has undoubtedly resulted in less abuse than a few decades ago, it is clear that the system must be improved if children in the care of the state are to grow into healthy productive adults.

Note 38: For a report on a tragic case where a foster mother severely abused a drug addicted baby, see Craig McInnes, "Child-protection system failed, B.C. report says," The Globe & Mail (13 May 1998) A3.

Note 39: Voices From Within: Youth in Care in Ontario Speak Out (Ontario Office of the Child and Family Service Advocacy, 1998).

The Gove Inquiry in British Columbia

¶ 41 One of most significant developments in the child welfare field in Canada in the late 1990s has been the public focus on child abuse deaths, often in situations where the children were known to the agencies but were not removed from parental care. While there is no clear evidence that the child welfare system is providing less protection than in the past, the public and politicians are now focussing on the failings of the system and demanding measures be implemented to reduce child abuse and neglect.

¶ 42 The concern that agencies were not doing enough to protect children resulted in investigations and inquiries in British Columbia, Quebec, Ontario, Manitoba and New Brunswick. The British Columbia public inquiry by Family Court Judge Tom Gove, responding initially to the tragic death of 5 year old Matthew Vaudreuil who was killed by his mother, provided the most comprehensive study. [See Note 40 below] The 1995 Gove Report resulted in new legislation in British Columbia as well as a substantial change in the administration of child welfare services in that province, with a new Ministry for Children and Families being created.

Note 40: British Columbia, Gove Inquiry into Child Protection in British Columbia (1995), [1995] B.C.J. No. 2483 (Q.L.); Ontario Association of Children's Aid Societies, Ontario Child Mortality Task Force Recommendations : A Progress Report (1998); Rheal Seguin, "Horrific child abuse case reveals deep flaws in system: Commission censures Quebec for failing to protect children," The Globe & Mail (23 April 1998) A4; Kevin Cox, "Answers sought on child neglect in New Brunswick", The Globe & Mail (29 December 1997) A4; and Kevin Cox, "Ontario to review child abuse cases," The Globe & Mail (22 September 1997) A7.

III. THE 1999 REFORMS TO ONTARIO'S C.F.S.A. - BILL 6

The Panel of Experts Report & Bill 6

¶ 43 After a series of Coroners' inquests a special Committee was appointed by the Ontario government to recommend legislative reforms. The Report of the Panel of Experts on Child Protection: Protecting Vulnerable Children was released June 12, 1998, written by a Committee chaired by Judge Mary Jane Hatton. Unlike British Columbia's Gove Inquiry, the Ontario Panel did not hold public hearings, though there were private consultations with professionals. The Panel had a limited budget and very little time to produce a report. The Ontario Panel members were two Family Law judges, a

police detective, a school principal, two doctors, and two social work professionals. All the Panel members had experience with child abuse and neglect issues, but absent from the Panel were any representatives or advocates for children or for parents involved with Children's Aid Societies. [See Note 41 below]

Note 41: The Panel Chair, Judge Mary Jane Hatton, before being appointed as a judge had experience in representing parents and other parties in child protection proceedings.

¶ 44 While there are common themes in the reports in different provinces, the Panel of Experts Report placed greater reliance on substantially expanding the legislative basis for state intervention than British Columbia's Gove Inquiry Report. [See Note 42 below] The Gove Report placed greater emphasis on administrative change, increased training and better supervision for child protection workers.

Note 42: It should be noted that the mandate of the Hatton Committee was limited to recommending legislative change; even so, its recommendations called for a more intrusive model of legislative reform.

¶ 45 These reports reveal that some child protection workers (undoudtedly influenced by their perceptions of what judges and agency lawyers are thinking) applied the legislation in a way that made agencies reluctant to intervene and remove children from situations of real danger. It is, however, clear that agencies can change their approach to intervention without a legislative amendments.

¶ 46 In Ontario there has been a recent increase in the number of children apprehended and taken into care, without any statutory change. This has been a response to concerns raised by Coroners' reports and elsewhere about the failure to protect children from abuse. [See Note 43 below] There is also a highly publicized on-going case in Toronto in which a child protection worker has been charged with criminal negligence causing death as a result of a mother on her caseload allowing her very young infant son to starve to death. This type of proceeding, which warns that workers may have personal liability if they make a "wrong decision"- that is by leaving a child who subsequently dies in parental care - has undoubtedly made some workers more aggressive in removing children from parental care. [See Note 44 below]

Note 43: See e.g. Henry Hess, "Foster care overflows to college dorm," The Globe & Mail (19 June 1998) A1.

Note 44: See e.g.Michael Grange, "Charged colleague weighs on case workers" The Globe & Mail (12 August 1997) A10.

¶ 47 The Panel of Experts Report recommended very substantial changes to Ontario's Child and Family Services Act. When the Report was released in June 1998 Ontario's Minister of Community and Social Services pledged to quickly enact new legislation in order to increase protections to children. The Minister, Janet Ecker, stated that she favoured the basic thrust of the Report. She clearly

favoured a more interventionist legal regime, though she left herself room to decide which of the proposals to support: [See Note 45 below]

> I don't see it as a debate over whose rights are more important . I'll leave that to the lawyers. The question for us to ask is: What is in the best interests of the child?

Note 45: Jane Gadd, "Child protection law to get tougher" The Globe & Mail (13 June 1998) A3.

¶ 48 Bill 73, The Child and Family Services Amendment Act (Child Welfare Reform), 1998 was introduced October 28, 1998. That Bill died when the government ended the Second Session in December 1998, in order to terminate the debate over the sexual harassment suit against the Conservative former Speaker. When the short pre-election session of the Legislature began in April 1999, the government reintroduced essentially the same amendments as Bill 6, saying that there would not be time to hold hearings. Somewhat reluctantly the opposition parties agreed that Bill 6 should be passed without hearings or real debate.

¶ 49 Bill 6 was given Third Reading on May 3, 1999, and is expected to be proclaimed in force in a few months time, giving child protection agencies and the courts time to prepare for implementation. The opposition parties recognized that the Bill has some positive aspects, and did not want to be perceived as being against the protection of children. Opposition politicians did express concerns about whether Bill 6 has the "appropriate balance" and about the failure of the government to act on some issues that the Panel of Experts recommended, in particular in regard to adoption. Francis Lankin of the N.D.P. complained that the Conservatives "blackmailed" the opposition into giving up the opportunity to hold hearings and propose amendments, or risk being perceived as unconcerned about child abuse. [See Note 46 below]

Note 46: Quoted from Caroline Mallan, "Rush on new law to guard children" The Toronto Star (27 April 1999) A1 & Ontario Legislature Hansard, April 26, 1999.

¶ 50 I worry that the cumulative effect of the changes to the C.F.S.A. may result in a large increase in the number of children being apprehended from parental care in Ontario. The Panel of Experts Report briefly acknowledged: [See Note 47 below]

> There are many who will raise concern that the implementation of these recommendations may increase the number of children in care. However, the intent of the Panel's recommendations is that early identification and intervention will increase the opportunity for children to remain with their families. When this is not possible, it is the Panel's expectation that early permanency planning will increase the children's opportunities for early stability and adoption.

Note 47: Page 50, emphasis added.

¶ 51 Notwithstanding this vague assertion, there is a real danger that the cumulative effect of the amendments in Bill 6 could be a significant increase in the number of children apprehended and taken into state care. While some of the proposals are aimed at improving the efficiency of the court system and increasing the information available to child welfare agencies and the courts, other definitional and process oriented changes may well "widen the net" for the involuntary child welfare agency involvement with children and families. At least some expansion in the scope of agency involvement with children at risk may be justified, but this assertion by the Panel that no increase in the number of children in care is intended does not seem convincing.

¶ 52 While Bill 6 was clearly a response to the Panel of Experts Report, it is important to appreciate that many of the Report's major recommendations are not reflected in the proposed legislation. Some of the recommendations were disregarded because they would result in a too intrusive child welfare system, reflecting some of the concerns raised in this paper and by other advocates for children or parents. [See Note 48 below] Some of the recommendations in the Panel of Experts Report that favoured a more intrusive legislative scheme which are not in Bill 6 include:

-- allowing agencies 10 days (instead of the present 5) to bring an apprehended child to court, and introducing a less onerous test for interim care orders;

-- creating a presumption for the use of affidavit evidence unless there is a demonstrated need for oral evidence;

-- allowing child protection workers to express opinion evidence about the basis for their intervention, even if not qualified as experts;

-- explicitly making exposure of a child to domestic violence a ground for finding a child in need of protection; [See Note 49 below]

-- explicitly adding to the definition of child in need of protection cases where there is a "risk ... of physical, developmental or emotional harm" by reason of parent's age, level of maturity, mental or emotional condition, or significant drug or alcohol use;

-- elimination of the bifurcated hearing so that the issues of need for protection and disposition would be dealt with together.

Note 48: My analysis of Bill 73 borrows from an excellent critical piece by Sudbury lawyer, Philip Zylberberg, "Overview of the Child and Family Services Amendment Act" (October 29, 1998); he can be contacted at pzylberberg@on.aibn.com

Note 49: There was concern expressed by advocates for women that victims of wife abuse might be penalized and would become even more reluctant to seek assistance if their victimization could be a ground for intervention. Even without explicit mention in the Act, exposing children to domestic violence may be taken into account in a child protection proceeding; see New Brunswick Minister of Health and Community Services v. M.L. (1998), 41 R.F.L. 339 (S.C.C.), at para 56.

¶ 53 There are other recommendations in the Panel of Experts Report that, in my view, should have been implemented, but were apparently disregarded because they were felt to be too politically controversial or expensive to implement. These would include recommendations:

-- to encourage adoption by allowing post-adoption access where beneficial to the

child; [See Note 50 below] this was probably considered too close to controversial issues related to post adoption contact between biological parents and adoptees.

-- to increase the age for initiating protection applications to 18 and providing for the continued support of wards to the age of 23; this was undoubtedly considered too expensive and perhaps inconsistent with the Conservative government's position on lowering the age for youth court jurisdiction to16.

Note 50: The Supreme Court of Canada recently recognized that there are situations in which it may be in the "best interests of the child to maintain contact with his or her natural family" despite adoption; see New Brunswick Minister of Health and Community Services v. M.L. (1998), 41 R.F.L. 339 (S.C.C.), at para 42 & 43. The Ontario courts also seem more willing to recognize that continued contact with a biological parent after adoption may be in a child's best interests. See S.R. v. M.R., [1998] O.J. No. 5127 (C.A.) where the Court of Appeal, citing the Supreme Court in M.L., allowed a biological mother to continue to have access to her son, after adoption by the aunt (the mother's sister) and her husband; the Court accepted that the boy's relationship to his mother was "positive" and "significant." While the mother's relationship with the adoptive parents was strained, the Court accepted the views of an an expert who concluded that the boy's relationship to the mother "will not go away" and that there will be a "significant risk of later issues of trust due to a sense of betrayal" if the relationship were severed.

Declaration of Principle - Focus on the Child as "the Paramount Purpose": s. 1

¶ 54 Section 1(1)(a) of the Ontario's 1984 C.F.S.A. already states that "as a paramount objective [the Act] is to promote the best interests, protection and well-being of children."

¶ 55 The Panel of Experts Report recommended that the "paramount" purpose of the Ontario Act should be "to ensure each child's entitlement to safety, protection and well-being."

¶ 56 Bill 6 did not adopt this recommendation in the form proposed. Rather it stipulates that s. 1(1)(a) should be amended to provide that : "The paramount purpose of this Act is to promote the best interests, protection and well-being of the child." That is the word "a" is amended to "the." But more significantly, the recommendation that "best interests" be replaced by "safety" was rejected. Bill 6 also provides that all other purposes of the Act, set out in s. 1(2), should be "additional purposes" that are to be pursued only "so long as they are consistent with the best interests, protection and well-being of children."

¶ 57 It is not clear that this change is very significant. Even under this new principle, decision makers (child protection workers and judges) will need to make difficult decisions balancing immediate concerns about "protection" (which might favour removal from parental care) with concerns about emotional and psychological "best interests and well-being" (which might favour a child not becoming a ward of the state but rather remaining with the family).

¶ 58 Bill 6 also amends what will be s. 1(2)2 so that state action only needs to be "the least disruptive ...to help a child" instead of the present s. 1(2)(c) which requires the "least restrictive or disruptive" to the "child or family" The removal of the term "restrictive" may not be significant, but under Bill 6 the exclusive focus is on the disruption to the child, and disruption to parents is not to be directly considered. The new principles articulated in s. 1 make clear that the central focus of the child welfare system is to be the child. Notions of parental rights, culture, or aboriginal status are to be "secondary" to the focus on the child. This, however, may not be a significant change, at least in terms

of how the courts have interpreted the present s. 1.

¶ 59 Already in 1994 in M.(C.) L'Heureux-Dubé J. emphasized that "the first and 'paramount' objective of the Act is to promote the 'best interests, protection and well-being of children.'" She recognized that the 1984 C.F.S.A. has "one of the least interventionist" child protection regimes in Canada and commented: [See Note 51 below]

> This non-interventionist approach is premised not with a view to strengthen parental rights, but, rather in recognition of the importance of keeping a family unit together as a means of fostering the best interests of children...the value of maintaining a family unit intact is included [in the Declaration of Principle] in contemplation of what is best for the child, rather than the parent.

Note 51: (1994), 2 R.F.L. (4th) 313 at 336.

She also emphasized the importance of s. 1 for guiding the courts in the interpretation of the Act: "The procedural steps and safeguards which govern the entire process under the Act...must always be construed in light of the clear purposes of s. 1."

¶ 60 I submit that Bill 6 has not fundamentally altered these principles, though it has reminded decision makers that the focus is on the welfare of children, not the rights of parents or the convenience of agencies. It is significant that the Legislature did not adopt the recommendation of the Panel and make concerns about "safety" into a "paramount" position, and does not explicitly use this term, though of course "safety" is a component of "protection." One can appreciate the importance of the safety and protection of children in defining the mission of child welfare agencies. But it is only with hindsight that one can be certain of the steps that are necessary to ensure the safety of a child, and possible concerns about parental care will need to be balanced against risks of intervention, so that the child's "best interests ...and well-being" may be promoted.

The Definition of Child in Need of Protection: s. 37(2)

¶ 61 A central theme of criticism of the 1984 C.F.S.A. has been that children have been endangered because the definition of "child in need of protection" is too narrow, and that the definition required agencies to leave children with parents who abused or even killed them. However, all of the child abuse deaths arose in cases which were within the present definitions of "substantial risk of physical harm." The problems arose because of difficulties that agency workers had with evidence gathering or (at least with hindsight) from the failure to exercise proper judgement. No definition of child in need of protection will eliminate the need for professional judgement and sometimes very difficult individualized decision making.

¶ 62 Neglect added: Bill 6 adds s. 37(2)(a)(ii) so that a child who suffers "physical harm" as result of a parental "pattern of neglect in caring for, providing for, supervising or protecting the child" is a "child in need of protection." Since s. 37(2)(a) of the 1984 C.F.S.A. already included a child who suffers physical harm as a result of a parental failure to "care and provide or supervise and protect the child adequately," there would not appear to be significant change by adding neglect. There may be controversy over the meaning of the term "pattern" of nelgect, which suggests that there must be several incidents.

¶ 63 To the extent that the new words simply clarify the old definition, it is useful for educative purposes for child protection workers and potential child abuse reporters, making clear to them that neglect is included in the concept of "harm".

¶ 64 Emotional abuse and neglect widened: Because of the vagueness of the concept of "emotional abuse" the definition in the present s. 37(2)(f) is intentionally narrow. The 1984 C.F.S.A emotional abuse provision is not frequently invoked. It requires the agency to prove:

> "severe anxiety, depression, withdrawal, self destructive or aggressive behaviour" and that the parent is unable or unwilling to provide services or treatment that would alleviate that condition.
> Bill 6 amends this definition by providing that:
>
> (1) the condition only needs to "serious" not "severe" and by adding "delayed development" to the list; and
> (2) adding to parental unwillingness or inability to provide services [s. 37(2)(f.1)], cases where "there are "reasonable grounds" to believe a child's emotional condition "results from [parental] actions, failure to act, or pattern of neglect"[s. 37(2)(f)].

¶ 65 I submit that under the new provision judges should require expert evidence from qualified mental health professionals to establish that the child has one of the conditions listed.

¶ 66 It is often difficult to be certain why a child or adolescent (or an adult) suffers from a particular emotional, psychological or behavioural condition. There may be a number of genetic, environmental, life history and parenting factors that have contributed. Section 37(2)(f) will require the agency to establish at least "reasonable grounds" (i.e. less than proof on the balance of probabilities) that the condition "results from" parental conduct or neglect. Even at this lower standard of proof, the causal link may be difficult to establish. The statute does not make clear how the courts should deal with interacting factors; the wording ("results from") would appear to suggest that the parental action or neglect must at least be the dominant factor in the child's condition.

¶ 67 As many as one fifth of the child and adolescent population in Ontario at some point has emotional or psychological problems that might fit within the listed conditions. If a broad interpretation of the new provisions were to be adopted, very large numbers of children might be considered to be in "need of protection," rather that merely being in need of mental health services. However, it is submitted that the courts should not take an expansive interpretative approach, as Bill 6 requires that the conditions must be "serious" (though not necessarily "severe.").

¶ 68 Further, the definitions also require that there must be parental failure to consent to treatment, or responsibility for the condition. One of the biggest problems that Ontario children and adolescents with emotional and behavioural conditions face is not parental unwillingness to seek help, but the lack of access to mental health professionals. While those who are financially well off may seek private treatment, for families and children who have to rely on the public education and health systems to diagnose and treat emotional, psychological and behavioural problems, there are very long waiting lists for mental health services. Frequently in low income families mental health problems cannot be properly addressed due to a lack of resources. Judges should not penalize families because of their inability to access mental health services.

¶ 69 "Substantial risk" that a child will suffer harm replaced by "risk of likely harm": Bill 6 will

change the verbal formula for establishing that a child is in need of protection in situations where there is a concern about future risk as opposed to past harm. While this change is intended to provide for greater consistency in approach by agencies and judges, it is not clear that this change is intended to alter the approach taken by the leading precedents to this issue.

¶ 70 Under the 1984 C.F.S.A. future risk of physical, sexual or emotional harm is a ground for intervention if there is a "substantial risk" that a child will suffer harm. The concept of "substantial risk" appears at different places in the 1984 C.F.S.A., including the risk of future harm and in the test for keeping a child in interim care under s. 51. The Panel of Experts Report noted that there have been differing interpretations of the term "substantial risk" by protection workers and judges. The Panel recommended that there should be a "clearer" and "less onerous" test.

¶ 71 There were some decisions which interpreted the term "substantial risk" as placing a burden on agencies that is "almost massive... in that the risk must be substantial...risks which are significant [are] not [necessarily] substantial." [See Note 52 below] Most decisions, however, interpreted the term "substantial risk" as indicating that the agency must establish, on the balance of probabilities, that there is an "actual, real and not illusory risk" [See Note 53 below] or that the agency faces an evidentiary burden that is "more than a mere suspicion." [See Note 54 below]

Note 52: Felstiner Prov. J. in C.C.A.S. of Metro Toronto, [1986] W.D.F.L. 1254 (Prov. Ct.), aff'd. Hawkins Dist. Ct. J. [1986] W.D.F.L. 1746.

Note 53: Janet Wilson J. in Catholic C.A.S. of Metro Toronto v. A.D. and A.G. (1994), 1 R.F.L.(4th) 268, at 281.

Note 54: See e.g. C.A.S. of Peel v. Y.J., [1998] O.J. No. 1652 (Prov. Div) per Wolder J.

¶ 72 Bill 6 is intended to provide a clearer test for risk of future harm, though whether it is less onerous depends on the interpretation one took of the old "substantial risk" test. The words of Bill 6 are less ambiguous, though there is still a lack of clarity in the new words.

¶ 73 For the risk of future harm, the new test uses the phrase: "risk that the child is likely to be harmed." While the term "risk" is unmodified, it is grammatically linked to "likely." This new test is not unproblematic. The term "risk" on its own might suggest that a low probability of future harm would suffice to allow intervention. But the word "likely" connotes more probable than not, and some dictionary definitions suggest an even higher standard, including as synonyms for "likely" such as "probable" or "to be expected" [See Note 55 below] and even "apparently destined." [See Note 56 below]

Note 55: Concise Oxford Dictionary, 4th ed., s.v. "likely."

Note 56: Unabridged Random House Dictionary, (1996), s.v. "likely."

