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Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario

Lois Shereen Winstock

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SAFE HAVENS OR DANGEROUS WATERS?

*A phenomenological study of abused women's experiences in the
Family Courts of Ontario*

Lois Shereen Winstock

**A Dissertation Submitted to
The Faculty of Graduate Studies
In Partial Fulfillment of the Requirements
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Doctor of Philosophy**

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Abstract

This qualitative, interdisciplinary research study explores the experiences of women abused by their intimate partners who appear as litigants in family court proceedings in Ontario, and the responses of judges presiding over those proceedings.

Domestic violence and abuse affects families from all social, economic and cultural groups. Women have been overwhelmingly identified as the victims of domestic violence and abuse. Children exposed to domestic violence and abuse, either directly or indirectly, are also negatively impacted. The term “woman abuse” has been employed to denote the gendered nature of the phenomena.

Studies of abused women’s interactions with the legal system across common law jurisdictions have found that abused women are usually dissatisfied with the legal response to domestic violence and abuse. The extant literature examining the experiences of abused women in family court proceedings has revealed that abused women appearing as litigants in family courts do not think that their stories of domestic violence and abuse are believed, and, consequently, they do not obtain the legal relief they seek.

This dissertation combines law and legal research with sociological methodologies within a feminist epistemological framework in a phenomenological study of abused women’s experiences in the family courts of Ontario. Employing grounded theory, the narratives of abused women are analyzed to provide a thematic rubric from which questions were derived to pose to judges to explore their understanding of the nature of woman abuse and the impact of the phenomena of domestic violence and abuse on abused women and their children. Judges’ narratives were also analyzed using grounded theory. Critical discourse analysis was used to analyse relevant case law. A comparative critical analysis was undertaken to identify any disconnects in intersubjective understanding of the phenomena of domestic violence and abuse between abused women and the judiciary.

The findings may provide some areas of consideration and further examination beyond those usually explored by those charged with the task of ‘improving’ the family law system to make it more responsive to the needs of abused women and their children.

Keywords: domestic violence, woman abuse, child abuse, family court, family law, child custody, spousal support, gender equality, judicial reasoning, fathers’ rights, grounded theory, phenomenology, critical discourse analysis

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The experience of conceiving, researching and writing this dissertation has been, for want of a better word, a challenge. The process has taken close to a decade to complete. I have not ended up where I started out; what was to be a dissertation in support of a doctorate in social work became a dissertation in support of a doctorate in law. As a result, I completed far more courses than were eventually required, wrote two thesis proposals, submitted two ethics proposals, engaged two thesis committees, and transferred from one university, and one discipline, to another university and another discipline. As challenging as this process has been, I think, in the end, it has resulted in a far more informed project.

Phenomenological research is all-consuming. Those ‘a-ha’ moments can come at any moment, upon waking, in the midst of conversation, while day-dreaming – they catch one unawares, are not always welcome, but are rarely forgotten. The process of remembering is helped, of course, by blurting out every thought to one’s long-suffering spouse and child – actually, to whomever is handy – and my degree must be shared with any number of people who have travelled with me on this journey.

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INTRODUCTION

1. Outline of this Research Study

a. How and Why the Research Topic was Chosen – Identifying Tentative Assumptions and Theories

The topic of this dissertation, abused women's experiences in the family courts of Ontario, represents the confluence of multiple life experiences that have informed my world view, or paradigm.¹ I have personal, academic and professional reasons for engaging with this topic, that have directed me throughout my adult life to question what appears to be apparent, search for hidden meanings, challenge dogma, and advocate on behalf of the oppressed. My involvement, both as a lawyer and social worker, with women abused in their intimate relationships, has provided me with insights into my own experiences as a victim and child witness to domestic abuse.

As a female litigator representing women in family court proceedings, I was struck by the apparent lack of appreciation demonstrated by many members of the judiciary, both male and female, for the difficulties abused women faced in their intimate relationships. Orders would be made and decisions rendered that often exposed my clients and their children to the possibility of further harm from their abusers. Children might be forced to submit to access visits with fathers who had assaulted their mothers. Women could be left impecunious as a result of their estranged husbands having closed family bank accounts, encumbered family property, and refused to pay support. 'Exchanges' – the handing over of children from custodial to access parent, usually over the objections of abused mothers – provided opportunities for abusers to further victimize my clients.

My experiences in this regard were not unique. I articulated for the pre-eminent family law firm in Canada at the time, and my principals, too, often failed to persuade those judges before whom they appeared on behalf of abused women that the respondents, many of whom were well regarded in society as leaders in the fields of commerce, politics and law, represented a danger to

their clients. The consequences of their failure, it later turned out, included the sexual abuse of children forced against their will to endure court-ordered access with their predator father and the suicide, on the eve of her cross-examination, of a client whose abusive husband repeatedly psychologically terrorized her, more viciously even after separation.

Thirteen years after my call to the bar in 1983, I returned to the academy to study social work. I attended the School of Social Work at York University, which is described in its mission statement as a “critical school of social work”. I pursued my Bachelor, and then Master of Social Work, and, in the process, began to engage critically with my world, including my experiences as a law student and practising lawyer. I recognized that the absence of social context from most of my law courses allowed ‘the law’ being taught to me to be presented as something other than the social construction I, now a critical theorist, considered it to be. I no longer accepted that ‘the law’ was immutable, nor judges, like the rest of us, capable of objectivity.

I also began to realize how my experiences as a lawyer were influenced and informed by my gender. This revelation was not new – during my years in law school, female students represented no more than one-third of the student body, and female law professors were rare. I was always cognizant, during my practice, of the sexist proclivities of other lawyers and members of the bench, expressed in their remarks or implied in their treatment of female lawyers, including me. However, I now recognized that ‘the law’ itself was decidedly gendered, manifested as: the fiction of the ‘ordinary’ or ‘reasonable’ *man*; the pre-eminence of ‘reason’ over ‘emotion’; and the ‘male voice’ with which the law ‘spoke’ through statutory interpretation directing the reader to interpret the words “he” and “his” as including “she” and “her”. I recognized that such interpretation privileged a constructed male view-point against which those of women were to be compared and measured. I began to develop my own tentative theories about the law from a feminist standpoint that reached into the very foundation of the common law system, based on the following preliminary assumptions:

1. The law is a coercive social institution that embodies, reflects, supports and promotes the dominant patriarchal ideology of our society, including its values, mores, practices, symbols, as well as other social and socializing institutions (Martin, 1993; Smart, 1984). By *patriarchy*, I am referring to “a system of social and political practices in which men subordinate and exploit women. This subordination occurs through complex patterns of force, social pressures and traditions, rituals and customs” (Levit & Verchick, 2006:23);
2. As such, the law is a locus of power and control that privileges men and oppresses women, creating a hierarchy of entitlements and rights (Smart, 1984);
3. The law is historically *sedimented*; that is, current laws are derived from and informed by laws that preceded them (Hamrick, 1987);
4. Speaking in the ‘male voice’, the law has always assumed a male persona (Ezzy, 2002), and reflected a world view prescribed by characteristics attributed to men, such as: logical and reasonable (Thornton, 1986; Smart, 1984); neutral, objective (Munro, 2009; Naffine, 1990); fair, impartial, dispassionate, disinterested (Comack, 1999); principled, thoughtful, capable of abstraction (Olsen, 1998); and rational, and pursuing victory over defeat (MacKinnon, 2009; Hunt, 1978);
5. In contrast, characteristics attributed to women, in the dyadic nature of ‘knowledge’, have been constructed as opposite to those of men, and characterized as illogical, nurturing, irrational and emotional (Olsen, 1998; Gilligan, 1993);
6. Accordingly, women’s experiences, including those of domestic abuse, have rarely found a place for expression in and before the law, except where expressly allowed (West, 2009; Ezzy, 2002; Smart, 1989);
7. Taken further, if the law is capable only of ‘knowing’ what lies within the experiences of men, then that which women ‘know’ and experience will remain unknown and/or unrecognized (West, 2009);
8. The law, as a social institution, is inclined toward social stasis. Even in the face of social change, the law will be resistant, particularly when social forces threaten patriarchal hegemony (Hamrick, 1987; Berger & Luckmann, 1989);
9. Accordingly, when the law is forced to respond to external, as well as internal, pressures, it does so with the least possible disruption to either the established social order or to the existing power dynamic between the privileged and the oppressed (Berger & Luckmann, 1989);
10. In order to restore stasis or minimize disruption, meanings ascribed to new laws will legitimate those which have already been established through existing legal discourses. This necessitates the “coherent deformation” of the new laws to create “new meanings” that suggest “a continuity with received [legal] traditions” (Hamrick 1987:52). While these “new meanings” might appear “coherent”, they are often regressive and oppressive, inasmuch as they negate the intended benefit of the new laws.

I was fortunate to be placed with the Woman Abuse Council of Toronto for my practicum in satisfaction of my Master of Social Work. In that capacity, I was once again working with and on behalf of a dynamic group of survivors of domestic violence and abuse whom I have called “survivor advocates”. They recounted stories of terrible violence and debasement at the hands of their former intimate partners; they also related their experiences as litigants in the family courts. None of these experiences were positive. Their pleas for protection from their abusers for themselves and their children were ignored by the judges presiding over their claims. Applications for interim restraining orders and/or exclusive possession of their matrimonial homes were rejected. Their narratives revealed that they were financially abused, as well. Emergency room records and photographs confirming their injuries were passed over. Their claims for support were repeatedly adjourned in response to their abusers’ persistent failure or refusal to file their financial statements; their attempts to enforce support orders came to naught.

With these survivor advocates, I conceived and facilitated a *Family Court Watch Pilot Project* in which the advocates and I attended family court proceedings and observed them. For the first time, I was able to see these proceedings from the vantage point of the participants and not merely as counsel.

I was both astounded and dismayed; I watched counsel for the allegedly abused wife position her/himself at one corner of the single counsel table, and counsel for the alleged perpetrator sit at the opposite corner, leaving victim and perpetrator to sit beside each other in the middle. I saw counsel for abused women abandon their clients following their hearings; the victims’ abusers would immediately pounce upon them, and harass them as they exited the courthouse. (I wondered if I had been guilty of the same lack of sensitivity and understanding with my clients.) I watched judges dismiss allegations of abuse supported by hospital records and photos of physical injuries. I noticed that some judges ignored female litigants and female counsel, directing all of their comments to the male litigants and/or their male counsel while speaking of the ‘other side’ as if they were not present.

I was incensed by the antics of abusive men who manipulated the legal system to further victimize their wives and children, for example, by repeatedly failing to file financial statements, attend counseling, and/or follow parenting plans, usually without any response from the bench. I often had to restrain my companions from leaping up to harangue the presiding judge for his or her failure or refusal to *listen* to and *believe* the victims' stories of domestic violence and abuse. In short, I witnessed many examples of abused women failing to obtain the legal rights to which they assumed they were entitled, including simply *being heard*.

I reconsidered the set of preliminary assumptions I had relied upon during my practicum to inform my theories about 'the law'. I reconstituted these assumptions in the best traditions of critical deconstruction and analysis as tentative theories emerging from my professional and experiential engagement with the law and social work. My involvement with the Woman Abuse Council of Toronto had provided me with fresh revelations about the family justice system and its treatment of abused women. Accordingly, I developed a further set of tentative assumptions upon which the design of this research study is premised:

1. The family is the primary social construct in our society, and patriarchy's chief institution is the family (Millett, 1970). It is the locus of our socialization, thus where the values, norms and beliefs of our dominant ideological discourse are (supposed) to be imparted and carried forward through succeeding generations. The hegemonic order relies upon the family to promote social stasis. Therefore, in response to social upheaval, it is necessary to reinforce the primacy of the family as an enduring and unchanging symbol of all that is good about the established social order (Smart, 1984; Millett, 1970);
2. Changes have been made to legislation governing marital separation and issues corollary thereto (custody, access, child and spousal support, property determinations, and issues concerning safety), which appear to promote gender equality. Removed from the law were overtly gendered common law presumptions and statutory mandates that were oppressive to women.² At the same time and since then, amendments to existing legislation and passage of new statutes relevant to family relations purport to promote gender equality and include: legislative presumptions of marriage as a partnership; the equal entitlement of both spouses to support; and both mother and father to custody and/or access; the concept, first, of family property and constructive trust, and then later equalization payments between former spouses; the imposition of the responsibility for both parents to share equally the financial responsibility for their children; and the equal responsibility of husbands and wives to attain economic self-sufficiency following marital separation;

3. However, the repeal of statutes and abandonment of legal presumptions considered to be outdated, inapplicable, no longer representative of current social practices, and even unconstitutional, has not resulted in equal treatment and consideration of women and men in family law determinations;
4. Judges continue to rely upon traditional constructs of what constitutes ‘good mothers’, ‘good wives’, ‘acceptable marital conduct’, and the ‘ideal family’, when adjudicating claims under the current legislation. Consequently, the traditional two-parent family model subsists even after separation and/or divorce through various legal mechanisms such as de facto joint custody imposed by the “friendly parent” or “maximum contact rule” found in s. 16(10) of the *Divorce Act 1985*, and the provisions of the federal and provincial *Child Support Guidelines* that encourage payers to seek more child access in order to reduce or eliminate their child support obligations. These provisions are particularly problematic and potentially dangerous for women abused by their former intimate partners;
5. Further, judges are socialized and trained as lawyers, first, then as judges, within the patriarchal dominant ideological discourse. Legal education reinforces and promotes this ideology. The wide discretion afforded judges in family courts allows them to decide cases through their individual subjective ‘lenses’ informed by their personal opinions, beliefs, values, mores and experiences, about which they cannot be challenged because they are not required to identify them (presuming they were aware of them in the first place);
6. Accordingly, abused women seeking the legal rights and entitlements to which they believe they are entitled from their abusive “partners” do so within a patriarchal construct which oppresses them while empowering their male abusers, and affords them neither place nor space in which their experiences of abuse can be related and understood. ‘The law’ exists within and is informed by a legislative framework that purports to promote ‘gender equality’ while it is being applied by individuals in whom the sedimentation of their socialization by the dominant patriarchal discourse is so deep and unacknowledged that their individual attitudes and opinions obscure the inherent gender inequality of the entire legal exercise.

I returned to Osgoode Hall Law School to pursue a doctorate in law. During the course of my doctoral studies I have been a Course Director at the Schools of Social Work of York and Ryerson Universities, responsible for conceiving and teaching courses on family violence. The vast majority of my students have disclosed to me their own stories of abuse at the hands of parents, siblings, other relatives and intimate partners (and sometimes their own children). I am gratified that, by disclosing their own experiences of family violence and abuse, my students have described the exercise as emancipating for them. I am not surprised by the omnipresence of domestic violence and abuse in our society, and recognize it as a very serious social issue that the legal system (of which I am a part) has yet to successfully address.

In choosing the research topic for this dissertation, I have drawn upon my personal and professional experiences as a child victim of domestic abuse, and as a lawyer, social worker and social work academic representing, interacting with and counseling abused women, as well as my familiarity with the scholarly literature and research concerning domestic violence and abuse. I have conceived a series of research questions directed at addressing the phenomenon of abused women's experiences in the family courts of Ontario and the ways in which those experiences are informed and impacted by the family court judges who 'hear' and adjudicate their claims.

b. The Research Questions

This dissertation addresses the following research questions:

1. What are the experiences and expectations of abused women who appear as litigants in the civil family justice system of Ontario?
2. What do judges of the civil family justice system of Ontario 'know' about domestic violence and abuse, and 'hear' from the abused women who appear before them?
3. What disconnects exist, if any, between abused women's experiences of domestic violence and abuse, as well as their interaction with the civil family justice system, and what judges 'know' and 'hear' about domestic violence and abuse, and why do these disconnects exist?
4. What direction can future research take to address those disconnects identified between victims and the civil family justice system to ensure that the former obtain from the latter the relief to which they are entitled?

c. The Conceptual Structure of this Research Study

This qualitative inquiry is premised upon the narratives of seventeen women (the survivor participants) who appeared or were appearing at the time of their interviews with me as litigants in proceedings before the family courts in Ontario. All were disappointed and dissatisfied with their experiences in some way. The title of this dissertation, "safe havens or dangerous waters?" refers to the tentative assumptions that inform the above research questions. In short, many women abused by their intimate partners approach the family justice system seeking due process (procedural fairness) and the legal rights and entitlements to which they believe they are entitled. They do so

with certain expectations – that the judges presiding over their claims will actually *hear, acknowledge* and *validate* their stories of abuse and adjudicate their legal claims on the basis of their evidence. But these expectations may not, in fact, be met. Instead, many abused women who appear in family courts feel that the judges who adjudicate their claims dismiss or ignore their experiences of domestic violence and abuse. In so doing, these judges become complicit in the further oppression of these victims.

Qualitative research studies conducted in Canada as well as other common law jurisdictions, such as the United States, Australia and Great Britain, and reported in the scholarly literature have found that abused women interacting with the civil family justice system believe that judges favour the abusers and/or minimize, misapprehend or disregard allegations and evidence of abuse. Most fundamentally, the participants in these studies, as well as those abused women with whom I have interacted, feel that their stories of violence and abuse are not heard or believed by the family court judges adjudicating their claims (Gillis et al, 2006; Heim et al, 2002; Charlesworth, 1999; Ptacek, 1999). My review of the scholarly literature concerning domestic violence and abuse, and the response to the phenomena of civil family justice systems across common law jurisdictions, comprised a substantial portion of the data upon which I relied to inform my tentative assumptions, address the research questions, and develop my interview guides and protocols for my research participants.

Accordingly, in order to examine the possible reasons for abused women's dissatisfaction with the civil family justice system for the purposes of this dissertation, I assumed that our judiciary in the civil family justice system, as assessors of evidence and adjudicators of claims advanced by or against abused women in family court proceedings, may bear some responsibility for abused women's unsatisfactory interaction with, and negative appraisal of, our civil family justice system. I also assumed that abused women may have unreasonable expectations of the ability of the civil family justice system to remediate the behaviours of their abusers.

After completing my interviews with my survivor participants, I analyzed their narratives and extracted common themes or issues from which I developed a series of open-ended questions to pose to fifteen family court judges (the judge participants). These questions were conceived with reference to the relevant legislation and established legal precedents (case law). These questions were directed at exploring the judges' personal frames of reference (their subjective lenses) about the phenomenon of woman abuse.

I was interested in discussing with the judge participants their views on allegations of domestic violence and abuse advanced in family court proceedings, the importance of the demeanor of the parties to their determinations, what constituted sufficient evidence of domestic violence and abuse to be persuasive, and to what extent, if any, the inclusion of allegations of the phenomena in family court claims affected the judge participants' decision-making processes. Finally, I was curious to ascertain upon what 'expert' information (if any) the judges based their decisions in family court proceedings; for example, on what theories emanating from the 'psy' sciences (psychiatry, psychology, sociology, social science and social work) did the judges rely in determining what constituted 'the best interests of the child' in custody and access claims in which woman abuse was alleged.

d. The Six Areas of Inquiry Identified in this Dissertation

This dissertation represents a critical interdisciplinary study of abused women's experiences in the family courts of Ontario. In this regard, it is a qualitative research study employing phenomenological and feminist paradigms. As a study within and of the law, it includes both legislative and case law analyses. As a qualitative study examining human experience and interaction, critical research methodologies developed in the social sciences have also been employed in this dissertation to address the research questions raised by the thesis and include grounded theory and critical discourse analysis.

Six areas of inquiry have been identified and pursued in order to examine the questions posed in this dissertation:

1. *A critical deconstruction and analysis* of federal and provincial legislation concerned with marital breakdown are presented with reference to its historical context, and situated in its contemporary social context in accordance with the established paradigm of critical theory. Four themes dominate this discussion: ‘gender’; ‘conduct’; ‘rights’; and ‘entitlements’.
2. *A critical deconstruction and analysis* of various aspects of the category of ‘judgeship’ are undertaken, including an examination of: legal education; judicial appointments; the judicial ‘environment’; the application of judicial discretion; the reliance upon the doctrine of *stare decisis*; and use of legal language. Judges’ attitudes about themselves as judges, as well as the attitude of abused women towards judges are depicted. The influences of the social sciences, the father’s rights discourse, and the media in shaping judicial ‘knowledge’ are also explored.
3. *A critical analysis* of the relevant case law employing *critical discourse analysis* demonstrates what judges ‘know’ about domestic violence and women’s experiences of the phenomenon, and how what they ‘know’ informs judicial discretion and thus determines the outcomes of claims advanced by victims of woman abuse. The legislative and case law analyses are presented as the institutional frame-work in which abused women present their narratives and judges render their decisions.
4. *A grounded theoretical analysis* of my interviews with the seventeen survivor participants in order to uncover their experiences of abuse and violence as well as their experiences as litigants in family court proceedings. Grounded theory is employed in *narrative research*. Through the themes that emerge from my analysis of this data, I develop a series of open-ended questions to pose to family court judges in interviews. These questions were designed to elicit data from this group of research participants that relate to their individual frames of reference (the judge participants’ subjective lenses) as well as their understanding of the phenomena and how women experience it. A review of the survivor participants’ court files was conducted as a method of triangulating data³ and is referenced.
5. *A grounded theoretical analysis* of the interviews I conducted with fifteen judge participants in which I deconstruct their narratives to reveal their subjective lenses and understanding of the phenomenon of woman abuse. Reference is made to the relevant legislation and case law, the interpretation of which the judge participants claim in their interviews to rely upon to set the parameters of their discretionary powers. I infer from my analysis what and how much these participants “know” about woman abuse by their use of language and concepts borrowed from the ‘psy’ sciences. Through this analysis I develop theories to explain how judges approach allegations of woman abuse and determine legal outcomes in cases where such allegations are made. These theories are presented as indicators of what judges ‘know’ about woman abuse and thus ‘hear’ in the stories of abused women who appear before them.
6. *A comparative critical analysis* of my examination of the survivor participants’ narratives and those of my judge participants is directed at identifying the ‘disconnects’ between women’s experiences of woman abuse and what judges ‘know’, ‘hear’ and ‘acknowledge’ about the phenomenon from abused women who appear before them in family court

proceedings. ‘Theory building’ is part of this critical exercise to explain the reasons for these ‘disconnects’. The ‘disconnects’ in this area of intersubjective understanding⁴ between abused women and the judiciary are presented as impediments to the realization of abused women’s legal rights and entitlements, and thus deficiencies in the civil family justice system. A ‘grand theory’ is presented as a possible explanation for these disconnects.

The findings of this dissertation present opportunities for further critical research into the responses of other actors in this system, such as lawyers, mediators, and assessors toward abused women appearing before the family courts, as well as an invitation to legislators to revisit the relevant legislation and the presumptions and assumptions upon which it is premised. Recommendations are also made regarding changes to law school curricula and continuing legal education for family court judges.

e. The Current Position of Law Makers and Stakeholders Regarding “Domestic Violence” – Past and Current Policy Papers and Inquiries concerning the Civil Family Justice System

There have been many inquiries undertaken federally and provincially to examine the efficacy of the civil family justice system in meeting the expectations and needs of litigants in legal disputes arising from marital breakdown. Indeed, Winkler C.J.O. expressed his impatience with the plethora of reports on family law reform in Ontario that have failed to ‘fix’ the system:

“At a certain point, let’s not adjust anymore,” Chief Justice Winkler said from his home in rural Ontario. “This has been studied to death. We have to sit down with a white piece of paper and redesign the system. It has to be made cheaper, faster and simpler, without convoluted rules ... Everywhere I go, there is a constant refrain: The family-law system is broken and it’s too expensive” (Makin, 2012:2).

Most recently, in April, 2013 the Action Committee on Access to Justice in Civil and Family Matters identified numerous impediments to the realization of legal rights by those accessing the civil family justice system, including its prohibitive cost, inordinate delays, the adversarial nature of family court proceedings, and its complexity (Action Committee, 2013). Its *Final Report* (hereinafter referred to as the *Cromwell Report*) commissioned by the Chief Justice of the Supreme Court of Canada, contains the admission that “violence and physical safety – involving spouses as well as children – are often part of the relationship dynamic [of the family]” (*Cromwell Report*, 2013:16).

The *Cromwell Report* described estranged spouses and their children as being seriously damaged by the current adversarial nature of the legal system, and recommended that judges, lawyers and law schools embrace “a culture of mediation and settlement” as well as mandatory mediation for all family court litigants (Makin, 2013).

Earlier, the *Interim Report* of the Law Commission of Ontario (the LCO) recognized that “domestic violence remains a serious concern, despite many efforts to address it” (2012:10). Before that, the *Domestic Violence Action Plan for Ontario* prepared by the Ministry of Citizenship and Immigration stated its “vision ... to free all women and their children from the fear or threat of domestic violence” (2005:i). All of these reports included numerous recommendations for improving society’s and the civil family justice system’s response to domestic violence and abuse, both as phenomena that are gendered (that is, experienced primarily by women) and non-gendered (experienced by men and women equally). However, women and children continue to be victimized in their intimate relationships, and the family justice system has yet to provide relief to women and children seeking to be heard, validated, and protected.

Non-governmental organizations and individual stakeholders involved in the civil family justice system have also conducted investigations and produced reports purporting to evaluate the delivery of legal services in the family courts of Ontario. In 2008, the Canadian Forum on Civil Justice issued a comprehensive study of the practices, procedures and court-connected services in place at six Superior Court of Ontario (Family Court Branch) sites. Investigators were primarily concerned with ascertaining the opinions of various stakeholders associated with these sites: judges; court staff; lawyers; mediators; counselors; and family services personnel. Research methods included interviews and focus groups, an on-line survey, files reviews from three sites, systems data review, and a literature review related to operations and ancillary services.

The investigators found that “the culture of litigation continues to dominate the process of resolution of family law problems once matters are in the court system” (Mamo et al, 2008:114).

However, the report promoted mediation, offered both on-site and off-site, as an important feature of family court as “offering an alternative pathway”, and recommended “an automatic referral to mediation in cases involving child custody/access and motions to change and recalculate support” (Mamo et al, 2008:114). To facilitate the promotion of mediation in the family courts, the investigators asserted that “all of the partners in the family justice system have to make a concentrated and deliberate effort to enhance the rise of mediation services and to instill a solution-centred atmosphere in the family court” (Mamo et al, 2008:114). They described mediation “as an effective intervention to resolve conflicts and empower litigants to find meaningful resolutions outside of the courtroom”, popular because “it works”, and one of the benefits of which is the alleviation of the volume of cases before the courts and an attendant reduction in costs (Mamo et al, 2008:115).

The report recognized that mediation was best suited to those who are in a “relatively equal negotiating position”, which necessarily excluded cases “where there is a clear and inherent power imbalance between the parties” (Mamo et al, 2008:115). Accordingly, the report cautioned that mediation may not be appropriate in cases involving domestic violence. The investigators recommended that a “comprehensive plan to screen and assess risk in cases of domestic violence and promote interventions that recognize *safety and accountability as paramount*” (Mamo et al, 2008:115, researcher’s emphasis). Further, the investigators recognized that “the systemic pressures to settle cases and minimize the effects of violence on victims and their children could lead to improvident and unjust resolutions” (Mamo et al, 2008:115). However, it does not appear from the report that they were aware that their own recommendations contribute to those “systemic pressures to settle cases” so potentially detrimental to abused women and their children.

The investigators’ analyses of their data from interviews, focus groups and on-line survey revealed that, while 100% of mediators believed that mediation was effective, other stakeholders were less impressed. Judges and mediators were found to have quite different perceptions about the nature of mediation. Mediators were self-described in the report as facilitators and educators,

dedicated to encouraging the parties to find their own solutions to their disputes, while judges (and lawyers) regarded mediation as a “bilateral negotiation process focused primarily on reaching an agreement on the issues in disputes” (Mamo et al, 2008:38). Those who were the least enamoured with mediation were counsellors and family services personnel: those most likely to be working closely with victims of domestic violence and abuse. Unfortunately, the study did not include any litigants amongst its participants, and it was not known how many domestic violence cases were mediated, nor their outcomes. However, community advocates (not specifically described or identified) advised the investigators that many abuse victims who attended the family courts were coerced into mediation. Given that the study revealed that, in the case of on-site mediation services (provided by the Ministry of the Attorney General), “very few” referrals were terminated (“closed”) because of the presence of domestic violence, the investigators queried whether domestic violence was being “missed” due to lack of client disclosure, lack of mediator screening, or both (Mamo et al, 2008:22).

Many of the reasons for the failure on the part of the legal system to respond to those abused women who appear before it seeking their legal rights and entitlements appear to be those systemic issues identified in the reports discussed above. These include the adversarial nature of the legal system, the absence of adequate structures to address the need of families in crisis at the time of marital breakdown, the failure of current mechanisms for collecting support, the prohibitive costs associated with litigation (and unavailability of Legal Aid) and deficiencies in education and training of legal ‘actors’ in the civil family justice system, all of which are examined later in this dissertation. As discussed later in this dissertation, new research has pointed to inadequacies in the legislation governing marital breakdown; in this regard, the efforts of feminist activists as well as fathers’ rights lobbyists have informed amendments to existing statutes, addressed the content and wording of new legislation, and continue to influence lawmakers in their efforts to reform the civil family justice system, discussed elsewhere in this dissertation. Still others, representing disparate special interest

groups such as mediators and assessors, representatives from the fields of psychology and social work, stakeholders in collaborative law practices (lawyers, counsellors and financial advisors, amongst others), and even some judges promote mediation as the panacea for all of the problems attendant with the adversarial nature of family court proceedings, although often absent from this group are victims of domestic violence and abuse.

However, the assumptions with which I approached the research questions in this dissertation suggest that there exist in the civil family justice system far more fundamental and deeply sedimented impediments to the validation of abused women's experiences and recognition of their legal rights and entitlements than those referred to in the preceding paragraphs. These impediments are founded in: the ideological premises that inform family-related legislation and legal precedent; judges' subjective lenses and their understanding of woman abuse and women's experiences of the phenomenon of woman abuse; and the ways in which judges exercise their judicial discretion in the receiving and considering of evidence of woman abuse in their decision-making processes. These impediments are historically sedimented, constitute 'knowledge' of woman abuse both within law and society at large, and, being regarded as 'givens', or even 'common sense' are rarely, if ever questioned. Further, what 'informs' judicial discretion is not often apparent in legal judgments; judges rarely say, "I believe", or "in my opinion" in their judgments. When a judicial decision refers to a particular premise such as 'the best interests of the child' or 'situational partner violence', discussed later in this dissertation, what a particular judge understands these terms to mean can only be inferred from the evidence upon which he or she relied and how the premise is defined.

Why the civil family justice system in Ontario has failed to respond to the needs and expectations of abused women and their children is the central research problem of this critical inquiry. The reason or reasons for this failure are not found, in my opinion, solely in those set out in the *Cromwell Report* (2013), *Interim Report* (2012), or *Domestic Violence Action Plan for Ontario* (2005), in any lack of funding for legal processes, or in the lack of information services for litigants,

or in the lack of availability of legal aid or legal representation in family court proceedings, although these issues are certainly relevant to how well, and to whom, legal services are delivered within the legal system. Nor, I contend, will the introduction province-wide of an integrated (unified) family court system, changes to the language utilized in family law (changing ‘custody’ and ‘access’ to ‘parental responsibility’, ‘contact’, ‘time’ and ‘schedules’), nor further simplification of the family court process as Winkler, C.J.O. recommends, nor even greater emphasis on alternatives to the adversarial process – mediation, arbitration, collaborative practice, and mandatory conflict dispute resolution – alone or in combination increase, the probability of abused women’s voices being heard within the family justice system.

It is my contention that a far more *critical* form of inquiry is required to challenge and expand these ‘problems’ identified in the civil family justice system. A critically based inquiry asserts that social theory should be directed at critique and change, in contrast to traditional theory oriented solely to understanding or explaining it (Wodak & Meyer, 2009). Accordingly, this dissertation steps outside the bounds of ‘legal method’ (Mossman, 1986) traditionally employed in legal research to ‘understand or explain’ legal issues, and utilizes critical concepts and methodologies developed in the social sciences to provide a more nuanced (and potentially controversial) explanation for abused women’s experiences in the family courts of Ontario. In this dissertation, ‘the law’ – legislation and case law – is not considered immutable, nor sacrosanct, nor beyond the bounds of critical deconstruction and analysis, nor regarded as expressions of objectivity, neutrality and impartiality, but, instead, as formalized discursive texts (Chng, 2002) implicit in the construction and promotion of historically ‘sedimented’ legal knowledge that has oppressed, and continues to oppress, women.

An examination of the family justice system founded in *critical* paradigms recognizes that legislation and case law represent society’s dominant ‘view’ of domestic violence. This dominant view influences and informs both litigants’ and judges’ attitudes, opinions and expectations about

each other as well as the civil family justice system, generally. A critical review of legislation does not merely compare and contrast one statute, or section of a statute with another without reference to its or their historical and social contexts. Nor is a critical review of case law restricted to the compilation of judicial decisions and the comparison of the level of contradiction evident in them, the fallibility of their *ratios*, or whether or not they have been ‘followed’, and thus represent ‘good law’. A critical review of case law examines the use of judicial ‘language’ in creating constructs and theories, perpetuating concretized ‘givens’ and reinforcing and promoting the patriarchal status quo.

A critical inquiry addressing the research problem of this dissertation necessarily demands that the researcher examine what judges ‘know’ about woman abuse. Questions are posed directly to members of this cohort to ascertain how judicial ‘knowledge’ is informed by the individual judge’s personal, subjective frames of reference, practices and experiences about domestic violence, as well as his/her understanding of the relevant legislation and case law, all of which is informed by society’s dominant ideology.

The relevance of human subjectivity in judicial reasoning has been validated through the extant critical research studies that have investigated judges’ experiences of and attitudes toward abused women who have appeared before them in both the criminal and civil family justice systems. Qualitative first-person studies of judges’ attitudes toward child custody law (Bradbrook, 1971), divorce legislation (Glass, 1984), and the processing of domestic violence cases in the criminal justice system (Hartman & Belknap, 2003) have been reported. Qualitative studies have also been conducted of abused women’s interactions with members of the judiciary in dedicated American domestic violence (criminal) courts (Ptacek, 1999), the California family justice system (Heim et al, 2002), and, in Canada, in court-ordered child custody and access assessments (Charlesworth, 1999). More recently, research studies have been conducted that examine women’s experiences of appearing as unrepresented litigants in the civil family justice system (Dragiewicz & De Keseredy,

2008a), and more generally, appearing or having appeared before the family court (Dragiewicz & DeKeseredy, 2008b; Abshoff & Lanthier, 2008).

Further, domestic violence (criminal) court watch projects have been conducted in Saskatchewan in 1992, Nova Scotia in 1989 (Langer, 1995), and Toronto (Lanthier, 2008), which examined the demeanor of judges in those settings. These studies make it apparent the judiciary has not been exempt from critical examination.

f. Critical Epistemology – Adopting Social Constructionism

Young, in her critical examination of the concept of justice, described critical theory as a

normative reflection that is historically and socially contextualized. Critical theory rejects as illusory the effort to construct a universal normative system insulated from a particular society. Normative reflection must begin from historically specific circumstances because there is nothing but what is, the given, the situated interest in justice, from which to start. Reflecting from within a particular social context, good normative theorizing cannot avoid social and political description and explanation. Without social theory, normative reflection is abstract [and] empty ... critical theory denies that social theory must accede to the given ... Critical theory presumes that the normative ideals used to criticize a society are rooted in experience of and reflection on that very society, and that norms can come from nowhere else ... (1990:5).

Critical *feminist* paradigms are particularly well suited to examining phenomena in law as well as society since “it is part of the feminist intellectual and political tradition to address itself to the nature, form and content of legislation and legal structures” (Smart, 1984:3). A critical examination of legislation and case law founded in *feminist paradigms* recognizes that legal knowledge is itself an expression of a patriarchal hegemonic discourse and thus complicit in the oppression of women. However, accepting that the nature, form and content of legislation and legal structures promote a dominant male view that excludes the voices and experiences of women cannot alone explain why abused women do not obtain the legal rights and entitlements that they believe the law extends, or should extend, to them. The extent to which judicial discretion and therefore individual subjectivity play active roles in the application of the law and, by extension, abused women’s experiences in the family justice system, must also be critically examined.

Given the feminist theoretical standpoint from within which the within research problem is being addressed, I assume that the ideological premises upon which judges' subjective lenses, as well as their 'ways of knowing' are constructed are sedimented in the dominant Canadian discourse which is patriarchal, Eurocentric, and hierarchical. As such, judges have privileged a particular set of beliefs and body of knowledge that is responsible for the exclusion of women's voices and experiences. This dominant social discourse has been, and continues to be, the source of what is remembered, known, understood, and sustained; it also determines what will not be acknowledged or recognized, and thus remains *unknown* – in the case of the research problem, abused women's experiences of domestic violence, and as litigants in the family courts. Any proposed changes or 'improvements' to the existing civil family justice system, therefore, will be ineffectual unless and until *what is currently known* about domestic violence and abuse is challenged and includes the voices of abused women.

As a critical theorist who has both conceived and taught undergraduate courses in critical theory, I am predisposed to approach social problems from this epistemological stance and submit that the inquiries conducted, to date, have not addressed the underlying impediments to abused women attaining their legal rights and entitlements inasmuch as they fail to include critical inquiry into the response of the civil family justice system to abused women and their children.

Further, as a critical researcher examining the research problem from a feminist standpoint, I contend that any examination of abused women's experiences with the family courts of Ontario must be premised upon, and thus privilege the experiences of those victims, themselves; studies that purport to address the phenomena of domestic violence and abuse without including the voices of abused women perpetuate the oppression and marginalization of women (Ezzy, 2002), whose voices have long been absent from both sociological and legal research. Therefore, this investigation and its findings are premised upon the experiences of the seventeen survivor participants. I am unaware of any first-person qualitative studies of judicial 'ways of knowing' about domestic violence and

abuse that is founded in the lived experiences of abused women appearing as litigants in family court proceedings.

2. Identifying the Phenomenon

The phenomenon of domestic violence has gained increasing recognition in recent years as a serious issue in Canada (Bala et al, 1998) that is endemic, transcending racial, cultural, class, economic, ethnic, religious, and age differences (Brennan, 2011). Indeed, the seventeen survivor participants interviewed for this dissertation came from a variety of racial, religious and ethno-cultural backgrounds, were Canadian-born or had arrived in Canada as immigrants or refugees, and hailed from all socio-economic strata of society – from the wealthy to the abjectly impoverished and from the well-housed to the homeless. Their ages ranged from the mid-twenties to late sixties. One of my survivor participants described herself as physically disabled, and two others self-described as having “emotional problems”.. All but one had graduated from secondary school, and the majority (11) had some post secondary education. All of the survivor participants had children. Further demographic information regarding the survivor participants is found in their self-descriptions set out in Chapter Five. All were victims of one, or multiple, forms of domestic violence and/or abuse in, but not limited to, their former intimate relationships. The survivor participants are referred to in this dissertation through pseudonyms to protect their identities.

The prevalence of incidents of domestic violence in Canada is well documented in quantitative studies conducted under the direction of Statistics Canada (Sinha, 2013; Hutchins & Sinha, 2013; Brennan, 2011; Burczycka & Cotter, 2011; Ogradnik, 2006; Hotton, 2002; Johnson, 2002; Trainor et al, 2002), and the federal Department of Justice (Zhang et al, 2012), as well as in the United States (Neighbors et al, 2012; Scott-Storey, 2011; Kimmel, 2002; Waller, 2000; Dobash & Dobash, 1979; Bard & Zacker, 1974) and Great Britain (Radford & Hester, 2006). Further, this phenomenon has been the subject of innumerable studies conducted in the social studies, medicine and law, referred to later in this dissertation.

There is no, single, definitive theory of causation for the phenomenon. There is a plethora of such theories; Harway and O'Neil identified thirty different, descriptive, conceptual labels used to describe the causes of male violence against women (1999). These theories can be defined, rather subjectively, as those: that pathologize woman abuse as a product of individual characteristics that predispose the abuser to violence, and/or the recipient to victimization; or that identify woman abuse as a social issue arising from the systemic oppression of women, and the pervasiveness of male dominance.

How a particular theory identifies the phenomenon determines the label assigned to it. 'Pathologizing theories' locate domestic violence in organic or psychological/emotional predispositions of both perpetrator and victim. These theories are not gender-specific. They are popular within disciplines engaging in positivist research, such as medicine and psychology, and also inform the platform of fathers' rights groups and 'expert' knowledge emanating from the 'psy' disciplines accepted in the family justice system, discussed later in this dissertation. Domestic violence examined within social contexts as social issues, such as those provided by feminist paradigms, however, is identified as gendered, historically sedimented, and rooted in issues of power and control (Johnson et al, 2005; Pence & Paymar, 1993; Dobash & Dobash, 1979).

Nor is there one accepted term ascribed to the phenomenon commonly referred to as 'domestic violence'. Domestic violence – intimate partner violence – spousal violence – all are gender-neutral terms commonly used in the literature concerning violence against women. Other terms – wife battering and woman abuse – are also used in the literature to describe the phenomenon, and are decidedly gender specific. Various quantitative and qualitative research studies have been conducted to prove or disprove the gender specificity of domestic violence, and are examined in the next chapter.

Research studies premised in critical, feminist theoretical paradigms, such as those of Dobash and Dobash (1979), Walker (2000, 1984), Dragiewiz et al (2008a) and Se'ver (2002),

engage primarily in qualitative research studies through investigative interviews of a relatively small data set of individuals who have a shared experience of the phenomenon forming the subject matter of the inquiry. Those who espouse the view that men and women are equally culpable in, and capable of, committing violent acts against their intimate others, such as Straus (1993, 1979) and Dutton (2006), rely on large-scale quantitative studies that purport to confirm the gender symmetry of the phenomenon.

Clearly, whatever descriptor is utilized to identify the phenomenon will reflect the view-point of the user; whether one ‘sees’ domestic violence as a phenomenon to which women are overwhelmingly subject, or as behaviour engaged in equally by men and women, has very serious consequences for victims, particularly when it is the judiciary who are invoking a particular descriptor for the phenomenon and rendering decisions on that basis.

For the purposes of this dissertation, I refer to *domestic violence and abuse* when this terminology is used in material to which I am referring. I have adopted the term *woman abuse* to identify the phenomenon forming the subject matter of this inquiry. *Woman abuse* encompasses both *domestic violence and abuse*; they are not mutually exclusive. My reasons for employing the term *woman abuse* are set out below, and more fully justified in Chapter One.

Woman abuse, and not ‘domestic violence and abuse’, is far more inclusive of the myriad ways in which perpetrators attack their victims in intimate relationships, and does not privilege, nor is it predicated on, the presence of physical violence, with other forms of abuse appurtenant, as the term ‘domestic violence and abuse’ is commonly construed. Indeed, the association of ‘domestic violence’ with acts recognized by and punishable under the *Criminal Code of Canada* (the *Criminal Code*) obscures others forms of woman abuse that are as, if not more, debilitating and dangerous to the welfare of the recipient as is physical violence.

Violence against women “is a politicized topic of social-scientific inquiry” (DeKeseredy, 2011:5); therefore, how the phenomenon is described constitutes a political act. ‘Woman abuse’ also

reflects the phenomenon as a political issue (Stark, 2007); women are abused in their intimate relationships (at the micro level), but also by and in society at large through the marginalization and oppression of women (at the macro level) which diminishes their engagement as citizens in ways not reflected by the term ‘intimate partner violence’. What is important – and fundamental to the credibility of any study of violence against women – is that the definition utilized reflects the experiences of its participants (DeKeseredy, 2011). The use of the term ‘woman abuse’ to describe the phenomenon examined clearly situates it within the lived experiences of the abused women who participated in this study.

This dissertation, therefore, adopts the definition of woman abuse promoted by DeKeseredy and MacLeod:

Woman abuse is the misuse of power by a husband, intimate partner (whether male or female), ex-husband, or ex-partner against a woman, resulting in a loss of dignity, control, and safety as well as feelings of powerlessness and entrapment experienced by the woman who is the direct victim of ongoing or repeated physical, psychological, economic, sexual, verbal, and/or spiritual abuse. Woman abuse also includes persistent threats or forcing women to witness violence against their children, other relatives, friends, pets, and/or cherished possessions by their husbands, partners, ex-husbands, or ex-partners (1997:5).

The concept of ‘woman abuse’ is far more inclusive than is ‘domestic violence’ of the plethora of indignities, attacks, debasements, humiliations, and devaluing and delegitimizing behaviours to which abusive men subject their female victims in intimate relationships. It reflects the extraordinary and outrageous intentional “dignitary harm” abused women suffer from the physical, emotional, sexual, psychological and financial wrongdoing to which they are subjected by their abusive intimate partners (Laufer-Ukeles, 2010:257). The adjective ‘woman’, rather than ‘wife’ (Walker, 2000) has been chosen for its inclusion of *women* in all social strata and forms of intimate relationships for whom the various intersections of oppressions inform their realities. It should be noted that, for the purposes of this dissertation, I have limited my inquiry to the experiences of abused women in heterosexual intimate relationships. DeKeseredy and MacLeod (1997) argued that the term ‘woman

abuse', rather than "violence against women", better represents the experiences of First Nations, immigrant and refugee women who are oppressed by their male partners, because it allows space for appreciating the cultural norms, values and practices that inform this phenomenon as they impact *women*; in other words, women, and not violence, are the subject matter of the inquiry.

The utilization of a gendered conceptualization of 'domestic violence' does not ignore the fact that men are victims of domestic violence and abuse as well as women. Nor does it reject the relevance of psychopathologies in those sensationalized cases of torture and murder of wives (and children) by husbands, the stories of which grab public attention away from, and thus delegitimize the far more common experiences of woman abuse: insults; threats; slaps; put-downs; pushes; stony silences or yelling; unreasonable demands; isolation from family and friends; disruption of her workplace; financial dependency and/or impecuniosity; and sexual debasement. Utilizing the term *woman abuse* situates 'domestic violence' within a dyadic context of power and control. Pence and Paymar (1993) identified numerous (and by no means exhaustive) categories of male violence and abuse against women in their "Power and Control Wheel".⁵ For Pence and Paymar, the identification of the many forms of male-perpetrated abuse against their female intimates reflects issues of power and control endemic in the broader society. "The cultural acceptance of dominance is rooted in the assumption that, based on differences, some people have the legitimate right to master others" (1993:2).

A gendered conceptualization also rejects any theory of the cause of woman abuse that blames the victim, or describes abused women solely as victims. Abused women are recognized as agents exercising personal power in their own right who utilize certain tactics to ensure their and their children's safety, even survival. These tactics might not often be the most efficacious or even advantageous to victims, but they are pursued with the aim of avoiding further harm (Se'ver, 2002).

The phenomenon of woman abuse is the subject of much debate at the practical, theoretical and ideological levels. Sociologically, the issue of 'domestic violence' has been approached from

two theoretical perspectives, one founded in the ‘family violence perspective’ and the other in feminist paradigms. Feminist theoretical paradigms of woman abuse view the phenomenon as asymmetrically gendered to the detriment of women. As such it is seen as emanating from the long-established tradition of the patriarchal family and historically sedimented constructions of masculinity and femininity. Feminist theorists argue that the systemic structural constraints women encounter in society, such as reduced employment opportunities, lack of affordable housing and/or daycare, and the inaccessibility of funds, make escape from their abusers difficult if not impossible (Gavigan & Chunn, 2007; Mosher et al, 2004).

Feminist theorists reject the pathologization of domestic violence, generally. They rely primarily on smaller sample, qualitative research studies that irrefutably demonstrate the profound gender asymmetry of domestic violence (and the realities of the users of shelters and hospital emergency rooms) wherein women are overwhelmingly identified as the victims and men the perpetrators (Burczycka & Cotter, 2001).

The ‘family violence perspective’ was originally promoted in American sociological literature and views domestic violence and abuse as indicators of family conflict within the family ‘system’ (Johnson, 1995). Within this perspective family conflict need not have its origins in any kind of individual psychopathology of family members, as domestic violence was traditionally viewed, but is “endemic to family life in the American cultural context, [where] some kinds of family violence are considered acceptable under some conditions, and therefore, family conflicts will sometimes lead to violence” (Johnson & Leone, 2005:324).

Proponents of this ‘family violence perspective’ thus normalize domestic violence and rely on numerous large, quantitative studies that purport to show that men and women are equally violent in their intimate relationships. This perspective has been promoted by fathers’ rights groups, discussed later in this dissertation. One of the assumptions informing the foundation of this dissertation is that the prevailing ideology of these groups reinforces and promotes the dominant *social*

discourse and thus accords with the dominant *legal* discourse. Concepts promoted in legislation relevant to marital breakdown, and utilized by the judiciary in its decision-making, such as gender equality in intimate relations, the ‘maximum contact’ principle in custody and access determinations, the erosion of women’s right to spousal support, and the de facto if not legislatively prescribed presumption of joint custody, can all be directly traced to the political platform espoused by fathers’ rights lobbyists. The application of these presumptions in cases involving woman abuse can inure to the benefit of perpetrators and to the detriment of abused women (Boyd, 2006, 2004, 1993, 1990). These issues are discussed more fully later in this dissertation.

Stark (2007) has formulated an alternative model to the ‘family violence perspective’ that dominates mainstream domestic violence discourses, which he has termed “coercive control”. Stark emphasizes the right of abused women to seek to free themselves from the coercive male domination of their intimate partners.

... the primary harm abusive men inflict is political, not physical and reflects the deprivation of rights and resources that are critical to personhood and citizenship. Although coercive control can be devastating psychologically, its key dynamic involves an objective state of subordination and the resistance women mount to free themselves from domination. Women’s right to use whatever means are available to liberate themselves from coercive control derives from the mode used to oppress them, not from the proximate physical or psychological harms they may suffer because of the abuse (Stark, 2007:5).

Stark’s model of woman abuse does not centre exclusively on acts of physical violence, but on the way abusive men use various strategies to hurt, humiliate, intimidate, exploit, isolate and dominate their victims: the “microregulation of everyday behaviours associated with stereotypic female roles ... Like assaults, coercive control undermines a victim’s physical and psychological integrity” (2007:5). Stark’s conceptualization of woman abuse is particularly attractive to a critical feminist inquiry into the legal response to the phenomenon. It recognizes the myriad of ways abusive men dominate and oppress their victims physically, emotionally, psychologically, sexually, and financially. Abusive men isolate their victims from friends and family members. They threaten,

harass, and stalk their victims. They interfere with their victims' employment, or forbid them to work. They attempt to maintain absolute control over family finances and render their victims impecunious. The methods employed by abusive men to oppress and suppress their victims is limited only by their imagination and the threat of censure by the state, through criminal charges, for example, although criminal, civil and/or social denunciation, if expressed at all, may be of little or no concern to some woman abusers. "Coercive control" is discussed further in the next chapter.

Domestic violence, woman abuse, coercive control (whatever terminology is employed to identify the phenomenon) is, at its essence, an assault upon the integrity of the individual woman, and a denial of the fundamental rights of citizenship: personal autonomy – "the ability to determine the condition of one's life and pursue one's life projects" (Lister, 1997:16); sex equality, and freedom of association and speech, represented in the *Canadian Charter of Rights and Freedoms*, 1982; and freedom to exercise human agency in the realization of the individual's full potential (Lister, 1997).

Women's responses to coercive control – "whatever means are available" – also provide a rationale for behaviours employed by abused women in their relationships that, to anyone unfamiliar with the phenomenon or predisposed to minimize or reject it, would appear to be counter-productive, illogical, or, in some cases, inflammatory. Instead, Stark (2007) has focused on abused women's personal agency. Thus, women who remain in abusive relationships because they have been deprived of funds or access to funds, or are too psychologically, emotionally or physically damaged to extricate themselves, or who steal, embezzle or defraud in order to secure enough money to escape, or who try to physically fend off their attackers, should be seen as attempting to accomplish what, to date, society, including the legal system, has been unable or unwilling to extend to them: safety; freedom from harm; and the opportunity to realize their full potential as individual human beings.

3. The Methodological Approaches

At first glance, it might appear that this dissertation employs many, unrelated research paradigms and methodologies. However, Fineman and Opie (1987), in their examination of the uses of social science data in custody determination in divorce proceedings, have identified feminism, phenomenology, critical theory and linguistic theory as mutually compatible and complementary methodological approaches. The following research methodologies have been borrowed from the social sciences to inform this dissertation:

Qualitative Research: This dissertation is a *qualitative study* of abused women's experiences as litigants in the family courts of Ontario. Qualitative research

(means) any type of research that produces findings not arrived at by statistical procedures or other means of quantification...In speaking about qualitative analysis, we are referring ... to a nonmathematical process of interpretation, carried out for the purpose of discovering concepts and relationships in raw data and then organizing these into a theoretical explanatory scheme (Strauss & Corbin, 1998:11).

Qualitative research methods are oriented toward exploration, discovery and inductive logic; they are directed toward theory-building, not theory-proving. Qualitative studies begin with specific observations and build toward general patterns, or theories (Patton, 1987).

This contrasts with the hypothetical-deductive approach of experimental designs that require the specification of main variables and the statement of specific research hypotheses before data collection begins. Qualitative analysis is guided not by hypotheses but by questions, issues and a search for patterns (Patton, 1987:15).

Qualitative research engages the researcher in an exploration of meanings ascribed to particular *phenomena* experienced by the study's participants (Ezzy, 2002), thereby identifying the participants as the 'experts' on the subject under investigation. Qualitative research studies that purport to express 'lived experiences' from the perspectives of those whose lives they are examining create meaning from them by capturing the respondents' points of view – they are *emic* – rather than seeking to explain the phenomenon from the perspective of an 'objective' outsider (*etic*) (Padgett, 1998).

Qualitative research assumes there are multiple realities and perspectives to be discovered, explored, and examined, and that the researcher and her participants engage in a process that both informs and creates knowledge through discourse. The voice of the researcher as well as her participants is present in the research, represented in this chapter, and Chapters Five, Six and Seven.

Qualitative research directed at critical theoretical subjects can produce “undeniably dangerous knowledge, the kind of information and insight that upsets institutions and threatens to overturn sovereign regimes of truth” (Kincheloe & McLaren, 2000:433). It is perhaps for this reason that I am unaware of any qualitative studies that have identified and examined through first-person interviews the subjective ‘ways of knowing’ of family court judges regarding woman abuse (and the victims who appear before them) as indicators impacting abused women’s experiences in the family courts. Some members of the legal profession might consider this exercise subversive, as indeed it is; it challenges sedimented dogma celebrating the promotion of gender equality in the law and judicial neutrality and objectivity, while abused women continue to be, or believe they are, oppressed in and by the legal system.

Phenomenology: This dissertation describes woman abuse as a *phenomenon* experienced by women and children in their intimate relationships. The concept of *phenomenon* has particular meaning within critical social science discourses. The twentieth century German philosopher, Edmund Husserl, has been identified as the ‘founding father’ of the philosophical school of *phenomenology*. For Husserl, all human experience was subject to categorization, either in isolation or “by means of a plurality of theses” (Husserl, 1989:20), which, in turn, could contribute to the constitution of other categories of experience. As a philosopher, Husserl was primarily concerned with describing his conceptualization of phenomenology’s ‘way of knowing’. However, writing from the standpoint of sociology, Schutz (1962) and Garfinkel (1969) were able to transcribe Husserl’s philosophical model into one of practical application. This assumes

that everyday reality is a socially constructed system in which people give pheno-

mena a certain order of reality; and this reality has both subjective and objective elements. On the one hand, everyday life presents itself as a reality interpreted by people and subjectively meaningful to them as a coherent world. Thus society is actively constructed by “activity that expresses subjective meaning.” On the other hand, although society is a human product, it is also an objective reality; that is, society is external to the individual who is a product of it (Levesque-Lopman, 1988:14).

Unpacking the dense script of philosophy, phenomenology, therefore, recognizes that everything that human beings know (or think they know) and acknowledge, through their experiences, is a set of phenomena that is synthesized through objectification – the categorization of things known or perceived, and named. These *categories* of knowing are discrete and wholly comprehensive ‘silos’, socially created (‘constructed’) and defined, and replete with meanings. That which is not known, is not acknowledged, and thus has no meaning. The stripping away of ‘what is’ or ‘what we know’ to expose ‘what we believe to be true’ or ‘what we think we know’ is *the* critical phenomenological exercise. “Nothing is more difficult than to know precisely *what we see*” (Merleau-Ponty, 1962:58). In the identification and naming of categories of experience, every individual engages in a process through which his/her own experiences and understandings of particular phenomena are known to him/her.⁶ Naming a phenomenon imbues it with qualities and characteristics which resonate within the listener. These qualities are at once recognized, acknowledged and understood. Critically deconstructing ‘what is known’ to the individual about particular phenomena requires engagement in *critical self-reflection* upon closely held beliefs, understandings, mores, values, and practices, including (particularly) oppressive and/or discriminatory ones.

The social significance of the phenomenon is determined by the extent of its notoriety across relationships and/or cultures. This aspect is particularly problematic for abused women. The social implications of woman abuse are becoming more apparent through social science and medical research studies conducted in First World settings, discussed in the next chapter. However, some ethno-cultural communities now residing in Canada have traditionally normalized violence against women, and thus are resistant to acknowledging and promoting its prohibition.

A phenomenologically-based inquiry recognizes the uniqueness of individual experience; each individual makes meaning of his/her experiences through an unlimited number of ‘lenses’ or variables, including social location, education, gender, ethnicity, age, and race. As described by Renzetti, (1997), a phenomenological inquiry must be sensitive to difference; one cannot assume that the phenomenon of woman abuse will be experienced exactly the same across cultures. Those differences, themselves, may be sites for further phenomenological inquiry (Van Manen, 2011).

The recognition of law within phenomenology as a *social institution* provides this dissertation with a further area of inquiry into the inter-relationship between abused women and the family courts. ‘Social institutions’ are “often hidden or unconsciously held assumptions which interdisciplinarily or cross-scientifically determine a set of practices which are followed” (Ihde, 1986:53); as such, they are the structural embodiments of the dominant ideology, and its values, beliefs, practices, mores, and symbols. Social institutions are “the sedimentation of the habitualization of human activity” (Berger & Luckmann, 1989:54), which control human conduct “by setting up pre-defined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible” (Berger & Luckmann, 1989:55).

Martin has identified certain characteristics of social institutions that are particularly applicable to the family justice system (2004). The law is coercive; it identifies which behaviours are acceptable and which are not. In so doing, conveys social values, particularly moral ones, which, in practice, it also shapes (Hamrick, 1987). The law identifies and defines behaviour and misbehavior in terms of *conduct*. Therefore, in and at law, the adjudication of the acceptability of conduct – by an individual, group, or some other entity, such as a corporation – determines legal entitlements and/or punishments. Second, that law promotes the ideological rightness of legislation and judicial decisions is self-evident; the law promotes itself as “Truth” (Smart, 2009:169). The ability of law to disqualify experiences and ways of knowing is an exercise in power (Smart, 1989). Third, the law is historically sedimented through the doctrine of *stare decisis*, or reliance on legal precedent. Fourth,

the law is neither rational nor objective; it does not always provide a rational basis for choosing which right to recognize and protect in any particular instance, nor are all legal decisions obvious and uncontroversial. In both cases it is the intrusion of policy that renders the law irrational and subjective (Olsen, 1998).

Further, judicial subjectivity and discretion significantly inform judicial decisions and thereby impact the experiences of abused women appearing in family courts. The consequence of the intrusion of policy and judicial subjectivity on the law results in its deformation such that the original contexts of the decisions are lost, yet their relevance is projected forward. Fifth, the law is a social institution originating and rooted in power relations (Hamrick, 1987; Merleau-Ponty, 1962). Sixth, the law is susceptible to internal and external forces that change or modify it. Finally, the law is an instrument of power for those to whom privileges and advantages attach, in this case, men (Munro 2009). Each of these characteristics of social institutions identified in the literature cited is present in my critical deconstruction and analysis of the law.

Feminist Theory: This dissertation employs feminist theory, a branch of *critical theory*, which privileges the voices of women and rejects the dominance of a male-centred ‘way of knowing’ that can describe and explain women’s experience (Ezzy, 2002). Feminist theory utilized in qualitative research identifies the centrality of gender in the shaping of consciousness (Creswell, 1998; Renzetti, 1997), and rejects the dominance of a male-centred ‘way of knowing’ which can describe and explain women’s experience (Ezzy, 2002). “Only women who have been [abused] can testify about both the physical suffering and the meanings that the violence has had in their lives” (Ptacek, 1997:107). Qualitative research, therefore, is admirably suited to an inquiry into the phenomena of woman abuse and abused women’s experiences in family courts.

By recasting abused women as both victims and experts on domestic violence, rather than considering them simply as victims, we allow ourselves to pose the questions that will enable such women to express their unique insights into the general phenomenon of spousal abuse and its potential solutions (Nabi and Horner, 2001: 239).

Feminist inquiry is particularly challenging to legal scholarship; it questions “long-held assumptions about neutrality, coherence and universal applicability of law” (Conaghan, 2009:1). As critical theorists, feminist legal theorists

fundamentally question the dominant liberal paradigms prevalent and pervasive in ... culture and society. This thorough questioning is not primarily a constructive attempt to put forward a conception of a new legal and social order. Rather, it is a pronounced disclosure of inconsistencies, incoherencies, silences, and blindness of legal formalities, legal positivism, and legal realists in the liberal tradition (West, 1993:196).

Women’s knowledge and experience, hereinbefore subjugated and marginalized, are given voice through feminist theoretical paradigms exposing women’s ‘otherness’ and their unique (that is, different from men’s) world view arising from a shared experience of being women. Feminist theorists utilize qualitative research methods to hear the voices of women masked by traditional quantitative methods (Ezzy, 2002).

Perhaps one of the most revolutionary features of feminist methodology is its emphasis on the inclusion of gender as a central category of research. By promoting the inclusion of gender as a central category of research, feminist methodologists demonstrated that *gender matters*, that our everyday social lives are not only *gendered*, they are also characterized by widespread *gender inequality*. Moreover, this inequality *intersects* with other inequalities: racism, social class inequality, heterosexism, ageism, ableism (Renzetti, 1997:133).

Feminist legal theorists have identified the law as essentially male; it is “androcentric” in its representation as “law as rules”. “What passes for objectivity, neutrality and justice is really a male-centred way of adjudicating” (Comack, 1999:49-50).

The common law system of justice presumes the existence of “a human norm” (Comack, 1999:23), the legal person, embodied in the ‘reasonable man’, against whom all deeds, words and intents are measured in legal adjudications. “The legal person is endowed with a specific set of characteristics that are prescribed as universal ... he is deemed to be able-bodied, autonomous, rational, education, monied, competitive, and essentially self-interested” (Naffine, 1990).

In contrast, Gilligan (1982) has identified what she has described as an “ethic of care” as the “moral voice” in which women speak, one that expresses the interconnectedness of women’s lives and serves as a repository for the socially ascribed values of womanhood antithetical to law and legal reasoning; and to the autonomous and unencumbered legal subject (Thornton, 2009). The hierarchal arrangement of this dualism means one side (the masculine side) dominates the other (feminine) side; things are related to the dominant side as the absence of those qualities that define it.

Accepting the omnipresence of the androcentric gaze in law, one recognizes that women will necessarily be regarded (and judged) against this traditional male norm. Indeed, law is most comfortable and, it could be argued, will only consider, concepts that allow comparison with this male norm (Smart, 1989). It follows that the law is inaccessible to anything that exists outside the realm of men’s experience: that which resides exclusively in the domain of women’s experience, particularized by the various sites of oppression that intersect at the junction of women’s, especially abused women’s, lives.

It is at this point that phenomenology and feminist theory happily intertwine. The aim of this inquiry is to present a different ‘way of knowing’ about woman abuse in the family that is “unclouded” (Levesque-Lopman, 1988), that is, predicated upon the experiences of the victims themselves rather than through the lenses of the law and/or the judiciary.

Judges’ attitudes and opinions about woman abuse, and abused women’s experiences of the phenomenon, are also examined within the feminist phenomenological paradigm. From a feminist standpoint, the responses of the judge participants to questions arising from the narratives of the survivor participants constitute an exploration of the personal accounts of those in positions of dominance and privilege (Fine, 1998). Judges, the elites of the legal system, have an important role in promoting the values, beliefs, norms and mores established in society and sedimented in the law (Moyser & Wagstaffe, 1987).

Founding a qualitative research study upon phenomenological paradigms that examine what judges ‘know’ about abused women and their experiences necessarily requires the examination of judicial “knowledge” and what constitutes ‘common sense’ (Hamrick, 1987; Berger & Luckmann, 1966). For the judge participants, for example, this is particularly relevant to the evidentiary requirements of proving the nature and/or quantum of abuse that will: trigger the issuance of orders for protection from the perpetrators of abused women and their children; deny abusers custody or access; prompt a spousal support order; or result in an unequal division of net family properties. The relationship between what judges ‘know’ in this context, and whether what they ‘know’ reflects abused women’s experiences of abuse, constitutes the intersubjective relationship between victim and judge that determines the quality of justice abused women obtain in family court.

Narrative Research: The qualitative research strategy employed in this dissertation is *narrative research*. Narrative research involves identifying and recruiting a carefully selected purposive sample of research participants (Padgett, 1998) with whom the researcher conducts formal, open-ended, long interviews in order to collect the research data to be subject to critical deconstruction and analysis. “A qualitative interview is a goal-directed conversation” (Padgett, 1998:59), requiring insight, mental acuity, skill, sensitivity, concentration, interpersonal understanding, and discipline (Patton, 1987). Interviews are an important source of data in qualitative research.

Interviewing allows the evaluator to enter another person’s world, to understand that person’s perspective ... Interviews add an inner perspective to outward behaviours. In this way interviews are a source of meaning and elaboration ... We also interview to learn about things we cannot directly observe. We cannot observe everything. We cannot observe feelings, thoughts, and intentions ... We cannot observe how people have organized the world and the meanings they attach to what goes on in the world. We have to ask people questions about those things. *The purpose of interviewing, then is to allow us to enter the other person’s perspective* (Patton, 1987:109, author’s emphasis).

Narrative research methods are particularly conducive to examining phenomena through a feminist lens. In examining the subjective lenses, practices and ‘ways of knowing’ of family court judges whose decision-making processes inform and impact abused women’s experiences in the

family courts, it was not enough to merely interview those judges and conduct statutory and case law analyses. The experiences of victims of domestic violence and abuse would not have been privileged in accordance with feminist theory had not their interviews first given them ‘voice’ as my basis for formulating my questions directed to the judge participants.

Fifth, by employing *Grounded Theory Methodology*, I distilled a series of questions from these interviews to thereafter direct at the judges in their interviews. These narratives were also analyzed using grounded theory. The narratives of my survivor and judge participants constituted two, separate discourses, each representing a distinct position within the hierarchy of the legal system. This process is discussed more fully in Chapter Four.

Sixth, the reported case law was critically deconstructed and analyzed through *Critical Discourse Analysis (CDA)*. Critical discourse analysis

is characterized by the common interests in de-mystifying ideologies and power through the systematic and *retroductable* investigation of semiotic data (written, spoken or visual). CDA researchers also attempt to make their own positions and interests explicit while retaining their respective scientific methodologies and while remaining self-reflective of their own research process (Wodak & Meyer, 2009:3).

Critical discourse analysis utilized in this dissertation is concerned with judicial language. All that is known is identified through language – words identify objects (things) and objectified reality (experiences). This process of identifying and synthesizing experience does not usually lie within conscious understanding of reality because it is so deeply ingrained as to be rendered invisible. Similarly, ideologically informed values, practices, mores, and beliefs are transmitted through language; “ideology works best when its presence is unobtrusive” (Chng, 2002:101). Language represents all that we know – or need to know, as determined outside ourselves.

Language, however, can also serve multiple purposes within society, beyond mere identification and objectification. Language: excludes; imparts values; perpetuates a status quo; oppresses; privileges; and mystifies. Language, and all that is expressed through language, are socially constructed and “socially constituting ... Careful attention to the language we use can reveal

hidden but powerful assumptions framing the way people think about the world” (Finley, 2009:77). Thus, for the purposes of this dissertation, “language matters. Law matters. Legal language matters” (Finley, 2009:76). In law “words take on different meanings and import in different contexts, are weighed differently, carry greater or less *gravitas*, and have different consequences depending on how, where, why and when they are used” (Chng, 2002:42).⁷

Legal discourse is constituted through a ‘male voice’ (Finley, 2009), further legitimating and sedimenting the ‘maleness’ of law. Courts lean “semantically” toward male references whenever there is a case of ambivalence or neutral semantic expression (Chng, 2002), thereby insidiously privileging the male perspective and the qualities attributed to ‘maleness’ through language usage.

Language is constituted by and expressed through the *voice* as *discourse*, with which critical analysis is concerned (Chng, 2002). “Discourse is the actual use of language in the context of community and culture. Linguistic and social negotiations are inextricably linked. The life and history of a community – the legal community – are inscribed and expressed in its discourse” (Chng, 2002:17). Further, discourse represents

... the meanings and assumptions embedded in different forms of language use, ways of making sense of the world, and their corresponding practices. Discourses will vary according to the power effects accompanying them; certain discourses will attain a position of dominance in society. From this perspective, knowledge is not objective, but political. Knowledge production has to do with power, as power is productive of knowledge (Comack, 1999:62).

The law is a particularly authoritative discourse (Finley, 2009). Judicial decisions represent judicial discourse.

Critical discourse analysis must account for “social cognition, that is, the beliefs or social representations [individuals] share with others of their group or community. Knowledge, attitudes, values, norms and ideologies are different types of social representations” (van Dijk, 2009:78). There are, however, “no pristine interpretation(s)” (Kincheloe & McLaren, 2000:286). Human reality is bound up in those meanings ascribed to it by language. “Perception is steeped in

Language” (Ihde, 1986:28). Therefore, a critical discourse analysis of judicial language in case law (and, by their adoption of and reliance on case law, the judge participants’ narratives) allows me to uncover the subjective lenses to which they subscribe regarding woman abuse which would otherwise remain obscured.

4. Overview of this Dissertation

This dissertation is divided into this Introduction and seven chapters, as follows:

Introduction introduces this study, identifies the assumptions informing the research questions, defines the phenomenon of woman abuse, identifies the feminist and family violence theories of ‘domestic violence’, and areas of inquiry, and describes the research methodologies employed to address them.

Chapter One – Examining the Phenomenon of Woman Abuse examines the phenomenon of woman abuse in greater detail, and includes reference to statistical studies, and a discussion of the forms woman abuse can take, including the newly emerging interest in brain injuries suffered by abused women. The sequelae of psychological and emotional abuse are examined. Child abuse is identified as a form of woman abuse, and the effects on children of witnessing woman abuse are discussed. The intersection of various sites of oppression with woman abuse as represented by the lived experiences of the survivor participants is presented as an important area of critical inquiry. Prevailing theories of the cause of ‘domestic violence’ are outlined, in particular, ‘situational partner violence’, the theory of ‘domestic violence and abuse’ to which many of my judge participants subscribed. “Parental Alienation Syndrome”, a concept emanating from the ‘psy’ sciences and entrenched in custody and access disputes, is also discussed.

Chapter Two – Woman Abuse and the Law provides a critical deconstruction and analysis of the legislation concerned with marital breakdown – divorce, custody, access, spousal and child support, property determinations and issues of safety – under which the legal proceedings of my survivor participants were determined: the *Divorce Acts, 1968 and 1985*; the *Family Law Reform*

Acts, 1975 and 1978; the Family Law Act, 1990, and the Children's Law Reform Act, 1990, as amended. Further, the negative impact on women, particularly abused women, of legislative omissions and deficiencies is identified and discussed. The legislation is analyzed within its socio-historical context in accordance with critical analytical methodology. This chapter represents part of the structural framework in which the research questions in this dissertation are addressed. This chapter reveals how the legislation has been informed by the dominant patriarchal social discourse and how it increasingly reflects the political platform of fathers' rights groups. In so doing, this discourse marginalizes women's legal rights and entitlements.

Chapter Three – Woman Abuse and the Judiciary critically examines, in short, how judges are educated, chosen, and adjudicate. The influence of the 'psy' sciences on judicial reasoning is examined. How judges perceive themselves, and how abused women perceive them, are discussed. Reported decisions continue the discussion and are examined through critical discourse analysis to demonstrate how the legislative framework, and the dominant patriarchal discourse it promotes, inform and are reflected in judges' responses to women's legal claims in family law proceedings.

Chapter Four – Research Methods presents the methods employed in carrying out this research study, including the recruitment of participants, the interview process, engagement with the data through the application of grounded theory and critical discourse analysis, and presentation of the findings as an "analytic story" (Strauss & Corbin, 1998:252). The application of the qualitative research methods I have utilized in this dissertation are also described more fully.

Chapter Five – The Survivor Participants Speak presents the narratives of the survivor participants elicited during the course of open-ended long interviews during which they related their lived experiences as abused children, intimate others and mothers, and as litigants in the civil family justice system following marital breakdown. References have been made to the survivor participants' court files, where relevant to their narratives. I have presented my synopses of these

narratives as discrete biographies in order to give voice to the survivor participants and allow the reader to bear witness to their stories.

Chapter Six – The Judge Participants Respond presents the narratives of the judge participants elicited during the course of their open-ended long interviews. These participants were asked a series of questions developed out of my analysis of the survivor participants' narratives. I directed the judge participants to comment upon their subjective understanding of the relevant legislation and case law, as well as their own practices in their court rooms. Member checking (discussed in Chapter Six) enhanced credibility and enriched the data. Judge participants were also encouraged to disclose the 'expert' sources of their 'knowledge' about the sequelae of woman abuse for victims. This chapter concludes with a brief discussion of my findings.

Chapter Seven - Conclusion presents the 'grand theory' (Strauss & Corbin, 1998) and provides a synthesis of the various theories from which it has been developed and are presented in the body of the dissertation as a possible explanation for the dissatisfaction abused women have with the current civil family justice system, its failure to protect them and their children, and realize the legal rights and entitlements to which abused women believe they are entitled. The research questions are revisited and responses provided. This chapter concludes with suggestions for future investigation, legislative amendment, and enhancement of legal and judicial education. The Appendices conclude this dissertation.

CHAPTER ONE

EXAMINING THE PHENOMENON OF WOMAN ABUSE

1. Introduction

This chapter identifies woman abuse, through statistical evidence, as a tragic reality in the lives of thousands of Canadian women throughout the country and across the social spectrum. The phenomenon of woman abuse, however, is not universally recognized and accepted, and the denial or minimizing of violence against women in all its manifestations support a dominant social discourse that, in turn, marginalizes and disempowers women.

Acknowledging the existence of woman abuse is but one step in the undertaking to legitimate abused women's experiences; the full extent of the sequelae of woman abuse has yet to be examined and understood. This chapter provides an overview of the current research concerning the present and long-term consequences of domestic violence and abuse on women as well as on their children.