¶ 74 The 1998 decision of the British Columbia Court of Appeal in S. (B.) v. British Columbia Director of Child and Family Services may be helpful for the interpretation of the new future risk

provision. The Court in that case was applying a definition that requires the agency to show that a child "is likely to be physically harmed by the child's parent." Justice Lambert concluded that in the context of a child protection proceeding, that the word "'likely' was to be used in the sense of a 'real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.'" The judge also went on to emphasize the need for a balancing of concerns, and the need to consider both the nature and the likelihood of harm. He warned of the dangers of overintervention: [See Note 57 below]

> I remain concerned that interpreting the word "harm" too broadly may result in casting the protection net too widely, thus leading to the removal of children from the care of their parents in circumstances in which the appropriate course of action would be to offer the family support services.
>
> I cannot conceive that the Legislature intended .... to authorize the removal of children from their parents' care on the basis of any harm to those children, no matter how trifling or transitory the harm might be. I am of the view, therefore, that s. 13 must be interpreted as justifying a finding that a child is in need of protection only if the harm established is significant harm. By "significant", I mean harm that is more than trifling or transitory in nature; that is substantial enough to warrant government intervention, rather than government assistance through the provision of support services. Inadequate diet or hygiene, for example, would not meet this threshold; the type of life-threatening harm found in this case, would.

Note 57: (1998), 38 R.F.L. (4th) 138, at 169 (B.C.C.A.), quoting from a helpful House of Lords child protection decision, Re H (1995), [1996] A.C. 563 (H.L.)

In Catholic C.A.S.of Metropolitan Toronto v. T.K., [1997] O.J. No. 4554 (Prov. Ct.), Judge James dealt with an interim care application, where the concept of "substantial risk" is also used. In making an interim care order, he offered a useful commentary on the concept of "substantial risk" and the caselaw which defines this as an "actual" or "real risk:" :

"With the greatest of respect, the trouble with expressions such as "actual", "real" or "not illusory, speculative or fanciful" are that they not very helpful or practical definitions for a sitting judge and, to the extent that some of them imply a very heavy burden of proof, these phrases can be thoroughly misleading. "Risk" is an element that is measured in terms of probabilities, not only by actuaries and statisticians, but by the general population. When one speaks of a "very risky" venture (whether a medical procedure, a financial investment or otherwise), the implication is that the probability of success is grim or low. For certain risks, experts have been able to assign fairly precise probabilities by the application of the known laws of physics and mathematics (such as various games of chance), occasionally supplemented by a wealth of empirical data (as in the case of weather predictions). For vastly more complex systems, risk probabilities must be gleaned laboriously through repeated experiment or, where experiments are either impractical or unethical, by direct examination of historical data (as in the case of actuarial tables compiled by insurance companies).

The quantifier "substantial" as applied to "risk" is rather unusual because it seems to me to call for a highly personal value judgment. Why the legislature chose this expression is a bit of a puzzle. A patient deciding upon a critical medical procedure with a failure rate of 30 or 40 percent might readily agree that he or she was facing a "substantial risk". But an investment broker or a professional gambler, when presented with a profitable venture with a success factor of 50 percent, might regard that a normal risk of his or her business. The area of child welfare, I would hold, would be one more akin to the example of the patient, where relatively low percentages of risk can constitute a "substantial risk", simply because the subject matter is far too important to permit wide tolerances." This type of analysis, which considers the child welfare context as well as the words of the statute, is also appropriate in analyzing the amendments.

¶ 75 While it will ultimately be for judges to interpret the definitions in Bill 6, the definitional words

(inevitably) still give decision makers significant interpretative discretion. The new definition of future risk is somewhat clearer, and reminds decision makers that there does not need to be certainty of future harm. However, the new definition ("risk of likely harm") may not be less onerous for agencies than the commonly used approach to the old test ("substantial risk").

Interim Care & Control: s. 51(3)

¶ 76 As noted above, s. 51(3) of the 1984 C.F.S.A. provides that at an interim care hearing the court will return a child to parental care, if necessary under C.A.S supervision, unless there are "reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety" and that the child cannot be adequately protected by agency supervision of parental care. Bill 6 changes this standard so that at an interim care hearing the judge shall not make an order that removes a child from parental care unless there is "a risk that the child is likely to suffer harm and the child cannot be protected adequately" by an order for agency supervision.

¶ 77 The concept of "harm" is not defined, but clearly includes sexual abuse, physical abuse and neglect and presumably "emotional harm," as defined in s. 37(2)(f).

¶ 78 This new test for interim care is similar to the change in s. 37(2) in the provision for "future risk." The concept of "substantial risk" is replaced by "risk of likely harm." As discussed above, it is submitted that the term " risk" should be interpreted to be a "real" risk and not a mere speculative risk. The court should consider both the nature of the harm, and the likelihood of risk; if the nature of the harm is greater, the probability of risk may be lower. While at the interim hearing this risk of harm does not have to be proven on a civil standard of proof and the court can admit evidence that the court considers "credible and trustworthy" [s. 51(7)], the agency must still establish that there are reasonable grounds to believe that harm is "likely". [See Note 58 below]

Note 58: The new Family Law Rules provide in Rule 33 that a temporary care and custody hearing will have to be held within 25 days of the start of the case. An extension of this time can only be granted if this is in the "best interests of the child." The consent of the parties is not sufficient reason for an extension. Unless the court otherwise orders, evidence at this hearing is to be by affidavit only.

Permanency Decisions: Reducing the Time Frames for Temporary Care

¶ 79 The 1984 C.F.S.A. has a "24 month rule" as a maximum period for "temporary" decisions to be made about children, though in reality this period may be longer as proceedings drag along through "litigation drift." [See Note 59 below] The Panel of Experts Report recognizes that 24 months is an appropriate maximum period for older children, who are more difficult to permanently place and who will usually have deep psychological bonds with their biological families. But 24 months in a temporary situation may be very long for very young children who have not yet formed strong psychological bonds to caregivers. The Panel of Experts Report recommended that legislation require "permanent" decisions for younger children, as follows:

- -- 12 months for children under the age of 2;
- -- 18 months for children aged 2 to 4;
- -- 24 months for children aged 5 and older.

Note 59: See e.g C.C.A.S of Metro Toronto v. P.A.M., [1998] O.J. No. 3766 (Prov.Ct.) where Katarynch Prov. J. refers to the problem of litigation drift' and returned a child to her mother's custody after 31 months in foster care; the mother had dealt with her drug addiction and the foster parents did not want to adopt the child.

¶ 80 These proposals reflect a belief that parents who are clearly incapable of providing adequate care for their very young children (with appropriate community support) should not be "entitled" to two years to try to develop parenting capabilities. A maximum one year period was recommended for the youngest children, who may have the greatest prospect for benefiting from being placed relatively quickly in stable, permanent adoptive homes. However, longer periods were recommended for older children.

¶ 81 This is the one area where Bill 6 has taken a more interventionist approach than the Panel of Experts Report, making it more difficult for children to leave agency care and be reunited with their parents. Bill 6 provides that for children under 6 years of age, on the date that a society wardship order or temporary care agreement is made, this arrangement shall not result in a total time in a "temporary" agency care (by court order and care by agreement) of more than 12 months. In effect, for children up to the age of 6, courts will be operating on the basis of a "12 month rule."

¶ 82 Further, the new ss. 29 (6.1) and 70(2.1) will require the period in "temporary care" to be determined on a cumulative basis for the past five years. The total period of "temporary care" in any five year period is not to exceed 12 months for a child six and younger, and 24 months for older children. In practice, there may be real difficulty in determining the cumulative periods in care, especially if the child was in care with more than one agency. Presumably there is an onus on the agency to establish this cumulative period.

¶ 83 Some of the practical complexity and a little of the rigidity of the new scheme is reduced by the transitional provision found in s. 37(3) and (4) of Bill 6. For children in agency care who are under the age of 6, the 24 month rule will continue, as long as they remain in agency care. For all children, periods in care that were ended before the Act comes into force, will not count towards the cumulative provision.

¶ 84 While some other provinces have a similar 12 months period for very young children, they typically have "steps" (as recommended by the Panel) with longer periods as the child gets older than two. No other province has a "cumulative" approach to counting temporary care periods. Apparently the Ontario government decided not to have "steps" at 2 or 4 years of age because this would be too complex. But it choose to introduce the practically complex cumulative period scheme, which no other Canadian jurisdiction has adopted.

¶ 85 It is highly desirable to prevent children, especially young children, from "drifting" in care. Permanent decisions need to be made in a timely fashion. However the provisions of Bill 6 are quite rigid, and in some cases may be unfair to parents as well as contrary to the best interests of children. For children between two and six, Bill 6 establishes the shortest time periods for temporary wardship in Canada.

¶ 86 At least in significant measure, these provisions are premised on the expectation that if parents cannot "turn things around" in a year, they are unlikely to be able to do so in a longer time period. This assumes that parents who have temporarily lost (or voluntarily given up) care of their children will have access to programs like alcohol and drug rehabilitation services, psychological counselling, and parenting courses. In reality there are often long waiting lists which can make a year a very short time

for parents to "turn things around," especially in Northern Ontario (where many aboriginal families live) where social resources are lacking.

¶ 87 These provisions may also be unfair if a child spends a considerable period in temporary care after apprehension, despite a later judicial finding made that the apprehension was not justified (or that the child should have been returned to parental care sooner); this period will still "count" towards the cumulative period.

¶ 88 The relatively short periods for younger children and the "cumulative" care provision may discourage parents from seeking voluntary care arrangements. These amendments also have the potential to more quickly drive parents and agencies into an adversarial relationship, with the agency forced to threaten parents with the permanent loss of their children in a relatively short time if the children are under seven or have spent time in agency care in the past few years. There are already cases in which judges have criticized the agency for being too quick to cut off support for parents, for example by restricting access in anticipation of a Crown Wardship application necessitated by the twenty-four months rule. [See Note 60 below]

Note 60: See e.g. Catholic C.A.S of Metro Toronto v. P.A.M., [1998] O.J. No. 3766 (Prov. Ct.) per Katarynch J. where a child was in care for 31 months, virtually from birth, living with foster parents who were unwilling to adopt, apparently because of their age. The child was doing well and the mother had succeeded in dealing with her drug addiction problem. The agency was seeking Crown Wardship with a view to seeking an adoption placement. The court ordered the return of the child to the mother, noting that the agency had ignored opportunities to help the mother improve her parenting skills and had restricted her access in anticipation of the wardship application. The judge remarked: "To cut back access in preparation for a possible success in its Crown Wardship application and then to argue 'limited relationship' between a parent and child strikes this court as a frank attempt to use its discretion regarding access to design the outcome of the trial."

¶ 89 While it is desirable to try to limit periods in temporary care for very young children and to have permanent decisions made more quickly, it must be recognized that major problems now exist because of the underfunding of legal aid and the courts, and the consequent delay in the legal system. The proposals in Bill 6 are a rigid and inflexible attempt to deal with this problem, especially for children between the ages of 2 and 6. In some cases a more flexible approach would be best for children, as well as for parents and agencies.

¶ 90 It should be noted that the amended s. 70(4) will give courts some flexibility, by allowing the court to "extend" the 12 and 24 month cumulative maximum periods in care under s. 70(1) "by a period not to exceed six months if it is in the child's best interests to do so." This power to extend only applies to a court; an agency cannot make a temporary care agreement that extends beyond the 12 or 24 months.

¶ 91 There will be cases where the legislative scheme seems inflexible and contrary to the child's best interests. There are a number of arguments that can be advanced to give a court sufficient flexibility to promote a child's best interests.

¶ 92 One argument is that as a matter of statutory interpretation, s. 70(4) might be read as giving a court the jurisdiction to make more than one order extending the time periods, as long as no single order exceeds six months, and each order is in the best interests of the child. [See Note 61 below] While this might not be the most natural reading of s. 70(4), in individual cases it could be the most consistent with the child's best interests and hence with s. 1 of the Act.

Note 61: Support for this approach can be found in cases that interpreted provisions of the 1968 Divorce Act that permitted the exclusion from living separate and apart a resumption of cohabitation for "a period" of not more than ninety days. Some courts took a purposive interpretation of this provision to encourage rehabilitation and held that it allowed more than one period to be considered, provided that no single period exceeded ninety days. See e.g. Crawford v. Crawford (1976), 24 R.F.L. 172 (Man. C.A.), but contra, Nolan v. Nolan (1977), 1 R.F.L. (2d) 280 (Ont. H.C.)

¶ 93 Another interpretative argument that gives the courts flexibility is that the provisions of s. 70 are merely "strongly directory" rather than mandatory. This type of argument was accepted by the Nova Scotia Court of Appeal in C.A.S of Colchester v. W. (H.) where the court considered the significance of the breach of a statutory provision that required a court to hold a disposition hearing within 90 days of making a finding that a child is in need of protection. Justice Freeman wrote: [See Note 62 below]

> ... the object of eliminating the excessive time delays experienced under the previous legislation can best be attained not at the expense of the paramount consideration but by giving the best interests of children their fullest and broadest effect.... the time limits, which give effect to the concern expressed in the Preamble, are sometimes in conflict with the best interests of the child. When that occurs, the legislation must be given a construction consistent with the best interest of the child. In my view the ordinary meaning of the legislation creating the time limits cannot be ascertained from looking at the sections containing those specific provisions standing alone; they must be read in light of the Preamble and s. 2 [the Declaration of Principle]....

Note 62: (1996), 25 R.F.L. (4th) 82, [1996] N.S.J. No. 511 at para. 28 - 31 (C.A.)

¶ 94 Because their meaning varies with their context from case to case, depending on whether there is a conflict with s. 2, I would consider the time limits provisions to be not mandatory but strongly directory, to be obeyed to the fullest extent possible consistent with the best interests of the child.

¶ 95 There is also a constitutional argument that can be invoked to give courts some flexibility to "override" the legislative scheme, if this is necessary to promote the best interests of the child. In a decision from the Yukon Territorial Court, Re R.A.J., [See Note 63 below] Judge Lilles held that a child's constitutional rights under s. 7 of the Charter of Rights were infringed by the statutory regime in that Territory that requires a "permanent decision" to be made after 12 months for a child initially apprehended under 2 years of age. The case involved a three and a half year old child who was not considered suitable for adoption by the child welfare agency; the parents continued to visit and hoped to regain custody at some future time and were accordingly opposed to a permanent wardship order. Judge Lilles stated:

> While there is general acceptance of the principle that children should not be kept in temporary custody indefinitely, there is no consensus on what the maximum time should be. The 12 month limit [for children apprehended under 2 years of age] prescribed in the Yukon is not and cannot be justified except by the aforementioned general principle. The general principle, however, does not account for the shortness of the period, the rigidity of the section or the absence

> of a safety valve to permit extensions of time where the interests of the child so dictate. The 12 month period does not accommodate the resolution of the issues in this case and prevents the development of a plan which would reflect R.'s interests as paramount. In this case, the 12 month rigid time period is arbitrary.....
>
> To remedy the Charter violation, the section may be struck down. In this instance, this may not be the most 'appropriate and just' remedy. The provision seeks to ensure that children who are placed in temporary care and custody are not indefinitely in such care. As such, the provision does attempt to strike a balance between the rights of the child and the parent with respect to the state. In many instances, the time frames prescribed may be perfectly workable and fair. In some cases, including the case at bar, the child's s. 7 Charter rights are infringed.....
>
> In the absence of any flexibility, it is not surprising that in some individual cases, such a short time period will be totally inadequate.

Note 63: [1992] Y.J. No. 126 (Terr. Ct.).

¶ 96 This type of argument may be used in specific cases to obtain a "constitutional exemption" that would allow for a longer time period for temporary care and wardships, where this is in the child's best interests. [See Note 64 below]

Note 64: This constitutional argument can only be regarded as strengthened by the Supreme Court of Canada's decision in R.B. v. C.A.S. of Metro Toronto (1994), 9 R.F.L.(4th) 157, though the issue of constitutional protections for familial rights for parents or children has yet to be fully resolved by the Supreme Court.

¶ 97 While at first reading the new scheme seems rigid, if a judge is convinced that the provisions of the Act are contrary to the best interests of the child, there may be scope for some flexibility. The position of counsel for the child, and even the position of counsel for the agency, may influence judicial approaches in individual cases. Most obviously, if all counsel consent, the court would probably be most inclined to take this approach, though consent is not required. Ultimately, the Declaration of Principle in s. 1(1) indicates that judges should take such an approach if it is necessary to promote the best interests of the individual child before the court.

Evidentiary Changes: s. 50 - Past Conduct Towards Children

¶ 98 The Panel of Experts Report recommended that the court should explicitly be permitted to receive hearsay evidence of a child's wishes and experiences, as long as the evidence is "reliable," without requiring proof of "necessity." In practice in child protection cases the standard for proving "necessity" for the admission of a child's hearsay statement has not been high, as judges generally recognize that it would be emotionally distressing for a child to testify in a proceeding in which their parents are the parties, so this would not have been a significant change. It would, however, have provided clarity and promoted consistency to have had this approach clearly adopted in the Act.

¶ 99 The Report also recommended that legislation allow a child protection worker to give opinion

evidence about the basis for an intervention, even if the worker is not qualified as an "expert," leaving the court to determine the weight to be given this evidence. This change would have allowed judges to receive information that in fact influenced an agency intervention decision, even if that information was not reliable or subject to challenge through cross-examination, for example based on information taken from the Internet. [See Note 65 below] Counsel for children and parents must be in a position to challenge opinions that may be made by workers who may lack qualifications, experience or information about a case. Thus agencies should be expected to lead evidence from those with appropriate knowledge and qualifications, whose opinions can then be challenged in cross-examination..

Note 65: See e.g C.A.S. of London v. A.M., [1998] O.J. No. 2530 (Gen Div.) where Grant J. struck out material in the affidavit of a child protection worker attached as exhibits about "Shaken Baby Syndrome" taken from various American sources on the Internet. While Shaken Baby Syndrome is a cause for very serious concern, before a child is apprehended on this basis, the agency should have a qualified physician prepare an affidavit (or testify) about the risk to this particular child from the conduct of these particular parents.

¶ 100 While Bill 6 does make some changes to s.50, it did not enact most of the Hatton recommendations about evidentiary changes. I submit that the only substantial change is in regard to evidence of past conduct towards children.

¶ 101 Section 50(1) of the 1984 C.F.S.A allowed a court to consider evidence about a person's past conduct towards a child in his or her care (past parenting evidence), if the person may get custody or care of a child. This provision only allows this type of evidence to be admitted after a finding has been made that a child is need of protection i.e. at the disposition stage of the bifurcated protection hearing.

¶ 102 The new s. 50(1) in Bill 6 provides:

> Consideration of past conduct toward children
>
> (1) Despite anything in the Evidence Act, in any proceeding under this Part,
>
> (a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and
> (b) any oral or written statement or report that the court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence.

¶ 103 The new s. 50(1)(a) makes evidence of an adult's conduct towards any child admissible. The new provision also makes this evidence admissible at any stage of a protection hearing, including an interim care hearing and for the purposes of determining whether a child is in need of protection. Thus, for example, if the mother has a boyfriend who has a history of sexually abusing children who were not in his care, this type of evidence will be admissible. It is understandable that this type of evidence about conduct towards children may be relevant to a child protection proceeding, but this provision should not be interpreted so broadly as to admit any evidence about a person's past conduct, rather the conduct must have directly related to the care (or abuse) of children. [See Note 66 below]

Note 66: See e.g.C.A.S. of Waterloo v. C.(R.), [1995] W.D.F.L. 1934 (Prov. Ct.); and Re B.(J.) (1998), 4 R.F.L.(4th) 165 (Nfld. C.A.).

¶ 104 In addition to the provision allowing the admission of past parenting evidence, s. 50(1) of the 1984 C.F.S.A. includes a stipulation that judges have a discretion to admit "any oral or written statement or report that a court considers relevant" to be "proved as the court directs." This provision has not been frequently cited by the Ontario courts. There have been conflicting views about how broad this provision is intended to be, with some judges suggesting that this allows any hearsay or opinion evidence to be admitted with concerns about the quality of the evidence only going to weight. [See Note 67 below] Most judges, however, have emphasized that concerns about reliability of evidence and fairness to the parties require that judges should be cautious about using this provision to disregard the ordinary rules about admissibility of evidence. [See Note 68 below] Most judges have limited the scope of s. 50(1) of the 1984 C.F.S.A to the admission of past parenting evidence, though the words could be more broadly interpreted.

Note 67: See e.g. C.A.S. Waterloo v. F. (S.J.M.), [1994] W.D.F.L. 863 (Ont. Gen.Div.)

Note 68: See e.g. C.A.S. of Waterloo v. C.(R.), [1995] W.D.F.L. 1934 (Prov. Ct.)

¶ 105 The new s. 50(1)(b) is problematic and enigmatic. A plain reading of s. 50(1)(b) might suggest that this is a sweeping new provision. Any relevant evidence is admissible, regardless of concerns about reliability or fairness. The semicolon at the end of s. 50(1)(a) suggests that s. 50(1)(b) is a separate provision, and not restricted to issues of past conduct towards children.