2. The Prevalence and Sequelae of Woman Abuse

The prevalence of physical violence against women: The interface of domestic violence with gender is revealed in statistics gathered concerning violence and abuse in intimate relationships which identify women primarily as the victims (all statistics originate in Canadian sources and emanate from the General Social Survey – GSS – unless otherwise indicated¹). In 2000, women accounted for 85% of all victims of domestic violence reporting spousal violence to the police (Trainor et al, 2002). Sinha (2013), in her examination of the Uniform Crime Reporting and Homicide Surveys found that men were responsible for 83% of incidents of violence against women in 2011: 45% of the perpetrators were their victims' intimate partners; 27% were the victims' acquaintances or friends; 16% were strangers to their female victims; and 12% represented non-spousal family members. Many victims of spousal violence report recurring incidents, with 66% of

female victims reporting having been victimized at least once before reporting their assaults to the police, and 28% reporting having been victimized more than ten times before contacting the police (Brennan, 2011).

In 2009, of those women reporting incidents of domestic violence to the police, 34% were more likely than men (10%) to report having been sexually assaulted, beaten, choked or threatened with a gun or knife by their partner or ex-partner in the previous five years (Brennan, 2011). Sixty-seven per cent of Canadians with a spouse or former spouse reported being physically or sexually victimized by their spouses or former spouses in the five years preceding the 2009 GSS and women continue to report more serious forms of violence than men (Brennan, 2011).

For women, any one type of domestic violence rarely occurs in isolation from other types, and a single abusive experience is usually the exception and not the rule (DeKeseredy, 2011; Scott-Storey, 2011). Women are the recipients of more violent and severe forms of abuse at the hands of their male perpetrators than are men exposed to domestic violence from their female spouses or partners, and those experiencing more serious forms of violence are more likely to report those incidents to the police (Trainor, et al, 2002). However, the failure or refusal of abused women to report violent assaults by their domestic partners to the police suggests that this phenomenon is much more prevalent than represented by these statistics (Neilson, 2000).

Socio-economic status has been associated in some research studies with an increased likelihood of woman abuse (Kiss, Schraiber et al, 2012; Nixon & Humphreys, 2010; Goodman et al, 2009; Coulter, 2009; Evans, 2005; Staggs & Riger, 2005; Mosher et al, 2004; Moore, 1997).

However, researchers investigating this factor in relation to domestic violence and abuse have reached different and often contradictory conclusions. What does appear consistent is that the influence of “social controls” – legal sanctions, social status – correlate with economic and social class. Arrest for domestic violence, for example has been found to have a “criminogenic effect” for unemployed men, while reducing the recidivism rate for employed men (Moore, 1997:95).

Similarly, legal sanctions for domestic violence have been found to have the greatest deterrent effect upon men who are highly educated, employed and without prior records. “These results not only indicate that social controls reflect the social structure of individuals, but that the effectiveness of formal and informal sanctioning, depends in part, on one’s ‘stake inconformity’” (Moore, 1997:95).

More recently, a meta-analysis of a large number of research reports and studies investigating domestic violence was conducted under the auspices of the National Institute of Justice in the United States. Part of this survey involving a major re-examination of credible studies in multiple American jurisdictions found that arrest deters repeat abuse, whether suspects are or are not employed, while another major study based on 2,564 partner assaults found that the mere involvement of the police had a strong deterrent effect, whether or not the suspect was arrested (Klein, 2008). The positive effects of police involvement and arrest were not found to be dependent upon whether or not the victim contacted the police, nor upon the seriousness of the assault (Klein, 2008).

The highest re-abuse rates were found in those instances where responding officers left the victim to lay a private charge against the suspect (Klein, 2008). Perpetrators, in these cases, may have assumed the failure of police to lay charges represented condonation of their actions that encouraged them to re-abuse. Perceptions of the attitudes and behaviours of others with respect to social norms have a greater influence on individual behaviour than the *actual* attitudes and behaviours of others, of which there rarely is direct knowledge (Neighbors et al, 2012). Social stigma and social licence govern an individual’s attitude and conduct out of fear of social rejection. For woman abusers, the social stigma attached to domestic violence and abuse in contemporary society inhibits them from engaging in abusive and violent acts in public, which would, presumably, attract condemnation (Neighbors et al, 2012). Conversely, where abusers assume social condonation of their conduct, they are less inhibited from public displays of violence and abuse against their intimate partners (Erez et al, 2012).

Various reasons have been proposed in the literature concerning domestic violence to explain the disproportionate numbers of women reporting being victims of domestic violence, including that most men are generally larger and stronger than women, and are thus able to inflict greater physical damage on their victims (Dobash & Dobash, 1979). Further, society has come to recognize the phenomenon of domestic violence, and thus the stigma of victimization for women has decreased, thereby encouraging reporting.

Increasing gender equality over the past several decades, including rising income levels and labour force participation rates among women, are linked to both delayed marriage and improvements to women's economic status. These factors may have helped expand women's alternatives to either entering into or remaining in a violent relationship (Bunge, 2002:12).

Men, it has been suggested, are reluctant to report incidents of domestic violence at the hands of their female partners for a variety of their own reasons. First, it has been proposed that men would be emasculated by the stigma and shame attached to being exposed as victims of violence perpetrated by women (Kimmel, 2002). Second, men might tend to under-estimate the extent and severity of the female spouses' violence toward them (Kimmel, 2002).

However, numerous studies have revealed that, to the contrary, male victims of domestic violence tend to over-estimate the rate and severity of domestic violence perpetrated against them by their female spouses, while under-estimating their own violence against their female victims (Anderson, 2002; Kimmel, 2002). Women, on the other hand, tend to over-estimate the frequency and severity of their aggression because they consider it is less acceptable than is men's aggression, and thus those actions become memorable and redolent of the shame they feel (Kimmel, 2002).

Many chronically abused women do eventually leave their abusers (DeKeseredy, 2011), although how many women do leave remains unclear. However, between 1999 and 2000, 96,359 women and children were admitted to 448 shelters² throughout Canada, 81% of whom were there for reasons of abuse (Trainor et al, 2002). The latest report from Statistics Canada concerning women's shelters revealed both an increase in the numbers of shelters and of women and children using them.

In 2010, there were 11,461 beds in 593 shelters available across Canada for women and their children fleeing domestic violence, 3,581 of which were located in Ontario's 157 shelters (Burczycka & Cotter, 2011). These figures represent an increase of 7% from 2008, which, itself, was an increase of 2% from 2006 (Burczycka & Cotter, 2011). Between April 1, 2009 and March 31, 2010, 64,500 admissions to shelters were reported across Canada, representing 452 admissions per 100,000 women in Canada (Burczycka & Cotter, 2011).

Women who leave their domestic relationships as victims of violence are not safe from abuse; in fact, ex-spouses are more likely to have had repeated and chronic contacts with police for spousal abuse than they did while co-habiting (Mihorean, 2006). According to the 2000 GSS, most women who reported violence after separation stated that the assaults became more severe *after* separation (Hotton, 2002). According to respondents to the 2009 GSS, 17% of ex-spouses reported at least one incident of physical or sexual assault after separation, whereas only 4% of co-habiting intimates reported being physically or sexually assaulted (Brennan, 2011).

Non-physical violence against women: Victims of domestic violence are also victims of other kinds of abuse. The United Nations Declaration on the Elimination of Violence Against Women (1993) includes in its definition of violence against women any act of gender-based violence that results or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty in public or private life (Boyd, 2004). Qualitative studies indicate that jealousy and possessiveness “are part of the dynamics of abuse”, as are enforcing isolation, limiting contact with friends and family, name-calling, put-downs, threats to the female victim, her family members or friends, damaging property, and financial abuse. Four times as many women as men report being denied access to family income (Jiwani, 2002:68).

More than 75% of respondents to the 2009 GSS who reported being physically abused also reported “being emotionally affected” (Brennan, 2011:14), including feeling upset, confused or

frustrated (32%), angry (27%), hurt or disappointed (16%), fearful (15%), and/or depressed (15%) (Brennan, 2011). Over three times as many women as men reported having been emotionally affected by domestic violence, which Brennan (2011) attributes to the higher rates of severity and greater frequency of domestic violence endured by women. Women are three times more likely than men to report that their abuse had disrupted their daily lives (Brennan, 2011). Nearly 20% of respondents to the 2009 GSS reported being victims of emotional and/or financial abuse at some point during their intimate relationship (Brennan, 2011). Further, the correlation between physical, emotional and financial forms of abuse is evident from the reports of 70% of respondents of physical abuse who also reported having been emotionally and financially abused (Brennan, 2011).

Emotional sequelae to domestic violence continue post-separation from the abusive spouse. Hotton (2002) found that the vast majority of women experiencing physical abuse after separation also suffer from serious emotional consequences, including being fearful for their and their children's lives, lower self-esteem, depression and anxiety, shame or guilt, and sleeping problems.

Psychological abuse against women, like physical abuse, is likely to increase after marital breakdown, particularly where the abuser has access to his victim, or exercises some sort of control over his victim, as in the case of financial dependency (DeKeseredy, 2011) or child access when the victim is the custodial or primary parent. Statistics also reveal that loss of control over their victims upon marital breakdown increases the likelihood of abusers attempting to reassert their control by regulating the conduct of their victims, indicated by the significant increases in rates of checking on whereabouts and limiting contacts with others, all of which may be driven by the abusers' notably increased jealousy (Follingstad et al, 1990).

The sequelae of physical and non-physical violence against women: Physical violence during episodes of domestic violence may include broken bones and teeth, fractures, bruises, bites, cuts, abrasions, scalds and burns, and may lead to disfigurement, temporary or permanent disability, or death (Doherty, 2002).

The physical, psychological and emotional harm done to women as a consequence of domestic violence and abuse is profound; women who are repeatedly assaulted suffer from physical, emotional, psychological and cognitive impairments, the extent of which has not been fully identified in the research literature. Elevated risks have been observed as a consequence of domestic violence for a wide range of adverse health outcomes affecting the brain and nervous system, cardiovascular system, gastrointestinal system, genitourinary system, immune and endocrine system, musculo-skeletal system, reproductive system, adverse pregnancy outcomes, and other health problems.

A number of somatic syndromes, adverse mental health outcomes, and health risk behaviours have also been linked to [domestic violence]. Additionally, evidence from several studies suggests a dose-response effect of violence; as the frequency and severity of violence increases, the impact of the violence on health of victims also becomes increasingly severe. Furthermore, although physical, sexual and psychological violence each have significant mental and physical health consequences, women who have experienced multiple forms of [domestic violence] are more likely to develop serious health consequences (Black, 2011:429).

The head, neck and face are most likely to be injured during episodes of domestic violence, with attempted strangulation also common (Kwako et al, 2011). Unfortunately, little research has investigated the neuropsychological, physical, and psychological consequences of head and brain injuries in battered women (Banks & Ackerman, 2002:134). Jackson et al (2002) reported that 40% of women in a study of 53 battered women seeking emergency shelter had experienced domestic violence in the form of at least one episode of traumatic brain injury resulting in loss of consciousness, while 92% reported a blow to the head or face. Their subjective complaints of cognitive impairment included trouble concentrating, remembering, focusing on more than one activity or thought at one time, forgetting appointments, having difficulties at work, headaches, dizziness, distraction, losing things, inability to find the right words, and inability to follow directions, all suggestive of serious cognitive impairment as a consequence of even mild traumatic brain injury resulting from domestic violence.

In a sample of 99 women (67 of whom were living in battered women's shelters) who had sustained any type of physical abuse by a current or past intimate partner, 74% sustained some type of brain injury from their partners; a further 27% sustained brain injuries from being choked by their partners. While the shelter residents suffered a higher number of incidents of severe brain injuries and chokes, the rates of at least one and of multiple mild traumatic brain injuries were almost identical between shelter and non-shelter participants (Valera & Berenbaum, 2003).

Unfortunately, many health professionals, including those working with women experiencing domestic violence, have not received training in the area of brain injury and treatments, and misdiagnoses and omission of proper diagnoses are significant for women with mild traumatic brain injury, even though it "can be a life-altering experience and can be a source of chronic, sometimes hidden disability in the absence of appropriate rehabilitation" (Banks, 2007:291).

Brain injuries like those described have been, and are being, studied in mostly young, male athletes, usually with considerable financial backing from professional sports organizations. That research has been, and is being utilized to effect strategies for quick assessment and treatment (Banks, 2007). Research studies on professional hockey and football players and the sequelae of their concussive head injuries have been conducted at various sites, including the Boston University Center for the Study of Traumatic Brain Encephalopathy, Toronto Western Hospital and Baycrest Centre for Geriatric Health. The protocols for these studies include interviews and psychological testing, neurological and psychiatric evaluation and medical imaging. The preliminary findings of these studies indicate that the type of head injuries to which professional athletes are subjected contribute to substantial disability.³ However, no similar studies of abused women who are the victims of repeated head injuries have been undertaken, to date. Further, what is not known is whether those extant studies purporting to examine the consequences of post traumatic stress disorder in female victims of domestic violence are actually measuring PTSD, or organic brain damage. The lack of

awareness of the potential consequences for brain damage from even one blow to the head of a woman engaged with a violent intimate partner brings into question the credibility of those studies.

Women are not likely to seek help or medical attention for their injuries occasioned through domestic violence, and rarely do so in any event until they have been repeatedly victimized (Radford and Hester, 2006; Doherty, 2002). This is particularly dangerous for pregnant women. Pregnant women experience violence from their intimate partners that is more frequent and more severe than their non-pregnant counterparts, and are four times more likely to have miscarriages as a result of the violence they suffer than women who are not subject to domestic violence during pregnancy (Radford and Hester, 2006; Doherty, 2002). In 2011, 11% of female spousal victims of police-reported domestic violence were pregnant at the time of the assault (Sinha, 2013). It goes without saying that domestic violence during pregnancy endangers both mother *and* foetus.

Sexual violence against women can include rape, buggery and the insertion of objects into the vagina and/or anus (Radford and Hester, 2006). Sexual abuse can lead to physical problems including unwanted pregnancy, bladder and urinary tract dysfunction, sexually transmitted diseases, pelvic pain, anal tearing and fissures, bruising, bleeding, and vaginal tearing-related sequelae (Doherty, 2002). Russell (1982) found that 14% of the female participants in her study of rape during marriage had been sexually abused during cohabitation.

Women who experience domestic violence are at a higher risk for drug and alcohol dependency than women who are not abused. In their study of British hospital records, Stark and Flitcraft (1996) found that women who had experienced domestic violence were fifteen times more likely to abuse alcohol, and nine times more likely to abuse drugs than women who had no history of domestic violence. Another form of self-destructive behaviour in which women have been found to engage as a response to domestic violence includes various forms of eating disorders. Children exposed to domestic violence have similarly responded to that trauma through bulimia or anorexia, as well as

dangerous sexual behaviours (unprotected sex with numerous partners), drug and/or alcohol abuse, and self-cutting (Doherty, 2002).

Post Traumatic Stress Disorder (PTSD) has been long been recognized as a consequence of domestic violence (Zorza, 1995-6).

Post-traumatic stress disorder (PTSD) is characterized by recurrent, intrusive memories of a highly distressing traumatic event. These recollections tend to be vividly sensory, are experienced as relatively uncontrollable, and evoke extreme distress. The individual may lose the capacity to distinguish the memory from current perceptions, and the event is re-experienced as a flashback. Unwanted memories may be uncontrollably triggered by a variety of trauma-related cues. The accompanying fear and distress are sufficient to stimulate substantial efforts (both overt and covert) to avoid recalling the event (Halligan et al, 2003:420).

In studies of both male and female victims of assaults as a consequence of violent crimes reported to the police, PTSD has been associated with cognitive dysfunction, including memory loss, disassociative behaviours, detachment from self and others, inattention, labile mood, impulsiveness, emotional numbing, confusion, an altered state of time, amnesia, narrative disorganization and negative interpretations of the trauma (Halligan et al, 2003).

Further, cumulative abuse, that is, the phenomenon of accumulating abusive experiences, including repetitive abuse of the same type as well as repetition of differing types, or a combination of both, have been found to result in health outcomes that are significantly greater in their severity and degree of physical, psychological, emotional and cognitive impairments than those associated with isolated incidents of abuse (Scott-Storey, 2011).

The dissociative or distracted behaviours exhibited by abused women who have suffered blows to the head or strangulation from their intimate partners, as well as similar behaviours resulting from PTSD, can be perceived as indicative of an uncooperative and/or noncompliant attitude, notwithstanding that these behaviours can be indicators of brain damage due to past or continuing trauma. Cognitive impairment limits abused women's capacity to make decisions concerning their safety planning, and attendant need for shelter and child care (Banks & Ackerman, 2002).

The social consequences of violence against women: Society as a whole pays a steep price for the cost of domestic violence. A recent study of the economic impact of domestic violence on both men and women in Canada estimated the cost to be approximately \$7.4 billion per year (Zhang et al, 2012).⁴ The failure of our legal system to protect women and children from woman abuse, has serious and costly repercussions for the individuals involved and also for society at large.

Despite the statistical substantiation of the prevalence of domestic violence against women, a random telephone survey conducted by EKOS Research Associates between December, 2001 and January, 2002 of 2,053 Canadians aged 16 and older, revealed that 83% of respondents asserted that family violence does not occur very often, or only occasionally, in their communities, while 7% believed that domestic violence did not occur in their communities at all (Trainor et al, 2002). The failure of the majority of the respondents to this survey to acknowledge the prevalence of domestic violence against women may reflect a lack of appreciation, generally, in society, that the phenomenon is a grave and pernicious social problem.

3. Determining the Influence of Gender in Woman Abuse

Historically, one of the most fundamental and divisive arguments within the family violence discourse has been the conflict between positivist and critical theorists, particularly feminist theorists, regarding the characterization of the phenomenon as either gender neutral/ 'symmetrical', or gender specific/'asymmetrical'.

Gender neutrality, or 'gender symmetry' advanced by Straus (1993,1979), Straus & Gelles (1986) and Dutton (1993), amongst others (Kimmel, 2002) holds that women are just as likely as men to commit violent acts in their intimate relationships. These researchers have utilized large-scale statistical surveys to support claims of gender symmetry in incidents of domestic violence (Johnson, 2006; Straus, 1993,1979; Straus & Gelles, 1986). These large-scale surveys include crime statistics collected for decades by police that form the bases for reported crime rates (Johnson, 2002). The narrow definitions of 'violence against women' that focus on physical abuse reflect the

historical context of these crime statistics in which the phenomenon came to be recognized, but fail to capture the intent of the perpetrators or the context in which the violence was committed. Nor have these surveys included abusive conduct not defined by criminal legislation, such as psychological, emotional and financial abuse. The criminalization of physical violence against women has conflated the reality of physical and sexual assault in the dominant discourse to the exclusion of these other types of woman abuse that are equally, if not more, damaging to their victims.

Gender symmetry of family violence has clearly been refuted by feminist-premised analyses of data compiled by Statistics Canada and referred to in this chapter (Hutchins & Sinha, 2013; Sinha, 2013; Brennan, 2011; Scott-Storey, 2011; Taylor-Butts & Porter, 2011; Ogradnik, 2006; Hotton, 2002; Johnson, 2002; Trainor et al, 2002). This is not to suggest that women do not use physical force against their male partners and ex-partners. It has been suggested that women exhibit violent conduct in relation to violence directed at them by their male partners, in self-defence, or out of frustration (Kimmel, 2002). Acts of physical violence committed by women in these circumstances do not instill in the recipients a sense of intimidation, subordination or coercion, nor result in prolonged power, supremacy and domination for the aggressor, which are the intended consequences of woman abuse (Dasgupta, 1999).

The absence of context from the quantitative studies relied upon by promoters of gender symmetry in domestic violence precludes a credible discussion of the nature of female-perpetrated violence (Kimmel, 2002). While abusive men will use violent behaviours to control their victims, women who use violence to evoke the same response in their abusive partners are usually unsuccessful, and, in fact, are rendered even more vulnerable (Dasgupta, 1999) when their ‘victims’ retaliate. Further, intimidation can be thwarted by the fact that very few women have the physical stature and strength to back up non-physical threatening conduct with the potential for serious harm. “It might be useful to observe that the type of violence labelled as coercive control, woman abuse,

battering or intimate terrorism is qualitatively different than [sic] infrequent, non-injurious acts that evoke no fear or coercion” (DeKeseredy, 2011:56). Therefore, the intention of the perpetrator is relevant to any assessment of domestic violence.

Proponents of the conceptualization of domestic violence and abuse as gender symmetrical rely upon studies utilizing the Conflict Tactic Scales (CTS), after which the GSS has been modeled. In 1979, sociologist Murray A. Straus developed the CTS to measure the rates of intrafamily conflict amongst adults he assumed were represented in and by the data collected in large-scale quantitative surveys.

The CTS is the most commonly used instrument in family violence surveys (Straus). Using the ‘family conflict’ approach, the CTS consists of 18 items intended to measure ways of handling interpersonal conflict in family relationships. The items range from “verbal reasoning” (from discussing the issue calmly to bringing in someone to help settle things) to “verbal aggression” (ranging from insults and swearing to throwing, smashing, hitting, or kicking something), and “physical aggression” (from throwing something at the other person to using a knife or gun). Respondents are asked how frequently they had perpetrated each act in the course of settling a disagreement with a spouse, a child, or a sibling, and how frequently they had been the victim of these acts. Estimates of rates of violence and victimization for both men and women are tallied from these self-reports. Sexual assault is absent from the scale (Johnson, 2002:48-49).

Although the CTS was later amended to include sexual assault, studies utilizing the CTS consistently demonstrate equivalent rates of both severe and minor types of violence and abuse for men and women (Johnson, 2002; Kimmel, 2002; Doob, 2002). (Indeed, the claim of gender symmetry in domestic violence perpetrated by men and women appears to be based almost exclusively on findings from the CTS (Dobash et al, 1998).) The CTS ‘counts’ acts of violence but disregards the context in which those acts occurred; each ‘violent’ act counts as ‘1’ regardless of its being a shove or a stab. Acts of self-defence are counted along with the aggressive acts that provoked them, and one act of violence will characterize an individual as violent (Dobash et al, 1998).

Where gender symmetry exists it tends to be clustered entirely at the lower end of violence (Brownridge & Halli, 2001; Dobash et al, 1998), but to conflate these findings to substantiate the

proposition that all domestic violence and abuse are gender symmetrical flies in the face of the reality of abused women's experiences as patients in emergency rooms and residents in women's shelters, as consequences of the abuse they have endured from their male perpetrators. Indeed, scholarly researchers examining domestic violence have repeatedly cautioned against interpreting the national survey findings of gender symmetry as evidence of gender *equity* in domestic violence, although some scholars and special interest groups, most notably fathers' rights groups, continue to use the findings to support their contention that women are equally as violent as men (Anderson, 2002). The pre-eminence of these arguments in informing both social discourse and legal presumptions "raise troubling questions about what the public is thought to 'know' to be true of domestic violence" (Kimmel, 2002:1334).

In 1993, Canadian policymakers, responding to heightened public awareness of the gendered nature of violence against women, commissioned the first national population survey concerned with violence against women, the Violence Against Women Survey (VAWS). Approximately 12,300 women from across Canada were interviewed using this instrument, which included questions concerned with women's experience of spousal assaults (Johnson, 2002). The VAWS stood in stark contrast to the traditional method for collecting data concerning intimate partner violence through the CTS. Regardless of the vociferousness of those supporting the concept of gender symmetry in domestic violence, data collected by innumerable governments sources across jurisdictions, including Statistics Canada (Brennan, 2011; Ogradnik, 2006; Hotton, 2002; Trainor et al, 2002), the American National Institute of Justice, and the Center for Disease Control and Prevention (Scott-Storey, 2011; Kimmel, 2002), and the Economic and Social Research Council of Great Britain (Radford & Hester, 2006), amongst others, have subsequently revealed a profound gender *asymmetry* with respect to domestic violence, overwhelmingly to the detriment of women, who are the majority of victims. However, studies emanating from the VAWS, as well as the survey itself and current editions of the GSS written by 'feminist' researchers have been attacked for promoting

an allegedly skewed, and thus false, impression of domestic violence as asymmetrically gendered (DeKeseredy, 2011; DeKeseredy & Dragiewicz, 2007; Dutton, 2006).

More recently, the gender symmetry purportedly demonstrated through quantitative analysis of the large-scale surveys utilized by Straus (1993), Straus and Gelles (1986) and Johnson (2006), amongst others, have been challenged by feminist-based quantitative research. Anderson (2002) subjected data from 6,470 respondents to the (American) National Survey of Families and Households (similar to the GSS) to a series of regression analyses to determine if domestic violence is, in fact, gender symmetrical. Anderson's subjects were heterosexual, married and cohabiting couples who had reported being both victims and perpetrators of a single act of minor violence (hitting or throwing something at his/her partner) during an argument. Anderson hypothesized that, if her analyses demonstrated the consequences of this type of 'minor violence' were not symmetrical, it would be difficult for proponents of gender symmetry in domestic violence to continue to claim that intimate partner violence is *not* a gendered phenomenon.

Relying upon previous studies that showed high levels of social isolation, stress, depression, suicide, low self-esteem and substance abuse were associated with domestic violence against women (Stark & Flitcraft, 1996; Pan et al, 1994; Walker, 1984), Anderson examined the relationship between domestic violence perpetration and domestic violence victimization and three psychological variables – depression, self-esteem and substance abuse – that have been constructed as both causes and consequences of domestic violence in prior research.

Anderson found that mental health and substance abuse problems were associated with an increased likelihood of domestic violence perpetration. The use of drugs and alcohol significantly contributed to the perpetration of domestic violence amongst male subjects. Further, substance abuse was significantly more prevalent amongst female victims than male victims or perpetrators. Anderson suggested that her findings supported those of qualitative research studies that female

victims of domestic violence often self-medicate with alcohol or drugs as a method of coping with their abuse.

Further, the association of 'mutual violence' (that is, a single incident of violence within an intimate relationship committed by both a man and a woman against each other (Anderson, 2002)) with depression was significantly higher amongst women. Associations between mutual violence and substance abuse, low self-esteem and depression were found, generally, to be greater amongst women than men. In conclusion, Anderson found that although men and women may report similar rates of intimate partner violence perpetration and victimization, the negative consequences of domestic violence are more likely to be experienced by women. Conversely, men involved in relationships characterized by mutual violence suffer physical and emotional consequences that are significantly less severe than are those experienced by women in such relationships. Accordingly, Anderson concluded that gender symmetry in reported violence perpetration does not imply gender symmetry in outcomes.

4. Theories of the Origins of Woman Abuse

Substance abuse theory: Substance abuse has been implicated in the prevalence of violence in society. However, contrary to popular belief, drug and alcohol abuse does not cause domestic violence (Gelles & Cavanaugh, 2005; Anderson, 2002). Only amphetamine has been associated with increased crime and violence; it raises excitability and muscle tension, possibly leading to impulsive behaviour. Individuals with aggressive personalities who ingest high dosages of amphetamines are likely to become more aggressive when taking this drug (Gelles & Cavanaugh, 2005). The majority of men (and women) who use alcohol and drugs are not violent toward their intimate partners, and most episodes of violence do not involve substance abuse (Gelles & Cavanaugh, 2005).

Further, the common assumption that alcohol and drugs are disinhibitors and relax or negate social governors has been disproven through cross-cultural studies that reveal that drinking behaviours are associated with cultural expectations of what people believe about alcohol and drugs. These cultural

expectations derive from social norms, the implicit or explicit rules governing the appropriateness of behaviour (Neighbors et al, 2012). In a study conducted by Bard and Zacker (1974) of 1,388 cases of domestic assault where nearly half of the male partners admitted to have been drinking at the time of the incidents, blood alcohol tests found fewer than 20% of the men were legally intoxicated, and in only between one-third and one-half of all disputes had one or both parties even used alcohol. Bard and Zacker suggested that “when dealing with highly complex human interaction, it is tempting to simplistically infer that events have been caused by alcoholism” (1974:291). Bard and Zacker hypothesized that their subjects, having assumed they were intoxicated at the time of the assaults, thereby excused their assaultive behaviour.

Biological determinist theory: Since the nineteenth century, biological determinism has viewed criminality to be a consequence of individual pathology or pathologies that predispose the aggressor to violence (Naiman, 2004). Theories of domestic violence founded in biological differences between men and women situate men’s ‘inherent’ proclivity to violence squarely in the study of genes and hormones, although such studies are extremely controversial (Marin & Russo, 1999). Women, as victims of domestic violence have, on the other hand, been constructed as “naturally masochistic, narcissistic, and passive” (Caplan, 1985:18); Freud explicitly described masochism as feminine, even when masochistic behavior was exhibited in men (Caplan, 1985).

The assumption that women are inherently masochistic has become a tenet of psychiatry (Caplan, 1985:20) with the image of the long-suffering, fragile *feminine* woman having captured the public imagination fascinated with ‘scientific’ explanations for human behaviour. Indeed, a common response to the question of why women remain in abusive relationships is that they must enjoy it, or have brought the abuse on themselves (Caplan, 1985).

‘Woman’ as object is valued primarily for her personal appearance and sexual attractiveness. Her persona is characterized by a presumed passivity, dependence and helplessness. Her personal integrity is devalued by the expectation she will live through others and sacrifice her personal needs.

These aspects of woman's gender-role socialization leads to her disempowerment and loss of self-esteem (Nutt, 1999). These oppressive, diminishing, and negating characterizations of 'woman', combined with the concept of female masochism, have come to be recognized in the dominant discourse as necessary ingredients in cases of chronic domestic abuse and violence (Caplan, 1985).

Gender role socialization theory: Woman abuse has also been viewed as a consequence of the gender role socialization of men that predisposes them to be violent toward women (O'Neil & Nadeau, 1999). According to this theory, gender roles are acquired through socialization that 'distorts' them and induces fear of femininity and emasculation in boys. Conversely, these distorted gender roles are, themselves, potentially emasculating, as boys experience negative emotions, including fear, anger, guilt, shame, loss and self-hatred during the course of their socialization. In response to these emotions, men develop protective mechanisms to help them cope with these threats to their masculine gender role identity, including: power and control; restricted emotionality; and homophobia/heterosexism. When these protective mechanisms break down, men become violent and abusive toward women (O'Neil & Nadeau, 1999).

The 'masculine mystique' theory: "Masculine gender-role identity is formed by the overall patriarchy and men's sexist socialization to the values of the Masculine Mystique" (O'Neil & Nadeau, 1999:93). External forces such as unemployment, poverty, health problems, substance abuse, and interpersonal conflicts exacerbate men's difficulty with maintaining their defence mechanisms against their emasculation. Unable to control his rage, shame, and anger, 'the man' (presumably every or any man) rages against the perceived threat of 'woman's' (any and every woman's) emotionality, which he, having suppressed his own emotions, must silence. He rages against the spectre of his own threatened heterosexism. "Violence is the only way to regain one's masculine and heterosexual identity" (O'Neil & Nadeau, 1999:114).

The theory of the "masculine mystique" is attractive in its simplicity: men are threatened by women, so they lash out at them. However, it does not explain why men, presumably in control of the

dominant patriarchal discourse, perpetuate their own socialization in such a negative and damaging way such that they must see themselves as emasculated. In short, the theory of the “masculine mystique” accepts the social construction of gender as a naturally occurring phenomenon – a logical contradiction.

The ‘social learning’ theory: A predilection for violence and abuse has been correlated with a history of domestic violence and abuse in the family of origin (Brownridge & Halli, 2001). ‘Social learning theory’ postulates that behavior is learned through modeling. Observing or experiencing violence by influential people teaches children that violence is a useful means of resolving conflicts in their favour. Girls who witness or experience violence in their families of origin may learn to expect similar treatment from their intimate male partners in adulthood (Brownridge & Halli, 2001). Walker (2000) found that women who were abused by their intimate male partners reported being equally abused as children by both their mothers and fathers, while male abusers were more likely to have been abused by their fathers.

Walker hypothesized that children are socialized to accept corporal punishment from their parents “for their own good” (2000:23), and thus are able, in adulthood, to rationalize abusing their spouses as somehow benefitting the victim through this form of ‘correction’. Sixty-three per cent of Walker’s male batterers reported that their fathers also abused their mothers, and fathers were more likely to batter other family members. Walker concluded that fathers’ behavior had an important impact on their sons who become violent as adults in intimate relationships.

Brownridge and Halli (2001) also found strong correlations between abusive men having witnessed and experienced violence and abuse by their fathers against their mothers and their own high rates of violence in their common law relationships.

Systems theories: Systems theory provides the model of choice for most social workers and psychologists engaged in the domestic relations field, including those who act as assessors and mediators in the family courts.

Systems theories ... emphasize an interpersonal perspective that focuses upon the

social and relational contexts and the unique patterns of interaction that recur within relationships. Systems perspectives highlight the unique histories of each partner and the situational factors that characterize a given relationship (Anderson & Schlossberg, 1999:137).

Kerr's and Bowen's 'family systems theory' (1988) has been identified as the best and most comprehensive explanation of the development and maintenance of intimate partner relationships within system theory, generally (Skowron, 2000). According to Kerr and Bowen, a family is a 'system' in which each member is assigned a particular role, and that member is expected to react to and interact with every other member of the 'system' in accordance with his or her role, all of which is determined by unstated but socially prescribed 'relationship agreements' (GenoPro, 2012; Kerr & Bowen, 1988).

The problems arising from the use of family systems theory in cases of woman abuse are self-evident. It assumes that each party to an abusive intimate relationship is equally to blame, as both are viewed as "co-responsible" (Anderson & Schlossberg, 1999:139). Family systems theory ignores the relevance of personal agency in woman abuse: abusive men *choose* to be abusive. It ignores the roles of intentionality in woman abuse: to exert power and assume control by the dominant partner over the weaker, thereby privileging the former and disempowering the latter. Despite attempts to introduce feminist standpoint variables, such as the conceptualization of power in terms of interpersonal bargaining processes (Anderson & Schlossberg, 1999), family systems theory is antithetical to an analysis of woman abuse within a critical paradigm.

Situational partner violence theory: 'Situational partner violence' theory arises from the 'family violence perspective' of systems theory and is purportedly supported by the findings of gender-symmetry in the large scale surveys utilized by Straus and his proponents. Originally identified as 'common couple violence', this theory views domestic violence and abuse as responses to stress within and/or without the family (Johnson, 1995), in contrast to more serious and chronic "patriarchal" violence (Johnson, 1995) or "intimate terrorism" (Johnson & Ferraro, 2000), which are pathological in origin.

Common couple violence is an intermittent response to the occasional conflicts of everyday life, moderated by a need to control in the specific situation but not a more general need to be in charge of the relationship. In contrast [is] the causal dynamic of patriarchal terrorism, adopted with a vengeance by men who feel they must control “their” women by any means necessary (Johnson, 1995:286).

Johnson estimated that ‘common couple violence’ occurs in families on an average of once every two months, is as likely to be perpetrated by women as by men, and does not escalate over time, although he offered no evidence to support these contentions. In subsequent articles (Johnson, 2006; Johnson & Leone, 2005; Johnson & Ferraro, 2000) Johnson expanded his explication of ‘intimate terrorism’. What distinguished common couple violence from intimate terrorism was the presence of “the constellation of controlling behaviours that the perpetrators use to dominate their relationships” (Johnson & Ferraro, 2000:854). His adoption of the term “situational partner violence” in place of “common couple violence” did not alter the premise upon which the concept was based. However, now Johnson suggested that violence in intimate relationships was endemic in family life, reflective of the acceptance and promotion of a culture of violence in America. In this regard, Johnson and Leone (2005) assume that violent responses to social and/or interpersonal stimuli should not be considered pathological, given that society celebrates violence as a means of gaining power and asserting control, and violence is one of the most common forms of political action (Dobash & Dobash, 1979). Therefore, for Johnson and Leone (2005), family conflicts may lead to violence.

Inherent in the rationale for domestic violence of Johnson and Leone (2005) is the contradiction that, while situational partner violence does not arise out of the perpetrator’s desire for power and control, they define violence as a means of gaining power and control, generally, in society. They do not explain why domestic violence differs in this regard from violence in the public domain. Further, what has been lost in Johnson’s subsequent expansions of his concept of situational partner violence is his initial caveat in describing common couple violence: “[t]here may well be cases in which the perpetrator does not need to use violence often in order to terrorize his [sic] partner ... [violence] may be one of many tactics and is partnered with psychological abuse in the fear instilled

in victims that they will be attacked again” (1995:287). Indeed, “a single incident of violence can permanently alter the balance of power within a marriage” (Frieze & McHugh, 1992:461).

Johnson does not acknowledge that, even in a purportedly violent society like that of the United States, physical violence, at least that perpetrated in the public sphere, still attracts criminal sanctions. Nor does Johnson recognize in his scholarly publications the role of personal agency in a perpetrator’s decision to use violence in his or her intimate relationships. Most importantly, Johnson, unlike Stark (2007), fails to acknowledge that there is rarely one violent incident in an intimate relationship; “...by the time abuse reaches this point, coercive control is likely to have severely eroded a woman’s personhood from the inside out, the way carpenter ants devour a house” (Stark, 2007:218). The acceptance and promotion of the theory of situational partner violence by the family justice judiciary is similar to what Stark terms “the reigning level of ignorance” apparent in medicine, which has also revealed a profound lack of understanding about the phenomenon of woman abuse (2007:40).

Coercive control theory: Stark adopted the term “coercive control” to describe what Johnson (2006) has called “intimate terrorism”. In so doing, Stark has appeared to endorse Johnson’s “typology” of violent and abusive relationships. Both Stark and Johnson distinguish between “situational partner violence” and a different “class of abusive behavior” having “different dynamics and qualitatively different outcomes [that] should be judged by different moral yardsticks. They also require a different response. Abuse should no more be considered a simple extension of using force than a heart attack should be treated as an extreme instance of heartburn” (Stark, 1997:104).

At first blush, Johnson’s and Stark’s conceptualization and categorization of ‘types’ of domestic violence look similar. Both assume the vast majority of assaults between intimate partners are “relatively minor” (Stark, 1997:104) and viewed by couples engaged in this conduct as “legitimate ways to settle differences” (Stark, 1997:104). Both Stark and Johnson note that these

“relatively minor incidents” are engaged in equally by men and women and, in this regard, both Stark and Johnson cite Straus’s work promoting gender symmetry of domestic violence (Straus, 1993,1979; Straus & Gelles, 1986), even while acknowledging that women report incidents of violence in greater numbers than do men, and suffer more serious injuries from domestic assaults than do men.

Stark’s “coercive control” model, in his opinion, “more accurately captures the tactics being deployed in the type of abuse [than does Johnson’s], which are not intimate and have little to do with the tactics normally used by terrorists” (2007:105).

In contrast to fights between relative equals where violence is used to settle conflicts, the perpetrators of partner assaults or coercive control hope to suppress conflict or keep it from surfacing or to punish a partner for some perceived hurt or transgression, almost always by asserting the physical superiority of the person initiating the abuse (2007:105).

Stark’s recognition of the sedimentation of patriarchal power in society that facilitates woman abuse distinguishes his paradigm of domestic violence and abuse from Johnson’s:

the imposition of control in abusive relationships presupposes the unequal distribution of right and resources even as the perpetrator takes the substance of inequality as the focus of his abuse, by imposing the victim’s compliance with gender stereotypes, for instance. Asymmetry in sexual power gives men (but rarely women) the social facility to use coercive control to entrap and subordinate partners. Men and women are unequal in battering not because they are unequal in their capacities for violence, but because sexual discrimination allows men privileged access to the material and social resources needed to gain advantage in power struggles (1997:105).

Coercive control recognizes the myriad of ways abusive men subjugate their female intimates in a concerted effort to disempower them and thereby render them vulnerable, isolated and helpless. Coercive control does not have to include physical violence, but represents a campaign of psychological, emotional and financial (amongst other) forms of woman abuse that entrap women, over time, in these toxic, demeaning, demoralizing, and humiliating states of dependency. Women subjected to coercive control lose their “liberty”, in effect, their ability to self-actualize by “foreclosing their opportunity to imagine and freely choose to perform certain activities and not

others” (Stark, 1997:280). It is the cumulative effects of “hundreds or even several thousand incidents” (Stark, 1997:375) that diminish abused women’s independence, autonomy and personal integrity over time.

Both Johnson’s and Stark’s conceptualization of domestic violence rely upon “typologies” to distinguish intimate terrorism/coercive control from other ‘types’ of domestic violence. In so doing, they normalize these other ‘types’ of violence by relying on their perceived gender symmetry, and absence of an intent to control. It is difficult to imagine how Stark, who acknowledges the all-pervasiveness of male dominance in society, could differentiate amongst different ‘types’ of male violence and abuse of women, in a sense, rationalizing some ‘types’ as symmetrically gendered and other not. In so doing, Stark ignores the reason most women strike: they strike *back*.

Further, both Johnson’s and Stark’s “typologies” require a subjective determination of what differentiates situational couple violence from coercive control. Questions that might be asked in making this assessment could include: how long has the misconduct continued; and, what is the nature of the conduct. The answers to both questions may be readily ascertainable. But how would the judiciary establish a threshold between intimate terrorism/coercive control and other “types” of violence and abuse? Would there have to be a checklist of behaviours that identified intimate terrorism/coercive control? Would there be a particular length of time the perpetrator engaged in intimate terrorism/coercive control that would be necessary to cross the threshold?

In reality, it is the *effect* of the misconduct on the victim that appears to determine whether the violence and/or abuse suffered is or is not intimate terrorism/coercive control. Stark recognizes that how an abused woman will react to her abuser and his actions depends on many factors particular to each individual; some abused women are more resilient than others, and/or have better (or worse) strategies to self-protect (1997). In this regard, therefore, the determination of the effects of the intimate terrorism/coercive control on each victim would necessarily be subjective. Not only

the victim's personal lived experience of the misconduct, but the judge's assessment of the nature and degree of the victim's suffering would be brought to bear in the decision-making.

At this point, a judge would be engaged in assessing the victim's psychological, emotional and physical sequelae from the actions of the perpetrator to ascertain if they amounted to intimate terrorism/coercive control. Absent credible expert evidence in this regard, it is difficult to imagine what information a judge would rely upon when making this decision, other than his or her own personal subjectivities and opinions, since few, if any judges have the requisite personal expert knowledge to make these determinations. The issues of the impact of personal subjectivity and opinion on judicial decision-making, and judges' reliance on theories and constructs emanating from psychology, psychiatry, sociology and 'junk science' in the absence of expert testimony are discussed in Chapter Three.

Feminist standpoint theory: While the *actus* of woman abuse may vary from abuser to abuser, relationship to relationship, and the consequences of that *actus* may vary from victim to victim, and over time, the intent of the abuser, from a feminist theoretical standpoint is the same: to maintain power and control.

The feminist standpoint theory of woman abuse provides a comprehensive framework in which to examine the phenomenon. This theory identifies patriarchy as both structural and ideological (Dobash & Dobash, 1979). Patriarchal structure "is manifest in the hierarchal organization of social institutions and social relations, an organizational pattern that by definition relegates selected individuals, groups, or classes to positions of power, privilege, and leadership and others to some form of subservience" (Dobash & Dobash, 1979:43). The promotion of patriarchal values, norms, practices, symbols, and institutions by a dominant discourse through cultural symbols has ensured that the socialization of those within society reinforces the acceptance of a hierarchal order that privileges men (Marin & Russo, 1999). Further, power and control, and the patriarchal discourse that both engenders

and promotes them, are operationalized through a gender hierarchy which privileges men, and oppresses women.

Woman abuse is the means by which some men assert their patriarchal power and control within the private domain of the home. That social factors, such as socio-economic status and/or immigrant status appear to mediate woman abuse does not detract from the gendered nature of the phenomenon, nor its *raison d'être* in its infliction by abusive men (Moore, 1997). Accepting that woman abuse can be examined taking into consideration social, psychological, biological, psychosocial, individual and relational factors (O'Neil & Harway, 1999) does not detract from the fundamental premise of feminist theoretical paradigms: men's use of violence and abuse against women "is a form of social control used to maintain a subordinate social and political status for women" (Marin & Russo, 1999:19-20). Simply stated, some men abuse women because they can.⁵

5. Abused Women and Child Abuse

The prevalence of child abuse: Research on domestic violence has developed separately from that concerned with child protection, with issues surrounding the impact of domestic violence and abuse on children arising incidentally to the research of domestic violence per se (Radford & Hester, 2006). More recently, a body of research has developed that deals exclusively with the intersection of domestic violence and abuse and children (Radford & Hester, 2006), and emergent findings reveal that children who experience domestic violence and abuse directly and/or indirectly are at great risk.

It is clear that violence against women has a profound impact on their children when one considers that 40% of women assaulted by spouses say that their children witnessed the violence against them (Kong, 2006), and that children and youth are more at risk of physical assault by their parents (Sinha, 2011). Between 1999 and 2009, there were 326 homicides in Canada of children aged 0 to 17 committed by family members, 84% of which homicides were committed by parents (Sinha, 2011). Of the 15,000 child and youth victims of family related violence in Canada, 67% were physically assaulted, of which 18% were characterized as serious assaults: assault bodily harm; aggravated

assault; or assault with a weapon (Sinha, 2011). One-third of the child and youth victims of family related assault were sexually assaulted, with parents responsible for more than one-half of these offences (Sinha, 2011). Girls under the age of 18 were four times more likely than boys to be victims of sexual assault by family members, regardless of their ages (Sinha, 2011).

Earlier reports on family violence prepared by Statistics Canada provide a clear snapshot of the gendered nature of child abuse; in its 2007 report on family violence in 2005, male family members were identified as the accused in 97% of all family-related sexual assaults and in 71% of physical assaults against children and youth, with fathers accounting for 38% of all family-related sexual assaults, followed by male-extended family members (31%) and brothers (28%). For physical assault, where the relationship between perpetrator and victim was identified in police reports, fathers were the most frequently identified (61%), followed by brothers (20%) (Brzozowski, 2007). Female family members were seldom identified as the perpetrators of violence against children (Brzozowski, 2007).

Fathers were found more likely to be the perpetrators of family-related homicides against children and youth; between 1996 and 2005, 56% of children and youth killed by family members were killed by their fathers and 33% by their mothers (Brzozowski, 2007). Investigations of 103,298 investigations conducted by child welfare agencies into allegations of child abuse have revealed that, in 40% of substantiated or suspected cases of child abuse, child-functioning issues were confirmed through observation or formal diagnosis, including: any behavioural issues (40%); health issues (34%); and any child functioning issues (50%). Child functioning issues included: depression or anxiety (17%); learning disabilities (15%); negative peer involvement (13%); Attention Deficit (or Hyper-activity) Disorder (13%); irregular school attendance (14%); the need for specialized education (12%); and violence toward others (11%) (Trocmé, Fallon et al, 2005). The primary causes of child maltreatment leading to emotional harm noted in these allegations of child abuse were: neglect (19%); exposure to domestic violence (14%); physical abuse (44%); emotional abuse (35%); and sexual abuse (27%) (Trocmé, Fallon et al, 2005). Exposure to domestic violence occurred when a child directly

witnessed violence between his/her parents, or saw the effects of domestic violence, such as bruising on the victims, or overheard the violence (Trocmé, Fallon et al, 2005).

The sequelae of child abuse: Recent research has provided compelling evidence that the consequences to health of children who are abused can be found at the cellular level in the brain, with changes to the DNA of cells located in those parts of the brain that manage stress responses. McGowan et al noted significant changes in the brains of individuals who committed suicide, and had reported having experienced child abuse and/or neglect, suggesting that “the transmission of vulnerability for depression from parent to offspring could occur, in part, through the epigenetic modification of genomic regions that are implicated in the regulation of stress responses” (2009:345) – in other words, child abuse causes permanent changes in those parts of the brain that regulate stress response.

Further, childhood physical abuse has been: associated with heart disease in adulthood (Fuller-Thomson et al, 2010a); significantly associated with functional somatic syndromes in adult women (multiple chemical sensitivities, irritable bowel syndrome, chronic fatigue syndrome, and fibromyalgia) (Fuller-Thomson et al, 2011a); highly associated with migraine in adults (Fuller-Thomson et al, 2010b); and highly associated with cancer in adulthood (Fuller-Thomson et al, 2009). The most recent study of Fuller-Thomson et al (2011b) found a significant and stable relationship between childhood physical abuse and peptic ulcer disease in adulthood. It should be noted that Fuller-Thomson et al, throughout their studies, did not examine the relationship, if any, between childhood emotional abuse and the various diseases and illnesses under investigation, and this omission should be the subject of further study.

The vulnerability of children to abuse: Walker (2000) found a high overlap between partner and child abuse in her study of 403 women abused by their intimate male partners. Further, studies conducted in the United Kingdom of women’s experiences of domestic violence have revealed a link between woman abuse and physical and/or sexual abuse of children (Radford & Hester, 2006). Fathers may engage in child abuse as a form of woman abuse, and/or may engage in woman abuse in order to

distance themselves as a source of support for their children so that the abusers can more easily continue their sexual abuse (Radford & Hester, 2006).

Woman abuse renders children more vulnerable to being abused by their mothers; Walker's participants admitted that they were eight times more likely to physically abuse their children when they, themselves, were being physically abused than when they were not (2000). However, the presence of domestic violence in the home affects children in far greater ways than provoking their mothers to abuse them.

Children exposed to domestic violence and abuse: One of the most significant developments in the field of family violence made over the past two decades has been the recognition that children who witness or are exposed to domestic violence are seriously at risk for developing child and adolescent psychopathologies (Gewirtz & Edleson, 2007; Trocmé, Fallon et al, 2005; Walker, 2000; Maker et al, 1998; Sternberg et al, 1993; Fantuzzo et al, 1989). In fact, witnessing domestic violence is a form of psychological or emotional abuse that can leave the same adjustment problems as the direct experience of physical or sexual abuse (Special Joint Committee on Child Custody and Access, 1998). Witnessing or being exposed to domestic violence includes watching or hearing events, direct involvement (calling police, or attempting to physically intervene between perpetrator and victim), or experiencing the aftermath (seeing cuts and bruises, and/or witnessing maternal depression) (Fantuzzo & Mohr, 1999). Jaffe (2002) found that 96% of the children of the abused women he studied in London, Ontario ($n=62$) had been exposed to parental abuse, of which 91% first experienced parental abuse in infancy.

The sequelae of children witnessing domestic violence and abuse: Children exposed to domestic violence and abuse have been found to exhibit more aggressive and antisocial behaviours (externalizing behaviours), as well as fearful and inhibited behaviours (internalizing behaviours) (Fantuzzo et al, 1991; Hughes et al, 1989), and higher anxiety, depression, trauma symptoms and temperament problems than non-exposed children (Maker et al, 1998; Sternberg et al, 1993). Children exposed to domestic violence also have low self-esteem, poor peer relationships, poor academic

performance and truancy, PTSD symptoms, and self-blame and guilt for the domestic violence to which they are subjected (Jaffe, 2002). Children who witness woman abuse in their homes may be profoundly affected by the fear of their mothers' dying as a result of the violence perpetrated by their fathers, and children are more affected by the stress their mothers endure as a consequence of domestic violence and abuse than the violent episodes themselves (Radford & Hester, 2006).

In their study of forty abused, and 44 non-abused children residing in a women's shelter, Hughes et al (1989) found that those children who were both abused *and* witnessed or heard physical altercations between their parents, the so-called *double-whammy* effect, exhibited more severe problem behaviours than those who had witnessed domestic violence but had not been abused themselves, (Hughes et al, 1989). In contrast, Sternberg et al (1993) conducted a study of 110 Israeli Jewish children living at home with both parents: 33 had been physically abused by their parents; 16 had witnessed abuse; 30 had been both victims of abuse and witnessed it; and 31 had experienced no known domestic violence (the comparison group). Contrary to the presumption of the *double-whammy* effect, these researchers found that children who witnessed abuse did not differ significantly in their behaviours from children who, themselves, had been physically abused, nor those who had both witnessed abuse and been physically abused. Those children who had been physically abused, however, themselves described more depression and behavioural problems than those who had witnessed abuse, but had not been abused.

The apparent contradictions between the results of these two studies may reflect some of the methodological problems enumerated by Fantuzzo and Lindquist (1989), such as sample size, *locus* of study, who was asked (mothers, fathers or children), and the effects of other stressors (poverty, for example).

Mothers may underestimate the impact of violence and abuse on their children. Research has shown that children as young as two years of age later recount having witnessed acts of violence perpetrated by their fathers against their mothers (Radford & Hester, 2006). Mothers who believe that they

have successfully shielded their children from the worst of their abuse later learn that the children were fully aware of what was happening, although they remained silent about what they knew or observed (Radford & Hester, 2006). The realization that they had been unable to shield their children from domestic violence and abuse, even as they believed they were acting in their children's best interests, evoked feelings of failure and guilt in abused women, who assumed responsibility for their children's suffering caused by the actions of their abusers, who were, in turn, thereby relieved from any responsibility for their actions (Radford & Hester, 2006).

Witnessing domestic violence and abuse in childhood also has long-term consequences. Maker et al (1998) found that young women who witnessed domestic violence in their childhoods were more likely to experience violence in their dating relationships, exhibit a greater number of antisocial behaviours and trauma symptoms, and were more depressed than those who did not. Further, the more severe the violence witnessed, the higher the levels of these outcomes experienced.

Not all children develop psychopathological reactions to having witnessed domestic abuse. Certain factors in children's lives appear to protect them against the long-term effects of child abuse: high intelligence on the part of the child; internal 'governors', or control mechanisms for behavior; positive self-image or self-esteem; and a determination to be different from abusive parents (Herrenkohl et al, 2008). A positive relationship with a caring and non-abusive adult can also reduce the likelihood of negative outcomes (Herrenkohl et al, 2008). Mothers and mothers' positive interaction with their children figure prominently in the research as protective indicators against the long-term effects of witnessing and experiencing abuse. "Positive parenting by mothers can mitigate against damages from exposure to abuse" (Walker, 2000:78). For example, the influence of mothers who are highly accepting and responsive to their children's needs in the face of woman abuse have been found to significantly reduce the risks to children for dropping out of school and teenage pregnancies (Tajima et al, 2011).

One would think that social services would attempt to assist mothers who are, or have been, in abusive intimate relationships in order to facilitate optimum outcomes for their children, but the opposite seems to be true. Women involved in abusive relationships bear the brunt of blame for their children witnessing domestic violence, the most plausible explanation being that society expects mothers to keep their children out of harm's way regardless of the cost to themselves (Walker, 2000). This explanation recalls the construction of 'woman' as self-sacrificing. Pursuant to section 37(2)(f) of Ontario's *Child and Family Services Act*, a child will be deemed in need of protection if he/she has suffered emotional harm, demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behavior, or delayed development, and there are reasonable grounds to believe that the harm has been caused by the actions, failure to act, or pattern of neglect on the part of the custodial parent.

Inasmuch as child protection agencies in Ontario have identified living with domestic violence as a form of emotional or psychological abuse (Roberts, 2007), the effect of the legislation is that mothers who fail to leave abusive relationships are deemed to be unfit. Their children will be assessed as being at risk and in need of protection *from their abused mothers*, from whom they will be seized. "The concept of 'failure to protect' essentially transforms [the mother's] experience of being battered to one of causing her children harm" (Strega, 2006:252). Indeed, with the inclusion of section 37(2) in 2000 to the *Child and Family Services Act* to broaden the definition of a child in need of protection to include "risk", reports of domestic violence cases to the Children's Aid Society increased by *four hundred per cent* between 2000 and 2003 (Roberts, 2007). The consequences of this policy are detrimental to women and children, and contribute to a continuing failure to hold abusive men responsible – or even acknowledge their culpability – in the perpetration of violence against women (Strega, 2006).

Children's relationships with their abused mothers post-separation: Wallerstein and Kelly (1980) found that woman abuse seriously impacts the mother-child relationship after marital separation. Children left in the custody of their mothers who were abused by their fathers during marriage may

model the abusive behaviours they witnessed, physically, emotionally, and even financially. Where the father was a “harsh and frightening disciplinarian”, his departure can signal “a new freedom [to the children] to express impulses that had been carefully held in check during his presence, a freedom to do so with impunity and with pleasure” (Wallerstein & Kelly, 1980:444). Such children may express anger and blame directed at mothers perceived to have permitted the abuse or caused the marital problems leading to the break-up of their marriages. Alternatively, children exposed to woman abuse may become wholly aligned with their abused mothers, becoming compliant and unquestioningly obedient (Wallerstein & Kelly, 1980). In either case, children exposed to woman abuse suffer emotionally as a consequence, developing coping strategies that can inhibit their own emotional and psychological well-being and development. Four of the survivor participants in this study were physically abused by their children after marital separation.

The sexual abuse of children: The sexual abuse of children has particularly devastating consequences for them. Vine et al (2006) found that most forms of substantiated sexual abuse involve sexual contact, including fondling (68%) and intercourse (21%). Children subject to sexual abuse have been identified as having diminished self-esteem, anger, hostility, aggression, antisocial behavior, guilt, shame, depression, sleep disturbances, “traumatic sexualization” – meaning the inappropriate development of the victims’ sexuality (Finkelhor & Browne, 1986:181) – difficulties at school, truancy, delinquency, running away from home, early marriages, and eating disturbances (Browne & Finkelhor, 1986). A history of childhood sexual abuse has been found to increase the likelihood of depression, self-destructive behaviours including substance abuse and sexual promiscuity, anxiety, feelings of stigma and isolation, poor self-esteem, trust issues and sexual problems (sexual dysphoria, sexual dysfunction, impaired sexual self-esteem, and avoidance of or abstention from sex) in adult women (Finkelhor & Araji,1986; Finkelhor & Browne, 1986). Two of the survivor participants admitted to being sexually abused by their fathers.

Given that fathers are usually the perpetrators of sexual assaults against their (mostly female) children and the perpetrators of violence and abuse, generally, toward their female intimates, it is not surprising that children residing in households where domestic violence occurs are at higher risk for sexual abuse than are children in nonviolent households (Fantuzzo & Mohr, 1999). The sexual abuse of children should be understood as part of the broader problem of men's violence against women and children (Hooper, 1995).

However, numerous research studies have attempted to link child sexual abuse with the sexual abuse of mothers during their own childhoods, suggesting that it is a distinguishing characteristic of mothers who had been sexually abused as children that renders their own children vulnerable to sexual abuse. This conceptualization of a "cycle of abuse" has been criticized as deterministic and disempowering to women by pathologizing their experiences as children, and thereby implying that they are a danger to *their* children (Hooper, 1995:352). What the empirical literature does demonstrate, however, is the apparent vulnerability of women who have been sexually abused as children being revictimized in their adult intimate relationships (Browne & Finkelhor, 1986).

'Parental alienation syndrome': There is compelling evidence that abused women's allegations of sexual abuse of their children by their abusers are not believed, although false allegations of both child abuse and sexual abuse of children are rare (Trocmé & Bala, 2005; Brown et al, 2000; Charlesworth, 1999; Penfold, 1997). Columbia University psychiatrist Richard Gardner coined the term "parental alienation syndrome" (PAS) in his best-selling (self-published) opus of the same name (1992), in which he blamed vindictive mothers for pressuring their children to advance false allegations of sexual abuse by their fathers in custody disputes (Trocmé & Bala, 2005; Kooklan, 2002). "Conceptualizing one parent as 'good', and the other as the 'programming' parent, fits well with the adversarial model of a family justice system that traditionally awarded custody to the 'better' parent" (Bala, Fidler et al, 2007:83-84).

[Gardner] argued that alienation only became a problem in the latter years of the

twentieth century, because courts had abandoned a maternal presumption for custody cases; faced with a gender-neutral “best interests of the child” test, some mothers resorted to alienating children from their fathers to ensure that they would get custody. His original description of the syndrome, which identified custodial mothers almost exclusively as the programming parent, gave fathers potentially important ammunition in litigation. Not surprisingly, frustrated by what they perceived as an imbalance between aggressive judicial enforcement of child support and only sporadic enforcement of access, fathers’ rights groups embraced the concept of PAS. That concept allowed fathers to blame mothers for access difficulties, and offered an explanation for their children’s unwillingness to see them ... (Bala, Fidler et al, 2007:84-85).

However, Gardner’s “syndrome” has been criticized as simplistic, not founded on scientific rigor or credibility, and easily discredited. Faller (1998) discredited Gardner’s PAS nearly twenty years ago. She pointed out that, while Gardner believed 95% of allegations of sexual abuse advanced by children to be true, he was convinced that the vast majority of these allegations made in the context of divorce are false. “He evidently did not see that the likely outcome of the discovery of incest is a decision by the mother to divorce the offending father” (Faller, 1998:104). Gardner considered children to be “polymorphous perverse” – that is, unilaterally and spontaneously capable of engaging in any manner of sexual activity, yet influenced by a variety of sexual influences including the media. He also described sexually abused children as “wicked”, writing “[w]hat strikes me is the degree of sadism that many of these children may exhibit. In many of these cases I have been impressed by what I consider to be the innate cruelty of these children” (Gardner, 1992:119-120).

Gardner and his followers employed/employ the Sexual Abuse Legitimacy Scale, which, like the CTS, is seriously lacking in credibility and has never been validated. It is focused on father-child incest (Faller, 1998). “It is important to appreciate that Gardner publish[ed] the vast majority of his work himself” (Faller, 1998:106). The fundamental flaw in his work is that Gardner failed to take into account alternative explanations for children’s and mothers’ behaviour, including that the allegation might be true, or that the mother was genuinely mistaken (Faller, 1998). “No data are presented by Gardner to support the existence of the syndrome and its proposed dynamics. In fact, the research and

clinical writing of other professionals lead to a conclusion that some of its tenets are wrong and other tenets represent a minority view” (Faller, 1998:112).

Later, Johnston et al (2005) studied 125 children referred from family courts for custody evaluation or custody counseling and found that most children are resistant to pressures from one parent to reject the other in high conflict divorce cases, where alienating conduct by both parents is the norm.

Allegations of sexual abuse of children advanced by abused mothers may be taken by the court as indicia of PAS, and genuinely abusive men often attempt to dismiss their partners’ allegations of abuse as deliberate fabrications, or to attribute children’s expressed fears about access visits to their mothers’ alienating behaviour (Special Joint Committee on Child Custody & Access, 1998). This discrediting of women in the courtroom arises from the oppressive, patriarchal stereotype of ‘deserted’ women as overtly emotional, unstable or hysterical, vindictive and consumed with hatred for their estranged spouses (Heim et al, 2002; Charlesworth, 1999). Consequently,

in essentially every case in which the courts placed children with their abusers, despite substantial evidence of sexual abuse or domestic violence and no evidence of fabrication on the protecting parent’s part, it is the parental alienation syndrome that is used by the judge, the evaluator, or the children’s lawyer to ignore and discount the abusive evidence and to wrongfully construe all of the children’s symptoms as evidence of alienation (Waller, 2001:2).

PAS has been extended to apply to cases involving allegations by abused women of domestic violence and abuse, generally. Hence the court may readily accept the three most common arguments advanced by abusive men in their defence or to support their claims for custody or access:

1. The mother is psychologically unstable;
2. The mother is financially incapable of caring for the children;
3. The mother’s allegations of violence are exaggerated or unfounded (Bala et al, 1998).

The concept of parental alienation continues to inform public perception about the sexual abuse of children by their parents.

During its 1998 hearings, the Special Parliamentary Joint Committee on Child Custody and Access heard heated testimony from fathers, men’s groups and professionals about the problem of false sexual abuse allegations in cases involving custody disputes. One witness is quoted as saying that false sexual abuse allegations are the “weapon of

choice” of mothers in custody disputes. The Director for Legal Services for a local child welfare agency gave the Committee the “rough” statistic of “three out of every five cases ... of alleged abuse ... involve custody and access.” The Director of another agency estimated that “only 15% of allegations made in divorce cases are likely to be true” (Trocmé & Bala, 2005:1334).

In order to challenge these popular misconceptions, Trocmé and Bala (2005) conducted a multistage sampling of 51 child-welfare service areas across Canada in which allegations of child maltreatment were investigated during the months of October-December, 1998 in the selected sites. A sample of 7,672 child maltreatment investigations reported to child welfare authorities because of suspected child abuse or neglect were identified. Statistical analyses were used to examine the relationship between source of referral, form of maltreatment, custody dispute, and false allegations. Of the estimated 135,574 child maltreatment investigations conducted in Canada in 1998, only 4% of all reports were judged to have been intentionally false. However, when the allegations were raised within the context of a custody or access dispute, the rate of intentionally false allegations was 12%, with anonymous reporters and non-custodial fathers most frequently making false reports. The researchers were surprised to discover that false allegations of neglect and emotional maltreatment were far more prevalent than false allegations of abuse. PAS is discussed further in Chapter Three.

Child abuse = woman abuse: Pence and Paymar (1993) argued that child abuse is a form of woman abuse. Both woman and child abuse are perpetrated by abusive men as means of gaining power and control over those weaker than themselves. Acts of violence by fathers against their children and witnessed by their mothers are forms of woman abuse, and the abuse of children by their fathers should be viewed as a form of woman abuse (Hooper, 1995).

Men’s abuse of their children and partners may be difficult to separate into discrete categories of ‘child maltreatment and abuse’ and ‘domestic violence’ where the intention of the perpetrator is the violence or abuse of the child will have a directly abusive impact on the woman (Radford & Hester, 2006:61).

Men who abuse their female partners deny their children their mothers’ full capacity to care for them as a consequence of the physical, emotional, psychological, and cognitive impairments resulting

from their abuse. Men who abuse their children negatively and detrimentally affect their emotional, psychological and behavioural stability and development, thereby interfering in the relationship between mother and child. Men who abuse their female intimates cause damage to their children who often witness their abuse and/or its aftermath. These children, too, are affected emotionally, psychologically and behaviourally, and their relationships with their mothers are likewise diminished. Accordingly, it is the position throughout this study that child abuse is woman abuse, and woman abuse is child abuse. This does not suggest that woman abuse cannot occur in the absence of children; it does.

6. Intersectionality and Woman Abuse

“Intersectionality focuses on how forms of oppression and inequality intersect. Depending on an individual’s circumstances, gender is modified by other forms of oppression and markers of difference” (Brownridge, 2009:9). That every individual’s life can be characterized as the locus of a multitude of oppressions and ‘markers of difference’ has called into question the efficacy of an intersectional approach in research because of the apparent difficulty in identifying and addressing a particular phenomenon, the purpose of empirical research (Brownridge, 2009; Ludvig, 2006).

However, Yuval-Davis (2006), in response to this criticism identified four ‘social markers’ that have universal application to one’s social location:

in specific historical situations and in relation to specific people there are some social divisions that are more important than others in constructing specific positioning. At the same time, there are some social divisions, such as gender, stage in the life-cycle, ethnicity and class, that tend to shape most people’s lives in most social locations, while other social divisions such as those relating to membership in particular castes or status as indigenous or refugee people tend to affect fewer people globally (at p.203).

Intersectionality must be seen as having a multiplying, not additive effect (Ludvig, 2006).

Social divisions are institutionalized in one’s social life; “[s]ocial divisions have organizational, intersubjective, experiential, and representational forms, and this affects the way we theorize about them” (Yuval-Davis, 2006:197). Social divisions also inform subjective, personal accounts of

experiences “in terms of inclusion and exclusion, discrimination and disadvantage, specific aspirations and specific identities” (Yuval-Davis, 2006:197).

While categories of oppression are, themselves, social constructs, and have been criticized for being fundamentally self-limited, “they nevertheless have “real” consequences for our existence in everyday life” (Ludvig, 2006:248). Intersectionality is, therefore, an important ingredient in the examination of woman abuse. “Intersectionality can be applied to understanding definitions, risk, causes, experiences, consequences of, and responses to, violence” (Brownridge, 2009:11). Certainly age, socioeconomic status, ethnicity, culture, and/or religion, able-ness, citizenship status, and the presence and age of children had profound consequences for the survivor participants in this study in their narratives of abuse, and are examined, below.

a. Age

The World Health Organization has adopted the following definition of “elder abuse”: “elder abuse is a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person” (WHO, 2008:6). It is interesting to note that some research concerned with the abuse of older persons included with that group individuals with disabilities, under the presumption that old people and the disabled share similar needs and interests (McDonald et al, 2006), thereby homogenizing the phenomenon of abuse between these two populations who have, in reality, different experiences, responses, and needs.

Older women are more likely to be victims of domestic violence than are older men; of senior victims of domestic violence, in Canada in 2009, 41% of domestic violence against older women was perpetrated by male spouses and/or adult children (Sinha, 2011). Further, older women are more likely to be murdered by family members than are older men; between 1994 and 2003, 67% of murders of older women in Canada were committed by family members, 29% of which murders were committed by spouses (Turcotte & Schellenberg, 2007); this statistic rose to 37% by 2007 (McGeachie, 2007).

There is scant research in the area of woman abuse for and of older women, even though the experiences of woman abuse for older women, and their needs, are substantially different from their younger counterparts. Domestic violence amongst the elderly can manifest as a continuation of long-standing abuse, as violence that starts only in old age, or that begins with a new relationship commenced later in life (Straka & Montminy, 2006), although woman abuse in older populations is usually regarded as “a form of wife abuse grown old” (McDonald et al, 2006:439; Straka & Montminy, 2006; Phillips, 2000). Older women experiencing woman abuse are doing so as on a continuum of domestic violence of abuse that has characterized their spousal relationships throughout their marriages (Band-Winterstein & Eisikovits, 2009). Research conducted in 1992 by the American Association of Retired Persons into the phenomenon of woman abuse amongst older women demonstrated that older victims of woman abuse are less likely than younger abused women to leave their abusive partners (Wolf, 2000).

The lives of older women experiencing woman abuse are the sites of (at least) two intersecting oppressions: gender and age. Old age, constructed as a social liability, compounds the oppression older women have experienced throughout their lifetimes as second-class citizens in an ageist society (Harbison et al, 2006). Their socialization in earlier times usually prevents them from leaving their abusive relationships, or seeking help – they must cope with their lot in life (Aronson et al, 1995) – as a consequence of having been raised during periods of want and war, and when duty to family superseded self-actualization (Straka & Montminy, 2006).

Older women often face financial constraints on their ability to remove themselves from abusive partners. They may have few financial resources or social support (Wolf, 2000). Many older women were not gainfully employed prior to their marriages, or were employed briefly, in low-wage jobs, which they surrendered upon marriage (either by intention or under the terms of their employment), or were unemployable due to market conditions or lack of education. Few who were employed enjoyed sufficient wage remuneration to have saved for their retirement; those who did were constrained to relin-

quish their savings to their spouses. It is not surprising, therefore, that the ‘feminization of poverty’ – the disproportionate number of women located near the lowest levels of income distribution in Canada – has historically included elderly women, particularly elderly women of colour and First Nations elderly women, who may not have had any history of employment, or a history of intermittent, low-paying and/or precarious employment (Chappell et al, 2003; Hardy & Hazelrigg, 1993).

Woman abuse in old age can take the form of emotional and/or psychological abuse, neglect or maltreatment, financial abuse, and/or physical and sexual violence (McGeachie, 2007). Older women may suffer from physical and/or cognitive impairments. Older persons, older women in particular, are more likely than their younger counterparts to report chronic health conditions (arthritis, hypertension, eye problems, dementia, stroke, epilepsy, bowel disorders and incontinence) (Turcotte & Schellenberg, 2007). The sequelae of chronic woman abuse in the form of physical, emotional, psychological and cognitive impairments and diseases are thus exacerbated by the exigencies of old age.

The absence of suitable emergency housing for older women compounds their vulnerability to ongoing woman abuse, and is itself, a form of institutionalized oppression of this cohort. Shelters for women may be ill-equipped to handle the needs of older women; they are noisy, with low levels of privacy; they may have accessibility issues; shelter staff may be unfamiliar with the special needs of the elderly; shelters may not have the means to transport older women, particularly older disabled women, to their medical appointments; and shelter staff may be insufficient to provide older women with the care associated with daily living (Straka & Montminy, 2006). Three of the survivor participants in this study were older women: one had been homeless, and, following her interview, was rendered homeless again, thereafter taking up residence in a long-term shelter; another was homeless, and intended to remain homeless in the foreseeable future; and one was physically disabled and living in assisted housing. In all three cases, the survivor participants believed that the chronic violence and abuse to which they had been subjected, first, for two of them, in their families of origin, and later, for all three, in their intimate

relationships had impacted their physical and psychological resiliency and contributed to their disabilities.

b. Disability

There is no universally accepted definition of the term ‘disability’ (Brownridge, 2009). The World Health Organization defines disability as “an umbrella term for impairments, activity limitations and participation restrictions, referring to the negative aspects of the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors)” (WHO, 2011:4). Although women with disabilities rank violence as their most important health issue, the lack of research on violence against women with disabilities has rendered invisible a serious social problem (Brownridge, 2009).

Individuals with disabilities experience a greater risk of abuse and violence compared to non-disabled persons in the general population, and disabled women are at even greater risk than disabled men (Mays, 2007). Disabled women face a double bind; they live in a society that is both “disablist” (Brownridge, 2009:234) and patriarchal (Curry et al, 2001). Research suggests that women with disabilities face an elevated risk of violence from their intimate partners compared to ‘abled’ women and have a particularly high risk of experiencing severe forms of violence (Brownridge, 2009). Disabled persons experience higher incidences of poverty, unemployment and exclusion from the labour market than the non-disabled, and economic disadvantage is thus exacerbated for the disabled woman (Mays, 2007).

It should be remembered that woman abuse has been directly implicated in the development of physical, psychological, emotional and cognitive impairments in victims. Women who have been the recipients of such abuse will suffer from these sequelae into their old age, where they are likely to be diagnosed as the inevitable vagaries of old age: geriatric disabilities. One cannot examine the lives of abused women without projecting the consequences of their abuse into their futures.

c. Race, Culture, Ethnicity and Religion and Woman Abuse

Ethnicity refers to socially selected cultural traits, including language, religion, ideology (and ideologically based values), historical symbols, ancestry and practices (Naiman, 2004). Ethnicity is not synonymous with race – “a category of people who share certain common physical traits deemed to be socially significant” (Naiman, 2004:264) – although race and ethnicity may overlap (Naiman, 2004). Culture refers to the “complete way of life shared by a people”, including both the material elements (such as artifacts and products created by its members) and non-material elements (knowledge and beliefs, verbal and non-verbal forms of communication, and values and behavioural expectations) (Naiman, 2004:48).

In Canadian society, race, culture, ethnicity and religion are categories of ‘difference’ that are defined by a hegemonic White, Christian, Northern Eurocentric social discourse. “Cultural norms and traditions that are perceived to be ‘different’ and negatively valued become the vehicles through which the hierarchy of preference and privilege are communicated and sustained” (Jiwani, 2002:850). The socially prescribed categories constructed by the dominant discourse that identify racial, ethnic, cultural and religious ‘differences’ have been identified as sites of oppression that intersect with woman abuse. Just as categories of ‘difference’ essentialize and homogenize the experiences of those identified (or who identify) with one or more of those categories, (Jhappan, 2006), “the conceptualization of violence against women as ‘cutting across’ boundaries of ethnicity and income risks minimizing differential experiences of, and potential vulnerabilities to, domestic violence” (Nixon & Humphreys, 2010:146).

The conflation of gender inequality as the sole, or primary determinant of violence against women has marginalized the systemic oppression as well as sites of oppression of race, ethnicity, culture and religion abused women of difference experience in their daily lives.

We exist in social contexts created by the intersection of systems of power (eg., race, class, gender and sexual orientation) and oppression (eg., prejudice, class stratification, gender inequality, and heterosexist bias). No dimension, such as gender inequality, is privileged in explaining domestic violence. Most important, gender inequality itself is modified by its intersection with other

systems of power and oppression. This intersectionality of race, class and gender has real-life consequences for many battered women who are seeking safety (Sokoloff & Dupont, 2005:43).

Examining the intersectional nature of woman abuse draws attention to diversity, that “speaks more directly” to the experiences of women who find themselves “on the margins” of society (Nixon & Humphreys, 2010:150).

The cumulative, or additive effects of marginalization and oppression of difference *and* woman abuse have, in turn, been associated with poverty:

[w]ithin the movement against domestic violence [against women] the credibility of claims around prevalence, gender, ethnicity and socioeconomic status have [sic] been staunchly supported by narrative accounts of domestic violence, which have been an important element of establishing the issue in the public sphere (Nixon & Humphreys, 2010:142).

Ethnicity, culture and race are viewed by and within the dominant social discourse primarily within the context of immigration. For that reason, the problems regularly encountered by immigrants to Canada, including isolation, financial difficulties, language barriers, discrimination, and social exclusion, are often identified as the paramount reasons for domestic violence and abuse within those communities (Jiwani, 2002). . Consigned to the margins of society as a consequence of their ‘difference’ (Ladson-Billings, 2000), immigrant communities coalesce around a self-described identity characterized as “traditional: anti-modern; anti-progressive; anti-secular; and anti-gender equality” (Bannerji, 2002:362).

Unfortunately, “cultural explanations can and have been used to justify violence against women and have arguably resulted in a certain degree of moral relativism” (Sokoloff & Dupont, 2005:46), and have afforded some abusive men rationalizations for their conduct: see *Dhaliwal v Dhaliwal*, Chapter Three. The civil family justice system has experienced considerable difficulty responding to cultural difference in relation to woman abuse: see Note 5, Chapter Six. To date, the only possible ‘solution’ to this difficulty being considered by the family court bench of which this researcher is aware would have the effect of creating a separate set of procedural rules for litigants ‘of difference’ whom the judiciary

determined were not amenable to settlement as a consequence of the perceived gender inequality inherent in their cultures.⁶ To date, these procedural rules have yet to be implemented.

Survivor participants included: two women of colour, one of whom was born in Jamaica, and the other born in England to Jamaican parents; one white Canadian-born woman whose ex-husband was Jamaican; a Bulgarian refugee; a Mexican refugee (at the time of their interviews, both of these participants had been denied refugee status; one was awaiting her appeal decision; and the other had yet to launch her appeal); four Jewish women; and one self-described Chinese woman, born in Hong Kong, who immigrated to Canada with her family as a child. For the purposes of this study that privileges the voices of the survivor participants, and recognizes that women's experiences of violence and abuse are not homogeneous, but can be informed by socially constructed categories of difference, the survivor participants' self-descriptions, and their intersection with their experiences of woman abuse are related in their narratives found in Chapter Five.

d. Immigrant and Refugee Women

Immigrant women: Canada's demographic complexity reflects its apparent attraction as a haven for immigrants from around the world. While the 2006 Canadian Census reported that immigrants to Canada represented one-fifth of the Canadian population (Brownridge, 2009), recent projections from Statistics Canada indicate that between 29 and 32% of the population in Canada in 2031 could be members of "visible minority groups", described as "Chinese, South Asian, Arabs and West Asians" (Malenfant, et al, 2011).

The lives of many immigrant women must be considered as sites of multiple oppressions to which non-immigrant women are not necessarily subject: race; colour; ethnicity and/or cultural difference; language barriers; social isolation; home-sickness; and lack of extended family supports, all reflecting their construction as 'other' and all exacerbating the likelihood of abuse (Brownridge, 2009; Raj & Silverman, 2002; Orloff, et al, 1995-6). Of the women interviewed for this study, the majority had been born outside Canada.

The risk of violence and abuse experienced by immigrant women may be related to their place of origin (Brownridge, 2009). As examined earlier in this chapter, a feminist standpoint regarding woman abuse situates the phenomenon squarely within patriarchy, and Canada is certainly not the exclusive domain of patriarchy. “In many immigrants’ cultures of origin, patriarchy is thought to be the norm and violence against women may be a socially acceptable way of life” (Brownridge, 2009:202). The patriarchal restrictions placed upon women in their cultures of origin are transmitted to Canada with the immigrant family. In their social isolation in a new country, immigrant women are vulnerable to domestic violence and abuse, kept from fleeing or reporting the abuse out of ignorance of their legal rights, lack of financial resources, the unavailability of culturally sensitive social service agencies, fear and/or shame (Shirwadkar, 2004).

Male partners of immigrant women, most of whom are immigrants themselves, who abuse immigrant women utilize unique forms of domination and control, “some of which [described below] are facilitated or even sanctioned by federal immigration law” (Erez et al, 2012:244). Family members of immigrant women, both their own and their spouses’, counsel them through fear of shame, gossip and guilt to remain with their abusers, warning that their children would be negatively affected by the separation, younger sisters’ chances of marriage would be detrimentally affected, or the honour of their and their husbands’ families would be sullied (Erez et al, 2012).

Some factors, such as the age at which the victim arrived in Canada, her marital status, and the length of time she has lived in Canada, are also associated with violence against women in immigrant communities and transcend cultural differences (Hyman et al, 2006; Jiwani, 2002; Shirwadkar, 2004; Raj & Silverman, 2002). While it has been reported that immigrant women report lower rates of woman abuse than Canadian-born women (Sinha, 2013), studies that examine the phenomenon within immigrant populations categorized by length of stay have revealed that there is a correlation between length of stay and the reporting of incidents of domestic violence to the police: the longer the parties

have lived in Canada, the more likely the female victim of domestic violence is to report (Hyman et al, 2006).

In their study of immigrant women reporting intimate partner violence in the 1999 GSS, Hyman et al (2006) found the age-adjusted odds ratio for any intimate partner violence suggested that recent immigrant women experienced significantly lower rates of woman abuse compared with non-recent immigrant women. While the statistical results of this study mirror those reported by Statistics Canada in the GSS, these results appear to contradict assumptions that the stresses of unemployment, low income, isolation, separation from family and community supports, religious, cultural, ethnic, racial and language differences experienced by recent immigrants would contribute to a much higher prevalence of domestic violence and abuse in recent immigrant communities (Erez et al, 2012). However, Hyman et al (2006) suggest that the likelihood that immigrant women will report incidents of domestic violence and abuse increases as they become more enculturated into the fabric of Canadian life, achieve greater proficiency in English or French, become more aware of their legal rights and the availability of community resources to assist them, and come to regard domestic violence as unacceptable in their lives.

Threats of kidnapping children to foreign jurisdictions force abused women to acquiesce to their abusers. Abusers also exploit their victims' fears and uncertainties to ensure they will not seek help (Orloff et al, 1995-6). Immigration laws that allow a spouse to sponsor his/her partner are appropriated as weapons with which to threaten the victim – if the abuser is the sponsor, he can threaten to revoke his sponsorship. If a victim has yet to secure permanent resident status, her status may be lost if her abuser withdraws his sponsorship, even in those cases where the relationship has broken down as a result of domestic violence and abuse (Raj & Silverman, 2002).

Since domestic violence, per se, is not a ground for an application for permanent residence under the federal *Immigrant and Refugee Protection Act (IRPA)*, victims must apply on humanitarian and compassionate grounds. The evidentiary requirements of these applications can present real

difficulties for abused women. Immigrant women are less likely to call the police following an assault, seek help or use the shelter system and related social services due to their fear of deportation, isolation, mistrust of government and police, language barriers, shame, and fear of ostracism from their communities (Alaggia & Maiter, 2006). Accordingly, they may lack evidentiary proof of their victimization sufficient to support their immigration applications. Immigrant women also fear child welfare intervention and the threat that their children will be taken from them (Alaggia & Maiter, 2006). Their unfamiliarity with bureaucratic and legal processes, lack of language proficiency, and their inability or unwillingness to leave the confines of their cultural enclaves all preclude immigrant women's willingness and ability to seek relief from violence and abuse in their homes (Alaggia & Maiter, 2006; Raj & Silverman, 2002).

Nine of the participants in this study arrived in Canada as immigrants.

Refugee women: As a distinct subcategory of immigrant women, refugee women are particularly vulnerable to woman abuse. Refugee women who flee abuse in their countries of origin, or accompany their abusers here, cannot be guaranteed that their lives will be lived abuse-free. "It cannot guarantee her adequate protection should the woman find herself in a battering relationship in Canada" (Macklin, 1995:274). In this regard, refugee women find themselves aligned with Canadian-born women. Not only do they experience all of the factors that impact immigrant women's lives enumerated in the previous paragraphs, but they, identified by the authorities as either 'legal' or 'illegal' refugees are by definition at terrible risk. The United Nations Convention and Protocol Relating to the Status of Refugees (1951) defined "refugee" as one unable to return to his country of origin "owing to a well-founded fear of being persecuted for reason or race, religion, nationality, member in a particular group or political opinion" (United Nations, 2010), and this definition has been incorporated into Canada's *IRPA*.

Residence criteria are increasingly associated with skills deemed beneficial and necessary to the Canadian economy and the applicants' employability. Since refugee women are usually at a

disadvantage on both counts, their skills may not meet the requirements for residency (Moussa, 2002; Macklin, 1995). Accordingly, refugee women who arrive in this country as dependants of their male spouse applicants must rely on their sponsors for their continued lawful refugee status. Their precarious status pending review of their application for permanent residency puts them at greater risk for abuse.

Refugee women fear their partners' revoking their sponsorship if their abuse is revealed to authorities, their cultural community, and family; unlike non-refugee immigrant women, they may have no country of origin to which to return (Alaggia et al, 2009).

For abused refugee women, there is little, if any, escape from domestic violence and abuse. Any contact with authorities will inevitably result in the perpetrators being apprehended and incarcerated pending deportation. Women finding themselves in this position must apply to the Immigration Review Board on humanitarian and compassionate grounds in order to remain in this country. One of the survivor participants in this research study was granted refugee status on humanitarian and compassionate grounds following her interview.

e. Poverty

Despite the advances women have made in the marketplace, they continue to be undercompensated compared to their male counterparts. In 2008, women earned, on average, 65% of men's average annual income from paid employment. The gender disparity in income and assets is shown to be most pronounced when the differences in net worth and median value of assets for single-parent families are examined: lone-parent mothers had a median value of assets at \$60,000, and a net worth of \$17,000 – the lowest median net worth of any family type in Canada; lone-parent fathers, on the other hand, had a median value of assets at \$200,000, and a net worth of \$80,000 (Statistics Canada, *The Daily*, December 16, 2010).

Women continue to bear the brunt of unpaid work in child and home care, and these demands interfere with their ability to obtain full-time, secure employment. "As women increase their paid work

time, they do not achieve a corresponding one-to-one reduction in their unpaid work hours”

(MacDonald et al, 2005:65). The demands of what amounts to two full-time jobs create stress for working mothers *and* fathers, but research has shown that not all work results in stress. MacDonald et al (2005) found that, while an increase in the number of hours spent for all kinds of unpaid labour (child and elder care, and housework) increased the amount of stress experienced by women employed full-time, childcare was the least stressful. However, for men, an increase in the number of hours spent in unpaid work was rarely associated with stress.

For MacDonald et al (2005), this difference between men and women in their response to an increase in the number of hours dedicated to unpaid work reflected the gendered nature of unpaid work, with women relegated to performing the more unpleasant tasks (housework, eldercare), and men assuming responsibility for the more enjoyable aspects of unpaid work (playtime, excursions). These findings take on new meaning when considered in light of the assumption advanced by men’s rights groups, discussed in the next two chapters, and promoted in current legislation governing family law, that during cohabitation, fathers’ contribution to their children’s care and upbringing is equal, if not greater, than mothers’.

Women dominate the domain of ‘precarious employment’ – contractual, piecework, and part-time jobs with no benefits or security (Lenon, 2002). The decline in women’s poverty noted in recent years reflects the drop in the number of senior women living at or below the poverty line; in 1976, 34% of women 65 and older were classified as living in low income, but, by 2008, this figure had decreased to less than 8% (Statistics Canada, *The Daily*, December 16, 2010). This speaks more to the fact that women reaching the age of 65 in 2008 were far more likely than those aged 65 in 1976 to have been employed in occupations that provided income security and pension plans than it does a sudden surge in women’s incomes. Never-employed elderly women still rank amongst the poorest in Canada (MacDonald et al, 2005).

In comparison, for younger women escaping domestic violence and abuse, social assistance may provide the only means of support available to them; approximately 60% of female welfare recipients report past domestic abuse (Scott et al, 2002). The damage inflicted through childhood sexual assault, as well as woman abuse, can leave some women with serious psychological problems that prevent their participation in the labour market (Scott et al, 2002). Single mothers collecting social assistance find that their economic opportunities are limited by lack of childcare, transportation, access to training or education, adequate housing and job availability (Davies, 1998), all of which reflect and compound the systemic financial oppression of women in society.⁷ Abused women are more likely to have experienced periods of unemployment, to have more job turn-over, have lower incomes (Scott et al, 2002), and miss days at work, which jeopardizes their employment and precludes the possibilities for advancement (Brown et al, 2000). Many poor women combine, or cycle, between work and welfare (Bell 2003). “Women’s complex negotiations in their relationships with violent men and movements between welfare and work shape the relationship between poverty and abuse” (Bell, 2003:1245-6).

With the on-going dismantling of Canada’s social welfare system, abused women can find themselves pushed into the labour market in jobs, the salaries of which cannot sustain them; while their dependence on the state is eliminated, their dependence increases on their abusive partners. Women may stay in abusive relationships, or return to their abusers, out of economic necessity that overrides their fear (Carlson et al, 1999; Davies, 1998; Pryke & Thomas, 1998; Casale, 1984). This dependence provides abusers with further opportunities to sabotage their victims’ financial autonomy, by harassing them in their workplaces, refusing to cooperate on childcare, preventing them from upgrading their education, and/or further physically and emotionally abusing them so that they are unable to work (Scott et al, 2002; Brown et al, 2000). Thus, while financial abuse is one of the indicia of woman abuse (Rimer, 2001), it is not limited to abusers denying their female intimates access to or information about family income, but includes their campaigns to frustrate or obviate their partners’ opportunities in the work-force. All financial abuse is designed to perpetuate the victims’ dependency and vulnerability.

Poor women, particularly very poor women, are acutely susceptible to woman abuse (Bell, 2003; Pearson, et al, 1997); “violence affects poor women in two ways: it makes them poor and it keeps them poor” (David & Kraham, 1994-5:1144), thus woman abuse can negatively impact victims’ socio-economic class. Poverty remains a woman’s issue (Richards et al, 2010). Poverty is experienced differently by women than by men: the systemic oppression of women manifest through lower wages; inadequate social service provision; inadequate housing; the unavailability of childcare; and the prevalence of woman abuse all contribute to the ‘feminization of poverty’ first recognized in 1978 (Richards et al, 2010; Pearce, 1978). In general, women and children experience economic disadvantage disproportionately to men at marriage breakdown, thereby contributing to the feminization of poverty (Mossman and MacLean, 1997).

Lack of adequate institutional support in the form of social services, and public housing, as well as the intrusions and coercive controls by the state and its agencies (eg., welfare) is another level of violence experienced by battered women, which occur in ways that are racialized as well as gendered and classed (Sokoloff & Dupont, 2005:44).

Notably absent from this list of social institutions that contribute to “violence experienced by battered women” is the legal system and the imposition of its “structural power” (Sokoloff & Dupont, 2005:44), the examination of which concerns this research study.

Welfare is a critical resource for many women leaving abusive relationships (Scott, et al, 2002). Welfare reform legislation that limits eligibility, or involves ‘workfare’, as in the relevant provincial legislation in Ontario, places serious limitations on abused women’s ability to free them-selves from their abusers, on whom they may have to rely to meet the requirements of continued eligibility (Mosher et al, 2004; Scott et al, 2002).

Women’s attempts to secure affordable housing upon fleeing woman abuse may be jeopardized by their abusers having destroyed their credit, providing negative references to prospective landlords, and/or denying access to previously available joint bank accounts (Richards et al, 2010). Inasmuch as women are more likely to experience more, and more serious, abuse and violence from their former

intimate partners following separation, abusers' conduct in this regard has profoundly negative consequences for abused women's ability to live independently (Richards et al, 2010). Four survivor participants were recipients of social assistance.

Mosher et al (2004) also found that the lack of social and financial supports, and the manipulation of the provincial welfare system by domestic abusers, were exacerbated and heightened in the case of abused immigrant women. For Mosher et al, it was clear that a climate of suspicion, fostered in the current welfare system, is antithetical to disclosure of abuse, and that language and cultural barriers further exacerbate for immigrant women the difficulties faced by all participants in the welfare system.

The demands of the 'participation agreements', those multiple benefit sources poor women, particularly single mothers, can access, constitute a further burden of unpaid work upon them, and interfere with their abilities to parent their children and secure remunerative employment (Cumming & Cooke, 2008). Mosher et al found that Ontario Works provides neither real opportunities nor good jobs to their study's participants:

The workfare requirement does not further their opportunities for decent employment. What it does do, however, is to further stigmatize women on welfare as individuals who, in the absence of a requirement to participate in work or work-related activities, would prefer 'scrounging' to working. Such a policy is profoundly dissonant with the aspirations and realities of the lives and experiences of women in this study (Mosher, et al, 2004:vii).

In general, women and children experience economic disadvantage disproportionately to men at marriage breakdown (Mossman & MacLean, 1997). Therefore, child support (and spousal support, if and when awarded) is critical for many women who leave abusive relationships without a viable financial resource (Scott et al, 2002). However, financial support, paid by way of either settlement or court order, offers another means for abusers to exercise their power and control. Inconsistent and/or missed payments make it impossible for poor women to meet their financial obligations, such as shelter payments and food costs (Bell, 2003).

Abused women are at great risk of homelessness, although homelessness has been constructed historically as a “male experience” (Lenon, 2002:403). Research directed at homelessness has revealed that the vast majority of homeless women have been in abusive relationships (Richards, et al, 2010; McQuarrie, 2005). Unable to secure adequate financial help and accommodation from the government, or access support networks, they are forced to live on the streets, where their vulnerability is greatly heightened (DeKeseredy, 2011; Lenon, 2002) . The threat of homelessness precludes many abused women from leaving their abusive relationships (Marin & Russo, 1999). For those women, ‘home’ does not represent a safe haven, while homelessness represents an untenable solution (Lenon, 2002). Most homeless women are excluded from research because they are not readily accessible, lacking telephones and any form of address (DeKeseredy, 2011); however, this study includes the voices of three homeless, or previously homeless, women.

7. Why Women Stay

Many women stay in abusive relationships - some for the duration of their lives. They do so out of economic necessity, because of a lack of resources and support systems, as a consequence of the diminution by their abusers of their self-esteem, personal autonomy and independence, in response to ethnic/cultural/religious pressures to stay, out of fear, for the sake of their children (often misguided, given the effects of domestic violence and abuse on children), and for whatever benefits they derive from their intimate relationships with their spouses (Se’ver, 2002). Some cling to the hope that their abusers will stop abusing them; thirty years ago, Walker (1984) identified the ‘cycle of violence’ domestic abusers employ to manipulate their victims into remaining with them in the hope that the abusers’ promise to change will come true.

Discussions of ‘why women stay’ in abusive relationships are misdirected. The better question is ‘why do men abuse women’? Mahoney (1991) suggests that perception of the struggle for power and control between husbands and wives should focus on the abuse (specifically, assaults) men use as strategies to limit women’s autonomy. The goals of these strategies are: to frustrate their victims’

efforts to separate themselves from their abusers; as punishment, coercion and retaliation against their victims as mothers in their relationships with their children; as coercion or retaliation against the victims' actions for seeking criminal and/or civil legal redress; and as assaults upon the victims' objections to manifestations of the abusers' male authority (sexual entitlement, possessiveness and jealousy, vengeance or revenge for perceived wrongs, and/or alcohol and drug abuse). These tactics constitute impediments to women's safety, and must be challenged and repudiated by victims *while they remain in their abusive relationships*, and/or in order to leave those relationships, and/or to deter their returning to their abusers. In each instance, abused women should not be viewed as victims, but as survivors of abuse employing their own tactics and strategies to challenge their abusers (Ferraro, 1997).

8. Conclusion

“Individual women are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize and control so many women draws on institutional collusion and gender inequality” (Ptacek, 1999:10). The statistical evidence of woman abuse, the severity of its sequelae to the health and well-being of its victims, its impact, in economic terms, and, most ominously, its omnipresence over time, demonstrate that those social institutions entrusted with the safety of citizens have failed to discharge their obligations in this regard. The next chapter critically examines the “institutional collusion” of existing federal and provincial legislation in failing to adequately address the phenomenon of woman abuse.

CHAPTER TWO

WOMAN ABUSE AND THE LAW

1. Introduction

Writing in the fifth edition of their textbook, *Canadian Family Law*, Payne and Payne stated that “[i]t is only in the last twenty years that family violence has been recognized as a serious social problem” (2013:86). The authors failed to identify who, or what constituency, within Canadian society experienced this recent epiphany. Nor did they identify the impetus behind it. In contrast, Sheehy, writing eleven years earlier, identified family violence, more particularly, violence against women, as omnipresent in women’s lives, socially prescribed and historically concretized. For Sheehy, violence against women represented a unique social phenomenon that was, and continues to be, informed by dominant social discourses and inextricably linked to the law. These discourses have been challenged over the last one hundred and fifty years almost exclusively by women themselves, in their capacity as social change agents (social reformers, suffragettes, women’s liberationists, and women’s rights advocates amongst them).

Any history of the development and changes in the law as it relates to women and male violence is also a chronicle of the history of the women’s movement and its relationship to law. All of the legislation and policy that recognizes women’s rights to be free of male violence has been put in place because of the political strength and persistence of the women’s movement in our country.

... In spite of our many legal advances, violence against women has not subsided in Canada because women’s vulnerability to male violence and our ability to harness law are inextricably linked to women’s social, economic, and political position in Canada, in relation to those who hold power. Thus, while law is an important tool in advancing women’s equality rights, law alone cannot end this violence until all women’s equality is fully realized (2002:473).

One hundred and forty-one years earlier, in his 1861 treatise, *The Subjection of Women*, (published in 1869) John Stuart Mill¹ condemned what he identified in Victorian England as the socially prescribed subordination and diminution of women. Women’s subordination, for Mill, was promoted by men in order to maintain their power and control over all facets of public and private life. Women’s

presumed physical, emotional and intellectual inferiority were rooted in the ancient doctrine of ‘might is right’, which Mill identified as untenable in the type of modern progressive society with which Britain proudly identified itself.

For Mill, British legislation regulating the spousal relationship represented the most blatant expression of women’s subordination and oppression. This legislation had recently been ‘revolutionized’ through passage of the *Matrimonial Causes Act* in 1857 allowing for civil divorces, but, for Mill, this statute merely facilitated divorce for the monied classes, and did nothing to protect women throughout the social strata from physical, emotional, financial or sexual abuse. Inasmuch as this legislation was, at the time *The Subjection of Women* was published, adopted as the law of the newly established Dominion of Canada, Mill’s observations are particularly relevant to the within analysis.²

Mill recognized that the oppression and suppression of women in British society was legitimated as natural, or instinctive, or merely ‘the way things are’: an all pervasive, social meme. The attribution to women of inferiority in all respects was neither rational nor scientifically grounded or provable. Mill challenged the subordination of one sex by the other, the primary vehicle for which was marriage, which he likened to a form of slavery (except more odious and inhumane). Mill championed sex equality and the reformulation of marriage as a business agreement between equal partners, through which women would be allowed to keep their own property and employment income. These profound and fundamental social reforms were necessary, Mill asserted, to promote the advancement of civilization.

The descriptions of contemporary married life and women’s lot in Victorian Britain – and Canada – provided by Mill may surprise those unfamiliar with the law’s historical condonation of woman abuse and the reality of women’s legal impotence. However, his vision of a society in which gender equality are social and legal givens and marriage exists as a form of partnership must ring familiar, inasmuch as they are the hallmarks of both current federal and provincial legislation relevant to marriage and divorce in Canada and Ontario, respectively. So, too, must his allusions to his society’s rejection of his platform (which was dismissed at the highest echelons of the social and political orders

of his day) evoke memories of the treatment of Margaret Mitchell, NDP MP for Vancouver East. Her pronouncement in the House of Commons in 1982, that one in ten Canadian women was regularly beaten by her husband, was met with “prolonged laughter and general derision” (Sheehy, 2002:478). Whether Mill’s vision, Canada’s *Charter* right of sex equality, and the promotion of gender equality and the presumption of partnership in marriage have been realized through legislation is the subject matter of this chapter.

A comprehensive analysis of the history of family-related legislation within its historical and social context lies outside the scope of this dissertation. However, as a phenomenologically-based research study, current federal and provincial legislation governing marriage and marital breakdown must be considered with reference to their historical antecedents, and within their socio-historical contexts. “To dissect family law is to begin to understand the dynamics of laws, traditions and culture. It is also to begin to appreciate the dynamics and components of social change. In short, it is a study on law, politics, history, philosophy and sociology” (Abella, 1981:1). It is the premise of this study, as stated in the Introduction, that the legislation concerned with marriage and marital breakdown in this jurisdiction has oppressed, and continues to oppress women, particularly abused women.

Accordingly, this chapter begins with brief examinations of the history of the laws governing marriage and divorce in Britain and pre- and post-Confederation Canada and Ontario. A feminist-based descriptive analysis of the social context of this legislation follows. The chapter continues with critical deconstruction and analyses of the *Divorce Acts, 1968 (DA 1968)* and *1985 (DA 1985)*, *Family Law Reform Acts, 1975 and 1978 (FLRA 1975; FLRA 1978)*, *The Family Law Act, 1990*, as amended from time to time (*FLA*), and *Children’s Law Reform Act, 1990*, as amended from time to time (*CLRA*) in accordance with the four themes identified by the researcher as being present throughout the legislation: gender; rights; conduct; and entitlements.

2. The Primacy of Husband's Rights under British Law – a Brief Historical Excursion

Men's proprietary interests in women: Historically, under English law, women were considered property, first, of their fathers, and, after marriage, of their husbands, and effectively had no legal identities of their own except in restrictively prescribed circumstances that were, themselves, easily overcome (Sheehy, 2002; Arnup, 2001; Chambers, 1997; Backhouse, 1986; Sachs & Wilson, 1987). At common law, the husband's authority over his wife was established through the doctrine of coverture (Foyster, 2005; Sheehy, 2002; Arnup, 2001; Chambers, 1997; Sachs & Wilson, 1978; Weitzman & Dixon, 1980). Under this doctrine, the wife's identity became subsumed by that of her husband, thus relegating the woman to a *feme covert*, or legal nonperson (Weitzman & Dixon, 1980).³ The nature of the marital relationship including the responsibilities of the spouses both within and without the union, and the construction of marriage, husband, wife and child, as well as the relationships that existed amongst these categories, were determined by the doctrine of coverture, and represented the patriarchal ideological premises of their times.

Women's suitability for marriage and their right to be maintained by their husbands after marriage were determined by their chastity. The common law, and, later, legislation governing marital relations were informed by *dum casta* provisions: married women were expected to be chaste before marriage and to remain monogamous during marriage (Chunn, 1999). Women were also expected to remain chaste after marital separation. However, men were not subjected to the same restrictions upon their sexual conduct.

Women were also denied most legal rights and entitlements enjoyed by men, and were denied the legal rights and entitlements men were obligated to extend to other men, such as the right of legal ownership of property, the right to engage in contracts, the right of self-defence, and the right to freedom of movement and association (Foyster, 2005). The denial of these rights left

married women without recourse to leave violent and/or abusive marriages, and are examined, briefly, in turn.

The primacy of men's property and contractual rights: “Of all the impediments imposed on married women, the loss of their property and money, and the lack of control over their own earnings were probably the most detrimental to their status and well-being” (Nevill, 1989:36). Marriage for women thus represented “civil death” under common law (Chambers, 1997:3). Married women were, except in the most extraordinary of circumstances, completely financially dependent upon their husbands. Property laws were thus amongst the key legal mechanisms for ensuring the stability of the conjugal family (Arnup, 2001), inasmuch as they effectively left married women powerless, property-less, and penniless, without recourse to funds, and thus bound to remain in their marriages, regardless of their toxicity.

Children as fathers' property: The common law right of fathers to the sole custody of their children reflected their inherent proprietary interests in their progeny (Foyster, 2005). Mothers had no legal rights to their children, were severely restricted in their ability to assert control over them (Sheehy, 2002), and could be denied access to them by their fathers (Mill, 1960). The threat of banishment from their children's lives undoubtedly forced many women to stay in their marriages, regardless of how unbearable they might have been.

The right to self-defence and damage claims – men's, not women's rights in marriage: Eighteenth century legal commentators supported the socially accepted view that husbands had the right to physically chastise and control their wives.

The husband hath, by Law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in such cases, or if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace (Bacon, 1876, Vol. 2:14).

Thus, British law did not prohibit violence against women, but merely “regulated its excesses” (Sheehy, 2002:475). Wilson, J, articulated the stance of British (and Canadian) law regarding domestic violence in *R. v Lavallée*:

the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership and his “right” to chastise her. One need only recall the centuries-old law that a man is entitled to beat his wife with a stick “no thicker than his thumb” (at 872).

Women did not own their bodies: their fathers, prior to marriage did so, and, thereafter, their husbands. A husband’s absolute right to demand sexual submission rendered women unable to protect themselves from marital rape. Nor were unmarried women who were raped, or married women who were raped by men other than their husbands, perceived as having sustained personal injuries that would attract damages *to them*. The criminal act was not construed as having been committed against the victim herself, but, if she were chaste and unmarried, against her father, or, if monogamous and married, against her husband (Sheehy, 2002). Accordingly, damages accrued to their fathers and husbands in recognition of their proprietary rights over the physical bodies of their daughters and wives.

Husbands whose wives were found to have committed adultery (or were raped) could claim damages for loss of consortium against their wives’ defilers. Further, as a consequence of her actions, an adulterous woman could be denied any and all rights and entitlements that accrued to her by virtue of her marriage. These included being: precluded from seeking a legal separation or divorce, support or alimony, access to her children, or continued ownership in any property gifted to her; and banished from her home; and considered a social pariah condemned to live in the eternal chastity of the single woman or moral turpitude of cohabitation outside of marriage (Foyster, 2005).

A married woman who was injured as a result of an accident had no claim for damages against the third party – but her husband did, for the loss of her household and childcare responsibilities, just as a master claimed damages for injuries occasioned to his servant under the legal

maxim per quod servitium amisit. Nor could women sue their husbands (nor children their parents) in tort for damages under any circumstances. A woman was, therefore, in all respects, defenceless against assaults to her person, and her injuries were non-compensable to her.

Freedom of movement and association: enjoyed by men, denied to women: Under the doctrine of coverture, married women had no independent legal identities. Married women's lives were highly regulated and circumscribed, determined and limited by class, and confined to the home (Foyster, 2005).⁴ Behaviour that deviated from these norms could be condemned as wanton and scandalous. Accordingly, the law supported a husband's ability to "confine" his wife but not "imprison" her (Bacon, 1876, Vol. 2:14). In the eighteenth century, many husbands seeking to 'correct' their wives committed them to madhouses (Foyster, 2005).⁵

Married women who found continued cohabitation untenable could, and did, leave their husbands and children. Divorce was made available in England from the time of Henry VIII based on both civil and canonical grounds.⁶ Later, the grounds were extended to include adultery. Men could petition for divorce on the basis of their wives' adultery, desertion, or on such grounds that brought dishonor upon them. However, women seeking to divorce their husbands were limited to the double standard of 'aggravated' adultery: that is, adultery accompanied by another offence: incest; bigamy; rape, sodomy; and/or bestiality (Foyster, 2005). Women could also claim cruelty as a ground for legal separation – but not divorce – 'from bed and board' (*a mensa et thoro*), but cruelty, to be persuasive, had to endanger life (Foyster, 2005). Material deprivation of a wife that threatened life and limb could be considered a form of extreme cruelty that would support a legal separation, but not a divorce (Foyster, 2005).

Women for whom judicial separation was their only recourse were not entitled to a decree of divorce (Foyster, 2005), and they, too, were forever bound to their husbands. Adulterous women were banned from obtaining a divorce decree regardless of the conduct of their husbands (Foyster, 2005).

3. Separating Church from State: Civil Divorce in Great Britain

The Matrimonial Causes Act, 1857 of Great Britain transferred jurisdiction over divorce from the Church to the state (Armstrong, 2006). Civil courts were established to hear all divorce and matrimonial matters (custody and support applications), while petitions for divorce were presented to Parliament as private members' bills and required an Act of Parliament. The separation of Church and state with respect to divorce afforded by this *Act* set the groundwork for all later legislative reforms (Geffen, 2008), but did not necessarily alter the social institution of marriage, the social perception of divorce, nor the relationship between men and women, publically or privately.

The chief ground for divorce under the new legislation was adultery, available to both husbands and wives. The *Act* legally reproduced and concretized the extant double standard for husbands and wives that reflected social expectation of women's conduct (but not men's). The *Act* made available to wives a further ground for judicial separation: desertion without cause for two years or more. However, a wife seeking a judicial separation on this ground would have had to demonstrate that she had been sexually faithful to her husband during cohabitation and remained chaste *after* his desertion. Thus women's sexuality, sexual conduct and relationships continued to be directed and monitored by their husbands after separation – perhaps for the duration of the women's lives.

The Matrimonial Causes Act was illuminating in its treatment of women with respect to their entitlement to property and support. A wife who had been deserted *without cause* could apply to the court for an order to protect any money or property she may have acquired “by her own lawful industry” (s. 21), as well as an order for interim alimony, the quantum of which would be based on need, ability of the husband to pay, and the conduct of the parties (s. 32). In this regard, husbands advanced all manner of allegations before the courts to substantiate their allegations of sufficient ‘cause’ to relieve them of their financial obligations to their wives. Wives were described as quarrelsome, lazy, flirtatious, ill-mannered, poor housekeepers, unkempt, and irresponsible (Foyster,

2005). The *Act* also granted jurisdiction to the court to make awards of custody (mothers found to have committed adultery were precluded from claiming custody), and issuing protection orders for children (s. 35). In every instance, it was the woman's moral misconduct, and not the man's, that determined her eligibility to claim the relief and rights established under the legislation.

4. The Regulation of Marriage and Divorce in Ontario at Confederation

Before Confederation: While, in all respects, the laws governing separation and divorce in Upper Canada, and, later, Canada West, mirrored their British counterparts, the laws governing marriage did not. Civil marriages were first introduced in England in 1836 through the *Act for Marriages* (Everitt, 2012), but were legalized in Ontario only in 1950 pursuant to the *Marriage Act* of that year, and not without considerable resistance from the clergy (Snell & Abeele, 1988). Indeed, the colonial government, at the urging of the Church, passed the first *Marriages Act* in 1793 in order to 'legalize' marriages conducted by non-clergy (Draper, 1863) under frontier conditions (Arnup, 2001). The *Act* also limited the availability of marriage to certain categories of individuals, initially, to those married by Anglican priests. Amendments to the *Act* in 1857 granted authority to ordained clergy of other Christian denominations, and rabbis, to conduct 'legal' marriages (Arnup, 2001). In so doing, the colonial legislators were able to limit the class of the socially desirable to which accrued the legal entitlements afforded through marriage (such as the presumed legitimacy of children born in 'lawful' wedlock). The family, as the touchstone of colonial society, was thereby assumed to be reinforced by limiting legal entitlements to those who were eligible to marry.

However, divorce legislation remained elusive in the colony. The first private divorce bill was passed in 1841 in Canada West (as Upper Canada had been renamed the previous year), but, of the twenty divorce petitions filed in the Canadian Parliament between 1841 and 1867, only five were successful (Armstrong, 2006).

Women residing in Upper Canada had no opportunity to pursue their deserting husbands for support until the establishment of the Court of Chancery in 1837 (Chambers, 1997). Thereafter,

married women could initiate proceedings for alimony in that court, where, like their British counterparts, they had to prove constructive or actual desertion or entitlement under one or more of the established grounds, provided they were not barred by their own immoral conduct.

After Confederation: Establishing the federal legislation governing divorce: The British North America Act of 1867 (the BNA Act) established regulatory jurisdiction over marriage and divorce in the newly-established Dominion of Canada. Section 91(26) gave the federal government authority over marriage and divorce. However, the concept of divorce posed great difficulty for Canadian legislators, inasmuch as it represented the tearing asunder of the fundamental underpinning of society: the family. The aversion of Canadian society to divorce was reflected in the absence of a universally applicable divorce act until 1968, one hundred and one years after the BNA Act empowered the federal government to enact one.

In the absence of a federal divorce statute, the divorce process differed according to province. In Ontario, which had not established a divorce court prior to 1867, citizens were required until 1930 to seek an Act of Parliament by private member's bill to secure a divorce. Thereafter, in 1930, the federal *Divorce Act (Ontario)* adopted the British *Matrimonial Causes Act, 1857*, as amended in 1870, which granted to the Supreme Court of Ontario power to grant judicial divorces, *seventy-three years* after their British counterparts (Armstrong, 2006).

Adultery was the basic ground for divorce in Ontario (Green, 1968), with its attendant double standard. For men in both Britain and Ontario, marital violence continued to be seen as transgressive only when combined with adultery (Foyster, 2005). While the double standard regarding adultery was abolished in Britain in 1923, it remained the law of Canada until it was abolished in 1952, pursuant to *The Marriage and Divorce Act*. However, a wife could be estopped from obtaining a decree of divorce on the ground of her husband's 'simple adultery' if she, herself, were "guilty" of any one of a variety of transgressions.⁷ In this regard, the 1952 statute resembled its precursor in its gendered oppression of women whose conduct within their intimate relationships

remained subject to public legal scrutiny and determined legal entitlements. Further, merely abolishing the ‘double standard’ did not end the prevalence or persuasiveness of the idea in the judicial mind (Snell, 1991).

In 1930, the *Divorce Jurisdiction Act* provided wives with a further ground for divorce: separation for two years or longer. Again, this statute contained the omnipresent *dum casta* restrictions. A deserted woman was expected to remain faithful to her absconding husband even in his absence.

The temerity with which federal legislators approached divorce reflected the inherent conservatism of Canadian society (Snell, 1991). Indeed, attempts to introduce legislation to, first, establish a federal divorce statute, and, later, reform extant divorce legislation, usually met with strong opposition (Snell, 1991). To support any proposed reform legislation, the effect of which would be to facilitate divorce, would result in political death (Snell, 1991).

Establishing provincial legislation governing marriage and marital breakdown: Section 92(12) of the *BNA Act* granted jurisdiction to the provinces over “the solemnization of marriage in the province” and s. 92(12) over “property and civil rights”. This latter authority stimulated the legislators in Ontario to execute their new-found powers through enactment of a plethora of statutes designed to regulate the ownership of property, to establish creditors’ rights with respect to that property, and to allow for the orderly devolution of property interests upon marriage, separation, and death.⁸ The provinces were also mandated to pass legislation governing the welfare of children, and the financial support of deserted women and children.

Historically, one of the few legal mechanisms affording a woman real property rights upon marriage was dower, codified in Ontario in the *Dower Act*, and representing an interest “for life” of one-third of her husband’s estate. This dower interest was deemed to be held in trust by the husband for the benefit of his wife pending his demise. By the time of Confederation, however, the action of dower was “nearly effete” (Draper, 1863:1). Women’s dower rights were being appropriated to

satisfy their husband's debts (Arnup, 2001). Accordingly, women were often helpless in marriage and incapable of preventing their husbands from taking advantage of them (Arnup, 2001).⁹

Women left impecunious through desertion found the legislation in place governing their claims for spousal and child maintenance far less amenable to extending entitlements to them than those enjoyed by their propertied counterparts.¹⁰ Well aware that desertion would leave them in abject poverty, women were likely prepared to endure abusive and violent marriages. Similar to the legislation and common law governing marital property, the statutes concerned with spousal and child support established codes of acceptable wifely conduct, including monogamy during marriage and chastity after separation, that determined eligibility for relief. The primacy of the paternal proprietary interest in children waned over the course of the latter half of the nineteenth century, and the *Infants Act* of 1877 allowed a mother to make application for custody of her infant(s) "having regard to the welfare of the infant, the conduct of the parents, and to the wishes as well of the mother as to the father" (s. 1). However, adulterous mothers were precluded from obtaining a custody order. A court could order maintenance of an infant to be paid by the father having regard to the "pecuniary circumstances of the father" (s. 2).¹¹

For those to whom the family law statutes of the 1970's and 1980's represent a novel approach to family relations in their references to equal entitlement of mother and father to custody and /or access, and concern for children's "best interests", the wording of the *Infants Act*, 1877 that predated the *FLRA 1978* by a century must be a revelation. This statute established spousal support and child support as different and distinct 'envelopes' of entitlement which persist today, often to women's detriment. Despite the 1877 statute appearing progressive, and regardless of the efforts of legislators (and judges) to relieve women of the consequences of coverture, an adulterous woman could, potentially, lose her home, her property, her children, and her reputation. The social mores of the day regarded women who chose to leave their marriages as the authors of their own misfortunes.

5. The Social Context of Marriage after Confederation

The Industrial Revolution witnessed the breakdown of large, multi-generational extended family structures typical of rural-based economies such as existed in Ontario (Arnup, 2001). The attendant migration of rural populations to urban centres, and the rise in prominence and numbers of the working class greatly challenged the doctrine of coverture (Chambers, 1997), which provided an iteration of class differentiation between the haves and have-nots. Certainly the upper classes, from which the judiciary was selected, clung to the values espoused by coverture, particularly as it benefited those with property interests to protect. The concept of the nuclear family emerged from this social upheaval as the means of promoting and maintaining social stasis in the new Dominion.

The form and content of legislation and legal practices, including judicial decisions, in Canada following Confederation “presented decidedly powerful images of the family, of marriage, of spousal roles and relations, and of sexual behaviour and morality ... [i]n particular, divorce law played a vital part in establishing the hegemony of ... the conjugal family” (Snell, 1991:7). The concept of the nuclear family, with its rigid, and rigidly enforced differentiated gender roles and responsibilities – that of husband/father as breadwinner, and wife/mother as homemaker and child carer – constituted the locus of gendered power relations and assumed to be reflected throughout society. However, the private domains of the family home and family relations together represented a separate sphere from the public domain of the workplace, with the former exclusively inhabited by women (and children), and the latter by men. The separate and distinct loci of life over which women and men held sway reflected their relative social and legal stature; the public sphere dominated the private sphere just as men dominated women. While motherhood was idealized (Chunn, 1992), women in their legal impotence had no real power, except that granted to them by men.

The enhancement of women’s financial independence as a consequence of industrialization presented legislators and judges with a difficult dilemma: how could married women and mothers

be persuaded to remain dependants and thus subject to male dominance? The emergence during the latter half of the nineteenth century of the image of mother as exclusive nurturer of children established the requisite proximity between mother and child that allowed legislators to develop new laws. Legislation was formulated entitling mothers to the legal right of child custody upon separation or desertion if certain conditions were met. This devolution of power and entitlement initiated by men of men's exclusive domain over their children was not an act of altruism. By promoting an ideal of motherhood that prescribed for women sole responsibility for the arduous, full-time tasks of child care and child-rearing, women were successfully diverted away from the public sphere to the private domain. The image of this family model – the nuclear family – did not arise in the nineteenth century, but had its much earlier antecedents. What differentiated the 'modern' nuclear family from its predecessors was the availability of the model to a newly emergent middle class who could financially afford it (Foyster, 2005).

Inasmuch as women, as mothers, were viewed as solely responsible for child care during this period (and beyond), they were also perceived in law, and in the larger society, as responsible for the ills that befell their children, both during marriage and after separation (Chunn, 1992; Snell, 1991). A mother was expected to abide by 'proper' standards for child rearing and devote her entire time to domestic duties. A woman's responsibility and obligation in marriage rested primarily in providing a "happy and comfortable home" (Arnup, 2001:6) for her husband, that demanded obedience and obeisance, sexual exclusivity and moral chastity. It follows that the responsibility for a failed marriage rested with the wife (Arnup, 2001).

Policies and legislation were enacted to regulate the conduct and reinforce the subordination and subjugation of the lower classes, in which inadequately paid working women (including mothers), and abandoned wives and mothers (working or otherwise) were overwhelmingly represented. The nuclear family model was rarely identified with the lower classes. Deserted women were often associated with moral turpitude, inadequate parenting skills and the resultant social

maladaptation of their children, without any corresponding inquiry and examination of the roles of men as husbands and fathers in family breakdown and children's delinquency. "Among the new urban middle classes, a recurrent perception of pervasive social disorganization and crisis (in the lower classes) was articulated in overlapping discourses about rampant immorality, family breakdown and race suicide" (Chunn, 1992:28).

Unable to emulate the ideal mothers of the middle class, these women were usually perceived to be incapable of instilling the appropriate values and morals in their children, who, along with their disreputable mothers, were seen as threats to the social order. "Deviant families had to be prevented if possible and rehabilitated if necessary" (Gavigan & Chunn, 2007:738).

Failure to subscribe to middle-class norms of child-rearing and family life was often subject to legal coercion. During the period in question, federal and provincial governments enacted criminal and quasi-criminal legislation that, while universally applicable, in reality, targeted non-middle and -upper classes (Chunn, 1992).¹² "Some laws and by-laws regulating labour, education, leisure and sexuality restricted the activities of children and women in extrafamilial sites. Other statutes governing child welfare and spousal maintenance regulated interfamilial relations" (Chunn, 1992:44).

Legislation such as the *Children's Protection Acts*, 1888, 1893 reflected the new interventionist attitude toward marginalized families: the first statute gave police the authority to remove children from their parents or guardians and place them in industrial schools for the sake of the children's welfare; and the latter statute make parental cruelty to children a criminal offence. The 1893 *Act* also established children's aid societies empowered to seize children deemed at risk and consign them to foster care (Chunn, 1992).

Similarly, the federal *Juvenile Delinquents Act* "added another potentially coercive edge to state powers of intervention in family life among the working and non-working poor. By creating the offence of delinquency and mandating the establishment of special socialized children's courts,

the state enlarged its parental role and power” (Chunn, 1992:46). Henceforth, a child could be sanctioned for non-criminal conduct as as truancy, wandering, loitering and for participating in adult activities such as gambling, drinking and sex (Chunn, 1992).

The *Married Women (Maintenance in Case of Desertion Act, 1888* defined the rights of husbands and wives within families of the working and non-working poor. Desertion was incorporated into the legislation as “the poor man’s [sic] divorce” (Chunn, 1992:47), and had the effect of providing a cheaper, summary alimony procedure for poor women that allowed a deserted woman to appear before the Police Court. If the court found that the applicant had been deserted, it would summons the delinquent husband, issue a maintenance order regardless if the husband did or did not appear, and enforce the order with criminal sanctions, including incarceration, if necessary (Chunn, 1992). What differentiated these statutes from earlier versions dealing with the same issues was the “degree and mode of state intervention. The legislation enacted to regulate state-family and intrafamilial relations ... sanctioned unprecedented intervention into deviant, or potentially deviant, families” (Chunn, 1992:44).

Consequently, domestic relations divisions dedicated to enforcing family welfare legislation were established in the traditional criminal courts and new family courts (Gavigan & Chunn, 2007), historically characterized as ‘poor man’s court’ (Chunn, 1992) – although they could more properly have been called ‘poor women’s court’.¹³ The monied classes, in contrast, continued to avail themselves of the more genteel environment of the Supreme Court of Ontario for the adjudication of their matrimonial property disputes, and procure private members’ bills in Parliament to obtain divorces.

The Second World War and its aftermath heralded the development of a new social reality which brought fundamental challenges to social stasis and ultimately agitation for change. “Old rules of patriarchal domination which were necessary or tolerable under the old pronatalist familial patriarchal system became obsolete and/or impediments to the new social order” (Ursel, 1986:267).

In the case of Ontario, the extant law was archaic and chaotic (Craig, 2003), with legislation dating back to the nineteenth century. Attempts to restabilize the nation “logically start[ed] with the family” (Smart, 1984:50). The Victorian morality that informed existing legislation relevant to marriage and marital breakdown complemented the popular glorification of motherhood and ‘wife-dom’, hence there was little impetus to change it. Women in Ontario continued to be judged on the basis of a prescribed gendered and oppressive moral code that informed all aspects of family law, including entitlement to support and maintenance, child custody, and personal safety. None of this was responsive to the social reality with which Canadian society was faced in the latter half of the twentieth century.

Following passage of the federal *Divorce Act* in 1968 (*DA 1968*), the pace of change to the concepts of marriage and the family increased dramatically, in contrast to the previous era of legislative inaction and political ennui regarding divorce reform (Arnup, 2001). In Ontario, the last three decades of the twentieth century witnessed a veritable flurry of legislative activity as family law was perceived as the public arena most amenable to the agendas of gender politics. Family law has thus become “politicized in a way that is not true of most other areas of private law. Indeed, there can be few areas of law or public policy where there is as much conflict and turbulence as in family law” (Parkinson, 2011:3-4).

Intimate relationships – the family – continue to constitute the bedrock of our society. Even in the face of fundamental social changes to and in the family, such as the inclusion of non-heterosexual intimate relationships within the definition of marriage, the expansion of fathers’ ‘rights’ to child custody, the universality of the two-income family and the marginalization of the traditional stay-at-home mother, family law in Canada promotes the sedimentation of the social institution of the traditional family. To paraphrase Snell (1991), the essential power of the dominant discourse has always rested in its ability to persuade people that the characteristics of marriage and divorce, and the marital roles they describe are the only sane and appropriate ones. Anything else is deviant

and destructive. “[T]he law itself is an actor in the contest, a vital conservative force that shapes the ideas of the contestants and helps to maintain the existing social structure by inhibiting one’s ability to conceive of alternatives” (Snell, 1991:7).

6. The Four Themes Informing the Civil Family Justice System

Family law is necessarily continually being ‘reformed’ (Parkinson, 2011) because it represents the locus of fundamentally incompatible, competing, public and private (and public versus private) interests. The state, through law, has always been involved in the formulation of the family, in the identification of women’s and men’s ‘rights’ within (and without) that private domain, in determining the relevance of conduct and the bestowal or denial of those ‘rights’, and the entitlements emanating therefrom, based upon sex and, often, conduct, itself differentiated by sex.

The four themes reoccurring throughout legislation and common law informing the civil family justice system identified in the Introduction – gender, rights, conduct and entitlement – are used in the balance of this chapter to critically deconstruct and analyze the following statutes: The *Divorce Acts*, 1968 and 1985 (*DA 1968*; *DA 1985*); Ontario’s *Family Law Reform Acts*, 1975 and 1978 (*FLRA 1985*; *FLRA 1978*); the *Family Law Act*, 1990 (*FLA*); and the *Children’s Law Reform Act*, 1990 (*CLRA*). References are made to other statutes relevant to the discussion, such as the federal *Bankruptcy and Insolvency Act (BIA)*, and the draft *Domestic Violence Protection Act*, and the *Partnerships Act* of Ontario, amongst others. The predecessor legislation to that currently in force is examined because three of the survivor participants’ legal proceedings were commenced under the earlier legislation.

a. Theme One – Gender: Still Different, Not Equal

Sex v gender; sex and gender; sex/gender: The *Charter* guarantees “sex equality”.

However, the literature concerned with woman abuse usually refers to “gender equality” (or inequality). What is the difference between “sex” and “gender”? West and Zimmermann describe “sex” as “ascribed by biology, anatomy, hormones, and physiology” (1987:125), and as “a

determination made through the application of socially agreed upon biological criteria for classifying persons as females or males” (1987:127). Ridgeway defines “gender”:

as a multilevel structure, system or institution of social practices that involves mutually reinforcing processes at the macro-structural/institutional level, the interactional level, and the individual level (2009:146).

West and Zimmerman identify gender as an “achieved status”: “that which is constructed through psychological, cultural, and social means”, a “routine, methodological, and recurring accomplishment” (1987:126). “Gender is a primary cultured frame for organizing social relations” (Ridgeway, 2009:146). The “sex” to which the *Charter* refers is either male or female; for the purposes of this dissertation, “gender” refers to the socially prescribed attributes and roles of “doing” gender as a heterosexual man or woman:

Doing gender involves a complex of socially guided, perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine “natures” (West & Zimmerman, 1987:126).

Thus, gender refers to the behavioural aspects of being male or female. The characteristics ascribed to men and women as binary opposites discussed in the Introduction are examples of the way men and women are differentiated. These characteristics are not biologically, but socially determined.

Sex/gender, of course, is a form of human variation that is highly susceptible to cultural generalization as a primary category for framing social relations ... The male-female distinction is virtually always one of a society’s primary cultural-category systems (Ridgeway, 2009:148).

When legislating “sex equality”, the framers of the *Charter* were referring to equality between men and women, biologically differentiated, but socially constructed in their heterosexual masculine and feminine roles that have historically privileged men and oppressed women. If this were not the case, there would be no reason to guarantee “sex equality”. A discussion of the limitations inherent in this conceptualization of both “sex” and “gender” lies outside the scope of this research study. In this dissertation, the term “sex” is used when referring to the *Charter*, simply

because that is the word used. The term “gender” should be construed as encompassing the biological differences between men and women associated with the word “sex” as well as the qualities and characteristics that define the categories of boy and girl, man and woman as the social performances of “doing gender”. It should be noted that Ridgeway does not appear to distinguish between sex and gender in the above quote.

The Divorce Act, 1968: The *DA 1968* represented the first attempt by the federal government to formulate a national divorce strategy, although, from the outset, the *Act* was “seen as a compromise piece of legislation, one which, even at the time, did not reflect the realities of marriage breakdown” (Bureau of Review, 1990:1).¹⁴

The most significant development under the statute was the introduction of the concept of marriage breakdown as a ground for divorce, included with the traditional grounds of adultery, rape, sodomy, bestiality, homosexuality and physical or mental cruelty. These grounds were equally available to husbands and wives, thereby reinforcing the earlier abolition of the old ‘double standard’ imported from British law. The importance of this alteration in the law’s perception of entitlement to divorce should not be overlooked: the issue of sex was no longer relevant. The *Act* repealed the *Divorce Act (Ontario)*, which had applied the law of England as of July 15, 1870 in the province. Section 11(1) provided that the court “may, if it thinks it fit and just to do so having regard to the conduct of the parties” make orders against either the husband or the wife for periodic or lump sum spousal and/or child maintenance, and/or a custody order directed at either the mother or the father. It must be remembered, however, that this section applied to matters brought under federal legislation (in a divorce action). Other considerations included the “condition, means and other circumstances of each [of the parties]”. Payne asserted that this section allowed the court to “look to the conduct of both parties in contributing to the destruction of their marriage” when determining a wife’s entitlement to maintenance (1968:125). He made no comment about the application of this consideration to custody, presumably because, at the time of promulgation of the

DA 1968, and long thereafter, the greatest proportion of sole custody awards in divorce actions were granted to women, most on consent (Bureau of Review, 1990).

Claims for corollary relief in divorce proceedings inspired various courses of conduct that could be (and were) adopted by those men seeking to avoid the obligations now imposed upon them under the new statute.¹⁵

The Family Law Reform Acts, 1975, 1978: The archaic provincial legislation governing custody, access and support in force until 1975 was replaced with the *FLRA 1975*, a ‘housekeeping’ statute that abolished unity of personality (s. 1(1)), allowed married women the authority to act as guardians *ad litem* (s. 3(b)), and sought to remedy the consequences of a legal decision recently rendered in the Supreme Court of Canada concerning claims for the division of matrimonial and other property. The decision had been condemned as particularly oppressive to women and precipitated family law reform at the provincial level.¹⁶

The *FLRA 1975* was subsumed by its successor legislation, the *FLRA 1978*. The *Act* was unusual for a Canadian statute in that it contained a Preamble,¹⁷ the contents of which purported to reflect the ethos of the ‘new society’, one which embodied the concept of gender equality and the celebration and promotion of the individual and her/his liberal rights. While encouraging and strengthening the family “in society” (para.1), the Preamble established that it was necessary “to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership” (para. 2). The Preamble, and the *Act* that followed it, represented a fundamental change in the legal perception of the institution of marriage, and the traditionally socially-prescribed and socially-gendered roles of men as husbands, and women as wives and mothers, within it.

The support obligation, previously a personal duty of a husband to support his wife during and after marriage, was now presented as a responsibility (on the part of either spouse) to supplement the income of the person whose inability to achieve self sufficiency following marital break-

down could be traced in some way directly back to the marital relationship (Krever, 1983). The support provisions of s. 18(5) set out sixteen criteria a court was to consider when determining an amount of support to be paid “in relation to need”. Many of these criteria reflected the legislators’ recognition of the financial sacrifices women might make for the benefit of their marriages, husbands and children, and, in this regard, were gender-specific.¹⁸ These provisions stood in contrast to the promotion of gender equality expressed in the Preamble.

The issues of custody and access were summarily dealt with in s. 35(1) of the *Act*: either parent “or any other person” was equally entitled to seek custody of or access to a child, having regard to the child’s “best interests”. No guidelines were provided to the court to determine what constituted these “best interests”. They were to be decided on the basis of the facts of each case, having regard to the various legal presumptions or doctrines that had guided the court previously, and were thereby left to judicial discretion, discussed in the next chapter. Suffice it to say at this point, the legal presumptions entertained by judges in custody applications at the time of passage of the *FLRA 1978* continued to be decidedly gendered in favour of mothers.¹⁹

Through the *Act*, the legislators attempted to engage in a form of social engineering (Ursel, 1986) by defining what constituted marriage in Ontario (a “partnership”), and how spouses were supposed to behave (as ‘equals’). It also spoke to the relationship of spouses following marital breakdown: recognizing their “mutual obligations”, engaging in “equitable sharing” in their parenting responsibilities, and realizing an “orderly and equitable settlement” of their affairs. The repudiation of the traditional gender hierarchy in the nuclear family was reinforced in the statute by the use of gender-neutral language, although it is clear that, with respect to certain sections of the *Act*,²⁰ the gender-neutral language used belied the intent of the legislation to apply to women rather than men.²¹

From the outset, the *FLRA 1978* differed from all previous legislation governing marital breakdown and the determination of legal rights of separated spouses in that it rejected the necessity

of establishing legal entitlements for women that hitherto did not exist, because gender equality *in law* was assumed. Men no longer enjoyed more or different inherent legal rights from women during marriage or after marital breakdown. The *Act* did not actually speak of gender *equality*. Instead, it identified the conjugal relationship as a *partnership*, in which the spouses were *partners* – in effect, non-gendered, legal constructs, absent from which was any attribution of those gendered qualities or traits socially ascribed to the categories of ‘man/husband/father’ and ‘woman/wife/mother’.²²

By importing into the legal conceptualization of the marital relationship what was, in essence, a basic commercial law concept, the *FLRA 1978* imbued the legislation, and through it, intimate relationships, with qualities of “legal rationality” that family law and personal relationships were previously assumed to lack. The ingredients of “legal rationality”, which included “a general duty of partners to observe good faith” (Coombs, 2013) were expected to characterize not just the conduct of the parties in family law proceedings following separation, but during cohabitation, as well. The personification in law of “legal rationality” was the ‘reasonable man’ – indeed, an individual imbued with those qualities associated with men (Conaghan, 1996). Accordingly, the tenets of ‘good faith’ that applied to marital conduct reflected men’s, not women’s (particularly abused women’s) experiences.

The Preamble, as well as other sections of the *FLRA 1978*, such as the requirement for full and frank financial disclosure by the parties, appears to have imposed “a duty tantamount to a fiduciary duty” on the parties. “Obtensibly, the definition of fiduciary duty appears particularly suited to the spousal relationship” (Carson & Stangarone, 2010:286). Unfortunately, an express reference to a mutual fiduciary duty between spouses was not included in the *FLRA 1978*, nor in any other family law statute, to date, but has been examined in the parental context in case law (see Chapter Three).

Drafters of the *FLRA 1978* presumed that men and women in their intimate relationships were rational, autonomous individuals who freely negotiated as equals in the terms of their “partnership”. Their bargaining positions were, it was assumed, also equal. Gone were the draconian requirements for wives of chastity and obedience. Gone, too, was the implication that husbands and fathers needed to be legally coerced into honouring their financial obligations to their families following separation, since child care, house management and financial provision were joint responsibilities of the spouses. Pursuant to s. 4(5), inherent in the marital relationship was joint contribution, whether financial or otherwise, by the spouses to the assumption of those responsibilities, entitling each spouse to an equal division of the family assets.

Part IV of the *FLRA 1978* refers to “Domestic Contracts”.²³ Section 50 of the *FLRA 1978* identified four types of “domestic contracts”: a) “cohabitation agreements”; b) “domestic contracts” (marriage contracts, separation agreements and cohabitation agreements); c) “marriage contracts”; and d) “separation agreements”. Section 51(2) provided that “any provision” in a marriage contract purporting to limit the rights of a spouse under Part III with respect to a matrimonial home was void. Non-cohabiting spouses, pursuant to s. 53, could enter into separation agreements in which they could determine, upon agreement, all matter between them, including custody of or access to children, and possession of the matrimonial home. Marriage and cohabitation agreements could not contain provisions regarding custody and/or access (s. 52). The assumption in the *FLRA 1978* that marital ‘partners’ were (or, at least, should be) legally rational before and during marriage presaged the promotion in successor legislation of cooperative behaviour and mediated settlements of marital disputes arising *after* separation. It was assumed that all individuals joined in marriage subscribed to this orderly view of that institution.

The Divorce Act, 1985: The official rationale for reconsideration of the *DA 1968* was grounded in “the significant social and economic changes Canada ha[d] experienced” following its enactment (Minister of Justice, 1984:2).²⁴ In this regard, the *Act* embodies the right of sex equality

guaranteed by the *Charter of Rights and Freedoms, 1982* (the *Charter*), which is presumed to reflect the already sedimented recognition of gender equality throughout society, or to encourage acceptance of gender equality by the force of law.

The Law Reform Commission of Canada, in its recommendations concerning the new *Act*, had taken particular exception to the absence of any “principled basis for spousal support after divorce” (Engel, 1993:6) once the doctrine of coverture and the old statutes governing the rights of married women to maintenance and support were repealed. Instead, the Commission recommended a “theory of rehabilitative support, (Engel, 1993:6), the premises of which have been embodied in the *DA 1985*. However, a *guarantee* of sex equality, the *presumption* of gender equality in intimate relationships, and the *assumption* of equality of opportunity to achieve financial independence embodied in the *DA 1985* certainly did not, nor do they reflect the reality of most women’s lives, particularly abused women’s lives, nor could they ensure, nor have they ensured substantive equality between men and women. The issue of gender equality and its relationship to rights is more fully discussed in the next section, and rehabilitative support is discussed in Chapter Three.

The Family Law Act: In its 1983 brief, the Ontario Status of Women Council presented the Attorney-General for Ontario with a number of legislative recommendations which, it was believed, would further the interests of women upon marital breakdown. Most of the recommendations were concerned with reforming the family legislation that was considered oppressive to women, particularly that dealing with property division, spousal support and possession of the matrimonial home. The recommendations were premised on the presumption of formal equality between men and women, but included provisions that effectively favoured women as they sought to encourage substantive as well as formal gender equality (Ontario Status of Women Council, 1983). Most remarkably, the Ontario Status of Women Council failed to comment at all on the absence of any mention of domestic violence and abuse in the *DA 1985* or *FLRA 1978*.²⁵

The *FLA*, first passed in 1986, appeared to have embodied most of these recommendations. What was *not* included is instructive: a definition of self-sufficiency; and a statutory recognition of women's unequal access to employment, both of which would have codified the reality of institutionalized gender inequality in the public sphere and which the judiciary would have been obligated to address in their decisions. No mention was made of domestic violence and abuse as a consideration to be taken into account in the determination of claims under the *Act*, excluding claims for restraining, no-contact and exclusive possession orders. The following discussion refers to the current *FLA*, as amended.

The Preamble to the *FLA* differs from the *FLRA 1978* in only one, significant respect: gone is the reference to “strengthening the role of the family *in society*” – the family in its private domain, is, itself, the end product with which the statute is concerned. One can only assume that the process of ‘social engineering’ undertaken by previous lawmakers was deemed to have been completed by the time the Preamble was amended; gender equality was, and is, a given – a presumed *reality* – in the private as well as the public domains. The reality of abused women's lives both during marriage and after marital breakdown, evidenced throughout this dissertation, belies that assumption, and is aided and abetted by the reprivatization of the marital relationship that is encouraged by the current legislation.

Section IV of the *FLA* dealing with domestic contracts closely resembles its predecessor. The types of domestic contracts recognized in the *FLA* have expanded to include paternity agreements and family arbitration agreements. The rights and limitations applicable to marriage and cohabitation agreements set out in the *FLRA 1978* continue under the *FLA* regarding the right to custody of or access to children (s. 53(1)(c)) and, for marriage contracts, “a provision in a marriage contract purporting to limit a spouse's rights under Part II (Matrimonial Home) is unenforceable (s. 53(2)). These rights remain extended to separated former co-habiteés (s. 54).

The Children's Law Reform Act: The issues of custody and access were removed from the *FLRA 1978* in 1982 and thereafter constituted as Part III of the *Children's Law Reform Act, 1978*, until the *Children's Law Reform Act (CLRA)* was revised, as amended, in 1990. As in the *FLRA 1978*, the entitlement to custody and/or access, or child support, are/is not determined by the gender of the parent: "the father and the mother of a child" are "equally entitled" to custody (s. 20(1)). Inasmuch as either the mother or the father is equally entitled to custody, the custodial parent, regardless of gender, is entitled to child support. The *CLRA*, like the *DA 1985*, reflects the guarantee of sex equality embodied in the *Charter*. Once again, however, legal equality has not guaranteed substantive equality with respect the custody/access and/or support of children.²⁶

Woman abuse is a roadblock to mediation in family law disputes: It has been argued by Naffine that the nature of 'sex equality' as defined in and by law demands that women will achieve equality only by becoming more like men; efforts to prohibit sex discrimination have "in many ways served only to entrench the dominant legal model of the person. For what is now expected of women, if they insist on equality with the man of law, is that they mimic him in as many ways as possible – they become pseudo-men of law" (1990:23). For men asserting their 'rights' to child custody, it has been necessary that they become 'pseudo-women'.

That the social 'level playing field' envisioned by proponents of sex equality did not, and does not yet exist appears to be irrelevant to the presumption of sex equality in the family and beyond. "A gender-neutral [legal] framework ... masks real inequalities between women and men. Gender-neutral rules are applied in a gendered world to gendered lives" (Fineman, 1989/1990:91). Gender neutral laws also tend to reproduce white, middle-class and heterosexual norms of 'family' and caring for children (Boyd, 1997) that neither reflect, nor are capable of responding to, the realities of the lives of those women – poor, immigrant, disabled or older women and women of colour, for example – who find themselves before the courts in family law disputes. The principles underlying the equality provisions of the 'new' family law – that the spouses are similarly situated,

are entitled to an equal share of family property, equally entitled to support and custody, and have the same opportunities after separation – do not necessarily resonate in the absence of property to divide, or support to be awarded or left unpaid.²⁷ Failure to recognize the intersection of gender and class, as well as other identified categories of difference, as sites of oppression has diminished the achievement of ‘sex equality’.

The notion of a gender-neutral ‘level playing field’ upon which separated marital ‘partners’ will rationally and equitably agree upon the resolution of their marital differences informs the promotion in the *FLA* of mediated settlement following marital breakdown. The federal Minister of Justice, in his recommendations for reform of the *DA 1968*, questioned the utility of an “adversarial trial” in divorce proceedings as “inherently inconsistent with the constructive resolution of family disputes”, and recommended “counseling and mediation services” as “valuable alternatives to the trial process as a means of resolving disputes” (Minister of Justice, 1984:20). The *FLA* reflects this sentiment, first, in its Preamble, and second, in s. 3, allowing the Court to appoint a mediator, on consent.

Further, the provincial *Family Law Rules* expressly state as their “primary objective” “to enable [the court] to deal with cases justly, [by] ... saving expense and time” (s. 2(2) and 3(b)) and the “duty to manage cases” imposed upon the court by statute includes “encouraging and facilitating the use of alternatives to the court process” (s. 2(5)(b)). Indeed, both the OCJ bench and its mediation services are mandated by the Ministry of the Attorney General to achieve as many mediated settlements as possible (Ministry of the Attorney General Court Services Division, 2005).

There are certain underlying assumptions with respect to the promotion of mediation in cases of woman abuse: that the abuse can be identified; the abused woman is capable of volunteering to participate in the process; and the mediator can address any power imbalance between the parties through the exercise of his/her mediation skill and expertise in order to achieve the requisite equality in bargaining positions necessary to mediate (Pearson, 1997; Raitt, 1997; Landau, 1995;

Benjamin & Irving, 1992). Mediation, as a mode of intervention, is expected to modify the power relations, resolve problems of physical and psychological violence, and bring about social adjustments in the family (Imbrogno & Imbrogno, 2000).²⁸ However, the presumption of a 'level playing field' between an abused woman and her perpetrator upon marital breakdown is fallacious. Abused women do not enjoy 'equality' with their male abusers during cohabitation, and certainly do not after separation. Accordingly, the inherent power differential between abuser and victim is a fundamental impediment to achieving the requisite equality of position necessary to the mediation process. Nor, as discussed in Chapter One, has the extent and impact of intimate partner violence and abuse on the cognitive and executive functioning of women been adequately explored to determine if abused women are, in fact, capable of participating as equals in mediation. The majority of studies focusing on mediated outcomes in family law disputes in which woman abuse was present have concluded that mediation is not appropriate in those cases, nor do the results flowing from those mediations protect abused women and their children from further abuse (Johnson et al, 2005; Tishler et al, 2004; Greatbatch & Dingwall, 1999; Mathis & Tanner, 1998; Raitt, 1997; Zorza, 1995-1996; Pagelow, 1993).

The referral of marital disputes to mediation (and thus the private domain of negotiated settlement) obviates the relevance of woman abuse to social issues surrounding the family. However, the promotion of justice and due process in legal proceedings demands that woman abuse be dealt with in "a forum of strength and public review" the court room affords (Howe & McIsaac, 2008:593). It should come as no surprise that fathers' rights activists are ardent supporters of mediation in family law disputes.

The notions of a marital "partnership", "sex equality", and "equality of bargaining position" cannot be reconciled with the oppressive consequences of woman abuse. Nor should "equal entitlement" with their victims be afforded abusers. Unfortunately, the advancement of 'men's rights', the rejection of conduct as a determinant of both rights and entitlements, and the conflation of entitle-

ments with ‘rights’ and corresponding deflation of rights to ‘entitlements’ (or less), have concretized the presumption that husbands and wives are, in all respects, equal during marriage and after its breakdown.

b. Theme Two – Rights

Establishing a discourse of rights: The “guaranteed right” contained in the *Charter* that is particularly relevant to this discussion is found in section 15(1), guaranteeing “sex equality” under the law. (The limitation currently imposed by the courts upon section 7 – notwithstanding the decision in *R v Seaboyer*, that recognized the competing, but lesser rights of a complainant with those of an accused in criminal proceedings²⁹ – guaranteeing the legal right to “security of the person” to an accused person, including an abusive spouse charged with contempt of a family court order under s. 127 of the *Criminal Code*, and not to abused women and children, is discussed briefly later in this chapter.)³⁰

The right of sex equality: The theme of rights with respect to marriage and divorce has, historically, been framed as an issue of *women’s* rights. Historically, legal ‘rights’ in marriage and divorce have usually accrued to men. The denial of these rights, as well as all other legal and equitable ‘rights’ granted exclusively to men throughout society constituted the *raison d’être* of women’s rights movements since the nineteenth century (Foyster, 2005).

‘Rights’ had always been fundamental to the claims of feminism and associated with the issue of power: men had power; women did not (Smart, 1989). “Now rights constitute[d] a political language through which certain interests [could] be advanced. To couch a claim in terms of rights [was] a major step towards recognition of a social wrong” (Smart, 1989:143). Women’s equal rights and entitlements would thus be protected and promoted through sex (gender) equality.

However, the women’s ‘rights’ discourse of the Canadian social reform movement that informed s. 15(1) of the *Charter* ignored three basic premises in its position that were incompatible with the realization of women’s equal rights. First, advancing women’s rights might be met by a

counter position of competing men's rights, a problem that was soon realized in family law reform. Second, the exercise of power in the private sphere had very little to do with legal rights. Third, while the promotion of rights is equated with the protection of the weak against the strong, and the promotion of an entitlement to power by those without from those in possession of power, those rights could be appropriated by the more powerful (Smart, 1989). This latter scenario has played out in the arena of family law reform, dominated by men's and fathers' rights lobbyists and the demonization of feminism as a "self-interested lobby which seeks rights without responsibility and is negligent as to the consequences for children and the family" (Smart, 1989:146).

Boyd and Young (2002) have noted that the discourses surrounding proposed changes to the *DA 1968* were markedly different from those informing creation of that statute. While the pre-1968 debates had been characterized by a concern that the financial burden to support mothers and children not be placed on the state by defaulting husbands and fathers following marital separation, statutory reform of the *DA 1968* was now debated in a politically charged climate in which the 'rights' of fathers were pre-eminent. Fathers' rights groups asserted that the law, particularly with respect to custody and access, was biased in favour of women, who held a monopoly in this regard.³¹ Hence, the dominant rights discourse surrounding the family justice system was, and continues to be appropriated by those seeking to advance *men's*, or *fathers'* rights, and, occasionally, *children's rights*, but rarely women's or mothers' rights.

The rhetoric of 'fathers' rights': The demand for equal rights advanced by women has proven to be of considerable utility for those men who have embraced the fathers' rights movement. Fathers' rights groups began to organize in Canada in the early 1980s in response to the implementation of stricter enforcement mechanisms for child support payments (Amyot, 2010). Fathers' rights lobbyists were successful in attracting the attention of legislators during the Standing Committee on Justice and Legal Affairs in 1985, when the child custody provisions of the subsequent *DA 1985* were negotiated (Mann, 2005). This movement vociferously attacked the civil family justice

system as fundamentally biased against them and manipulated by women to achieve a monopoly on custody ‘rights’ and extract support payments to which they were not entitled.³² The emergent legal discourse of ‘rights’ was advanced to challenge the established social presumptions that were alleged to favour women and were thus discriminatory and intolerable. Fathers’ rights advocates accused women of concocting allegations of domestic violence and abuse against men in their intimate relationships in order to ensure their continued dominance of the civil family justice system (Mann, 2005; Boyd & Young, 2002; Laing, 1999).

The rights rhetoric of feminists provided those who stood (and continue to stand) in opposition to the advancement of women’s rights an opportunity to reinforce their own ‘rights’, ‘rights’ they historically enjoyed *as a matter of right* – a natural right the law reflected – but they now misrepresented as having been denied them in court, but which, in reality, they never lost.