¶ 106 However, I submit that the new 50(1)(b) is intended to deal only with evidence of past conduct towards children, and to make clear that any evidence of this type of conduct" is admissible," including prior reasons for a decision in a civil or criminal proceeding.

¶ 107 Discussions with those close to the legislative drafting process and the Ministry's public material [See Note 69 below] about the new Act both support a less expansive view of s. 50(1)(b). Further, the new marginal note to the paragraph is actually narrower and more specific than the old heading. The old heading refers to "Evidence at hearing: past conduct toward children." The new marginal note is simply "Consideration of past conduct towards children." While the Ontario Interpretation Act s. 9 indicates that the heading is not part of the statute, increasingly courts, including the Supreme Court of Canada, have used these notes to help interpret the legislation. [See Note 70 below] In this case, the marginal note clearly limits s. 50(1)(b) to past conduct towards children.

Note 69: Ontario Ministry of Community and Social Services, "Proposed Changes to the Child and Family Services Act, April 26, 1999 <http://www.gov.on.ca/CSS/page/news/apr2699b.html>.

Note 70: R. Sullivan, Driedger on the Construction of Statutes (3rd edit, 1994) at. 273-275.

¶ 108 The view that s. 50(1)(b) is not intended to abrogate all the rules of evidence is reinforced by the fact that s. 51(7) remains in effect, permitting a court at the interim care hearing "to admit and act on evidence that the court considers credible and trustworthy." The retention of the broad discretionary provision for admission of evidence in interim care hearings suggests that at child protection trials, the ordinary civil rules of evidence are to apply, subject to specific exceptions of past conduct towards children set out in s. 50(1).

¶ 109 The Newfoundland Court of Appeal in its recent decision in Re B. (J.) considered the issue of the admissibility of a child's hearsay statements in child protection cases. The Court reviewed cases from different provinces and emphasized the need for ensuring that hearsay evidence is reliable and that it is necessary to admit it: [See Note 71 below]

> Since the decisions of the Supreme Court of Canada in R. v. Khan [1990], 2 S.C.R. 531 and R. v. Smith [1992] 2 S.C.R. 915, the approach to admission of hearsay evidence has changed ... to a determination, on a principled basis, of whether the reception of the evidence, notwithstanding the dangers of its use without an opportunity to cross-examine and to have had the information stated on oath, can be justified on the basis of necessity and reliability.
>
> This approach to dealing with hearsay evidence has been applied in child protection proceedings in this jurisdiction.... On the other hand, other cases pre-dating Khan seemed to suggest, without enunciation of any alternative principle, a more open-ended approach to the reception of hearsay evidence in child protection proceedings, justifying that approach simply because of the non-adversarial, inquisitorial nature of such proceedings.....
>
> In the child protection context, post-Khan cases have applied the necessity/reliability test to reception of hearsay.....Even in some jurisdictions which have statutory provisions authorizing reception of hearsay evidence in child protection proceedings, the principles of necessity and reliability have become part of the legislative requirements.
>
> To adopt the seductively simple approach of allowing all hearsay evidence to be received without any threshold test of admissibility, and relegating it merely to a consideration of the weight to be accorded to it, is in effect to abandon any pretext at deciding evidentiary issues according to appropriate principle and to expose those who may be adversely affected by the reception and use of the evidence (parents facing the loss of their children as a result of allegations they are in need of protection) to considerable risk of having their interests determined or at least influenced by potentially untrustworthy evidence which they may find difficult to rebut....

Note 71: Re B.(J.) (1998), 40 R.F.L. (4th) 165 (Nfld. C.A.) at paras. 107 - 117.

¶ 110 I submit that in the absence of a more explicit statutory amendment, the minor wording change in s.50(1) was not intended to adopt the more radical evidentiary changes that the Panel of Experts Report recommended, let alone to virtually abolish the rules of evidence for child protection proceedings. The unfortunate wording and punctuation of s.50(1)(b), with its potentially very broad interpretation, illustrates the dangers of enacting legislation without public hearings.

Assessments: s. 54

¶ 111 The Panel of Experts recommended that a court ordered assessment should be permitted at any stage of a proceeding without requiring a finding that a child is in need of protection, which should help provide independent information about cases. This recommendation could have resulted in more expedited proceedings by reducing the delays that occur as an assessment is ordered after the first stage of a protection hearing, but it would also likely have resulted in more assessments being ordered. This recommendation was not adopted, though a minor amendment is made to s. 54(8) to clarify that once an assessment has been made in one protection proceeding, it is admissible in later proceedings without the consent of the parties. [See Note 72 below]

Note 72: This amendment reverses some prior decisions that held that reports from prior proceedings were not admissible; see e.g. C.A.S of Ottawa Carleton and J.(J.), (10 November 1997), Ottawa 1248./87 (Ont. Prov. Ct.) per Da Sousa Prov. J.

Criteria for access & return to parents made more difficult: ss.57(3), 57(6), 59(2) & (3), 65(3)

¶ 112 Bill 6 contains a number of provisions that are intended to facilitate the making of Crown wardship orders and the termination of parental access to Crown wards. As with the changes to the "24 month rule," these amendments are intended to promote earlier permanency planning. These amendments structure judicial decisions, placing more emphasis on terminating children's relationships to parents and making a "permanent decisions" for children sooner.

¶ 113 Bill 6 amends s. 57(3) so that the focus is on the least "disruptive" alternative for the child, rather than the "least restrictive" alternative. This provision focuses on the child, though it is important to notice that it retains an emphasis on continuity of care. Children are only to be removed from their parents' care only if there is "no less disruptive alternative to the child, including non-residential services and the assistance referred to in subsection 57(2) [efforts of the C.A.S. or other agencies to informally assist the child and parents before seeking involuntary intervention] would be inadequate to protect the child."

¶ 114 Section 57(6) of the 1984 C.F.S.A. provides that a Crown wardship order shall not be made unless "the circumstances [usually relating to parenting capacity] are unlikely to change within a reasonably foreseeable time not exceeding twenty-four months so that the child can be returned to" parental care. Bill 6 deletes this provision, presumably because it is inconsistent with the new 12 month rule for younger children. I would, however, submit that when courts are considering whether to make a Crown wardship order before the maximum period is up, it is still appropriate for judges to consider whether the parents are likely to be able to resume care within a reasonable time. The definition of the best interests of the child, unamended in s. 37(3), still requires a preference to be given for returning a child to the care of parents if there are reasonable prospects that they will be able to care for their children. The effect of the elimination of s. 57(6) may be to change the onus of adducing evidence of parental amenability to develop the capacity to properly care for their children.

¶ 115 Bill 6 amends ss. 59(2) & (3), which deal with parental access to Crown wards, to make it easier to terminate access. Under the new s. 59(2) there would appear to be an onus on the parent (or child or agency) to show the court that the "relationship" between the parent and child is "beneficial and meaningful" and that the access will not impair the "child's future opportunities for a permanent or stable placement [i.e. adoption]." The wishes of a child 12 or older and the fact that the child is not likely to be

placed for adoption are no longer explicit statutory factors under this section. However, the wishes of the child and a child's relationships by blood are still "best interests" factors under s. 37(3) that shall be considered in making this type of decision.

¶ 116 Section 65(3) of the 1984 C.F.S.A. lists a number of factors that are to be considered by a court at a status review application, with a particular focus on whether the agency has been following the plan of care submitted to the court when the original order was made, and whether adequate support has been provided to the parents since the making of the original order. Bill 6 repeals s. 65(3) without providing a replacement, though the "best interests" criteria of s. 37(3) continue to apply. One would hope that courts will continue to require C.A.S.'s to make good faith and reasonable efforts to assist parents in gaining the competencies needed to have the care of their children.

Reporting Child Abuse & Neglect: s. 72

¶ 117 A number of the recent child abuse deaths in Ontario raised concerns about professionals and community members being slow or unwilling to report suspected abuse to Children's Aid Societies. Bill 6 attempts to address these concerns by increasing reporting requirements. However, the major problems related to under-reporting do not arise out of the legislation. Rather such problems as poor communication and mistrust between the C.A.Ss and other agencies and professionals in their communities, and lack of training and support for community professionals need to be addressed. [See Note 73 below]

¶ 118 Bill 6 consolidates the reporting provisions with the relevant definitions of child in need of protection. This is useful for the purposes of public and professional education. However, when the widened reporting provisions are combined with the expanded definitions, there is the prospect for a substantial increase in the number of cases reported to C.A.Ss. Already about only about one quarter of cases of abuse and neglect that are reported to CASs in Ontario are substantiated by the agencies, with another third being suspected, and about 40% of the reports being regarded as unfounded. [See Note 74 below] The prospect is that only a small portion of any increase in reporting will be high risk cases.

Note 73: See e.g Loo, Bala, Clarke & Hornick, Reporting and Classification of Child Abuse in Health Care Settings (1998, Canadian Research Institute for Law & the Family)

Note 74: Ontario Incidence Study on Child Abuse and Neglect (1993).

¶ 119 At present, it is only an offence for professionals to fail to report reasonable suspicions of "abuse." Bill 6 extends the mandatory reporting to require professionals to report in any situation where they have "reasonable grounds to suspect" any situation where a child may be in need of protection.

¶ 120 The new s. 72(3) will require a person who has reported abuse to again report if the person has additional grounds to suspect abuse or neglect.

¶ 121 The new s. 73(3) provides that a person who has a duty to report shall report directly to the C.A.S. and shall not delegate this duty. While this amendment was presumably made to ensure that the agencies receive the fullest possible information, it may make busy professionals who often work in teams, feel less inclined to report or delay reporting.

¶ 122 The Panel of Experts Report recommended abrogation of solicitor-client privilege, imposing a requirement on lawyers to report based on communication with clients, other than in the context of child protection proceedings. This recommendation would have been very controversial, especially with Criminal lawyers who represent those charged with abuse, and is not included in Bill 6.

¶ 123 One of the issues not addressed by Bill 6 is the extent to which C.A.Ss may share information with other agencies and professionals in the community. Some of the under-reporting from community professionals may reflect a sense that information tends to "flow in only one direction," undermining the establishment of co-operative relationships with professionals that might encourage reporting.

Access to records: ss. 74 & 74.1 & s. 74.2

¶ 124 There have been a number of cases in which C.A.S.s have had difficulty in gaining access to information that is relevant to abuse and neglect investigations and court proceedings. Although in some of these cases the obstacles may have been statutory, it would appear that often the difficulties related to a lack of knowledge about potentially relevant records or a lack of resources or experience in conducting investigations.

¶ 125 Section 74 of the 1984 C.F.S.A already allows the agency to bring a motion in a protection proceeding to obtain access to records that "may be relevant" to whether a child has been abused. Bill 6 expands this by allowing the application to be made in the context of any protection application, whether or not abuse is alleged. Under the new s. 74(3.1) the documents may also be "relevant to assessing compliance" by a child or parent with a supervision or access order.

¶ 126 The new s. 74.1 is intended to give C.A.Ss expanded powers to obtain a warrant to have access to any record if there are "reasonable grounds" to believe that the record is "relevant to investigate an allegation that a child is or may be in need of protection." This provision is not limited to abuse cases but applies to any type of protection investigation. This provision would also appear to apply to records relating to an adult who may care for or have access to a child, as well as to the child. It would appear that this provision can be invoked without any notice to the parent or person affected, or to the record holder. This type of document search warrant may be obtained by a telewarrant under the new s. 74.2 where it would be "impractical" to require the C.A.S. to appear personally before a judge or justice of the peace. Given the broad powers involved, the power to issue telewarrants should be limited to "emergency situations" as suggested in the Ministry of Community & Social Services Backgrounder to Bill 6. [See Note 75 below]

Note 75: Ontario Ministry of Community and Social Services, "Proposed Changes to the Child and Family Services Act, April 26, 1999 [website http://www.gov.on.ca/CSS/page/news/apr2699b.html]

¶ 127 These are very broad new powers. As parents become aware of these provisions, they may become less willing to confide in those who may be able to help them become better parents, for fear that agents of the state may have access to any confessions of parental weakness.

¶ 128 Bill 6 gives no direction as to what criteria are to be applied when considering whether to issue a warrant to search for records under s. 74.1, except for specifying that if the records are governed by the Mental Health Act, "equal consideration" is to be given to the privacy and rehabilitative factors in s. 35 (6) of that Act and the need to protect the child. It is submitted that by analogy, when judges and

justices of the peace (who may lack familiarity with child protection issues) give effect to these provisions, there is a discretionary authority (the provisions are permissive - "may issue a warrant") to consider and weigh the privacy interests of adults and children, and the likely contents of record, as well as the need to facilitate abuse and neglect investigations.

Abolition of the Child Abuse Register: s. 75 & 76 repealed

¶ 129 The Ontario Child Abuse Register was condemned in a report released in 1988 as ineffective, highly variable and unfair to those whose names are identified as suspected abusers. [See Note 76 below] Bill 6 will abolish the Register. The federal and Ontario governments are taking steps to improve child related job screening for those with criminal records for abusing children and to better track sex offenders in the community. A new province-wide computer information system linking C.A.Ss will also facilitate information sharing and tracking of children in need of protection if they move around the province.

Note 76: Bala et al, Review of the Ontario Child Abuse Register (1988, Queen's Social Program Evaluation Group, for the Ministry of Community and Social Services)

¶ 130 Given the ineffectiveness of the present Register, abolition is appropriate though it would have been preferable to have put in place mechanisms to allow job screening based on civil findings of abuse, as Manitoba and Nova Scotia allow.

Increasing Provincial Control: ss. 19, 20.1, 22(1)(d) & 214(1) 6.1

¶ 131 As part of the restructuring of funding for local agencies in Ontario, the provincial government assumed responsibility for all funding for Children's Aid Societies, ending the 20% municipal contribution. Accordingly, the C.F.S.A. is being amended to end the requirement that municipal representatives sit on C.A.S. Boards. As well as assuming complete financial responsibilities, the province confirms its powers to issue directives to local C.A.S executive directors and may require that volunteer members of the agency undertake specified training.

Five Year Review Child Welfare System: s. 224

¶ 132 The Panel of Experts Report recognized the need for on-going monitoring of the child welfare system and Bill 6 responds to this by requiring the Minister to conduct a review of the C.F.S.A. every five years. Section 224 requires the Minister to inform the public that a review is being conducted and to make the report public. However, it also allows the Minister to specify that only certain provisions of the Act will be the subject of review, so the review may not be comprehensive. There is no requirement for any public hearings to be held, or for the review to take any particular form, though presumably the intent of the public notice provision is to permit public participation in the process. One would also hope that the review will be conducted in an open fashion by a credible, independent, broadly representative body. It is distressing that the entire process for the 1999 amendments to the C.F.S.A occurred without any meaningful public debate or dialogue.

¶ 133 The Panel of Experts only had a short time to work and a wide mandate. It recognized the need for further study of some issues, including aboriginal concerns and issues related to adoption and services for hard to place youth. The addressing of these issues should not have to wait for the first five

year review.

The Limited Role of Legislative Reform & Dangers of Over-intervention

¶ 134 In the rush to "increase" protection, I worry that we may lose sight of important concerns about over-intervention that the reforms of the 1970s and 80s were intended to address. Recently a number of Ontario Children's Aid Societies have responded to the increased awareness of abuse and Coroners' reports by being more aggressive about interpreting the 1984 Child and Family Services Act to emphasize child safety. [See Note 77 below] This has already resulted in substantially more children coming into care in some agencies, straining foster care resources. It also illustrates that agency practices and interpretations play a very large role in how any legislative scheme is actually implemented, and raise questions about whether dramatic legislative reforms are needed.

Note 77: See Henry Hess, "Foster care overflows to college dorm" The Globe & Mail (19 June 1998) A1.

¶ 135 Improving the child welfare system requires an understanding of the challenges faced by those who work in this field. Child protection work is less satisfying and more stressful than most other types of social service work. Protection workers (and judges) are often called upon to make extraordinarily difficult decisions about the future of children. If a child is left in an abusive or neglectful situation and killed, the worker will feel enormous guilt, but if a child is unnecessarily removed from a home, the parents, and often the child, will express great hostility towards the worker. It is only with hindsight that one can assess whether a decision was really "right", and even then one really can only be certain if the decision turns out to have been "wrong."

¶ 136 While social workers go into child welfare work with the objective of helping individuals, many of the "clients" (i.e. parents and children) view the representatives of the agency not as having a therapeutic role, but as adversaries - as investigative agents of the state who pose a threat to the family. This can make child protection work frustrating and contributes to a relatively high turnover and lack of experienced staff, a problem that was exacerbated by budget cuts.

¶ 137 The relatively high turnover and lack of experience of supervisors and front line workers may also result in poor decisions being made. Inexperienced staff and supervisors may be reluctant to take cases to court, where they know that their decisions may be subject to intense scrutiny. It is apparent that some workers try to "second guess" judges and only take cases to court where they are quite confident that a judge will uphold their decision.

¶ 138 While changes are needed in how the legal system deals with child welfare cases in order to improve the efficiency of the justice system and, in some areas increase the protections for children, it is also important to recognize the risks and costs of "over-intervention." Indeed a child welfare agency often simultaneously has cases where they may have been overly intrusive and others where the agency has failed to be sufficiently intrusive. [See Note 78 below]

Note 78: The dilemmas are illustrated by events in Quesnel, British Columbia in 1998 where a post-Gove audit during a fatality review revealed systemic problems in one local child welfare office. As a result of changes in the office, files were reviewed and new staff brought in. Seventy-one children, many of them aboriginal, were quickly apprehended. There was a

widespread public condemnation at the time of the apprehensions. Even though later Ministry review supported many of the apprehensions (65 out of 71), one can ask whether all of them were necessary to protect the safety of the children. See Craig McInnes, "Children seized justifiably in B.C., investigation finds" The Globe & Mail (10 June 1998) A3.

¶ 139 We must respond to the inadequacies of the child welfare system, including those in legislation and the court system, hopefully to achieve the best balance possible and not to "overeact." Unnecessarily intrusive intervention can be harmful to children, disrupting their relationships with primary caregivers, family, friends and schools, and resulting in a series of placements in foster homes and other facilities that may be less than ideal. While the recent inquiries have focussed on situations where agencies have failed to intervene aggressively enough, there are also cases in which inexperienced and inadequately supervised child protection workers have been inappropriately aggressive and made unfounded allegations of parental abuse. [See Note 79 below]

Note 79: See e.g. D.B. v. Durham C.A.S. (1996), 136 D.L.R. (4th) 297, 30 C.C.L.T. (2d) 310 (Ont. C.A.).

¶ 140 I worry that some of the changes in Bill 6 will tend to more quickly push C.A.S.s and parents into adversarial relationships, making child protection work more difficult for front line staff.

IV. CONCLUSION: HAVE WE GOT THE BALANCE RIGHT?

¶ 141 While recent research into issues of child development, child abuse and child welfare has been significant, it must be acknowledged that there is a lack of empirical data regarding how the child welfare system in Canada is actually operating. [See Note 80 below] There is also a lack of knowledge about what are the optimum intervention strategies for children at risk. As noted by an American author: [See Note 81 below]

> we continue to insist, as evidenced in our propensity to pronounce what is best for the child, that we have some reason to believe that our prescriptions (be they minimum interventionist or otherwise) are correct.... Perhaps part of this appearance of knowledgeable policy making is attributable to the demands made by the "consumers" of our policy. It may be difficult ... to "sell" public policy when we are not certain if that policy will work. The public wants to know what will happen when we institute a particular child welfare policy. Guaranteed results are what the public craves. Thus, we create the illusion of knowledge and refrain from policy making choices that might expose our ignorance.

Note 80: This is, for example, acknowledged in Ontario, Protecting Vulnerable Children (1998), 4. The Report includes recommendations for support of research and monitoring of the implementation of any legislative change.

Note 81: Morehead, "Of Family Values and Child Welfare:

What Is in the 'Best' Interests of the Child?" (1996) 79 Marquette L.Rev. 517.

¶ 142 This is not to suggest that we can wait until we have better research before we make policy, as we will always have a child welfare policy, no matter how uncertain our knowledge. And research in this area, especially good control group studies, will take time to conduct, and will be subject to ethical and legal constraints that may make it difficult to draw clear conclusions. However, the absence of good research should make us cautious about substantial policy changes, especially ones that call for dramatic changes in social relationships or massive increases in state intervention in the most important and sensitive of human relationships.

¶ 143 There are some sound ideas in the Panel of Experts Report and Bill 6. Unfortunately the continuing evidence of problems in the child welfare system in "post-Gove" British Columbia make clear that good public reports and new laws are not enough. Sustained political will, dedication of adequate resources, and commitment of time to allow for recruitment and training of child welfare workers and other professionals are all needed. In Ontario there is a real concern that the Conservative government will focus on high profile and inexpensive legislative reform while failing to adequately address issues of resources, training and morale in the child welfare and justice systems.