That men were, historically, overwhelmingly subjected to support orders and found themselves relegated to the role of access parent reflected, not a new reality, but the historically sedimented realities of women’s inferior economic status in society, and the attribution by society to women of the responsibility for child care. This “everyday evidence” was no longer interpreted as an indication that mothers rather than fathers assumed the majority of child care, but re-interpreted as proof mothers excluded fathers from “the caring roles they would otherwise adopt” (Smart, 2006:viii). For fathers’ rights advocates, the rights they sought could not be shared with mothers – fathers’ ‘rights’ and mothers’ ‘rights’ were competing, incompatible, and irreconcilable. Thus, fathers’ rights could only be realized at the expense of mothers’ rights.

The fathers’ rights movement centred its attacks on three issues that, it contended, were exploited by women to the detriment of men in family court proceedings: custody; domestic violence and abuse; and support. The latter two issues are discussed below under the sub-headings “Conduct” and “Entitlements”, respectively.

Custody and access 'rights': For fathers' rights advocates, the only way to end discrimination against the non-custodial father and safeguard his "inalienable rights as a parent" (while reducing or eliminating his financial obligations for mother and children) was through a statutory presumption of joint custody (Mann, 2005:30).³³ While the legislators have failed, to date, to accede to the demands of fathers' rights advocates in this regard,³⁴ the success of the fathers' rights movement, and the ideas it promotes have proven to be popular both in the courtroom and the public domain, reflected in the judicial decisions discussed in the next chapter, as well as in the promotion of mediation. "The *Act* allows but does not presume or prefer joint custody and encourages but does not mandate custody mediation, both of which are, increasingly, the norm" (Mann, 2005:31). The wide and unquestioning acceptance of this discourse speaks to the powerful attraction and appeal the ideals and values of the fathers' rights lobby hold, and are both shared and promoted in our society (Amyot, 2010).

Actualizing 'fathers' rights' in legislation: The inclusion (and judicial interpretation) of certain sections of the current federal and provincial legislation has encouraged, if not a de facto presumption of joint custody as being in children's "best interests", then a preference for any sort of custody arrangement that presumes active and persistent fatherly engagement with children.³⁵ Section 16 of the *DA 1985*, which deals with custody and access, does not expressly acknowledge that either parent has a *right* to custody of or access to his/her child. However, s. 16(5) grants to the access parent "the right to make inquiries and to be given information, as to the health, education and welfare of the child". This "right", when exercised by a controlling and abusive spouse, can have the effect of diminishing the authority of the custodial parent and interfering in the care and upbringing of her children. No other 'rights' regarding custody and access are referred to in the statute, save and except the right of the child aged sixteen or older to withdraw from parental control (s. 65).

Section 16(10), known as the ‘friendly parent’ or ‘maximum contact’ rule, does not bestow any rights to access on either the parents or their children. Instead, the section imposes an *obligation* on the custodial parent to encourage – ‘facilitate’ – maximum contact between the access parent and child(ren) if in the ‘best interests’ of the latter. The effect of this section is that the strength of the obligation imposed on the custodial parent has created a de facto *right* of maximum contact enjoyed by the access parent through judicial interpretation and legal practice not expressed in the legislation.³⁶ The obligation imposed on the custodial parent, usually the mother, to facilitate maximum contact between the access parent, usually the father, and child has taken the form of a de facto preliminary presumption of entitlement to that *right* of maximum contact by the access parent (as demonstrated through the empirical evidence adduced in Chapters Five and Six). For abused women seeking to protect themselves and their children from their abusive husbands and fathers through orders of sole custody, and/or limited, supervised or no access, this preliminary presumption has serious consequences. First, the presumption must be rebutted before an abused woman can proceed with her application for sole custody and/or restricted access. Second, an abused woman who might have attempted to protect herself and her children from further violence and abuse by unilaterally limiting or denying access to her perpetrator will have already offended the obligation imposed on her to facilitate maximum contact.

Section 17(9) of the *DA 1985*, the ‘maximum contact rule’, is replicated with respect to applications to vary custody orders. In these cases, the court is to take into consideration the willingness of the parent seeking custody through a variation order to facilitate contact with the parent who risks losing custody on the application. In so doing, and in the absence of sufficient persuasive evidence to rebut the preliminary presumption, a mother finding herself in the circumstances described may have exposed herself to losing custody altogether. ‘The provision lays a threat over women who have been victims of family violence that they might lose custody if they fail to provide access to a violent spouse’ (Special Joint Committee on Custody & Access, 1998:45). An

abused woman who loses custody of her child to her abuser will likely find that he is not disposed to facilitating her access.

While the ‘friendly parent/maximum contact’ provision is not reproduced in the provincial legislation, it nevertheless impacts and informs those statutes by statutory interpretation.³⁷ The primary – and first – objective of the *FLRA 1978* (and *FLA*) was/is stated in the Preamble: “to strengthen the role of the family”. This objective appears to apply to the family both during cohabitation *and after separation*. Application of the ‘friendly parent/maximum contact’ provision of the *DA 1985* achieves this objective by mandating the continued involvement of parents in each other’s life regardless, apparently from the material presented in Chapters Three, Five and Six, of the toxicity of the relationship and the occurrence of woman and even child abuse during cohabitation, and after.

Sections of the *CLRA* can also be interpreted to grant *rights* that favour the access parent. Section 20 of the *CLRA* identifies “the father and the mother of a child” as “*equally entitled*” to custody (ss. (1)). However, once “entitled” to custody, the custodial parent “has the *rights and responsibilities* of a parent” and must exercise those rights and responsibilities in the best interest of the child (s. 20(2)). As stated, the best interests of the child are now assumed to include the non-custodial parent’s *right* of maximum contact, again, in aid of the best interests of the child. The *entitlement* to access to a child “includes the *right* to visit with and be visited by the child and the *same right as a parent* to make inquiries and to be given information as to the health, education and welfare of the child” (s. 20(5)). It would appear that the section thus bestows *rights* on the access parent otherwise enjoyed by the custodial parent, and to which the access parent would not otherwise be *entitled* (see the discussion of *Young v Young*, Chapter Three).

However, it is the custodial parent upon whom the obligation rests to ensure the non-custodial parent enjoys maximum contact with his/her child, with no corresponding obligation on the access parent to demand or exercise *any*, let alone maximum access. The case law and experiences

of the survivor participants in this research study reveal how the obligation to promote a father's perceived *right* to maximum contact is exploited by abusive fathers to control their estranged wives and, in some instances, their children.³⁸

That a child “should have” maximum contact with each parent under s. 16(10) of the *DA 1985* has been appropriated by the fathers' rights lobby to reinterpret *fathers'* right to joint custody as the *child's* right to maximum contact with his/her father. Characterizing the right to “maximum contact” with the access parent as a right of the child renders that right incontrovertible, and any mother who might dare to challenge a father's claim for “maximum contact” is perceived as failing to act in her child's best interests – perhaps even engaging in ‘parental alienation’ (Gardner, 1992). “Against the backdrop of ‘friendly parent’ provisions which emphasize maximum contact with each parent, the person who requests sole custody appears to be selfish, power seeking and indifferent to the other parent's and the children's rights” (Delorey, 1989-1990:40). There does not seem to be a legitimate way mothers can request such orders without appearing to be arguing against the best interests and right of their children to “maximum contact” with the abusive spouse.

c. Theme Three – Conduct

Conduct under the Divorce Act, 1968: The *DA 1968*, while purporting to have intended to benefit women by making divorce equally available to men and women by expunging the emphasis placed upon wives' sexual *misconduct* under the previous federal legislation (which acted as barriers to women's claims for alimony and child custody upon divorce), impacted the way the courts under both federal and provincial legislation have approached conduct, generally, including abusive conduct, in determinations of rights and entitlements between spouses.

The removal of wives' sexual misconduct from the *DA 1968* as a factor in considering claims for corollary relief and child custody supposedly represented a step forward in mediating the negative impact of the adversarial process on post-separation relationships (Minister of Justice, 1984). Similarly, the marginalization of fault grounds for divorce was considered necessary to

recognize that “marriages fail for many complex reasons, usually involving both parties” (Minister of Justice, 1984:7). However, marriage breakdown on the basis of separation contemplated under the *DA 1968* included some notion of fault under s. 4. The *Act* incorporated the fault grounds established under previous legislation, and incorporated fault in the ground of marital breakdown by reason of the spouses having lived separate and apart (s. 4(1)(e)(ii)): the deserted spouse could apply for divorce after three years; while the deserting spouse, being deemed to have caused the breakdown of the marriage, could not apply until five years had elapsed.

Conduct remained relevant to claims for corollary relief (spousal maintenance and/or custody) under s. 11(1), or for variation of existing orders for corollary relief (s. 11(2)).

Conduct under the Family Law Reform Act, 1978: The *FLRA 1978* contained numerous provisions specifically designed to address malfeasant conduct on the part of a spouse who repudiated the assumption of marriage as a “partnership”. In this regard, it echoed s. 11(1) of the *DA 1968*, by which a spouse’s misconduct in contributing to the breakdown of the marriage could be taken into account when determining spousal maintenance and/or custody. More particularly under the *FLRA 1978* (concerned, as it was, with proprietary rights upon the dissolution of marriages), a spouse who unreasonably impoverished the family assets would be subject to an unequal division thereof to that spouse’s detriment (s. 7(6)(a)). A delinquent and/or absconding payor of support could be subject to attachment and/or imprisonment (ss. 25-32). A spouse found to be “molesting, annoying or harassing” his/her former spouse or children in that spouse’s custody could be made subject to a recognizance order (s. 34). The interest in property of a spouse found to be “unreasonably with-holding consent” to its disposition or encumbrance could be subject to judicial determination (s. 44).

Section 35 provided that either parent or any person could apply for custody of or access to a child. Orders were to be made in accordance with the best interests of the child. There was no reference in this section to conduct as a consideration when determining a child’s best interests.

Decisions in these matters were left to the discretion of the judge. However, as a matter of legislative interpretation (Kondo, 1978), the juxtaposition of the section dealing with restraining orders (s. 34(1)) with that referable to custody and access (s. 35(1)) suggests that family court judges were mandated to consider intra-spousal conduct as the paramount consideration when determining the best interests of the child.³⁹ However, the *Act* did not expressly stipulate that it was the parents' past (and present) conduct *toward each other* that should be taken into account when determining the best interests of a child (and not just the parents' past conduct toward the child). While it may seem self-evident that the behaviour of one parent toward the other should be relevant to their children's best interests, the courts consistently repudiated that proposition (and continue to do so), to the point that legislative amendment by insertion of s. 24(4) directing the courts to consider "violence and abuse" when determining the fitness of a person to act as a parent to a child was required in the *CLRA* in 2006 to direct judges' attention to what should have been obvious.⁴¹ This omission in the *FLRA 1978* and, prior to 2006, in the *CLRA*, may have had the effect of minimizing, if not precluding, consideration of woman abuse in custody and access disputes.

Conduct under the Divorce Act, 1985: The *DA 1985* establishes only one ground for divorce: "marriage breakdown" (s. 8). There are three ways of proving "marriage breakdown" under the *Act*: adultery; cruelty; or marital separation (living separate and apart) for one year. The *DA 1985* rejects spousal *misconduct* as a determinant of entitlement to corollary relief in the forms of spousal support (s. 15.2(5)) and custody and/or access (s. 16(9)). The 'fault' associated with desertion contained in the previous statute has been expunged. The concepts of 'fault' and 'conduct' are held to be irreconcilable with the objectives of divorce reform: the first (and primary) objective remains preservation of the family unit; the second to permit an untenable marriage "to come to an end as peacefully and painlessly as possible" (Minister of Justice, 1984:3). However, in the process of their repudiation, 'fault' and 'conduct' have become inextricably linked, and, subsequently, those

engaged in marital *misconduct* have not been seen to be ‘at fault’ such that their actions deny them any ‘rights’ to which they are deemed to be entitled, because conduct is no longer a consideration.

It was earlier suggested that some judges may have become so convinced that fault is an inappropriate notion in marital disputes that they will not hear evidence or arguments related to the supposed bad conduct (Ontario Status of Women Council, 1983). More pragmatically, “[f]amily law got out of the fault business because it was too ugly, too difficult and too expensive to prove who did what to whom” (Cossman, 2006:2).

However, the “friendly parent provision” of s. 16(10) dictates the acceptable *future* conduct of a custodial parent toward the access parent. This provision has allowed abusive men to utilize the legal system to further their abusive conduct. Custodial mothers are repeatedly dragged before the courts⁴² on the pretext that they have failed or refused to discharge their responsibility to grant maximum contact between father and child – contact determined by the father in accordance with *his parental right*, and not, as fathers’ rights groups attest, in accordance with *children’s rights* to maximum contact.

Conduct under the Family Law Act: The sections of the *FLA* concerned with spousal conduct are primarily concerned with property division, and are discussed below. Section 12 allows a court to issue an interim or final restraining order against a party to ensure the preservation of property to protect the interests of the other spouse. Further, under s. 13(1), the court may also make a no-contact order if the order is determined to be necessary to ensure that the preservation of property or that the realization of a charge against property “is dealt with properly”.

The *FLA* recognizes the phenomenon of domestic violence. Pursuant to s. 24(3)(f), the court is mandated to consider “any violence committed by a spouse against the other spouse or children” when considering an application for exclusive possession of the matrimonial home. Anyone contravening an order for exclusive possession is subject to arrest without warrant (s. 24 (6)). Similarly, a court may issue an interim or final restraining order (s. 46(1)) and/or a no-contact order (s. 47)

against a spouse or former spouse if the applicant has reasonable grounds to fear for his or her own safety or the safety of children in that spouse's custody. In addition to its contempt jurisdiction, the OCJ is granted the power to fine or imprison "any willful contempt of or resistance to its process, rules or orders" (s. 49(1)). It is interesting to note that the legislators, having imbued the family with legal rationality, and having conferred on spouses the presumption of good faith inherent in partnership, have included remedies for marital conduct that connotes neither rationality nor good faith.

Conduct is irrelevant to the issue of entitlement to spousal support, but not quantum, "having regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship" (s. 33(10)). However, a careful reading of s. 33(10) suggests that the provincial legislators were prepared to allow conduct to be taken into consideration in determinations of *entitlement to*, as well as quantum of spousal support to be awarded. The "obligation to provide support ... exists without regard to the conduct of either spouse" suggests the "conduct" to which the legislators were referring was sexual misconduct of married women that, historically precluded them from spousal support. This section is reminiscent of s. 18(6) in the *FLRA 1978*. It does not suggest (at least to the researcher) that the "conduct" referred to includes domestic violence and abuse, since s. 33(10) does not include the mandatory directive that the court "*shall* not take into consideration any misconduct" found in the *DA 1985*. Unfortunately, this is not the way the section has been interpreted, as described in Chapters Three and Six.

Contempt orders are enforced by the OCJ. The SCJ has no jurisdiction to enforce its own contempt and no-contact orders. Accordingly, enforcement proceedings do not constitute part of the continuing record of SCJ files in family dispute actions, and SCJ judges may be unaware that their orders are being ignored. The necessity of bringing applications in two courts, first, for support, and second, for enforcement or contempt, imposes a further financial burden on abused women they can probably ill afford. The *Criminal Code* was amended in 2009 to bring contempt of civil orders issued under the *FLA* and *CLRA* within the jurisdiction of the criminal courts, inasmuch as the police

were reluctant to make arrests pursuant to civil contempt orders. There is little evidence, to date, that the criminalization of civil contempt has made a difference in the attitudes of those who would hold family court orders for support or exclusive possession in contempt, or of the police entrusted with charging them.

Conduct under the Children's Law Reform Act: The *CLRA* provides a set of guidelines designed to direct the court's determination of the best interests of the child in custody and access disputes (s. 24). In 2006, however, in response to much agitation by women's rights activists, the guidelines were amended to specifically include consideration of an applicant's "violence and abuse against his or her spouse, the child's parent, a member of the person's household, or any child" (s.24(4)) if that conduct "is otherwise relevant to the person's ability to act as a parent". Self-defence is excluded from consideration in this regard (s. 24(5)). This provision stands in stark contrast to the previous version of the section, which reiterated s. 16(9) of the *DA 1985*, that states that in making an order for custody or access, "the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child", and did not refer to "violence and abuse". Now, the provincial statute is clear: past domestic violence and/or abuse perpetrated by one spouse against the other is a relevant consideration in determining the best interests of a child. One must infer that *current* domestic violence and/or abuse would also be relevant, inasmuch as abusive conduct can continue, or commence, after marital breakdown.

Unfortunately, prior to enactment of the above amendments to the *CLRA*, the judiciary in Ontario, generally did not take domestic violence and abuse against mothers by fathers (and vice versa) into consideration when determining custody and access claims under that statute or under the federal divorce legislation. Inasmuch as s. 16(9) of the *DA 1985* has never been repealed, and the established case law has more often than not ignored domestic violence in custody decisions (Mann, 2005), the foundation for considering domestic violence and abuse is absent from the civil family

justice system regarding custody and access, regardless of the legislative directive to consider these issues.

Support: The *DA 1968* established, for the first time, national criteria for spousal and child support and custody, thereby enabling claims for “corollary relief” to be brought with divorce petitions (Arnup, 2001). Claims for maintenance and alimony increased. However, frustration of both spousal and child maintenance awards increased dramatically; in 1976, the Law Reform Commission of Canada estimated that 75% of these orders were in default (Boyd & Young, 2002).⁴⁰

Of growing concern to legislators was the financial burden on the state these defaults represented, without any commensurate concern for the detrimental effects the nonpayment of support had on the welfare of women and children (Boyd & Young, 2002). The feminization of poverty, whereby increasing numbers of single mothers were relegated to the social welfare rolls, was seen as a direct consequence of defaults of maintenance and support orders (Boyd & Young, 2002).⁴¹

Section 15(2) of the *DA 1968* allowed a court to make such orders as it considered just, having regard to the “conduct” of the parties. Under s. 18(6) of the *FLRA 1978*, the misconduct of a spouse was relevant to quantum of, but not entitlement to, support. Such conduct had to be “so unconscionable as to constitute an obvious and gross repudiation of the relationship”. Read together, these sections appear to have been directed at wives (at the time, the primary recipients of spousal support) who abandoned their husbands, and, as such, recalled the punitive *dum casta* restrictions on support eligibility to which women had been earlier subjected. These sections were rarely used (Ontario Status of Women Council, 1983). However, this did not prevent the provincial legislators from importing s. 18(6) into the *FLA* as s. 33(10). It is possible that s. 33(10) could be used by the courts to acknowledge their repudiation of woman abuse in the form of a punitive support award. On the contrary: the courts have specifically excluded woman abuse, alone, from being directly relevant to any consideration of either entitlement to, or quantum of spousal support. Marital misconduct has,

however, been taken into consideration in determining how a support award will be realized, such as, in the case of a delinquent payor, in the form of a lump sum, not periodic, payment.

The *FLA* has provided payors of support (usually men) various opportunities to avoid, frustrate and/or default on their financial obligations to their dependent wives and children. They are able to deceive the courts about their financial circumstances, fail or refuse to file the requisite financial statements, change jobs if garnisheed, or declare bankruptcy in the hope of avoiding their obligations.⁴²

The procedural requirement of delivering a current financial statement has also provided abusers with information concerning their victims' income, liabilities, spending habits, and other data which would otherwise be unavailable. This information can then be exploited by abusers to support their allegation (favoured by fathers' rights advocates) that mothers receiving child support convert the money to their own, selfish uses, and therefore should not be entitled to spousal support (Boyd, 2004a; Boyd & Young, 2002). In so doing, fathers' rights advocates (and the fathers who made, and continue to make these kinds of allegations) intentionally obfuscate the reality of women's economic disadvantage upon marital breakdown. That disadvantage has afforded those men who are so inclined with further opportunities to engage (or continue with) a campaign of economic coercion against their former spouses (Langer, 1994). Commission of such malfeasant acts rarely attracts legal sanction, but does deny financial assistance to the intended support recipients.

The legislators attempted to resolve the problems of inadequate child support orders and non-payment of child support in the *DA 1985* by prioritizing it over spousal support (s. 15.3). The consequence of so doing was to ensure that, in many cases, the payors' available funds went to satisfy child support only. This became particularly problematic after passage of the *FLA*, in which the section is reproduced as s. 38(1). Absent a spousal support award, any change in custody that would reduce or eliminate child support in the mothers' hands would leave her without any support

whatsoever, even though funds previously prioritized for child support would now be available to satisfy a spousal support order. The privatization of the spousal support obligation under the *FLA* was criticized for diminishing the societal commitment to alleviating women's poverty expressed in the previous statute (Boyd, 1994).

Subsequent amendments to the *DA 1985* in 1997 have provided that, where a child support order, and not a spousal support order, is made, "or the amount of a spousal support order is less than it otherwise would have been", any subsequent reduction or termination of child support will constitute a change of circumstances necessary to trigger an application for spousal support (s. 15.3(3)). However, for women rendered impecunious as a consequence of the inadequacy or refusal of their support orders, the cost of returning to court for an application to vary could be prohibitive. Applications to vary provide ample opportunity to men so inclined to harass their victims with protracted proceedings and their attendant cost. The artificial distinction between spousal and child support has obscured full appreciation of the economic costs of the custodial parent/child relationship, which can only be determined if the custodial parent and child(ren) are considered as a single economic unit (Duclos, 1987).

The child support sections of the *DA 1985* were criticized for a number of reasons, by both father and mother advocates: they allowed for wide judicial discretion, which resulted in inconsistent and arbitrary awards; awards were often wholly inadequate (Douglas, 2008); support orders were difficult to enforce; and collection was all but impossible to pursue (Langer, 1994). The introduction of the federal *Child Support Guidelines (CSG)*⁴³ was supposed to alleviate inconsistency and arbitrariness. However, the *CSG* have provided opportunities to deprive wives and mothers of the support to which they are otherwise entitled.

Child support is now perceived as a right of the child, and not the custodial parent, a "golden rule" (Robson, 2008:295) that is incontrovertible. The apportionment between child and spousal support has obscured the reality of custodial parents' financial liability for their children beyond that

envisioned under the *CSG*, particularly as they base liability for support on the payor's ability to pay, which is easily manipulated in many instances. Section 10 allows a payor to plead for a variation from liability for child support on the basis of "undue hardship", which may include the financial responsibilities of supporting a second family after divorce. Non-custodial parents seeking to avoid paying child support are thereby afforded a variety of avenues through the operation of the *CSG*: to hide or reduce their reportable income; inflate their expenses and financial liabilities; and otherwise assume liabilities in order to absolve themselves of their support obligations.⁴⁴

Further, s. 9 of the *SCG* allows a court to deviate from the normal guideline amount for child support where a parent exercises access to, or has physical custody of, a child for not less than 40% (146 days, or 3,504 hours) of the time over the course of a year (Payne & Payne, 2013). Fathers' rights advocates had proposed, within the context of their demands for the recognition in law of a presumption of joint custody upon marital breakdown, that fathers would be more inclined to satisfy their child support obligations if they were given more access. There is little evidence, if any, to support this contention. That men would want greater involvement in their children's lives did not, nor has not, posed a problem for feminist supporters or mothers, in general – that some men wished to do so after separation, and not necessarily during cohabitation, reveals their true intentions: to re-assert paternal privilege while reducing their financial liability (Smart, 2006). Research concerned with examining and evaluating change in fathers' participation in contemporary family life found minimal change from the levels historically associated with fatherhood, with mothers still discharging the preponderance of responsibilities for child care and the household (Drakich, 1989-90).

More recently, researchers examined data from the American Time Use Survey, 2003-2007, to ascertain the percentages of time mothers and fathers spent with their children relative to their respective employment. Random telephone surveys were conducted with 6,572 fathers and 7,376 mothers to ascertain what the subjects did within a 24-hour period. In all categories of employment, mothers still spent far more time with their children, and were more involved in child care, than did

and were fathers: 49.8 hours v 31.4 hours/week. Further, fathers were found to do much less routine, physical care of their children than were mothers; 38% of fathers compared with 71% of mothers were involved in this type of care.

The type of care fathers and mothers contributed to most equally was recreational or ‘fun’ care, although mothers still contributed more of this type of care, as well. The amount of time fathers spent with their children was reduced with employment and longer hours. However, this was not the case for mothers. Indeed, in households in which mothers contributed 100% of the family income, fathers contributed only 6 hours more than the average to their children (37 hours, compared with 31.4 hours). The researchers concluded that fathers, unlike mothers, do not alter their labour force participation to provide for child care. However, there was some indication that, in two-income families, mothers may be negotiating with fathers to assume a greater share of physical and managerial child care than in families where the father is employed full time and the mother is not employed. This finding suggested there is a slow erosion of the traditional allocation to mothers of all child care responsibilities (Raley et al, 2012).

Property Division: Under the *FLRA 1978*, s. 4, family assets were subject to an equal division between the spouses. Section 4(6) allowed for an unequal division of family assets in situations “where the court [was] of the opinion that a division of the family assets in equal shares would be inequitable”, having regard to six criteria. The rationale for this section could be found in s. 4(5): “to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise ... to the assumption of these responsibilities...”

Further, a non-family asset could be subject to division, pursuant to s. 4(6), in those cases in which one spouse had unreasonably impoverished the family assets, or, if it were deemed that a division of the family assets would be inequitable “in all the circumstances, having regard to “the effect of the assumption by one spouse of any of the responsibilities set out in sub-section (5) on the

ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset". In that case, the court could direct payment of an amount in compensation for the contribution, or award a share of the interest of the other spouse appropriate to the contribution.

Section 8 of the *FLRA 1978* addressed those circumstances when a spouse (usually the wife) had assumed childcare and household management responsibilities that allowed the other spouse (the husband) to "acquire, manage, maintain, operate or improve property that is not a family asset" (ss. 7(6)(a) and (b)). In these cases, the court could order a compensatory amount to be paid to the wife, or award her a share of the interest in the non-family asset. What the reported cases did demonstrate was that the fiduciary spirit with which the *Act* assumed marriages were imbued was clearly absent in those ending up before the courts. See, for example, *Leatherdale v Leathdale* re: employment pensions.

Matrimonial homes were given special status and treatment under the *FLRA 1978*. Each spouse was entitled to a right of possession of the matrimonial home (s. 40(1)), and neither spouse could dispose of, or encumber any interest in the matrimonial without the consent, or release of the interest therein, of the other spouse (s. 42). The disposition or encumbrance of the matrimonial home made without the consent of the other spouse could be set aside (s. 42(2)), unless the interest was acquired "for value, in good faith and without notice that the property was at the time of the disposition, agreement or encumbrance a matrimonial home". The relationship between the spouse disposing of or encumbering the matrimonial home and the subsequent interest-holder thus became a matter of evidence. When the matrimonial home constituted the major asset of the family, its dissipation, encumbrance or disposition by one spouse could have serious financial repercussions for the other spouse and the children.

The *FPA* has established a new family property regime intended to address the inadequacies of the previous statute. In this regard, the legislature appears to have adopted many of the recommendations of the Ontario Status of Women Council.⁴⁵

The concept of “net family property” is defined in the *FLA* as the value of all property, subject to certain exclusions identified in the statute that a spouse owns on the date the marital relationship is deemed terminated: the “valuation day” or “date” (s. 4(1)).

The property regime and support provisions outlined in the *FLA* would, on their face, appear to be unconnected and distinct; unfortunately this has not proven to be the case.

It has commonly been assumed that an equal division of property adequately compensates women for the economic consequences of marriage and family, and in addition, that a ‘once and for all’ property settlement implements a clean break, allowing spouses to pay their dues and move off into new lives. The property remedy is thus now viewed as primary, the support remedy as secondary. Capital assets are willingly redistributed, whereas the future stream of income tends to be protected from reallocation (Rogerson, 1990:101).

The equalization payment (s. 5(1)) owed to the spouse with the “lesser” net family properties is deemed to be the primary source of money to satisfy the needs of the recipient to “relieve financial hardship” (s. 33(8)(d)), thus rendering support orders unnecessary and superfluous. In this regard, the prediction of L’Heureux-Dubé, J over thirty years ago that “maintenance is on the way out, except perhaps for the disabled housewife or as a transitory measure” (L’Heureux-Dubé, J, 1983:305) seems particularly prescient. However, a capital payment in lieu of support cannot provide continued financial assistance when the monies are used to secure alternative housing to a matrimonial home from which the proceeds of sale have been shared with the other spouse. Further, other monthly expenses previously incurred by the family and borne by both spouses, or, in the case of a ‘housewife’, by the husband, constitute an ongoing financial obligation requiring a regular income stream to pay them. An equalization payment cannot sustain, in the long term and without additional regular, spousal support, a woman suffering from the sequelae of woman abuse that prevent her from attaining self-sufficiency. Accordingly, giving effect to s. 33(8)(d) can unfairly relieve a payor spouse from the ongoing statutory obligation imposed by s. 30 – to provide support for the spouse, in accordance with need and his ability to pay.

Section 5(6) of the *FLA* sets out the criteria for judicial consideration in determining whether or not a spouse is entitled to more or less than one-half the difference between the spouses' net family properties "if the court is of the opinion that equalizing the net family properties would be unconscionable".⁴⁶ The six of the eight subsections of s. 5(6) identify criteria clearly borrowed from commercial law. However, inasmuch as the courts have always considered family law as a different legal 'species' from other areas of law, the adoption of commercial law concepts in s. 5(6) has not meant that the remedies available in commercial law for the types of misconduct contemplated by the section have been applied in property disputes following marital breakdown. Nor should it be surprising that the one subsection particular to marriage, ss. 5(6)(e), whereby a period of cohabitation of less than five years may affect a spouse's entitlement to an equalization payment, has been negatively construed by the courts to apply to abused women who are forced to flee their perpetrators for their own and their children's safety before the arbitrary five-year period has elapsed, thereby denying them an equal share of net family properties.

Section 5(6) is to be read in conjunction with s. 5(7). Section 5(7) of the *FLA* states:

child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities ...

which will be acknowledged and compensated through the redistribution of net family properties.

However, as indicated by the relevant case law, "a woman who sacrifices her own career opportunities in order to improve those of her husband is making a bad investment, unless she is able to obtain the benefits of her husband's career during marriage" (McCallum 1994:207).⁴⁷

There are many problems inherent in the *FLA* arising from the presumption of "legal rationality" in marriage and after marital breakdown that are inapplicable in the case of woman abuse. Deficiencies and/or misapprehensions in the statute of the prevalence of spousal financial misconduct allow abusive men to deny to their victims the financial autonomy and independence the property provisions are intended to encourage. Given that family law proceedings can be pro-

tracted, the longer the dependant spouse is left without recourse to either spousal support or an equalization payment, the more likely she will be to agree to an improvident settlement. During the period preceding settlement or trial, there is little in the *Act*, with the exception of the provisions contained in s. 10 to prevent a titled spouse from wasting, hiding, disposing of, gifting, transferring, diverting or otherwise divesting his assets to decrease the amount of his net family properties that will be subject to the calculation of an equalization payment owing.⁴⁸ Nor is there any provision in the *Act* allowing the assets of a payor spouse acquired *after* marital separation to be made available to satisfy any outstanding claims for support or an equalization payment.

Bankruptcy legislation has proven to be particularly useful to financially abusive men to defeat the claims of their wives as well as their creditors.⁴⁹ Spouses, whose financially abusive husbands have left no property in which to realize what otherwise would have been considered a sufficient equitable interest as a consequence of bankruptcy following separation, might be forced to return to court seeking spousal support from an unemployed spouse whose assets have been liquidated by (or hidden from) his trustee in bankruptcy if no order was made at first instance.

Perhaps the most exploited omission in the property regime of the *FLA* relates to the s. 8 requirement of each party to deliver a sworn financial statement of his/her property interests before, during and after marriage.⁵⁰ The *Act* does not include a penalty for a failure or refusal to deliver a financial statement, nor in the case of a fraudulent financial statement having been presented, whereas the *BIA* sets out a list of offences, punishable by fine or imprisonment (at the level of both summary and indictable offences) for misconduct in financial disclosure by a bankrupt. The failure or refusal of woman abusers to provide full and frank financial disclosure constitutes one of the most common and egregious acts of domestic abuse apparently condoned by the courts (Barnett, 2000). So empowering to financially abusive men is the absence of penalty in the *FLA* in cases of financial non-disclosure that they, as bankrupts, have no hesitation in misleading their trustees and creditors in this regard, as well, as illustrated in the relevant case law discussed in the next chapter.

Safety: Legislation directed at promoting the safety of spouses/parents and their children following separation is limited to three strategies: the issuance of restraining and no-contact orders; the issuance of orders for exclusive possession of the matrimonial home; and, under the *CLRA*, s. 34(1), allowing the issuance of orders for supervised custody or access where the court considers it “appropriate”. That the paragraphs pertaining to restraining, no-contact and exclusive possession orders, and supervised access orders are buried deep in their respective statutes may attest to the disregard with which the issue of personal safety is held by the legislators, in comparison to concerns over the property rights and entitlements that precede these sections.

There is an inherent illogic in the civil family justice system, which has all but eliminated consideration of *conduct* and *fault*, when one or both must be taken into account when adjudicating applications for restraining or exclusive possession orders, or applications for supervised access. It is, after all, the misconduct of the alleged abuser that will be assessed to determine if the alleged victim has reasonable grounds to fear for her safety. Further, before protection orders will be issued, the sections require satisfaction of a two-fold test: first, the *misconduct* complained of must be found to be sufficient to give rise to a fear in the alleged victim for her safety; and second, the fear must be “reasonable”. It is, therefore, the presiding judge who determines if the misconduct warrants a reasonable fear, not the victim herself. Accordingly, conduct that a judge considers not to reasonably induce fear in an applicant will not be deemed to constitute *misconduct*, and the alleged victim’s fear will be dismissed as unwarranted – potentially with serious consequences to her continued well-being and safety. Given that the law comprehends and ‘speaks’ in a male voice (as described in the Introduction and discussed later in this dissertation), one wonders how a woman, rendered vulnerable and powerless by her ‘conditioning’ at the hands of her abuser, would be able to persuasively convey the real threat to her safety implicit in a meaningfully menacing glance or a threateningly raised hand, in the absence of actual physical contact.

In 2009, the *FLA 1990* was amended to grant the Family Court additional jurisdiction to make an order containing “any other provision that the court considers appropriate” (s. 46(3)(b)). Penalties for contempt of orders issued in the Family Court were widened in 2006 to include punishment by fine or imprisonment, or both, not to exceed \$5,000 or ninety days, respectively (s. 49(1)). Again, this section is little utilized.

A recent amendment to the existing provincial statutes relaxed the evidentiary burden to be met to prove entitlement to a restraining order from that of proof in criminal proceedings (‘beyond a reasonable doubt’) to the civil burden of ‘reasonable grounds’. (However, s. 127 of the *Criminal Code* still requires contempt of civil family court orders, excluding support orders, which are not subject to s. 127, to be proven beyond a reasonable doubt.)

“[N]otwithstanding the relaxed evidentiary burdens, it remains substantially difficult for victims of domestic violence to prove that they are, in fact, victims” (Vaccaro, 2013). That contempt of civil orders may now be punishable under s. 127 of the *Criminal Code* encourages the sedimentation of physical violence, the threat of physical violence (including the *Criminal Code* offence of criminal harassment) and sexual assault (*Criminal Code*, s. 273) as the defining characteristics of domestic violence and abuse. Accordingly, other forms of non-physical abuse, such as emotional, psychological and financial abuse, all of which may be equally, if not more debilitating and destructive for victims, are marginalized, minimized, discounted, or ignored altogether.

This problem is exacerbated by the fact that the legal right of “life, liberty and security of the person” afforded accused persons in their relationship with the State under s. 7 of the *Charter* now protects men who are found in contempt of civil court protection and support orders and are subsequently charged under the *Criminal Code*, but does not protect women’s and children’s legal right to “life, liberty and security of the person” against those same abusers. There is considerable, long-standing disagreement amongst feminist legal advocates on the impacts of increased reliance upon

criminal justice strategies in family law, particularly for women and men in socio-economically marginalized communities (Girard, 2009).

Unlike most of the other provinces, at present Ontario has no legislation specifically addressing the issue of domestic violence,⁵¹ although compensation for victims of violent crimes is available in Ontario through the Criminal Injuries Compensation Board.⁵² There are restrictions, however, to accessing this tribunal: the abuser must have received a criminal conviction for the conduct (therefore, it must be a *Criminal Code* offence); the Board cannot find evidence of “contribution”, that is, the victim “cannot be the author of her own misfortune” (Weigers, 1994:14); and “battered woman syndrome” may have to be advanced (and proven) in relevant circumstances to discount any rejection of a claim on the basis that the victim waited too long before advancing it, stayed with her abuser after the assault (and thus condoned his conduct or ‘forgave him’), or even further exacerbated the problem (Weigers, 1994).

Inasmuch as “one of the challenges for feminists in using law as a potential form of empowerment is to promote an outcome that recognizes both the harm suffered by women and women’s agency” (Weigers, 1994:22), the necessity of presenting an abused woman as helpless and without agency in order to ‘prove’ her eligibility for compensation for ‘criminal injuries’ seems counterproductive to the assertion of abused women’s rights to justice and due process in the legal system. It would appear, therefore, that if “[o]ne of the uncontested objectives of political order in a liberal regime is the protection of its citizens from violence ... the liberal state has failed in this basic task with respect to women and children” (Nedelsky, 1993:454).

d. Theme Four - Entitlements

How does one differentiate a right from an entitlement?: The definition of rights is multifaceted, a thorough examination of which lies far outside the scope of this research study. However, attempts to locate any comprehensive definition of *entitlement* proved to be difficult. The terms connote different concepts, inasmuch as they are referred to in different sections and contexts in the

legislation under discussion. The common conceptualization of rights identifies the terms with natural, or human, or citizenship rights (Lister, 1997). As such, rights are considered inherent, and once recognized by law, are not easily taken away. An *entitlement*, on the other hand, must be earned; it may be claimed, but the claim must be proven. Searching through *Halsbury's Laws of Canada* (McGuinness, 2013) for 'entitlement' one will be directed to the discussion of *restitution*, which speaks of there being no legal entitlement to payment on the grounds of restitution, but a remedy under the law of restitution may be given only where three conditions are met.

The difference between rights and entitlements in the present context is apparent when one considers that a spouse does not have a *right* to support, but may claim and prove an *entitlement*. In comparison, s. 20(2) of the *CLRA* alludes to *rights* of a parent that a person *entitled* to custody enjoys. The foregoing discussion and analyses have demonstrated how the family justice system has conflated newly recognized entitlements with rights while deflating historically sedimented rights to the level of entitlements, at best, or eliminating existing rights altogether. Through the ceaseless efforts of the fathers' rights lobby, this process has tapped into the dominant patriarchal social discourse and served the interests of men, particularly abusive men, at the expense of women and children.

"Literature on rights consciousness in social movements tends to focus on activists" (Merry, 2003:345). If the fathers' rights lobby is defined as a "social movement", then the domination of any discussion of family law reform in legislatures (and media) by fathers' rights activists and narratives of fathers' alleged abuse by the 'system' make sense. On the other hand, "vulnerable populations seem less inclined" to assert their "rights" (Merry, 2003:345). Hence, the voices of abused women fail to be heard over the din.

In this light, therefore, it is not surprising that scant, if any, attention is paid to woman abuse in most of the literature reviewed for this research study, including that produced by feminist advocates, such as the Ontario Status of Women Council. These omissions have left women abused by

their intimate partners, as well as their children, at risk. If women's rights lobbyists fail to promote domestic violence as a violation of women's inherent human rights, who else will? Abused women, themselves, may be unable to identify the violence and abuse they suffer as violations of *their* human rights (Merry, 2003).

There is little in the current legislation that would facilitate abused women's recognizing the conduct of their abusers as illegal, actionable, and or compensable, let alone a violation of their human rights. While divorce has been identified "as one long-term solution for battered women along with prosecution of abusers" (Langer, 1994:11), the fundamental problem for abused women with the current family justice system remains: that the preservation of intra-family relationships espoused by the Preamble to the *FLA* and imposed through the "maximum contact" rule in the *DA 1985* are inappropriate and, potentially contraindicated and dangerous in cases of woman (and child) abuse. The prevalence of post-separation violence and abuse is undoubtedly exacerbated by this mandate and its schema; the statistics regarding post-separation violence outlined in Chapter One speak for themselves in this regard.

The entitlement to civil compensation for woman abuse: While the criminal justice system does provide some opportunity for legal redress against domestic violence and abuse, the availability of civil remedies is far more tenuous. With the abolition of both coverture and the statutory prohibition against interspousal torts in the *FLRA 1975*, there has been ample opportunity for a damage claim to have found its way into family law proceedings in which domestic violence and abuse have been alleged in one of the 'boiler plate' prayers for relief regularly advanced in pleadings involving tort-based actions. This has not been the case, and "[a]n uneasy dance continues between equitable remedies and statutory schemes in family law" (Carson & Stangarone, 2010:253).

Claims for damages in tort have been advanced by both allegedly aggrieved women and men in Canadian courts since the late 1970s (Buckingham, 2007), with varying degrees of success. An

examination of the case law surrounding interspousal torts for domestic violence and abuse can be found in the next chapter.

There are reasons (and rationalizations) for the relative paucity of interspousal tort proceedings having been advanced. Some are procedural.⁵³ Tort claims attract the *Limitations Act*, which precludes an action being commenced “after the second anniversary of the day on which the claim was discovered” (s. 4).⁵⁴

There is an apparent prohibition against any right of set-off against the family property of the tortfeasor, including his/her entitlement to an equalization payment (Swisher, 2001). Procedural issues regarding joinder of the tort action to the family law action, and the possibility of *res judicata* or estoppel claims if these actions are not joined (Wieggers, 1994) act as deterrents to commencing tort actions at the same time as, or after, the commencement of legal proceedings under the family law statutes.

Practical considerations present another area of concern to victims of domestic violence and abuse. “A victim is only able to bring a suit in tort if she knows it is available” (Buckingham, 2007:288). With increasing specialization in legal practice, lawyers working exclusively in the field of family law may not feel competent to launch or advance tort claims on behalf of their clients, nor might tort lawyers recognize that their clients’ damage claims in motor vehicle accidents, for example, could be reduced or obviated if the third party were made aware that the plaintiff were a victim of domestic violence and abuse. Similarly, tort actions are costly; physicians demand payment for medical reports, physiotherapy, and psychological counseling may not be covered by medical insurance. Legal disbursements for examinations for discovery transcripts, filing fees, and counsel fees can be prohibitive. Actions in tort, unlike matrimonial disputes, are unlikely to be brought by self-represented victims (self-representation in family law proceedings is discussed in the next chapter). There is also the problem of recovery; without insurance coverage (none exists for intentional torts, and domestic violence and abuse are never, by definition, a result of negligence),

the probability of a successful tortfeasor realizing satisfaction on a judgment may be slim, particularly for those in the lower socio-economic echelons of society.

Together, tort law and crimes compensation schemes comprise an individual dualistic, class-stratified system of compensation for victims of wife abuse. Since recovery in tort depends upon the individual defendant's resources, only women whose husbands are middle- or upper-class can seek recovery through the courts. Unless ... victim compensation schemes are modified to advance funds to cover the legal costs of litigation and satisfy judgments awarded but not collected or unless claims against third parties such as government agencies can be advanced, tort law will do little to assist working class or poor women, many of whom are women of colour or Aboriginal women (Wieggers, 1994:24).

Brown (1990) identifies the refusal of the dominant discourse, and therefore, the courts, to recognize in monetary terms the value of 'women's work' – housekeeping and child care – as an impediment to the realization of an adequate and representative award for loss of future income to those women whose marital abuse has impaired their abilities to discharge these responsibilities. The failure or refusal of most judges (notwithstanding a directive from L'Heureux-Dubé, J in *Moge v Moge* to do so)⁵⁵ to recognize the historical disadvantage of women in society, combined with the 'reasonableness' standard applied in tort law (that of the 'reasonable man') necessarily challenges the bona fides and/or quantum of claims advanced by abused women who remain with abusive intimate partners (Peppin, 1996). Hence, a chronically abused woman might be viewed as "pathetic, stupid or even deserving of the abuse they experienced" (Hartman & Belknap, 2003:363), or her injuries from repeated episodes of violence and abuse construed as 'reasonably foreseeable' by her as a consequence of living with an abusive man, and thus could nullify her entitlement to claim damages on the basis of legal doctrine of *volenti non fit injuria*, or even a finding of contributory negligence.

Cases of spousal violence and abuse "can involve misconduct so egregious that society's abhorrence cannot be remedied through costs or other sanctions" (Carson & Stangarone 2010:286). One of the purposes of tort law is, in fact, to express society's condemnation of conduct, both negligent and intentional, that results in harm to another.

The protections of tort exist to provide bodily security and to ensure the social bases of self-respect. They are guarantors not only of social peace and cooperation, but also of moral personhood. Conventionally seen as a vehicle for expressing the negative side of experience (the experience of doing wrong or being injured), tort also can serve as a language for defining those personal and social interests that make up a humane and good life, and as a means to extend that life to persons previously excluded from the full measure of social respect (Larson, 1993-1994:58).

Tort actions, unlike criminal proceedings in which the victim's powerlessness is reinforced by her status as a witness, provide vehicles for women to control the legal processes they initiate, thereby facilitating their empowerment (Buckingham, 2007). While tort law has been dismissed by some feminist legal theorists as an inappropriate vehicle in which to promote social change and advance women's social emancipation from systemic oppression and marginalization (Larson, 1993-1994), the remediation of spousal misconduct by an expression of social disapproval could work as well for abused women as it has for victims of impaired driving. Tort thereby offers the potential for empowerment to abused women, as well as an opportunity for education (Buckingham, 2007). A damages claim can be a political statement directed at the tortfeasor: that the misconduct attracting the award will not be tolerated by society. Even an uncollectable award may provide some sense of satisfaction to the victim, for whom this expression of social condemnation might legitimate her experiences of abuse and violence.

However, tort actions for spousal violence and abuse seem inconsistent with current family-related legislation. "Tort is about fault, while legislatures and courts are reluctant to assign blame for the breakdown of marriage" (Buckingham, 2007). "Treating the family as an area where there is no fault conveys the message that violence within the family is not violence at all – a message that justifies cruelty" (Buckingham, 2007:311).⁵⁶

11. Conclusion

The pervasiveness of woman abuse, even in the face of changes enacted in the family legislation referred to in this chapter, demonstrates that violence against, and abuse of women and children is so endemic in our society that it cannot be explained or understood merely in terms of

individual pathology, criminality or “wickedness” (Nedelsky, 1996:458). The fact that fathers’ rights lobbyists were able, within the span of less than one decade, to have their demands realized in the form of statutory provisions is a testament more to their ability to identify and exploit historically sedimented beliefs about motherhood, fatherhood and childhood that resonated within conservative Canadian society than it is reflective of the legitimacy of their positions. Their success also demonstrates “how class and access to social/cultural capital can mediate the way in which protest movements are constituted and come, in turn, to engage with the media” (Collier, 2009:383). This is particularly relevant to the sedimenting of popular, if not necessarily sound, theories and “syndromes” emanating from the ‘psy’ sciences in the dominant discourse (and the law) which advance ‘fathers’ rights’ while disadvantaging mothers (discussed in the next chapter). In most, if not all respects, formal equality has not guaranteed substantive equality before or under the law (Mossman, 1986b).

How the judiciary has interpreted the legislation reviewed in this chapter to the detriment of abused women and children is the topic of the next chapter.

CHAPTER THREE

WOMAN ABUSE AND THE JUDICIARY

1. Introduction

This chapter examines the role of the judiciary in determining the legal outcomes of abused women who are involved in litigation in the family justice system in Ontario. The four major issues impacting the relationship between abused women and the legal system identified in the Introduction and discussed in Chapter Two – gender, rights, conduct and entitlement – inform every reported decision referred to in this chapter. The inter-relationship of gender and rights and its relevance to legal entitlement, with respect to the legislation concerned with marital breakdown, were discussed in the previous chapter. How the judiciary renders its decisions in the family justice system with respect to abused women and their entitlements is the subject of this chapter. For the purposes of this examination, only reported decisions of the Supreme Court of Canada, the Superior Court of Justice of Ontario (SCJ) and Ontario Court of Justice (OCJ) in which allegations of woman abuse were alleged (or are inferred) are discussed.¹

2. The Prevalence of Separation and Divorce

Only a small percentage of separating couples actually involve the legal system. Instead, they negotiate a settlement of the issues between them with or without legal counsel (Neilson, 2000; Special Joint Committee on Child Custody and Access, 1998). In 2010/2011, 80% of divorce cases proceeded on an uncontested basis, with the majority of divorce decrees in Ontario (42%) being issued within three months of initiation of the action (Kelly, 2012).

Although the *DA 1985* allows “marriage breakdown” to be proven by the petitioner adducing evidence of the respondent’s adultery or “physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses” (s. 8(2)), 95% of divorce cases proceed on the grounds that the couple has been living separate and apart for at least one year (Kelly, 2012).

The civil divisions of the SCJ and OCJ also consider family law cases in which a claim for divorce has not been made. In 2010/2011, 265,853 civil cases involving family matters were initiated in Ontario's civil courts, of which 96,716 were classified as family cases; of these family cases, 31,281 were divorce actions (Kelly, 2012). The remaining 65,435 family cases were originating claims for custody or access, support, restraining orders, and/or declarations of interest in, or divisions of, property. Only a very small percentage of these cases proceed to trial (Kelly, 2012). It must be remembered, therefore, that the most litigious of proceedings in the family justice system represent outliers within the population of cases of marital separation and divorce, and have been characterized as 'high conflict' cases by the judiciary. What part woman abuse plays in these outliers has never been determined, but it may be assumed that they are characterized by a high level of conflict, hostility and antagonism.

3. The Rules and Procedures Governing the Civil Family Justice System in Ontario

Family justice proceedings in both the SCJ and OCJ are governed by the *Family Law Rules*. However, the level of formality with which proceedings in the SCJ might be imbued is not necessarily reflected in the lower court, for a number of reasons.

The OCJ, from its inception in the nineteenth century as the Police Court, represented a legal venue for the adjudication of cases that was and is, in many respects, separate and apart from the rest of the civil justice system. Greater reliance on inquisitorial, rather than adversarial procedures, a certain blurring of the civil/criminal divide, and the involvement of non-legal personnel, such as social workers, characterized these proceedings (Chunn, 1992). The *Report of the Royal Commission Inquiry into Civil Rights in Ontario*, released in 1968 stated "the purpose and functions of the juvenile and family courts are quite different from those of the ordinary courts of justice. The rigid procedural requirements of the ordinary courts would in some measure frustrate the social purpose of juvenile and family court" (cited in Stewart, 1971:63-4).

In Ontario, the development of distinct procedures for family law set family court proceedings outside the strict requirements of civil procedure and evidence, and reliance upon an adversarial legal system on social policy grounds (Chunn, 1987; Bottomley, 1985). Judges were no longer just legal adjudicators, but mediators, as well, in family disputes. While the rules of civil procedure and evidence were to be followed, and the right to due process recognized, it was assumed that special rules and procedures for family courts would be required suited specifically to the “needs” of the Family Court (Stewart, 1971:63). Indeed, until the Ontario Provincial Court (Family Division) was established in 1968, provincial magistrates adjudicating family matters were not required to have been lawyers prior to their appointments to the bench.

The current *Family Court Rules* (the *Rules*) represent the most recent incarnation of this conceptualization of the family court (including the Family Division of the SCJ) as distinct in form and function from other “ordinary courts of justice”.² Of particular relevance to this chapter is the establishment of a case management system in the OCJ and Family Division of the SCJ, described as the “one judge-one case” approach to family law disputes (Bala et al, 2010:395) in which judges engage in ‘case conferences’.³ Proponents of this approach assert that it avoids the problems inherent in the established procedural rules governing law suits in the adversarial system that, in family law disputes, render the system vulnerable to abuse.⁴

Four basic principles of case management have been identified:

1. in the long term, to provide stability and financial security to family members;
2. to recognize the dynamic of violence and power imbalances in the family;
3. to recognize the importance of the finality of judicial decisions; and
4. to insure the enforcement of court orders (Martinson, 2010).

“The role of family law judges is now redefined to include a role as conflict managers and disputes solvers, rather than exclusively as fault finders and neutral arbitrators, and as such have a role in trying to change parental behaviour and attitudes” (Bala et al, 2010:406). Case management judges are presumed to have specialized knowledge of family dynamics, be familiar with child

development theory, and understand the effects of parental conduct of children (Bala et al, 2010). They should not just be decision-makers, but also have a “therapeutic” role in family dispute resolution (Bala et al, 2010:408). However, in high conflict cases it is difficult to achieve the goal of a just, timely, and affordable decision, particularly when the merits of the case are obfuscated, as described by one judge, by the personality disorders, mental health issues, substance abuse problems and controlling behaviours of perpetrators of domestic violence and abuse (Martinson, 2010). There is no suggestion in the literature that judges should be clinical psychologists or psychiatrists, or have specialized training in either discipline.

Bala et al (2010) have asserted that family law, unlike other areas of law, is prospective. This assertion is incorrect. Both tort and criminal law are also, in part, prospective: the first, in determining the quantum of a claim, calculating projected claims for damages; and the second, for the purposes of sentencing, assessing the potential of the perpetrator to reform. In both cases, it is assumed that the public has an interest in the outcome of the proceedings – both damage awards and criminal sanctions represent society’s condemnation of conduct deemed unacceptable. The failure of Bala et al (2010) to recognize family law’s similarity to other areas of law reflects the difficulty with which the law and legal actors, generally, seem to have in reconciling existing legal domains with family law, perceiving it

... as in many ways unique in that it falls somewhere between civil and criminal law. While containing elements of both, it ... has neither the “legal rationality” of pure civil litigation or, for the most part, the retributive and moral elements inherent in criminal proceedings (Bureau of Review, 1990:2).

How judges utilize the *Family Law Rules* can “have a profound effect upon how litigants, particularly those who are self-represented, view the family law dispute resolution system” (Colman, 2004:379). Litigants must perceive that their cases are being conducted with the highest standard of fairness with respect to their procedural and substantive rights (Colman, 2004). The “settlement

mission”(Semple, 2012)⁵ of actors in the family justice system can militate against the goal of family judges to afford litigants at least the appearance of procedural fairness (due process).

4. Who are our Judges?

How judges are selected: Who becomes a judge in Ontario is, to a large extent, a matter of self-selection. A candidate for a judicial appointment must apply for a position on the bench. For appointments to the SCJ, applications are considered at the federal level by regional ‘Judicial Appointment Committees’ (JACs) established by the federal Minister of Justice and comprising members of the Superior Court bench, laypersons, government officials and members of the Ontario bar (Canadian Superior Court Judges Association, “CSCJA”, 2006).

“The sole criterion which ought to be used by those whose task it is to select judges is the excellence of the candidate” (Wilson, 1980:31). The CSCJA has established a more particularized list of preferred personal characteristics for their peers. The qualities required of an SCJ judge include demonstrating “virtually irreproachable conduct”, holding “the highest standards of integrity in their professional and personal lives”, being *and* appearing “open-minded” and “fair”, possessing “sound” judgment, and being “knowledgeable about the law”. Judges should also be “good listeners”. Successful candidates must also have practised law for at least ten years, and made significant contributions to the legal profession and their communities (CSCJA, 2006).

OJ judges are selected in similar fashion to their federal counterparts, except at the provincial level. However, the criteria for consideration by the provincial Judicial Appointments Advisory Committee (JAAC) are rather different, according to the provincial website. “Applicants must have a sound knowledge of the law, an understanding of the social issues of the day and an appreciation of the cultural diversity of Ontario”. Further, while courtroom experience is described as a “distinct asset”, applications are considered from lawyers working with “administrative tribunals, academia and in the social policy field”. Finally, “applications are encouraged from women, aboriginal peoples, francophones, persons with disabilities, and visible and ethnocultural minorities”

(Judges Library, no date). In neither instance are judicial applicants to the family divisions of the SCJ or the OCJ required to demonstrate the particular expertise identified by Bala et al, 2010.

Judicial independence: The judiciary in Canada is deemed to be independent, that is, immune from political interference. Indeed, the “sole concern” in choosing an applicant for judgeship should be “the public’s perception of [judicial] independence” (Wilson, 1980:31). The CSCJA asserts that is not enough for the judiciary as an institution to be independent – “individual judges must be seen as objective and impartial” (CSCJA, 2006). Judicial impartiality is heralded as the hallmark of the Canadian legal system, and “judges are seen essentially as arbiters in conflicts and as having no position of their own, no policy even in the narrowest sense of that word” (Griffith, 1997:292). SCJ judges, “once appointed”, are also supposed to be free from “bureaucratic interference” (CSCJA, 2006).

Judicial neutrality and the issue of diversity: The justification for judicial diversity is founded (some might say) somewhat contradictorily, in the social mandate to uphold judicial neutrality. It is assumed that appointing representatives to the bench from previously excluded groups will enhance public respect for the judiciary while dispelling “the widespread perception that the judiciary does not represent society and is thus biased or insensitive to certain groups and issues” (Omatsu, 1997:5). One may infer that the rationale for judicial diversification is founded upon the presumption that, notwithstanding the directive (and expectation) that judges are, or must be objective, impartial and neutral, it is their *subjective* life experiences that inform their decision-making. A diversified bench would, it follows, bring a variety of life experiences to the courtroom and judicial decision-making purportedly lacking in a homogeneous bench (Omatsu, 1997).⁶

However, if judges (and this is not limited to provincial appointments) are apparently chosen, at least in part, upon quite selective and otherwise discriminatory (as in, differentiating) criteria, this implies that those candidates so chosen are expected *if not required* to be something other than “impartial” and “objective” in the traditional meanings of these terms. One can thus infer that the life experiences of

those candidates, and judges already appointed, who do not fit within the listed criteria for selection⁷ are objective in an unacceptably subjective way. As this argument is internally illogical, one must assume that what have traditionally been defined as objectivity and impartiality are equally expected from female, aboriginal, ethno/cultural/racially ‘othered’ or differentiated judicial candidates.

Alternatively, approaching this issue from a phenomenological standpoint, a culturally/ ethnically/religiously/racially diversified bench could, it might be argued, broaden the intersubjective understandings of its members through an empathic exchange of personal knowledge and subjectivities – but only if those involved were engaged in critical self-reflection and deconstructive analysis of their individual stock of knowledge. Unless a judge was to include his/her self-reflective musings or express personal opinions in his/her judgment, the parties would have no way of determining what personal knowledge and subjectivities informed the judge’s decision-making. Judges who engage in this kind of ‘creative’ legal writing risk chastisement by the Court of Appeal (Wiffen, 2012).

There is little research to confirm that a culturally or ethnically or religiously or racially diversified bench, or that male or female judges, and/or the appointment of a judge identified by any one or a combination of these socially prescribed categories of difference has or have any effect upon judicial decisions. McCormick & Greene (1990), in their study of Canadian judges’ attitudes toward their work, each other and themselves, working on the presumption that the social class background of judges was a determinant of their attitudes on the bench, found little correlation. Judges with self-described working class backgrounds tended to hold more conservative views than their more advantaged counterparts, as evidenced by the formers’ tendency to reject *Charter* arguments.

The gender of judges: Stribopoulos and Yahya (2007), in their review of all reported decisions of the Ontario Court of Appeal from 1990 to 2003 found that in decisions involving complainants/accuseds and mothers/fathers, the gender of judges on that bench was statistically significant in determining outcomes. Female judges tended to favour complainants/ mothers, and male judges tended to favour accuseds/ fathers. While these gender biases might have been apparent at the appeal level, no similar

study has been conducted in the lower courts. The researchers suggested that any such bias could be obviated by ensuring that appeal panels were composed of judges of both sexes. This does not mediate the proclivities of a judge sitting alone, however, if, in fact, the judge's sex is a fundamental determinant of his or her decision-making process.

The findings of Stribopoulos and Yahya (2007) could be interpreted to mean that female judges favour female litigants, and this is what their research suggests. Such favouritism would surely stand in opposition to the expectation that judges should be impartial and objective in their fact-finding and decision-making. However, identifying the legal system as patriarchal necessarily implies that it favours men. Query if female judges favoured female litigants, the result would merely level the playing field of a legal system predisposed to marginalize and oppress women. In fact, Schultz and Shaw note that there is evidence to suggest that female judges tend to be "less generous" than male judges in making alimony awards to women, explaining that female judges, being independent women, both financially and professionally, have less sympathy for women who are financially dependent upon their husbands (2013). The fallacy of this logic is apparent in the finding that male judges, ipso facto, are *more* generous than female judges in making alimony awards to women. One might have assumed, following the reasoning of Schultz and Shaw, that male judges, having a certain degree of empathy for payor husbands reluctant to part with their hard-earned income, would be particularly draconian in their determinations of spousal alimony, but this is not, apparently, the case.

Kenney argues that sex can be a useful, but should not be *the only* variable in the selection of judges. "Using sex as a variable, however, is unhelpful if it leads us to magnify differences or tendencies or to claim differences exist when they do not" (2013:182). It cannot be assumed, therefore, that increasing the number of women on the bench will automatically bring a 'different' perspective to the law (Graycar, 2013). Essentializing sex (by assuming a universal experience of being female) as the basis upon which the selection process for judges is, in part, based, will inevitably lead to disappointment in outcomes for proponents of gender diversity on the bench (see Chapter Six).

Judicial objectivity: Mark MacGuigan, a former federal Minister of Justice, federal Attorney General, and Justice of the Federal Court of Appeal attempted to describe judicial decision-making as restrained by “judicial objectivity”: ... “the internal restraint of doing justice according to the law in its various forms” (MacGuigan, 1987:30). He asserted that “the guiding principles of judicial objectivity are the ‘objective standards’ of proper, or correct, social behaviour” (MacGuigan, 1987:32), of which judges, themselves, as members of society, are best able to reflect and promote. Therefore, for MacGuigan, judges are arbiters of the social status quo both *in personam* as well as *in rem*.

The objectivity which judges are duty-bound to seek is also of course present subjectively within themselves, inasmuch as they, as people of their own time, partake subjectively of whatever is generally accepted at that time, and *so their approach may qualify as objective from a sociological point of view* (MacGuigan, 1987:33-34, researcher’s emphasis).

MacGuigan suggests that there should be no internal disharmony between a judge’s objectivity and subjectivity – the perfectly socialized individual, represented by the judge, will promote the dominant discourse because it is the ‘right’ thing to do – the only thing to do – ‘right’ because it is the *acceptable* thing to do, regardless, one must presume, whether that which is socially acceptable to do is nevertheless oppressive, discriminatory or marginalizing. The homogeneity of the character or personality of the bench is therefore assured, regardless of the religion, ethnicity, race, cultural origins, gender or ableness of its members, as long as the right (that is, a non-radical) person is elevated to the bench.

When people, like members of the judiciary, broadly homogeneous in character, are faced with [important social or moral issues] they act in broadly similar ways ... behind these actions lies a unifying attitude of mind, or political position, which is primarily concerned to protect and conserve certain values and institutions ... They are protectors and conservators of what have been the relationships and interests on which, in their view, our society is founded. They do not regard their role as radical or even reformist, only (on occasion) corrective (Griffith, 1997:7-8).

Accordingly, “judges often see themselves as the repository and keepers of society’s lasting values, the protectors of the status quo” (Day, 1987:409).

One might assume, then, that a homogeneous bench would be more inclined to hand down similar judgments (Kennedy, 2008). To the extent that certainty of result is the fundamental *raison d'être* of a legal system based upon precedent such as Ontario's, choosing candidates with similar personal characteristics and qualities might be the goal of judicial appointment committees. Accordingly, it should come as no surprise that judicial decisions are more or less homogeneous both in content and tone, regardless of the social identifiers of their authors. Therefore, it would seem that judges who identify as other, as described in the JAAC guidelines, are not expected to promote different (and potentially contradictory) viewpoints, but merely reinforce that which has been deemed socially acceptable in the greater society across a spectrum of socially-prescribed categories of difference. Those awaiting decisions from judges of difference that are, in fact, different from what might be expected from their white, male, Christian, Eurocentric counterparts (this presumption, of course, being itself socially constructed) may be sorely disappointed.⁸

Notwithstanding any statutory allowance for judicial discretion, Posner has identified the "legal theory of judging" as the judiciary's "official theory of judicial behaviour", which

hypothesizes that judicial decisions are determined by 'the law', that is, a body of pre-existing rules found in statute and precedent. Under this theory, factors personal to judges, such as values and political beliefs and personal experience, are irrelevant to the judicial decision-making process. Interpretation, itself, is a rule-bound activity, precluding discretion (2008:41).

However, "it is a fact of life that judges, as human beings, bring with them to the bench attitudes, values and stereotypes which influence their decision-making and reflect their upbringing and socialization" (Steel, 1987:154). When a judge does express a viewpoint or render a decision that is fundamentally at odds with those supported by legal precedent, or outside the purview of the accepted limits of judicial discretion, he/she does so at his/her peril. This is particularly troublesome when considered in light of the hostility and ostracism Wilson, J, the first woman appointed to the Ontario Court of Appeal and Supreme Court of Canada, experienced personally from some of her

fellow judges (Backhouse, 2003). Further, the response of many of the judiciary to the decisions of L'Heureux-Dubé, and Sparks, JJ provide cases in point, described below.

When judges 'of difference' decide differently: Mossman described L'Heureux-Dubé, J as having “an abiding concern for equality and the need to understand legal principles in a social context” (2004:303). L'Heureux-Dubé, J proposed that the promulgation of the *Charter* had demonstrated multiple perspectives that there co-existed in Canadian society multiple perspectives that challenged the “underlying premises” of the “normative basis of judging” (Lessard, 2004:136). Here, then, is described an exemplary judge of difference (a woman, and a Francophone) purportedly espousing her subjective yet learned legal position, informed by her understanding of current social conditions.

However, her decisions have been much criticized (Boyd, 2004b); her decision in *R. v Ewanchuk*⁹ in 1999 was demonized by McClung, J. of the Alberta Court of Appeal (whose acquittal of a sex offender she overturned) who accused her of advancing her personal feminist agenda in her decisions (Lessard, 2004; Backhouse, 2003).

Similarly, Sparks, J of the Nova Scotia Family Court and Canada's first African-Canadian female judge, was accused of racial bias in her decision dismissing charges against a fifteen-year-old male youth of colour in *R. v. R.D.S.* (1997). Upon appeal to the Supreme Court of Canada, three (male) judges (including Lamer and Sopinka, JJ) in a dissenting opinion accused Sparks, J of stereotyping the police officer when, in *obiter* statements, she remarked that the police overreacted when dealing with non-white groups.

What is concerning about these decisions is not just that they reveal a genuine resistance at the level of the judiciary to recognize the existence of gender inequality and racism in society at large, but also within their own membership, particularly given their mandate to discharge their responsibilities objectively, fairly and in accordance with *Charter* principles. It may, therefore, be unreasonable to expect discriminatory judges to act other than in a discriminatory way.

Judicial impartiality: Perhaps it is not surprising that female jurists – most notably McLachlin, CJC, and L’Heureux-Dubé, and Abella JJ of the Supreme Court of Canada, amongst others in lower courts – have repudiated the concept of judicial neutrality, and instead promoted a conception of judicial “impartiality” that privileges the personal knowledge and experience that each judge-as-individual utilizes in her/his decision-making (Lessard, 2004:136). One assumes that female judges (particularly those such as L’Heureux-Dubé, J) subjected to misogynistic rants would reject the notion of judicial neutrality. However, judicial “impartiality” sounds much like personal subjectivity, albeit somehow absent the discriminatory opinions, attitudes, stereotypes, and beliefs that ordinary human beings – including all judges – are likely to hold. Recognizing judicial “impartiality” as defined here acknowledges and legitimates the intrusion of personal subjectivity in judicial decision-making.

One might ask if the *Ewanchuk* and *R.D.S.* appeal decisions would have been the same without the influence of the female members of the Supreme Court of Canada bench (Razack, 1998). Instead, perhaps it was ‘time’ for these decisions, regardless of the composition of the bench – their detractors were out of step with emerging social values of difference and inclusion. Judges of difference might thus be expected to display their difference in various ways, just not necessarily in their decisions – that is, *until* their difference accords with the dominant social discourse.

Given that judges are amongst the most powerful and privileged members of our society, for whom the status and trappings of their office represent the state, the marginalization, diminution, humiliation, and demonization of its female members send a troubling message to women who appear before the courts that they are not equal before the law, and that they, too, can be (much more easily) mistreated. Perhaps it is therefore not surprising that abused women appearing before these judges report feeling abused by them.

The ‘good’ judge: The internal and external constraints imposed on judicial discretion identified in this part provide a further happy by-product for the judiciary: those judges who are able to

successfully rein in their subjectivities are perceived as good judges in the eyes of their peers, members of the legal profession, and the public. They are lauded for their restraint and even-handedness. They are regarded as level-headed and above the fray of political activism. “Good judges do not deviate too far from the norms and usages of the [dominant Eurocentric, patriarchal social discourse] and over time, they internalize these norms” (Mirza, 2009:179). However, this process of ideological assimilation and socialization is not initiated by elevation to the bench; it is inherent in the common law.

5. The Creation of Judicial Knowledge – Phenomenology Explains

Stare decisis: The judiciary represents the human face of the legal system. Judges are the intermediaries between the individual and the state in the court room. The law – statutes, regulations, practice directions, for example – are not and cannot be applied in a contested legal proceeding without a finding of their applicability, nor rejected without a finding of their inapplicability, to any situation by judges as triers of law. Facts, too, alleged by the parties will be rejected or considered on the basis of their relevance to decisions rendered as determined by judges as triers of fact. Such findings are determinations made by judges as triers of fact and law who, in common law jurisdictions, rely upon legal decisions already rendered: *stare decisis* – as well as legislation, practice directions and procedural rules. In short, judges determine outcomes (Kennedy, 2008).

In the Introduction, feminist phenomenology was identified as the critical paradigm utilized in this research study. The precedent system of legal jurisprudence is, itself, phenomenologically premised. Fundamental to phenomenological “comprehension” is the “dimension of history”, that is, the historical origins of the “thing perceived” (Merleau-Ponty, 1962:xviii). What is known in society is a consequence of what is remembered from – and through – history, recalled, shared and retained – *sedimented* – and concretized as knowledge in the collective consciousness (Berger & Luckmann, 1989).

What is known, however, is not understood as the culmination in the here and now of historical moments embedded in one's routines and thoughts, but merely as "the way things are, rational meanings derived from the totality of experiences over time" (Merleau-Ponty, 1962:xix). These meanings form the "'stock of knowledge' and 'frames of relevance' ... of the world in general ... in the mundane reality of everyday life" (Ferguson, 2006:93). These "frames of reference" become "common-sense" (Schutz, 1962(1):7). "Common sense" is legitimated through everyday activities and the meanings socially prescribed to them (Berger & Luckmann, 1989; Garfinkel, 1969).

"Common sense" is relied upon to provide the appropriate responses to everyday encounters as well as unusual and/or unexpected circumstances. Thus one must assume that judges, like all people, when responding to, or explaining, "troubling events" (Hall, et al, 1978:165) which characterize legal disputes,

tend to draw, often in a piecemeal and unreflexive manner, on the social images, the ideas of society ... which frame their everyday experience ... [and] seem to have some relevance to the problem at hand. These bits and pieces are really the fragments of other, often earlier, more coherent and consistent theoretical elaborations which have lost their internal consistency over time, and fragmented, become sedimented in ordinary 'common sense' (Hall, et al,1978:166-167).

Within common law, there is no better example of this phenomenon than the reliance on *stare decisis*, or legal precedent, representing the legitimization of meanings perceived within their historical moment and carried forward. Judges in common law jurisdictions, relying upon *stare decisis*, reason by analogy because like cases are to be treated alike (Hamrick, 1987). Analogous decision-making requires the acceptance of generalized social understanding (Hamrick 1987) – that things are the same all over, and over time. The reliance on legal precedent imbues the common law with a particular immutability that lifts it above and tends to exclude any examination of the social or political framework informing the issue at hand (Sachs & Wilson, 1978). This is accomplished by emphasizing the *word* (that is, earlier decisions) rather than concepts, facts rather than sentiment (it

is a bloodless exercise), and the cited instance rather than overarching principles (Hunt, 1978; Sachs & Wilson, 1978).

The doctrine of *stare decisis* establishes the *dominant* legal discourse; established legal precedents become lines of legal reasoning that “exert control over concepts and ideas which are understood to be the foundation of the area” (Fineman, 1988:736). The survival of common law – judge-made law – is expressed through a multitude of cases (Sachs & Wilson, 1978). Before a judge reviews the files on her/his daily docket, he/she is “already knowledgeable about hundreds of opinions by judges and lawyers and legislators about how to handle conflicts roughly analogous to [those awaiting adjudication]” (Kennedy, 2008:61). The plethora of cases available for consideration necessarily demands that judges pick and choose those upon which they rely.¹⁰ When considered in light of how judges think, this activity is fundamentally subjective.

Mossman (1986) has identified *stare decisis* as a mechanism for denying new legal claims – that for which there is no precedent. “If a precedent is required to uphold a claim, it is only existing claims which will receive legal recognition; the doctrine of precedent thus becomes a powerful tool for maintaining the status quo and for rationalizing the denial of new claims” (Mossman, 1986:40). As such, the law has acted (and acts) as a “vital conservative force” (Snell, 1991:7). The voices of women, historically absent from the law, have thereby been excluded, precluding the legal precedents upon which their claims could be founded.

Judicial discretion: Langer suggests that conservatism in law is aided and abetted by judicial discretion, “purposefully” incorporated into the legal system in order “to perform a powerful legitimization function in legal discourse ... Discretion allows for the invocation of values widely attributed to society and reinforces the idea that consensus exists on controversial and context-specific issues” (1994:2).

However, judges do not merely apply the law as it is, they create it. “[A judge] must construct a scheme of abstract and concrete principles that provide a coherent justification for all com-

mon law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well (Hamrick, 1987:180). The act of judicial decision-making is at once constrained *and* creative, predetermined *and* novel, reasoned *and* intuitive. Reliance on legal precedent, therefore, cannot constitute the only determinant of judicial decision-making. “There are clearly hidden subjective factors somehow at work in judges’ decision-making” (Hamrick, 1987:165). The law is interpreted actively through a particular, personal judicial lens that is both subjective and value-laden (Hamrick, 1987). Accordingly, “the inevitable contingency and ambiguity which surround all human choices apply as well to judicial decision-making” (Hamrick, 1987:180).

The scope afforded judges to be creative, novel and intuitive is thus enhanced and enlarged by *judicial discretion*. Judicial discretion has never been absolute; it is not only delineated by reference to precedent, but, through precedent, a set of principles, practices, assumptions and presumptions can be established that act as guidelines that judges are expected to follow. Failure or refusal to do so could attract a reversal on appeal – a form of negative attention from the superior bench no judge wishes to attract (McCormick & Greene, 1990). These guidelines are often referred to as doctrines emerging from case law, some of which are examined later in this chapter.

The extension and quantum of judicial discretion allowed by legislation beyond that invested through the common law represent an acknowledgment on the part of lawmakers, judicial and/or political, of the limitations of law to be responsive to the totality of the human condition. In this regard, judges making determinations in family law disputes have been afforded the greatest degree of autonomy in their discretionary decision-making processes.