¶ 144 In the legal system, issues like delay in protection proceedings clearly need to be addressed, but again, the solutions will not be costless [See Note 82 below]. At least in some cases child protection workers have taken too narrow a view of their mandate to protect children and have placed too much emphasis on "parental rights." It is important to remind child protection workers and the legal system that the primary focus must be on children's needs and not parental rights. But the cumulative effect of changes in Bill 6 raise concerns that there will be a substantial increase in the number of children being taken into care, without any assurance that there will be a corresponding increase in the welfare of children.

Note 82: Rule 33 of the new Family Court Rules Ont. Reg. 114/99 attempts to address the issue of delay, though the success of this provision will depend on resources devoted to the justice system.

¶ 145 As Ontario adopts a more interventionist child welfare scheme, judges may be more inclined to adopt an interpretative approach or invoke the Charter to protect the rights of children and parents. While previous attempts to invoke the Charter in child welfare proceedings in Ontario have not met with success, as the legislative scheme becomes more restrictive the courts may be more likely to feel the need to protect familial rights. [See Note 83 below]

Note 83: See e.g P. Zylberberg, "Minimum constitutional guarantees in child protection cases" (1992) 10 Can. J. Fam. L. 257-281 and R.(B.) v. Catholic C.A.S of Metro Toronto (1994), 9 R.F.L. (4th) 157 (S.C.C.)

¶ 146 We need to learn from the tragic deaths of children as a result of abuse and neglect. But we must also recognize that it will never be possible to have a "perfect" child welfare system, in which the system protects all children who are victims of abuse or neglect, and never inappropriately intervenes. The Ontario legislature has made significant amendments to the C.F.S.A. It is heartening that Ontario politicians have made child welfare a priority concern, but I hope that their interest will be sustained and that they will remain committed to dealing with a complex and vitally important set of

problems.

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Allegations of Sexual Abuse When Parents Have Separated*

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Introduction - The Context

¶ 1 Parental custody and access disputes are emotionally charged and difficult for everyone involved: parents, children and professionals. If there are allegations of abuse, the emotional tension, bitterness and complexity are invariably heightened. These cases are very distressing for parents and children. They are also very challenging for all of the professionals involved: lawyers, judges, child protection workers, police and mental health professionals.

¶ 2 It is apparent that a significant proportion of allegations of child abuse made in the context of parental separation are unfounded. In some cases of untrue allegations of abuse, the accuser and even the child may be deliberately lying. However, it is more common for the accusers to honestly believe what they are alleging. Pre-existing distrust or hostility may result in misunderstandings and unfounded allegations, especially in cases where the children involved are young and the allegations are reported through a parent. Some cases of unfounded allegations may be the product of the emotional disturbance of the accusing parent.

¶ 3 It must, however, also be emphasized that many abuse allegations made in this context are well founded. While there are legitimate concerns about the possibility that accusing parents or children may be lying, those who have abused children usually falsely deny or minimize their abuse. Abusers are only likely to admit their wrongdoing if confronted by irrefutable evidence.

¶ 4 In most cases there is no clear forensic evidence and there may a welter of conflicting claims. Investigations of abuse allegations in this context are especially difficult because the alleged perpetrator will often have legitimate reasons for touching a child. The determination of whether a touching was "sexual" requires an assessment of intent; it may be very difficult for an investigator or judge to later make that assessment. There is usually no conclusive physical evidence, nor is there a valid psychological test or profile that can conclusively determine whether an accuser, an accused or a child is telling the truth about an allegation.

¶ 5 There may be a number of different mental health professionals and social workers involved in a case, with differing levels of expertise and conflicting opinions about the case. It may be very difficult

to prove conclusively that abuse either did or did not occur. Once the issue of abuse is raised, a number of agencies with differing mandates may become involved. There is the potential for a criminal prosecution, a child protection application and a parental custody dispute to be proceeding at the same time in different courts, adding to complexity and expense. In practice, however, criminal or child protection proceedings are most likely in cases where there is the clearest evidence of more serious abuse, and there is less likelihood of a parental family law dispute reaching the trial stage. On the other hand, cases where there is more uncertainty of whether abuse occurred are most likely to be resolved in family law proceedings.

¶ 6 This paper considers how parental separation affects the making of child sexual abuse allegations, with particular emphasis on how separation may contribute to false allegations. We then review the legal issues which arise in this type of case. This analysis begins with a brief discussion of child protection and criminal law issues, but has a primary focus on questions of concern to family law practitioners and judges. The paper concludes by offering some practical advise to lawyers involved in this type of case.

True Allegations of Sexual Abuse After Parents Separate

¶ 7 Many of the child abuse allegations made after a parental separation are true. In some situations, the abuse commenced while the family was intact, but the child may have felt too intimidated by the presence of the abuser to disclose until after separation. In some cases the child's disclosure of abuse was the precipitating factor in the separation. Where there has been spousal abuse, the non-offending parent may have felt unable to take protective steps until after the separation.

¶ 8 In many cases, particularly of sexual abuse, the abuse may not commence until after separation, with an emotionally needy and lonely parent starting to exploit the child. [See Note 1 below] Although some parents who sexually exploit their children are pedophiles - i.e. have a sexual preference for children - in many of the cases the abuse is more situational than pedophilic.

Note 1: See e.g K.C. Faller, "Possible Explanations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 61 Am. J. Orthopsychiatry 86-91; and S.P.Penfold, "Mendacious Moms or Devious Dads? Some Perplexing Issues in Child Custody/Sexual Abuse Allegations" (1995), 40 Can J. Psychiatry 337-341.

¶ 9 In some cases abuse may be perpetrated by a parent's new partner and only begin after that the new partner has begun to reside with the parent.

False and Unproven Allegations of Abuse After Parents Separate

¶ 10 A significant portion of allegations of abuse which are made following parental separation, they are not proven in court. In some of these cases abuse has occurred, but the accuser, who bears the onus of proof, is unable to satisfy the court that the abuse occurred. The failure to prove abuse is not surprising since there is frequently no physical evidence of abuse, and children, especially young children, may have great difficulty in communicating a coherent and consistent story, especially if they feel pressure or guilt to retract allegations.

¶ 11 There are, however, also a significant number of cases in which the allegations of abuse are not true. While in some cases of false allegations there may be a deliberate effort to deceive, more

commonly the parent who brings forward the unfounded allegation of abuse following separation has an honest belief in the allegation. As explained by Leonoff and Montague: [See Note 2 below]

> [unfounded] accusations are most often multi-causal and are rarely simply the conniving manipulation of a competitive parent who wishes to win at all cost. There is a gradient between the parent who consciously deceives and the one who is deluded in belief and whose accusations are built of several elements: personal history projected onto the present relationship; shock and betrayal turned into malevolent mistrust of the other; aggression and hatred; fears based on regressed violent behaviour at the termination of the marriage; comments made in emotional turmoil; suggestibility enhanced by outsiders who are keen to find sexual abuse in men; wishes to denigrate, humiliate and punish the ex-spouse; distortion in thought processes in mentally vulnerable parents who view their overreactions as protectiveness; and finally, a fervent desire to win a custody case and be rid of that person forever.

Note 2: A. Leonoff & R. Montague, Guide to Custody and Access Assessments (Toronto: Carswell, 1996), p. 357.

¶ 12 Children can often provide accurate and detailed accounts of abuse that they have experienced. However, a child who has been repeatedly questioned by a parent who may have preconceptions or biases about the possibility of abuse, may be quite suggestible and manipulable. Repeated questioning by a trusted adult can alter the memory of a child, especially a young child, to resemble the beliefs of the accusing parent. As a result of leading questions or suggestions from a parent, a child may come to believe that abuse occurred and create descriptions of events that did not occur. [See Note 3 below]

Note 3: See Ceci & Bruck, "Children's Testimony: Applied and Basic Issues"(p. 713-774) and Goodman, Emery & Haugaard, "Developmental Psychology and Law: Divorce, Child Maltreatment, Foster Care and Adoption (p. 775 -874) in William Damon, Handbook of Child Psychology, Child Psychology in Practice, vol 4, (New York: John Wiley & Sons, 1998); and Saywitz & Camparo, "Interviewing Child Witnesses: A Developmental Perspective"(1998), 22(8) Child Abuse & Neglect 825, at 830.

Studies on the Incidence of True and False Allegations

¶ 13 When considering the research on false allegations of abuse in the context of parental separation, it is important to distinguish allegations that are considered by a researcher to be clearly unfounded (or false), from those that are uncertain (or unproven). In the clearly unfounded category, it is important to distinguish between those that are a result of conscious fabrication (or lying), either to seek revenge or to manipulate the legal system, from those that are a result of misunderstanding or miscommunication, or are a result of an emotional disturbance of the accuser. If there is a deliberate lie, one must also distinguish between cases where it is a parent or the child who is taking the lead in the fabricating.

¶ 14 Much of the research about the incidence of founded and false allegations of child abuse in the context of parental separation is not as conclusive as one might like. Many studies suffer from small or biased samples. One also has to be cautious in using research from other jurisdictions or even from

other periods in time, since public and professional attitudes to child abuse have changed over time. Differences in attitude towards child abuse may affect rates of false and founded claims being made.

¶ 15 The nature and context of different studies is important, and may explain some of the apparent discrepancies in the research. Studies that focus on litigated family law cases - those which go to assessment and on to trial - find relatively high rates of false allegations. On the other hand, studies of all cases of parental separation at the investigative stage generally find lower rates of false allegations. The discrepancy may be a result of the fact where an investigation makes clear that the allegation is true, the case is less likely to be pursued through the assessment and trial stage in family law proceedings. Whereas cases where there is a false allegation are probably more likely to be pursued through family law litigation.

¶ 16 American research: Although cases that raise abuse allegations are extremely challenging, it is important to remember that they are only a fraction of the total number of litigated custody and access cases. One large scale multisite American study reported that on average only 2% of custody and access court files raise abuse issues, though at some sites the rate was as high as 10%. [See Note 4 below] Child protection and court workers believed that 50% of these cases actually involved abuse, 33% were unfounded and 17% could not be determined.

Note 4: Thoennes & Tjaden, "The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visiitation Disputes" (1990), 14 Child Abuse & neglect 151-163.

¶ 17 Some small scale American studies based on assessors' files of contested custody and access cases raising child sexual abuse issues have reported rates of false and unproven allegations of 36% to 79%. [See Note 5 below]

Note 5: See e.g Benedek & Scetky, "Allegations of sexual abuse in child custody and visitation disputes" in Scetky & Benedict eds Emerging Issues in Child Psychiatry & the Law (New York: Brunner/Mazel, 1985) 18 cases of which 55% were considered false; Green "True and false allegations of sexual abuse in child custody disputes" (1986), 25 J. Am Acad. Child Psychiatry 449-56, 11 cases, 36% were considered false; Yates & Musty (1987), "False allegations in molestations of preschool children", presented at meeting of American Psychiatric Association, 19 cases, 79% could not be substantiated. Faller & DeVoe "Allegations of Sexual Abuse in Divorce (1995), 4(4) Journal of Sexual Abuse 1-25 found a substantiation rate of 72% based on clinical assessments (n = 215), though of the "substantiated (by clinical standards) cases in the study that went to domestic relations court only 45% were also considered by the court to be cases where there was a civil finding that abuse occurred.

¶ 18 Ontario Incidence Study: The 1993 Ontario Incidence of Study of Child Abuse revealed that 9% of the 42,000 physical and sexual abuse and neglect allegations involved separated parents. Mothers made two thirds of those allegations, while fathers made a third of the allegations. [See Note 6 below]

Note 6: This Ontario Incidence Study by is discussed at greater length in Bala et al, Allegations of Child Abuse in the Context of Parental Separation (Calgary: Canadian Research Institute for Law & the Family, forthcoming 1999)

¶ 19 Of the allegations made by custodial mothers against noncustodial fathers, 23% were considered substantiated by the child protection workers, 27% suspected and 50% unfounded, but only 1.3% were considered to be intentionally false. The police investigated in 30% of the cases, and criminal charges were laid against the suspected male abuser in 7.6% of the cases.

¶ 20 In cases in which the father alleged that the custodial mother had abused or neglected the child, only 10% were considered by child protection workers to be substantiated, 18% suspected and 72% unfounded, while the rate of reports believed to have been maliciously made was 21%. No abuse related charges were laid against mothers.

¶ 21 Thus while custodial mothers made more reports of suspected abuse against noncustodial fathers, the allegations of abuse made by noncustodial fathers were less likely to be considered founded and more likely to be believed to have been made maliciously.

¶ 22 Canadian Family Law Judgements: As a part of a project funded by the Department of Justice, a study was undertaken of reported Canadian Family Law decisions from 1990 to 1998. [See Note 7 below] This study considered all reported judicial decisions on the Quicklaw databases in Canada in that period that dealt with sexual and physical abuse allegations in the context of parental separation. It dealt only with family law cases; child protection and criminal decisions were excluded.

Note 7: The caselaw study by Schuman & Bala (1999) was undertaken as part of Bala et al, Allegations of Child Abuse in the Context of Parental Separation (Calgary: Canadian Research Institute for Law & the Family, 1999), funded by the Department of Justice Canada. It should be emphasized the Quicklaw databases depend on receiving written decisions from judges. Many decisions delivered in Canada are not included in any legal databases. "Less significant" judicial decisions usually do not result in written reasons and do not appear on legal databases; some judges tend to give only short unreported decisions. These are generally cases that the judge considers to be relatively simple and do not involve complex issues of fact or law. In addition, some judges tend to give only short unreported decisions. This may mean that certain types of decisions are under-represented in the legal databases. For example, in a case where there is clear evidence that a father sexually abused his daughter and consequently he has lost access to that daughter, the result may be viewed as unremarkable and not result in written reasons. These types of cases, where there is clear evidence of abuse, may well be underrepresented in the databases in the study. The Quicklaw databases, however, are one of the most complete set of judgments in Canada. They give a sense of what is happening in the most highly contentious cases that family law judges are called upon to resolve.

¶ 23 One hundred and ninety-six cases were identified. Of these, a judicial finding on the balance of probabilities (the civil standard) that abuse occurred was made in 46 cases (23%). In 89 cases (45%) the judge made a finding that the allegation was unfounded, while in 61 cases (35%) there was evidence of abuse but no judicial finding that abuse occurred. In 45 of the 150 cases (30%) where abuse was not proven, the judge believed that it was an intentionally false allegation.

¶ 24 In the 89 cases where the court found that the allegation was clearly unfounded, the accusing party lost custody in 18 cases, though this was sometimes for reasons not directly related to the making of an unfounded allegation of abuse. In only one case was the accuser charged (and convicted) for false reporting (mischief) in connection with the false allegation, though in 3 other cases the accuser was cited for contempt of court in connection with denial of access. In the 51 cases where abuse was proved on the civil standard, access was denied in 21 cases, and supervised in 16. The abuser was criminally charged in only 3 of these 51 cases.

¶ 25 The cases involved 262 alleged child victims (74% of them alleged sexual abuse). Thirty-two percent of these children were under 5 years of age, 46% were 5 to 9 years of age, 13% were 10 or older; for 9% the age was not specified. About 71% of the allegations were made by mothers (64% custodial and 6% non-custodial), 17% were by fathers (6% custodial and 11% non-custodial), 2% were from grandparents or foster parents. In about 9% of the cases the child was the prime instigator of the allegations. This study found that fathers were most likely to be accused of abuse (74%), followed by mothers (13%), mother's boyfriend or stepfather (7%), grandparent (3%) and other relatives, including siblings (3%).

¶ 26 It must be emphasized that this study may not be representative of all cases where abuse allegations are made after parents have separated, as in cases with strong evidence of abuse, the perpetrator is likely not to contest the issue of abuse in family law proceedings. This study may, however, give some sense of the cases that are likely to be reported in the media or receive attention in legal periodicals. It also gives a flavour of the cases in which false allegations are likely to be the subject of family law litigation.

¶ 27 Conclusions on the Research: The outcome of each individual case must be assessed on its particular facts and not on the basis of statistics about cases in general. It is nevertheless useful for practitioners to have some sense of "typical outcomes".

¶ 28 Most parents who separate resolve disputes about their children without going to court. However, cases involving abuse allegations are more difficult to resolve by negotiation or mediation and more likely to go to trial. It is apparent from the literature that abuse allegations are made in less than 10% of contested custody and access cases - perhaps in as few as 1% or 2% of cases. Within the group of litigated family law cases that involve abuse allegations, the rate of unproven and unfounded allegations is quite high, probably in the range of 25% to 75%. However, even where the allegation is considered unfounded, the incidence of deliberate fabrication or lying is low, in the range of 3% to 30% of unfounded allegations.

¶ 29 Most unfounded allegations are a product of miscommunication or misunderstanding. If there is fabrication, it is usually by the accusing parent, but in rare cases the child (usually older) may deliberately fabricate a false allegation.

Child Protection Agency Involvement

¶ 30 When a parent believes that their child has been abused, a child protection agency is likely to become involved in the case. Sometimes the accusing parent directly contacts the agency; in other situations the parent may first contact a doctor or mental health professional, who will then be obliged under child abuse reporting laws to report a suspected case of abuse.

¶ 31 When a child protection agency begins an investigation of suspected abuse, the agency is likely to want to take steps to ensure the immediate safety of the child. If, for example, the allegation is against an access parent, the agency may go to court under child protection legislation to suspend visitation by the parent suspected of child abuse, but more typically the agency will "request" a voluntary suspension or supervision of access, with the threat of going to court if there is no agreement. The suspected abuser will generally want to appear co-operative, and may be informed by a lawyer that a court is also likely to "err on the side of caution" at this initial stage and hence will "agree" to restrictions or suspension of access.

¶ 32 Child protection agencies are facing resource constraints. This means that investigations

regarding children who are not in immediate danger tend to be a given a low priority. Children who have been allegedly abused by an access parent may be protected if there is suspension or supervision of access. As such, investigations of suspected abuse by access parents tend to receive a relatively low priority and tend to proceed relatively slowly. Further, they are often complex cases that require careful assessment which results in an investigation that may take months to complete. If the agency concludes that abuse perpetrated by a parent has occurred, the agency generally has legal authority to seek some kind of court order to protect the child.

¶ 33 Although practices vary between agencies, if the parents have already commenced family law proceedings, the agency often decides not to bring a child protection application to court but rather will rely on the accusing parent to seek a judicial determination and protect the child. Indeed in some cases, the agency may encourage the accusing parent to bring a family law application, and may even threaten that if the accusing parent fails to take adequate measures to protect the child, the agency will bring a protection application that may result in the child being placed in agency care. If the agency does not make a court application, the agency workers may still testify in the family law case, or may be asked to supervise access visits by the alleged abuser. [See Note 8 below] There are, however, cases in which the agency decides to commence child protection proceedings if it has special concerns or if the accusing parent is not pursuing family law proceedings, for example for financial reasons. [See Note 9 below]

Note 8: In some family law cases where there are abuse concerns the court will order that access should be supervised by a child protection agency (see e.g Beckett v. Beckett, [1995] O.J. No. 2185 (Gen Div.) Kent J.). Though agencies are sometimes willing to do this, they may lack resources. Also there is doubt as to whether a child protection agency can be legally required to supervise access unless there is a child protection application; see Levesque v Levesque (1983), 54 B.C.L.R. 164 (B.C.C.A.)

Note 9: In some jurisdictions the rules of court permit one judge to deal with the family law proceeding and a child protection application at the same time, reducing the expense for all involved. However, the accused parent may consider it unfair to have to litigate against both the other parent and a state agency in the same proceeding.

¶ 34 If the evidence of abuse is relatively weak, or if the allegations of abuse are less serious, the agency may decide that no further action on its part is warranted. In this situation the accusing parent may still proceed with the family law case, and protection workers may be called upon to testify, perhaps by the accused parent if the agency workers have concluded that the allegations are unfounded.

¶ 35 Many of the reported Canadian family law cases that deal with separated parents and abuse allegations are cases where there has been some form of involvement by a child protection agency, but for one of the reasons outlined here, the agency is not bringing the matter to court.

Criminal Prosecution of Alleged Abusers

¶ 36 In some cases the accusing parent may contact the police directly, but it is more common for the police to be contacted by child protection workers who have become involved in the case. If child protection workers believe that there is strong evidence of serious abuse, they will inform the police and a joint investigation may be conducted. In some cases of abuse allegations in the context of parental separation, there may be a considerable delay between the initial disclosure and the police being informed, complicating the police investigation. Given the nature of the criminal law or investigatory process, it is only when there is strong evidence of abuse that criminal charges will be laid. It is relatively uncommon for there to be simultaneous criminal and civil proceedings, though clearly this

does occur. In the study of reported Canadian family law judgements, in fewer than 10% of the family law cases in which the judge found that abuse had occurred was there an indication that criminal charges had been laid. The 1993 Ontario Incidence Study on Child Abuse found that in only 30% of the cases where child protection agencies conducted an investigation of non-custodial fathers accused of abuse by custodial mothers did the police investigate; only a quarter of those police investigations resulted in charges.

¶ 37 It is much more difficult to prove abuse in a criminal proceeding than in a civil context. For a criminal conviction, there must be proof beyond a reasonable doubt while a civil case only requires proof on the balance of probabilities. Further, the criminal rules of evidence and the Charter of Rights may exclude evidence in the criminal proceeding that would be admissible in civil child protection or family law proceedings. There is, for example, much more scope in a civil case for the admission of hearsay evidence about a child's out-of-court disclosures of abuse.

¶ 38 Judges in criminal cases are generally aware of the dynamics of parental separation. When they consider the rights of an accused, they are likely to be sensitive to the possibility that allegations are fabricated or exaggerated. It is not uncommon for a judge in the criminal trial to acquit the accused, but emphasize that this is being done because of the high criminal standard of proof and to express concerns that the child may well have been abused by the parent. [See Note 10 below]

Note 10: R. v. J.C.P., [1998] O.J. No. 3883 (Gen. Div.); R. v. B.L., [1998] O.J. No. 2522 (Gen. Div.)

¶ 39 If criminal charges are laid, they will tend to "dominate" the resolution of any family law proceedings, at least until the criminal charges are resolved. A usual condition of the release of the accused in the community pending a criminal trial is the denial of contact with the alleged victim, or at least close supervision of access. In some cases the criminal trial judge will release the accused on bail with a condition that there be no contact with the child unless that contact is permitted by the order of a family law judge. The Charter of Rights guarantees that a criminal trial will be held within a reasonable time. This means that a criminal trial will often be held before civil proceedings are fully resolved. [See Note 11 below]

Note 11: If the civil case comes to trial before the criminal case, it is possible for the accused to seek a stay of the civil trial. However, judges are reluctant to grant a stay, especially if this would delay the making of a decision about the best interests of the child: see e.g Forbes v. Throughlow (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.); for an unusual civil case (not involving abuse allegations) where a stay was allowed see Gilles v. Eagleson (1995), 23 O.R. (3d) 164 (Gen. Div.)

¶ 40 If there are simultaneous criminal and family law proceedings, the person accused of abuse will often have separate lawyers for each proceeding, though it is highly desirable for these two lawyers to communicate and coordinate their efforts. [See Note 12 below] Defense counsel in the criminal case will generally be very reluctant to allow a person charged with a criminal offence to testify in a civil case that deals with the same issues, and will generally want any civil proceedings adjourned until the criminal case is resolved. If the accused files an affidavit or testifies in the civil case, for example for a interim access application, the Crown prosecutor may use any inconsistencies between that affidavit and

testimony in a later criminal trial to impeach the credibility of the accused. [See Note 13 below] Similarly, if the accusing parent testifies in the criminal trial, any inconsistencies between that testimony and evidence in a later family law trial may be used to impeach the credibility of that person in the civil case.

Note 12: See e.g Todd White, "Spousal Abuse Issues and Their Impact on the Resolution of the Family law Case" and H. Niman & J. Pirie, "How to Deal with Allegations of Spousal Assault in a Family Law Case" in Canadian Bar Association - Ontario, Family Law Institute, (Toronto, January 1999). Niman & Pirie suggest that it might also possible that counsel for an alleged abuser to may try to get access to the file of the lawyer for the accusing spouse in the family law case to assist in preparation of the criminal defence. Before allowing production the court would also have to decide whether the accused's right to disclosure and a fair trial should take precedence over the right of the accusing parent to solicitor client privilege in the civil case.

Note 13: Section 13 of the Charter of Rights creates a right against self incrimination so that prior affidavits or testimony of an accused in other cases cannot be used if the accused fails to testify. However, if the accused does testify in the criminal trial, the prior statements from the family law proceedings can be used to impeach his credibility; see e.g R. v. B.(W.D.) (1987), 38 C.C.C.(3d) 12 (Sask. C.A.); and R. v. Kuldip (1991), 61 C.C.C. (3d) 385 (S.C.C.). Counsel in the civil case may try to get an order to seal the civil trial record until after the criminal case is over; this would prevent any use of the material in the criminal case; see e.g Forbes v. Througlow (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.) where such an order was made.

¶ 41 If the accused is convicted of abuse in the criminal trial, a judge in a later family law trial is likely to take the criminal conviction as very strong or even conclusive evidence that the abuse occurred. [See Note 14 below] At least in theory, the fact that a person abused a child is not determinative of whether it is in the "best interests" of the child to lose contact with the perpetrator. However, in practice if the accused is convicted of child abuse related offence in a criminal trial, there is little likelihood that there will be any family law hearing on custody or the fact that abuse occurred, and the convicted abuser is likely not to seek visitation rights to the child.

Note 14: In ordinary civil cases judges have held that since the parties to a civil case are not the same as those in criminal case, the criminal conviction is only prima facie evidence of guilt. The accused may in theory attempt to relitigate the issue in a later civil trial; Taylor Estate v. Baribeau (1985), 51 O.R. (2d) 541 (Div. Ct.). See, however, D.E. v. O.L., [1996] O.J. No. 3136 (Prov Div) which applied the doctrine of "issue estoppel" to prevent the accused from relitigating the issue of abuse after a criminal conviction at a later interim access hearing and terminated unsupervised access. See also Demeter v. British Pacific Life Insurance.(1984), 13 D.L.R. (4th) 318 (Ont. C.A.) which held that in some circumstances it may be an "abuse of process" to allow a person convicted of an offence in a criminal trial to relitigate the issue of guilt in a later civil case if the primary purpose of the civil case is a collateral attack on the criminal conviction.

¶ 42 The fact that an alleged abuser is not charged or is tried and acquitted in criminal court is not binding on a judge in a civil proceeding. It is not uncommon for an alleged abuser to be acquitted in criminal court and then have the issues of abuse relitigated in the context of a family law trial, where the rules of evidence and the standard of proof make it easier to prove that abuse occurred. Sometimes the criminal charges against the alleged abuser are dismissed due to a violation of his rights by the police or courts under the Charter; this type of dismissal does not prevent the judge in civil family law proceedings from considering the abuse allegation. [See Note 15 below] Further, even if there is no judicial finding of abuse, in either the criminal or the family law proceeding, there may be other concerns about the parenting capacity of a person acquitted in criminal court that lead to a denial of

custody. [See Note 16 below]

Note 15: S.S. v. P.S., [1994] O.J. No. 995 (Prov. Ct.), Main J.

Note 16: S.S. v. P.S., [1994] O.J. No. 995 (Prov. Ct.), Main J.

¶ 43 While a criminal conviction for child abuse will often result in the termination of access, a judge in a family law case must still consider whether it is in the "best interests" of a child to continue or resume contact. Children who have been sexually or physically abused by a parent will often feel an attachment to that parent, despite the abuse. A family law court may allow access by a convicted abuser if it is satisfied that this is in the child's best interests. The judge should be satisfied that the children will not be at risk, which may require supervision (especially at first) and evidence of rehabilitation. The judge should be satisfied that the visits will actually promote the welfare of the child, and not simply allow access based on some notion of parental rights. [See Note 17 below]

Note 17: M.R.P. v. P.P. (1989), 19 R.F.L. (3d) 437 (N.S. Co. Ct.), a new trial was ordered when trial judge allowed unsupervised access to a father convicted of sexually abusing the children five years earlier and trial judge satisfied that father was rehabilitated and there was no risk to safety of children. The appeal court held that the trial judge should have not only considered the issue of risk of further abuse but should have also required evidence that access was in the best interests of the children.

¶ 44 If the Crown withdraws the criminal charges or the alleged abuser is acquitted, there may be a tendency for some accusing parents or others involved in the case to accept this criminal finding for civil purposes as well. The alleged abuser will often feel a psychological boost from the criminal acquittal or the Crown's decision not to proceed with charges. Indeed in some family law cases the judge has granted interim access to an alleged abuser, taking account of the fact that the police decided not to lay charges. [See Note 18 below] However, in light of the different types of proceedings, it seems inappropriate for a family law judge to place much weight on the decision of the police not to charge or on a criminal court acquittal.

Note 18: Stuart v. Stuart (1985), 32 A.C.W.S. (2d) 53 (Ont.S.C.) per Cork M. In Bartesko v. Bartesko (1990), 31 R.F.L. (3d) 213 (B.C.C.A.), McEachern C.J.B.C. suggested that the fact that no charges were laid is "less than conclusive" but it "was at least a matter that the trial judge was entitled to comment upon."

Family Law Proceedings

¶ 45 All federal and provincial family law legislation in Canada requires that custody and access disputes between parents must be resolved on the basis of a judicial assessment of the "best interests" of the child. Newfoundland is the only province with legislation that specifically refers to abuse as a factor in custody or access cases. [See Note 19 below]

Note 19: The Children's Act R.S. Nfld. 1990 c. C-8, s. 31(3) specifies that the court shall consider the person's history of "violence" towards a spouse or any child when making a determination about whether that person shall have custody or access to a child.

¶ 46 Despite the absence of explicit legislative mention, when an abuse allegation is made, this will generally become a central focus for the parents and the court. Testimony from various mental health professionals, social workers and assessors is often very important in these cases. However, their testimony is by no means determinative. In cases that are most likely to be litigated, professionals and experts may disagree about whether abuse occurred.

Interim Access

¶ 47 It is apparent from the reported case law that when there is an allegation of abuse, especially sexual abuse, most judges will tend to "err on the side of caution" after the allegation is made and pending a full hearing in determining interim access. [See Note 20 below] At this interim stage there is little opportunity for the accused parent to challenge the allegation. However, there a few reported cases in which judges have decided that even at the interim stage the evidence to support the allegation is so weak that unsupervised access may continue. [See Note 21 below] Judges are generally prepared to suspend unsupervised access at this stage if there are "real concerns" about abuse, without an actual finding on the civil standard of proof that abuse has occurred. [See Note 22 below] In such a situation a court will generally only allow supervised access, or if this is not possible, will terminate access pending a trial.

Note 20: See e.g. S.S. v. A.S., [1987] W.D.F.L. 897 (Ont.S.C.) per Cork M.; Zarb, "Allegations of Sexual Abuse in Custody and Access Disputes (1994), 12 Can J. Fam. L. 91, at 100; and J. Wilson, "The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent" (1987), 1 Can Fam. L.Q. 138, at 160.

Note 21: For examples of cases where the judge concluded at the interim stage that the allegation of sexual abuse was unfounded and allowed unsupervised access, see Flanigan v. Murphy (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork M.; and B.J.A.B. v. K.J.R. (1996), 21 R.F.L. (4th) 401 (Ont. Gen. Div.) per Aston J.

Note 22: See e.g. G. (D.) v. Z. (G.D.)(1997), 30 R.F.L.(4th) 458 (B.C.S.C.) per Power M.

¶ 48 It now appears to be accepted that if there are reasonable grounds to believe that a non-custodial parent has been abusing a child during access visits, a custodial parent has the right, and perhaps even the duty, to suspend access until the allegation can be investigated or the matter brought to court for at least an interim hearing. If a child protection agency is involved, the agency will usually advise the immediate suspension of access pending full investigation. [See Note 23 below]

Note 23: See e.g. B.M. v. N.G.W., [1998] O.J. No. 297, 36 R.F.L. (4th) 249 (Ont Gen Div); see also comments of L'Heureux-Dubé J. in Young v. Young (1993), 49 R.F.L. (3d) 117 (S.C.C.).

¶ 49 Interim hearings are generally decided on the basis of affidavits from parents and any investigators or others who have been involved in the case. It is difficult for an alleged abuser to challenge the validity of an accusation at this stage.

¶ 50 In one British Columbia case, the judge at a trial recognized the unfairness to the father that arose from the mother making unfounded allegations of sexual abuse and the resulting very limited supervised access that he had pending trial. Nevertheless the judge felt that this had been the proper course of action under the circumstances. [See Note 24 below]

> It is unquestionably unfair to Mr. T. that he has been deprived of his children for the past year by circumstances beyond his control. It is also unfair that the very person whose actions placed him in this position is to be granted custody of the children. But, unlike other proceedings where the Court seeks to do justice between the parties, and in so doing attempts to be both just and fair, custody proceedings have a completely different focus, namely, the best interests of the children. It is not the parties' best interests which govern, but rather the interests of the children. Fairness to the parents is a secondary consideration. It is not that the Court is not sympathetic to the apparent injustice that arises to a parent such as Mr. T in these circumstances; it is simply that the Court cannot allow sympathy for the parent to interfere with the best interests of the children.

Note 24: T. (K.E.) v. P. (I.H.), [1991] B.C.J. No. 133 (S.C.), per Prowse J.

¶ 51 Clearly, reducing delay in the investigations and court hearings would help to reduce the unfairness to the wrongly accused parent. It would also ensure that the children do not suffer from the inappropriate loss of a relationship with the wrongly accused parent.

¶ 52 Frequently the alleged abuser will be advised by a lawyer to consent to supervision of access on an interim basis, even if the allegation is unfounded, so as to minimize the possibility of further allegations and to demonstrate appropriate concern for the child. [See Note 25 below] While it is understandable that alleged abusers find access restrictions frustrating, especially in cases where the allegation is ultimately not proven, it also understandable that judges will not take a risk with the safety of a child. Counsel representing a person against whom an allegation is made will want to try to ensure that the most generous access possible is maintained pending trial, with whatever supervision that can be arranged that is satisfactory to the court.

Note 25: See e.g. R.M.C. v. J.R.C. (1995), 12 R.F.L. (4th) 440 (B.C.S.C.)

The Standard of Proof: Balance of Probabilities or Is a Real Risk of Abuse Enough?

¶ 53 Canadian judges are not consistent in family law trials involving abuse allegations about the issue of the burden of proof and how to deal with uncertainty. Most judgements require that the person making the allegation prove to the court that it is more likely than not that the abuse occurred - the civil standard of proof or proof on the balance of probabilities. [See Note 26 below] Some cases, however,

focus on the issue of the "best interests" of the child, and take account of situations where there are "serious concerns" about abuse, but the judge is unable to make a clear finding that abuse has occurred. Judges taking this approach may decide to terminate all contact if the child appears to fear the alleged abuser. If the child seems comfortable with the alleged abuser and resources are available, supervised access may be permitted. [See Note 27 below] In some cases the judge adopts this lower standard, but concludes that even at this lower standard of proof there is insufficient evidence to conclude that there is a "real risk" to the child of abuse by the accused parent and allows unrestricted access. [See Note 28 below]

Note 26: See e.g. M.T. v. J.T., [1993] O.J. No. 3379 (Prov. Div.). per Hatton Prov. J.; H. v J. (1991), 34 R.F.L. (3d) 361 (Sask. Q.B.) Gagne J.; and R.A.G. v. R.J.R., [1998] O.J. No. 1415 (Ont. Fam. Ct.) Robertson J.

Note 27: See, however, J.A.M. v. J.J.B., [1995] B.C.J. No. 1395 (Prov. Ct.) where Auxier J. was "unable to reach any definite conclusions" about the sexual abuse allegations, but felt that there was a "a substantial degree of risk that the child must be protected against" and terminated access. See also E.S. v. D.M. (1996), 143 Nfld. & P.E.I.R. 192 (Nfld. U.F.C.) where Puddester J. considered allegations by a custodial mother that the father had sexually abused their young child during access visits. The judge concluded that there was a "substantial possibility" that the abuse may have occurred, and ordered supervised access, albeit at the father's home.

Note 28: See e.g. M. (P.A.) v. M.(A.P.), [1991] B.C.J. No. 3020 (S.C.) per Errico J.

¶ 54 A Manitoba decision, Y.S. v. W.B., illustrates a judicial response to uncertainty about how to assess allegations of abuse. The case involved a three year old boy, whose parents never cohabited but whose father had access rights. The mother became concerned about improper sexual conduct during the father's access visits. She based her concerns on observations of the child's sexualized behavior, and on disclosures made to her and to a child psychologist to whom she sent the child. At trial, the court admitted the child's hearsay evidence, as related by the mother and psychologist, concerning improper exposures to male genitalia during access visits. It was unclear from this evidence, however, whether the acts were committed by the father or his friend. The judge observed: [See Note 29 below]

> This is a very unsatisfactory state of affairs.
>
> The father appears to be an intelligent, responsible, and loving father, with an unblemished record in the community. There is nothing about him which would raise the suspicion of child molestation. Unfortunately, experience has shown over the years that many persons clearly shown to be child abusers have these same attributes. In short, one of otherwise exemplary character may yet, in fact, be a child abuser. There is simply no way to tell. This, unfortunately, leaves an innocent parent in a horrendous situation. He cannot prove he is innocent. It leaves the court in a very difficult position as well. To grant access in such cases may be the wrong decision if, indeed, there has been abuse. If so, the child is clearly put at great risk of serious harm. On the other hand, to refuse access may also be the wrong decision if the father is indeed innocent. The consequence to the child will also be harmful in depriving him of a relationship with a good and loving father.
>
> The governing principle here is to do what is in the child's best interest, not what serves the interests and needs and rights of the parents.

Note 29: (1993), 49 R.F.L. (3d) 429 at 435 (Man. Q.B. - Fam. Div.) per Bowman J. See also Levesque v. Levesque (1983), 54 B.C.L.R. 164 (B.C.C.A.) ("real risk" of sexual misbehaviour by father resulted in supervised access); Cameron v.

MacDonald (1989), 20 R.F.L. (3d) 119 (N.S. Co. Ct.); and Migliore v. Migliore (1989), 23 R.F.L. (3d) 131 (B.C.S.C.)

¶ 55 The judge concluded that there was insufficient evidence to terminate the father's relationship to the child, but enough evidence to require that further access visits were to be supervised, either by a child care professional or by another adult acceptable to both parties.

Founded Allegations

¶ 56 About one quarter of the reported family law cases from 1990 to 1998 that dealt with allegations of abuse in the context of parental separation resulted in a clear finding by the trial judge that the child had been abused by the alleged perpetrator. The portion of true allegations of abuse in the context of parental separation that is reported to investigators is undoubtedly higher than this, as the cases that are litigated in the family law context are more likely to be unfounded, or to have weak evidence of abuse.

¶ 57 In some cases the court will conclude that not all of the allegations of abuse were proven, but sufficient abuse was proven to terminate or curtail parental contact. In E.H. v. T.G. there was some expert testimony to support the mother's claim that the two children were subjected to physical and sexual abuse during access visits with the father, though one of the children, then aged 8, testified that the father had not sexually abused the children. The trial judge allowed unsupervised access. The Nova Scotia Court of Appeal ruled that there was sufficient evidence of physical and emotional abuse during the visits that access should be terminated, even though the sexual abuse was not proven. [See Note 30 below]

Note 30: (1995), 18 R.F.L. (4th) 21 (N.S.C.A.).

¶ 58 Though a finding by a judge that an allegation of abuse is founded will often result in a termination of access, or closely supervised access, in some cases a judge may allow unsupervised access even after making a finding that abuse occurred. Unsupervised access has been allowed when the judge is satisfied that the child will not be at risk in the future. Judges recognize that even children who have been abused often want to have some contact with the parent with a history of abusive conduct towards the child. Unsupervised access is most likely if the parent has recognized that he has been abusive and sought treatment, and if the child is older and is likely to report any inappropriate parental behavior. [See Note 31 below] In some cases the abuser is a person who resided with a parent, like a mother's boyfriend or an older step child, and the court may allow the parent to have access if satisfied that the perpetrator will not be in the house while the child visits. [See Note 32 below]

Note 31: See e.g. F.(E.) v. S. (J.S.) (1995), 17 R.F.L.(4th) 283 (Alta C.A.).; and Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child" (1997), 12 Can J. Fam. L. 91, 108-113.

Note 32: C.H.M. v K.W., [1983] O.J. No. 744 (Prov. Ct. Fam. Div.)

Unfounded Allegations: Misunderstanding, Fabrication or Mental Disturbance?

¶ 59 There is a range of circumstances that may lead a parent to make of an unfounded allegation of abuse in the context of parental separation. The situations of unfounded allegations can arise when: 1) allegations are made in the honest but mistaken belief that abuse has occurred, often due to some misunderstanding or misinterpretation of events; 2) allegations are made knowingly with the intent to seek revenge or manipulate the course of litigation; 3) allegations are made as the result of an emotional disturbance of the accuser. It may be difficult to determine which of these factors, or what combination of factors, resulted in the unfounded allegation being made. One must also remember that there are cases where the allegations are in fact true but where a judge has made a finding that the allegation was not proven.