What determines or informs judicial discretion? If one accepts that meaning is phenomenologically conceived as a thoroughly human enterprise, intersubjectively relational and historically situated (Hamrick, 1987) yet fundamentally egocentric (Beyer, 2013), then one must assume that an individual’s “stock of knowledge” will consist of whatever the individual subjectively deems relevant to him or her (Bentz & Rehorick, 2008:18). The corollary of this presumption, therefore, is that

that which is considered irrelevant is ignored or unacknowledged; the individual might not even be aware of it (Rheinstein, 1966). “Clearly, judges have the authority and ability to act as gatekeepers in deciding what knowledge claims and what types of knowledge will be made legally relevant in a family law proceeding” (Richman, 2005:18). Legal devices such as *stare decisis* and the ‘reasonable man’ test are but two of a variety of legal mechanisms that operate to obscure the policy content of judicial decision-making (Conaghan, 1996).

The application of *stare decisis* may appear, and is represented by the dominant legal discourse to preclude, the influence of personal subjectivity, contemporary social conditions and political forces upon the eventual resolution of legal proceedings. However, these operate through the discretionary powers of individual judges. The conservatism inherent in reliance upon *stare decisis* in common law can be reinforced through judicial discretion, if those who constitute the judiciary accede to the current dominant social discourse.

Therefore, who the judges are as individuals, from whence they come, how they perceive themselves and what they represent, how and what they are taught or learn about the law and how they judge it, are inextricably intertwined.¹¹ As progenitors of legal decisions, judges, the elites of the legal system, have an important role in promoting the values, beliefs, mores and hegemonic discourses impacting everyday life in the most profound ways, and are thus intrinsically relevant to any study of woman abuse and abused women’s experiences before the courts. “Their perspectives, the quality of their leadership, the immediate moral and political culture within which they operate and the social formation from which they are drawn are all part of the equation” (Moyser & Wagstaffe, 1987:3) in any examination of society and social issues.

6. How and what are judges taught?

How law schools present ‘the law’: “Law is taught, justified and interpreted as if it were a form of science, and therefore a systematic and rigorous exercise” (Naffine, 1990:44). The law and legal knowledge are primarily conceived through a positivist lens, operating autonomously from

other social institutions (Boyd, 2001). Law is presented as a “technical exercise in sorting legal material rather than as a social practice which may reshape the lives of those who enter the lawyer’s office or who are brought before the courts” (Naffine, 1990:29).

It is curious that, although law claims to have a method to establish “Truth” (Smart, 1989) it is easily manipulated – what law students ingest, in fact, as they plough through hundreds of reported cases in their three years (or more) of law school are the multitude of ways the law can be interpreted, compressed, expanded, and/or rejected in order to fit it to a particular fact situation, or to achieve a desired result. Students come to appreciate that “the rules of law are sufficiently flexible to allow a judge to justify more or less any interpretive reading of an operable statute” (Sumner, 1979:278). What is not taught in law school is how judges come to interpret statutes and apply relevant cases in ways that best suit their subjective vision of the correct result, and then rationalize after the fact (Posner, 2008; McCormick & Greene, 1990; Smart, 1984; Sumner, 1979).

Recent theories about judicial reasoning: More recently, MacLean has challenged what he describes as the “realist” approach espoused by Frank, J to explaining legal reasoning (2012:125). MacLean views judicial decision-making through the “hunch” theory (2012:125) that consists of five activities:

1. brooding and puzzling over the facts;
2. hunching intuitively of the just position;
3. checking and testing the hunch;
4. making a decision;
5. formulating the decision in accordance with accepted forms.

The judicial “hunch” is “not just arbitrary ... but the source and origin of a purposeful brooding and concentration over the facts of a particular case in order to determine its *just* response” (2012:128). Accordingly, MacLean dismisses the ‘arbitrariness’ and ‘irrationality’ of the realist approach that posits judicial reasoning as primarily the manifestation of individual subjectivity and opinion. The reliance on *stare decisis* would appear to support the “hunch” theory. “[L]ooking at

caselaw allows a decision to become disembodied from the judge ... [and] assumes that the judge does nothing but arrive at a correct ‘legal’ decision” (Hunter et al, 2008:78).

MacLean does not explain how a judge goes about identifying a “just” response to a set of facts without referencing personal subjectivity. It is interesting to note that he eventually defers in his argument to “Whiteheadian metaphysics” (2012:128) which, to this researcher, appear to be another iteration of phenomenological philosophy, inasmuch as this theory describes judicial understanding of the ‘here and now’ in phenomenological terms: the “conrescence” of things past, brought forward (2012:130).

Examining MacLean’s “hunch” theory within the context of the common law exposes its weaknesses. MacLean does not acknowledge that every set of facts are, themselves, subjectively chosen and particularized for presentation in court in order to support the party advancing them. One might ask: cannot a result flow from a particular set of facts simply because one party’s counsel is more adept and persuasive in presenting them? How does that make the result “just”? What intellectual ‘tools’ are employed in “brooding and puzzling”? Is not a judge’s capacity for “brooding and puzzling” individually and subjectively prescribed? How is “intuition” not subjective? The order of activities in the “hunch” theory appears to defer the act of judicial decision-making until after the “hunch” is ‘checked’ and ‘tested’, but, is not limiting the checking and testing to a hunch effectively making a decision in the case at that stage? It would seem that there is much room for arbitrariness and irrationality in the operationalization of the “hunch” theory, despite MacLean’s protestations to the contrary.

Even more recently, Radmilovic, a York University scholar, asserted that “judges regularly mould their decisions so as to curry favour with governments for fear of adverse government reactions”: (2013:323). Radmilovic advances the “dialogue” theory that suggests “[g]overnments can curb judicial policy-making not just by enacting legislation sequels, but also by mobilizing in advance of judicial rulings and influencing their content” (2013:341). For Radmilovic, therefore,

judicial decision-making is constrained by judges' subjective fear of losing their judicial autonomy and independence should they stray too far from the established status-quo in legal decisions. His "dialogue" theory thus presents a further source of subjectivity in legal reasoning: fear, not just of having one's decisions appealed, but of losing the ability to deciding in particular ways altogether.

The issue of the political affiliation of judges has been recently examined by Hausegger et al (2013). Utilizing the data collected by Stribopoulos and Yahya (2007) Hausegger et al conducted logit analyses of four different case categories, one of which was concerned with 'family' law (primarily child custody, and spousal and child support). Their goal was to ascertain if the judges' "gender" and "strength and direction of his/her party affiliation" were predictive of judicial outcomes (2013:676). Only Liberal and "Progressive Conservative" affiliations were examined (2013:676) – a curious combination, given that the subjects were appellate court judges, and thus federal appointments, yet the researchers used the provincial Progressive Conservative (P.C.) party as one of their independent variables.

The results of this study regarding the case category 'family law' were inconclusive with respect to "gender". The researchers found that a judge's own party ties did not appear to influence his or her votes in family case issues per se. However, they noted that a vote in favour of a female litigant in a family law case was 19% less likely from a judge with Liberal ties if he/she sat on a panel with a judge with P.C. ties. Hausegger et al posited that Liberal affiliates tended to be influenced by P.C. colleagues across most issues. They concluded on this point, "[a]lthough we can only speculate if Liberal affiliates have a less structured set of ideological commitments, then, perhaps, they are more easily persuaded than their P.C. affiliates" (2013:679). This study presents yet another source for judicial decision-making: the influence of the personal subjectivities and proclivities of other judges. Taking the "dialogue" theory promoted by Radmilovic (2013), it might be assumed that a judge's reasoning and decision-making might be influenced by those of his/her

peers who have been identified with, and are presumed to be favoured by, the governing political party

Regardless of the persuasiveness of the arguments presented in the research literature of the role personal subjectivity play in judicial reasoning and decision-making, judicial interpretation is presented in law school as a rule-based activity, and thus immune to judicial subjectivity (Posner, 2008).¹²

“A good law student may pass through the university encountering more than thousands of cases with little thought for the human beings to whom they must be applied” (Naffine, 1990:29). The case law method of legal pedagogy reduces the study of law to a purely intellectual exercise; the fact situations outlined in judicial decisions are not presented *in situ*, their “social dimensions” (Naffine, 1990:30) are not explored nor explained, and the human element of the legal process is all but erased.

“*Legal method*”: What law students are expected to divine and assimilate from the study of innumerable reported decisions is what Mossman (1986) has termed “legal method”.¹³ In Mossman’s rubric for legal method, human experience – and human beings themselves – are reduced to “issues”. Mossman suggests that judges will define these issues as narrowly as possible, “eschewing their ‘political’ or ‘social’ significance, and explaining that the court was interested only in the law” (1986:38). There is no place within the adoption of legal method as the foundation of legal pedagogy for the consideration of the social. Cases are considered in isolation on the basis of their fact situations or the legal reasoning of their judgments. “[H]arms are largely understood to be individual and private; not shared and social. Because problems are understood as individual in nature – as aberrations in an otherwise just social and legal order – that order goes unchallenged” (Mosher, 1997:621). The reproduction of law, through legal pedagogy, legal practice, and judicial decision-making is, therefore, at its essence, “decidedly anti-critical” (Mosher, 1997:621).

Reliance on precedent involves case analysis. “This is where the legally-trained mind searches out cases which may constitute the precedent of a judicial decision. Some cases become ‘good law’, i.e. should be followed, others mysteriously become ‘bad’ law and are ignored” (Smart, 1989:180). This winnowing is itself a subjective exercise.

While Smart minimizes the influence of “legal method” on the vast majority of cases in which “a lot of law in practice never gets near a judge” (1989:181), she fails to recognize that the assimilation of legal method by law students determines how they will practise law: what files they will assume; how they will assess the allegations made by their clients and the respondents; how they will advise their clients; and how they will pursue the interests of their clients. The process of legal method becomes for law students turned lawyers, and eventually judges, so natural, so matter-of-fact, to be taken for granted and ignored as a discrete practice. It becomes the “common sense” legal methodology.

Emotion and legal reasoning: There is assumed to be no place for the irrationality of human emotion in legal reasoning (an androcentric activity). However, to expunge emotion from *reason* is to deny that which makes one *human*; “... once affect is perceived as distinct from and interfering with reason, there is no room for reflecting on affect, for evaluating it, for educating it; feelings are simply the raw data of nature to be controlled by reason” (Nedelsky, 1996:261). Emotions have been constructed through science as learned responses associated with particular images or experiences, and thus there may be appropriate or inappropriate responses to various stimuli. Citing Damasio’s research concerning the emotive responses of severely brain damaged, yet cognitively intact, subjects, Nedelsky posited that “shocking” failures in judgment in legal decision-making are indicative of an inability of some judges “to assign the appropriate affect to the events they confronted” (1996:259).

Examples of “shocking” failures in judgment in legal decision-making are, it is submitted, evident in many of the reported cases referred to in this chapter. Nedelsky would not suggest that

“these judgments are evidence of brain damage” (1986:259), nor, might one assume, would she agree with Frank, J that all judicial applicants should undergo “something like psychoanalysis” to determine their psychological and emotional eligibility for the bench (1949:250). Instead, Nedelsky suggests that “good judgment requires learning appropriate affective responses” (at p. 261). Unfortunately, the disembodiment of legal method and legal reasoning from the human does not provide any space or place for consideration of emotional affect. Nor is there space or place for application of “appropriate affect” in a family justice system where consideration of conduct has been expunged; that is, there is nothing that can be considered to respond affectively *to*. Finally, engagement in critical self-reflection is not, unfortunately, mandated by the *Rules of Professional Conduct* (Law Society of Upper Canada, 2000).

The best we can hope for is that the emotions of the trial judge will be sensitive, nicely balanced, subject to his [sic] own scrutiny. The honest, well-trained trial judge, with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses, is the best guarantee of justice. The wise course is to acknowledge the necessary existence of the “personal element” and to act accordingly (Frank, 1949:412).

7. The Judiciary and the Self-Represented Litigant in Family Law: An Impediment to Justice

The legal process allows, theoretically at least, an opportunity for intersubjectivity between litigant and judge; the abused female litigant shares with the court her narrative of abuse in the form of affidavit, or *viva voce* evidence. One must question what capacity for understanding is available to an unrepresented victim, for whom the language of law, and to the Court, for which the subjective language of violence and abuse, are mutually incomprehensible. The unrepresented victim of woman abuse appearing before the family court may confront a double impediment to realizing her legal rights and entitlements: not only might the judge adjudicating her case not hear (and thus refuse to acknowledge) her narrative of abuse, but each might be speaking a language unintelligible to the other.

The issue of self-representation is particularly problematic in family court. “A rising flood of litigants who do not qualify for legal aid lawyers, yet cannot afford one on their own, is costing the system heavily” (Makin, 2013:A9). Between 1998 and 2003, 46% of Family Court applicants in Ontario were unrepresented by counsel at the time they filed their applications (Langan, 2005).¹⁴

Birnbaum’s and Bala’s study of the experiences and perceptions of litigants in Ontario’s family court system found that, by 2012, 61% of family court litigants were unrepresented. There was no difference in the rates of legal representation between male and female applicants regardless of income. While women almost always represented themselves because they could not afford to retain legal counsel, their male respondents chose to be self-represented because they were confident in their own abilities. “[Some men] believe that they will actually have better outcomes if they represent themselves, and some may relish the prospect of personally confronting their former partners” (2012:5a-29). Others distrusted the legal system, which they believed was inherently biased against men – an opinion undoubtedly fueled by popularization of the fathers’ rights lobby.

While, occasionally, a self-represented litigant might be as effective as legal counsel, the vast preponderance of unrepresented parties are detrimentally affected by their lack of legal counsel, incur procedural delays, errors and the unnecessary prolongation of trials and/or the rejection of reasonable settlement offers (Birnbaum & Bala, 2012),¹⁵ all of which work to the detriment of women, particularly abused women, for whom the self-representation of their abuser provides further opportunity for harassment and abuse.

8. The Perceptions of the Judiciary – Theirs and Others

Theirs: “Law schools promote the mythologization of the judiciary as über-mortal; the bar, perhaps out of concern for its members’ professional well-being, has perpetuated the image of a judiciary unmoved by ‘the virtues and weaknesses of mortals generally’” (Frank, 1949:146). Pronouncements made by judges upon the topic of their collective professional persona are instructive;

the majority reflects a belief in their individual and collective impartiality, objectivity, and generally held wisdom. They assume a position on the dais ‘above the fray’ both literally and figuratively.

Disengagement may free judges to act. Psychologically, the distance between judges and their judgments may enable judges to render the decisions that so profoundly affect the lives of others. If freed from having to engage personally with what occurs subsequent to their judgments, judges may be enabled to impose rulings that would otherwise be too painful to pronounce. And, psychologically, those who are judged may wish for a judge who is, at some level, a mystical “Other”, not like ourselves but endowed with special wisdom and insight (Resnik, 1987-1988:1885).

Some Canadian judges are remarkably candid in expressing their personal opinions about their judicial role, and how that role requires them to behave (they all assume that they behave in accordance with these expectations). For example, the elevation of judicial decision-making beyond the impact of human subjectivity has been eloquently expressed by Binnie, J:

I think the media greatly overstate the room for personal views and biases. When I got to the court and participated in court conferences, the overwhelming issue was one of professionalism. The judges were attempting to arrive at what they understood the law to be regardless of what the media was going to say about it and regardless of how they personally might have decided if we were free of precedent and we have an open book to write whatever laws we wanted (Makin, 2011:A8)

However questionable this stance might be to critical analysis, “[i]t is nigh impossible ... to convince judges that the law’s face (not to mention their own face) is anything but neutral” (Jhappan, 2009:230). In comparison, Sparks, J posited that

[t]o be a good judge requires a high standard of knowledge, sophisticated interpersonal skills, deep compassion, sound articulation, and great patience. But outstanding jurists have extraordinary qualities that imbue them with leadership capacity. It is a gift: a unique combination of intellectual brilliance and innovation, coupled with an innate ability to relate to all humans in the rainbow of humanity. J. B. Wilson calls it the ability to step into the skin of the litigant (Sparks, 2004:379).

However, markedly absent from this description is recognition of personal subjectivity – as judicial discretion *or* judicial impartiality – in judicial decision-making. One might question the necessity of a judiciary ‘of difference’ if the qualifications of an “outstanding jurist” are those described by Sparks, J, and not the experience of difference per se. These omissions are particularly striking inasmuch as Sparks, J has drawn on her personal experiences as a woman of colour in her

decisions, and been attacked for so doing by the dissenting opinion in the Supreme Court of Canada in *R. v. S. (R.D.)*.

It is undeniable that the individual proclivities of each judge play major roles in family law, “since the subject is essentially a fact-based arena for decision-making, where legal principles are merely guidelines to extraordinary amounts of flexibility granted to the judiciary” (Steel, 1987:154). Unlike many of her brothers and sisters, L’Heureux-Dubé, J recognized the role of personal subjectivity in judicial decision-making:

Whatever the test [of relevance of case law], be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the context of any relevant decision will be filled by the particular judge’s experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth: *R. v Seaboyer; R. v Gayme* (1991) at para. 196.

Needless to say, L’Heureux-Dubé, J was speaking for the minority in this decision.

It has been well established that the most reliable predictor of the outcome is the known, or apparent, predilections of the presiding judge (Crocker, 2005). An ‘old saw’ in legal practice is that, it matters not what you say as much as whom you draw. An examination by Ford et al (1995) of 174 violence cases in civil proceedings commenced in Kentucky and randomly directed to and presided over by one of three judges revealed that the *only* significant factor related to case outcomes was the judge hearing the case.

Others: How judges discharge their discretionary powers in family law proceedings has been examined in various research studies concerned with judicial demeanor toward female litigants generally and abused female litigants in particular. Studies of abused women’s impressions of the judges before whom they appeared in family court matters have also been conducted. Contrary to how judges might perceive themselves, the findings of these studies present a universally negative image of the judiciary, and its response to the abused women involved in family-related litigation.

In the first reported Canadian study of judicial attitudes toward mothers' and fathers' custody claims, Bradbrook (1971) found that judicial discretion was manifest as entirely subjective, personal opinion and beliefs. He concluded that "there are no universally applicable principles in custody disputes" (at p. 571).¹⁶ Charlesworth's examination of judicial attitudes in the family courts of British Columbia revealed that the maximum contact rule contained in the *DAI985* was interpreted by all actors in the family justice system as children needing their fathers, and that custodial mothers who challenged non-custodial fathers' right to maximum contact, even in the presence of incontrovertible evidence of woman abuse, were deemed to be acting against their children's best interests. "A child's need for a father appears to override all other considerations, including the risk of abuse" (1999:28). Ironically, mothers were often faulted for discouraging good parental relations when the father's own efforts in this regard were questionable.

American studies of gender bias in the courts have documented how judges disbelieve credible evidence of domestic violence and/or discount its seriousness. "Too often, judges ignore the substantive law along with the evidence. Too often, their orders hurt women and children who come to court in family law cases" (Czapanskiy, 1993:249). Further, gender bias reports document that judges too often fail to listen to or believe women *lawyers* (Czapanskiy, 1993). Female litigants who retain female legal counsel may thus be at a double disadvantage in family court proceedings.

In short, outcomes of studies examining the judicial response to allegations of domestic violence and abuse advanced by female litigants in family-related (criminal, as well as civil) litigation across common law jurisdictions consistently demonstrate that abused women are not believed (Heim et al, 2002; Waller, 2001; Imbrogno & Imbrogno, 2000; Charlesworth, 1999; Ptacek, 1999; Pryke & Thomas, 1998; Taylor et al, 1996).

Abused women also report experiencing negative interactions with court personnel:

Qualitative studies describing the nature of victims' experiences reveal that they

are often negative, with victims sometimes reporting that they feel anxious and confused about the process, receive insensitive and dismissive responses from court personnel, and encounter difficulty in securing the issuance or enforcement of sanctions (Bell, et al, 2011:73).

The tone set by judges in the courtroom appears to have a strong impact on women's evaluation of their courtroom experiences. Ptacek's seminal study of judicial demeanor in two Massachusetts county criminal courts with a specialized function of issuing orders of protection (restraining orders) found that "the psychic aftershocks of violence affects battered women's encounters with judges" (Ptacek, 1999:166).¹⁷ Ptacek identified five judicial 'types': "good-natured"; "bureaucratic"; "formal"; "condescending"; and "harsh" judges.¹⁸ Respondents reported that "supportive" judges responded to their desire for recognition, need for safety and appeal for justice. "Bureaucratic, condescending and harsh presentations of authority failed to address – even betrayed – the recognition, safety and justice they sought" (Ptacek, 1999:151). The gender of the judge was irrelevant in determining his or her sensitivity to abused women and their concerns.

A later study, in which researchers relied upon responses to questionnaires submitted from selected, self-identified users of the California family court system found that: men, having greater financial resources, enjoyed better legal representation than women; traditional gender roles were manipulated to accommodate fathers; false sexist syndromes were applied by the court in determining custody and access awards in the fathers' favour, regardless of allegations and/or evidence of abuse; there was a lack of due process as a consequence of a failure to follow the rules of evidence and procedure; and judges expressed a tendency to assume that parents are 'equal' upon marital dissolution, in spite of evidence to the contrary. Ninety-eight per cent of respondents felt abused and discriminated against by the legal system (Heim et al, 2002).

9. What do Judges purport to 'know', and how do they 'know' it?

Personal subjectivity as a form of judicial assessment: The abandonment of family law presumptions and doctrines, such as coverture, with their strictly delineated gender roles for spouses,

and, later, the maternal presumption for young children afforded by the tender years doctrine (discussed later in this chapter), left judges adrift, reliant upon their own personal experiences and opinions in making their decisions (Bourque, 1995; Fineman & Opie, 1987). Intuitive evaluations “based on unspoken values and unproven predictions” have subsequently characterized judicial decisions (Mnookin, 1975: 291). To this end, various studies of judicial behaviour have identified the ‘demeanor’ of litigants as one of the most important variables, if not *the* most important variable, in judicial decision-making (Posner, 2008; Ptacek, 1999; McCormick & Greene, 1990; Glass, 1984; Bradbrook, 1971), although judges, themselves, may be unaware of how, or the extent to which, their personal subjectivities influence their assessments.

What judges ‘know’ about an individual’s demeanor is necessarily limited to what they observe and the meanings they ascribe to those observations. What they know is influenced by what they *expect* an individual’s demeanor to be in response to what is being alleged, and it is at this juncture that determining what a judge might know or expect from litigants becomes crucial to judicial outcomes.¹⁹ The flat affect and automaton-like responses of the victim of PTSD have been negatively interpreted by judges as indicators of dishonesty, evasiveness or scripted evidence (Hinds & Bradshaw, 2005; Dalton, 1999; Zorza, 1995-6; Saunders, 1994), and thus may be misconstrued by judges who expect a battered or abused woman applying for an emergency restraining order to manifest some level of hysteria or histrionics or other similar subjective indicator of “fear for her own safety” required pursuant to s. 46 of the *FLA*.

In the alternative, a battered woman who disassociates or is distraught, appearing disoriented or furtive in the presence of her abuser because of past abuse may not present as the better parent, “whereas a batterer may be adept at hiding personality disorders and substance abuse problems” (Morrill et al, 2005:1078). Similarly, the sequelae of psychological abuse that undermine victims’ self-confidence and negatively impact decision-making may be misinterpreted by judges who view indecisiveness, vagueness in responses, or forgetfulness with skepticism (Weisz, 1999).

In *Ruscinski v Ruscinski* (2006), Cavarzan, J awarded the wife \$5,000 in damages for one episode of assault, but rejected corroborating evidence of other incidents of assault, and the wife's characterization of the husband as vindictive and controlling. Cavarzan, J negatively assessed the mother's demeanor: "I note at this point the evidence in the case does not support the view urged on behalf of the applicant that she is a vulnerable female dominated by a psychologically abusive male. She is no shrinking violet" (para. 42). The judge based his assessment upon the wife having told her husband to "fuck off" when he confronted her with a pre-nuptial agreement. Despite the evidence of the husband's physical abuse, intimidation and stalking of the wife, his anger control issues, his late payments in child support and frequent late returns of the children from access visits, the court ordered joint custody and unsupervised access. Further examples of judicial assessments of litigants' demeanor appear elsewhere in this chapter.

The influence of 'experts' in judicial decision-making: Family judges have, historically, relied upon 'experts' in the 'psy' medical professions (psychiatry and psychology) and social sciences (social work) to guide them in their adjudications (Chunn, 1992). However, the increased involvement of representatives of these disciplines, as assessors and/or mediators, in the family justice system "has resulted in the redefinition of separation and/or divorce as an emotional, rather than a legal, process" (Boyd, 1997:203). Accordingly, "social scientific scholarship and expertise have become, in many cases, a centerpiece of the family court process" (Richman, 2005:5).

Just as psychiatry and psychology are accepted within law as legitimate and persuasive medical discourses, social science research, as a *science*, has been accepted as providing an objective basis for the formulation of generalized rules with which to objectively evaluate facts and allegations in family law proceedings (Fineman & Opie, 1987). Clinical social workers represent the vast preponderance of 'social scientists' in the family justice system in their roles as mediators and assessors. Clinical social work continues to be informed by various systems theories of human development (including general, biological, ecological, and psycho-social systems theories, a discussion of

which lies outside the scope of this study) that, like law, are epistemologically positivist and decidedly non-critical (Boyd, 1994; Siporin, 1980). Hence, the advice provided and knowledge imparted by experts in these fields direct the legal profession at all levels to pathologize or normalize problems for which answers may lie elsewhere. Similarly, in law, problems are “understood as individual in nature” (Mosher, 1997:621).

The intrusion of social science paradigms, represented by clinical social workers as assessors and mediators, into the family justice system has resulted in the appropriation of sociological language by judges and lawyers. “The professional language of social workers and mediators has progressed to become public, then the political, then the dominant [family law] discourse” (Fineman, 1988:730). The conceptual tools and language of clinical social work have become cloaked with the mantle of assumed neutrality and objectivity worn by social science, generally, and thus are invariably accepted on their face. However, there are few lawyers or family court judges sufficiently familiar with the relevant social science or social work research literature to challenge these ‘experts’ or the positions they promote.

More fundamentally, current family law legislation and practice are, in essence, incompatible with the language and conceptual tools of both the ‘psy’ professions and clinical social work, despite the reliance of lawyers and judges upon the practitioners of these disciplines, their language and concepts. Both the ‘psy’ sciences and clinical social work rely upon various forms of inquiry – empirical, narrative, observational, therapeutic – into human *conduct* to determine the level of mental health, in the case of the former, or their “social functioning” (Siporin, 1980:510), in the case of the latter. In other words, human *conduct* is the focus of inquiry of these disciplines. The language utilized in the ‘psy’ and social sciences is derived from examination of human *conduct*. The conceptual tools are designed to explain human *conduct*. But current legislation concerning marital breakdown precludes consideration of conduct except in certain, delineated circumstances.

When what must be determined falls within the mandates of both social workers and judges,

each discipline is likely to define and analyse the contentious issue differently and arrive at a different conclusion having different consequences (Newberger & Bourne, 1980) because the former will have examined the parties' conduct to inform their opinions, while the latter will have ignored it. Alternatively, "judges with a cursory cross-disciplinary education will make errors in applying and interpreting professional 'knowledge'" (Neilson, 1997:144). The conceptual tools offered by the 'psy' sciences and clinical social work may be misconstrued or misapplied by legal actors without regard to conduct at all, which can have dire, if not dangerous consequences for abused women and their children, examples of which riddle the reported case law examined later in this chapter, and the survivor participants' narratives found in Chapter Five.

Ironically, while the study and practice of law remove the human element from consideration, the 'psy' sciences and clinical, systems-based social work paradigms elevate individual choice (human agency) as the sole determinant of inter-spousal and parent/child conduct represented in legal disputes. Unfortunately for family court judges, the settlement mission inherent in the civil family justice system has relegated mostly high conflict cases to their dockets.²⁰ 'Common sense' would dictate that it is in these cases that spousal conduct would be relevant to judicial outcomes.

These families are generally mired in intractable legal disputes, ongoing conflict over parenting practices, hostility, physical threats and intermittent violence ... Additionally, as many as 60 per cent of these high conflict parents are likely to have personality disturbances and/or disorders ... about 10 per cent of the family law cases take up to 95 per cent of the court's time and professional services ... (Birnbaum & Fidler, 2005:341).

However, the within case law review will illustrate that, given the current legislative mandates regarding conduct, the influence of legal precedent, established judicial practice, and the exercise of personal opinion, biases, and subjectivities, judges ignore, rationalize or excuse misconduct that they would *or should* otherwise consider relevant. It would, in fact, appear that the judiciary embraced the legislative directive to ignore conduct in family law proceedings as soon as they were able. In 1978, Pickett, J, in *Renaud v Renaud*, rejected (with considerable contempt and vitriol)

evidence of marital misconduct adduced by both parties in an application for spousal support. The wife had alleged the husband was abusive and, during the course of the marriage, had conducted an adulterous affair with a woman with whom he began living after leaving the matrimonial home. Pickett, J found that the husband's conduct did not constitute an obvious and gross repudiation of the relationship necessary to trigger s. 18(6) of the *FLRA 1978*, even though his adulterous conduct had precipitated the end of the marriage. Pickett, J characterized the wife's suspicion of the husband's marital misconduct as "well founded" but irrelevant, and ignored her allegations of abuse, finding the evidence of conduct, generally, "amounted to an utter waste of the court's time": para. 6. Many of the decisions rendered in the cases reviewed in the balance of this chapter suggest that the sentiments of Pickett, J are shared by many of his brother and sister judges.

Sedimenting a dominant 'psy' discourse in family law: When expert opinion is generally accepted, it is almost impossible to challenge it because it is assumed that the opinion is so commonsensical that judges may unthinkingly rely upon it (Valverde, 1996). The law and the 'psy' and social sciences legitimate sedimented discourses; "[f]amily law does not question but merely mirrors and offers justification for the ideologies and interests that dominate the social order from time to time" (Neilson, 2000:104). Those 'experts' who challenge the status quo in the 'psy' sciences, as in all areas of life, are considered dangerous and quickly marginalized and defused (Berger & Luckmann, 1987).

Indeed, Weber contends that status groups (such as those emanating from the 'psy' sciences), generally, determine the content of law (Rheinstein, 1966). Two recent reported decisions demonstrate how the courts can reject 'expert' opinion when it does not accord with the current, popular judicial discourse. In *Fasan v Fasan* (1991) and *W. (K.M.) v W. (D.D.)* (1993), the first a decision of the Provincial Court (now the OCJ) and the latter a decision of the Supreme Court (now SCJ), the presiding judges rejected the evidence of a psychologist, agreed to by both parties and

properly qualified as an ‘expert’ in both proceedings, who refused to condone the promotion of joint custody currently favoured in the family justice system.

In the first case, *Fasan v Fasan* (1991), on consent, the parties retained a psychologist, Dr. Albin, to conduct an assessment regarding their competing claims for sole custody. The psychologist recommended sole custody to the mother after completing psychological assessments of both parties. At trial, Dr. Albin was duly qualified by Granger, J. as an expert.

Granger, J. rejected the report and recommendation of Dr. Albin, although he ordered that the mother have sole custody of the child. Ironically, he dismissed the expert’s report because it was based upon established psychological tests and assessments (the expert’s tools), truly a fallacious argument:

In this case, Dr. Albin appears to have arrived at his recommendations by interpreting the actions and personalities of the parties based on the tests which he administered. I do not feel comfortable in accepting or placing a great deal of weight upon a report which is based to a great extent upon psychological tests of admitted limited value which were administered in a short period of time. Accordingly, I place very little weight, if any, on the report of Dr. Albin: para. 18.

In *W. (K.M.) v W. (D.D.)* (1993), Dr. Albin was retained, on the consent of both parties, to investigate allegations of father’s sexual abuse of his young daughter, which allegations Dr. Albin confirmed following his psychological assessment of the child. He was qualified as an expert at trial, and called by the mother as her witness. The father called a social worker employed with the Children’s Aid Society (CAS), who was not (nor could be) qualified as an expert at trial.

In rejecting the expert report and testimony of Dr. Albin, Webster, J stated

I am led to believe that once qualified as an expert, the Court should not dismiss [experts’] evidence lightly. I have always understood that the weight given to the testimony of witnesses is something entirely within the purview of the trial judge. In giving weight to testimony, the Court is not bound by the fact that a witness is an expert. Being qualified as an expert merely permits opinions to be offered to the Court in the field of the expertise. It is still open to the Court to reject conclusions drawn, provided there is a proper basis for so doing: para. 17.

Webster, J then cited *Fasan & Fasan*, remarking, “Curiously enough, the assessor in the case cited was none other than Dr. Albin who gave the evidence and prepared the report in this case”: para.18. On the basis of the criticisms directed by Granger, J at Dr. Albin in *Fasan v Fasan* (without noting that Granger, J had, in the result, agreed with the expert), Webster, J rejected Albin’s finding of sexual abuse, favoured the ‘opinion’ of the CAS worker (who had not been qualified to give one) and granted the father unsupervised, overnight access.

In his reasons, Webster, J, made the following observations concerning the parties’ relative demeanor:

Clearly the applicant is not a believable witness. She hesitated in her answers, she avoided questions, the answers to which would put her in a bad light vis-a-vis her marriage ...: para. 24.

I found the respondent to be a believable witness. While it is true he has demonstrated violence in the presence of his wife and others, normally directed at his wife, such was almost on all occasions provoked by the applicant’s immature behaviour. While such does not excuse the behaviour, it does, in a sense, make it more understandable. In any event, it does not affect his credibility: para. 26.

In this decision, the presiding judge appears to have validated evidence of woman abuse by blaming the victim for the husband’s violent conduct. Accepting the ‘opinion’ of the CAS worker allowed Webster, J to grant the father maximum contact, the order he undoubtedly felt compelled to give in light of the accepted discourse surrounding children’s best interests, even in the face of clear evidence and expert opinion to the contrary.

These cases demonstrate that, at some point, “judges are often put into the position of deciding, what is ‘good science’?” (Richman, 2005:4). What ‘science’ the judiciary has decided is “good” in relation to issues arising in family court inevitably informs their decisions and becomes sedimented in legal knowledge through *stare decisis*.

What judges ‘know’ about woman abuse from the ‘experts’: The National Judicial Institute is responsible for the overall coordination of judicial education in Canada. Its mission statement describes the organization as “an independent, not-for-profit institution committed to building better

justice through leadership in the education of judges in Canada and internationally” (National Judicial Institute, *About the NJI*, no date) . A review of its Board of Governors reveals that it is chaired by the Chief Justice of Canada, and is comprised of five judges, 2 law school deans, and 2 retired Supreme Court of Canada judges, and its Executive Director is a judge (National Judicial Institute, *About the NJI*, no date, no page no.).

A link to the organization’s “judicial education” site includes its *Judicial Education Course Calendar and Education Resources, 5th Edition* (National Judicial Institute, no date) that lists a sub-chapter entitled “Family Law” at p. 20. There is no mention of ‘family violence’ or ‘domestic violence and abuse’ as topics of judicial education in that sub-chapter, perhaps because the federal statute, the *DA 1985*, with which a federal organization might be primarily concerned, does not specifically refer to it, either. Similarly, another publication available under this heading, *Problem Solving in Canada’s Courtrooms: A Guide to Therapeutic Justice* (National Judicial Institute, 2011) is directed at the specialized criminal courts, concerned with federal legislation, that administer ‘therapeutic justice’, including the domestic violence courts in various jurisdictions. It should be noted that ‘therapeutic justice’ was originally spear-headed by the late Bentley, J, a provincially appointed judge to the (provincial) Ontario Court of Justice.

It would appear, therefore, that the national organization responsible for educating judges about domestic violence and abuse in the family justice system ignores these topics (of national importance) altogether because they are deemed matters for provincial, and not federal jurisdiction (although it apparently has no difficulty identifying and disseminating nationally the initiatives of provincially appointed judges in provincial courts). If this is the case, then it would seem that the Board of Governors of the Institute may believe that consideration of the phenomena, as forms of conduct, are irrelevant in family law claims brought under the *DA 1985* (even if they are relevant to claims for custody and access under the *FLA* in the case of Ontario, and Ontario Superior Court judges, being federally appointed, determine these cases). Those of the judge participants who chose

to discuss the judicial education they received upon their appointments to the bench advised that instruction was primarily directed toward the conduct of various types of proceedings such as trial conferences, and evidence, and not substantive issues such as family law.

Notwithstanding the apparent absence of any judicial education on domestic violence and abuse being provided by the national body entrusted with judicial education, some of the judge participants reported that they had attended education conferences for judges on family law, including domestic violence and abuse, held under the auspices of various organizations in Canada and the United States. This would appear to support Dalton's contention that education and training in the area of domestic violence and abuse are offered "to virtually every professional constituency" involved in the family justice system (Dalton, 1999:274). However, Dalton also criticized these training sessions as being "often ineffective in changing professional practice ... In part, the problem is that the training sessions, constrained by limited time and resources, are often superficial" (Dalton, 1999:274).

Dalton posited that "as long as competing literature and bodies of research advocate competing norms and practices", professionals will tend to seek out and support those which are "more thoroughly and deeply imbedded in their earlier professional training and orientation to their work" (1999:274). Thus, far from liberating the professional from the confines of discredited theories and outmoded practices, the presentation of the familiar at conferences purporting to expose participants to 'new research' can have the opposite effect, particularly in the absence of critical examination. This phenomenon is best illustrated by the influence on the family justice system of what was promoted as the most current trends in the 'psy' sciences concerning domestic violence at the "Wingspread Conference", held in 2007 under the auspices of the National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts. Some of the judge participants in this study attended this conference.

The conference brought together thirty-seven researchers, practitioners such as social workers and mental health professionals, as well as lawyers and family court judges, from across North America to “think about and discuss issues related to domestic violence and the family courts” (Madsen, 2012:351). A “major goal” of the conference was to “begin to develop a common vocabulary for, and a shared understanding of, the ways in which domestic violence manifests, and its implications for families” (Ver Steegh & Dalton, 2008:454).

There was consensus amongst conference participants that the impact of domestic violence depends largely upon the context in which it occurs (Ver Steegh & Dalton, 2008: 456), and “that each domestic violence situation must be closely examined to determine the potential for lethality, the risk of future violence, and the presence of other forms of intimidation” (Ver Steegh & Dalton, 2008:257). It does not appear from their subsequent reports that any of the Canadian participants were troubled by the obvious contradiction between the exclusion of conduct under the relevant federal/provincial legislation concerning marital separation, and the “consensus” to focus the evidentiary inquiry on marital misconduct within family law disputes.

Conference participants disagreed on the characterization of domestic violence as gender symmetrical or asymmetrical. Straus’s research (1993, 1979) promoting the gender symmetry of domestic violence, and Johnson’s 2006 study as well as Johnson’s and Leone’s 2005 study differentiating four types of domestic violence were presented.. It was reported that many participants “felt strongly” that domestic violence is not “gender neutral” and that gender inequality “underlies the violence in many families”, and, further, that “family court systems must be alert to issues of gender both in the cases coming before them and in their own processing of cases” (Van Steegh & Dalton, 2008:459). Again, there is no evidence that Canadian participants were cognizant of the obvious conflict between the gender neutrality promoted in the relevant federal and provincial legislation, and the majority of participants’ identification of domestic violence as a gendered phenomenon.

It should not be surprising that, in a family justice system dedicated to the settlement mission such as that which exists in Ontario, the concept of “situational partner violence” appears to have been eagerly embraced by those members of the judiciary familiar with the “Wingspread Conference”, without any accompanying critical assessment of the efficacy, validity or credibility of the research upon which this concept was founded.²¹ The influence of this conference on the judge participants who attended is discussed in Chapter Six.

The success of the fathers’ rights lobby in shaping judges’ views on custody and access: The fathers’ rights lobby has been particularly persuasive in shaping current popular discourse, and, by extension, judges’ views on issues of custody, access, domestic violence and spousal and child support.

Fathers have been promoted in the fathers’ rights discourses as being equally involved, or, at least, as capable of being equally involved, with their children’s needs as their mothers (Smart, 1989). However, what fathers’ rights activists did in asserting their claims for equality in family law was not to promote the image of the father as a male child caregiver, with uniquely male abilities and capacities. Fathers’ rights lobbyists appropriated the social construction of motherhood and ascribed it to fathers.

Fathers’ ‘care’, however, differed dramatically from that demanded of mothers; playtime in the park, or visits to McDonalds with father as access parent, were promoted as being of equivalent, if not greater value to children’s wellbeing as were the day-to-day demands of the custodian/mother which mothers were expected to continue satisfying (Boyd, 2004). Inasmuch as ‘motherhood’ was defined (and evaluated) within a patriarchal discourse, it should come as no surprise that it was a stridently patriarchal discourse that redefined ‘motherhood’ and removed it from the exclusive domain of women to a shared domain with men – except it was asserted that men could be better mothers than could women in all respects. This was accomplished by ignoring, minimizing and/or marginalizing the invaluable and necessary responsibilities of daily housework and child care which continued to be discharged by, and/or were delegated to, mothers.

Those studies upon which advocates for fathers' rights relied examined the role of fathers in intact families *before* separation, wherein fathers in various family settings – during pregnancy, in the delivery room, in the family home with mother present – conveyed the image of father as sensitive, nurturing, supportive, capable, competent, responsive, and loving. “The impression given by such (research) is that if a child has an active father, he or she really does not need a mother” (Drakich, 1989:75). These results have been absorbed and promoted in the popular literature (Drakich, 1989) as “good research”, and thus sedimented in current, dominant ideological premises surrounding custody and access. “Bad research”, on the other hand, such as studies that demonstrate that “more is not necessarily better” when it comes to access, fail to resonate in the civil family justice system (Bourque, 1995:73). The following review of case law on point reveals that judges do not expect men as fathers to replace women as mothers in the role of childcare provider – women are expected to maintain that role – but are lauded for satisfying the most minimum requirements of parenthood, and sometimes not even that. Housekeepers, nannies, girlfriends, new wives, or grandmothers have all been deemed acceptable substitutes for mothers. Apparently, mothers have nothing ‘special’ to offer their children, unlike fathers, who cannot be replaced.

The assumptions supporting current practices involved in child custody and access determinations by both judicial and quasi-judicial personnel “have been drawn from the politically charged discourses of the alternative dispute resolution movement as well as the fathers’ rights campaign for ‘equal parenting’” (Radford & Hester, 2006:103) best represented in Canada by the 1998 Special Joint Committee on Custody and Access, chaired by Senator Anne Cools. The terms of reference for the Committee

were to examine and analyze issues relating to custody and access, issues after separation and divorce, and in particular to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on the child’s needs and best interests (*For the Sake of the Children*, 1998:ix).

As a result of the preferential treatment given fathers' rights groups during the hearings and the extraordinary media coverage they attracted, concepts such as "parental alienation syndrome", "false allegations", "false memory syndrome" and "fatherlessness" were introduced into the discourse of custody and access while being "couched in terms of 'children's rights' and 'best interests of children'" (Laing, 1999:240).²²

Further, fathers' rights advocates argued in favour of instituting a presumption of joint custody and creating new criminal offences for denial of access or making false allegations of abuse (Bala, 1999). They called for gender equality and neutrality in custody and access, and lobbied for the elimination of concepts and terms such as 'custody' and 'access' in favour of 'shared parenting' (Laing, 1999). It was the subject of domestic violence, however, that engendered the most antagonistic response from fathers' rights supporters.

Concerns about potential for violence were considered and dismissed, for the most part, because presenters held that either the allegations were fabrication or exaggerations or that the violence was a result of the adversarial nature of divorce. When violence was recognized by presenters, it was characterized as unnatural and "heinous" and women were admonished to "just leave." Otherwise it was held, they (women) were willing participants in an addictive "dance of death" (Laing, 1999:251).

The sensationalization of the Committee hearings, the inflammatory rhetoric of the fathers' rights proponents, and the fact that the federal government of the day was prepared to consider acceding to many of the demands of those lobbyists (Bala, 1999) have had the effect of sedimenting much of the fathers' rights platform in the social fabric, and thus in the collective mind of our judiciary as "good science".

Legal discourse in the family justice system has come to accept that the denial of access by a custodial parent "[is] tantamount to child abuse" (Laing, 1999:250). Maximum contact with their fathers has been portrayed as indispensable to children's emotional health (Collier, 2009). "Judges are heavily influenced by accusations, real or imagined, that a [custodial mother] may, did or will interfere with access between the children and the non-custodial [father]" (Taylor et al, 1996:26).

Accordingly, the interests of mothers have been “downgraded” (Collier, 2009:382), and “mothers have become curiously invisible” (Boyd, 2004a:266). The image of the ‘new father’ (Amyot, 2010) has thus been concretized in the dominant legal discourse concerning custody and access. Woman abuse has, despite the legislative directive to consider “domestic violence and abuse” in determining the best interests of the child, is usually ignored, except when such allegations are found to be indicative of a pattern of parental alienation by the mother or to directly impact the children.

In her review of Canadian cases reported between 1990 and 1993 in *the Reports of Family Law*, Bourque found that

[i]n both initial custody orders and variations to existing orders, non-custodial parent (usually fathers) access to children emerges as the major issue of contention. In nearly all of the cases reported, paternal access is viewed by the judges as paramount in the “best interests of the child,” eclipsing virtually all other factors. A child’s supposed “need” for or “right to a father”, irrespective of the quality or quantity of his parenting, has superseded virtually all other considerations (Bourque, 1995:6).

In a similar study, this time of all (16) custody and access cases published in the *Reports of Family Law* between April, 1992 and April, 1994, Rosnes concluded that the decision-making criteria used by judges in child custody and access cases “operate differently vis-a-vis mothers and fathers” (1997:33). She found that judges had assumed the language of the ‘psy’ sciences, defined divorce as “an emotional crisis”, and decided cases more on the basis of what they “believe” rather than what they “know” (1997:44). They did not give proper weight to evidence of violence and assumed that wife abuse is not seriously damaging to children, nor did being violent necessarily affect a father’s parenting ability. “Many judges continue to deny that men who batter their wives are unfit parents, despite research demonstrating the harm done to children who witness spousal abuse” (Rosnes, 1997:41). Indeed, men who are emotionally, physically and sexually abusive toward their intimate partners may be over-represented in the group of men who fight for custody of their children (Taylor et al, 1996).

Media influence: Kushner (2009) has pointed out that the media has the potential to generate attention to certain studies emanating from the sciences, particularly the ‘psy’ sciences, which influence the opinions of the public in powerful ways. She has described how parents might base their decisions regarding post-separation child custody and access planning on popularized ‘scientific’ discourses. There is no reason to believe that judges are immune from these influences, and those “who refer to experts should question the rigor associated with the literature cited in their courtroom” (Kushner, 2009:38). The problem arises, however, when there is no expert in the courtroom to be questioned. When legal decisions, informed by ‘psy’ studies assimilated by judges from the media – rather than expressed through an ‘expert’ witness present on the stand – become sedimented in the common law, not only is the opportunity to challenge their validity, reliability and credibility lost, but the positions and platforms they espouse become concretized as precedent upon which future determinations will be based.

The confluence of influences on judicial decision-making: As noted, few judges are equipped to evaluate the internal and external validity, methodology, sampling techniques and other potentially problematic aspects of the studies upon which the current, popular ‘psy’ scientists rely. Actors in the civil family justice system – judges, lawyers and assessors – may also be unable (or unwilling) to acknowledge methodological problems in the social sciences upon which their legal policy arguments are built (Fineman & Opie, 1987:108), a deficiency particularly problematic in the areas of child custody and access.

The risk to children is that if child custody evaluators reference this material without an understanding about valid and reliable research they may design child custody and access plans that do not enhance the future development of the children for whom they are designated the responsibility of planning. With more than 7,000 articles presenting themselves in computerized data bases it becomes apparent that child development, when presented as a scholarly discourse, is overwhelming. The responsibility associated with screening the research pertaining to this substantive area is immense. Consequently, child custody experts and judges must exercise due caution when referring to this scholarly knowledge base (Kushner, 2009:46).

It has been suggested that judges are naïve, unable to understand how a husband and/or father could be responsible for violence or abusive conduct toward his wife and children, as described by one judge participant. Alternatively, “judges have been portrayed as skeptical, even cynical regarding allegations of abuse raised by women against their spouses” (Taylor et al, 1996:87). In both cases, judges turn to what they ‘know’ about the psychology of mothers/fathers, husbands/wives, and children/parents. How individual members of the judiciary rely upon legal precedent and/or assimilate the information emanating from the ‘psy’ sciences (or the media) will depend upon their own, personal subjectivities, life experiences, proclivities and ways of ‘knowing’ about intimate relationships, parenting and child development, all of which is reflected in their decisions.

Case law review and analysis is important to all family law disputes, including those which will never reach litigation

since the rulings of judges set the parameters for advice given and negotiation tactics of lawyers, and perhaps for parents. If judges say that partner or spousal abuse has little or no sway on decisions about access to children, it is likely that many, if not most, lawyers will advise their clients to negotiate accordingly (Neilson, 1997:128).

The following case law review and critical discourse analysis examine cases in matrimonial proceedings in which woman and/or child abuse were/was alleged, and the decisions (whether or not woman abuse was alleged) that are, in the opinion of the researcher, oppressive to the female litigants involved, or to women, generally, and/or form part of the foundational case law of the civil family justice system to which abused women appearing as litigants therein are subject. The cases cited have been selected on the basis of various criteria: first, they are cases having been adjudicated in Ontario family courts or by the Supreme Court of Canada; second, some form of woman abuse had been alleged, or was evident from the decisions; third, the decisions provide rich description of the parties’ relationships and the nature of the abuse in question (many decisions lack particularity in the recitation of their facts and were therefore not included); fourth, certain decisions of the Supreme

Court of Canada that have become ‘leading cases’ are discussed, inasmuch as they inform judicial decision-making at all levels and are relevant to the relief abused women receive or do not receive; fifth, decisions that demonstrate a judicial train-of-thought, such as those decisions relevant to s. 5(6) of the *FLA*, the results of which are oppressive to women, are discussed; sixth, decisions that deal with the particular issues under discussion are analyzed; seventh, in the tradition of legal method, decisions that support, illustrate, enlarge and/or enhance the theoretical arguments advanced in this research paper, the experiences of the survivor participants, and narratives of the judge participants, have been sought out and are discussed; and, eighth, where possible, having regard to the previous criteria, the most recent cases have been selected for discussion.

10. Case Law Review: How Judges have Responded to Claims by and against Abused Women

a. Custody and Access

The development of legal doctrine – reflections of social values: The “best interests of the child” doctrine was already well established by the 1915 decision in *Re Armstrong*, long before the ‘tender years doctrine’ (which determined child custody throughout much of the twentieth century) was legitimated in *Re Orr* (1933). In this latter case, the Ontario Court of Appeal (OCA) held that children under the age of seven needed their mothers more than their fathers: “the general rule, other things being equal, the mother is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age”: per Mulock, C.J.O. at para. 12.²³ Application of the ‘tender years’ doctrine was considered to be in young children’s “best interests”. With the approval of the Supreme Court of Canada, it thus became “the well-established general rule ... in all questions relating to the custody of an infant”: *McKee v McKee* (1950), per Carwright, J. at 582. In this regard, these decisions reflected contemporary social values.

Prior to the late 1960s, social science and ‘psy’ research tended to ignore the role of fathers or the effects of the paternal role in child development (Drakich, 1989). Early studies of the mother/

infant bond demonstrated that infants – babies and young children – develop best (‘start to *be*’ as functional individuals) under the care of their mothers. Winnicott (1960) was unequivocal in this regard: “the infant and maternal care together form a unit” (at p. 586). Ainsworth (1969) asserted that the origins of both ‘object relations’ and interpersonal relations in infants – both of which are fundamental to human development – lie in their relationships with their mothers. Both Winnicott and Ainsworth have been cited in, literally, thousands of scholarly articles and studies. More recent works, such as those of Kenny (2013), support Winnicott’s and Ainsworth’s theses.²⁴ The ‘tender years’ doctrine thus was concretized in common law, continuing to be characterized as late as 1977 as “a rule of common sense” by Holland, J of the Ontario Supreme Court in *Veighey v Veighey*: para. 148.

Other “common-sensical” rules concerning the welfare of children were developed by the judiciary, such as ‘little girls’ should remain with their mothers.²⁵ Given that it was considered in the best interests of all young children that they remain with their mothers, and the judiciary was unwilling to interfere with existing custody arrangements, a presumptive maternal preference was established which reinforced women’s socialization as homemakers and child-carers. Seminal psychiatric treatises such as *Beyond the Best Interests of the Child* written by Goldstein, Freud and Solnit (1979), which promoted sole (maternal) custody and, further, no access in certain circumstances as being in a child’s “best interests” were eagerly embraced by the judiciary.²⁶ Indeed, L’Heureux-Dubé, J at paragraphs 33 and 73 in her reasons in *Gordon v Goertz* (1996), (the leading Supreme Court of Canada decision sedimenting the pre-eminence of the doctrine of ‘the best interests of the child’ as *the* overriding consideration in custody and access cases) liberally quotes from *Beyond the Best Interests of the Child*.

Promoters of fathers’ rights found support in Wallerstein’s and Kelly’s study, *Surviving the Breakup* (1980),²⁷ which quickly supplanted *Beyond the Best Interests of the Child* as the preferred ‘psy’ treatise to which lobbyists and legislators turned for ‘expert’ direction regarding what was best

for children embroiled in a custodial tug-of-war between parents. It is this study, and those that have followed it, which have informed popular discourse and influenced legislators and the judiciary²⁸ regarding the determination of custody and access disputes, without critical examination of their premises. It would seem that Abella, J, has been proven correct in her assessment of the ‘best interests’ test expressed in *MacGyver v Richards* (1995), in which she described it as “indeterminate” and “more useful as legal aspiration than as legal analysis”: para. 443.

The decline in authority of the custodial parent: The “maximum contact rule” set out in ss. 16(10) and 17(9) of the *DA 1985* has taken on special significance in contested custody and access applications. Two appeals considered by the Supreme Court of Canada at the same time, the decisions of which were released the same day, sought to examine the rule within the context of the principle of the best interests of the child: *Young v Young*; and *P.(D.) v S.(C.)* (1993). It is evident from the texts that the decision in *Young* is to be construed as preceding that in *P.(D.) v S.(C.)*.

A review of the facts as found by the trial judge, Proudfoot, J in *Young v Young*, is instructive. The parties were married for thirteen years and had three daughters, aged 11, 9 and 2 at the time of trial. They ran a jewellery business, which floundered with a downturn in the market, and eventually went bankrupt. Two years before the final separation, the father embraced the religion of the Jehovah’s Witness. The mother only ascertained the father’s conversion around the time of separation. The spouses agreed that the father could do as he wished, as long as he did not involve the mother or children.

Following separation, the father consented to the mother assuming sole custody of the children. The father continued to reside in the matrimonial home while his family lived with his mother-in-law. He began to sell real estate, with considerable success. However, he paid no maintenance to the mother or his daughters, who were forced to turn to social assistance. He allowed the mortgages on the matrimonial home to fall into arrears. A brief reconciliation resulted

in the birth of the third daughter. The parties separated once again, with the mother and children remaining in the matrimonial home.

The mother petitioned for divorce, sole custody, maintenance, a division of family property, and costs. The father counter-petitioned for sole, or in the alternative, joint custody.

Upon interim motion, the father was ordered to pay spousal and child maintenance, which fell into arrears within ten months of the order. By the time of trial, the father was in substantial arrears. He repeatedly applied to the court for cancellation of the arrears and a reduction in the amount of maintenance to be paid, which applications were refused. He sought partition and sale of the matrimonial home on two occasions, claiming that his debts and expenses should first be paid from the proceeds of sale, with the remainder divided between the parties, while he refused to pay maintenance or satisfy the arrears. The trial judge noted that the father had seriously misrepresented his financial circumstances to the court on at least four occasions, having sworn financial statements and affidavits in which he pleaded financial hardship while having been in, or anticipating receipt of substantial sums of money as gifts and real estate commissions. Further, his living expenses were being paid by his church, as were his legal fees. In this regard, Proudfoot, J found that the case was characterized by an excessive number of applications, motions and appeals. “This case clearly exemplified the difficulty where one side has unlimited resources of creating for the other side, pure and simple, financial economic oppression”, and described the case as having been “litigated to death”: para. 78

During cross-examination, the father admitted, “I want custody so that I can have the final say” regarding the children’s religious upbringing. Proudfoot, J noted, “It seems clear from that admission that the respondent does not want the petitioner to have control of the religious upbringing but he wants that control. Unfortunately he attempts to argue this in the guise of loss of his religious freedom”: para. 34. Indeed, it appears that the divorce trial provided a public forum for the father,

his counsel and their church in which to promote the Jehovah's Witness doctrine. Proudfoot, J found the father was not acting in his children's best interests:

Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings. The respondent's counsel insisted throughout the trial that the respondent's religious beliefs were on trial and the respondent's "right to freedom of religion" was being infringed: para. 78.

A family counselor and a psychologist, both appointed by the court, and the father's own psychologist, attested that custody should remain with the mother. However, the issue of "religious freedom" arose within the context of the father's "right" to maximum, unrestricted access to his children. Both the mother and children did not want the father to involve the children in his church, and the older children grew increasingly resentful of his attempts to indoctrinate them. The children loved their father, but did not want to be subject to a set access routine, nor did they want to stay overnight with their father, who made them feel guilty about wishing to maintain their own religious faith. The children were firmly opposed to their being obliged to attend religious services with their father or to be schooled in the tenets of his faith. The older children expressed considerable frustration and anger toward their father. The experts testified the relationship between father and daughters was deteriorating and could become "even more serious". Proudfoot, J concluded from the expert evidence that "the children were not benefitting from the religious conflict and that conflict must be resolved": para. 61.

Proudfoot, J held that joint custody was not appropriate "in view of the bitter acrimony between the petitioner and respondent over the religious upbringing and to some extent, the medical attention of the children": para. 47. She ordered sole custody to the mother, with access to the father, the terms of which were one evening and one day each weekend, overnight access "permitted upon the request of the children and in agreement by the parents": 7 consecutive days during the summer, and 5 consecutive days during Christmas holidays, as agreed by the parents: para. 66. She also imposed certain restrictions "because that [was] necessary to protect the best interests of the

children”: para. 67, and included that: the father was not to discuss the Jehovah’s Witness religion with the children or take them to any religious services, canvassing or meetings without the written consent of the mother’ and was not to expose the children to religious discussions with a third party without the mother’s written consent. Further, the father was enjoined from preventing any of the children from having blood transfusions, if required. Neither party was to denigrate the religion of the other in front of the children. The balance of the order directed the father to transfer his equity in the matrimonial home to the mother, pay spousal and child maintenance, allowed for some property transfers, and ordered costs payable on a solicitor/client basis against the father, his counsel and the local congregation of the Jehovah’s Witness.

On appeal to the British Columbia Court of Appeal, the Court was divided with respect to the issues of access and costs. The father abandoned his claim for custody, substituting a claim for joint guardianship, with reasonable and liberal access without restrictions. He also requested that the restrictive terms of access imposed upon interim motion and disposition of the divorce petition be struck out as violations of his and the children’s rights of freedom of religion, thought and association pursuant to the *Charter, 1982*. He requested partition and sale of the matrimonial home, he to have sole authority to list the property for sale, and the proceeds of sale to be used to pay the remaining family debt and reimburse him for his ‘family expenses’, and asked for cancellation of all maintenance arrears having accumulated before and *after* trial, thereby demonstrating his continued refusal to pay spousal and child maintenance. He also requested a reconsideration of the costs award. By the date of the appeal, the father was exercising access only one day per month, and accused the mother of frustrating his attempts to see his children.

The appeal was allowed with respect to the issue of access and costs, but dismissed with respect to the cancellation of arrears of maintenance, and partition and sale of the matrimonial home. All three judges wrote separate, concurring decisions. Cumming, JA acknowledged the trial judge had found a total disregard on the part of the father for the children’s wishes, paid no maintenance,

misrepresented his financial affairs to the court, claimed and pursued custody at trial in the face of the experts' – including his own – opinion that his claim had “little merit”: para. 197, and had been responsible for an excessive number of proceedings (17, six of which were brought by the mother).

Southin, JA noted that, “in every issue concerning children, whether it be custody, access, or guardianship, the issue is ‘best interests’,” which was described as a “protean issue”; paras. 28, 124. After a comprehensive canvassing of the law of guardianship, Southin, JA held that, apart from the question of the *Charter*, there was no foundation in law for interfering with the trial judge’s exercise of discretion. Southin, JA did not find it necessary to decide if either the *DA 1985* or relevant provincial legislation “by conferring powers upon a parent or a guardian, thereby authorizes an unconstitutional intrusion in to the constitutional freedoms of the child or ward. If either does, then, at least in the case of those below the age of discretion, the intrusion is justifiable in a free and democratic society: para. 109.” She held that the custodial parent had the full authority to determine the religious upbringing of his/her children. Accordingly, she found that the mother had the right to refuse to allow the father to take the children to his church or engage in religious activities but did not have the right to control what conversations took place during access.

If she disagrees on whatever he says on religious subjects, or, for that matter, on any other subject, she will have to explain her own position to the children. That some conflict may thus arise in the children’s minds, it is true. But intellectual conflict is a part of life, and learning to deal with it is part of life: para. 115.

Southin, JA, had little comment on the concept of the application of the “best interests of the children” principle, except to say that if the mother believed that her children’s involvement in the Jehovah’s Witness Church was not in their best interests, not to give her the right to advance that allegation was “contrary to fundamental justice”: para. 131. Inasmuch as this issue was not before the trial judge, she would not comment on it. The bulk of her decision was concerned with property division and the issue of costs, which order she overturned and substituted party-and-party costs.

Cumming, JA, concurred with Southin, JA regarding the dispositions of property, maintenance and other financial issues. He concurred with Wood, JA on the issues of custody and access. The bulk of the decision of Cumming, JA was concerned with the issues of costs, the award of costs against the solicitor and the Jehovah's Witness Church, and the trial judge's assertion that counsel's conduct had been insulting, for which she found him personally liable for costs. Cumming, JA added nothing to the discussion concerning the dispute over access or efficacy of the father's *Charter* arguments.

Wood, JA agreed with the disposition of costs directed by Cumming, JA, and the resolution of the property and maintenance issues by Southin, JA, but disagreed with her disposition of the issue of access. Wood, JA clearly disapproved of the mother's attitude toward the father's religion, describing her as intolerant of her husband's beliefs and practices. He reiterated the opinion of Scarth, J, uttered during one interlocutory motion, that the mother's attitude toward the father's religion was one of "undisguised loathing. At trial, she acknowledged that statement as accurately representing her view of the teachings of the Jehovah's Witnesses" [sic]: para. 357 The mother attempted to adduce evidence at trial of the teachings of the Church and how it could be harmful to her children, but was prevented from so doing on the basis that the court was not prepared to entertain a dispute between two religions.

Wood, JA disagreed with Southin, JA that the custodial parent has an unfettered right to determine her children's religious upbringing and that such right is unfettered by s. 2(a) of the *Charter*. He rejected her position that the custodial parent has "the absolute right to 'lay down the law' to the access parent with respect of any matters relating to the child": para. 373. He found that Canadian courts had come to recognize the "right" to access "which amounted, in practical terms, to a right of temporary custody and control of the child, with the access parent implicitly entitled to exercise all of the power of parenthood associated with the minutiae of daily living during those periods of time when the child was in his or company": para. 375. Wood, JA then found that s. 16

of the DA 1985 recognized, through statute, his understanding of the nature of access as a form of “temporary custody”: para. 375. He further “agreed that access to a child by the non-custodial parent is a *right* given by statute”: para. 379 (researcher’s emphasis).

Wood, JA interpreted “contact” found in s. 16(10) – the maximum contact rule – broadly. He did not construe it to be limited to physical contact, because of the addition of the adjective “meaningful” to describe it. Accordingly, he was prepared to enlarge its meaning “beyond a mere right of visitation”: para. 384. He found that the custodial parent’s right to choose the religion of her children necessarily interfered with the access parent’s right, under s. 16(10) to discuss his religion with his children, one presumes, ‘meaningfully’. The “whole of s. 16” reflected

the modern view that the best interests of the child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. That construction in turn requires the redistribution of ‘rights’ between the custodial and access parent ... to encourage such a relationship: para. 392.

This “redistribution of ‘rights’ between the custodial and access parent” was, immediately thereafter, described by Wood, JA as a redistribution of “parental powers” between custodial and access parents in order to ensure children development a “meaningful relationship” with both.

The “right” of an access parent to share his religious beliefs with his children, according to Wood, JA, flowed from s. 16(10), subject to two restrictions: 1) the unwillingness of the child to participate in such sharing; and 2) such restrictions the court may impose on the grounds that exposure to such religious beliefs or practices of the access parent is, or is likely to be, harmful to the well-being of the child. With respect to the former, Wood, JA acknowledged that an access parent who attempted to force his child to acquiesce to his wishes would soon find his relationship with that child to be compromised. With respect to the latter, he posited that, if on the standard civil burden of proof, it could be established that exposure to conflicting religious doctrines causes the child psychological harm, or by engaging in activities associated with those teachings, the child would

suffer “real psychological or physical harm”: para. 404, the wellbeing of the child would require court inter-vention by way of an order eliminating the potential for such harm.

However, Wood, JA distinguished between “real harm” and the “general emotional distress which every child experiences” from divorce and his/her parents’ post-divorce “turmoil”: para. 405. He held that the power of the custodial parent to determine the religious education and doctrine of his/her children did not impair the freedom of the access parent to teach or disseminate his/her religious views to his/her children. He found that there was no evidence of real harm having been suffered by the children as a consequence of their exposure to their father’s religious beliefs. He referred to the undertaking given by the father to respect the wishes of his older daughters not to accompany him to church or engage in his proselytizing efforts, which, he claimed, the trial judge had failed to take into account, although “she certainly did not reject it”: para. 457. Taking the position that the court was entitled to accept [the undertaking] at face value, the Court of Appeal struck out the restrictive conditions.

Before embarking on a discussion of the decision rendered in the Supreme Court of Canada of the mother’s appeal of this decision, it is submitted that a number of observations and comments must be made. First, the question arises whether the trial judgment in *Young* should have been overturned in the first place. It appears that the appeal decision was based upon the appeal judges’ apprehension of the evidence adduced at trial, without finding that the judge at first instance misapprehended the evidence. It has been well-established that an appeal court is limited in its ability to substitute its decision for that of a trial judge (this chapter). Absent a misapprehension of the evidence, or a mistake in application of the appropriate law, the decision of the trial judge should be not be disturbed. Given that Proudfoot, J questioned the apparent lack of credibility of the father, it is possible that the trial judge, unlike the Court of Appeal, was not prepared to accept the veracity and conviction of his undertaking to accede to his children’s wishes to leave them out of his church attendances and proselytizing.

Second, the import of the financial and systemic abuse in which the father engaged throughout the trial and appeal process was evidently lost, as was the fact that the parties could not possibly have been construed as pursuing their positions on an even playing field, given that the father's legal representation benefitted from unlimited financial resources, while the mother's, apparently, did not, given the observation of the mother by Southin, JA. as one of "those who must fight their battles alone" against the "rich and powerful": the father and the unlimited resources of his church: para. 187. In this regard, the BCCA appears to have condoned the father's plethora of proceedings for custody, none of which was (or, according to Proudfoot, J, could have been) successful. Rather than finding that he had abused the process of the court, Cumming, JA asserted his conduct was acceptable and understandable, positing the father "was, in my opinion, entitled to present his case in a way which might serve to maintain what he perceived to be his rights as an access parent, even if that entailed advancing what turned out to be an unsuccessful claim for custody": para. 219.

Third, although 'lip service' was paid to taking the children's wishes into account, access was ordered over their objections. Fourth, Wood, JA found that s. 16(10) of the *DA 1985* elevated the status of the access parent to that of a custodial parent during the period of access, a position not established in the legislation.

On appeal to the Supreme Court of Canada by the mother, the Court was divided in the result, with McLachlin, J writing the majority decision dismissing the appeal, and L'Heureux-Dubé, J writing the minority decision on behalf of La Forest and Gonthier, JJ, allowing the appeal, in part. McLachlin, J acknowledged that

[t]he best interest of the child test is the only test. The express words of s. 16(8) of the Divorce Act require the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and 'rights' play no role": para. 202.

Accordingly, “it has been left to the judge to decide what is in the best interest of the child by reference to the ‘condition, means, needs and other circumstances of the child’”: para. 203. The best interests test, therefore, is not one of “pure discretion”, but “is to be applied to the evidence of the case, viewed objectively”: para. 203.

McLachlin, J asserted that the maximum contact rule

stands out as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase “as is consistent with the best interests of the child” means that the goal of maximum contact with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted: para. 204.

McLachlin, J held that, in some cases, the risk of harm may be a factor to be considered in determining what is in the best interests of the child: para: 209:

This is particularly so where the issue is quality of access – what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is: para. 210.

“Viewed in this light, the argument that paternal access is unequivocally in ‘the best interests of the child’ loses its validity. In fact, the ‘rights’ or ‘interests’ of the child appear to have very little to do with it” (Bourque, 1995:12).

L’Heureux-Dubé, J rejected the harm test espoused by the majority. She considered this test to potentially confound the best interests of the child test: para. 99.

While the effects of custody and access decisions always remain uncertain to some degree, the harm test places any risk of miscalculation in the degree of stress or conflict occasioned by such decisions squarely on the back of the child, such that the child would have to experience harm before the situation could be corrected. Instead of minimizing the risks, the harm test would maximize them: para. 102.

While L’Heureux-Dubé, like McLachlin, J held that most research literature suggests continued access with both parents following divorce is normally in their best interest, “that finding cannot be separated from a consideration of the degree of conflict to which the child will be subject.

Ironically, unrestricted access may, in some circumstances, cause the continuation of the very stresses from which the parties sought relief when they divorced”: para. 109. For L’Heureux-Dubé, J, the adoption of the harm test

would be a regression back to the era when the interests of the child were subjugated to those of the parents. Despite the fact that the test purports to further the best interests of the child by promoting unfettered contact between non-custodial parents and their children, in reality the test subordinates the best interests of children to a presumptive right of the non-custodial parent to unrestricted access: para.115.

L’Heureux-Dubé, J asserted that “the only applicable test is the best interests of the child, assessed from a child-centred perspective, a test which is mandated by the Divorce Act [1985] ... and which is universally applied and constitutional sound”: para. 5. She described the “best interests of the child” test as “indeterminate”: para. 75, and “the least detrimental available alternative for safeguarding the child’s growth and development”: para. 77.

L’Heureux-Dubé, J, found that the power of the custodial parent is not a “right” with independent value granted by the court for that parent’s benefit. It is the child who has a right to a parent who will look after his/her best interests, and the custodial parent has a duty to ensure, protect and promote the child’s best interests: para. 25. The non-custodial parent “retains certain residual rights over the child as one of its two natural guardians, among which is the right to apply to the court for a variation of custody and access terms”: para. 31. She noted that the right to access is described, at common law, as an entitlement, not a right. L’Heureux-Dubé, J found that the *DA 1985* envisages contact between the child and each of its parents “as a worthy goal which should be, all things being equal, in the best interests of the child”: para. 36. However, she rejected the position of Wood, JA that the *DA 1985* had introduced significant changes to the traditional law of custody and access, particularly the enlargement of the concept of access that required a redistribution of rights between parents, or that it suggested or required the division of parental responsibilities between the custodial and access parents: para. 41. She wrote, “Courts in Canada

have never adopted the view that the custodial parent's decisions are subject to the approval of the non-custodial parent, and that such disagreements must be resolved in court": para. 38.

The chief feature of custody orders was, and still is, the implied, if not explicit conferral of parental authority on the person granted custody. The long-standing rule in Canadian law is that an order of custody entails the right to exercise full parental authority. In the case of a sole custody order, that authority is vested in one parent to the exclusion of the other: para. 24.

L'Heureux-Dubé, J held that "[a]ny expansion of the traditional rights of the non-custodial parent risks reducing the decision-making power of the custodial parent, without any parallel reduction in responsibilities": para. 48. In this regard, she acknowledged the efforts of fathers' rights groups' claims for legislative changes that would entitle them to the benefit of neutral presumptions in custody decisions: para. 34, and cautioned against allowing the "ideals of parental sharing and equality" to overcome "the lived reality of custody and access arrangements", and obscuring the accommodation of children's needs and concerns "by abstract claims of parental rights": para. 80. Her position is what Boyd has called the "realistic" approach to family breakdown post-separation (Boyd, 2004b:177). L'Heureux-Dubé, J also criticized Mr. Young for failing to pay child support, noting the irony in his claim for greater contact while choosing to neglect his children's basic needs.

For L'Heureux-Dubé, J, the goal of maximum contact under s. 16(10) is not absolute; access may be restricted where there is evidence that such contact would otherwise conflict with the best interests of the child: para. 53. She disputed the reversal of the trial decision of Proudfoot, J by the Court of Appeal for basing its decision on the absence of harm ... "we are far from the best interests test": para. 54.

L'Heureux-Dubé, J was particularly concerned that the harm test redirected the focus of inquiry away from the best interests of the child to the issues of custody and access. She noted that there is no mention of harm in the list of considerations under s. 16(8) to be taken into account when determining the best interests of the child, and concluded that the test "makes harm the controlling factor in custody and access decisions": para. 101. Further, the harm test "essentially requires a

court to determine how much conflict and stress a child should be required to endure in order that the parents' wishes may prevail" para. 102. In comparison, the best interests of the child doctrine "is not simply the right to be free of demonstrable harm. It is a positive right to the best possible arrangements in the circumstances of the parties": para. 111. She found the majority decision, espoused by McLachlin, J, to be "totally unfounded": para. 122.

On the facts of the case, the majority held that the father's undertaking to respect his children's wishes obviated any harm his religious beliefs or his observance of same may have brought to his children, and dismissed the appeal, reiterating the Court of Appeal's position that it was in the children's best interests that they get to know their father as he really was, a devout Jehovah's witness. In so doing, the Court removed the remaining restrictions on access.

The erosion of the custodial parent's authority over her children that resulted from the decision in *Young v Young* elicited much criticism from Professor McLeod, who, in his commentary, was critical of the decision:

There is much to be said for the view that the courts should not continue to sever the incidents of custody and continually second-guess the custodial parent. In those instances, the custodial parent is responsible for the child but has no decision making power (1993:133).

The companion decision to *Young v Young, P.(D.) v S.(C.)*, an appeal from the decision of the Québec Court of Appeal rendered under the Québec Civil Code, appears at first blush to contradict the decision in *Young*. A brief review of the facts in this case sheds light on the differences between the two cases that may have led to the seemingly irreconcilable decisions.

The parties cohabited for three years. They had one child. Following the breakdown of their relationship, they agreed in writing that the mother would have legal custody and the father would exercise access. The Superior Court of Québec ratified this agreement. Relations between the parties deteriorated after the father became a member of the Jehovah's Witness faith. The

mother, who was Roman Catholic, objected to the father's attempts to indoctrinate the child, who was three and one-half years old.