¶ 60 In the majority of cases of unfounded allegations of abuse the accusing parent has an honest but erroneous belief that the child has suffered some form of abuse. For example, the allegation may arise from misinterpretation of a young child's answers to questions about having red genitalia after a visit. A unfounded allegation may also arise from a misunderstanding about innocent conduct, such as parental nudity or bathing with a young child.

¶ 61 Consider the British Columbia case of K.E.T. v. I.H.P. [See Note 33 below] where the mother's concerns about possible sexual abuse began when the three year old girl returned from her father and was "very upset." The child also reported that she had showered with her father, though this did not appear to disturb the child. The mother, who was in the process of dealing with her own experiences as a victim of childhood abuse, began to question the young child about whether her father had ever given her a "bad touch" and the child apparently pointed to her vagina. The mother contacted the child protection agency and the police who began an investigation. The father's contact was immediately reduced from shared custody of the two children (the girl and her older half brother) to very limited supervised access. The mother was genuinely concerned that the children had been sexually abused; the children clearly identified with the mother and began to tell investigators that they did not want to see the father (the step father to the boy). Various mental health professionals and physicians became involved. Most of them concluded that the children had not been sexually abused, although the older boy, then about eight, eventually made some vague "disclosures" that his step father may have touched his penis when he was three or four.

Note 33: [1991] B.C.J. No. 133 (S.C.); see also M. (P.A.) v. M. (A.P.), [1991] B.C.J. No. 3020 (S.C.) per Errico J.

¶ 62 By the time the case came to trial the father had had almost no contact with the children for a year. Madame Justice Prowse concluded that the mother's "preoccupation with sexual abuse rubbed off on the children" which explained the vague "disclosures" of abuse. The judge accepted that the mother had not "consciously encouraged or coached the children" to say that they had been abused. The mother "honestly believed that her children" had been sexually abused. Her actions, including moving from British Columbia to Ontario, were "motivated by a desire to protect." However, the judge concluded that the father had not sexually abused either child, though by the conclusion of the trial his relationship with the children was "troubled." The judge recommended counselling for the children and parents, and concluded that the man should not have access to the older boy, who by this time was refusing to see him. The father was awarded access to his daughter, which "out of an abundance of caution" was to be supervised for the first three weekend visits.

¶ 63 In some cases the judge will conclude that the accusing parent was intentionally making a false allegation, as occurred in one Manitoba case, where the judge concluded: [See Note 34 below]

> It is patently obvious from the evidence and the manner in which it was given that the mother thereafter set out to punish the husband for the embarrassment that he had caused her. The only ways she knew of were to deprive him of property (she took all of the furniture) and their son. Her motivation was revenge, pure and simple... I conclude that she never believed that her son had been abused, not when she reported the abuse and not now.

Note 34: Plesh v. Plesh (1992), 41 R.F.L. (3d) 102 (Man Q.B.)

¶ 64 In theory a parent who knowingly makes a sworn statement that contains a false allegation of abuse could be prosecuted for an offence such as perjury. If the accusing parent knowingly makes a false report to the police, there could be a charge of mischief or obstruction of justice. However, such prosecutions are very rare. [See Note 35 below] This is at least in part because the falsely accused parent is often so emotionally exhausted by the end of the family law process that police are rarely contacted about the possibility of laying charges. Further, even if the police are contacted, there is real difficulty in proving on the criminal standard that the accusing parent was aware that the allegation was false when it was made.

Note 35: A.N. v. A.R. [1995] O.J. No. 3420 (Prov. Ct.) Magda Prov. J. is one of the very few cases where there was a criminal conviction arising out of the making of a false allegation of sexual abuse against a parent. The parents were never married and had separated shortly after the child was born. The mother initially had de facto custody, and began to make allegations that the father was sexually abusing the child; the allegations became increasingly serious. At first the father was denied access, though he later obtained interim supervised access, and eventually interim custody. He only obtained custody after the police and Children's Aid Society thoroughly investigated, and assessments were carried out by four mental health professionals. These professionals all concluded that the mother had an "irrational fixation" and suffered from "delusional thinking." As a result of her persistence in making these allegations, the mother was charged with and convicted of public mischief. Nevertheless, she continued to maintain that the allegations were true and raised the issue of abuse at the custody trial. The judge observed that the child's emotional health improved since he ceased living with his delusional mother, and awarded custody to the father with supervised access to the mother. The judge warned the mother that if she continued with her "delusional thinking" access would become harmful to the child and would have to be terminated. The mother's criminal conviction for mischief did not deter her from raising the false allegations in the subsequent family law proceeding.

¶ 65 In extreme cases, a parent may recover damages for slander from a parent who made false allegations of sexual abuse. [See Note 36 below] It is also theoretically possible for a falsely accused parent to launch a civil suit for malicious prosecution against a person who knowingly made a false report to the police that resulted in a criminal prosecution, but there are no reported Canadian cases of such suits in the context of parental separation.

Note 36: See R.G.H. v. Christison, [1996] S.J. No. 702 (Q.B.) discussed below.

¶ 66 Not infrequently a custodial parent who falsely accuses the access parent of abuse will interfere with access even after a judge concludes that the allegation is unfounded, which may result in contempt proceedings. [See Note 37 below] The use of civil contempt proceedings to enforce access can be a cumbersome and expensive process judges only make a finding of contempt and the impose of a sanction like jail as a last resort.

Note 37: In L.B. v. R.D. (1998), 35 R.F.L. (4th) 241 (Ont. Prov. Ct.), varied 39 R.F.L. (4th) 134 (Ont. Gen. Div.) the custodial mother persistently made allegations that the father sexually abused their daughter and that his new wife was physically abusive to the child. The Children's Aid Society investigated and could find no evidence to support the allegations, but supervised access was ordered. The mother repeatedly interfered with the father's supervised access visits; the mother's testimony about the reasons for failure to allow supervised access was refuted by the access supervisors, who were professionals, as well as by the Office of the Children's Lawyer. There were several attempts to enforce access, involving both the police and court appearances. Ultimately Judge Dunn decided to impose a sentence of 60 days in jail for civil contempt, finding that there were at least forty occasions on which the mother deliberately failed to comply with the access order. The appeal judge reduced the sentence to the time served, nine days.

¶ 67 There are a number of cases in which it is apparent that the accusing parent is suffering from some form of emotional or mental disturbance that results in the making of an unfounded allegation. In some of these cases a mental health professional will testify about the accuser's mental disturbance. In some (but certainly not all) cases this may be related to that person having been abused as a child. For example, in one British Columbia case the custodial mother terminated the father's access and made sexual abuse allegations. Both the police and child protection services investigated and found the allegations to be without substance. The father gained interim custody while the mother continued to make the allegations in the local media and court. The mother was seen by a number of mental health professionals. They included a psychologist, retained by the lawyer appointed for the child, who concluded that the mother was suffering from a "delusional disorder." The judge terminated the mother's access, commenting: [See Note 38 below]

> For the past two years, the defendant [mother] has persisted in allegations that S. [the child] has been ritualistically abused by a cult or occult group. Extensive investigations have proven those allegations to be unfounded but the defendant, who has been diagnosed as suffering from a delusional disorder, continues to assert repeatedly... that S. has been abused.

Note 38: H.B.M. v. J.E.B. [1998] B.C.J. No. 1181 (S.C) per Allan L.J.S.C.

¶ 68 In some cases the accusing parent's mental state may affect her perception of reality, so that it is not clear whether an unfounded allegation is being made honestly, manipulatively, or as a result of mental disturbance. For example, in one Ontario case, a bitter, protracted custody litigation went on for three years between parents who were both physicians. The case centered around the mother's sexual abuse allegations. Although the young child made some "disclosures" of sexual abuse to investigators, it became apparent that these were a result of her mother's influence. The allegations were thoroughly investigated by child welfare workers, the police and the Suspected Child Abuse and Neglect Team at the Hospital for Sick Children in Toronto. All of these agencies concluded that the allegations were unfounded. There was, however, support for the allegations from some less experienced mental health

professionals, including the mother's therapist. The mother's therapist purported to conduct her own "assessment" and concluded that the child had been abused. Justice Janet Wilson rejected the allegations and concluded that the mother was "an emotional, at times irrational person...she has exaggerated, dramatized and modified her evidence to adjust to her reality. This adaption may be conscious, unconscious or a combination of both." [See Note 39 below] The child had spent nine months in a foster home during the proceedings. In the end, custody was awarded to the father with supervised access to the mother.

Note 39: M.K. v. P.M., [1996] O.J. No. 3212 (Gen. Div.)

¶ 69 In most child related litigation judges usually do not follow the ordinary rule of civil litigation of ordering the unsuccessful party to pay at least a portion of the legal costs of the successful party. However, in cases where a judge believes that a parent has deliberately made a groundless allegation for the purpose of gaining a tactical advantage in family litigation, the judge will sometimes order the accusing parent to pay at least a portion of the legal costs of the parent who was unfairly accused of abuse. Judges are most likely to do this if the accusing parent has proceeded to trial in the face of clear professional advice that the fears of abuse are groundless. Judges are also likely to order costs if accusing parent appears to have manufactured evidence. [See Note 40 below]

Note 40: See e.g. Scott v. Scott, [1990] O.J. No. 607 (S.C.) Fitzgerald J. where the judge recommended that the Director of Legal Aid should exercise his discretion to assist a father falsely accused of sexual abuse with his legal fees. The mother had was indigent and her lawyer had been paid by Legal Aid. Although the father has a substantial income he was heavily in debt as a result of the litigation. The judge commented: "The protracted litigation was made possible by legal aid financing [the mother's legal expenses] and I feel it only fair that legal aid bear the consequences [and assist the father]."

Making an Unfounded Allegation - Effect on Family Law Decisions

¶ 70 Some lawyers and advocates for women worry that the courts may "punish" accusers if an allegation of abuse is made which the judge does not accept. [See Note 41 below] Of particular concern is that a custodial mother may lose custody if she makes an allegation of abuse against an access father which is not proven in court. There are some reported cases where judges have suggested that a custodial parent who makes an unfounded allegation is by that very act harming the child and should therefore lose custody. For example, in one Ontario case the judge commented: [See Note 42 below]

> it is also my opinion that if the allegations of abuse are determined to have been unfounded, then the raising of these allegations by the accuser parent are in themselves the ultimate abuse by that parent against the child, for it spoils or at least shadows, the future relationship that child has with the now proven innocent parent.

There is an understandable concern that this type of judicial response may discourage parents from bringing forward valid concerns of abuse for fear that they might not be able to prove them, and that parents who make true allegations which are not proven in court may be unfairly punished for bringing these allegations to the attention of the authorities.

Note 41: See e.g Law Society of British Columbia Gender Bias Committee, Gender Equality in the justice System (1992), Vol. II: 5-49.

Note 42: Flanigan v. Murphy (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork M.

¶ 71 While these are legitimate concerns, it would appear that most judges take a sensitive and contextual approach to cases where there are abuse allegations that are not proven. Where an allegation of abuse is rejected by a judge, the most common response is to then proceed to a "best interests" assessment. That assessment considers the accuser's motive in making the allegation, the reaction of the children to the allegation, and whether the accuser can maintain a positive relationship with the child and the other parent.

¶ 72 In a majority of reported cases where a judge finds an abuse allegation by a custodial parent to be unfounded, the accusing parent continues to have custody. [See Note 43 below] Although in some of these cases the judge warns the accuser that if she persists in making unfounded allegations of abuse, custody might be varied. Those cases in which a judge is most likely to reverse custody (or terminate access if the allegation was made by an access parent), are ones where the accuser appears to be suffering from an emotional disturbance that contributes to the making of the allegation, or appears to be so hostile towards the wrongfully accused parent that the children would suffer.

Note 43: See discussion of Schuman & Bala study (1999) above. See e.g. D.W.H. v. D.I.S., [1997] O.J. No. 3074 (Gen. Div.); M. (S.A.J.) v. M. (D.D.) (1998), 40 R.F.L. (4th) 95 (Man. Q.B.).

¶ 73 An example of a case where the accusing parent lost custody is the Ontario decision of Ross v. Aubertin. [See Note 44 below] Following separation and the establishment of a joint custody regime for a young girl, the mother repeatedly made allegations of physical and sexual abuse against the father. She made the allegations to doctors, who could find no evidence to support them. The doctors began to have concerns about the effect on the child of relatively intrusive medical examinations and about the mother's open discussion of her allegations in the presence of the child. Assessors from the Family Court Clinic expressed similar concerns and concluded that the father was more "child focused and more likely to promote a positive relationship with both parents." Counsel for the child expressed "great concerns about the [lack] of insight of a parent who would continually make these false allegations and not be apparently aware of the risk to the child." The judge terminated the mother's custody and awarded custody to the father, with reasonable access to the mother.

Note 44: [1994] O.J. No. 806 (Prov. Div.) per Pedlar J. See also R.S.S. v. S.N.W., [1994] O.J. No. 1572 (Prov. Div), per Zuker Prov. J.; V.A.L. v. J.F.L., [1994] O.J. No. 642 (Gen Div) per Pardu J; Metzner v. Metzner (1997), 28 R.F.L.(4th) 166 (B.C.C.A.); A.L.J.R. v. H.C.G.R., [1995] O.J. No. 4226 (Prov. Div.) per Fisher Prov. J.; Scott v. Scott, [1990] O.J. No. 607; S.W.C. v. T.L.C., [1996] O.J. No. 4577 (Gen. Div.) per Fleury J.; and Bartesko v. Bartesko (1990), 31 R.F.L.(3d) 213 (B.C.C.A.)

¶ 74 In some cases, it is the access parent who makes the unfounded abuse allegations. In D.F. v. A.F. [See Note 45 below] after the parents separated, the mother was feeling great stress and consented to the father having custody. Over the next few years the mother made several unfounded complaints to the child protection authorities and police about abuse by the custodial father. There was considerable difficulty with access. On one occasion, the mother assaulted the father's new partner in the presence of the child, and invited the child, then aged five, to join in the attack. The mother was criminally charged and wanted the boy, then aged five, to testify in the criminal case, though the Crown prosecutor prevented this. The mother regularly tried to involve the child in her disputes with the father. She showed the child all the court papers and questioned the child about his meetings with the Children's Lawyer. In the family law proceedings the judge referred to the mother's "harassment" of the father and step-mother, and expressed concerns about the "outrageous" conduct of the mother and her failing to recognize the harm caused to the child by the repeated investigations arising from her accusations. The judge nevertheless allowed the mother to have access on alternate Saturdays, supervised by her own mother, as well as ordering that the child should receive counseling. In some cases the non-custodial parent makes repeated unfounded allegations that result in intrusive assessments and investigations. These parents cause real harm to their children and demonstrate an insensitivity to the interests of the children and a manipulative personality. In such cases a judge may well suspend access rights to the accusing parent. [See Note 46 below]

Note 45: [1998] O.J. No. 3198 (Gen. Div.) per Lack J.

Note 46: See e.g. Jeanson v. Gonzalez, [1993] O.J. No. 3269 (Gen. Div.), MacLeod J. terminated access to a mother who repeatedly made false allegations of sexual abuse against the two fathers of her two daughters, each of whom had custody. In J.K.L. v. J.S.H., [1997] O.J. No. 1305 and A.H.T v. E.P., [1997] A.J. No. 739 (Alta Q.B.) unfounded allegations of abuse were made against the custodial mother and the accusing party (the father and grandparents respectively) lost access rights.

¶ 75 In general judges do not appear to be reducing the parental rights of those who make "honest mistakes" that result in allegations that are ultimately not proven in court, provided their continued involvement does not pose a risk to the welfare of the child. On the other hand, the court will consider whether the accusing parent appears to be mentally unstable or deliberately undermining the relationship of the child to the other parent.

Dealing with the Uncertain Outcome

¶ 76 No matter how careful the investigation and assessment, there will be cases in which judges, professionals and parents will have to accept that there are reasonable suspicions of abuse, but not sufficient proof to convince a court. Learning to live with uncertainty may be a difficult aspect of some of these cases.

¶ 77 It is often possible to take steps to protect the child against the possibility of further abuse without completely terminating contact with a suspected abuser. This may be done, at least for a time, through supervision of access, first in a neutral setting and perhaps eventually in the home, provided that the supervisor is a person committed to the welfare of the child. [See Note 47 below] In some cases concerns about physical or even sexual abuse may be a result of inappropriate parenting as opposed to a desire to exploit a child; in such cases the court may order counseling or education of the parent if appropriate. [See Note 48 below] A long term plan to ensure the safety of the child may include therapy by a skilled neutral professional, who can both provide support for the child after the stresses of

litigation and monitor for possible abuse. In some cases educating the child about inappropriate touching and the need to report is useful, though it must be recognized that in some cases the children may be too young or otherwise unable to protect themselves.

Note 47: See Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 213-16; and Bross, "Assumptions About Child Sexual Abuse Allegations at or About the Time of Divorce" (1992), 1(2) Journal of Child Sexual Abuse 115. See E.S. v. D.M. (1996), 143 Nfld. & P.E.I.R. 192 (Nfld. U.F.C) where the court was concerned that there was a "significant possibility" that the father had sexually abused the child during access visits, and allowed supervised access at the father's home.

Note 48: C.A.S. Waterloo v. B.D. [1991] O.J. No. 2398 (Prov. Ct.) was a child protection case involving allegations of sexual abuse against a father who was separated from the mother of their two girls. Robson Prov.J. was ultimately not satisfied, on the civil standard of proof, that abuse had occurred, but he was sufficiently concerned to take steps to try to protect against the possibility of future abuse. He concluded that there was a "substantial risk of sexual abuse occurring" during visits, and ordered that the father should take a parenting course as well as a course on the effects of child abuse on children as a condition of his visitation with the children.

The allegations arose following a mother's report of complaints by her six year old daughter about the father's touching of her vulva, while he was bathing her during an access visit. The mother initially reported her concerns to a doctor, and then to the Children's Aid Society and the police. The decision in C.A.S. Waterloo v. B.D. reflects a judicial effort to deal with uncertainty about an abuse allegation without unduly jeopardizing the welfare of children. In part the decision also may reflect a response to what the judge referred to as "inexcusable" record keeping and "bias" by the Children's Aid Society worker responsible for investigating the allegations. The judgment emphasized the need for investigators in these cases to maintain the appearance of objectivity and fairness.

¶ 78 There are also cases in which the judge determines that the allegation of abuse is unfounded and the accusing parent, who is unwilling to accept that conclusion, "goes underground" rather than expose the child to the prospect of further abuse. In some cases the abducting parent may be correct and the judge was indeed wrong to have concluded that abuse did not occur. [See Note 49 below] However, in other cases the abducting parent may be the one who is wrong. That parent may be suffering from some form of emotional or mental disturbance, perhaps a consequence of her own history of abuse.

Note 49: In one infamous American case the mother, Elizabeth Morgan, was jailed for contempt of court for refusing to allow an abusive father to visit her daughter. Only later was it established that the judge was wrong to conclude that the father was not sexually abusing his daughter during access visits. A network of American feminists - the "Underground Railroad" helps women and children to "disappear"; see Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 194 -197.

Child Takes a Leading Role in Making a False Allegation

¶ 79 In most cases where there is an unfounded allegation of abuse arising out of a situation where parents have separated, it is a parent who first "discovers" that the child has been abused. In many cases the only reported "disclosure" of abuse is through the accusing parent. The child never makes a disclosure to any investigator or assessor; or the child may make statements to investigators that appear to be the result of parental suggestion or manipulation. Most cases of false allegations arise out of the misinterpretation, distortion, suggestion or even manipulation of a child's statements by the accusing

parent, or even outright fabrication by the parent.

¶ 80 There are, however, a few reported cases of false allegations where the child is taking the lead in making the allegation. In these cases the child repeats the statements to investigators or even in court, but the judge ultimately concludes that the allegations have been fabricated by the child. These relatively rare cases may involve older children, often preadolescent or adolescent girls, who may be manipulative or emotionally scarred by the process of separation. In some cases the child may be subtly encouraged by a parent to make these false allegations. In other cases the false allegation may arise from a child's desire for revenge against a father who has left the home, [See Note 50 below] or from a desire to remove a person, such a stepfather, from the child's life. [See Note 51 below]

Note 50: See e.g. "The accused", Toronto Sun, July 16, 1994 reporting on a case where a 13 year old boy made allegations of ritual abuse against his father and the father's family in the midst of a custody dispute between his parents. The allegations were ultimately not proven, and there was a suggestion from the judge that the boy may have been influenced by his mother in the making of the initial allegations. He continued to concoct the stories to fuel the attention he was receiving from police and counsellors.

Note 51: See Green, "Factors Contributing to False Allegations of Child sexual Abuse in Custody Disputes" (1991), in Assessing Child Maltreatment Reports (Binghamton N.Y.: Haworth Press, 1991)

¶ 81 In the British Columbia case of G.E.C. v. M.B.A.C. [See Note 52 below] the parents separated when the two girls were very young. After an initial trial in which the mother made allegations of sexual abuse that were not proven, the mother had custody of the two girls and the father had generous access. The litigation had been very stressful resulting in the girls seeing various counselors. The older girl, in particular, became upset when the father began to live with a new partner and announced plans to marry her. About two years after the first trial, when she was about 8, the older girl reported to her mother that during an access visit the father had slid his hand down the back of her trousers into her "bum hole." The disclosure was reported to police and social services, and a psychiatrist who had been working with the children carried out an assessment. The investigators and psychiatrist concluded that the allegation was unfounded, with the psychiatrist noting that the child reported the allegation without emotional affect and could give no context or details. The child's psychiatrist concluded that the girl was the "central player" who was attempting to manipulate her father, although the mother was "only too willing to accept what [the child] says at face value." In a 1995 trial Madame Justice Newbury concluded that the allegation was unfounded and awarded custody to the father. She awarded the mother limited supervised access and made a recommendation for counseling for the children. The change in custody was not on the basis of the "fault" of either party, but rather because of the mother's lack of parenting skills and hostility and the "psychological damage" suffered by the girls while in their mother's custody.

Note 52: [1995] B.C.J. No. 1810 (S.C.) per Newbury J. See also D.R.P. v. D.J.P., [1997] B.C.J. No. 2024 (S.C.) where a girl made allegations of physical, emotional and later sexual abuse against her mother. After the initial allegations were made, child welfare authorities transferred care of the child to the father. The family law judge ultimately found that the allegations of physical and sexual abuse were without substance. However, the 11 year old girl had a troubled relationship with the mother. The judge awarded custody to the father and the mother was given access one weekend per month.

¶ 82 Of course, great care must be taken to not improperly dismiss allegations in cases where the child is making the allegation, as the child may well be telling the truth. Even a recantation by the child does not mean that the allegation was false. Instead it may rather reflect "accommodation" by the child to the pressure of the accused or other family members, or feelings of guilt or shame.

The Role of Therapists in Making False Allegations

¶ 83 It is apparent that in some cases a therapist, counselor or other professional, like a shelter worker, [See Note 53 below] has had a critical role in the making of a false allegation of child abuse. In some cases these professionals led the accusing parent to misinterpret statements or behavior of the child. Typically these therapists are acting in a professionally inappropriate fashion, and outside their area of expertise.

Note 53: See e.g Donna Laframboise, "One-stop divorce shops", National Post, Nov. 21, 1998. She reports on a claim by Ms. Louise Malenfant that over a four year period she had been advocate for 62 individuals in Manitoba who had been falsely accused of sexual abuse in divorce proceedings. In one third of those cases women's shelters were involved. Ms. Malenfant claimed that shelter workers gave children sessions "educating" them about sexual abuse. The workers then followed this up with suggestive questioning that resulted in false allegations.

¶ 84 The problematic role of a parent's therapist is most obvious when that professional comes to court and testifies about the child's condition. Less obvious, but also problematic, are cases in which a therapist may be inappropriately encouraging a parent to make an unfounded allegation. In addition, there are cases involving abuse allegations in which the courts have ordered the accusing parent's therapist to disclose records related to the therapy for possible use in the custody case. [See Note 54 below]

Note 54: Smith v. Smith (1997), 32 R.F.L. (4th) 361 (Sask Q.B.)

¶ 85 In M.K. v. P.M. [See Note 55 below] the mother alleged that the father had sexually abused their six year old daughter. Child protection, police and experienced medical investigators all concluded that the allegations were unfounded. They felt that the child's "disclosures were a result of the mother's manipulation and suggestions to the child." However, two mental health professionals testified to support the mother's allegations. Both had been involved in a therapeutic relationship with the mother. One had been the mother's therapist for over two years. Neither therapist had interviewed the child or the father. They nevertheless came to court to critique the work of the independent assessors and investigators, and to express their "professional opinion" that the mother did not "consciously or unconsciously" suggest anything to the child. In rejecting their evidence, Madame Justice Janet Wilson commented:

> Therapeutic counseling and providing objective expert opinion are two very different professional functions....therapeutic contact [with a parent] may make it very difficult for an expert to provide a neutral balanced assessment of a situation. Unless the expert evidence relates to the course of counseling itself, it ... may not be very useful.

Note 55: [1996] O.J. No. 3212 (Gen. Div).

¶ 86 In some cases it is the child's therapist who has become inappropriately "allied" with one parent in supporting or even inducing unfounded allegations of abuse. In D.A.B. v. J.J.K. [See Note 56 below] there was ongoing difficulty between the parents of a four year old child over access, including concerns by the mother that the father was drinking alcohol during visits. The mother reported to the police and child welfare workers that the child told her that: "Daddy pee-peed in my mouth" and "Daddy punched me." The child was interviewed by investigators three times but was non-communicative and made no disclosure. However, on the basis of the mother's statements the child was referred for counseling. In addition the mother stopped allowing access. After several months without seeing his son, the father began court proceedings to obtain access. As soon as the mother received the court documents, she again contacted the child welfare authorities and said that her son was ready to talk.

Note 56: [1998] O.J. No. 27 (Gen. Div.); see also B.A. v. D.M.A., [1996] O.J. No. 352 (Gen. Div.) per Perkins J.

¶ 87 A videotaped forensic interview was conducted at the offices of the child protection agency, with the mother present and the therapist taking the lead in conducting the interview. The child was repeatedly asked leading questions. However, the child was still unable to provide any contextual details, or to say what occurred before or after the alleged abuse. At one point in the interview he said to his mother: "You told me it was Daddy who did that." Later the boy said: "He didn't do anything else, right Momma?" Throughout the interview the therapist clearly reinforced the mother as the source of goodness and the father as the problem. The child accurately stated that the father is a stranger since the boy had not see him for almost eight months. Madame Justice Benotto rejected the allegations of abuse, and ordered a schedule of access, starting with short visits progressing towards overnight visitation. The judge believed that the child had been coached by the mother into making the "disclosures." The judge was also highly critical of the child's therapist, who had testified at trial and recommended no access, despite the fact that the therapist had never met the father or any members of his family. The therapist had told the mother that there was no need for a court ordered independent assessment, since nothing would be added to her opinions. The judge criticized the child's therapist for her "lack of objectivity" and "fundamental misunderstanding... of the respective roles of therapist, investigator and assessor."

¶ 88 When professionals demonstrate the most obvious and serious professional bias and incompetence, they may face civil liability for their negligence. A few such cases are discussed below. More commonly, their involvement does not entail civil liability, but it causes needless anguish and expense to the family.

¶ 89 It is apparent that most professionals who work with abuse cases are sensitive and aware of the complexity of such cases. There are cases where professionals may have a legitimate difference of opinion about whether abuse occurred. Further, depending on their professional role, some professionals have a legitimate role of support or even advocacy for an accusing parent or child. There are, however, some professionals who may have their own psychological or political "agendas." They become inappropriately "enmeshed" in their clients' lives.

Children's Evidence in Family Law Cases - The Admission of Hearsay Evidence

¶ 90 It is quite rare for children to testify in family law cases. Judges recognize the emotional stress that will inevitably arise if the child is forced to testify in court, and openly "take sides" with one parent against the other.

¶ 91 In most family law cases judges receive hearsay evidence about the child's out-of-court disclosures of alleged abuse to individuals such as parents or professionals like social workers or police officers. In some cases one of the parties will introduce a videotape of an investigative interview with the child. [See Note 57 below] While it is desirable to have this type of record of the child's out-of-court statements, it is not necessary to have this type of evidence for the court to hear about the child's out-of-court statements.

Note 57: See e.g. H. v. J. (1991), 34 R.F.L. (3d) 361 (Sask. Q.B.) and Z.M. v. S.M., [1997] O.J. No. 1423 (Gen. Div.)

¶ 92 Relatively few family law cases discuss the legal basis for the admission of the child's hearsay evidence. The decisions that consider the issue usually cite the Supreme Court of Canada decision in R. v. Khan, [See Note 58 below] for the general principle of admission of hearsay if it is "reliable" and "necessary." The circumstances of disclosure are often considered sufficient to give the statements an element of "reliability." "Necessity" arises from the desire to prevent the emotional harm that might arise if the child were required to testify, or the court may consider the child too young to be competent to be a witness. These factors can create the "necessity" to rely on hearsay disclosures. [See Note 59 below]

Note 58: [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92

Note 59: J.A.G. v. R.J.R., [1998] O.J. No. 1415 (Fam Ct)

¶ 93 In some cases the judge will admit testimony about the child's out-of-court disclosure " not for its truth," but just as evidence of the child's "state of mind," for example as revealing fear of the alleged abuser. [See Note 60 below] If a person is testifying as an "expert witness," whatever the child told them may also be admissible as the basis of their opinion evidence.

Note 60: See e.g. G.E.C. v. M.B.A.C., [1995] B.C.J. No. 1810 (S.C.) Newbury J., footnote 1.

¶ 94 Judges feel the burden of making decisions about abuse allegations. As a result they generally take a flexible approach to evidentiary issues, wanting to receive as much information as possible before making such a difficult decision. There are, however, a few reported cases in which the court ruled that statements by children made to parents involved in a custody or access dispute are inadmissible as they could not be satisfy the Khan requirement that they be "reliable," as there was such a potential for the children to say what they thought the parent wanted to hear. [See Note 61 below]

Note 61: M. (L.E.) v. M. (P.E.) (1996), 22 R.F.L. (4th) 83 (Alta C.A.)

¶ 95 Although it is rare, children sometimes testify in family law cases involving abuse allegations. Their evidence is entitled to careful consideration by the court. However, the court should recognize that a child who is testifying may been manipulated or coached into making an unfounded allegation, or into denying a previous true allegation. [See Note 62 below]

Note 62: In E.H. v. T.G. (1995), 18 R.F.L. (4th) 21 (N.S.C.A.) the appeal court discounted testimony of child who was apparently recanting. The girl had testified at trial she made never been abused and previous allegations were "dreams."

The Role of Assessors and Experts

¶ 96 Assessors, mental health professionals, police and child welfare investigators play a very important role in the resolution of cases where abuse allegations are made. Few of these cases proceed without some type of "expert" involvement. Indeed in most cases in which serious allegations of abuse are made, there are likely to be a number of professional investigators and assessors involved. One of the difficulties in this area is that some of the assessors, investigators and other "experts" who are involved in these cases lack the experience, skills and knowledge to deal effectively with this type of child abuse case. Many of the behavioral patterns that may be consistent with a child having been abused by a parent may also be consistent with a child suffering from the effects of a high conflict parental separation. Some research suggests that mental health professionals have considerable difficulty in reliably assessing whether young children have been sexually abused based on observing an interview of a "disclosure." [See Note 63 below]

Note 63: See e.g. Horner & Guyer, "Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Sexual Abuse Allegations Have Been Made" (1991-92), 25 Fam L.Q. 217 -252; 381-409 & 26 Fam. L.Q. 141-170; Horner, Guyer and Kalter, "Clinical Expertise and the Assessment of Child Sexual Abuse" (1993), 32:5 J. Am Acad. Child & Adol. Psychiatry 925-931. See also Penfold, "Questionable Beliefs about Child Sexual Abuse Allegations during Custody Disputes" (1997), 14 Can J. Fam.L.11, at 26 -29.

¶ 97 In practice, many cases are resolved without a family law trial once the investigators and other experts have assessed the merits of an allegation. A parent is unlikely to pursue a matter to trial if all of the "expert" evidence supports the position of the other party. In cases where the initial allegation is a result of an honest mistake, the accusing parent may be relieved that investigators or assessors have all determined that the allegation is unfounded and the child has not been harmed; such cases are less likely to be pursued in court.

¶ 98 Cases seem most likely to proceed for a family law trial if there is a division of opinion among the various mental health professionals and investigators, or if one parent seems especially hostile or emotionally unbalanced and is ignoring the expert opinions.

¶ 99 Judges in family law cases are generally reluctant to make a decision that is contrary to unanimous expert opinions. However, they will do so if there is a careful critique that demonstrates bias or lack of competence. Lawyers may have an important role in challenging the opinions of some "experts" in court.

¶ 100 In some cases there are divergent expert opinions about whether abuse occurred and the judge must decide which expert opinion to follow. Occasionally, counsel may be able to persuade a judge to discount one opinion on the basis of a lack of expertise with child sexual abuse assessments, or because the professional has been involved in a therapeutic relationship with one parent and hence is not in a position to present an unbiased position about whether or not the child has been abused. [See Note 64 below] In some cases the bias of an assessor or investigator may be apparent from the manner in which the professional became "allied" with one parent (often the accusing parent who is usually the first person to get in contact with an investigator) and the unfair or unprofessional treatment afforded the other parent (often the accused parent). [See Note 65 below]

Note 64: See e.g. M.K. v. P.M., [1996] O.J. No. 3212 (Gen Div.).

Note 65: See e.g. L.T.K. v. M.J.K., [1991] O.J. No. 1381 (Ont. Prov. Div.) where Pickett Prov. J. rejected the opinion of the staff at a hospital child abuse clinic that a two and a half year old child had been sexually abused by her father during an access visit. A physical examination by the physicians did not produce evidence of abuse (though that is not unusual even if the child has been abused), and the only source of the "disclosure" was through the mother. The assessors never interviewed the father and the judge characterized the staff as "anything but fair and open-minded." They "grossly overinterpreted innocent behaviour" such as how the child played with anatomically correct dolls. See also discussion below about D.B. v. C.A.S. of Durham Region, [1994] O.J. No. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.)

¶ 101 In some cases the judge must assess the methodology of each of the experts. For example in K.M.W. v. D.D.W., [See Note 66 below] the judge rejected a mother's allegations of inappropriate sexual conduct and permitted the father of a four year old child to have unsupervised access. The court severely criticized an assessment conducted by a psychologist, which was characterized as a "blitzkrieg assessment," because it was conducted in 6 hours on one day. The psychologist, who had initially been selected with the consent of both parties, asked the child leading questions about the disclosure and relied on his interpretation of the child's play with anatomically correct dolls to come to his conclusion that abuse had occurred. The psychologist ignored the fact that the child also reported that the mother had kissed the child's genital area. The judge preferred the opinion of a child protection worker, who followed the investigative protocol of the Institute for the Prevention of Child Abuse, and rejected the abuse allegation. While the protection worker was not accepted as an "expert witness," the judge gave "her testimony great weight," noting that she had 14 years experience. Her interview with the child, following the Institute protocol, avoided asking leading questions, and included questions challenging the child's story. The protection worker concluded that the child was "highly suggestible" and exposed to "inappropriate sexual material" on television, at her mother's home. The child's original "disclosure" to her mother, that her father "touched her peepee," may have been related to the child's diaper rash at the time.

Note 66: (1993), 47 R.F.L. (3d) 378 (Ont. Ct. J. - Prov. Div.), per Webster Prov. J.

¶ 102 In some cases a parent has retained an expert to critique incompetent work by a court appointed assessor or by child welfare investigators in order to persuade the court to reject their opinions. In M.T. v. J.T. [See Note 67 below], parents were involved in a custody litigation in which the mother alleged that the child had been sexually abused by the father. A child psychiatrist was appointed by the court to conduct an assessment, but he was not an expert in child sexual abuse. The assessor saw the child only once. At the assessment the child disclosed that the father had done "something bad" to her, but the assessor did not pursue this with the child. Instead, he concluded that the child had not been sexually abused because she seemed to play happily with her father during an observation session and spoke positively about her father. After this assessment the child welfare agency conducted its own assessment and two psychologists with expertise in child sexual abuse investigations were retained to critique the first assessment. It became clear that the child was afraid of being alone with her father. In the family law trial the judge was persuaded that the first assessment was inadequate and concluded that the father had inappropriately touched the child in a sexual manner. The father was only permitted limited professionally supervised access.

Note 67: [1993] O.J. No. 3379 (Prov. Div) per Hatton Prov. J. For other cases critical of the role of assessors or child protection investigators; see e.g. M.K. v. P.M., [1996] O.J. No. 3212 (Gen Div.); Brigante v. Brigante (1991), 32 R.F.L.(3d) 299 (Ont. U.F.C.) per Beckett J.; and D.B. v. C.A.S. of Durham Region, [1994] O.J. No. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.)

¶ 103 Litigation involving allegations of abuse is very expensive and many parents lack the resources to retain experts. If court appointed assessors or state paid investigators lack knowledge or skill, or are biased, this may be seriously and perhaps irreversibly prejudicial to the parent and child whose case has been improperly assessed.

¶ 104 It is possible for a child protection agency to be held civilly liable for negligence in carrying out an investigation that results in a parent being falsely accused of sexually abusing his or her child. However, to succeed it is necessary to demonstrate that the agency was both negligent and acting in bad faith when it was treating the parent unfairly. [See Note 68 below] An assessor or other mental health professional who testifies in court cannot be sued in negligence for their testimony. Testimony in court is generally viewed as "privileged" and cannot be the basis for a civil suit. However, if the professional has acted in a professionally inappropriate fashion discipline sanctions may result. [See Note 69 below] There may also be situations in which an assessor or therapist is liable for slander if the professional inappropriately circulates unfounded reports of abuse. [See Note 70 below]

Note 68: D.B. v. C.A.S. of Durham Region, [1994] O.J. No. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.) is the only reported Canadian case where a falsely accused parent succeeded in such a suit, recovering $85,000 from the agency. The court was satisfied that the child protection worker had clearly allied herself with the mother who made the unfounded allegation and that the agency had treated the father unfairly in the course of the investigation.

Note 69: In Carnahan v. Coates (1990), 27 R.F.L. (3d) 366 (B.C.S.C.) per Huddart J. a psychologist who worked with the clinic that was treating the mother was retained by the mother to provide an opinion that supported her application to terminate visits with the father. Although the psychologist did not interview the father, he concluded that the children had considerable anxiety about their visits with the father, and that their negative attitudes were their own views, rather than merely a reflection of the mother's concerns. Supported by the testimony of the psychologist, the court terminated access, though after four years, supported by an independent expert who concluded that the "children's wishes were a mirror reflection of their mother's destructive manipulation," the father was able to persuade the courts to reverse the decision and

gain a legal right to access. Unfortunately by that time it was too late for the father to establish a meaningful relationship with the children, and he "conceded defeat" and ceased trying to enforce access. In the meantime, the father complained to the British Columbia Psychological Association, which censured the first psychologist for "unethical and unprofessional conduct" in the course of preparing his assessment, including failing to adequately interview the children to ascertain the true reasons for their expressed preferences. The father then sued the psychologist for negligence an abuse of process that resulted in him losing his relationship with his children. The court rejected the civil claim as the psychologist had a "qualified privilege" that gave him immunity from civil suit for the opinions he expressed in court, even if he was negligent in formulating them. The judge did, however, recognize that the grant of privilege was not "absolute" and a witness could be liable if it was proved that there was a "conspiracy" to put forward false testimony.

Note 70: In R.G. v. Christison (1996), 150 Sask.R. 1, 31 C.C.L.T. (2d) 263, 25 R.F.L. (4th) 51 (Sask. Q.B.), varied with respect to costs (1997), 153 Sask. R. 311 (Q.B.), a counsellor was held liable for slander for having told teachers and others in the community that a father and his new wife sexually abused the children. The judge was critical of counsellor noting that she "must be, or should be, aware that in the heat custody battles [unfounded] charges of emotional, physical and sexual abuse are made with increasing frequency." The court was critical of how she assessed the case, and how she wrote her report and identified completely with one parent. The mother and counsellor were held jointly liable for $27,000 for defamation (loss of reputation) and various expenses incurred by the plaintiffs. The counsellor was held solely liable for $15,000 in aggravated damages. The court still had some sympathy for the position of the mother, and did not want to bankrupt her since she had joint legal custody and liberal access to the children. As a result the mother was held solely liable for only $1,000 in aggravated damages.

Assessing the Validity of Sexual Abuse Allegations

¶ 105 When child sexual abuse is alleged in the context of parental separation, there is rarely a single conclusive piece of evidence that abuse did, or did not, occur. The allegations almost always relate to times when the parent was alone with the child.

¶ 106 There is usually no conclusive forensic evidence; most sexual abuse allegations do not involve penetration and hence there is unlikely to be physical evidence. While a medical examination of a child is usually appropriate in these cases, it is rarely conclusive. Physical symptoms like vaginal irritation and non-specific vulvovaginitis, or rectal irritation or fissures, are common in young children. These conditions are sometimes misinterpreted by parents (or even by inexperienced physicians) as proof of abuse. [See Note 71 below]

Note 71: Green, "Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes" in Assessing Child Maltreatment Reports (Binghamton N.Y., Haworth Press, 1991), 177-189, 182.