The father applied to the Superior Court to set aside the agreement and asked for custody, or, alternatively, greater access rights, which application was dismissed. On appeal, the Court of Appeal held that the applicable criterion was the best interests of the child. The Court described the father's position regarding his religious zeal as "intransigent" and found, on the evidence, that the father's "religious fanaticism" was the main problem and that his fanaticism disturbed the child. The child was described as returning from her access visits and repeating, up to fifteen times a day, "It is Jehovah who made me, who made the moon, who made the stars, who made everything": para. 126. Vallerand, JA posited

A young girl, 3 1/2 years old must be able to benefit fully from her childhood without being constantly bothered by conflicts ... At that particularly vulnerable age, where, as everyone knows, psychological and emotional trauma often prove irreversible, there is no need to wait for such trauma to occur before intervening. The risk is unacceptable and the proposition that she should run the risk before being protected is inadmissible: para. 129.

The court concluded that the child's best interests would be served by the father ceasing his proselytizing to the child. Restrictions were imposed on the father's access, such that he did not have the right to indoctrinate the child continually with the precepts and religious practices of the Jehovah's Witness, was not to take the child to demonstrations, ceremonies, or conferences, or door-to-door preaching, until the child was capable of deciding which religion she wished to accept.

The father's appeal to the Supreme Court of Canada was dismissed. In this decision, the majority opinion was written by L'Heureux-Dubé, J, and the minority by McLachlin, J. Although their positions were reversed from those in *Young*, the reasoning they employed was entirely consistent. L'Heureux-Dubé, J held that, under the *Civil Code*, which recognized the primacy of the child's best interests, custodial rights include the right to decide upon the child's religious education until he or she is in a position to make his or her own choice: para. 44. She found that the *Civil*

Code contains no specific provisions regarding the “rights” of access of the non-custodial parent, asserting that “the various means of exercising the right to access (visiting, taking out, accommodation) are only small pieces of the right to custody”: para. 56. Further, the age of the child was one of the criteria in dealing with custody, and, presumably, access: para. 85.

Considering the appeal under the *Civil Code* allowed L’Heureux-Dubé, J to reiterate in the majority many of the points she had made in *Young* in the minority. Referring to art. 30 of the *Code*, she claimed “it is hard to understand how the concept of ‘harm’ as the sole criterion could have made inroads into this area of law. Neither courts nor commentators have taken this approach”: para. 91. She identified the right to access as a creature of statute – “the right [to access] is a purely statutory creation under the *Civil Code*”: para. 92. Once again, she rejected the harm test (upon which McLachlin, J relied in her dissent), commenting that

as I also observed in *Young*, waiting for harm to occur, which is essentially the theory of harm, is not only contrary to the child’s best interests but puts the burden of error on the child and placed the emphasis a posteriori rather than a priori, which definitely distorts the purpose of the *Civil Code* provisions: para. 95.

McLachlin, J, as she had in *Young*, relied on the harm test to support her position that the appeal should be allowed. She asserted there was no evidence that the child suffered, or was likely to suffer, any psychological or physical harm as a result of the father’s conduct: para. 148. Further, she could find nothing on the record that would offset the benefit which, she believed, might accrue to the child from learning to know her father fully, including his religious values: para. 153. She thus based her dissent upon “the absence of evidence”: para. 154.

It should be noted that Cory and Iacobucci, JJ, although “troubled” by the trial decision, nevertheless concurred with L’Heureux-Dubé, J, deciding that, on issues of credibility, the trial judge is “uniquely well placed to make the necessary finding”, and, “[s]imilarly, the trial judge is in the best position to assess the evidence pertaining to the best interests of the child”: para. 141.

It is difficult to know what to take away from these decisions. Given that the *Young* decision was succeeded by *P.(D.)*, then one would assume that the primacy of the custodial parent is intact, subject to the best interests of the child, and that the harm test has been relegated to just one of the considerations that might be relevant in assessing a child's best interests. The emphasis placed on the evidence of the particular cases allows the decisions to be distinguished on their facts. In *Young*, the father undertook to leave his children out of his religious practices, whereas the father in *P.(D.)* was "intransigent" and "fanatical". Two of the three *Young* children were 11 and 9 at the time of trial, and 15 and 13 at the time of the Supreme Court of Canada appeal, and thus already considered sufficiently mature to make their own decisions regarding both access and religion. The *P.(D.)* child was still very young, and, according to the Court of Appeal, "vulnerable". However, given that *Young* was decided under the *DA 1985*, one must assume that that decision is binding on courts in Ontario, and, consequently, the harm test is, presumably, highly relevant in access determinations in the province. The narratives of the survivor and judge participants will be seen to accord with that assumption.

In its later decision in *Gordon v Goertz* (1996), the Supreme Court of Canada, once again, had opportunity to consider the competing interests of custodial and non-custodial parents. In this case, the parties had one child. Following an eight-day trial, the terms of their divorce decree granted custody to the mother, with very structured access granted to the father in order to avoid the friction between the parties that had characterized their relationship. The custodial mother thereafter indicated that she intended to move from Saskatchewan to Australia to pursue her study of orthodontics. There is no suggestion in the judgment of any evidence of domestic violence or abuse, although the reference to friction and requirement of very structured access suggests that their relationship was, at least, fraught with problems. The access father moved to vary the existing custody order by applying for custody, or, in the alternative, for an order restraining the mother from moving the child out of the province. The mother cross-applied for a variation of the custody order, allowing her to move to Australia. His

application was dismissed, although he was granted generous access to be exercised in Australia on one month's notice. This decision was upheld on appeal. The father appealed.

The Supreme Court of Canada upheld the appeal decision, but varied the order to allow the father to exercise access in Saskatchewan. Decisions with reasons were rendered by McLachlin and L'Heureux-Dubé, JJ. Although they concurred in the outcome, their approaches were different, and reflected their respective positions regarding the primacy of the custodial parent in determining the best interests of the child which they had expressed in their earlier decisions in *Young* and *P.(D.)*.

L'Heureux-Dubé, J continued to assert, as she did in *Young*, that the chief feature of custody orders “was, and still is, the implied, if not explicit, conferral of parental authority on the person granted custody”: para. 73. Accordingly, the right to determine a child's place of residence is an incident of custody and rests with the custodial parent: para. 75.

The primacy of the interests and needs of the child, McLachlin J, speaking for the majority, held, were “not merely ‘paramount’, they are the only consideration”: para. 28. The majority thus rejected the proposition advanced by the custodial mother that the best interests of the child “began” with a presumption in her favour: para. 26. Further, while the custodial mother was “expected to have the most intimate and perceptive knowledge of what is in the child's interest”: para. 36, her, and the father's “rights” and “interests” were irrelevant, except insofar as they impacted the best interests of the child: para. 37. Unlike L'Heureux-Dubé, J, McLachlin, J rejected the idea that a court should defer to the custodial parent when assessing the best interests of the child, although it should “show a reasonable measure of respect to the views of the custodial parent”: para. 29.

The reasons of McLachlin, J in *Gordon v Goertz* reveal that she privileged the opinion of the judge in determining a child's best interests. “This is the fact that Parliament has placed the duty of ascertaining the best interests of the child on the judge, not the custodial parent”: para. 38. However, she went on to say that “[t]he child's best interests must be found within the practical context of the reality of the children's lives and circumstances”: para. 46, which necessarily involve examining the

“reality” of the custodial parent’s “life and circumstances”, as well. McLachlin, J did not allude to any “duty” being placed on the judge by Parliament for ascertaining this information, which, one would assume, would best be determined by the custodial parent him/herself. In this regard, this aspect of McLachlin, J’s decision makes little practical sense. Notably absent from her reasons is any mention of the harm test, although one could assume it would have been as relevant in this case as McLachlin, J found it to be in *Young and P. (D.)*.

As Bailey (1994), in her commentary on this case, suggested, the consequence of this decision is the erosion of the primacy of the custodial parent to determine what lies in her/his child’s best interests. Instead, those best interests are determined by a judge whose only familiarity with the parties comes from their pleadings and, possibly, their transcripts. That judge is most unlikely to ever set eyes upon the child who is the subject matter of the litigation.

It should be pointed out that the “harm” test upheld by the Supreme Court Canada in *Young* had been considered in earlier decisions. In *Plume v Plume* (1981), the parties were married for only five months. The child was born one week after separation and remained in the mother’s care. The father had seen the child only once, and had failed to make maintenance payments. Carley, J found no evidence that the father was a danger to the child, but also found that the benefits inherent in access, generally, were not present in this case, and denied the father’s application. Carley, J also held that “the failure of a non-custodial parent to make maintenance payments is not a ground in itself for refusing access but it can be a measure of the intensity and sincerity of interest of such a parent and therefore a factor in determining whether access is in the best interests of the child”: p. 428.

Later, in *Trudell v Doolittle* (1984), the mother had denied the father access to their child after its birth. The spousal relationship was characterized by violence perpetrated by the father against the mother. In granting access to the father, Abbey, J held that the best interests of the child were not compromised by the father’s violent acts against the mother, as the evidence did not indicate that there was any danger to the child. Similarly, in *Erlich v Litwiller* (1984), Campbell, J rejected the mother’s

argument that the law at the time governing entitlement to access was based on the necessity of the applicant non-custodial parent demonstrating that access to the child will constitute a positive good rather than merely negate any apprehension of danger to the child. The court was not prepared to consider the mother's emotional trauma were she to be put in the position of having to communicate with and see the applicant father who had abused her during their relationship. In these decisions, as well as those of the Supreme Court of Canada, the erosion of the authority of an abused custodial mother with respect to her children is exacerbated by the "harm" test, which, through its application, had differentiated the harm wrought by abusive husbands to mothers from the harm attributed to these same men as fathers with respect to their children. The artificiality of the distinction is made readily apparent when the actual harm experienced by children in violent and abusive families is taken into account (see Chapter One).

Parental alienation in the court room: Gardner's publication of his *Parental Alienation Syndrome* (1992) was not the first iteration of this alleged phenomenon. The Supreme Court of Canada, in *Frame v Smith* (1987), determined that there was no fiduciary duty arising out of an access order imposed on a custodial parent toward a non-custodial parent. In this case, the father alleged that the mother had made every effort to frustrate the terms of his access order, including changing the children's names and religion, telling the children he was not their father, refusing to take his telephone calls and moving repeatedly. The father brought an action in tort for general and punitive, as well as special damages, on the basis of the mother's wrongful interference with the *legal* relationship he had with his children. In rejecting the father's claim, the majority of the Court held that there was no tort recognized in Canada after passage of the *FLRA 1978* that could respond to the husband's allegations. La Forest, J, for the majority, indicated that, while the temptation was strong to create a new tort to respond to the father's situation, the Court was cognizant of the undesirability of "provoking suits within the family circle": para. 9. Further, the Court rejected the father's argument that the access order created a fiduciary duty on the part of the mother to facilitate the father's access, relying on the

comprehensive remedies for enforcing custody and access contained in the *FLRA 1978*. Torts within the context of domestic violence and abuse are discussed later in this chapter.

Wilson, J dissented. She asserted that it was not in the best interests of children “to have custodial parents defy with impunity court orders designed to preserve their relationship with their non-custodial parents”: para. 35. However, she was not prepared to introduce the established torts, such as the tort of conspiracy, into the family relationship, inasmuch as she considered them contrary to the best interests of children. Further, she rejected the father’s claim to an inherent right to access, finding that that right now vested in the child. Referring to the (then) new *Children’s Law Reform Amendment Act, 1982*, Wilson, J held that no statutory provision had been made for a civil cause of action in these circumstances.

With respect to the father’s claim for damages for breach of a fiduciary duty, Wilson, J identified three general characteristics of a fiduciary obligation: 1) the fiduciary has scope for the exercise of some sort of power; 2) the fiduciary can exercise that power unilaterally to affect the beneficiary’s legal or practical interests; and 3) the beneficiary is vulnerable to the power exercised by the fiduciary: para.60. She found that the relationship between the custodial and non-custodial parents fit within the ambit of a fiduciary relationship, holding that the “underlying premise” to the granting of custody to one parent and access to the other is “that the custodial parent will facilitate the exercise of the other’s access rights for the sake of the child”: para. 65. She then described the custodial parent as being in a “position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with their non-custodial parent through improper exercise of the power”: para. 66.

Having found that an action for breach of fiduciary duty would be attractive for a number of reasons, including the creation of a strong incentive for the custodial parent to promote the children’s relationship with the access parent, Wilson, J nevertheless considered such claims to potentially be contrary to the best interests of children, and could only be advanced if there would be no risk to the

children's support, and "when the non-custodial parent-child relationship has been so severely damaged by the custodial parent's conduct as to make it highly unlikely that the action brought by the non-custodial parent would be cause of any conflict of loyalties in the children": para. 77. The appropriate remedy, in the opinion of Wilson, J, was not a transfer of custody to the non-custodial parent, but a general and special damages award. Mossman (1992) has pointed out despite Wilson, J's, reverence for the best interests of children, she placed more emphasis on the detriment suffered by the father than that of the children who were denied a relationship with him. Mossman also identified in the dissent of Wilson, J "her views of the aspirational role of law and its appropriate application to parental behaviour in the interests of children" (at 146-147). The vitriol that Wilson, J cast at the mother in this case, and her characterization of the custodial mother as wielding sufficient "power" to "destroy" the father/child bond has been echoed repeatedly in the discourse of fathers' rights described previously in this chapter.

The influence of the fathers' rights lobby is no more evident than in the prevalence of allegations of parental alienation syndrome brought by non-custodial parents (usually fathers) in the civil family justice system. Notwithstanding that this 'syndrome' is of highly suspicious provenance, it continues to be alleged by abusive fathers in many custody and access disputes, particularly those failing to come close to establishing the requisite criteria for proof of alienation.²⁹ The reported cases involving allegations of PAS seem to assume that the familial relationships are so toxic that only a punitive award could assuage the pain and loss endured by an access parent deprived of a relationship with his children. According to one judge participant, the case of *A.G.L. v K.B.D.* (2009) has been established as the leading legal authority on parental alienation syndrome in Ontario, thereby concretizing the untenable psychological sophistry of Gardner (1992) in judicial discourse in Ontario concerning child custody and access (see Chapter Six).

The parties had a tumultuous relationship. The mother accused the father of sexually molesting one of their daughters. Upon separation, the mother, who had all of the responsibilities for their care and upbringing, retained sole custody of the children for the next eight years. The mother frustrated the

father's attempts at access, which he failed to pursue by way of application for four years. The children did not want to see him, and, particularly, refused to stay overnight with him.

McWatt, J relied upon an eight-year-old assessment of the parties in which the assessor had stated the mother's "high level of vigilance and monitoring" of the father's access, based upon her fear of sexual molestation "had raised a red flag for her regarding alienation of the children": para. 88. He accepted evidence "about the concept and qualities of child alienation and its effect on families": para. 91. He dismissed evidence of domestic violence and the mother's allegation of sexual abuse of one of the children. He found nothing much had changed in the mother's alienating conduct since the report was written and awarded sole custody to the father with *no* access to the mother until such time as a counselor recommended it.³⁰ In so doing, he praised the "father", as he was referred to throughout the judgment (in comparison to his referencing the "wife", and not the "mother"), thereby privileging the father/child bond and rejecting the mother/child bond through the use of language.

PAS was raised unsuccessfully prior to *A.G.L.* in Ontario family courts by abusive men in their claims for custody in cases where no evidence of parental alienation by the mother was subsequently found: see *R. v K.C.* (2002), *Filaber v Filaber* (2008), *Murphy v Murphy* (2009). In those cases in which fathers have been found to have engaged in severe alienating "behaviours", the courts have been reluctant to attribute the PAS to them. In *J.K.L. v N.C.S.* (2008), Turnbull, J ordered custody to the mother with no access to the father, whose "behaviours" were alienating. However, he intentionally side-stepped the issue of PAS altogether:

I find that it is not necessary or helpful to engage in the controversy within the clinical profession about the merits of concepts of parental alienation, realistic estrangement, or family system based 'alienated child' approach ... The relevant enquiry must be the critical review of the actions of the parents as they impact on the children's function and their needs: paras. 168, 170.

Turnbull, J was not the only judge involved in this case reluctant to identify the father as an alienator. The father had been found in contempt of five previous orders for access to the mother. Thus, five previous judges were not prepared to acknowledge the father's conduct as alienating.

Judges now feel sufficiently ‘informed’ about PAS that they define it, comment on it, and determine its relevance without reliance on ‘expert’ testimony. In *Murphy v Murphy* (2009), the respondent father did not produce any expert evidence to substantiate his allegation of PAS against the mother. Gareau, J cited *R. v. K.C.*, *C.S. v. M.S.*, and *A.G.L. v K.B.D.*, and their reliance upon Gardner’s PAS, which theory he obviously accepted, and to which he dedicated much of his judgment. Further, Gareau, J failed to refer to the father’s acts of domestic violence in the marriage for fifty paragraphs of his judgment, eventually describing “evidence of an undercurrent in the evidence of some domestic violence between the parties and a power imbalance in the relationship of the parties which *may* explain the respondent’s fear and apprehension in allowing access initially”: para. 51 (researcher’s emphasis).³¹ The father’s egregious conduct post-separation³² was never identified by the judge as domestic abuse, nor did the judge posit that the older daughter’s rejection of her father was predicated upon his violent, abusive and threatening behaviours toward her mother. He granted sole custody to the mother, with access to the father. See also: *C.S. v M.S.* (2010).

Most recently, in *Scrive v Scrive* (2014), Donahue, J awarded costs on a partial indemnity basis in the amount of \$20,000 (\$24,829.63 had been claimed) against a mother whom the court had found to be alienating her sons from their father and thereby frustrating his access. The mother had previously been found in contempt. At the time the contempt order was made, the youngest child was thirteen. Donohue, J noted that, since that time, the child had indicated he did not want access imposed on him, but desired to make his own access arrangements with his father. The court found the mother had purged her contempt, but found her previous conduct nevertheless “unreasonable”: para. 32., and made the substantial cost award. At the time this order was made, the father was in arrears of child support.

These cases are representative of many custody and access decisions in a number of ways: evidence of woman abuse was downplayed and not considered relevant to the ultimate determination; the fathers’ abusive conduct was not seen as negatively impacting their children; and children were forced to submit to access with their fathers despite their unwillingness, *with justification as*

found (or should have been found) by the court, to do so. Judges refrained from characterizing fathers' abusive conduct as parental alienation when it would have been entirely appropriate. Despite the alleged gender neutrality of the family justice system, judges were reluctant to accuse fathers of engaging in PAS, despite clear and convincing evidence to support that finding. Unfortunately, these cases form the established legal precedents that continue to inform judicial decisions, despite the inclusion of s. 24(4) in the *CLRA*, directing the court to consider violence and abuse committed "at any time" as a factor in determining the fitness of that person to act as a parent to a child.

The 'loving' abuser: One of the most disquieting aspects of these cases, and those which follow, is the propensity of family court judges to characterize men appearing as litigants in custody disputes in which woman abuse has been proven as "loving" fathers on bases that are rarely, if ever, apparent. The decision of MacPherson, J in *Hilpel v Hilpel* (2011), exemplifies this tendency. In this case, physical, verbal, psychological and financial abuse characterized the relationship. The father expressed no interest in seeing his two children after the mother fled with them to a shelter, nor did he cooperate with the CAS, who attempted to facilitate supervised access. The father paid child support, but advised the court he would not take on overtime work as a truck driver if it meant his child support obligation would increase.

MacPherson, J did not look askance at the husband's profound disinterest in his children (the CAS worker having testified that she had never met a parent who was so disengaged), nor his having underestimated his income for two years in order to lessen his child support payments. Instead, MacPherson, J "accepted that the husband loves his two daughters": para. 71, based upon, apparently, nothing more than the judge's wishful thinking.

In *Renaud v Renaud* (1989), the mother had sole custody of two young daughters and exclusive possession of the matrimonial home. The father had both physically and verbally abused the mother during the marriage. She was forced to flee the matrimonial home with the children out

of fear of the father. One day, the father entered the matrimonial home in the mother's absence, changed the locks and refused to surrender the children or the matrimonial home to her.

Bolan, J found the mother to be a credible witness, and accepted her allegations of woman abuse. He described the father as "mean-spirited": para. 14 and vindictive, given to "fits of anger": para. 15. However, he also described both parents as "warm and loving" and "both ... capable of giving fit and proper care to the children": para. 12, although the father had consistently denied the mother access. Bolan, J determined that it was in the best interests of these "two girls of tender years": para. 16 to reside with their mother. However, he made no order regarding the matrimonial home, in which the father continued to reside. There was no evidence referred to in the decision to substantiate the description of the father as "warm and loving". Indeed, the opposite appears to have been the case.

These decisions suggest that in those cases in which woman abuse is present (but deemed irrelevant, as it was in *Hilpel*, or of little or no import, as in *Renaud*) little, if anything is required to support a finding of paternal affection. The court is thus left with the competing claims of two people who profess (or are assumed) to 'love' their child and have his/her best interests at heart. Hence, when the only issue is that of the best interests of the child, then one can dispute whether there is any kind of a contest or dispute at all (Karswick, 1982).

Forcing children to acquiesce to access: The decision in *Murphy v Murphy* reflects the position in Canadian common law that an access parent's entitlement to access will not be subverted by the wishes of the child not to acquiesce. In *Reeves v Reeves* (2001), Mossip, J found that the father had conducted a campaign of alienation against the mother, who had not seen her children, two teen-aged boys, for many months. The children were experiencing emotional trauma from the pressure their father and paternal grandmother put on them to reject their mother. Mossip, J concluded at para. 38

[b]ased on a significant number of studies and case law in this area, any support

or encouragement by one parent that the children not have a relationship with the other parent simply demonstrates the irresponsibility of the parent who has the children and demonstrates that parent's inability to act in the best interests of their children. Children do not always want to go to school or want to go to the dentist's or the doctor's. It is the responsibility of a good parent to manage their children's health and safety issues without necessarily the consent or joy of their children.

Mossip, J did not indicate in her decision which "studies" she relied upon to inform it, nor did she characterize the father's conduct as parental alienation. The balance of the quote could be construed as a threat to custodial parents that they will be characterized as child abusers, themselves, if they withhold access. Given that the preponderance of custodial parents are mothers, this threat disproportionately impacts abused women who frustrate their abusers' access as they attempt to protect their children from the very conduct the courts have ignored, minimized, justified or rejected: woman abuse. However, Mossip, J reversed the custody order, denied both the father and grandmother access, issued a restraining order against the father, granted interim exclusive possession of the matrimonial home to the mother, and ordered the father and children into counseling.

In *Geremia v Harb* (2007), Quinn, J identified the steps a custodial parent should take to ensure that the provisions of an access order are followed.

Whether a child should be physically forced by a custodial parent to go on an access visit depends upon the facts of the case. Certainly the force used should not be such as to cause physical harm to the child. And, although the spectre of emotional harm is far more problematic, a custodial parent would be advised to ensure that the evidence supports such a risk before declining to physically force the child to abide by an access order for that reason. Undoubtedly there are many tasks that a child, when asked, may find unpleasant to perform. But ask we must perform they must. A child who refused to go on an access visit should be treated by the custodial parent the same as a child who refused to go to school or otherwise misbehaves. The job of a parent is to parent: para. 44.

In this case, the father's multiple motions for contempt against the mother for his inability to exercise supervised access were dismissed, based on the daughter's abject refusal to be in her father's presence, but not without Quinn, J's admonishing the mother: "... the mother was required to do much more to facilitate access, including the use of physical force. Her passive, reasoning-

with-the-child approach was inappropriate and insufficient, amounting to a deliberate breach of her access obligations”: para. 63. No explanation was provided in the decision regarding the need for access to be supervised in the first place.

In *Fiorito v Wiggins* (2011), Harper, J cited *Geremia v Harb* and *Reeves v Reeves*, with approval, and found that that “the children’s express fear and dislike of their father was rooted in the mother’s dislike and fear of [him]”: para. 149. He found her in contempt of the access order and sentenced her to six months’ probation. He found the children to be in need of protection and ordered the CAS to monitor the mother’s custody. While Harper, J did not dismiss the mother’s allegations of her emotional and physical abuse by the father, he made no finding that the children’s “feelings of fear and dislike of their father”: para. 133 might have reflected their reaction to the very conduct of which the mother complained, and which she said the children feared.

In *Nixon v Hunter* (2009), Price, J identified no less than nine Ontario judgments in which custodial mothers were found in contempt of court for frustrating or refusing to accommodate the access of their children’s fathers: *Wood v Miller* (1993), *Thomas v Percy* (1993), *Campbell v Campbell* (1994), *Kassay v Kassay* (2000), *Einstoss v Starkman* (2003), *Cooper v Cooper* (2004), *Mondry v Mondry* (2005), *Starzycka v Wronski* (2005), *B.K. v A.P* (2006). In each case, the mother was found to have willfully alienated her children from their father, resulting in their rejection of him. Whatever misconduct on the part of the father might have triggered the mother’s negative response was either disbelieved or minimized.

Abused women must, as a consequence of this line of cases, force their children to associate with their abusers, and are thereby rendered vulnerable to further abuse. When judges fail or refuse to consider allegations or evidence of woman abuse in access disputes in which the children refuse to associate with their abusive fathers, they leave victims in the untenable position of acting against not just their interests, but their children’s best interests – the same best interests the courts are mandated to protect. As long as the prevailing belief in custody law is that two parents are better than one,

even if one of them is at high risk of inflicting psychological or physical harm on the other (Walker, 2000), abused women and their children will continue to suffer post-separation.

The realization of fathers' rights in further deformations of custody law: The issue of fathers' 'right' to claim custody or, at least, generous access, the de facto irrelevance of woman abuse in custody/access proceedings, and the ideation of the 'new father' have, in some instances, suspended the application of legal reasoning such that some judicial decisions cannot be rationally explained. In *LiSanti v LiSanti* (1990), the wife fled the matrimonial home with her two young children, alleging the father was physically abusive. In granting interim custody to the father, Vogelsang, J rejected the mother's allegations of abuse (supported by statements from workers at the shelter where she sought refuge). He found "no clear and cogent evidence which would justify the mother's removal of the children from their accustomed environment": para. 13. Vogelsang, J supported the father's position that the mother had "violated" his "legislated equal custodial rights set out in s. 20(1) of the *CLRA*": para. 11. The children's best interests, it seemed "clear" to the judge, could be "safeguarded by their father in the former matrimonial home": para. 13. This decision represents a clear deformation in custody law: presumed 'fathers' rights' trump the best interests of children.

The subjective application of punishment in custody and access decisions: The Supreme Court of Canada, in *Talsky v Talsky*, defined the role of "common sense" applicable to custody determinations, thereby revising the decision of the OCA in *Bell v Bell*. The majority of the Court held the "tender years rule" was not a rule of law, but a "principle of common sense and one of the more important factors to be taken into account when determining the best interests of the child in custody applications": para. 7. However, Spence, J, in his dissenting opinion in *Talsky v Talsky* (1976), and not the majority decision of de Grandpré, J, lay the foundation for the repudiation of intra-spousal conduct as a consideration in determining the best interests of the child:

It is my view that the conduct of the parents should not be considered in an attempt to

make any award of custody punitive to the person whose conduct the court finds to be improper. Such a course would be exactly contrary to what I have said is the primary consideration, that is, the welfare of the children and would be using the children as a whip to beat the misdoer: para. 42.

Echoing Spence, J, Lacourcière, JA, for the majority in *Baker v Baker* (1979) held that

The conduct of the parents is also a relevant consideration, not for taking punitive measures against misconduct, but for comparing the respective worth and quality of each parent as custodian. Parental conduct is more important where it can have a direct effect on the parent's ability to guide and help the child: para. 12.

The characterization of the denial of access as a form of punishment has become endemic in custody and access determinations, apparent from the narratives of the judge participants, as discussed in Chapter Six, further ensuring that misconduct will not be taken into consideration when adjudication of custody and access claims are undertaken. That woman abuse was not alleged in *Talsky v Talsky*, and thus was not the 'conduct' the court said did *not* affect the best interests of the children involved, has been lost.

On the other hand, it would appear that a parent *may* be punished by the court (notwithstanding the aversion to characterizing a denial of access or custody as a form of punishment) if perceived as having frustrated joint custody. In *Hensel v Hensel* (2007), Smith, J (who presided over three of the five hearings reported, to date, involving these litigants, including an 18-day trial) made an order for joint custody, which proved unworkable for the parents, whose relationship was characterized by domestic violence, "mistrust and hatred": para. 26. The father was criticized "for his refusal to communicate [with the mother] and his focus on painting [her] in an unfavourable light": para. 62. However, Smith, J took great umbrage over what he saw as the mother's hostility toward the father and his family, describing her conduct as demonstrating "a high degree of vindictiveness" although the incidents were relatively minor: para. 39. He had no difficulty punishing the mother for what he saw was her (and only her) attempt to frustrate joint custody, rather than acknowledging that a sole custody arrangement would have been more appropriate at first

instance.³³ He granted sole custody of the child to the father and terminated the mother's access altogether.

This series of decisions in the custody and access battles between the Hensels is significant in that it demonstrates that judges assess parental conduct differently for men and women. While violence, threats, financial, emotional, coercive and psychological abuse perpetrated by fathers against mothers will be ignored, mothers' defensive reactions to fathers' misconduct will be harshly evaluated. In short, fathers' misconduct toward mothers is apparently irrelevant to determining children's best interests, but mothers' response to that misconduct is relevant to their children's best interests when it interferes with fathers' rights to access and maximum contact to their children.³⁴

The preoccupation with parents' rights and entitlements in family law has obviated the relevance of conduct as the primary determinant of what custody and access decisions work best for children.³⁵ The statutory prohibition against considering conduct, generally, for the last twenty-nine years, since passage of the *DA 1985*, has led judges away from considering and assessing conduct even when it is appropriate to do so.³⁶ In fact, it would appear that the judiciary has *lost* the ability to identify and assess misconduct in custody and access disputes.

Joint custody: The 'enlargement' of custody law from sole custody to parallel parenting has been unceasing and progressive. Initially, the concept of joint custody was introduced as a means of ensuring a degree of equivalency between the parent with whom the child primarily resided and the other parent. Parents accorded joint custody were assumed to be able to confer with each other and agree upon what served the best interests of their children. However, joint custody was initially regarded with considerable skepticism by the judiciary: *McCahill v Robertson* (1974), per Weatherston, J.

Thompson notes that "the language of 'time' has come to dominate our understanding of 'shared custody/shared parenting', even in non-child-support settings" (2013:315). Thompson distinguishes between "language" and the "lingo of shared parenting" (2013:316). *Custody* is

described as a legal term, “a label for a bundle of parental rights and obligations towards a child”, and *legal custody* encompasses the “right and authority to make the major decisions for the child, everything from religion, language, residence, education and health care to haircuts and clothes” (2013:316). *Physical custody*, on the other hand, relates to “care, i.e., who cares for the child and meets the child’s needs on a day-to-day or hour-to-hour basis” (2013:316). As Thompson points out, what matters is what is “actually happening on the ground, in the ‘care’ of the child” (2013:316). Sole custodians are deemed to have sole legal custody and sole care and control over their children. Joint custody can encompass both ‘joint legal custody’ and ‘joint physical custody’, and, in the case of the latter, can be styled ‘shared custody’ (Thompson, 2013).

In cases of ‘joint custody’, at least theoretically, the parents are deemed to share equally in the major child-rearing decisions. In reality, the extent of joint decision-making is usually determined by the care arrangements agreed upon. Thompson notes that many ‘joint custody’ arrangements resemble the allocation of care resulting from sole custody orders. Parents are described as either the “primary care” or “residential” parent on one hand (the parent who exercises the majority de facto care and control), and the “non-primary” or “non-residential” parent, who acquiesces in the decisions made by the “primary care” parent.

In the case of a woman abuser and his victim, variations on joint, shared, or co-parenting offer a myriad of opportunities to coerce, manipulate and abuse the mother. Woman abuse would logically seem antithetical to joint custody, but the case law reveals that judges have made such orders, while at the same time, acknowledging the toxicity of the mother/father relationship.

While the *DA 1985* specifically allows for orders of joint custody, and the fathers’ rights lobby relentlessly pursues amendments to the legislation to create a presumption of joint custody upon marital breakdown (see Chapter Seven), it would appear that joint custody orders are not as popular in Ontario as they once were. The trend in Ontario’s family courts is to make no custody order at all. Thompson reports that, in Ontario, no custody order is made in 38.8% of cases

involving children (2013). As described in Chapter Five by some of the survivor participants, the absence of a custody order in their favour, notwithstanding that they had de facto custody of their child(ren): prevented Devorah from leaving the jurisdiction with her children; in Lily's case, empowered her abusive husband; and in Jean's case, allowed her abuser to obtain a sole custody order in his favour by misleading the court, which the police enforced.

What is the attraction of joint custody? The fathers' rights lobby insists that joint custody serves the best interests of children, who are able to maintain maximum contact with both parents, who, in turn, share in the major decisions affecting the child's life. The case law, and, as discussed in Chapter Six, the judge participants interviewed for this research study, concur that maximum parental contact is the optimal arrangement for children after their parents separate, although there is some skepticism that joint custody is the best way to ensure maximum contact. This 'fact' about maximum contact is something judges assume, even 'know', and presume that the 'psy' literature supports them in their certainty. Indeed, this position has become a matter of 'common sense'.

However, Shaffer, in her comprehensive overview and analysis of social scientific meta-analyses, found that, contrary to "popular belief", joint custody is not universally in children's best interests, and may, in fact, be detrimental to their well-being (2007:87). This is particularly true for children from high conflict families. Inasmuch as joint custodial arrangements necessarily keep parents in contact with one another far more often and intensively than in cases of sole custody, the opportunity for conflict is increased. Given that familial conflict is contraindicated for children, those high conflict parents who attempt to operationalize (or are ordered into) a joint custody arrangement usually find themselves in conflict, to the detriment of their children.

Shaffer (2007) found that it is not the *amount* of time a parent spends with a child, but the *quality* of time spent that determines whether the arrangement is in the child's best interests. Shaffer noted that the most recent studies into the well-being of children post-divorce have shown three factors to be strongly correlated for children's post-divorce adjustment: 1) the psychological and

emotional adjustment of the custodial parent; 2) adequate provision of financial resources; and, 3) a reduction of parental conflict, none of which are possible in cases of post-separation physical, emotional, psychological and financial woman abuse.

Lacourcière, JA, in *Baker v Baker* (1979), found “[t]here is absolutely no support in the case law to warrant the alleged presumption in favour of joint custody. Quite to the contrary, Canadian as well as British and American cases regard joint custody as an exceptional disposition, reserved for a limited category of separated parents”: para. 8. In this case, the husband and wife separated acrimoniously after an eleven year marriage. They had one child. The court noted that bitter allegations were made by each party against the other, but evidence was scant. Notwithstanding their acrimony, Boland, J, at trial, awarded joint custody.

Lacourcière, JA referred to the trial decision with considerable prescience, as follows: “In her judgment, the learned trial Judge moved away from the traditional concept of custody and access which was, with respect, inappropriate in the circumstances, and misleading as a precedent which, we are told, has gained popularity in the Family Division of the Provincial Court”: para. 1. The court noted that neither party had made a claim for joint custody, and no submissions had been made by counsel promoting it. Further, Lacourcière, JA rejected Boland, J’s reference to “experts in the field of child study”: para. 7, none of whom, nor writings of which, were produced. In this regard, clearly, the Court of Appeal was most critical of what it considered to be the trial judge’s reliance upon her own, subjective musings on the subject. The court referred to the trial judge’s explication of joint custody with some derision as her “general eulogy”: para. 6, in which she stated:

Joint custody should be considered in cases where there are two parents who are well qualified to give affection and guidance to the child and where it can be reasonably contemplated that they are co-operating with each other in the best interests of the child.

... It would seem logical to begin with a presumption in favour of joint custody, as children who fare best after divorce are those who are free to develop full and loving relationships with both parents. Surely, whenever possible, a child is entitled to the advice, training and love of both parents, as well as the benefit of two separate but

interdependent homes. Joint custody would assist recently divorced parents to find stability for their future relationship with their children. They would help them to understand that divorce is not the dissolution of a family but merely its reorganization.

The court held that “there was no basis on the evidence to support the conclusion reached and the broad general dicta of the learned trial Judge on the value of joint custody”: para. 8. Lacourcière, JA warned that “Judges engaged in the resolution of child custody litigation must take a realistic and practical approach to joint custody, and limit that form of order to the exceptional circumstances which are rarely, if ever, present in cases of disputed custody”, which view the judge described as “a healthy cynicism”: para. 9.

In *Kaplanis v Kaplanis* (2003), Weiler, J set aside an award of joint custody and granted sole custody to the mother. She found that the trial judge had committed an error in principle in awarding joint custody: a) “where there was no evidence of historical cooperation and appropriate communication between the parties; and b) in the hope it would improve the parenting skills of the parties”: para. 2.

However, in *Garrow v Woycheshen* (2008), McKay, J ordered joint custody in accordance with the father’s application (over the mother’s claim for sole custody). The mother alleged the father was an abusive partner who destroyed her personal property and threatened her. In refusing to grant the mother’s application, the judge found that, although she was a capable custodial parent, her hostility toward the father “ma[d]e it impossible for her to objectively assess the benefits to her daughter of an active, involved father”: para. 20. McKay, J rejected the mother’s allegations of abuse, and, although finding the mother to be “the source of much of the conflict between the parties”, ordered joint custody: para. 20. The order merely provided for alternating shared custody. One must presume that the judge assumed these conflicted parties could work out holidays amicably. See also: *May-Iannizzi v Iannizzi* (2010). It should also be remembered that the original order in *Hensel* was for joint custody; the extreme toxicity that developed in the parents’ relationship over time might have been averted had the judge awarded sole custody to Mrs. Hensel at first instance.

The continuing devolution of sole custody to parallel parenting: Given that the courts have acknowledged that joint custody is not appropriate in all cases, various parenting schemes have been devised to afford both parents maximum contact in cases in which tension, antagonism, disagreement, and even woman and child abuse have been or are present. Supervised access and parallel parenting are concepts specifically directed at ensuring that parents who cannot tolerate each other, or where safety is an issue, are nevertheless given opportunity to ‘co-parent’ in some capacity. It should be remembered that these various custody arrangements distinguish between legal decision-making responsibilities and care and control. Indeed, as one moves further away from sole custody to some sort of shared parenting, the differentiation of powers, or sphere of influence attributable to each parent with respect to his/her children becomes more nebulous. For abusive men, these constructs provide greater opportunity to disempower, diminish and abuse their victims.

1. *Supervised access:* Bad conduct might be bad, but not so bad as to trigger a denial of access, or even custody. Supervised access can address the potential for violence and abuse by the parent behaving badly. “Supervised visitation is designed to provide a means of meeting the need for maintaining a relationship between children and their non-custodial parent after separation and/or divorce when conflict between the parents requires a safe outside source” (Birnbaum & Chipeur, 2010:80-81). There is an implied assumption that supervised access keeps children from being exposed to parental conflict and that children benefit from supervised access to the non-custodial parent (Birnbaum & Chipeur, 2010). However, there is little empirical evidence to support this contention.

“Typically parents in high conflict families make post-separation allegations of intimate partner violence, sexual abuse, concurrent substance/alcohol abuse and concerns about the parenting deficits of the other parent” (Birnbaum & Chipeur, 2010:82). These allegations characterize high conflict cases, and high conflict families are the most prevalent users of supervised access.

Supervised access continues to be ordered in many custody and access disputes throughout the family justice system.³⁷ Most commonly, it is ordered when there is a perceived risk to the child from the non-custodial parent where: there is a history of violence between the parents: *Biraben v Pelland* (2006), *R.A. v J.R.* (2006), *Lindahl v Lindahl* (2011), *A.P.G.P. v M.S.P.* (2013); the non-custodial parent has abused alcohol and/or drugs: *Edwards v Tronick-Wehring* (2004); the non-custodial parent suffers from a psychiatric disorder that renders him/her unpredictable and potentially dangerous to the child: *Edwards v Tronick-Wehring*, *C.A.M. v D.M.* (2003), *Snodden v Snodden* (2004), *Jennings v Garrett* (2004); the non-custodial parent has not demonstrated him/herself capable to adequately meeting the needs of the child: *Young v Halverson* (2006), *Krawczyk v Triumph* (2005); the relationship between the child and non-custodial parent is non-existent: *Fasan v Fasan* (1991), *Farah v Rguen* (2004); and/or the access parent has used harsh discipline in the past and cannot be trusted not to do so again: *Krawczk v Triumph*, *Fasan v Fasan*. None of these cases are concerned with protecting the custodial parent (usually the mother) from the abuser.

Supervised access has also been considered to have an aspirational function: non-custodial parents who are incapable of or unwilling to maintain contact with their children may find a way of bonding with their children through the medium of supervision. Similarly, children whose relationship with their abusive fathers have led them to mistrust or fear them and refuse contact with them are assumed to benefit from relationships with them through supervised access. In *R.A. v J.R.* (2006), the father had been convicted of assaulting the mother and for breach of a recognizance. The mother had suffered three incidents of domestic violence resulting in serious bodily harm. The children had witnessed these episodes, and they, too, had been injured during the assaults. The father was unrepentant. He had a lengthy criminal record. He continued to use drugs, often in front of the children. Sole custody was granted to the mother. Although Rogers, J did not find the father

to be loving or caring regarding his children, he took the “very unusual step” of making a final order for supervised access:

If there is any hope of a positive relationship in the future [the children] must begin to trust him. This has to happen in an environment of safety ... Because the respondent refuses to accept responsibility for his actions, it is impossible to see how his behaviour will change so that there are not repeated acts of violence that put the children at risk: para. 33.

See also *Lauzon v Lauzon* (1995), *Spurgeon v Spurgeon* (2001), *Wehbe v Wehbe* (2007).

In those cases in which the father has had no contact with his children for an extended period of time, usually at his instance, supervised access has been ordered (over the objections of the custodial mother) in the expectation that his re-introduction to his children will inspire paternal feelings and/or parental capacity and capabilities: *Fasan v Fasan* (1991), *Inwood v Siderova* (1991), *Sawyers v McKechnie* (2003). In these cases, children are used as a kind of ‘therapeutic tool’ for fathers’ benefit.

Supervised access is a further manifestation of the primacy of the right of the access parent over the best interests of the child. It encourages scenarios of battered women being forced by court order to subject children, usually themselves unwilling, into contact with their abusive, disinterested and/or embittered access fathers. There appears to be a consensus amongst judges in the family justice system that “a violent husband does not make a bad father, and that it remains in a child’s best interests to maintain contact with a father even in circumstances where the father poses a significant risk to the mother” (Kelly, 2011:299). Supervised access promotes the ‘friendly parent’ and ‘maximum contact’ rules with a vengeance.³⁸

2. *Parallel parenting*: There is some confusion surrounding the difference between parallel parenting and joint custody (Birnbaum & Fidler, 2005). It is acknowledged (at least in theory) that joint custody orders are appropriate and workable only in those cases in which the parents actually get along and agree with one another about how their children will be parented. Paradoxically, parallel parenting “has developed as a way to protect children from parental conflict by disengaging

parents ... each parent is allocated a different domain of major decision-making ... [i]n other words, each parent has sole custody, only over a different domain of decision-making” (Birnbaum & Fidler, 2005:339). This scheme is purported to be particularly beneficial for parents who must remain “disengaged”: those incapable of cooperating with each other (Birnbaum & Fidler, 2005:341). Parallel parenting is promoted as the means of achieving cooperation over time through disengagement. In most cases of parallel parenting, each parent will provide care for the child between 40-50% of the time: the range of “shared custody” (Thompson, 2013:321). Thompson expressed his own opinion about parallel parenting: “In my view, ‘parallel parenting’ orders should be treated as a distinctive form of custody order, only in form related to joint legal custody or shared parenting. For child support purposes and the 40 per cent threshold, a parallel parenting order may look the same, but we all know it is different in every other way” (2013:321). Parallel parenting orders (or arrangements) require ‘parenting plans’, setting out in great particularity the responsibilities and the specific days and times the child(ren) will spend with each parent.³⁹ These plans are not unique to parallel parenting arrangements, but have been used in high conflict, sole custody cases to ensure the specifics of access are understood and acknowledged by both parents (Birnbaum & Fidler, 2005).

Parallel parenting as an adjunct to a joint custody award was upheld by the Court of Appeal in *Ursic v Ursic* (2006), described as a high conflict case. Both parents were described as having a loving relationship with the child. However, the trial judge feared the mother would cut the father out of the child’s life if awarded sole custody. See also: *Moyer v Douglas* (2006), *V.K. v T.S.* (2011).

The fallacy of the appropriateness of parallel parenting for parents embroiled in an adversarial relationship is self-evident, a position with which a judge participant concurred (see Chapter Six). The sum total of a child’s life cannot be fragmented and divided between two warring factions. Curiously, Birnbaum and Fidler assert that parallel parenting plans “protect children from parental conflict by disengaging the parents as much as possible” (2005:343) when, in fact, parental

disengagement is best achieved through sole custody orders. That these authors – leading Canadian representatives of the social and ‘psy’ sciences of social work and psychology, respectively – have rejected sole custody as a plausible outcome for custody and access disputes reflects the current state of ‘psy’, social science, legal and popular discourse surrounding this issue, and a redefinition of ‘common sense’ regarding the best interests of children.

Summary: It is submitted that the cases discussed in this section demonstrate that a combination of judges’ reference to reported case law, what they choose to accept and/or understand about child development, custody and access emanating from the ‘psy’ and social sciences, and the mandates imposed upon them by the relevant legislation, appear to influence what judges subjectively ‘know’ about woman abuse and how what they ‘know’ determines the outcomes of the cases before them.

The influences of the ‘psy’ sciences on legal outcomes cannot be underestimated. The decisions examined in this section clearly demonstrate the appropriation of their language and concepts, as well as those emanating from the social sciences, often inappropriately and uncritically. The dominant ‘scientific’ presumption that children flourish if they have maximum contact with both parents has been promoted by the judiciary as *the* sole determinant of children’s well-being, regardless of the quality of the father/child relationship. Their uncritical acceptance of this premise reflects a level of ignorance of the psycho-social dimensions of woman abuse, deficiencies that could be remedied through appropriate judicial education (Morrill et al, 2005).⁴⁰

b. Property Division following Marital Separation

Hovius (2012) has described Part I of the *FLA* as a legislative scheme of deferred equal sharing of the financial product attributed to marriage (Hovius, 2012), unless the court “is of the opinion that equalizing the net family properties would be unconscionable” taking into consideration the factors enumerated in s. 5(6). The conceptualization of marriage as a “partnership” within the meaning of contract law is reinforced in s. 5(7), which speaks of the “joint responsibilities” and

“equal contribution” of both spouses within marriage. Jennings, J, in *Merklinger v Merklinger* (1992), suggested the bargain, implicit in s. 5(7), could be broken by “unconscionable” conduct, so found within the rubric established in s. 5(6): para. 59.

While every factor contained in s. 5(6) is an indicator of financial abuse, this section does not identify financial abuse per se as a form of domestic abuse giving rise to an unequal division of net family properties. Only s. 5(6)(g), which speaks to a written agreement between the spouses that is not a domestic contract, has been applied in instances of woman abuse, where it has been shown that agreement to the contract, “unconscionably” detrimental to one spouse, was obtained under duress: see *Berdette v Berdette* (1991), *Stetco v Stetco* (2013).

Section 5(6) establishes a higher burden of proof than does the *Partnerships Act* in establishing misconduct of business partners. Whereas the *FLA* speaks of ‘unconscionable’ conduct necessary to invoke the section, the *Partnerships Act*, s. 35(1)(d) refers only to conduct that “is not reasonably practicable for the other partner ... to carry on the ... partnership”. That the burden of proving financial misconduct in a marital partnership is higher than that demanded in a commercial partnership defies ‘common-sense’. Surely the level of financial good faith expected between spouses, and between spouses and their children, as set out in the *DA 1985* and *FLA* should be higher than that those in business relationships, and the level of tolerance for misconduct should be lower. Indeed, Jennings, J in *Merklinger v Merklinger* described the husband’s divestment of his assets in order to reduce his net family properties as “conduct that cannot be tolerated in any dispute and particularly not in a matrimonial one”: para. 81.

The standard for an unequal sharing of non-family property has been described by Jennings, J, in *Merklinger v Merklinger*.

The legislature deliberately chose to strictly define the severity of the result of the application of s. 5(1) which must pertain before there can be any judicial intervention. The result must be more than hardship, more than unfair, more than inequitable. There are not too many words left in common parlance that can be used to describe a result more severe than unconscionable. However, outrageous

must be one of them ...: para. 54.

In *MacDonald v MacDonald* (1997), the court held that “unconscionable conduct is well established in the law to be conduct which is harsh and shocking to the conscience”: para. 17.

Backhouse, J in *LeVan v LeVan* (2006), expounded further on the subject of unconscionability:

“Unconscionability” is a much more difficult test to meet than “fairness” and as a result, the courts have only minimal discretion to order anything other than an equal division of family property. Unconscionable conduct has been defined as, among other things, conduct that is harsh and shocking to the conscience, repugnant to anyone’s sense of justice, or shocking to the conscience of the court: para. 258.

See also: *Brett v Brett* (1999).

The exceptions to the general equalization rule found in s. 5(6) of the *FLA* have proven to be troubling to a judiciary tasked with mediating the tensions between the *certainty of result* promoted in the *FLA* and the fettering of judicial discretion under the section in order to obtain *fairness of result*. Blair, JA, in *Serra v Serra* (2009), noted at para. 39 that

the exceptions in s. 5(6) ... appear to fly in the face of what is seen as the essential characteristic of present-day family law legislation in Ontario, namely, the promotion of certainty, predictability and finality in the determination of support obligations and property division and the removal of judicial discretion in those areas to the extent possible. In this view, expanding the discretion in the hands of the judiciary in family law matters is anathema to Ontario’s legislative scheme and the development of any trend in that direction would be worrisome.

However, a review of the relevant case law reveals that judicial discretion is instrumental in determining when the judiciary will operationalize s. 5(6). In this regard, there seems to be very little consensus about under what circumstances to invoke the section, and what the results should be. There does seem to be a trend toward ordering an unequal sharing of net family properties in cases of a depletion of family property: *Merklinger v Merklinger* (1992), and where the wife has been subject to duress in executing a promissory note for which she received no consideration: *Stetco v Stetco* (2013), but not in the case where a husband has not been gainfully employed during the marriage, nominally contributed to the wife’s businesses, and allegedly depleted family property

through chronic gambling: *Earle-Barron v Barron* (2012). Nor will a husband's failure to contribute equally to household management, child care and financial provision preclude his entitlement to share equally in the wife's net family properties, including substantial businesses which she, alone built: *Brett v Brett* (1999). See: *Giba v Giba* (1996), *Borutski v Borutski* (2011), regardless of s. 5(7).

Contrary to the assertion of Blair, JA in *Serra v Serra* that judicial discretion has been removed from the determination of property division in family law, the interpretation of s. 5(6) has undergone significant change through the operation of judicial discretion: *Heon v Heon* (1989), *Stone v Stone* (2001). Lang, JA, in *Von Czeslik v Ayuso* (2007), reiterated the description of s. 5(6) by Cory, J, in *Rawluk v Rawluk* (1990), as "a last avenue of judicial discretion" and linked unconscionable conduct with the concept of "fault":

Since the preamble of the FLA provides for the "orderly and equitable settlement of the affairs of the spouses", the FLA is intended to assist parties in obtaining fair and objectively predictable resolution of family issues. To promote a predictability and consistency, the legislation does not include a consideration of "fault" by a party, with two important exceptions where a party's conduct is sufficiently egregious to be labeled unconscionable: para. 26.

In *Serra v Serra* (2009), Blair, JA of the Ontario Court of Appeal rejected the position that relief under s. 5(6) was limited to circumstances arising from "fault-based" conduct, the "true target of the limited exception to the general rule is a situation that leads to an unconscionable result, whether that result flows from fault-based conduct or not": para. 58, emphasis in the original text. He found that only ss. 5(6) (a), (b) and (d) relate to "fault-based conduct", while ss. 5(6)(c), (e), (f), and (g) do not. The attribution of the notion of "fault" within the meaning of unconscionability by Lang and Blair, JJA is particularly notable, given the efforts expended to expunge it from family law. Such "fault-based conduct", further, would only trigger s. 5(6), according to Blair, JA, when an equal sharing would "shock the conscience of the court": para. 47.

The use of the terms “fault-based conduct” and “shock the conscience of the court” in the decision in *Serra v Serra* suggests that there is considerable room for judicial discretion in the determination of property disputes in the family justice system. However, judges have rarely, if ever, considered woman abuse as a form of unconscionable conduct that will attract an unequal division of net family properties. For example, in *Stetco v Stetco* (2013), Croll, J found that the husband had subjected the wife to thirty years of physical and emotional abuse. He had been convicted of assaulting his daughter, and charged with uttering threats and assault. He had been subject to a restraining order. He forced the wife to co-sign a line of credit through intimidation and threats of physical violence. The husband drew on the line of credit solely for his benefit, thereby reducing the equity in the matrimonial home.

The parties separated, and the husband remained in the matrimonial home, which he subsequently sold. Croll J awarded the wife one-half the net proceeds of sale of the matrimonial home as well as occupation rent and spousal support. She did not attribute any liability accrued under the line of credit to the wife, and thus did not include it in her calculation of the net proceeds of sale, thereby giving the wife an unequal division of the net family properties. However, Croll, J based her award, not on the abuse to which the wife had been subjected throughout her marriage, but on the inequity of making her liable for a loan from which she received no benefit: “In my view, this is a case where the circumstances “shock the conscience of the court” and call for an unequal division of net family property”: para. 44. Accordingly, Croll, J based her decision on s. 5(6)(d) of the *FLA* (the husband’s intentional or reckless depletion of his net family property) and not in recognition of his abusive and violent conduct. Not only did his “unconscionable” conduct not attract formal financial sanction, but the husband’s obfuscation, unreliability as a witness and general negative demeanor, so found, also failed to generate sufficient antipathy in the judge to attract a punitive cost award. See also: *Dillon v Dillon* (2010).

Section 5(6)(e), which allows the court to award a spouse less than half the difference between the net family properties in relation to a period of cohabitation that is less than five years, benefits abusive men whose victims are unable to endure their perpetrators' conduct for more than five years. In *Hilpel v Hilpel* (2011), the parties were married for three years before the wife fled from her physically, emotionally, verbally and financially abusive husband. Relying on this section, MacPherson, J granted the wife only a 30% share of the net family property. That the marriage was of short duration because it had terminated as a consequence of the husband's violence was never considered by the court.

Similarly, in *Futia v Futia* (1990), the parties were married less than two years. There were no children of the marriage. The husband had purchased a house prior to, but in contemplation of marriage. He provided the downpayment and was responsible for the upkeep of the residence. He was self-employed. The wife had limited means. She alleged, and the court acknowledged, that the husband had assaulted the wife "on more than one occasion": para. 2. The equity in the matrimonial home constituted the major asset of the parties. West, LJSC rejected the wife's assertion that the husband's violence and abuse should be taken into account when determining her share of the net family properties and mitigate against the brevity of the marriage. In finding that the wife contributed nothing to the acquisition of the matrimonial home, and, further, that it would be "unconscionable": para. 12 to allow her to benefit from the appreciation in the home from the date of purchase to the date of separation, the court awarded her 40% of the value of the home.

In his annotation to this decision, McLeod noted "[t]he cases have made it clear that matrimonial misconduct, per se, is not relevant to proceedings for the distribution of matrimonial property. Accordingly, the wife should not be entitled to an increased share because her husband was abusive. However, this is not the same as saying the husband's conduct is irrelevant" (1990:81). McLeod appears to distinguish between the irrelevance of matrimonial misconduct to the distribution of matrimonial property, and the relevance of spousal (mis)conduct to "economic

effects” (McLeod, 1990:81). Frankly, the argument is specious. When the “economic effects” of woman abuse preclude the victim from claiming a one-half interest in her matrimonial home, that conduct is, indeed, relevant.

The exclusion of spousal abuse as a head of unconscionability under s. 5(6) can lead to an unconscionable result. In *Hamilton v Hamilton* (1996), the parties separated after eighteen years. Both the matrimonial home and a cottage were registered in the wife’s name. The cottage had been purchased with proceeds from bequests left to both spouses, although the husband’s contribution was significantly more. Immediately after separation, the husband attended at the cottage, where the wife was living, and shot her at close range in the face. She survived and eventually sued for divorce. The husband, still incarcerated for attempted murder, counter-petitioned for an unequal division of net family assets and a declaration that the wife held the cottage “in trust” for him.

Osborne, JA found that the facts of the case justified imposing a resulting trust whereby the beneficial ownership of the cottage was deemed jointly held by the husband and wife, in order to recognize the husband’s direct contribution to the purchase price through inheritance. Osborne, JA, having earlier noted that the husband had admitted in his counter-petition that his conduct post-separation was “totally unacceptable” – a “concession” Osborne, JA found “somewhat understated” but “appropriate”: para. 8 – rejected the husband’s claim for a declaration of constructive trust.

I do not think it is appropriate to resort to a constructive trust remedy here. The contribution at issue was a direct financial contribution to the acquisition of the property and thus the circumstances come directly within the traditional resulting trust analysis. It would also be somewhat perverse in light of the facts of this case to argue that the remedy of a constructive trust should be granted in favour of Mr. Hamilton to prevent an unjust enrichment to Mrs. Hamilton were he not given an interest in the cottage: para. 38.

One cannot help but sense that Osborne, JA, would have like nothing better, “in light of the fact of this case” to award the wife all the net family properties, had the legislation allowed him to do so.

What is apparent from these cases is that some judges, Osborne, JA and Jennings, J amongst them, have recognized that domestic violence should give rise to an unequal division of family properties. The omission of domestic violence and abuse from consideration under s. 5(6) is, itself, unconscionable.

Misrepresentation of the value of property owned by a spouse, or in which a spouse has an interest, with the intention of significantly reducing his family property, has been found to be unconscionable. In *LeVan v LeVan* (2006), the wife applied to set aside the provisions of a marriage contract and determine the husband's net income, amongst other claims for relief. The wife had been coerced into signing the marriage contract by the husband and his family under threat that the marriage would not take place unless she did so. The wife's legal counsel found the entire document unconscionable and could not ascertain the extent of the husband's assets. The husband fired the wife's lawyer and replaced him with another lawyer with whom he was familiar, who, without reviewing the contract, advised the wife to sign it.

The marriage contract treated the husband's family's business interests, and any property to which they could be traced, as excluded property. The wife's right to claim support upon marital breakdown was severely restricted to the husband's income and assets not excluded in the agreement. The contract provided that each party had fully and completely disclosed to the other the nature and extent of all significant assets, debts or other liabilities. The schedule purporting to show the husband's assets: provided no disclosure of income; \$80,000 in RRSPs, bank accounts and the desposit on the matrimonial home; no debts; and no interest or contingent beneficial interest in the family business.

It should be noted that, at trial, the judge's review of the parties' relationship during cohabitation revealed that the parties lived modestly and the husband was financially controlling of thr wife, forcing her to pay all household expenses from an inadequate budget he provided. He gave her access to a credit card "to be used strictly for emergencies": para. 124. If she used the card for

other purposes, she was forced to pay him back. The husband told the wife, a university graduate and teacher, who had given up her career to stay home full-time to raise their children, that if she could not stay within the budget, she should get a job at Tim Horton's or McDonalds "or at some of the restaurants that their friends frequented to supplement her budget": para. 124. The husband told the wife she was spending more than he was earning. "While the husband was restricting the wife to his budget, he was spending significant sums of money on his own entertainment and recreation": para. 125. The wife was forced to collapse some of her RRSPs to cover the taxes on the matrimonial home, and the balance, along with her life savings, were used to cover household expenses, more taxes, bills and babysitting. At the date of separation, the husband's yearly income was assessed at \$370,000.

At trial, the husband submitted that, if the contract were set aside, it would be unconscionable to award the wife the full amount of an equalization payment (\$10,000,000) because the value of his shares had declined since separation. The wife argued that the decrease in the value of the shares since separation, in the absence of any misconduct by the husband, is not a basis for a finding of unconscionability under s. 5(6) of the *FLA*.

Backhouse, J set aside the marriage contract, pursuant to s. 56(4) of the *FLA*, on the grounds that: the husband failed to disclose to the wife his significant assets that existed at the time the contract was made (s.56(4)(a)); the wife did not understand the nature or consequences of the contract (s. 56(4)(b)), and; it was in her discretion to do so (S. 56(4)(c)). She assessed the husband's net family property to be \$20,654,416.52 (representing the difference in value between his net business interests at the time of marriage and separation, plus other assets), and the wife's at \$211,198.45.

Backhouse, J held that s. 5(6) did not include consideration of the fluctuations in value to which assets forming net family property are often subject, holding that s. 5(6) "given the frequency of these events ... [the section] would have included a provision to this effect": para. 267.

However, she then proceeded to find the devaluation of the husband's shares in his family's business post-separation substantially reduced his net worth, an equalization payment of which would "leave the husband with substantially less in value than the wife. In my opinion, this result shocks my conscience and I find it unconscionable": para. 270. Backhouse, J accepted the wife's claim of \$5,300,000 as her equalization payment. At no point in the reasons for judgment did the judge criticize the husband for his deception, financial abuse of his family, or his abusive put-downs and attempts to shame his wife in their community by suggesting that she seek employment as a server to their friends. Nor did she make inquiries of the wife regarding the circumstances surrounding her agreement to accept only one-half the value of the equalization payment to which she was entitled.

The husband's appeal to the OCA (2008) was dismissed. Borins, JA noted at paras. 42-44 that, while Backhouse J found s. 5(6) of the *FLA* did not authorize the court to make post-valuation fluctuations in the value of net family property, she nevertheless proceeded to do so, calculating an unequal division of the parties' net family property on the ground of unconscionability. Borins, JA found that Backhouse, J had been "clearly influenced by the wife's compromise offer to accept approximately one-half of the equalization payment to which the trial judge found she was entitled": para. 45.

While the OCA upheld the decision of Backhouse, J to set aside the marriage contract, Borins, JA provided a different interpretation of s. 5(6):

... it is important to note that Ontario's FLA does not give rise to a proprietary entitlement, nor does it provide either spouse with an interest in the assets accumulated during marriage. Instead, the FLA provides for an equalization payment on the date of separation. A sum of money must be assessed as a substitute for the property that the spouse would have had at the end of the marriage: para. 67.

Borins, JA proceeded to describe the "framework" established by the *FLA* as introducing "a debtor-creditor regime that focuses on the sharing of the net value of the property acquired during marital cohabitation. The debt crystallizes and becomes owing on the date of separation. Thereafter, financial increases and decreases are of no concern to the creditor, *unless the debtor files for*

bankruptcy”: para. 65 (researcher’s emphasis). Borins, JA found the wife should be treated as an “ordinary unsecured creditor”: para. 79. However, given that the wife offered to accept \$5,300,000 as an equalization payment (a “substantial benefit to the husband”: para. 82), the appeal was dismissed. The husband’s application to the Supreme Court of Canada was also dismissed.

The characterization, by Borins, JA of the marital relationship *during cohabitation* as one of creditor and debtor appears to fly in the face of the promotion of marriage as a “partnership” as set out in the Preamble to the *FLA*. A debtor-creditor relationship is not established between/amongst partners under the *Partnerships Act* and, frankly, it is difficult to ascertain from whence Borins, JA derived his analysis. Perhaps, had he entertained the consequences to financially abused women of his decision when a debtor husband did, in fact, file for bankruptcy (given that he acknowledged the bankruptcy of a debtor spouse post-separation could be of “concern” to the creditor spouse) he might have been more circumspect.

Where a husband has intentionally reduced his net worth in order to deprive his wife of her legal entitlements – a most common form of financial woman abuse – s. 5(6) merely allows the court to award to an aggrieved spouse that to which he/she is *entitled* under the law, and only if funds are available, and nothing more in recognition of conduct found to be unconscionable. The *FLA* currently does not allow for a division of property acquired after separation of a spouse for whom s 5(6) applies, nor a garnishment of income to ‘make up the difference’ if his/her net family properties are insufficient, nor for cautions to be placed on property acquired by the perpetrator post-separation. Nor does the section provide for damages of any kind to flow from the unconscionable conduct so found.

Lang, JA might have believed that the reapportionment of net family properties under s. 5(6) “sends a warning to spouses tempted to hide or divert assets that it is not worthwhile to so do”: *Von Czeslik v Ayuso* (2007), para. 35. However, given the absence of any punitive consequences in the

legislation for “unconscionable” conduct, it may be “worthwhile” for abusers to do so for whatever financial benefits they derive from it.

c. Financial Abuse through Existing Bankruptcy Legislation

While certain judges, such as Jennings, J in *Merklinger*, can be lauded for creatively interpreting the law to protect the interests of abused women upon separation and divorce, the absence of legislation with which to engage represents a far greater challenge to those members of the judiciary who might wish to pursue a fair and equitable resolution to post-separation marital property claims in cases where the payor spouse declares bankruptcy. When the judiciary is not predisposed to seek such resolutions, the absence of relevant legislation provides ample opportunity for the court to make political statements at the expense of financially abused women. The interface of the *FLA* with the *BIA* provides just such an opportunity.

The Ontario Court of Appeal, in *Thibodeau v Thibodeau* (2009), held that an arbitrator’s award of an equalization payment to be paid to the wife by the husband out of his share of the proceeds of sale of the matrimonial home did not create a proprietary interest in the property for the wife that would survive the husband’s declaration of bankruptcy. In this case, the wife was aware that the husband had made an assignment in bankruptcy mere days after she had taken out a court order incorporating the arbitrator’s decision awarding her an equalization payment to be realized from the proceeds of sale of the matrimonial home, and had the trustee added as a party.

Upon interim motion, the judge granted the wife a priority claim over the husband’s other creditors. On appeal, the court, per Blair, JA, held the arbitrator’s award divided the matrimonial home by providing that it be sold, as agreed by the parties. It divided the proceeds of that sale and did so explicitly by providing that the parties will share equally in the net proceeds of sale. But it did not divide the husband’s share of the sale proceeds of the matrimonial home to the extent to pay the equalization payment to the wife, as the motions judge determined. Blair, JA found, “[h]ad the arbitrator contemplated such a result, he would not have provided for an equal sharing of the net

proceeds ... What he did – as I read his award – was to create a mechanism to facilitate the enforcement of Mrs. Thibodeau’s equalization payment as between her and her husband”: para. 19. The OCA then found that a spouse entitled to an equalization payment under the *FLA* was an unsecured creditor of the payor spouse. In finding that a spouse entitled to an equalization payment under the *FLA* is an unsecured creditor, the court then found there was no “real need” to apply any of the powers of the court under s. 9(1) of the *Act*, including ss(d): “if appropriate, to satisfy an obligation imposed by the order”: para. 40.

Blair, JA recognized the results of this decision might be “unfair”:

I recognize that there are policy arguments at play here. On the one hand, spouses – women – need protection to ensure that their just share of the value of property accumulated during marriage will be paid by recalcitrant former spouses. These concerns are important, and can be often addressed without affecting the rights of other innocent third parties ... On the other hand, what is at issue here in terms of enforcement and access to assets as between spouses, one-on-one, takes on a broader dimension in the insolvency context when third-party interests are involved. And this gives rise to a counter-policy argument: equalization payee spouses are unsecured creditors and, like other unsecured creditors, should not receive higher protection one against the other: para. 44.

Interestingly, Blair, JA refused to apply the reasoning in *Gilmour (Re)* (1997), in which Greer, J held that the husband’s entitlement to an equalization payment from his wife took priority over the rights of the trustee in bankruptcy on the bases that, first, an order for an equalization payment imposed a trust on the funds in favour of the payee spouse, and second, that the principle of “equitable assignment” was applicable.⁴¹ If Blair, JA et al were so concerned about the “injustice” befalling the wife from their decision, one assumes they could have employed their considerable collective wisdom to mediate it.

The Supreme Court of Canada has not been prepared to challenge the apparent unfairness of result averred to by Blair, JA in *Thibodeau*. In *Schreyer v Schreyer* (2011), the Supreme Court Canada upheld a decision of the Manitoba Court of Appeal that dismissed the wife’s claim for an equalization payment after her husband was discharged from bankruptcy. The wife had filed for

divorce in 2000, claiming an equalization payment from the husband with respect to the family farm, which was registered in his name. The husband made an assignment in bankruptcy in 2001, but did not disclose the wife's claim to his trustee. The husband was discharged in 2002.

The Supreme Court of Canada, per LeBel, J, found that s. 121 of the *BIA* contained a broad definition of a provable claim which captured a claim for an equalization payment. However, under Manitoba (and Ontario) family property law, an equalization payment claim did not confer a proprietary right on the claimant. Therefore, her claim neither survived bankruptcy, nor gave her a priority over other creditors. Nor was it exempt from the effects of a discharge from bankruptcy.

Further, the Supreme Court Canada refused to apply the remedies available under the *BIA* in the case of mis-conduct on the part of a bankrupt, where the husband failed to disclose his debt to the wife. Boyd and Sarra (2011) have noted that, in non family law bankruptcy cases, the courts have regularly refused to discharge bankrupts who have failed to disclose assets and/or liabilities to their trustees and creditors. The authors assert that the *Schreyer* decision has created incentives for bankrupts to hide their assets and liabilities, contrary to the *BIA*, because, should they succeed, they could emerge from discharge with assets to which bankrupts are not entitled. See *Lipinska v Lipinska* (2011).

These cases demonstrate not only the lengths to which husbands will go to defeat their wives' legal – and equitable – economic entitlements, but also show that, in many cases, the courts condone these forms of financial abuse. Given that the legislators, both federal and provincial, have failed, to date, to take the steps necessary to remedy the statutory inadequacies from which these results arise, one must assume that these abuses will continue.

d. Spousal Support – Another Opportunity to Abuse Women

The prevalence of support claims in family law disputes: Statistics Canada has recently reported that, while issues of custody and access figured prominently in active divorce cases in Ontario in 2008/2009, 75% of cases involved disputes over support claims (Kelly, 2010). Statistics

Canada has further reported that the incomes of families headed by lone-parent mothers are consistently amongst the lowest of all major economic family types, earning less than one-half those headed by lone-parent fathers, and only 5% of couple families (Statistics Canada, *The Daily*, Spring, 2010). The feminization of poverty, has increased the welfare rolls with the inclusion of single mothers and their children – those for whom the path to presumed self-sufficiency has been, and continues to be, unrealistic (Bourque, 1995).

Abused women's impoverishment, through financial abuse during and after marriage, or as a consequence of non-payment of equalization payments and/or child and/or spousal support (if the latter were claimed or awarded at all) is directly related to their continued economic oppression in and outside the home. Abused women are forced to stay with or return to their abusers due to lack of funds or the unavailability of sufficiently remunerative employment. For many abused women, the inability to access money is the most prevalent reason they stay with their perpetrators (Smart, 1989). Legislative schemes and judicial determinations that fail to acknowledge woman abuse as a form of compensable misconduct therefore condone the marginalization and oppression of women, abused women in particular.

The three 'types' of spousal support: The body of case law concerned with spousal support has identified three types of spousal support under the *DA 1985*: contractual; compensatory; and non-compensatory (Rogerson, 2004). While the SSAG, discussed below, have brought some certainty to the issue of the quantum of spousal support, the test for *entitlement* to spousal support relies almost entirely on judicial discretion, which has been roundly criticized for contributing to uncertainty and unfairness (see Note 46, this chapter). Further complicating spousal support are the different approaches to spousal 'conduct' taken in the *DA 1985* and *FLA*. As discussed in the previous chapter, s. 15.2(5) of the *DA 1985* specifically states that spousal misconduct shall not be taken into consideration when determining entitlement to spousal support. However, s. 33(10) of the *FLA* allows a court to consider "a course of conduct that is so unconscionable as to constitute an

obvious and gross repudiation of the [marital] relationship” when determining the appropriate *amount* of support to be paid, discussed later in this section. A further curious development in the law governing support is, according to a number of the judge participants, the characterization of spousal (and child) support as “damages”. There is nothing in the legislation that would give rise to association of support with “damages”, which connotes both loss and fault. While one could argue that s. 33(10) grants jurisdiction to the court to make a punitive support award in cases of domestic violence and abuse, that might be in the nature of damages, the judiciary has not interpreted the section that way (see Chapter Six).

The “trilogy”: There is, perhaps, no other area of family law in which the promotion of sex equality prescribed by the *Charter* was greeted with such judicial enthusiasm as in relation to spousal support. It is suggested that, within two years of its passage, the directive of the *DA 1985* to spouses to assume economic self-sufficiency upon marital separation inspired the “trilogy” of cases – *Pelech v Pelech* (1987), *Richardson v Richardson* (1987), and *Caron v Caron* (1987) – through which the Supreme Court of Canada identified s. 15.2(6)(d) – “insofar as is practicable, [to] promote the economic self-sufficiency of each spouse within a reasonable period of time” after marital breakdown – as the over-riding objective of a spousal support order. “The right to support is conditional on need and not all need at that” (McLachlin, 1990:136). The “trilogy” espoused the “clean break” theory of spousal support, which held that spouses should be encouraged to sever their financial relationships as quickly as possible. That the trilogy dealt with applications to vary existing separation agreements – the *contractual* type of spousal support – did not seem to limit trial judges’ applying them to those cases involving what came to be identified as compensatory and non-compensatory support claims. “In general ... the judiciary ... embraced the concept of rehabilitation with a vengeance ...” (Langer, 1994:69).

The decisions were heard over the same two days in March, 1986, and the decisions released the same day in June, 1987. It would appear that the *Pelech* decision was rendered first, insamsuch

as *Caron* and *Richardson* refer to it. Reading *Caron* and *Richardson*, it appears that they were written in that order. Referring to the three cases as the trilogy, and not examining them separately, obscures the ways in which each case, read in this order, appears to entrench successively and more deeply the primacy of private contract over the exercise of judicial discretion in determining spousal maintenance. Indeed, it was not until *Richardson* that one of the bench, La Forest, J, seemed to notice how deeply the Court had eroded judicial discretion with respect to determinations of spousal support and maintenance, and refused to support the majority in continuing to do so.

The cases can be synopsized as follows:

The Pelechs were married for fifteen years and there were two children of the marriage. The husband was a contractor, and the wife assisted him with bookkeeping and receptionist duties. At the time of separation, the wife was suffering from serious psychological problems. At trial, the judge awarded custody of the children to the husband, and granted permanent maintenance to the wife. He rejected her submission that her health problems had been caused by the husband's physical cruelty. Subsequently, the parties entered into a separation agreement that gave the wife a lump sum payment of \$28,760 over a period of thirteen months. She also agreed to transfer her one share in the husband's business to him. The agreement contained a full and final release clause. At the time of the divorce, the husband's net worth was \$128,000. Fifteen years later, when the application to vary was heard, his net worth had increased to \$1,800,000. However, the wife had become impecunious, increasingly psychologically disabled, and severely physically disabled. She was often unable to work, and had used up her capital. At the time of trial, she was collecting social assistance. The wife brought a motion under s. 11(2) of the *DA 1968* for maintenance, having regard to her need and the husband's ability to pay, which was successful.