¶ 107 Children's statements are significant, but not unproblematic. There are possibilities for misunderstanding by the child, as well as suggestion, manipulation or intimidation by parents, especially if the child is young. An accused parent is likely to have had legitimate reasons for touching the child, and if the child is young, for touching the child's genitalia. An assessment of whether abuse occurred may require the child draw inferences about the parent's intent. This may may be very difficult or impossible for a young child to do. In the context of parental separation, the child is likely to have discussed the allegations with the accusing parent, often many times. After these discussions any interview by investigators or assessors suffers from potential problems of "tainting."

¶ 108 A child's sexualized play, genital handling, masturbation or interest in adult genitalia may be evidence of sexual abuse. However, these are not uncommon behaviours in children and may be

misinterpreted. Various non-specific behavioural symptoms such as sleep disturbance, regressive behaviour or even fear of or rejection of the suspected abuser may be evidence of abuse. Further, these signs can also likely to be attributable to the stresses of parental separation or other factors.

¶ 109 Many of the founded sexual abuse allegations in this context do not arise out of paedophilia (i.e. a sexual preference for children). Rather the sexual abuse may be a product of an emotionally needy, immature parent who has lost his sexual partner, and hence phallometric testing (sexual preference testing for males) may not be very useful as an exclusionary tool.

¶ 110 Usually investigators and assessors, as well as judges and lawyers, must try to assess all of the evidence to make an often difficult determination. In J.A.G. v. R.J.R. [See Note 72 below] Justice Cheryl Robertson offers a helpful summary of factors for assessing allegations of sexual abuse in the context of parental separation:

> While there is no formula to determine probability, the process must be more than intuitive. In evaluating the evidence ... the court must filter the circumstances, facts, expert opinion and assess the credibility of witnesses before reaching a conclusion. In weighing the evidence, I considered the following:
>
> 1) What were the circumstances of disclosure - to whom and where?
> 2) Did the disclosure or evidence of alleged abuse come from any disinterested witnesses?
> 3) Were the statements made by the child spontaneous?
> 4) Did the questions asked of the child suggest an answer?
> 5) Did the child's statement provide context such as a time frame or positioning of the parties?
> 6) Was there progression in the story about events?
> 7) How did the child behave before and after disclosure?
> 8) Is there physical evidence that would be available by medical examination? If so, and no medical report has been filed, is there a sufficient explanation for its lack?
> 9) Was there opportunity?
> 10) What investigative or court action was taken by the parent alleging abuse?
> 11) Who provided background information to the experts and investigators, and is it accurate, complete and consistent with both parties' recollections?
> 12) Was there other evidence supporting the allegations of sexual abuse?
> 13) Was the custodial parent cooperative regarding access, or was access resisted on other grounds prior to the allegations and after disclosure?
> 14) Was there harmony between the evidence of one witness and another, and between the evidence of the experts?
> 15) Was there consistency over time of the child's disclosure.
> 16) Did the child use wording in statements which appeared to be prompted, rehearsed or memorized?
> 17) Was the language used by the child consistent and commensurate with the child's language skills?
> 18) Was the information given by the child beyond age-appropriate knowledge?
> 19) What was the comfort level of the child to deal with the subject matter, in particular with respect to the offering of detail?
> 20) Did the child exhibit sexualized behaviour?
> 21) Was there evidence of pre-existing inappropriate sexual behaviour by the alleged perpetrator?

22) Was a treatment plan put forth by either parent?
23) Was the child coached or prompted?
24) Did the evidence of the expert witnesses, as accepted by a trial Judge, support the allegations of sexual abuse?

Note 72: [1998] O.J. No. 1415 (Fam Ct)

¶ 111 A proper assessment will normally include interviews with each parent alone, and with each parent together with the child, as well interviews with the child alone. The assessors should have specific training in dealing with allegations of abuse in the context of parental separation. They should be asking the child open-ended non-leading questions about the allegations of abuse. If at all possible, investigative or assessment interviews with children should be videotaped, or at least audiotaped. [See Note 73 below] Some of the factors that assessors should consider in evaluating abuse allegations include: [See Note 74 below]

The Child:

-- In false allegation cases, the child may be more likely to make the allegations only in the presence of the accusing parent, and to "check in" with the parent. In the absence of the accusing parent, the child may appear disinterested or unaffected when describing the allegations, or may have an inappropriate emotional tone. In some cases of false allegations the child may appear to have memorized the disclosure, but this is rare. More commonly the child will be unable to provide the type of contextual or descriptive information about the setting or mental state of the perpetrator that one would expect of a child of that age.

-- In false allegation cases there can be a discrepancy between negative attitudes expressed by the child in the presence of the accusing parent and an affectionate and relaxed demeanour in the presence of the accused when the child is free from the accuser's influence. However, there is also a need to be alert to the possibility of "gentle" fondling of a young child who is unaware of its abusive nature and maintains an affection relationship with that parent. A child should not be interviewed with the accused parent if the child is firmly opposed.

-- The child who has actually been abused is more likely to express feelings of self-blame, and quite possibly affection towards the abuser. The child whose unfounded allegation is a result of "alienation" by one parent is more likely to express only hostility towards the alleged abuser;

-- In founded allegation cases, the child may have profound distress or deeply disturbed behaviour that will have been apparent before the child disclosed the abuse, as the abuse may have been going on for some time before disclosure. In unfounded cases, behavioural disturbances are more likely to begin only after the reported disclosure.

The Accusing Parent:

-- In founded allegations, the accusing parent is more likely to have been initially shocked at the possibility of abuse. This results in an initial degree of doubt and checking with the other parent about the suspected abuse. The parent who is fabricating an allegation is more likely to appear certain that the abuse occurred and to immediately contact the police or child welfare investigators. This parent is likely to be hostile towards professionals who express any doubt that the child has been harmed.

-- In unfounded allegations, the accusing parent is likely to present as vengeful and aggressive, or paranoid and hysterical. Parents making false allegations tend to have little awareness of the effects of parental demeanour on the child. The parent may also appear to be unconcerned about the effects of the investigative process on the child, focusing on establishing the guilt of the other parent.

The Accused Parent:

-- A parent who sexually abuses his child is likely to have a childhood history of family dysfunction, often of abuse, neglect or violence. Abusers often engage in drug or alcohol abuse. This person is likely to engage in voyeurism or have a fixation with pornography, and to present as aggressive and self-centered.

Note 73: For a discussion of the way that children should be interviewed in the investigation of sexual abuse, see Lamb, Sternberg & Esplin, "Conducting Investigative Interviews of Alleged Sexual Abuse Victims" (1998) 22(8) Child Abuse & Neglect 813 -823; and Saywitz & Camparo, "Interviewing Child Witnesses: A Developmental Perspective" (1998) 22(8) Child Abuse & Neglect 825-843.

Note 74: Leonoff & Montague, Guide to Custody and Access Assessments (Toronto, Carswell, 1996) 341- 377; Green, "Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes" in Assessing Child Maltreatment Reports (Binghamton N.Y., Haworth Press, 1991), 177-189.

Representing the Accusing Parent

¶ 112 When an allegation of abuse is made in a custody or access case, it usually becomes a central focus of investigation and litigation. The fact that an allegation has been made will invariably heighten tensions between the parents. Counsel for the accusing parent should warn that parent that the litigation is likely to be especially intense and nasty. [See Note 75 below] The actions and motivations of accusing parents are likely to come under intense scrutiny. Their mental state and personal history may also be closely examined.

Note 75: See Jeffery Wilson," The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent" (1987) 1 Can. Fam. L.Q. 159; and Sandra Morris, "Abuse Allegations: A Child's Story, A Lawyer's Nightmare" [Summer 1996] Compleat Lawyer 20-25.

¶ 113 Counsel should advise the accusing parent to leave the determination of whether abuse occurred to independent investigators and assessors. Counsel should caution the client about the need to

focus on the child rather than hostility to the other spouse. If competent professionals support the allegations, the court is unlikely to be negatively disposed towards a parent who shares honest, reasonably based concerns about the child's welfare with the court. The basis for concerns about abuse should be presently fairly and without overstatement to investigators. If the report of abuse by the accusing parent appears to be made in a biased fashion and there is a lack of independent support for the allegations, the court may view the accusing parent as acting inappropriately or as mentally unbalanced.

¶ 114 An important role for counsel is to ensure that any professionals involved are competent in carrying out abuse investigations in the context of parental separation. Some investigators, assessors, social workers or physicians who work with children may lack the training and experience to express a well founded opinion about this complex type of case.

¶ 115 If the case proceeds beyond the initial investigation stage, it will often be helpful to try to get independent legal representation for the child. In Ontario the Office of the Children's Lawyer is quite frequently involved in these highly contentious cases. This lawyer should ensure that all the relevant evidence is before the court, and that the child's needs are being met. The Children's Lawyer can have an important role in helping parents to focus on their child's best interests.

¶ 116 It is important for counsel for an accusing parent to be aware of any investigations carried out by the police or child protection workers. However, there may be limits on the information that can be shared by these investigators with counsel for the accusing parent. If other proceedings are commenced, it will be important for counsel for the accusing parent to liaise with counsel for the child protection agency or Crown, to share information and to discuss scheduling issues. In some cases, the accusing parent may, with the advice of counsel, decide not to pursue family law proceedings if the child welfare agency is prepared to commence proceedings that will adequately protect the child. Counsel for the parent may have a role in persuading the agency to do this. While the accusing parent will not have control of the protection proceeding, these proceedings have financial advantages for the accusing parent. In addition, they may reduce the possibility for the accused parent to argue that the allegations are the result of a "vendetta" by the other parent.

¶ 117 The accusing parent is likely to find any proceedings that raise abuse allegations very stressful, and may need professional support during the process. However, as noted above, if the parent discusses the child's disclosures of abuse with a therapist, the therapist may become a potential witness, and the records of the therapist may be the subject of disclosure. [See Note 76 below]

Note 76: M.K. v. P.M., [1996] O.J. No. 3212 (Gen. Div.)

¶ 118 The accusing parent may ultimately have to be prepared to live with a situation where the court does not find that abuse is proven, but the parent believes that it did, or at least has strong suspicions and understandable fears. The accusing parent is also likely to find this situation highly stressful, and needs to be supported in coming to accept and respect any court order. However, that parent must maintain vigilance for further evidence of abuse that might justify another court hearing.

¶ 119 In some cases, counsel for the accusing parent may believe that the evidence of abuse appears very weak and is concerned that the allegations are not supported by investigators or assessors. In these situations counsel may feel that the client may be overreacting to very weak evidence of possible abuse, or even fabricating the allegations or suffering from mental instability. Making a clearly unfounded

allegation of abuse in court will not be helpful to either the parent or child. Counsel should be candid with the accusing parent about the possible consequences of putting abuse allegations before the court that appear to be completely unfounded, as well as pointing out how stressful court proceedings may be for the child and parent. If the Children's Lawyer is involved and not supporting the allegations, this may help persuade a client that it is not in the child's best interests to pursue unfounded allegations.

¶ 120 Given the emotional and financial cost of this type of litigation and the fact that pursuing an unfounded allegation can permanently poison relationships, it is important to try to resolve the issue of whether to pursue this type of allegation as early as possible in the proceedings. At least in some cases, especially where the accusing parent is mentally unstable, the lawyer who confronts the client with concerns about the absence of credible evidence to support the allegations may find that the parent dismisses that lawyer to find counsel who appears more committed to pursuing them.

Representing the Alleged Abuser

¶ 121 It is highly stressful to be accused of abusing one's child, and counsel for this parent will also have a challenging role. If the allegation is actually false, the client will understandably feel that he is being treated most unfairly, especially if some of the investigators or assessors appear to be acting in a biased or unprofessional fashion. Passions may be inflamed by the receipt of affidavits or other court documents.

¶ 122 It is important for the accused parent to appreciate that investigators and assessors are usually working to achieve what they perceive to be the child's best interests, and, especially initially, are likely to err on the side of caution. The accused parent should be encouraged to understand the role of these professionals and to maintain a cooperative attitude towards them. In some cases it is appropriate to explore with the client whether some other person could have been abusing the child during visits with the client.

¶ 123 When an abuse allegation is made, the accusing parent will usually want to immediately suspend that parent's access to the child. This initial position may be supported by child protection workers or the courts. Counsel should try to ensure that the accused parent continues to have as much regular meaningful involvement as possible with the child during a period of investigation and assessment that may drag on for months. Depending on the strength and seriousness of the allegations, this may require supervision of access. Often it will be preferable to consent to supervision and put forward an interim plan that meets legitimate concerns about a possible threat to the child's well being while maximizing contact.

¶ 124 Counsel for a parent accused of abuse must try to ensure that any investigations or assessments are carried out by competent professionals who are approaching the case in an unbiased fashion. If there is a concern that the initial investigation has been conducted in a biased or incompetent fashion, it may be necessary to obtain expert evidence to critique the original investigation.

¶ 125 In some cases it will be helpful for an accused parent to offer to take a polygraph test. [See Note 77 below] Although polygraph results are clearly not admissible in a criminal case, in family cases there is a less stringent approach to evidentiary issues. Judges may admit polygraph results as corroborative of other evidence. [See Note 78 below] Even if not admissible in court, polygraph results (or even the offer to take a polygraph test) may also affect how investigators and assessors view a case. The accused may also offer to take phallometric testing. However, this is a weak exclusionary test for sexual abuse within the context of parental separation, since abuse is often more situational than paedophilic. It is also a relatively invasive test.

Note 77: Sandra Morris, "Abuse Allegations: A Child's Story, A Lawyer's Nightmare," [Summer 1996], Compleat Lawyer 20-25.

Note 78: C. (R.M.) v. C. (J.R.) (1995), 12 R.F.L. (4th) 440 (B.C.S.C.) Edwards J. See also Whiten v. Pilot Insurance, [1999] O.J. No. 237 (C.A.) which held that in a civil case where the defendant is alleging criminal conduct, evidence of plaintiff's willingness to take a polygraph is admissible evidence of "good faith" and willingness to allow a full and fair investigation. However, in a criminal case not only are polygraph test results inadmissible (R. v. Beland, [1987] 2 S.C.R. 398), further the fact that an accused volunteered to take a polygraph test is ordinarily inadmissible in a criminal case, as the fact of volunteering poses no risk to an accused since a "negative" result would not be admissible.

¶ 126 If criminal proceedings have been commenced, it is important for the criminal defence lawyer and family law counsel to communicate and coordinate their efforts. [See Note 79 below] Although these are very distinct legal proceedings, they are interrelated. [See Note 80 below] Often the criminal proceeding is resolved first, and its outcome can affect the family law case. Further, as discussed above, evidence that is used in one proceeding, can often be used in the later proceeding. Criminal trial counsel should be kept informed about what family law counsel plans to include in an affidavit for a interim access motion. Similarly family law counsel will want to have access to information, and if possible transcripts, of key testimony from the criminal trial.

Note 79: Todd White, "Spousal Abuse Issues and Their Impact on the Resolution of the Family law Case" and H. Niman & J. Pirie, "How to Deal with Allegations of Spousal Assault in a Family Law Case" in Canadian Bar Association - Ontario, Family Law Institute, (Toronto, January 1999).

Note 80: See generally discussion above about "Criminal Prosecution of Alleged Abusers."

¶ 127 A parent who has in fact abused a child will often deny this, at least initially, for both psychological and tactical reasons. Counsel must advise the client of the evidence of abuse, and if there is strong evidence of abuse, explain to the client the likelihood that the courts will find that the child has been abused. If a parent has abused a child, it is likely that he has a history of having been abused in some way as a child (though not necessarily the same type of abuse as he perpetrated), and may well have alcohol or drug dependency problems. Acknowledging the problem and seeking appropriate help is likely to be the best strategy for maximizing contact with the child over a period of time, as well as promoting the welfare of the abuser and the child.

¶ 128 If a family lawyer believes that the client has abused the child, perhaps with the client admitting some of the less serious allegations, the lawyer may face some difficult ethical and tactical decisions. If a client wishes to pursue a course that the lawyer considers harmful to the child, the client may be advised that counsel will not advocate this position and will withdraw from the case rather than advocate a position that would harm the child. [See Note 85 below]

Note 81: It is our view that counsel for a parent in family law proceeding has an ethical right (but perhaps not a duty) not to advocate a position that the lawyer believes will harm the child, and may withdraw from a case if the client insists on advancing such a position. Although there are no explicit statements in the Rules of Professional Conduct that support this,

Beverley Smith, Professional Conduct for Lawyers and Judges (1998, Fredericton, Maritime Law Book) suggests that a lawyer should take "personal standards and values into any situation in which a lawyer is professional engaged."(p. 24).

In Law Society of Upper Canada v. Curtis, Lawyers Weekly, October 13, 1993, 1323-018 (one of the few reported Canadian cases involving professional ethics of a family law practitioner) a lawyer was found not guilty of professional misconduct for advising a mother to defy a court order that called for the child to be returned to the custody of the father whom the mother believed was sexually abusing the child, as long as the lawyer had an "honest reasonably held belief" that the child was in danger and took immediate steps to appeal the order, even though it was later established that the allegations were unfounded. This decision indicates that the ordinary rules about lawyers not counselling defiance of court orders should be modified when the welfare of a child might be affected, and perhaps more broadly that the rules of professional conduct for lawyers need to be interpreted in light of responsibilities to children, as well as to courts and clients.

The American lawyer Louis Parley, The Ethical Family Lawyer: A Practical Guide to Avoiding Professional Dilemmas (1995, Family Law Section, American Bar Association) writes that the American "courts have been consistent in finding that lawyers in a divorce proceeding owe a duty to their clients - the parents - and not to the children of their clients." (p. 157). He does, however, allow that a lawyer may withdraw from representation of a client if the lawyer finds continued representation "repugnant or imprudent," or if the client is being "unreasonably difficult." An example of this would be a client wishing to seek custody of a 17 year old child who does not want to live with the client.

Counsel for the Child

¶ 129 Custody and access disputes where there have been allegations of abuse are especially contentious. It may be very useful to have counsel appointed for the children involved, though this lawyer may also have a very challenging role. An important role for counsel will be to ensure that the best evidence is available for the court. In cases involving allegations of abuse, the evidence should include an assessment of all of those involved by a professional experienced with this type of case. In some cases counsel for the child will believe that the allegations of abuse are definitely unfounded, or clearly true, and the position to advocate may be relatively easy to determine. In these cases, counsel for the child may have a role in encouraging the parents to accept this position and avoid embittering litigation that may be harmful the child and make it very difficult for the parents to both continue to be involved in their child's life.

¶ 130 In other cases, counsel for the child, and perhaps the judge, may be uncertain about the allegations, and faced with the cruel dilemma of either restricting or terminating access to a suitable parent or exposing the child to the risk of abuse. In these cases, there should be a long term plan in place to provide support and protection for the child, perhaps involving a neutral experienced child therapist who can meet regularly with the child to deal with safety and other issues. It will usually be appropriate to have supervised access at least initially. That access could start in a neutral controlled setting and then move to the home of the alleged abuser, provided that the supervisor is someone who is committed to the welfare of the child.

¶ 131 It may also be appropriate to have some type of counselling in place for one or both parents, especially if the issue seems to be more inappropriate parental conduct rather than exploitative abuse.

Conclusion

¶ 132 Parental separation cases in which sexual abuse allegations are made are among the most challenging that justice system professionals have to deal with.

¶ 133 There are undoubtedly some incompetent professionals involved in cases of allegations of abuse after parents separate. However, it is also apparent that at least some of the parents involved in

these cases are emotionally unbalanced, either before the process starts or as they are dragged through the legal system. Those parents are all too willing to blame others for their own failings. If these parents are not vindicated in court they may be inclined to complain about the lawyers, judges or other professionals involved. This understandably makes some professionals wary of being involved in this type of case, and should make those professionals who are involved handle these cases with special care.

¶ 134 Many of the strategies recommended in this paper for dealing with sexual abuse allegations are expensive, and many parents cannot afford to hire independent experts or even counsel. If cases are resolved without access to competent counsel and appropriate involvement of mental health professionals, the stress on those involved is increased, and it may be impossible for the justice system to be fair to the parents or to promote the welfare of children.

¶ 135 There should be more societal support for services that assist in dealing with these difficult cases, such as supervised access. There is also a need for better education and training for the professionals who deal these cases, as well as for more research to better understand the dynamics and characteristics of these cases, [See Note 82 below] and to allow professionals to more effectively distinguish between founded and unfounded allegations.

Note 82: The federal Minister of Justice, Anne McLellan has recognized learning more about the issue of false allegations of abuse and pledged to carry out a research agenda. See Canada Department of Justice, "Minister of Justice Responds to Special Joint Committee Report on Child Custody and Access" (May 10, 1999).

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