The trial judgment in the wife's favour was reversed on appeal. The Supreme Court of Canada confirmed the appeal court's decision. Wilson, J, writing for the Court, held that, in order for a court to interfere with a private agreement, freely entered into on the advice of counsel, there

must be a “radical” or “dramatic” or “gross” change in the circumstances of one of parties that was related to the marriage: paras. 79 and 82. Absent these circumstances, and where the agreement was not considered “unconscionable in the substantive law sense”, Wilson, J held that the agreement should be respected: para. 81.

Absent some causal connection between the changed circumstances and the marriage, it seems to me that the parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should be free to make new lives for themselves without an ongoing contingent liability for future misfortunes that may befall the other. It is only, in my view, when the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves: para. 83.

It was irrelevant that the wife was impecunious and the husband had the ability to pay. Wilson, J, rejected *obiter* comments by Matas, JA of the Manitoba Court of Appeal in the 1984 decision of *Ross v Ross*, in which he acknowledged women’s inferior status in society, generally, and the workplace, in particular. Instead, Wilson, J stated

... where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state: para. 83.

In so deciding, Wilson, J not only refused to acknowledge the feminization of poverty, but also rejected the legal assumption, espoused in *Fabian v Fabian* (1983), that the burden of financial dependency falls, first, to the spouse of the other in need during and after marriage, and, second, to the state. Would “an economic pattern of dependency engendered by the marriage” include financial abuse in its most common forms, such as: withholding money from the victim; preventing her from securing employment or upgrading her academic qualifications; and/or converting all family property, as well as the victim’s income and savings, to his own use? In *Pelech*, it appeared that the wife was certainly ‘at the losing end’ of the bargain when she agreed to forfeit her interest in

the husband's business at the time the separation agreement was executed. Further, while Wilson, J was prepared to acknowledge the finding of the trial judge that the wife's emotional problems were sufficiently serious to have caused the breakup of the marriage, she never questioned if the wife had the capacity to enter into a separation agreement that was so clearly contrary to her interests in the first place.

In *Caron v Caron*, the parties were married for fourteen years and had two children. Two years after separation, they executed a separation agreement that contained a *dum casta* clause: spousal maintenance would terminate upon the wife's remarriage or cohabitation with another man for longer than ninety days. The agreement was incorporated into the decree nisi. The husband paid the wife maintenance pursuant to the agreement. The wife subsequently cohabited with another man for longer than the ninety day period set out in the agreement, but the husband continued to pay spousal maintenance. The wife's relationship ended, the husband eventually stopped paying maintenance, and the wife was forced to seek social assistance. The wife applied under s. 11(2) of the *DA 1968* for a variation of the decree nisi for a resumption of support. The wife was awarded maintenance at first instance, but lost on appeal.

Once again, Wilson, J wrote the majority decision in which she rejected the wife's appeal, finding that she did not meet the test in *Pelech*, because there had been no radical change in her circumstances related to a pattern of economic dependency caused by the marriage. Wilson, J held that the wife was unemployed at the time of separation, and continued to be unemployed; thus, there was no change in her circumstances. Further, the exit of her cohabité was not a radical change that would trigger s. 11(2), since possible cohabitation had been contemplated in the separation agreement (but not a cessation of cohabitation). Nor did the separation agreement provide for the resumption of maintenance, only a variation of existing maintenance.

In *Richardson v Richardson*, Wilson, J once again wrote the majority decision, but this time was faced with a dissenting decision from La Forest, J. In this case, the parties were married for

thirteen years and had two children. The wife was not employed at the time of separation, and had not been employed outside the home for five years. She had been employed during the marriage as a clerk typist until the birth of her second child, at which point she assumed the roles of full-time child carer and homemaker. Following marital breakdown, the parties executed minutes of settlement that provided spousal maintenance for one year to the wife. After one year, the wife was still unemployed and receiving social assistance. At the time of the divorce hearing, the wife sought to vary the terms of the minutes of settlement under s. 11(1) of the *DA 1968*. The wife was awarded maintenance, but the order was overturned on appeal on the basis that there had been no change in circumstances at the time of the hearing to justify the order.

The Supreme Court of Canada upheld the appeal. Wilson, J held that the *Pelech* test applied whether the applicant was seeking an initial support order or a variation of such an order, asserting the same underlying rationales in both cases, namely: 1) the importance of finality in the financial affairs of former spouses; and 2) the principle of deference to the rights and responsibility of individuals to make their own decisions. Wilson, J rejected the wife's position that her disadvantage in the workplace caused by her years as a homemaker were consequent to her marriage, and found no disadvantage at all. Nor did she recognize the apparent improvidence of the minutes of settlement, which left the wife \$10,000 in debt and gave the husband the matrimonial home.

La Forest, J rejected the ratio in *Pelech*. He held that only a trial judge can award spousal maintenance under the *DA 1968*, and appellate courts have a review function, only. He held that the *Pelech* decision fettered the inherent discretion of the trial judge, contrary to the intention of Parliament. He rejected the primacy of private contract, holding that it was an important, but not the overriding factor in support determinations. He also found that Mrs. Richardson's impecuniosity was directly related to her absence from the market as a result of her assumption of homecare and child-raising responsibilities. He distinguished applications made under s. 11(1) from s. 11(2),

characterizing the former as a hearing of first instance, and not a re-trying of an application already decided. *La Forest, J* would have allowed the appeal.

In her commentary on the trilogy, Bailey noted that the decisions

are consistent with the global trend toward privatization, our traditional protection of the private sphere of the family from state intervention, and the current push for settlement of family law cases, and the new family law's emphasis on self-sufficiency and a clean break, phenomena which are all problematic for the disadvantaged (1994:616).

Similarly, Sheppard criticized the trilogy "for sacrificing the economic well-being of women to the abstract principle of freedom of contract" (1995:289). She claimed that the cases represented "a dramatic about-face from the traditional view of needs-based spousal support" (1995:288).

Bailey asserted that the privatization of support arrangements in the family (long identified in feminist literature as a site of women's oppression) privileged by the trilogy would result in agreements that would be "inconsistent with the standards of fairness embodied in our family laws because of the inequality of bargaining power between men and women in a patriarchal society" (1994:616). In so doing, Bailey makes the assumption that fairness in spousal support determinations is more easily attainable in the public sphere of the court room, where, one must assume, Bailey believes sex inequality is obviated through the even-handedness of the justice system, rather than the private sphere of negotiation. The logic of this assumption escapes this researcher; it was in the court room that the trilogy was decided.

Both Bailey and Sheppard failed to recognize that the trial judge in *Pelech* rejected the wife's allegation of woman abuse, which, if accepted, might have compelled the appellate court to find in her favour. One might ask, in that case, whether there would have been a "trilogy" at all.

Mediating the damage caused to women from the trilogy through Moge v Moge: The Supreme Court of Canada decision in *Moge v Moge* (1992) attempted to address and redress the difficulties resulting from judicial interpretation and application of the trilogy to spousal support claims, generally, encountered by women seeking spousal support.

The parties were married in the 1950s in Poland, and immigrated to Canada in the 1960s. They were married and cohabited for about twenty years and had three children. The wife worked throughout the marriage as a night cleaner, and was described by Sheppard as defying “ the traditional white, middle-class, full-time home-maker and the modern white, upper-middle-class, full-time career woman” (1995:286). In 1973, upon the breakdown of her sixteen-year marriage, the wife was awarded spousal and child support of \$150/month. The wife was laid off from work, and in 1987 brought an application to vary spousal support. The application was successful, and spousal and child support were increased to \$400/month. In 1989, the husband was granted an order terminating support. The court held that the wife had had sufficient time to become financially independent, and the husband was no longer required to support her.

On appeal, Twaddle, JA identified the wife as the primary caregiver, homemaker and breadwinner of the family and awarded her spousal support in the amount of \$150/month. Sheppard (1995) queried how the conditions of Mrs. Moge’s marginalization as an immigrant, involved in low-paying precarious employment, could have been addressed with an award of \$150/month, but it should be noted that Mrs. Moge only sought \$150.00/month in spousal support. This suggests any questions regarding the sufficiency of the amount should be directed at her legal counsel.

The husband’s appeal to the Supreme Court of Canada to strike out the spousal support order was unsuccessful. The trilogy was distinguished on the basis that those cases dealt with variation applications of existing separation agreements, not disputed claims for spousal support based on court orders. (This overlooks the comments of Wilson, J in *Pelech* which seem to have much wider application). L’Heureux-Dubé, J, on behalf of the Court, held that

... the purpose of spousal support is to relieve economic hardship that results from “marriage or its breakdown”. Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party’s economic prospects: para. 43.

L’Heureux-Dubé, J acknowledged that “equitable distribution” could be attained in a variety of ways, including through child and spousal support, a division of assets, or combination of both: para. 45. However, economic self-sufficiency was but one of four factors to be taken into consideration when determining eligibility, quantum and duration of spousal support. It was not the primary, nor the only, consideration. L’Heureux-Dubé, J repudiated the “sink or swim” ethos of the trilogy: para. 54, and rejected the husband’s position that the trilogy espoused “a new model of support under the Act, asserting, “[r]ather, the Court has shown respect for the wishes of persons who, in the presence of statutory safeguards, decided to forego litigation and settle their affairs by agreement under the 1970 Divorce Act”: para. 26.

L’Heureux-Dubé, J went on to cite numerous research studies emanating from sociology in which the feminization of poverty has been examined.⁴² Relying upon these studies, and the ‘expert’ opinions contained therein, L’Heureux-Dubé, J distinguished the trilogy from disputed applications for spousal support:

It would be perverse in the extreme to assume that Parliament’s intention in enacting the Act was to financially penalize women in this country. And, while it would be undeniably simplistic to identify the deemed self-sufficiency model of spousal support as the sole cause of female decline into poverty, based on the review of the jurisprudence and statistical data set out in these reasons, it is clear that the model has disenfranchised many women in the court room and countless others who simply may have decided not to request support in anticipation of their remote chances of success. The theory, at minimum, is contributing to the problem: para. 63.

Of particular note in her reasons was the suggestion by L’Heureux-Dubé, J that the courts should take judicial notice⁴³ of the systemic and institutionalized economic oppression of women: para. 90.

Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice: para. 91.

... it is important that judges be aware of the social reality in which support decisions are experienced when engaging in the examination of the objectives of the Act: para. 92.

While the analysis of L'Heureux-Dubé, J suggests that women should be awarded larger and long-term spousal support awards, Douglas, (2008) noted a significant gap between principle espoused and practice performed, in that Mrs. Moge did not secure an increased award of support from the Supreme Court of Canada. However, it would appear that she did not seek an increase. The decision was criticized for its political polemics and vagueness, for being “too generous to wives” (McLeod, 1993:459) – a charge never lobbed at the trilogy. It should also be noted that McLachlin, J appears to have expressed some impatience with the sociological references advanced by L'Heureux-Dubé, J: “...this is, first and last, a case of statutory interpretation. It is interesting and useful to consider how different theories of support yield different answers to the question of how support should be determined. However, in the end the judge must return to what Parliament has said on the subject”: para.102.

Moge has been the subject of much commentary. Sheppard identified *Moge* as “a leading authority on the legal justification for providing financial support to a former spouse” (1995:284). She posited that *Moge* sent a message to lower courts that the trend toward promoting financial self-sufficiency should not take precedence over recognition of, and compensation for, “the actual and potentially long-term economic inequalities women often experience following marital breakdown” (1995:285). She noted with approval the Supreme Court of Canada’s rejection of the characterization of marriages as either traditional or modern, noting that many women subscribed to neither.

The after-shocks from the trilogy: In 2003, the Supreme Court of Canada overturned the trilogy in its decision in *Miglin v Miglin*, decided under the *DA 1985*. Arbour and Bastarache, JJ, for the majority, held that the appeal provided the Court with the opportunity to consider the continued applicability of the trilogy “in light of the significant legislative and jurisprudential changes that have taken place since [the trilogy] arose and since its release”: para. 1.

Echoing the dissent of La Forest, J in *Richardson*, the Court held that a private agreement that met the requirements of fairness and represented the intentions and expectations of the parties *and* complied substantially with the objectives of the *DA 1985* should receive considerable weight, but could not be considered the only, or overriding consideration. Perhaps, in deference to evidence ignored or allegations rejected in the trilogy, the Court asserted its responsibility to examine the circumstances of the parties at the time the agreement was executed to determine “whether one party was vulnerable” and taken advantage of”: para. 4.

Unfortunately, the entreaty of L’Heureux-Dubé, J in *Moge* that judicial notice should be taken of women’s inferior economic position in society has been ignored and the effects of the trilogy still resonate in the family justice system. Many women, as she averred in para. 63, were disenfranchised by the self-sufficiency model promoted in the trilogy. Women who would otherwise be entitled to spousal support refrained, and may continue to refrain from claiming it, and judges are inclined not to order it.⁴⁴

The decision in *Miglin* did little to change this reality. The equitable distribution of the “financial benefits” of marriage, which L’Heureux-Dubé, J, asserted could be accomplished “through a number of ways” has not, in fact, materialized for three fundamental reasons (alluded to by L’Heureux-Dubé, J): 1) the distinction made between child support and spousal support and the primacy of the former over the latter; 2) receipt of an equalization payment in lieu of spousal support; and 3) implying self-sufficiency by maintaining paid employment during marriage.⁴⁵

Notwithstanding the comments of Wilson, J in *Pelech* that the financial liability of an impecunious former spouse falls to the state, the Supreme Court of Canada subsequently reversed itself on this point in *Bracklow v Bracklow* (1999). In *Bracklow*, the parties cohabited for ten years, during six of which they were married. The wife initially earned more than the husband, and paid two-thirds of the household expenses for two years. Thereafter, expenses were shared. The wife suffered from chronic medical problems, and was eventually admitted to a psychiatric unit. It was

apparent that she was thenceforth unemployable. The parties separated, and the husband initially paid the wife \$200/month, which he stopped paying almost immediately. The wife applied, and was granted, interim spousal support.

The trial judge held that no economic hardship befell the wife as a result of the marriage or its breakdown, but ordered the husband's payments of \$400/month to continue to 1996. (McLachlin, J, either for effect or merely in reciting the evidence, indicated that the trial judge described the wife as a "highly capable person who brought emotional and physical illness to the relationship": para. 9, comments that, in the researcher's opinion, are outrageous, demeaning, and suggestive of fault.) The wife appealed the trial judge's decision, but was unsuccessful.

The Supreme Court of Canada allowed the appeal. McLachlin, J held that the wife was entitled to support, based on "the length of cohabitation, the hardship marriage breakdown imposed on her, her palpable need, and Mr. Bracklow's financial ability to pay": para. 60, and remitted the matter to the trial judge for an assessment of quantum and duration of support. McLachlin, J, relying on *Moge*, held that it was "now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union": para. 1. She identified three grounds for entitlement for spousal support recognized in law: 1) compensatory, as described in *Moge*; 2) contractual; and 3) non-compensatory. Further, McLachlin, J identified two "models" of marriage: the "social obligation model" and the "independent model": para. 23. She held that the roles assumed by marital partners during marriage and after would determine which model should be ascribed to their relationship.

Inherent in the "social obligation model" of marriage as described by McLachlin, J is an interdependency between spouses that creates expectations and obligations recognized and enforced at law. The obligation for support falls to the spouse with the ability to pay to the other spouse in compensation for the loss of the income of the other spouse shared during cohabitation. In comparison, the "independent model" of marriage arises out of a spousal relationship characterized by

financial independence and autonomy retained throughout the marriage. The “clean break” theory of compensation promoted by the trilogy, in the opinion of McLachlin, J, complemented this latter model. Financial obligations could take the form of either contractual or compensatory support based upon the claimant spouse’s entitlement “to what [he/she] would receive in the commercial world ... what they contracted for and lost”: para. 27.

The “mutual obligation” theory “places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners [sic] to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls”: para. 31. It assumes, therefore, that spouses ascribing to the “clean break” theory as financially autonomous and independent actors will never need state assistance.

It appears that the legislative mandate directing spouses toward financial self-sufficiency continues to impact the lives of women whose marriages could be characterized as ‘traditional’ (McLachlin, 1990). The recent case of *Thompson v Gilchrist* (2012) provides an example. In this case, the parties were married for eleven years, and had three children. All of the children had “high” needs. The husband remarried, quit his lucrative job and was subsequently under-employed. He unilaterally stopped paying spousal support and reduced his child support payments. Thereafter, he lost his job, began collecting social assistance and stopped paying child support altogether.

The wife claimed to be suffering from a number of serious medical conditions, including depression. She was dedicated to her children, whose special needs required constant supervision and care. She had been out of the workforce for seventeen years, had been receiving social assistance since the husband stopped paying spousal support, which she was continuing to receive at the time of the hearing.

Minnema, J found the husband under-employed and ordered him to pay child support in accordance with the *CSG*. In regard to the award of spousal support, the court reduced the award of \$1,500 by \$500, being the amount Minnema, J estimated the wife could earn were she to secure part-

time employment. In so doing, he “encouraged” the wife to fulfill her responsibility as set out in the *DA 1985* to achieve some level of self-sufficiency.

I have no doubt that Ms. Gilchrist would be able to find part-time work that could accommodate her need to be at home at important times with the children. Three shifts of 4 hours per week would not be unreasonable, which at roughly minimum wage would be approximately \$500 per month. I would accordingly reduce the level of spousal support to \$1,000 at the time of review. This would be a practical way to promote her moving toward self-sufficiency within a reasonable period of time para. 56.

It would appear that Minnema, J failed to appreciate that Ms. Gilchrist would not benefit in any way from this order; any spousal support paid would be deducted from her social assistance benefits. In reality, the court was simultaneously contributing to the wife’s reliance upon the state and her continued impoverishment to the benefit of the husband while effectively forcing her to seek employment when neither her health nor her child care responsibilities should have required her to do so. The husband’s abusive conduct in denying the wife her financial entitlements went unacknowledged.

It is significant that Minnema, J ignored the wife’s disabilities and health problems when “promoting” her “self-sufficiency”. It would appear that, for some members of the judiciary (despite the prognostication of L’Heureux-Dubé, J, over thirty years ago) the disabled housewife is still not protected from the consequences of the trilogy (L’Heureux-Dubé, J, 1983:308).

Quantifying spousal support: In those instances when spousal support orders have been made, they have been based upon needs *and* means, taking into account the accustomed standard of living of the parties (Rogerson, 2004; Engel, 1993), neither of which addresses the other criteria for making support determinations as set out in the *FLA*, s. 33(9).

While, presently, there are mandatory statutory guidelines to assist in the determination of the quantum of child support, no such *mandatory* statutory guidelines exist with respect to spousal support. Judicial awards of spousal support have always been regarded as excessively discretionary, arbitrary and responsible for an unacceptable degree of uncertainty and unpredictability (Rogerson &

Thompson, 2011). In 2001, the federal Department of Justice commissioned a project to examine the feasibility of creating a set of guidelines for spousal support, which were released in 2008 as the *Spousal Support Advisory Guidelines* (SSAG). The SSAG were described by their authors as “informal, advisory guidelines, not intended to change the law” (Rogerson & Thompson, 2011:250).

The SSAG do not deal with the “threshold issue of entitlement” (Rogerson & Thompson, 2011:251), and are most relevant to the relative financial positions of the spouses at the time of separation. These guidelines are based upon a concept of income-sharing between the spouses during cohabitation such that spousal support is calculated as a percentage of the income difference between the spouses (Rogerson, 2004), depending upon the presence or absence of dependent children (Rogerson & Thompson, 2011). It is not clear how, or when, this presumption of spousal income-sharing during cohabitation may be rebutted in cases where spouses do not pool nor share their incomes, either by agreement or in cases of financial abuse of one by the other. Nor are the SSAG responsive to variations in the quantum of support ordered under s. 33(10) of the *FLA*.

The SSAG have been described as useful tools: *Fisher v Fisher* (2008). It would appear that the SSAG have become, in practice if not in law, the sole determinants utilized by judges of spousal support (see Chapter Six).⁴⁶ However, the degree of judicial subjectivity required to determine the appropriate quantum of spousal support to be paid, combined with what effectively amounts to a preliminary presumption in favour of financial autonomy of the parties, continues to dissuade those who are otherwise entitled to claim and receive spousal support to advance such claims (Rogerson, 2004).

Lump-sum spousal support awards: In *Mannarino v Mannarino* (1992), the husband had abandoned steady employment to open a muffler franchise, which failed. The trial judge ordered the conversion of an equalization payment to a lump-sum spousal support award to defeat the now-bankrupt husband’s attempt to avoid satisfying his financial obligations to his creditor wife. In reversing this decision, the OCA held that “the law is clear that [lump-sum awards] should be

awarded only in very unusual circumstances, where there is a real risk that periodic payments would not be made”: para. 2. Further, the court held that such awards should not be, in effect, redistributions of family assets in the guise of support. The OCA found that the husband’s conduct did not amount to the “cavalier attitude towards the wife’s economic position” as characterized by the trial judge: para. 1. In the view of the OCA, the judgment for lump-sum support award was “unfair”: para. 6, and was replaced with a monthly support order of \$650: para. 6. Curiously, in denying the wife’s claim in *Mannarino* the OCA relied upon the decision of LeSage, J in *Jazenko v Jazenko* (1985), in which he did, in fact, order lump-sum spousal support to the wife due to the husband’s history of “significant” alcohol abuse, record of unemployment, interim spousal support arrears and accumulated debts. In that case, LeSage, J characterized the wife as a “cautious, sensible, indeed frugal money manager, to whom the dependant’s support money can be safely entrusted”: para. 20. The predisposition of LeSage, J toward the wife can be noted in his acknowledgment of her having been “employed primarily as a housewife and mother after her first child was born”: para. 3 (researcher’s emphasis). There are few cases where household and childcare duties have been recognized as a form of *employment*. It would appear that the wife’s positive demeanor was a significant factor in her success.

Section 34(1)(c), which allows a court to transfer to, or in trust for, or vest in the dependant an interest in property, absolutely, or for life or for a fixed term for the purposes of satisfying an order for spousal support. A vesting order within the context of this section is in the nature of an enforcement order, thus the court will only make an order under this section when the payor’s previous conduct and his/her reasonably anticipated future behaviour, indicate the likelihood of a refusal to abide by a periodic support order: *Lynch v Segal* (2006). It appears this section is not much utilized in cases of financial abuse; of course, the existence of financial abuse, as a form of woman abuse, would first have to be recognized by the court as a form of misconduct giving rise to the application of this section.

Non-payment of support orders – a site for woman abuse: A support order – either child or spousal support – is only effective if the payor complies with it. “Non-payment of support orders represents an obvious site for the economic coercion of women” (Langer 1994:8).

All court orders for child and spousal support issued by Ontario courts in divorce and separation proceedings are filed with the Family Responsibility Office (FRO); separation agreements may also be filed. The Auditor General’s 2010 audit found that “approximately two-thirds of all support-payers were either in non-compliance or only partial compliance with the support obligations and that enforcement actions were often neither timely nor effective” (Auditor General of Ontario, 2012).⁴⁷

The non-payment of support obligations is a federal, as well as provincial issue; support order enforcement agencies from across Canada, reporting to Statistics Canada, indicated that they continue to collect full payment of arrears in less than two-thirds of enforcement proceedings, and only partial payment in 8%, and no payment in 30% of cases (Steeves, 2012). The impotence of the provincial enforcement system encourages those bound by support orders to avoid them, and the assertion that payors default “not because they are unable to pay but because they do not want to pay” (Ontario Status of Women Council, 1983:67) still rings true today.

The irrelevance of woman abuse to spousal support: There is no statutory basis for awarding spousal support as compensation for domestic violence and/or abuse (unless one accepts the interpretation of s. 33(10) of the *FLA* discussed in Chapter Two). Indeed, s. 15.2(5) of the *DA 1985* precludes consideration of “any misconduct of a spouse in relation to the marriage”. In comparison, s. 33(10) of the *FLA* allows for consideration to be given to spousal misconduct in determining the amount of spousal support payable – but not entitlement – in those cases where spousal conduct “is so unconscionable as to constitute an obvious and gross repudiation of the relationship”. While this section appears to hold some promise for abused women, it has been relied upon more often by aggrieved husbands whose wives committed adultery – cases redolent of the patriarchal morality that

informed family-related legislation in the not-too-distant past. Domestic violence and abuse, per se, are not grounds for awarding spousal support: see *Mills v Mills* (1992), *Krigstin v Krigstin* (1992), *B.(S.) v B.(L)* (1999). Inasmuch as judges appear to be reluctant to acknowledge evidence of domestic violence in the cases before them, there has been little opportunity to consider these sections in order to award spousal support to the victims of woman abuse.

In *Harris v Harris* (2005), Olah, J acknowledged that spousal misconduct often indirectly impacts spousal support, inasmuch as the economic consequences emanating from spousal misconduct may be relevant in spousal support claims. She did not, however, find the husband's alcoholism to be a "condition" within the meaning of ss. 15.2(4) or (6) that could be directly linked to his ability to pay support, nor did she consider his physical and emotional abuse of the wife. However, the wife's claim for spousal support succeeded when the court struck out the husband's statement of defence for failing to answer questions on discovery.

In *Melanson v Melanson* (1991), the parties were married for twenty-two years, during which time the husband was physically abusive to the wife, and, on occasion, his son and daughter as well. Campbell, J rejected the wife's claim for spousal support on the basis of the husband's abusive conduct, stating, "[t]he steamy relationship between the parties and the physical assaults by the defendant standing alone does not in my view constitute an obvious and gross repudiation of the relationship": para. 9. Further, Campbell, J found that the wife was the author of her own misfortune:

[The husband's] assaultive behaviour occasionally reached a disgraceful climax, and was certainly not conducive to a happy and smooth marital situation. The nagging and challenging contributions of the plaintiff cannot be totally ignored. Undesirable as his behaviour may have been including occasional real or perceived extra-marital incidents do not reach the pinnacle of unconscionability within the meaning of the statutory provision which I have quoted [s. 33(10) of the *FLA*]: para.9.

The decision in *Melanson* does suggest that Campbell, J would have awarded spousal support to the applicant on the basis of the husband's misconduct had he found it to be sufficiently

“unconscionable” to trigger s. 33(10). Accordingly, for Campbell, J, spousal misconduct is relevant to entitlement to, as well as quantum of spousal support (although the judge did not indicate what conduct would be considered unconscionable).

One might wonder why women’s rights organizations have not sought judicial review of these cases that clearly reflect a gender bias against women. One defence to such an accusation might be that these decisions merely reflect the individual proclivities and biases of the judges. Indeed they may.

Subsequent to the above cases, there appears to be just one reported decision in which spousal misconduct was deemed to have a direct bearing upon entitlement to spousal support: *Leskun v Leskun* (2006). The parties married in 1978. The wife was substantially older than her husband, and had financially supported him throughout much of the marriage. As a result of the wife’s financial support through her full-time employment and/or utilization of her RRSPs, the husband was able to obtain a professional certification that “substantially boosted his earning capacity”: para. 4. In 1998, the husband announced to his wife that he wanted a divorce. He had, apparently, been conducting an adulterous relationship for some time with another woman, whom he eventually married.

At trial, the judge had found the wife had been disadvantaged by the marriage and awarded spousal support, subject to the husband’s right of review of both entitlement and quantum. Three years later, the husband sought to terminate spousal support on the basis that he was unemployed and experiencing financial problems. Binnie, J for the Supreme Court of Canada, noted the chambers judge found the husband to be less than credible and that the wife was not self-sufficient and in need of spousal support.

[The chambers judge] noted that the respondent [wife] was still “consumed by bitterness over the end of her marriage and what she sees as the betrayal and duplicity of her former husband; and her inability to move on in the workforce is unfortunate: para. 10.

The BCCA dismissed the husband's appeal. Southin, JA held that "the *Divorce Act* does not prevent consideration of a failure to achieve self-sufficiency as being the result, at least in part, of the emotional devastation caused by the other spouse's misconduct": para. 13.

On further appeal to the Supreme Court of Canada, Binnie, J upheld the decision of the BCCA and distinguished s. 11 of the *DA 1968* from ss. 15. 2(4), (5) and 17(6) of the *DA 1985* to support his finding that

[t]hese provisions make it clear that misconduct should not creep back into the court's deliberation as a relevant 'condition' or 'other circumstances' which the court is to consider when making or varying a spousal support order (s.15.2(4)). Misconduct, as such is off the table as a relevant consideration: para. 20.

Binnie, J proceeded to make a distinction between misconduct, per se, and the *consequences* of misconduct. He held that, while the legislation excluded the former, it did not necessarily exclude the latter. In making this distinction, Binnie, J. allowed consideration of the sequelae of spousal misconduct to be taken into account in support claims. In order to make these determinations, it is necessary to identify the spousal misconduct in order to link it to its consequences. However, having made this pronouncement, Binnie, J proceeded to base his decision on the myriad of other factors that prevented the wife from achieving self-sufficiency, claiming her emotional trauma, in itself, was not enough.

The decision in *Leskun* is significant; it invites the court to recognize, examine and assess allegations of woman abuse in order to determine if a wife's failure to achieve economic self-sufficiency has resulted from, amongst other reasons, the sequelae of the abuse she endured. "The conclusion to be drawn from the judgment of the Supreme Court of Canada is that it is the circumstances of each spouse at the conclusion of their marriage which is of ultimate importance in determining the entitlement to spousal support, not how those circumstances came to pass" (J.-P. Boyd, 2007:306-307). This interpretation would affect applications for support *de novo* as well as variation applications. None of the judge participants referred to *Leskun* in their interviews,

although a few of them alluded to the *ratio* of the decision as their guiding principle in making spousal support awards in cases of woman abuse.

The absence of domestic violence and abuse from statute as a ground for spousal support ignores the effects of such conduct (or misconduct) on the victim's ability to attain economic self-sufficiency, often at great cost to the victim of that misconduct, her children, and, ultimately, the state. Ursel has postulated that

[i]f it can be established that wife abuse serves no useful function in the current social patriarchal order, and if it can be further established that it is, in fact, costly to the state, both in terms of social costs and political legitimacy, then it seems we have a set of circumstances in which state interests can be seen to coincide with the interests of women (1986:267).

To date, we are still waiting for that moment of profound coincidence to be recognized.

e. Protecting Abused Women and Children – Restraining and Exclusive Possession Orders:

Restraining orders: “Protection or restraining orders ... that prohibit an offender from contacting his partner are among the most important legal innovations prompted by [the feminist lobby against domestic violence], both as a supplement to calling the police and as an alternative” (Stark, 2007:66). The availability of peace bonds and recognizance orders (with terms prohibiting contact or communication) against physically abusive spouses in criminal proceedings has tended to obscure their concurrence in the civil family justice system, as reflected in this quote. Why a victim might choose to avail herself of one justice system over the other depends on the circumstances of each case. The burden of proof is higher in the criminal justice system – beyond a reasonable doubt – and the request for a restraining order will necessarily accompany a criminal charge having been laid against the perpetrator.⁴⁸ One would assume that the lower burden of proof and the absence of a criminal association with civil applications for restraining orders (but not with contempt of these orders) would make them attractive to abused women, particularly when claimed in motions for interim sole custody, restricted or no access and exclusive possession of the matrimonial home.

Such claims, to be persuasive, should be advanced on an emergency basis, in toto, representing the ‘protection package’ offered under the *FLA* and *CLRA* that the police will be called upon to enforce.

The reported decisions regarding applications for restraining orders reveal that some judges in the family justice system are not predisposed to making these orders on application by either wives or husbands.⁴⁹ Inasmuch as an emergency order will be made without notice to the alleged perpetrator, judges might regard this process as contrary to the right of reply by the respondent, particularly as the consequences of these orders could include removal from the matrimonial home and a no-contact provision affecting the respondent’s relationship with his/her children. Another issue with which the courts are concerned arises when an emergency restraining order accompanied by an exclusive possession order made under s. 24(3) of the *FLA* situates one party in the matrimonial home with the children, thereby establishing a status quo regarding possession and custody before judicial determinations have been made for either. Accordingly, the courts must weigh competing interests constructed between the perceived right of the abuser to face his/her accuser and the judicial mandate to promote the best interests of children.

In some cases, it appears that judges appear more concerned with protecting, not just the proprietary and custodial rights of woman abusers, but their future welfare and social standing, as well. A judge refused to issue a restraining order against a husband accused of domestic violence by his wife, the wife’s mother, and various neighbours “as that would expose the father to possible criminal sanctions in the future”: *L.M. v D.K.O.* (2010), para. 68. In this case, the court seemed more concerned that the father’s re-assaults (that the judge evidently believed were likely) would result in his incarceration were a restraining order to issue than he was for the welfare and safety of his victims.

Sections 46 of the *FLA* and 35 of the *CLRA* allow the courts to issue interim or final restraining orders on the basis of the applicant’s “reasonable grounds” to fear for her/his safety or that of her/his children. Clearly, what will constitute “reasonable grounds” is up to the presiding

judge, not the applicant, to determine (see Chapter Six). Dunn, J, set out the definitive criteria for granting a restraining order in Ontario in *Khara v McManus* (2007). The following excerpt has been repeated in numerous subsequent decisions.

When a court grants a restraining order in an applicant's favour, the respondent is restrained from molesting, harassing or annoying the applicant. It is not necessary for a respondent to have actually committed an act, gesture or word of harassment to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. However, an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant. A restraining order cannot be issued to forestall every perceived fear or of insult or possible harm without compelling facts. There can be fear of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with the applicant's fears: para. 33.

Further, Dunn, J stated that past actions or words of harassment might be relevant to an existing application for a restraining order, but only if they have "some current relationship with the applicant's present fears": para. 34. The intervening period between the past aggression and the possible future aggression will, in that case, be looked at closely by the court. However, judges cognizant of the effects of coercive control may be more sensitive to the threat posed by a long-standing pattern of abusive conduct. In this regard, see Chapter Six for OCJ O's thoughtful response to this issue.

In *Edwards v Tronick-Wehring* (2004), the parties had met while they were in-patients in a psychiatric facility. The husband was diagnosed with clinical depression and personality disorder. There were two children of the marriage, whom he was alleged to have abused. Following separation, the mother obtained an interim order for sole custody and an emergency restraining order. The father was granted access, to be supervised by the maternal grandparents, which proved unworkable. The father was then granted supervised access to be exercised at a local access centre; three months later, the centre terminated his access privileges due to his inappropriate behaviour with the children. The mother sought an interim restraining order.

The Office of the Children’s Lawyer conducted an assessment of the father, which disclosed “no serious concerns about the relationship between the father and the children” and recommended a resumption of supervised access: para. 44, notwithstanding also finding the father was a habitual drug user, had failed to follow the assessor’s recommendation to attend an anger management program or obtain ongoing psychiatric counseling.

Rogerson, J denied the application. The court acknowledged the husband had threatened suicide on many occasions, had a serious personality disorder that was difficult to treat, even if he were to submit to treatment, had abused the children during cohabitation, had only recently stopped using marijuana, had defied the rules of the access centre and had been engaged in a “power struggle” with staff. However, Rogerson, J asserted that “[a]ccess is, of course, the right of the child”: para. 65. Further, the court asserted that the custodial parent could not determine what was appropriate or inappropriate for her children; “much of the characterization of inappropriate behaviour was subjective and being driven by the mother’s views”: para. 57, which, in turn were found to be unreasonable (even though the access centre supported the mother’s position). Rogerson, J denied the mother’s application for a restraining order and ordered supervised access with no conditions (even though supervised access had proven unworkable).

A somewhat more satisfactory result was achieved in *Van Roon v Van Roon* (2013). The parties were married for five years, and had two young children. The marriage was characterized by woman abuse. The wife was verbally demeaned, isolated and physically intimidated. There was evidence the husband had a “controlling personality”: para. 26; and determined which people the wife could see and to whom she could speak. There was also evidence that the husband had been inappropriately rough with one of the children, refused to allow the wife to immunize the children, and would not let the older child be registered in school. On an interim motion, the wife claimed sole custody and requested a restraining order.

Sherr, J found the allegations of domestic violence “very concerning”: para. 35.

... this court is well aware that victims of domestic violence (male or female), for many reasons, including shame, lack of self-esteem, emotional paralysis and fear, often do not report domestic violence. The failure to report domestic violence doesn't mean domestic violence hasn't occurred. On the other hand, the reporting of domestic violence at this time doesn't necessarily mean that it actually took place. The evidence has to be closely scrutinized: para 41.

Sherr, J noted that the husband had refused to cooperate with the access supervisor, which he characterized as “poor judgment on behalf of the father [that] raised a concern about his ability to prioritize the needs of the children and corroborated the mother’s allegations of his controlling personality”: para. 49. Sherr, J granted a temporary restraining order. It would still appear from these reasons that the wife’s allegations of abuse “at this time” were not enough to persuade the judge that a restraining order should issue – the corroboration of the husband’s conduct by the access supervisor was necessary. See also: *Fuda v Fuda* (2011).

Some judges have issued “banishment orders” in cases of a history of extreme woman abuse and an ongoing danger to the victim(s). In *Hamilton v Hamilton* (1996), the wife sought an order permanently banishing the husband from the District of Muskoka where she resided – once, of course, he was released from prison after serving his sentence for attempting to murder her. Blair, JA found that there was no statutory authority to banish a perpetrator “from an entire District”: para. 50, although such orders have been issued in criminal sentencing proceedings involving men convicted of uttering death threats to their ex-wives and children, as well as breach of recognizance: *R v Sayyeau* (1995); and for criminal harassment: *R v Maheu* (1995). Accordingly, Blair, JA issued a recognizance order with the condition that the husband did not enter upon the properties in which the wife resided, permanently or temporarily “to the best of his knowledge”: para. 50. One can only imagine that this recognizance order provided little comfort or sense of safety to the wife.

Exclusive possession orders: Section 24 of the *FLA* allows a court to make an exclusive possession order regarding the matrimonial home and its contents. Sections 24(3) and (4) grant the court considerable discretion when considering applications, whether temporary/emergency or

permanent applications for exclusive possession. In the case of applications for temporary possession, the courts have made a distinction between those situations where the spouses continue to reside in the matrimonial home and those cases where they live in separate dwellings (Hovius, 2010).

Section 24 (3)(a) makes “the best interests of the children affected” the first consideration in determining whether to make an order for exclusive possession. In this regard, the possible disruption to the child of a move to another residence, as well as his/her wishes “shall be considered” (s. 24(4)). This subsection must be read with section 24(3)(f), directing the court to consider “any violence committed by a spouse against the other spouse or the children”.

The cases reveal that judges treat applications for long-term or permanent possession of the matrimonial home differently from those for temporary possession, with the best interests of children being the paramount consideration in the case of applications for long-term possession (Hovius, 2010). The distinction noted by Hovius between the judicial treatment of applications for temporary or permanent exclusive possession makes little sense. One would assume that children, whose lives are already disrupted by their parents’ situation, particularly in cases of domestic violence, would benefit from the stability provided by remaining in their homes. The benefits to children derived from remaining in the home with which they are familiar while their parents re-establish their lives, often on unforeseeable trajectories, cannot be under-estimated (Goldstein et al, 1979).⁵⁰

The judicial preoccupation with ‘rights’, particularly rights that have yet to be identified and/or proven, has had deadly consequences for the victims of woman abuse. In *Behrendt v Behrendt* (1990), the wife sought an exclusive possession order for the matrimonial home. She alleged that the husband had physically assaulted her on a number of occasions and emotionally and psychologically abused her and their teenaged daughter, whom he had also slapped. The wife further alleged that the husband was depressed and suffered from other psychiatric problems. The

husband denied the wife's allegations, and adduced an affidavit from his son (who was estranged from the mother) in his support.

Charron, J dismissed the wife's application for an order for exclusive possession of the matrimonial home on the basis of the material provided in the affidavits. Noting that "[t]he Court should only exercise its power to make such an Order with great care", she was not persuaded to grant the order on the basis of the nature of the allegations, and in light of the contradictory evidence provided by the husband and the son, and the advanced ages of the children. Three months later, the husband murdered the wife and thereafter committed suicide.

The *Behrendt* case is indicative of the judiciary's pre-occupation with rights over safety. Clearly, s. 24(3)(f) of the *FLA* directs the court to consider "any violence committed by a spouse against the other spouse or the children" when considering the best interests of the child in applications for exclusive possession of the matrimonial home . Therefore, it is impossible to understand why and how judges refuse to make exclusive possession orders, particularly interim or emergency orders, when faced with allegations of domestic violence by women living in fear for their safety and that of their children. Perhaps the legislation would benefit from moving s. 24(3)(f) to the top of the list of considerations to reinforce this point. Given the absence of space or place in the civil family justice system for the narratives of abused women, it is difficult to appreciate how a judge would ever be in a position to challenge an (allegedly) abused woman's "fear for her safety" on an interim or emergency application. Judges who must weigh the safety of an allegedly abused woman against the temporary inconvenience her potential abuser might have to endure were he to be forced to seek alternative accommodation for two or three days (the usual term of an emergency exclusive possession order) should not hesitate to privilege safety over 'rights' or convenience. This position was promoted by a very small minority of the judge participants involved in this research study.⁵¹

Non-physical violence has been characterized as “violence” for the purposes of invoking s. 24(3) of the *FLA*. In *Hill v Hill* (1987), Fitzgerald, J found that the husband’s psychological abuse of the wife constituted ‘violence’ within the meaning of the section. However, not all judges are so liberal in their conceptualization of the term ‘violence’. Campbell, J refused to grant an order of exclusive possession of the matrimonial home to the wife in *Strobridge v Strobridge* (2000). The parties continued to live in the home after separation while they “treated each other with rancor, pettiness and childishness”: para. 3. Campbell, J averred that “there is no doubt in my mind that Mr. Strobridge has, at times, been emotionally abusive to his wife”: para.10. However, Campbell J relied on a dictionary definition of “violence”: “the exercise of physical force so as to inflict injury on or damage to persons or property”: para. 10. He posited that, had the legislators intended “that the court exclude a lawful owner from his or her primary residence for behavior that is emotionally abusive, they would have been more clear in their intent, rather than use the word ‘violence’”: para. 10. Campbell, J concluded the litigants’ behaviour was insufficient to qualify as “violence” for the purposes of s. 24(3).

Judges have denied ordering exclusive possession in some cases where the parties continue to occupy the matrimonial home in the express hope that continued cohabitation will lead to better relations between the spouses for the sake of their children: *Lauro v Lauro* (1988), *Korzec v Korzec* (1994), *Black v Black* (2008). They reflect the aspirational quality some judges attribute to their decisions: that they can alter human conduct. However, these decisions have been criticized for allowing volatile situations to continue (Hovius, 2010). It is difficult to imagine that forced cohabitation (the result of such orders) would diffuse hostilities between battling spouses. Instead, the consequences might include increasing the antagonism to the detriment of the weaker parties: the abused woman and her children.

However, *ex parte* orders for exclusive possession have been made in some cases in order to remove abusers from their matrimonial homes (Hovius, 2010): *Lorimer v Lorimer* (2009), *Kutlesa v*

Kutlesa (2008). These decisions should be contrasted with that of O'Connor, J in *Skrak v Skrak*, in which he refused to grant an exclusive possession order where the abusive husband was already subject to a criminal court probation order, and thus "no longer pos[ed] any danger: para. 4. Unfortunately as the notorious case of *May and Iles*⁵² illustrates, there is little any court order – criminal or civil – can do to prevent a perpetrator from harming his victim if he has the requisite intent to do so and the police are not prepared to uphold the orders made to protect victims.

11. Compensating Victims of Woman Abuse in the Civil Family Justice System:

With the legislative prohibition against interspousal torts removed by the *FLRA 1975*, there no longer was any statutory impediment to abused women suing their abusive spouses in tort, nor abused children pursuing their abusive fathers. However, the acceptance of tort as a remedy for woman abuse has been slow, and the inclusion of tort claims in family law proceedings remains a relatively rare phenomenon. Damages in tort have been awarded in the family law context for domestic violence and abuse, for assault, battery, sexual assault, confinement, fraudulent misrepresentation and conspiracy. However, claims for damages for malicious prosecution or abuse of process have been less successful (Carson & Stangarone, 2010).

A claim for damages for battery, negligence, fraudulent and negligent misrepresentation and intentional infliction of emotional distress survived a motion to dismiss it as disclosing no cause of action: *Bell-Ginsburg v Ginsburg* (1993). The husband had hidden his bisexuality from the wife and thus exposed himself and her to the risk of contracting AIDS. Rosenberg, J identified three characteristics of a fiduciary relationship: 1) the fiduciary has scope for the exercise of some discretion or power; 2) the fiduciary can unilaterally exercise that power or discretion such that the beneficiary's legal or practical interests are affected; and 3) the beneficiary is "peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power": para. 29. However, legal commentators have noted that "... the Court has been generally reluctant to impose a fiduciary

obligation between spouses to compensate a litigant for losses suffered as a result of emotional or financial distress” (Carson & Stangarone, 2010:253).

While access parents may allege suffering emotional and psychological harm (as well as financial expense) as a consequence of being frustrated in their attempts to see their children by the custodial parent (the purported ‘fall-out’ from the PAS), the courts have not been prepared to consider damage claims for this type of pain and suffering: *Frame v Smith* (1987). In this case, the father alleged that he had incurred significant financial expense in pursuit of his access rights, and, further, had suffered severe emotional and psychic distress as a consequence of the wife’s conduct.

In dismissing the husband’s claim, La Forest, J, for the majority of the Supreme Court of Canada, held that the tort of alienation of affection did not exist in Canada: *Kungl v Schiefer* (1962). Interestingly, the Court found that it was “doubtful that a parent had at common law a right of access, as opposed to custody, upon which an action could be grounded”: para. 8. One might question whether this case would have been decided differently under the *CLRA* (this was an appeal of a decision of the OCA). However, the majority was adamant that the creation of such a tort was ill-advised:

The spectacle of parents not only suing their former spouses but also the grandparents, and aunts and uncles of their children, to say nothing of close family friends, for interfering with rights of access is one that invites one to pause. The disruption of the familial and social environment so important to a child’s welfare may well have been considered reason enough for the law’s inaction, thought there are others: para. 9.

Abused women have had to overcome the assumption, expressed by McDonald, DCJ in *Wesley v Mosher* (1990), that they may not be entitled to general damages for on-going physical abuse if it is determined they had ample opportunity to leave their abusers, even in the face of medical evidence attesting to their emotional vulnerability.

However, a growing body of case law suggests that abused women and their lawyers are increasingly prepared to advance claims in tort for woman abuse, and judges are prepared to enter-

tain them. A review of these cases reveals that, when the courts accept the veracity of the victims' allegations of domestic violence, damage awards will be made. Further, judges are prepared to make punitive costs awards, and "[i]t is increasingly clear that courts will not ignore willful and unconscionable behaviour or misconduct and obstructionist tactics in family law" (Carson & Stangarone, 2010:285), but it is not clear if this result would only be available in a tort action.

The amount of damages awarded in tort claims brought as a consequence of woman abuse do not appear, from the judgments, to fit within the spectrum of generally accepted general damages awarded in personal injury actions, such as those arising from slip and fall or automobile accidents.⁵³ However, these types of claims in tort usually arise as a consequence of negligent behaviour. There is no question, in the case of woman abuse, that the injuries result from anything other than intentional acts on the part of the abuser. Accordingly, the courts have awarded aggravated, and sometimes punitive, as well as general and special damages to victims.

In *M.C. v F.M.* (1990), Keenan, J awarded \$40,000 in general and aggravated damages to the wife as compensation for the husband's sexual assault. Although framed as an action for damages for sexual assault, Keenan, J also described physical and verbal abuse by the husband, as well as confinement. The award represented the wife's shock and physical hurt, which the court considered to have resolved, but her humiliation and degradation "linger[ed] on": para. 37. Keenan, J acknowledged some of the wife's emotional sequelae could "remain with her for life": para. 37. No costs were ordered.

In *Surgeoner v Surgeoner* (1993), O'Connell, J awarded the wife \$4,000 for general damages and \$4,000 for punitive damages occasioned by her husband's having assaulted her by kneeling her in the groin. The wife, suffering from chronic pancreatitis, experienced lower back pain, headaches, neck stiffness, limited motion, tenderness of muscles and her groin as a result of the assault. The husband was charged and convicted. O'Connell, J described the husband's conduct as "malicious and contemptuous": para. 39, and acknowledged his abuse of the legal system in order to

thwart the wife's property and support claims (18 orders issued upon motion, 17 of which were initiated by the wife in response to the husband's abuse of the legal process, many of which were ignored). While he made no award of damages on this basis, he was prepared to award nominal punitive damages in light of the husband's criminal conviction.

It should be noted that the husband's total assets at valuation date were assessed at \$1,856,130.89.

In a similar vein, Métivier, J, in *Dhaliwal v Dhaliwal* (1997), awarded the wife \$5,000 in general damages, and aggravated and punitive damages of \$5,000 in recognition of the three instances of physical abuse and ongoing verbal abuse to which she was subjected by the husband. The husband was charged and convicted of assaulting his wife. The judge acknowledged there had been other incidents "where the husband lashed out violently at his wife and daughter": para. 58. Further, the wife had been so diminished in the eyes of her community by her husband's actions that she attempted suicide. She was left with ongoing depression, sleep disturbances, a lessened ability to concentrate (affecting her employment), general anxiety and a loss of self-esteem.⁵⁴

In rendering her decision, the judge posited that "a move to a new country presents challenges ... a new culture of course imposes not only new freedoms, but sometimes new restrictions. Often, some of these, either freedoms or restrictions, clash and conflict with the old country's ways": para. 54. Métivier, J rejected the husband's defence that spousal violence was acceptable in his country of origin. In the opinion of the court, the award of \$10,000 "[was] meant to indicate society's outrage at this conduct and to compensate the wife for the loss she has suffered": para. 66. Costs were reserved.

In *Rezel v Rezel* (2007), Young, J cited *Dhaliwal* and awarded the wife \$7,500 in general damages for two assaults by the husband, although the wife recounted a history of violence and abuse throughout the marriage. The court accepted the evidence of the *husband* that he had only assaulted the wife on two occasions. Acknowledging that the husband "was clearly contrite",

although he did not admit to his ongoing abuse, Young, J limited the award on the grounds that “[w]hile unacceptable, and constituting clear instances of assault, these incidents did not result in lasting injury to Ms. Rezel”: para. 32. She reserved costs, and no order was made for interest.

In *McLean v Danicic* (2009), Young, J was once again called upon to determine damages in a family court action. The parties co-habited for five years, during which time the plaintiff contributed financially and through her labour to the construction of a house and cottage. The parties separated after the plaintiff injured herself and could not longer work. Following separation, the plaintiff sought an interest in the properties from the defendant.

In response to the plaintiff’s claims, the defendant embarked upon a campaign of harassment, stalking, blackmail and intimidation. He threatened to kill her. Police were contacted, although it is not clear from the judgment if the defendant were ever charged. As a result of this conduct, the plaintiff suffered from acute anxiety, fearfulness and great distress. She considered moving to another jurisdiction and changing her identity. The defendant also dissipated the properties to defeat her claim. His abuse of the court resulted in 18 court appearances and 23 endorsements, multiple breaches of court orders, unnecessary delays and increased costs. Ultimately, his statement of defence was struck out, and the trial proceeded as an undefended matter.

In awarding the plaintiff \$15,000 in general and aggravated damages, Young, J indicated that “[t]his award is intended to ‘indicate society’s outrage at this conduct’”, citing *Dhaliwal*: para. 87. Young, J also awarded the plaintiff \$200,000 in costs in recognition that “the escalation of costs in this case lies largely at Mr. Danicic’s feet”: para. 98. The plaintiff was granted a vesting order in the two properties to recover her award pursuant to *Lynch v Segal*, although the judge admitted that, given the defendant’s conduct, the plaintiff was unlikely to collect.

In *MacKay v Buelow* (1995), Binks, J awarded the wife \$25,000 in general damages, \$15,000 in aggravated damages, \$44,000 in future care costs, pre- and post-judgment interest and solicitor and client costs in her action for damages for harassment and intimidation against the

husband, which conduct the judge characterized as “outrageous”: para. 16. Further, punitive damages of \$15,000 were awarded “because of the calculated, devilishly creative, and entirely reprehensible conduct by the defendant”: para. 17, relying on *Surgeoner* (1993). No Statement of Defence was ever filed by the husband. Notwithstanding the absence of a defendant to the action, Binks, J carefully identified those cases relied upon to fix damages.

More recently, Blishen, J, in *Shaw v Brunelle* (2012), awarded the wife general damages of \$65,000, a loss of competitive advantage award of \$25,000, future care costs to be determined, and pre- and post-judgment interest, with costs reserved. In this case, the parties were involved in a marriage of only one year. The parties separated when the husband was criminally charged with assaulting the wife, as a result of which she suffered a seriously fractured her wrist, requiring surgery and the insertion of screws and a metal plate. Following his criminal trial, the husband was found not guilty of assault causing bodily harm.

Blishen, J found the husband had committed the tort of battery. She referred to *Andrews v Grand & Toy Alberta Ltd.*, one of the “trilogy” of general damages cases decided in 1978 by the Supreme Court of Canada (see Note 53, this chapter) in order to assess damages. She refused to award aggravated damages on the basis of the Supreme Court of Canada decision in *Norberg v Wynrib* (1992), in which the Court held that aggravated damages are not to be awarded in addition to general damages, but general damages are to be assessed “taking into account any aggravating features of the case”: para. 109.

Blishen, J allowed that, without the “aggravating factors”, she would have assessed general damages at \$50,000.

In comparison, Beaulieu, J awarded \$65,000 in general damages and \$25,000 in aggravated damages to the wife in *N.C. v W.R.B.* (1999) for the physical and verbal abuse she suffered daily, and the sexual assaults she endured four to five time per week during six years of her 13-year relationship with the defendant. The plaintiff alleged the abuse started within three to six months of

the relationship and only ended one month before the defendant was arrested and charged with sexual assault, assault and uttering threats. He was subsequently convicted of sexual assault.

Citing *Dhaliwal* and *M.C.*, Beaulieu, J refused to award punitive damages, instead concurring with Keenan, J in *M.C.* that

by awarding aggravated damages, the court recognizes the immeasurable impact of the injuries suffered by the victim which are exacerbated by the way these injuries were inflicted. The court can only hope that by awarding aggravated damages, the victim can take solace in the fact that the wrongdoer is required to compensate her for the personal suffering she has endured: para. 12.

These cases demonstrate that the civil family justice system will acknowledge and condemn woman abuse in tort actions. The SCJ does have jurisdiction to make such awards. This line of cases suggests that, were the family legislation amended to include domestic violence and abuse in the definition of *conduct* to be taken into consideration in determinations of spousal support and property division, family court judges might be amenable to so doing. The acceptance by the civil family justice system of tort claims for domestic violence and abuse gives some hope that spousal misconduct might, once again, be relevant to abused women's claims for the rights and entitlements this chapter has revealed they are being denied.

12. Conclusion

“Abused women go to court with positive expectations of fairness. They assume there would be a focus on finding out the truth of the situation” (Taylor et al, 1996:64). They “hope for fairness and justice” (Taylor et al, 1996:44), but are shocked to discover that they are not listened to and have little credibility (Taylor et al, 1996).

Law, as a socializing institution, and those who have pledged to uphold – and represent it – cannot be expected to transcend what has become popularly ‘known’ about the phenomenon of woman abuse and assume a radical, and thus challenging stand against social stasis and the hegemonic discourse. Nor should it be assumed that judges are cognizant of the failures and omissions in the legislation and case law that oppress and silence abused women. Judges, after all, do

not set out to promote ‘bad law’, but they can be unwittingly complicit in promoting the dominant patriarchal social discourse that privileges men to women’s detriment.

The critical discourse analysis used to examine the cases included in this chapter reveals how abused women have been marginalized and oppressed through judicial discourse in various ways:

First, judges use disparaging language to refer to female litigants, for example, describing an abused woman as “no shrinking violet” to deny her allegations of abuse (*Ruscinski*, per Cavarzan, J),

Second, judges minimize the importance of mothers to their children through language, and/or the juxtaposition of statement or paragraphs. McWatt, J, in *A.G.L.*, clearly showed his preference for the husband as the custodial parent by referring to the husband as “father” throughout his judgment, while marginalizing the wife’s relationship with her children by referencing her as the “wife”. In so doing, McWatt, J may have been reinforcing through language the termination of the mother/children bond his judgment imposed on the mother. In another example, in *Gordon*, by tracing the references to the mother in the decision of McLachlin, J, the devolution of the importance of mothers in the lives of their children at law can be seen mirrored in judicial language. In para. 36, McLachlin, J acknowledges that the custodial mother is “expected to have the most intimate and perceptive knowledge of what is in the child’s interest’. But, immediately thereafter in para. 37, she asserts that the mother’s “rights” and “interests” are irrelevant except insofar as they impact the best interests of the child. These concepts appear incongruous; a mother who knows what is in her child’s best interests through her “most intimate and perceptive knowledge” has surely an interest in promoting her *child’s* best interests, and asserts her “rights” to do so. The proximity of these two statements appears to lead to one of Nedelsky’s “shocking” failures in judgment in legal decision-making (1996) .

Third, judges gender their conceptualization of conduct by ignoring most cases of woman abuse while finding in favour of abusive men who allege they are victims of PAS: *A.G.L.* Judges avoid findings of PAS when fathers engage in egregious conduct toward mothers: *Murphy*, and

appear reluctant to characterize abusive and controlling men as “alienating”, but will describe their “behaviours” as “alienating”: *J.K.L.*, as if the individual is not responsible for his misconduct. This interpretation of judicial language may correlate with some judges’ tendency to ‘blame the victim’; if the abuser is not responsible for his conduct, perhaps his victim is.

Fourth, judges may take greater offence to perceived misconduct on mothers’ part than on fathers’ in custody determinations. Smith, J, in *Hensel* criticized the father’s “failure to communicate” and for “painting the mother in an unfavourable [not ‘bad’] light”, but condemned the mother’s “high degree of vindictiveness” while relating minor incidents before granting sole custody to the father and terminating the mother’s access. In this decision, the hyperbole with which the judge referred to the mother’s conduct, compared to the nuance with which he described the father’s, appears to reinforce and legitimize the judge’s decision. A similar tendency toward hyperbolic invectiveness was detected in Wilson, J’s description of the ‘alienating’ mother in *Frame*.

Fifth, judges can use language to blame abused women for the misconduct of their perpetrators. Campbell, J, in *Melanson* described the wife’s response to her husband’s adultery, physical and emotional abuse as “nagging and challenging”, whereas the husband’s “assaultive behavior [only] occasionally reached a disgraceful [sic] climax”. One is left with the impression that the wife was constantly “nagging and challenging”, thereby triggering her abuser’s “occasional” responses. In *Edwards*, Rogerson, J dismissed the concerns of access centre personnel for the father’s inability to act appropriately during supervised access, asserting any negative assessment was “subjective” and “driven by the mother’s views” (researcher’s emphasis), suggesting that her assessment was incorrect and self-interested, and access personnel were being coerced into agreeing with her. Also, see the comments regarding *J.K.L.*, above.

Sixth, judges can use language to minimize abusers’ misconduct. Perhaps the most egregious example is that provided by Osborne, JA in *Hamilton* in which he utilized sarcasm in describing the hollow penitence of a convicted attempted wife murderer as “somewhat understated” but

“appropriate”. It is possible that, by treating the husband’s grievous misconduct with sarcastic understatement, Osborne, JA was attempting to justify his refusal to grant the victim her banishment order.

Seventh, judges can use language to inflate the importance of abusive husbands and fathers in their children’s lives in order to justify granting orders for access or even custody. The word “loving” is often used to describe abusive husbands who are also disinterested fathers. MacPherson, J, “accepted that the husband loves his two daughters” in *Hilpel* despite the father’s physical, psychological, emotional, verbal and financial abuse of his wife and having expressed no interest in seeing his children or cooperating with the CAS in facilitating access. Similarly, in *Renaud*, Bolan, J called a father “warm and loving”, notwithstanding he physically abused the mother, locked her out of the matrimonial home and refused to allow her access to their children. He also described this “warm and loving” father as “abrasive”, “mean spirited” and prone to “fits of anger”. The mother, on the other hand, was lauded for having “rehabilitated herself from the marriage”: para. 13, a phrase reminiscent of those often used to describe reformed substance abusers. The use of this phrase suggests that Bolan, J may have viewed the wife as weak-willed and unable to extricate herself from her abuser – as if it were her responsibility to leave, and not her abuser’s responsibility to stop abusing his victim.

Eighth, sometimes the use of language can inure to the benefit of abused women. In reiterating the trial judge’s description of the husband in *Leskun*, the BCCA ‘painted a picture’ of him that followed him up to the Supreme Court of Canada, to his detriment. The husband conduct was characterized as a “betrayal” and “duplicit[ous]” of the wife. His credibility was challenged at every level, and his appeals were dismissed. Woman abusers have been described as: having “controlling personalit[ies]” who “verbally demeaned, isolated and physically intimidated” their wives: *Van Roon*; being “malicious and contemptuous”: *Surgeoner*; and whose conduct can be “outrageous”:

MacKay. It is, however, far easier to find negative language in the reported cases used in descriptions of abused women than abusive men.

Ninth, judges can reveal the depths of their displeasure with the decisions of their brothers and sisters through the use of language. L'Heureux-Dubé, J used particularly strong language to distance herself (and her decision) from the trilogy. In *Moge*, she employed “perverse”, “penalize”, “simplistic”, “poverty”, “disenfranchised”, and “remote chance of success” in para. 63 alone when describing the trilogy, how it has been interpreted and its consequences. The strength of her words, and the images they convey, underscore the Court’s intention to repudiate the trilogy.

Tenth, the courts sometimes appear to attempt to temper the consequences of their decisions that might be oppressive to women (and thereby demonstrate their own sensitivity to gender inequality) by acknowledging them to be “unfair”: *Thibodeau*, per Blair, JA, and a consequence, not of judicial interpretation, but of “policy”, and thus outside the court’s purview and control. It is difficult, however, to rationalize the position taken in *Thibodeau* – one of judicial impotence – with those espoused by the courts in their law-making function. It would seem that just may ‘pick and choose’ their battles with legislators; it appears they have yet to do so on behalf of abused women.

Examining the subjective experiences of abused women in the family courts of Ontario, and the judiciary’s understanding of those experiences are the subject matter of Chapters Five and Six of this research study. Determining how those experiences were identified and analyzed is discussed in the next chapter.

CHAPTER FOUR

THE RESEARCH METHODS

1. Introduction

Conceptualizing the design of this study was a long and pain-staking process. I was cognizant, both from my review of the relevant literature, and from my own insights gained from working with abused women in my capacities as a lawyer and social worker, of the existence of a disconnect between what abused women sought – or hoped to achieve – as litigants in family court proceedings, and what they eventually realized.

In the Introduction to this study, I identified the rationale for engaging with the within topic, my assumptions about the law, woman abuse, and their intersection, and the research questions that compelled me to engage in this interdisciplinary study. I outlined the various methodologies I employed in this research study. In this chapter I discuss the research methods I utilized within a phenomenological framework, in identifying and choosing my participants, conducting interviews, reviewing, coding, analyzing and triangulating my data, developing and presenting theories emerging from my analyses in response to the research questions posed in the Introduction.

2. The Requirements of Phenomenological Research

Moustakas has described the requirements of an “organized, disciplined and ‘systematic’” phenomenological study as:

1. discovering a topic and question rooted in autobiographical meanings and values, as well as social meanings and significance;
2. conducting a comprehensive review of the professional and research literature;
3. constructing a set of criteria to locate appropriate co-researchers (participants);
4. providing co-researchers with instructions on the nature and purpose of the investigations, and meeting the formal ethical requirements of informed consent and confidentiality;
5. developing a set of questions or topics to guide the interview process;

6. conducting and recording a lengthy person-to-person interview(s) that focuses on a bracketed topic;
7. organizing and analyzing the data to facilitate development of individual textural and structural descriptions, a composite textural description, a composite structural description, and a synthesis of textural and structural meanings and essences (1994:103-104).

For the purposes of this study, I adopted the psychological approach to the phenomenologically-based methodology inherent in grounded theory, which focuses upon individual, not group, experiences (Creswell, 1998). This empirical phenomenological approach required an investigation of the participants' experiences in order to obtain comprehensive descriptions "that provide the basis for a reflective structured analysis that portrays the essence of the experience(s)" (Moustakas, 1994:13). The analysis involved my determining the underlying structures of the experience by "interpreting the originally given descriptions of the situation in which the experience occurs" (Moustakas, 1994:13). This method of analysis lent itself well to this study by allowing the survivor participants' narratives to be analyzed individually.

Moustakas's criteria 1 and 5, above, have been addressed in the Introduction to this study. My self-identification in the Introduction as a child witness of woman abuse, experienced family lawyer, and social work researcher of and with abused women satisfy Moustakas's requirement that the phenomenologist have experienced the phenomenon under investigation (1994).

I shall now respond to the remaining criteria, in turn, to explain how this research study was conducted.

3. Conducting a Comprehensive Review of the Professional and Research Literature

Phenomenologically-based research draws on a variety of sources, including survey, historical and interview observations of previous investigators (Denzin, 1984). Inasmuch as phenomenological inquiry is interdisciplinary, my literature review encompassed scholarly articles, reports of research studies, and conversations with experts from various fields, including sociology, social work, psychology, sociology, neurology and psychiatry, as well as law. I continually updated my

statistical information throughout the preparation of this dissertation. Further, given that phenomenology views contemporary reality – that which is accepted and known in every-day life – as the sedimentation of historical knowledge (Berger & Luckmann, 1967), I situated the various topics presented in my literature review within their relevant socio-historical contexts. My case law review, contained in the previous chapter, is a form of primary source research material that expanded my critical analyses of legislation relevant to marital breakdown as well as provide an historical context for my interviews with judge participants.¹

4. Identifying Participants

Identifying survivor participants: This study engaged in “purposeful” or ‘purposive’ sampling in order to secure “information-rich cases” for in-depth analysis (Patton, 1987:51). In accordance with the fundamental criterion for phenomenological research that subjects must have experienced the phenomenon in question (Moustakas, 1994), all participants have been (or were currently) victims of woman abuse who had appeared (or were appearing) as litigants in proceedings in the civil family justice system.

Further criteria for consideration in choosing participants for the proposed study included: demonstration of a degree of personal introspection and articulation that would allow the participant to discuss her subjective experiences of woman abuse and the civil family justice system (Padgett, 1998); varied engagement within the civil family justice system, and an ability to speak English, or provide a competent interpreter. I also sought participants who could be identified as members of those cohorts particularly susceptible to woman abuse, such as poor women, older women, disabled women and immigrant women. I hoped to secure participants from various socio-economic strata, such as homeless women, welfare recipients, working women, university students, professional women and women with independent financial means. In accordance with the parameters of my research questions, I sought women with children who were the subject of custody, access and/or support applications and disputes, women with support and property claims, and women who

brought applications for restraining orders, exclusive possession orders, and/or compensation. I assumed that each participant would have had both positive and negative experiences.

Identifying judge participants: I am fortunate to count amongst my friends a number of judges who have taken great interest in my research study, and offered to assist me in securing judge participants. These judges contacted a number of their brother and sister judges to introduce them to my study and secure their cooperation. Further, in preparation for this study, I approached the (then) Chief Justice of the OCJ, Justice Brian Lennox, to request permission to contact and interview members of his bench. Justice Lennox advised me that I did not need permission to contact and/or speak to any judge, but gave his consent and invited me to do so.

The legitimization of this aspect of the study can be found in the body of scholarship within feminist research that examines the “consciousness of dominant others” to “unpack how dominants manufacture and conceptualize the relations with subordinate others” (Fine, 1998:146). The study of ‘elites’ such as judges invites investigation of the way society is, or ought, to be organized; we are also illuminating not ‘who ought to govern’, but ‘who governs?’ (Moysen & Wagstaffe, 1987). Notwithstanding the importance of this question in legal research, very few researchers how judges “manufacture and conceptualize” their relations with litigants appearing before them. Given that the nature of such an inquiry would involve a critical interdisciplinary inquiry of one of the most powerful cohorts in our society, the dearth of such studies is not surprising, since “social scientists too rarely ‘study up’” (Ostrander, 1995:133).

Studying ‘elites’ has its perils: for those used to being in control, the interview process can overwhelm the interviewer, influence the research, hold up completion of the study, and even affect the future career of the researcher (Skinner, 2005). However, my position as a senior member of the Ontario Bar, my personal relationships with various members of the lower and upper court benches, the fact that I was no longer a practising lawyer, and my age put me allowed me to approach members of the judiciary on a more-or-less equal footing.

I approached members of the family court benches around the same time as the Law Reform Commission was conducting its own investigation into the efficacy of the Family Courts in Ontario and the Final Report of the Family Justice Working Group in Civil and Family Matters (the Cromwell Report) (2013) had just been published. I presented my research as a complementary adjunct to those studies in an atmosphere of inquiry and change – there was a sense of mutual self-interest involved (Yaeger & Kram, 1995). Those judges who responded to my invitation to participate in this study expressed their eagerness to discuss their experiences of judging in family court proceedings. I was able to glean judges' own accounts of problematic evidentiary and procedural situations they confronted in their courtrooms involving allegations of domestic violence, rather than impose my own interpretations of judicial decision-making processes, or rely upon established theoretical constructions on the nature of judicial decision-making (Yaeger & Kram, 1995).

I realized that I would have to “keep to the interview – not the [judge’s] agenda” (Skinner, 2005:47). I was also mindful that some “judges have explicitly labeled feminist perspectives and an analysis of gender politics as biased, unscientific and inappropriate in the courtroom” (Charlesworth, 1999:7). I knew from the few informal discussions I had had with some judges that their views on domestic violence and abuse were antithetical to mine; I also knew from these same conversations that I had to find a way to convey what I was hearing from these judges in a manner that was both respectful *and* critically meaningful.

5. Sampling Procedures

Locating survivor participants: I prepared a flyer (Appendix A) that outlined the nature of the proposed study, a request for participants, the parameters for eligibility to participate in the study, my contact information, and my assurance of anonymity of the participants' identities. The latter was accomplished by assigning pseudonyms to survivor participants in my notes, in identifying the audio-tapes, in my analysis and in this study.

In response to a request from the Human Participants Review Sub-Committee of York University, I prepared a list of agencies located in Toronto and Peel Region (Appendix B), dedicated to assisting female victims of domestic violence and their children, (to be provided to those participants who requested such information, for whom the information would, in my opinion, be of benefit), and it is from that list that I chose agencies to contact in order to seek their assistance in locating survivor participants.

Recruiting survivor participants: Initially, I assumed that survivor participants would be eager and willing to participate in my study. Having worked with survivor advocates at the Woman Abuse Council of Toronto, my experience with those women suggested to me that many survivors of abuse who had addressed their abuse in legal proceedings might be proponents of social change who would embrace opportunities to relate their stories of abuse and survival as the means of raising public awareness of the issue of woman abuse. Certainly, research in the area of abused women's responses to domestic violence (Olesen, 2000) supports my own experiences gained from interacting with abused women, in my legal practice, social work research and practicum that abused women benefit from relating their narratives of abuse and survival.

However, locating survivor participants proved to be particularly difficult; this difficulty was, apparently, not unique to me.²

Rather than enjoying the anticipated luxury of being able to pick and choose candidates for this study from amongst a pool of survivors of woman abuse, instead I offered to interview any prospective participant who met the criteria for participation. These included women who:

- i. were referred by agencies that had agreed to assist me in my search for participants, including Sistering, Jewish Family & Child Services of Toronto, the Woman Abuse Council of Toronto, and the Barbra Schlifer Clinic, for which assistance I am forever grateful;
- ii. responded to my flyer, which was posted in various agencies in Toronto and Peel, included on-line on the website of CLEOnet, and was forwarded, without my knowledge (but with my gratitude), on my behalf to other agencies across Ontario by those involved with agencies assisting abused women; one participant was referred by a former student of the researcher;

- iii. were referred by a psychiatrist with whom I am familiar, and who agreed to act as emergency reference for any participants whom I believed were in immediate need of counseling;
- iv. was referred by a member of the Toronto Police Service (but, unfortunately, refused to participate);
- v. were referred by other participants, or friends of the participants, a process described as ‘snowball sampling’ (Padgett, 1998).

I was contacted by thirty-three prospective participants. A number of them had been involved only in child welfare proceedings, and thus were not eligible to participate in my study. Three contacts seemed to me to have a high level of anxiety that suggested their participation in the interview process would be too stressful for them, and I gently discouraged them from participating. Another would-be participant subsequently took issue with my request that I wished to review her court file, and subsequently refused to participate. I was contacted by one man (!), whose telephone message I returned, but I received no further response. A number of prospective participants lived too far away for me to interview them. One prospective participant, who insisted through multiple emails that I interview her, stood me up – I drove thirty-five kilometers to her home, only to find it deserted. Another, a self-proclaimed “Ph.D. graduate”, insisted that I grant her editorial authority over my dissertation as a condition of her executing the Informed Consent; I demurred. I was able to identify and interview seventeen survivor participants representing the “width and diversity” (Glaser & Strauss, 1967:63) of experiences of woman abuse across discrete and inter-related categories of self-identified race, ethnicity, culture, religion, class, age, class and economic status.

Notwithstanding these annoyances and inconveniences, those women I did interview were overwhelmingly obliging and gracious. I was thanked profusely for *my* time and interest in a topic that so impacted their lives. I was deeply touched by the generosity and strength of character I encountered from my survivor participants.

Identifying judge participants: Judge participants were recruited from amongst judges of the Ontario SCJ and family division of the OCJ sitting in and around Toronto who adjudicated contested

applications for custody, access, support, property division and restraining orders under the *DA 1985* (SCJ judges only), *FLA* and the *CLRA*. I did not limit my search for judge participants to judges whose legal practices had been restricted to family law, nor to judges who either sat exclusively on the family law bench, nor seemed to favour that bench by their attendance, but attempted to draw upon the varied professional experiences of our judiciary by including judges with backgrounds in criminal law and civil litigation.

The judge participants had to agree to participate in an interview approximately one and one-half hours in length. They were assured that the identities of all participants would remain anonymous. This was accomplished by referring to each throughout the course of this study, and in this dissertation, by letter names: SCJ A through J, and OCJ K through O. Accordingly, given the relatively limited number of judges who met these criteria, I have not identified in which courts my judge participants sit, nor provided any personal characteristics, other than sex, that might identify them (see Chapter Six).

I first contacted those potential judge participants who had been introduced to my research study by phone, either through their assistants or personally. In all cases, I followed up my initial contact with a confirming email containing my Information Form for judge participants. Only five of twenty-two initial contacts failed to respond. It was gratifying that those initial contacts resulted in further access to other members of the bench, by means of ‘snowball sampling’.

I was able to recruit seventeen judge participants. Unfortunately, I was unable to complete the last three interviews before being prevented from so doing by the Chief Justices of the SCJ and OCJ (notwithstanding that I had obtained the consent of the latter’s predecessor, which consent was never withdrawn) on the bases that SCJ judges were “too busy” and OCJ judges could not “give opinions”. However, I was able to interview a retired judge of the SCJ, and thus interviewed fifteen judge participants.

Informing all participants of the research process: All participants were apprised of the nature and intent of this study upon their first contact, the reason for their participation and the extent of their participation, what contribution their participation might make to the study and body of research literature concerning abused women in the family courts of Ontario, and the ways in which the information would be disseminated. They had to consent to being audiotaped, and the audiotapes being transcribed. Anonymity and confidentiality were assured, as set out in the Information Form that was provided to every participant, and can be found in Appendices C (for survivor participants) and E (for judge participants). All participants were required to execute an Informed Consent form (Appendix F) acknowledging and accepting these terms and conditions. A copy of the Informed Consent, as executed, was provided to each participant.

The survivor participants were asked to execute an Authorization and Direction to the Registrars of the courts in which their family law proceedings were brought (Appendix D) to assist me in accessing their court files (if a Registrar requested such authority). Unfortunately, not all the participants were aware of court file numbers of the legal proceedings in which they were involved; however, I was able to access and review the court files of fourteen survivor participants for the purposes of this study. A number of these participants were litigants in more than one court file, in more than one jurisdiction. Therefore, I reviewed twenty separate court files, some of which filled multiple bankers' boxes (indicative of the level of hostility between the parties), and attended at six different court sites.

6. The Interview Process

Survivor participants: In my initial conversations by phone or email with my survivor participants, I advised them that I would not inconvenience them; they were privileging me by agreeing to participate in my study and I wished to accommodate them in every possible way. I insisted upon meeting with the participants at times and places convenient to them, and, in this regard, conducted my interviews in my participants' residences, places of business, at York

University's School of Social Work, at Sistering and the Adelaide Women's Centre, and for one survivor participant, still embroiled in an abusive relationship, in a coffee shop and my automobile.

Prior to the commencement of each interview, I reiterated verbally to the participants the purpose of my study, my professional qualifications, the nature of the interview process, and my assurance of anonymity. I tendered my Information Form and Informed Consent to each participant, and carefully reviewed their contents. I stressed to each participant that her involvement in my study was entirely voluntary, that she could ask me to stop the audiotape at any time, and could withdraw from the interview at any point. I also requested that each participant execute an Authorization and Direction to be directed to the Registrar of the court(s) in which the participant's legal proceedings were brought.

One-on-one, in-depth interviews were conducted with the survivor participants, and audio-taped. For survivors of domestic abuse, qualitative methods, particularly long interviews, are important in order to allow sufficient opportunity for these voices to be heard (Kane, 2006; Ezzy, 2002). These interviews consisted of open-ended questions that engaged the participants in recounting their experiences of domestic violence and their involvement with the family courts. The questionnaire (Appendix G) that I developed for my survivor participants was necessarily general and open. It reflects those categories I had identified from my review of the literature, as well as my personal experience and expertise with abused women and the civil family justice system as both a lawyer and social worker, that I wanted to explore with my survivor participants. These categories included:

1. their personal histories of abuse within their families of origin and their intimate relationships;
2. their involvement in the legal process, including their representation (if any), their understanding of the proceedings in which they were involved, and their personal experiences during the course of their involvement;
3. the results of their legal proceedings, and whether or not they achieved the results they expected or wanted in and from the legal process;

4. their perceptions of the legal process, including the judiciary, as a consequence of the family law proceedings in which they were involved.

As the primary purpose of asking questions in qualitative research is to develop theory (Strauss & Corbin, 1998), it is imperative that research questions be framed in a way that will provide the requisite flexibility and freedom to explore the phenomenon in depth. “Also underlying this approach to qualitative research is the assumption that all of the concepts pertaining to a given phenomenon have not yet been identified, at least not in this population or place” (Strauss & Corbin, 1998:40). To add credibility to my data and analyses, I engaged in ‘member checking’ (Denzin & Lincoln, 2000; Creswell, 1998; Strauss & Corbin, 1998; Padgett, 1998; Rodwell, 1998; Patton, 1990, 1987) whereby I would relate to survivor participants in later interviews the assumptions and hypotheses I had formulated in my analyses of previous interviews. This strategy involved my explaining to my survivor participants the impressions with which I had been left from my discussions with other survivor participants in this study, and the hypotheses I had developed to that point, and then asking them whether my interpretations were in accord with their experiences – and, if not, why not (Strauss & Corbin, 1998). In this way, I was able to constantly monitor my own involvement in the data, by confirming the identification and parameters of my categories with the experiences and perceptions of my survivor participants. I thus avoided, to the extent I was able to bracket my own experience and expertise, my personal perceptions and opinions of the proceedings in which the survivor participants were involved, their understanding, as laypersons, of the legal aspects of their proceedings, the manner in which the proceedings were handled by their counsel (if retained), and the results of those proceedings.

I conducted the interviews as informal conversations. I did not take any notes during the interviews – my interviews with my survivor participants demanded my full attention. Some of my survivor participants could not relate their stories in any kind of chronological or logically coherent way; often, their narratives would shift from past to present, or they would leave out portions of their histories which I would have to explore when it became apparent that I could not follow their nar-

ratives, or subsequent events in their stories were predicated on prior events of which I had no knowledge, and thus had to explore. I observed that those of my survivor participants whose narratives exposed prolonged and severe physical, psychological and/or emotional abuse (Elizabeth and Diane) seemed to have the greatest difficulty relating their stories chronologically, and spoke of experiencing memory loss and cognition problems. Both Elizabeth and Diane related having been admitted to psychiatric facilities on various occasions: after “mental breakdowns” (Elizabeth); and after losing custody of her children (Diane). Diane insisted her memory loss and “problems thinking” were directly related to the years of violence and abuse she suffered, while Elizabeth claimed that she was “broken” as a result of her experiences with violence and abuse. I wondered if these participants’ self-descriptions were perhaps indicative of the type of brain injury and chronic PTSD such abuse victims suffer, as examined in Chapter One.

I prepared field notes and memoranda as soon as practical after the completion of each interview and document review, which included my impressions of the participants and my own self-reflections, all of which constituted another form of triangulation as I engaged in the interpretive process that is at the heart of qualitative research (Ezzy, 2002). I found these notes to be of some utility.

Although I indicated to my participants that our interviews should only take one to one and one-half hours, only two interviews were completed within that timeframe. In fact, the average interview length was three hours; one interview, conducted in various locales, including my car, took nearly five hours. That participant was obviously depressed, and related her thoughts of death and suicide. I was very concerned for her, and insisted that she immediately telephone the psychiatrist who had agreed to act as my emergency contact. I was relieved to later receive an e-mail from this participant indicating that she was receiving counseling from my contact and was no longer experiencing any suicidal ideation.

Throughout the interview process I engaged in constant self-reflection: the engagement by the qualitative researcher in continuous self-appraisal and self-critique to enhance awareness of her imposition of self in the research process (Dowling, 2007). However, as a qualitative researcher, I recognized that complete objectivity of the researcher is “unattainable”, or even “undesirable” (Strauss & Corbin, 1998:159). To try to be objective, in order to avoid influencing the interview, is fruitless (Ezzy, 2002).

Phenomenological analysis, however, requires that the researcher reveal her assumptions regarding the phenomenon being examined, and then “bracket” these preconceptions in order to approach participants’ narratives as bias-free as possible (Creswell, 1998).

Bracketing merely changes our attitude toward the world, allowing us to see more clearly. We set aside preconceptions and presuppositions – what we already “know” about the social world; we refrain intentionally from all judgments related directly or indirectly to the experiences of the social world (Levesque-Lopman, 1988:19).

Husserl developed the technique of bracketing in order to allow for an examination of ‘what is’, without its attendant “assumptions of everyday life”, to allow the world to be seen with “clearer vision”; “the social world remains there, ready for examination and description as it is experienced” (Psathas, 1989:16). This does not mean that I, as researcher, must – nor should, nor even could – have suspended the influence of my own personal beliefs, values, experiences and emotional responses to both the data and my analyses during the course of this study. “In feminist-based research ... the researcher’s emotional responses to the stories of violence and abuse elicited from research participants are inevitable” (Stanko, 1997:75). My intensive and prolonged engagement with, and persistent observation of, my survivor participants contributed to and enhanced the credibility of my study (Rodwell, 1998), but certainly had a profound and lasting effect upon me as a survivor, witness, and opponent of woman abuse.

Phenomenology demands that the researcher utilize reflexive engagement – self-reflection and bracketing – in order to recognize the intrusion and supplanting of personal biases and precon-

ceptions of her own narratives, as well as those of others (Levesque-Lopman, 1988). However, the pre-eminence which I gave to my interview data of my survivor participants was accorded in this study, and the intended omission of any editorializing on my part throughout Chapter Five helped to “guard against, or at least minimize, the impact from ‘over-analysis’ that could result from my filtering that data through my own viewpoint” (Hancyz, 2003:278).

As an experienced civil litigator and family law practitioner, as well as social work academic, I have developed a particular fluency in the languages of both disciplines – in a sense, I represent my own collaboration between the law and social work, which collaboration is necessary in interdisciplinary research on gender bias in the law (Wikler, 1993), but which also served me well in my relationships with my survivor participants, allowing me to quickly grasp the nature of the legal proceedings of which they spoke in layman’s terms, while I engaged with them through the empowerment modalities of critical social work practice. As a critical social work academic and researcher, I was acutely aware of the inherent hierarchical relationship between interviewer and interviewee, as well as between social worker and client, *and* lawyer and client, all of which privileged the former to the detriment of the latter. It was my responsibility throughout my interviews with survivor participants to remain cognizant of this power imbalance through constant self-reflection and monitoring of our conversations lest it impede the dialogical process.

Most of my survivor participants had, at some point, interacted with one or more social workers during their lives, as children subject to abuse in their families of origin, or in their intimate relationships, so appeared to relate comfortably to me in that capacity. By revealing myself as a survivor of woman abuse as a child witness, I was able to establish a level of empathy with the survivor participants. It was as a lawyer, particularly a female lawyer, however, that my survivor participants appeared to relate to me most readily, even eagerly. In retrospect, I realize that the survivor participants were relieved that an experienced lawyer was taking a personal interest in the phenomenon of woman abuse and abused women’s experiences in the family courts, and all of them

expressed their gratitude to me for exposing what they considered to be the marginalization and oppression of abused women and their children by the legal system.

Judge participants: As with the survivor participants, I advised my judge participants from the outset that I did not wish to inconvenience them in any way, and endeavored to meet them at a time and in a place of their choosing. Given the court schedules of our judiciary, I recognized that my time with each of them would be limited, and I was determined to utilize whatever opportunities I had to the fullest. The questionnaire developed for my judge participants can be found in Appendix H. This questionnaire evolved through many iterations as I repeatedly engaged with my data, including my literature review, and ascertained new associations through comparison of data within, between, and amongst categories.

In order to privilege the voices of my survivor participants, this questionnaire for the judge participants was not fully realized until after I had completed my literature review and data analysis of my survivor participants. In this way, it was the voices of the abused women whom I had interviewed which directed and informed the questions I asked of my judge participants. Further, by premising my questions to be posed to my judge participants on the data gleaned from my survivor participants, and my analysis of it, I obtained different viewpoints of the phenomena of woman abuse, and abused women's experiences in the family courts, and in so doing, engaged in 'triangulation' of my data: "to attempt to determine how the various actors in a situation view it ... to know how situations are negotiated and how consensus or disensus of meanings are arrived at and maintained" (Strauss and Corbin, 1998:44).

Once again, I engaged in 'member checking' with my judge participants, advising them of the impressions and hypotheses I had, to that point, developed from speaking with their fellow judges, and eliciting their opinions concerning the validity of same, from their points of view.

Notwithstanding whatever personal or professional relationship I might have had with my judge participants, I conducted every interview in the same way: I introduced myself; outlined the

nature of my study, and the participant's role in it; explained the nature of the Informed Consent, and obtained the participant's signature; turned on the tape recorder; and proceeded with my interview. I ensured that every judge participant was asked the same set of questions, even as each discussion necessitated further questions to clarify points made, so that I would necessarily limit my review and analysis to the information they chose to give me on those topics, regardless of what they might have said to me in previous discussions, or what personal information about them I possessed.

I was particularly mindful that, while it was my personal association with many members of the judiciary that provided my entrée to them as participants in my study, the opportunity to engage them in my study was a privilege they had extended to *me*. While I cannot ascertain to what extent our personal relationships, nor how (or what) my judge participants thought of me, influenced their responses in our interviews, I can attest that, through constant self-monitoring and reflection, I used my best efforts to identify *my* contributions to this part of the process.

Upon completion of each interview with a judge participant, I prepared field notes containing my observations and initial impressions of the participant and the interview; these brief field notes proved to be of considerable assistance in informing my subsequent analysis of the transcripts of those interviews, particularly as they allowed me to explore my initial reactions to the contents of our discussions, and reflect upon the tenor of the interviews, and the ways in which the narratives unfolded. Upon reviewing my field notes while analyzing the transcripts of my interviews with the judge participants, I was able to identify multiple voices in the questions I asked of my judge participants: my voice, as a lawyer having represented abused women in family court proceedings; my voice as a feminist; and the voices of my survivor participants, as active participants in family law proceedings. When, for example, asking my judge participants for their opinions on the place, if any, for tort claims advanced by abused women in family law, I recognized it was I as lawyer, legal academic and researcher who was interested in the response, although the impetus for the question

originated within the narratives of my survivor participants and their pursuit of legitimization, respect, and redress.

However, when I queried my judge participants about the relevance of women's stories of abuse in family law, I realized that I was asking this question, not only as researcher, but as a direct conduit of inquiry for my survivor participants, most of whom felt that the judges adjudicating their claims did not care about their stories.

7. Approaching the Data

Survivor participants: I reviewed each audiotaped interview within twenty-four hours of my having met with my survivor participant. As I listened, I made more detailed notes about each audio-tape, outlining my impressions of, and reactions to, the survivor participant's narrative, as well as noting points in the narrative that were particularly insightful or compelling. Following completion of each interview, I found myself emotionally and physically drained. On one day, I interviewed four women at the Adelaide Women's Centre: three were homeless; two had been sexually abused by their fathers (one had born her father's child, and had been incarcerated twice as a 'drug mule'); one, a university graduate, was a cocaine addict whose children had been born addicted and were subsequently apprehended by the Children's Aid Society; and another was a heroin addict and convicted murderer of her rapist. Later that day, and the next, I listened to and reviewed these participants' recordings, and, as I jotted down my preliminary impressions of these participants and their stories, I became profoundly depressed. I could not conduct interviews for four months thereafter.

These stories of physical, sexual, emotional, psychological, financial, and child abuse and deprivation traumatized me. In fact, two of these survivor participants were not eligible to participate in my study, having only been involved in child welfare proceedings, and I advised them accordingly as soon as the context became apparent to me, but my responsibility to bear witness to their stories compelled me to complete their interviews. My interviews with my two refugee

survivor participants – one being the first of my interviews, and the other the last – left me feeling depressed, angry at ‘the system’ and saddened over their vulnerability and the insecurity they were experiencing from the denial of their refugee claims.

I had intended to transcribe each interview immediately upon its completion and endeavored to do so. However, listening to the survivor participants’ narratives over and over again further traumatized me, particularly as the audiotapes seemed to capture the intense emotional responses of both my survivor participants and me in all their painful clarity, and I was unable to continue. I located a retired court reporter who agreed to transcribe my audiotapes and undertook to keep confidential all of the information contained therein. As I had engaged in these interviews without referring to the participants by name, and identified the tapes with their pseudonyms, it was not difficult to ensure confidentiality. It seems that my reaction to the audiotapes was not unique; my transcriber was also traumatized by the survivor participants’ stories, and it took her over seven months to complete the transcriptions.

Upon completion of the transcripts, and their delivery to me, I began to review them, and found that I could read the narratives without their engendering the same intense emotional response I had endured while listening to the participants’ voices and my own. The process of committing their stories to paper had the effect of diffusing their emotional intensity – of, in a sense, emotionally sanitizing them, so that they became more palatable and much less evocative. I was able to detach myself emotionally from my survivor participants and their stories of abuse once I did not have to listen to their voices, or my own.

I realized that I could regard the transcripts much like any other legal transcript – of an examination for discovery, or a trial – and again realized how the legal process disembodies and decontextualizes personal histories from those who experience them. Given that most of what constitutes evidence in family law proceedings takes the form of affidavits, and not *viva voce* evidence, I wondered if the ‘distance’ my survivor participants felt between them and the judges presiding over

their cases, and the resulting alienation and invisibility of which they spoke was a consequence of their narratives necessarily being reduced to writing and thereby silencing their voices. This revelation constituted another category of experience to explore with my judge participants.

Judge participants: I was able to transcribe each interview quickly and reasonably easily, if only because my judge participants ably limited their answers to the questions I asked of them and did not have to be continuously guided back to their narratives, unlike most of my survivor participants. Mostly speaking in generalities and abstractions, and not from personal experience, the judge participants and I were insulated from the emotional upheaval of the lived experiences of my survivor participants that resonated in their narratives and had so emotionally paralyzed me. I began to understand how the ‘bloodlessness’ of law, and the courtroom could provide the existential distance between judge and abused woman that the victim experiences as disbelief.

8. Court File Review

I decided to undertake a review of the court files of my survivor participants as a way of triangulating their interviews, to enhance the trustworthiness of my data and reporting of it. Trustworthiness has been conceptualized as the qualitative equivalent to credibility in quantitative research, and includes concepts such as credibility (internal validity), dependability (reliability), confirmability (objectivity) and transferability (external validity) (Rodwell, 1998). By reviewing the court files of my survivor participants, I was able to triangulate my data by comparing one data source (my survivor participants’ narratives) to another (the court files) to enhance credibility through cross-checking (Rodwell, 1998). I also utilized the material I found in the court records, some of which is referred to in the next chapter, to enrich and expand the narratives of my survivor participants (Rodwell, 1998).

It was not my intention to use the information contained in the court files – affidavits, financial statements, assessment and/or mediators’ reports, or reasons for judgments and orders – to prove or disprove the veracity of what the survivor participants told me, although I was concerned

that, were I to find a substantive discrepancy between a narrative and the contents of its corresponding court file, I might doubt the participant's story.

With that possibility prompting me to reconsider my enthusiasm for reviewing the court files, I struggled with self-doubt: would any discrepancy negate my participant's story of abuse, or was I predisposed or too eager to minimize or discount their abuse from the outset, notwithstanding my stance as a feminist and self-proclaimed promoter of abused women's rights? After all, I, too, was a product of my socialization. I recognized that abused women were portrayed in the dominant discourse as having exaggerated their abuse, at best, and fabricated it, at worst. Was 'what I know' about domestic violence, in reality, a convenient veneer of political correctness, assumed in the academy, but hiding the sedimentation of centuries of patriarchal dominance that discounted women and their narratives? Why was I even having this conversation with myself, if I did not 'secretly' doubt the stories I had heard? In the alternative, would any discrepancies between the survivor participants' narratives and their affidavits represent to me yet another example of their not being 'heard' by their legal counsel, or their stories of abuse having been ignored altogether, as so many of them asserted in their interviews?

I resolved to accept that my survivor participants had told me the truth. They knew I would look through their court files; there was no utility in telling me a story different from their affidavits. I did wonder, however, about those women who, upon being advised that I would be perusing their court files, changed their minds about participating in this study. In retrospect, I was relieved that I did not have to include them.

Padgett legitimated my use of a court file review as a source for questions to direct to my judge participants. "Documents are valuable to the data collection process because of what the researcher can learn directly from reading them; but they also provide stimulus for generating questions that can only be pursued through direct ... interviewing" (1998:90). With this in mind, I reflected upon the possibility that some of my judge participants had adjudicated matters involving

my survivor participants. I had no intention of questioning my judge participants about specific cases, particularly those of my survivor participants. I decided to do so would put them at an unfair disadvantage (I would know about their involvement in those cases, and they would not). Second, doing so might pique their memories of those cases, thereby exposing the identities of my survivor participants. Third, so doing would confound this aspect of my theoretical framework, that is, the exploration of what they ‘know’ about woman abuse and abused women, generally, not *these* women in *these* particular circumstances of *these* cases.

I wanted to review as many of my survivor participants files as possible. Unfortunately, I was not able to access the court files of all of my survivor participants; the court records of three survivor participants appear to have been ‘lost’ in the courts’ filing system, apparently on account of the Ministry of the Attorney General having closed the OCJ location in Scarborough and consolidating those files with the remaining OCJ sites in Toronto. As well, reviewing the court files proved to be an onerous task.³

I discovered that I could assess the ‘quality’ of the legal proceedings from the court files by utilizing the framework developed by Mamo et al (2007) for a study of the practices and procedures of the Family Court Branch of the Ontario Superior Court of Justice of five different jurisdictions.⁴ The court file review conducted in that study “provided an opportunity to see the system in operation as reflected in judges’ actions during hearings” (Mamo et al 2007:81), and determine whether court appearances were “meaningful” (Mamo et al, 2007:92). I adopted the rubric created by Mamo et al when reviewing each file.⁵ My court file review left me far better informed about the difficulties the survivor participants encountered in responding to their abusers in and through the legal system, in particular, how the abusers, themselves, manipulate and exploit the legal system to further abuse their victims and achieve control and dominance over the process and the results.

9. Analyzing the Data – Grounded Theory

What is grounded theory? My analysis of the survivor and judge participants' interviews utilized grounded theory (Strauss & Corbin, 1998; Glaser & Strauss, 1967), a method of analyzing research data particularly well-suited to phenomenological research. Grounded theory is described by Glaser and Strauss as “the discovery of theory from data – systematically obtained and analyzed” (1967:2). “A researcher does not begin a project with a preconceived theory in mind (unless his or her purpose is to elaborate and extend existing theory). Rather the researcher begins with an area of study and allows the theory to emerge from the data” (Strauss & Corbin, 1988:12). Researchers utilizing grounded theory are not required to “know the whole field”, nor engage in random sampling, but are required to involve “carefully selected cases” in order to “generate general categories and their properties for general and specific situations and problems” (Glaser & Strauss, 1967:30). The description of my sampling procedures, while purposive, do not offend the requirements of grounded theory, and my literature review, although extensive, does not begin to cover the field of research in domestic violence and abuse, but specifically relates to the phenomenon of woman abuse that informs my data and analysis.

To this end, my intent with my research study was not to reiterate what had already been examined in other studies (abused women's experiences in family and criminal law disputes; judicial demeanor in the legal proceedings involving abused women), but to examine the inter-relationship between abused women's experiences in family court proceedings and the attitudes, beliefs, and ‘ways of knowing’ of the bench. Through this examination, my goal was to formulate a theory, or theories, that would explain how abused women's experiences in family court proceedings are influenced, or determined, by judges' ‘ways of knowing’ about woman abuse and abused women's experiences. I had no informed, preconceived notions of where this research would take me. I could find no published studies that had taken this approach to the purported problem, explored in the extant research and set out in the Introduction, of woman abuse being ignored as a substantive issue

for consideration in family law disputes. In this regard, my research topic was appropriate for grounded research.

Grounded theory is “a strategy for handling data in research, providing modes of conceptualization for describing and explaining...provid(ing) clear enough categories and hypotheses so that crucial ones can be verified in present and future research” (Glaser & Strauss, 1967:3).

Grounded theory is phenomenological (Glaser & Strauss, 1967). The production of grounded theory involves three major components: data, such as interviews, observations, a literature review, documents, and records; procedures, including conceptualizing and reducing data, creating and elaborating categories of meaning that reveal themselves to the researcher as she engages with the data; and relating the categories through hypotheses about the phenomenon (referred to as “coding”); and reporting (Strauss & Corbin, 1998).

Coding involves the opening up of the research texts – narratives, observations – to expose the thoughts, ideas and meanings within (Strauss & Corbin, 1998). The process of coding categories is central to grounded theoretical research. “Categories are concepts, derived from data that stand for phenomena” (Strauss & Corbin, 1998:114). The creation of data-informed categories, along with the frequency and/or intensity of the phenomenon as experienced by individuals, move the researcher away from the raw data into the realm of abstraction, hypotheses, and theory as categories are continuously contrasted and compared. Categorizing data with regard to their properties and dimensions allowed me to identify common patterns of experience amongst my survivor participants (Strauss & Corbin, 1998).

Categories: Categories can be borrowed from existing theories (Glaser & Strauss, 1967), as well as generated from the data. I initially approached my interview data cognizant of the categories of experience identified in extant published research studies of abused women’s personal experiences in abusive relationships, and their involvement in legal proceedings. As well, I considered the categories established in studies examining judicial demeanor in the courtroom, judicial subject-

tivity, and case reviews. I also benefited from having already successfully “pilot tested” (Glaser & Strauss, 1967:91) many of my categories in my Family Court Watch Pilot Project for the Woman Abuse Council of Toronto.⁶

Coding and analyses: The application of grounded theory to research involves “coding” of data, often referred to as “line-by-line coding” (Strauss & Corbin, 1998:57). “Coding” requires full engagement with the data, including interview transcripts and both technical and non-technical literature (Strauss & Corbin, 1998). To this end, the verbatim transcripts of my interviews with participants provided me with the requisite data to which to apply coding and analysis, which coding and analysis were extended, enhanced and refined by the literature review in which I engaged (Strauss & Corbin, 1998).

Coding involves the analysis of the data in order to ascertain, generate and classify categories of acts, events, outcomes (experiences) and the meanings ascribed to them by research participants and to suggest relationships amongst those categories (Strauss & Corbin, 1998). “Classifying indicates grouping concepts according to their salient properties, that is, for similarities and differences” (Strauss & Corbin, 1998:66). I was assisted in identifying the categories emerging from my data by my own personal experience with woman abuse, and abused women, as well as my literature review, which I used as a “secondary source of data” and an “analytic tool” (Strauss & Corbin, 1998:47).

In accordance with phenomenological and grounded methods, I read and re-read the transcripts of my survivor participants’ narratives.⁷ Once I had satisfied myself that I had immersed myself into a narrative – had rendered the unfamiliar, familiar (Van Manen, 2011) – and entered the world of the narrator, themes began to reveal themselves. I continued reading and re-reading my data, extracting categories, themes, and meanings within those initial themes, and redefining them until I had reached “theoretical saturation” when no new properties or dimensions emerged from my

data (Straus & Corbin, 1998:158) and I had amassed a body of meaning that represented the survivor participants' shared experiences of woman abuse and the legal process.

Having analyzed the data of my survivor participants, I turned to that of my judge participants. Once again, I read and re-read the transcripts of this second group of interviews; this time, I had the luxury of the themes already having been established.⁸

Once coded, I then re-engaged with my categories, and, finding connections amongst them, combined, and thereby reduced the categories to a manageable number that reflected the commonalities amongst aspects of the phenomena. Reduction “mean(s) that the analyst may discover underlying uniformities in the original set of categories or their properties, and can then formulate the theory with a small set of higher level concepts” (Glaser & Strauss, 1967:110). I continued with this process until I had reached a level of saturation in my analyses that satisfied me that I had uncovered all judge participants' 'knowledge' of abused women and woman abuse available to me in their narratives.

Formulating theory: Throughout the process of research inquiry and analysis, the goal of this study was to develop one or more formal theories to explain the disconnects I identified between what my survivor participants described as their impressions of and their experiences in family court and the perceptions emanating from the bench as represented by my judge participants, of abused women and their experiences in the civil family justice system.

The final grounded theoretical exercise in my study required me to take my three analyses – that of the relevant legislation and case law, my survivor participants' narratives, and my interviews with judge participants – and critically compare and analyze them. By paying attention to my survivor participants' concerns (Strauss & Corbin, 1998), I recognized that their sense of not being heard, believed, or validated, or of their stories of abuse being considered relevant to the judges presiding over their cases was of paramount concern to them, and necessarily constituted the focus of my research with my judge participants. The thrust of my comparative analysis was directed at

this category, and my judge participants' responses to questions arising from my analysis of it. My analysis of the relevant legislation and case law provided both an institutional framework and reference for the general or "grand" theory that ultimately emerged and is set out in the concluding chapter of this research study (Strauss & Corbin, 1998; Glaser & Strauss, 1967).

Throughout my analyses, I prepared "memoranda" (Strauss & Corbin, 1998:153) as logs of my analytic musings about the data, their categorization, and analyses. These 'memos' were written as ideas emerged from my research, during prolonged engagement with the data, and, sometimes, in response to those 'a-ha' moments when a relationship between categories revealed itself to me when I least expected it. This, I came to understand from reading Glaser and Strauss (1967) and Strauss and Corbin (1998) was part of the experience of conducting qualitative research utilizing grounded theory.

Subjectivity in grounded research: Grounded theory, as a method of qualitative research, necessarily engages the researcher's creativity. "Qualitative evaluation inquiry draws on both critical and creative thinking – both the science and the art of analysis" (Patton, 1990:434). As a method of qualitative research, this process is necessarily subjective.

[I]t is preferable to self-consciously bring disciplinary and research experience into the analysis but to do so in ways that enhance the creative aspects of analysis rather than drive analysis. Experience and knowledge are what sensitizes the researcher to significant problems and issues in the data and allows him or her to see alternative explanations and to recognize properties and dimensions of emergent concepts (Strauss & Corbin, 1998:58-9).

This study is not presented as an exhaustive and comprehensive elucidation of the phenomena of woman abuse and abused women's experiences in the family courts – no phenomenological study can make such a claim. On the contrary, it must be remembered that "no text is ever perfect, no interpretation is ever complete, no explication of meaning is ever final, no insight is beyond challenge" (Van Manen, 2011). I must assume that my study will provoke my readers to engage with the phenomenon of woman abuse in new ways, which will enhance their knowledge and understanding of that phenomenon – the objectives of phenomenological enlightenment.

10. Critical Discourse Analysis

During the course of my case law review, I engaged in *critical discourse analysis* (CDA), referred to in the Introduction. Mindful that language is used as a “social practice” (Wodak, 2001:1), I could, within the context of woman abuse, identify the socially sedimented ‘ways of knowing’ that informed my judge participants through the identification of individual words or terms used in the case law, which, in usual parlance, marginalized women and mothers and gendered conduct. Inasmuch as CDA developed from discourse analysis in grounded theory, I suggest that CDA is an essential ingredient in grounded theory although it is obviously not identified as such in the seminal texts that predate this form of analysis.

11. Verifying the Analysis

Verifying my analyses as the study unfolded was accomplished in a number of ways. I was privileged, during the stages of my study after which I had completed most of my background research, and had interviewed my survivor participants, to be invited to share my research to that point with members of the Executive Committee of the Woman Abuse Council of Toronto (WACT), the Violence Against Women Unit of Family Service Toronto and at the staff meeting of Victim Services of York Region. These groups were comprised of survivor advocates, social workers, social policy specialists, and, in the case of the WACT, members of the Crown Attorney’s Office and the Children’s Aid Society of Toronto (CAST). Through these engagements, I was able to share my findings and analyses with individuals who were very knowledgeable in the field of domestic violence and woman abuse, particularly the survivor advocates, who had their own, personal expertise.

While I was gratified with the positive and affirming feedback I received, I was also appreciative of the critiques and difficult questions directed at me from the Assistant Crown Attorney and representative of the CAST, which directed my attention to the 2009 amendments to the *FLA 1990* and *Criminal Code* regarding criminal penalties that would now attach to breaches of restraining

orders. All of these opportunities to expand, test, and reconsider my research gave my study greater credibility and rigor.

As mentioned earlier in this chapter, I involved both my survivor and judge participants in ‘member checking’, whereby, following the conclusion of each interview, I would provide my participant with a brief description of the data I had gathered to date, and my emerging hypotheses concerning same. I would then ask my participant for her or his impression of my understanding of my data, and whether or not she or he agreed with my hypotheses. My participants’ comments, critiques, and insights proved invaluable to me in supporting the direction taken in this study.

I did not provide my participants with copies of their transcripts for review. This decision was informed by my experience with this form of ‘member checking’ during my research for my Master of Social Work personal research paper. I found that providing my data and analyses to my survivor participants in that study only served to traumatize them. It seemed that, while they were capable of orally relating their stories of abuse, seeing those narratives in print was too much to bear. This reaction stood in stark contrast to my own, described above, that was to find emotional distance through the written accounts of my survivor participants’ narratives. I did not want to subject my survivor participants in this study to the same pain.

Similarly, I did not offer my judge participants the opportunity to review my analyses of their contributions to my study during the research process. However, I did suggest that I would gladly provide them with access to my completed dissertation once I had passed my oral defence.

12. Conclusion – Presenting the Data

“Phenomenology cannot be separated from the practice of writing” (Van Manen, 2011). While many grounded theorists mistrust verbatim transcriptions of narrative data in qualitative research, phenomenology draws a distinction between the vocal (what is said) and the written (reducing what is said to writing). I found the recordings and verbatim transcripts invaluable in this study. Upon reflection, I realized that, as a lawyer, I am concerned with credibility – the ability to

prove my assertions. My legal training demanded from me that I be able to substantiate my analysis by referencing my texts, be they from my literature review, case file review, or the narratives of my participants. I realized that the processes of research utilizing grounded theory are not much different from that with which I engaged when preparing a case for trial or appeal, except that, with the former, the theories emerge from the data, while, in the latter, the theory directs the data (or ‘facts’) to be elicited to prove the theory. Fundamental to both legal research and practice is engagement with text. Everything is eventually reduced to writing.

However, language as a social construct imparts meanings that are sedimented and unconsciously processed. To merely provide the reader of this study with my impressions of the survivor participants’ narratives, rather than their actual words, runs the risk of “infecting” or “contaminating” their verbatim expressions with meanings from the words I might choose to use (Van Manen, 2011). As words have the power to invoke “feeling understanding” (Van Manen, 2011), or, that ‘eureka moment’ when meaning is revealed, I have chosen to use the words of my participants, without synopsisizing them, to empower my participants in that act of “provocation” (Van Manen, 2011) and to illustrate and legitimate the emergence of the theories from this data.

Given the highly sensitive nature of the survivor participants’ narratives, I have, in essence, tried to reproduce the actual *voices* and experiences of abuse of my survivor participants through written word. Further, qualitative research involves ‘story-telling’ – the narratives of my survivor participants tell the stories of their experiences of woman abuse and the legal process. Presenting their stories of their lived experiences of abuse in their own words, where stated, both privileges them and allows the reader of this study to bear witness to those stories. Similarly, the words of my judge participants, recounted verbatim, allow the reader to engage directly with these narratives.

Grounded theory, however, mandates its own format for the presentation of data and theory. Data must be “analyzed closely...so as to construct an integrated (conceptually) dense theory” (Strauss & Corbin, 1998:283). Quotes are to be utilized to help the reader “better visualize the

analytical points being made, especially when the analytic points might otherwise be difficult to grasp” (Strauss & Corbin, 1998:283-4). Quotes are also valuable as “convincing items” (Strauss & Corbin, 1998:283) that can be used to substantiate analyses and theory that might be viewed skeptically by readers (Strauss & Corbin, 1998). The data in grounded theory provides the text, engagement with which produces concepts from which the researcher develops explanations for the phenomenon. These explanations inform the theories emergent from the research study.

The theory/theories that emerge from the comparative data analysis must be clear, readily operationalized in quantitative studies, where appropriate, and readily understandable across a spectrum of potential readers, including “laymen” (Glaser & Strauss, 1967:3). Therefore, grounded theorists (including the writer) hope that their work will have direct or potential relevance to non-academic and academic audiences, alike, (Strauss & Corbin, 1998), particularly those to whom the study has personal, and not just professional or academic meaning. Accordingly, my data and analysis have been presented as findings from the data as an “analytic story” in which narrative, hypotheses and theory have been integrated into what I hope is a seamless, persuasive and readable presentation of “what was this research all about?” (Strauss & Corbin, 1998:252). In so doing, I tried to avoid including words or terms that were suggestive, distracting, provocative, sensationalizing, or in any way indicative of my own, personal reaction to the narratives. In so doing, I attempted to “depersonalize” my writing so that I disappeared from the text at this point, and the authors of these narratives, themselves, emerged. This is the goal of the phenomenologist as writer (Van Manen, 2011), and, as such, was my goal, reflected in the next two chapters.

CHAPTER FIVE

THE SURVIVOR PARTICIPANTS SPEAK

1. Introduction

The stories of domestic violence and abuse related in the narratives of the seventeen survivor participants interviewed for this research study are presented in this chapter. They, their spouses and children are referred to by pseudonyms to protect their identities. Identifiers, such as their country of origin, race, religion, socio-economic class, educational attainment and ethnicity, are mentioned where the participants, themselves, have indicated them to be relevant to their experiences of woman abuse. In this regard, I refer my reader to Chapter One of this dissertation.

Inasmuch as this research study is premised on *their* experiences of woman abuse, and, in order for the reader to ‘bear witness’ to *their* stories, I have chosen to present them individually, as short case studies. In this way, the participants’ voices, and not mine, have been privileged, reflecting the omnipresence of domestic violence and abuse across the participants’ lives. The first section explores the violence and abuse in the participants’ families of origin, relating the relevant ethno-cultural and socio-economic factors identified by the survivor participants. The next section follows each participant’s relationship with her intimate partner(s) from initial contact, through cohabitation and legal engagement. Within this latter part, the survivor participants’ lived experiences are presented chronologically, with particular emphasis on the nature of the abuse suffered, the abusers’ relationship with his child(ren), and the survivor participants’ engagement with, and impressions of, the civil family justice system. The survivor participants’ reflections on their experiences with the civil family justice system are related. The chapter concludes with my commentary.

2. Violence and Abuse in the Survivor Participants’ Families of Origin

All but two of the survivor participants (Lianne and Gillian) described their families of origin as being characterized by their fathers’ violent and abusive conduct directed at them and/or

their mothers and siblings. Eight of the survivor respondents (Heather, Emily, Lily, Gillian, Devorah, Sharon, Lindsay and Diane) described their mothers as abusive. Four of the survivor participants were abused by their brothers; of these four, two were abused by both parents and their brother (Lily and Diane), one was abused by her father and brother (Caroline), and the other by her mother and brother (Gillian). Of the fifteen survivor participants whose fathers were violent and abusive, four (Caroline, Diane, Elizabeth, and Lindsay) indicated that alcohol was involved, but only Diane and Lindsay were prepared to identify their fathers as alcoholics.

All of the participant survivors described their husbands' families as violent and abusive. Indeed, those survivor participants who had been involved in serial abusive relationships (again, Caroline, Diane, Elizabeth, and Lindsay) advised that all of their intimate partners' parents, both mothers and fathers, had been violent and/or abusive. The survivor participants despised their husbands' or partners' parents, and blamed them, in part, for providing negative role models for their sons.

Introducing the survivor participants:

Lianne: Lianne was unique amongst the survivor participants in denying any violence and abuse in her family of origin. Perhaps it is not surprising that she presented as the most emotionally resilient survivor participant. She was involved in a stable relationship. She remained on cordial terms with her ex-husband to facilitate his access to their child. She held an executive position with the provincial government, and owned her own home. Upon reflection, I realized that Lianne chose to speak little of her family of origin, although she was quite animated when referring to that of her ex-husband. If there were any history of domestic violence and abuse in her family, Lianne was not prepared to address it with me.

Heather, Emily, Lily, Natasha and Mercedes believed their abusive upbringings were culturally determined.

Heather: Heather's parents emigrated from the former Yugoslavia in the 1950s. Her paternal grandfather "was known to be crazy and crazy violent", and had been murdered. Heather's father abused Heather, as did her mother. Heather attributed her father's and mother's propensity for violence to the impoverished and culturally backward region from which they came. She described her parents as "almost medieval in their thinking" and "superstitious", whose abusive behaviour toward her waned after she was seriously injured in a car accident at the age of nine.

Emily: Emily is an older woman of colour who suffered from rheumatoid arthritis, necessitating the use of a walker. Emily was born in Jamaica. Her parents never married, and her father "came and went". "He was abusive in the time he was there, but he wasn't there regularly, every day." Emily's mother came from "a very abusive background. She knew nothing different." She was over-protective of Emily, forcing her to stay in the house all day. Every time Emily "strayed", she was beaten "because that's how you correct bad behaviour."

The school system was based on the British model, and employed corporal punishment for "just simple things kids do, like talking in class or passing notes". When Emily was punished by her teachers, her mother condoned it. Emily considered violence endemic in Jamaican society, infusing every relationship.¹ She blamed her early experiences with violence on her later oblivion to and tolerance of her husband's violence and abuse.

Lily: Lily's parents were born in Hong Kong, as was Lily. She came to Canada when she was six years old. She described her parents as very "Old World", most concerned about their family honour. Lily had an older and a younger brother, the latter of whom physically abused her throughout her childhood. Lily sensed that he resented her academic superiority. She claimed that her parents liked the fact that her husband was white, because his pursuit of their daughter detracted from their sense of 'otherness': "to this day, they think we're still a little bit of foreigners in this country." Lily was outwardly totally assimilated into Canadian culture, but, internally, was still very much part of her parents' "Old World": obedient, emotionally reticent and very private.²

Natasha's and Mercedes' narratives represent the multiple oppressions experienced by immigrants (in both cases, refugee claimants) to Canada confronting ethno-cultural practices and values different from their own.

Natasha: For Natasha, who was born and lived in Bulgaria, Canada represented freedom from the misogyny of her native culture.

In my country women stayed home. If they work, they take care of the kids and the home, too; they did everything. But, the power of the man is more accepted in society than women's. Women had to obey the man and keep silent about what happened at home. No one complained to the police, because they can say, "Oh, she was not a good wife. She deserved that. She had an affair, or, she's not obeying, listening to her husband." It was always the wife's fault.³

However, after living in Canada, Natasha understood that woman abuse was not acceptable. "Now I understand this abuse can be in different ways, to control the wife in financial, emotional and physical abuse. It can be sexual abuse, many kinds of abuse, which I didn't realize back home." Natasha's enculturation and assimilation into Canadian society, with its professed intolerance of domestic violence and promotion of gender equality, empowered her to challenge the violence and abuse to which her husband subjected her, while rendering her more vulnerable to escalating levels of violence from her husband.

Mercedes: Mercedes' upbringing as one of eleven children in a poor Mexican family exposed her to violence and abuse. She asserted that "in Mexico, men control women's lives forever, their bodies and their money. It is very strong, this *machismo*, and it is something that was very deep in the rest of my family."⁴ She described her father as an "abuser", but only of his wife. "He was hurting her, assaulting physically" because "he was drunk almost half his life". However, Mercedes was prepared to forgive her father's violence, which he never directed at his children. Mercedes' mother did not accept her abuse; "at some point she was trying to show she was strong, but economically there were limitations." Mercedes' mother provided a role model for her adult daughter when she, too, was the victim of woman abuse.

Four of the survivor participants were Jewish, three of whom had emigrated from Israel. Three had been married to Israeli men. One, Devorah, was Israeli-born, Rena, was born in the Soviet Union but was raised in Israel, and Adit was born in Canada to Israeli parents who returned to Israel. Sharon was born in South Africa, but immigrated to Canada at the age of six. All described their families of origins as sites of conflict, and three identified their fathers as violent and abusive to their mothers and them.

Rena: Rena denied her father was physically abusive, although she allowed that there was “aggression” between her parents. They divorced at one point and did not live together for four years. Rena admitted her father had “backward ideas about a woman’s place” but he “never, ever touched” her. After her parents reconciled, “emotionally, it was a rocky situation. There were definitely fights between my parents, my grandparents and my dad, and there were a lot of issues around control in the house.”

Adit: Adit admitted that some elements of Israeli culture condoned domestic violence: “in Hebrew we have a saying, *shosaych sheevto sonneh b’no*. It means, the person who doesn’t use the staff does not love his child. It comes from the Bible and it’s frequently used in old school families to explain the way that we were treated.” But “what went on inside the home was supposed to stay inside the home. My mother was supposed to support *shalom bayit – peace in the home*.”⁵ However, she recognized that, while this maxim might have applied to his abusive treatment of his children, it did not explain the violence her father directed at his wife. Adit’s mother was also abusive. Once when Adit was 14, she “disciplined” her by holding a lit cigarette near her face and burning her. However, Adit forgave her mother, because “she had a horrific life with *her* mother [who was a Holocaust survivor], with my father, and she never got any ray of light in this life. So the bitterness that she experienced reflected outwards.” Adit was estranged from her brothers, whom she suspected of abusing their wives.

Devorah: Devorah described her parents as both coming from “very privileged families with a lot of money” and the “black sheep of their own families” who “somehow found each other.” She described her father as an abuser, while her mother had “mental problems.” She, the eldest of three girls, described being “abused all the time, and both parents used to “use me as kind of a slave, a kind of information messenger between them, and if I were to say the wrong information, I would get hit by them both.” She attempted suicide at 15. Her psychiatrist urged her to leave her family.

Devorah has accepted, but will not forget, what her parents did to her. She maintains a close relationship with her mother, and is very dependent on her. She does not have a relationship with her father.

Sharon: Sharon was conflicted about her childhood:

It was hard for me to look back and reflect on my childhood to see exactly what it was because I think we always want to think that we had the perfect childhood. It was a great family, it was all wonderful. My dad was very prominent in the Jewish community. He had this air about him that he just sort of always understood things, he could sort of foresee things. He was very intelligent. He and my mom didn't have the greatest marriage. He had an affair, a long-term affair which was something I had to deal with, that my mom didn't really know about until later, and then blamed me.

She recalled hearing arguments between her parents, in which her mother challenged her father to “pick her or me”. When Sharon revealed to her mother her knowledge of her father's affair, her mother denied it, and then blamed their marital problems on Sharon. Sharon was 16.

Sharon's father died of cancer. Just before his death, he insisted on dictating a letter to Sharon in which he directed his insurer to change the name of the beneficiary of his life insurance policy from his mistress to his wife, which Sharon took as an attempt to assuage his conscience, but her mother construed as confirmation of Sharon's complicity in her father's deceit and infidelity.

One survivor participant represented a *mélange* of ethno-cultural ‘differences’:

Gillian: Gillian, a woman of colour, was born in England, but her parents were Jamaican. She denied her father was abusive; in fact, he was away from home “a lot”. Her mother, one of thir-

teen children, grew up surrounded by violence. When Gillian's brother physically abused her, her mother considered it "the norm, she thought it was normal. My mother is from the old school, the double standard, and if my brother hit me, it was because I did something to deserve it. She still feels that way." Gillian suggested that her mother was content to allow Gillian's brother to be her disciplinary proxy. Gillian advised that her brother matured into an abusive man who "is an expert at the dance of misogyny." Gillian was now raising his teenaged daughter.

Gillian saw herself as fundamentally different from her parents. Her brother's abusive conduct might have been normal for her mother, "but it was not normal for me. I grew up in Canada." Gillian blamed her parents' failure to protect her from her brother for her feeling "like I wasn't protected and safe at home. I feel like that set the stage for me in my future relationships."

The balance of the survivor participants were Canadian born, white, Christian, and from western European backgrounds. Elizabeth, Caroline, Jean, Ruth, Diane and Lindsay, related different stories of the woman abuse they experienced as children, wives and mothers.

Elizabeth: Elizabeth presented as a tragic figure. She was homeless. A college graduate and professional book keeper, she described herself as "well educated". Her father was "a great guy until he had a car accident and the guy in the back seat was killed, and dad changed. No counseling back then when I was younger. There was some abuse, but only when my dad drank."

Caroline: Caroline described her father as "mean and an asshole". Her parents separated when she was nine when he suddenly abandoned his family and "left with a very young girlfriend". Caroline advised me that her father had a drinking "problem", but was not an alcoholic.

He wasn't the town drunk, he drank at home but it crossed the line. It wasn't just he was getting drunk at parties, it was he was throwing up all over the hallway and he was getting his kids to make his drinks for him. I mean, I don't really remember him drinking. I made his drinks, but I was young enough that it happened after I went to bed.

Caroline found her father's leaving "very traumatic" for which she received counselling.

From then on, "he was in and out, in and out, and everything was always very conditional. If you

didn't play the game, if you called him out on anything, if you were honest about your feelings, he wasn't interested." He refused to pay her mother child support. However, Caroline could not bring herself to describe her parents' relationship as 'abusive'. "I think that he is not a great guy, and I don't necessarily forgive him. I don't view my mom and dad's marriage as an abusive marriage. I don't think my mom does, either. But I see his behaviour, from an addiction standpoint, whatever he was doing was fuelled by his need to drink." Caroline's older brother also physically abused her.

Jean: Jean's father was "very abusive sometimes when he drank, and he drank quite a bit. Not a lot, not every weekend, but when he did drink it was to excess. So, he was not a very good role model as a male." Jean claimed her father abused her mother "more" than he did Jean, who described her father's misconduct toward her as "neglectful". Most importantly, she blamed him for the death of her beloved older brother, whom he had "thrown out of the house". Her brother was subsequently murdered in gang-related activity. "So, in retrospect, I don't have a lot of respect for my father because of that."

Jean's view of her mother was far more positive. "I know my mother tried to keep everything together because she and my father fought a lot, violent arguments, throwing and stuff like that." Jean admitted that she was aware of her parents' battles: "you could hear it you could see it, you came down the next morning and saw the whole scene or whatever, the broken furniture." She remembers being "really scared", but did not consider her home environment to be extraordinary. "I think it was probably that I looked at that as being not the norm, but that's the way people behaved. Now I look at it, it's not the norm. It's just what, I guess, we were accustomed to."

Marie: Marie, the eldest of four daughters, described her father as "very, very very controlling, not physically abusive, but very emotionally abusive, a perfectionist, an over-achiever." Marie saw herself as "the buffer" between her father and her siblings. "The expectations were very high, not attainable, not realistic, and when I didn't meet those expectations, he just didn't speak to me for long periods of time." Despite denying that her father was physically abusive, Marie recounted an

incident when, at sixteen, she told her father that she did not want accede to his demand that she attend medical school.

I remember that we lived at Jane and Bloor in one of the older homes with the long staircase. I remembered that he grabbed me by my hair and pulled me down those stairs by my hair, and put me in the car and drove me to 311 Jarvis Street and told me that, if, in fact, I didn't smarten up he was going to take me in there. That was the one thing about him that I remembered and it was like, 'you play by my rules or you don't play'. So his abuse with me was, basically, there was something wrong with me, being the eldest. I wasn't meeting the expectations he had for me. I didn't bend and my father hated that about me.

Much later, Marie recognized that her father abused her mother, as well. Her parents fought regularly, particularly over her. "It got into this situation where she was continually defending me. I remember quite vividly listening to my parents screaming and yelling, him saying how bad I was, and her trying to defend me." One day, her father proclaimed he did not want to be married anymore, and left. He refused to pay child support, although he had the means. The stress of raising four children alone precipitated Marie's mother's emotional decline, and she sank into a severe depression, aided and abetted by heavy drinking and an addiction to prescription medications. Marie thus assumed the role of 'mother' to her siblings.

The last two survivor participants, Lindsay and Diane, stand apart from the rest in the nature of the violence and abuse they were forced to endure throughout their lives.

Lindsay: Lindsay, whom I met in a women's walk-in clinic where she was volunteering, described her mother as "a very quiet, timid woman" whom her violent father "used to beat the crap out of." Lindsay's parents were divorced when she was a toddler, and her father exercised unsupervised, overnight access on weekends. Lindsay's father sexually molested her from the time she was four until she was about thirteen, at which point he impregnated her. She never told anyone about the abuse she suffered. "When I got pregnant, my mom went, 'Well, what the hell's going on, you're 13 years old', and that's when it all came out." Her father disappeared to avoid arrest.

Lindsay was made to feel responsible for what had happened to her; her mother blamed *her* for seducing her father, and surrendered her to the CCAS. Lindsay intended to stay in foster care until she “aged out” at 16, but just before her birthday, “ran off” to Jamaica, “fell in love with a Jamaican guy” and was arrested for importing drugs. Her lover had persuaded her to run drugs for him, and she spent two years in jail. It was not a pleasant experience: “I’ve got scars all over me from that experience,” she confided to me.

Diane: Diane was the oldest of the survivor participants I interviewed. At the time of our meeting, she was involved in her fourth, successive, abusive intimate relationship. Her background was horrendous. Her paternal grandfather had murdered her grandmother. Both of her parents were illiterate; Diane only learned to read when she was eleven. Her father was verbally abusive to everyone in his family. He physically abused his wife and oldest son “because he never really felt that this child was his biological son.” Her mother was very abusive to Diane’s older sister; she would lock her in the attic. Diane was most fearful of her father when he was drinking because he became very violent. Diane recalled her mother would take her and her siblings into the basement to hide from her father when he was drinking. Diane described her mother as being very frightened of her husband, but, at the same time, very angry with all of her children. “She displaced all her anger with us and it was not uncommon for her to hate me. She wanted me to hate my father. As my mother’s husband, I was very frightened of him, but as my father, I loved him, and she wanted me to hate him.” Diane resented her mother for attempting to alienate her from her father. She used to get into physical fights with her mother “all the time”.⁶ Her mother drank herself to death.

Diane’s older brother was very violent, and Diane was, and still is, very afraid of him. Her younger brother, who was eight years her junior, sexually abused her, which Diane described as “psychologically just traumatizing”. Her mother never believed her, and her father dismissed her as promiscuous and wayward. Despite his violent and abusive conduct, Diane spoke proudly of her father:

he was great. He was very wise and very smart, considering the lack of education that he had. He signed for the deaf/mutes in court. I gave him a lot of credit for doing things that he's done as far as work-related things, but as far as his own family, I loved him as my father but he was a very poor husband. I mean, he treated my mother terribly. He was very abusive to my brother.

Diane admitted to drinking and “dabbling in different drugs” from a very young age. Diane never finished high school. She has, at best, a grade eight education. She left home at eighteen and joined a bike gang. “It was such a bizarre world, but I felt so empowered. Loved bikes, loved guns, loved gangs. The abuse towards other people though, I mean, that were innocent people, I didn't like that but our family was really caught up in a lot of really nasty stuff.”

Diane was an alcoholic. One night, while still a teenager, she became intoxicated at a hotel bar and accepted a ride home with a stranger, who raped and impregnated her. She was sent by her parents to another city during the pregnancy to hide her “shame” and her baby was “given away”. One year later, she met the first of her intimate abusers at the Family Court at 311 Jarvis Street.

These background stories of the survivor participants set the stage for their abusive intimate relationships. Some of them normalized their parents' toxic relationships, while others felt helpless, as children, to challenge their fathers', and sometimes their mothers' abusive conduct. Still others rejected the violence and abuse that characterized their families, yet found themselves enmeshed in their own abusive intimate relationships as adults. What is indisputable is that these participants, as victims of woman and child abuse, were rendered susceptible to replicating the violence and abuse to which they were exposed, as children, and, in turn, exposing their own children to the phenomena, with deleterious consequences.

3. The Survivor Participants' Narratives of Abuse in Marriage and the Courts

There were many similarities in the abusive tactics and strategies the survivor participants' spouses employed during their campaigns of violence and abuse, regardless of their socio-economic status, age, level of educational attainment, occupation, ethnicity or religion. All the survivor participants endured multiple forms of abuse. They endured any combination of physical, sexual, psy-

chological, emotional, and financial abuse. Their children were abused, either directly through slaps, punches and/or kicks, or indirectly, through witnessing their mothers' abuse. The abuse of their children represented for the survivor participants the most painful type of woman abuse they endured. Indeed, in all cases, it was the imminent threat of violence, recognition of escalating violence, or the realization of the damage the parents' violent and abusive relationships was causing their children that provided the impetus the survivor participants needed to leave their relationships.

The survivor participants' experiences of abuse were replicated in the legal system. Their spouses' violence, and emotional, psychological and financial abuse continued. Their children remained subject to domestic violence and abuse, either as recipients or witnesses, or both. The survivor participants turned to the legal system with the expectation that their partners' misconduct would be condemned, and their experiences of violence and abuse acknowledged. They assumed the judges would, in the face of competing legal claims, favour theirs, particularly those that related to their and their children's safety and well-being. Unfortunately, their expectations of both the criminal and civil family justice systems were rarely, if ever, realized.

Lianne: Lianne, 33, was 24 when she married Doug, whom she had known since high school. She denied that there was any violence in her family of origin. However, Doug's family was "very unstable", and his father abused drugs and Doug's mother. Lianne had graduated from university, and held a supervisory position with the Ministry of the Attorney General. On the other hand, Doug, a security guard "wasn't highly educated, had some learning disabilities and didn't feel good as a person." Lianne described Doug as "two different people", "kind, sweet, generous, witty and charming" to those outside the home, but, to her, he was "a liar, manipulator and a cheat." Although Lianne recognized these unsavoury qualities in Doug, the birth of their son triggered their marriage because of Lianne's "very high family values." Lianne described Doug and their son as having "a very good relationship, a very close bond. There's no issue there."

Lianne described “a lot of verbal fighting” immediately after the marriage. Lianne believed that the violence and abuse Doug had witnessed between his parents, coupled with his low self-esteem and emotional immaturity, led him eventually to act out his frustration in the form of physical violence. She admitted that he had choked her on one occasion. When it became obvious to both of them that they had to “split up”, “he just burst and had a total meltdown”. In the midst of their verbal argument, Lianne slapped Doug, who then punched her in the face, broke her nose, and knocked her unconscious. Doug was charged with assault. At his criminal trial, Doug deposed that Lianne had injured herself by falling over a chair. Despite Lianne’s testimony, her videotaped statement taken immediately after her discharge from hospital, the admission of hospital records and photographs of her injuries, the charge was dismissed.

Lianne’s initial involvement with the family court was unsuccessful. Although she had been given a restraining order from the criminal court upon Doug’s arrest, she was denied both an emergency civil restraining order and a sole custody order from the family court. She was told that her application was dismissed on a “technicality”, but, in fact, my review of Lianne’s court file revealed that the judge rejected the application because Lianne had brought it without notice to Doug. In so doing, the court failed to appreciate the threat Doug’s volatility posed to Lianne.

This is the feeling I got the whole time. I just went through the processes through Family Court, especially after I didn’t get the emergency custody with everything I had said. I thought that was just amazing. I thought, you’re right, it doesn’t matter what I say or what he’s done to me, they’re still not going to give me emergency custody. Obviously that was supposed to be how it works. Right from the get-go, that’s what I thought.

Lianne was the most fortunate of the survivor participants in her interaction with the family court, if only because Doug was amenable to all of her demands. Between them, Doug and Lianne agreed to her sole custody, the terms of his access and the amount of child support. Lianne admitted, “I think he was fine with whatever I was willing to give him because he knew I was part of the system.” However, at their first case conference, Doug’s duty counsel at the family court persuaded

him to reject the terms of their settlement. “He wanted to change our son’s last name on the paperwork to his last name, and he wanted all sorts of crazy requests, so we kind of went back and forth and eventually he pretty much agreed. It took half of our day, but then the judge signed everything.”

At the case conference, Doug’s violence and abuse, including his criminal charge, were never referenced by the judge. Although Doug refused to admit to assaulting her, Lianne believes that she is fortunate that he did not dispute any of her claims. She attributed his complacency to her having asked for only “minimal things”.

I felt like it was separate. I felt like with his child, and support, that was separate from what had happened between us. It had nothing really to do with it because it had to do with me. It happened to me. Now I felt like it was two separate things in everything I did.

Lianne realized that Doug’s violence and abuse “didn’t count for anything. It didn’t at all. The judge didn’t even ask. Nobody ever asked me, ‘Oh, I see that you were abused. How did this affect your son?’”

I didn’t feel like we got to both go in front of the judge and tell our story, be heard, at least before they made a decision. Maybe then the judge would have come forth with something for my son, like, “I think your son should go into counseling”. I don’t feel like we really got to do that. We just kind of got pushed through without any red flags, no alarms going off. I felt the whole time that the abuse had nothing to do with anything. It wasn’t taken into consideration, it’s totally separate, unless the abuse was with my son. The clerk told me that. But because it happened to me it has nothing to do with what kind of access he should have with his son.

Lianne is hesitant to return to family court to request further child support. Her son was diagnosed with learning disabilities, and his therapy is costly. However, she is not prepared to risk Doug’s taking the opportunity to reopen the case. “I feel like this was luck, total luck, so I really don’t want to mess with it. Just leave it as it is because I’m fine with that.” Lianne’s comment suggested to me that she has little faith in the very system in which she played an integral role.

Heather: Heather, 41, a social worker and clinical researcher in psychology, met her husband, Jeff, in an office in which they both worked. He was five years her junior. He represented the antithesis of her family. She found in him a “guy who came from this Anglican family where people were social and cheery”. Heather was 33 when she married Jeff. They were married for six years and had one daughter.

Heather admitted to recognizing Jeff’s inability to control his temper prior to their marriage. She could never determine what might “set him off”. It was not until after their marriage, however, that Jeff became physically violent. Heather related that Jeff’s first physical assault occurred when, while pounding their bed with his fists, Heather’s ankles “just happened to be in the way.” Thenceforth, Jeff would be “intermittently” violent; each episode of throwing things at, or hitting Heather, prompted another course of counseling. On one occasion, Jeff threw a heavy stapler at Heather’s head, which missed its target but left a large hole in a plaster wall. After the birth of their daughter, Brittany, Jeff continued to “throw his tantrums”, and Heather feared the objects he threw at her might hit the baby. However, Jeff never hit his daughter; Heather asserted “I would have killed him”.

Jeff was jealous of Heather’s relationships at her workplace. She discovered that he cyberstalked her male co-workers and left messages at their residences, threatening them if they did not stay away from his wife. One night, Jeff “exploded”. He threw Heather out of their bed and started to hit her, then “choke” her. Jeff followed Heather to Brittany’s bedroom and punched Heather, hard, in the face. He was charged with assault. As a first offender, Jeff undertook to attend anger management therapy, thus his charge was withdrawn and he entered into a peace bond for twelve months, which he breached regularly by calling Heather to harangue her.

Heather acknowledged that Jeff loved his daughter, and she loved him. Brittany, who was an infant at the time of separation, suffered from not seeing her father, and Heather, not Jeff, requested that the CCAS agree to Jeff’s exercising access. The CCAS insisted that any access be

supervised, which Jeff resented. Heather had grave reservations about Jeff's ability to care for their daughter. He was too impatient and intolerant.

During the duration of Jeff's peace bond, Heather retained legal counsel, and instructed her to bring an application in the OCJ for a restraining order, sole custody and child support. Her lawyer advised her not to pursue a restraining order, pointing out that Heather's failure to advise the police when Jeff contravened his peace bond would not be regarded favourably by the court. Heather's material provided a comprehensive history of Jeff's violence and abuse, as well as a reference to his criminal charge, but "nobody asked about it".

After receiving Heather's material from the OCJ, Jeff retained legal counsel and commenced an action in the SCJ, effectively staying Heather's application in the lower court (the *CLRA* s. 27 and *FLA* s. 36, respectively, made subsequent to Heather's and Jeff's proceedings, allow for the continuation of actions for custody and access, and support, respectively, in the OCJ after divorce proceedings have been commenced in the SCJ). He claimed joint custody. He had been paying child support to Heather based on his income from employment. However, since their separation, Jeff quit his job, and Heather suspected he demanded joint custody to avoid paying child support.

The parties attended their first case conference. Jeff failed to file his financial statement and most recent tax return, as required, for which omission he was harangued by the judge. However, Heather had the impression that "Jeff was the most important person in the room. I can only guess that's because he's the only man in the room. He was the only one having his needs met."

There's an issue of child and safety and violence, that anything that the violent person has done can be hidden or protected. This is wrong. The judge talked about Brittany the most, you know, is the person to be considered here. I wished she would act like it and actually act more like the decision-maker. She was talking about how she didn't know Brittany. She asked me, "Do you really want a stranger to decide your child's future?" Well, of course I do, because I learned the long, hard way that Jeff is not a good decision-maker for Brittany.

Heather felt marginalized in the case conference. She did not know what was involved in "talking to a judge". The judge made no mention of Heather's concern for Jeff's ability to care for

Brittany. The judge asked her if there were any other instances of abuse aside from the one for which he was charged, “so I started trying to remember and I mentioned about how he threw the stapler at me or he’d throw something at me, I’m not sure if I told the judge about the time that Jeff punched me in the leg as I was walking by him. And she turned to Jeff, and said, ‘and what is your response to all this?’ Jeff replied that ‘there was hitting. That’s all’.”

Heather was confused. “Afterward my lawyer told me that she thought that what the judge was trying to establish that we hit each other, and that it was 50/50.” Indeed, the judge and both lawyers appeared to have reached an agreement that joint custody should be imposed.

The episode in front of the judge, the whole thing was really emotional. I’m having to bring up all this stuff and Jeff turned to me at one point and said, “It’s not about us anymore. Now it’s about Brittany.” It sounded rehearsed but it still sounded like nonsense to me. I realized what was bothering me about it was, like, how the hell did you think that choosing to be violent so that there’s no way that we could ever live together hasn’t already affected Brittany and, for the rest of her life, probably more profoundly than anything else? It isn’t now just starting to be about her, it was always about her from the day she was born. Where the hell have you been?

Instead of acknowledging Jeff’s misconduct, the judge lectured them that “there would be many years ahead and that we needed to be able to make decisions for Brittany’s future and to be able to discuss things together.” Heather suspected the judge took very little interest in the case before her.

She walked in the room with this - it didn’t come out of our material. But, when I asked about my situation, specifically, I got a different answer. There seemed to be a lack of taking responsibility for decision-making. “Oh, you really don’t want a stranger to decide, and then have to go and continue having to fight with Jeff some more, do you?” I thought, I’ve done that more times than you’ve sat in that chair. Like, are you kidding me?

The judge suggested mediation.

At one point she was going on about how, now, it was important to think about Brittany and try and put the past [behind], to let go of things that had happened in the past, to put Brittany first, and I’m thinking, if he were capable of doing that, I wouldn’t be here.

Heather was advised by her lawyer that, in order to please the judge, they should consent to one mediation session. When I last heard from Heather, she and Jeff had been involved in mediation for two years, with no end in sight because he insisted on joint custody. Heather advised me that she was considering just “giving up”.

Emily: Emily, 61, works full-time as an administrative assistant with a community services agency, despite being severely crippled by osteoarthritis. She immigrated to Toronto when she was eighteen. It was at that point that she met her future husband, Devon, at work. They had been dating for a while when he raped her.

At the time I didn't call it that, because at the time nobody called it that. When it first happened, I didn't want to have anything to do with him, however we got back together, and we got married. The belief system of my upbringing ... I was a virgin. My virginity was not something I gave away to just anyone. So when it was taken away from me, I thought, here is the guy I am committed to.

Emily and Devon had three sons, now adults, and were married for twenty-five years. She described Devon as abusive, coercive sexually, and angry. “He hit walls, and got really angry at the slightest thing. He put me down in front of the kids, he yelled at me in front of them and insulted me.” Emily recalled times when Devon would come up behind her, and, in front of the children, pull down her skirt or pants, exposing her to her sons. Devon was also financially abusive; he forced Emily to hand over her paycheques, and registered title to the matrimonial home in his name, although Emily had contributed the greater share of the purchase price.

Despite his abusive behaviours, Emily claimed, “it never occurred to me (I don't know if it was because I grew up with things like that happening between my dad and my mom) but it didn't ever occur to me that it bothered the children.” Nor did she consider Devon's conduct toward *her* abusive, until he started to physically assault their children. She started to hear stories from her sons about their father's violent beatings. She felt “something had to be done”. However, without funds, her only alternative to remaining was to take her sons to a women's shelter. She had difficulty

finding a shelter that would take teenaged boys. Devon suspected Emily was about to leave him. He raped her and threatened to kill her and himself. She left with her children the next day.

Emily and her children stayed in the shelter for six months. Devon found her, and constantly dropped letters off at the front door for her. While at the shelter, Emily secured new employment, but Devon found her there, as well, and began harassing her at work until she was forced to leave. In her absence, Devon failed to pay the mortgage or utilities for the matrimonial home, and allowed the property to deteriorate. Eventually, the bank initiated power of sale proceedings, and, having dissipated all of the equity in the property, Devon ensured that Emily realized nothing from the proceeds of sale.

Emily's impecuniosity following her separation affected her health. She began to suffer from anxiety attacks and other illnesses. She was forced to abandon her university studies, which she believed were necessary in order to secure the level of employment required to support her children. She had to resort to welfare to feed herself and her children. Eventually, Emily secured subsidized housing for herself and her children, where she lived with her children. She now resides in a community housing facility for people with disabilities.

Initially, Emily's oldest son was ambivalent about his father; following separation, he assumed the role of 'man of the house' and began to verbally abuse his mother. The two younger boys had no interest in seeing their father, and, eventually, all of Devon's children were estranged from him. Shelter personnel referred Emily to a family lawyer, whom she instructed to seek sole custody and child support.

Devon disputed Emily's allegations of abuse, as well as her custody and support claims. Emily found yet another job, but Devon harassed her there, too, forcing her to leave. Emily's lawyer was able to secure a temporary restraining order against Devon, which he ignored, and "nobody called the police". Devon went through three lawyers before representing himself. Emily could not understand how he could plead impecuniosity when he had sufficient funds to retain legal counsel.

Devon insisted on the Children's Lawyer being involved, but, to his dismay, his children were deemed old enough to make their own decisions, and no access order was recommended. However, Emily found the judges favoured Devon;

I don't think the judges were in any way sympathetic. I found my ex got away with so much. My ex controlled everything that happened. If he decided to delay for this reason or that reason, it just went his way. He didn't file his financial statement when he was supposed to. That's another thing. We always had to be running after him. There was always some kind of delay. He was not really criticized or punished for anything ... We did get a support order after a while. It kept changing, and then all of a sudden it stopped, because, of course, first he claimed he had to have surgery on his knee, so he was on Unemployment. So, every time we went back to court, he was having surgery. Then he ended up having huge arrears. The next time we came back he said he couldn't work because of all the knee surgeries, he's destitute, he's living in his car. He'd come to court in his work overalls! So the support just stopped. I found out three years later that he had opened an autobody shop and was working the whole time. My husband today is still doing the same autobody work he was always doing.

Emily was left with a very negative impression of the family court. She believes that the two judges she appeared before, once Devon represented himself and feigned disability, were sympathetic to him. "It seemed like they were feeling, 'poor guy. He's gone through so much. Now he's destitute.' I feel like they were blaming me for his condition, like I was being unreasonable." As a victim of woman abuse, Emily knew how effective and persuasive Devon's manipulation could be. "They have a way of having people believe them. And that's the way it turned out in the end. It looked like people believed this whole lie that he had. I came away feeling like the unstable one."

Emily concluded, "There was no success. And also there was no sensitivity for me. You guys are acting like he is the victim in this whole situation. So I got to the point where I was so fed up and so frustrated with the course of the justice system, but really, there is no justice in the justice system."

Lily: Lily, 49, a microbiologist and flight attendant, presented one of the most harrowing narratives of woman abuse of all the survivor participants. Lily met her husband, Michael, when she

was a teenager. Lily admitted that it took her seven years to make up her mind to marry Michael, because “there was some funny inner feeling”, but her parents pressured her and she “gave in”. Lily was 28.

Lily held two jobs during most of her marriage, and was earning twice Michael’s salary as a firefighter. She thought Michael considered her merely as a “work horse”, and she was forced to deposit her paycheques in a joint bank account. Lily and Michael had two children, a girl, born in 1991, and a boy, born in 1993. Soon after the birth of their daughter, Lily realized that “in every aspect of my life, Michael was very controlling.” Lily stopped depositing her paycheques into the joint account in 1998, in response to which Michael embarked on a campaign of psychological and emotional terrorism. He hid eavesdropping devices throughout their home and wiretapped the telephone. He enlisted his friends on the police force to follow Lily. His parents also stalked her, threatened her and physically abused her in front of her children. Michael’s wiretap revealed that Lily had had a brief affair, which infuriated him. He lied to her parents, telling them that Lily brought men to their home and allowed them to rape their granddaughter before having intercourse with her. Her parents believed him and accused her of shaming the family. Accordingly, Lily was alienated from her parents. “It got to a point that I hated them because they didn’t believe anything I said.” He accused her of being mentally unstable, an alcoholic and a drug abuser, and recounted these allegations to their mutual friends, her co-workers, the children’s teachers and school social worker, their pastor and family physician.

Lily had no support systems. Although she had friends, she did not disclose her marital problems to them “because, even though I grew up here, I was brought up with the old culture, with the old way of thinking, that you keep your private family matters very private. It took me a long time to be able to talk about personal situations.”

Michael never showed much interest in his son. However, Lily was concerned about the attention he lavished on their daughter, given his sexual proclivities; Michael often insisted in en-

gaging in sexual roleplay with Lily in which she dressed up as a little girl, whom Michael pretended to seduce. Consequently, his perceived overfamiliarity with their daughter worried Lily.

He always insisted upon giving her a bath, and once she said, “he can’t touch me there anymore”. That’s very hard to prove in court. He was always crawling in bed with her. He would always go and lay on her bed with her under the covers, and he would be in his underwear.

Lily and Michael separated in 1998. Lily’s involvement with the civil family justice system spanned fifteen years. Immediately upon their separating, Michael brought an application, without notice and on an emergency basis, for custody, supervised access, interim exclusive possession of the matrimonial home, a restraining order, an assessment, the release of Lily’s hospital and psychiatric records, the appointment of the Children’s Lawyer, and full indemnity costs. The motion was adjourned.

The first attendance set the stage for the balance of the proceedings. Lily was not granted custody; instead, an interim interim order stated “the children will have their primary residence with their mother.” Access was to be negotiated by the parties. The rest of the motion was adjourned.

Michael was incensed that he had not got “his way”. Three months later he brought another motion for interim custody, exclusive possession and the appointment of an assessor. That motion, too, was adjourned. Six months later, he “short served” Lily (served her inside the time provided in the *Rules of Civil Procedure*) with another motion in which he demanded access over Christmas, alleging that Lily was habitually denying him access, which she denied. The parties were referred to mediation, which failed, and an assessment was ordered.

The assessment was most unfavourable to Michael, and recommended sole custody to Lily.⁷ An order giving Lily interim custody and child support was issued, with access to Michael, who thenceforth embarked on a campaign to discredit Lily’s ability as a mother, ruin her reputation in the community, alienate her family and friends (as well as the children’s teachers), and destroy her emotionally and psychologically. He accused her of being suicidal and intent on murdering the

children. He reported her to the CAS and attempted to coerce their family doctor to have Lily committed. She was subjected to a six-week investigation by the CAS, during which she was not allowed to be alone with her children. “I had to sit at school and watch another woman walk off with my kids. I just sat there and broke down. I got so upset that I gave up eating as well. I couldn’t stomach food.” In the meantime, Michael would attend the children’s school in full fire-fighting regalia, “like a big hero”. During the investigation, Michael was allowed unsupervised access by the CAS. The CAS investigation found Michael’s complaints to be spurious and unfounded.

When Lily and Michael separated, he found an ally against Lily in her abusive younger brother. Between them, they reported her to the CAS on at least thirty occasions. Michael exploited his authority as a firefighter to enlist the assistance of the local police force, which he called at least 40 times to raise various outrageous allegations against Lily, such as accusing her of stealing a chafing dish or a moving blanket from the matrimonial home. Every call prompted an investigation; all were proven unfounded.

Michael also used his firefighting acumen to repeatedly gain access to the matrimonial home while Lily resided there; neighbours observed him climbing in through her second storey window on many occasions. He would go through her purses and remove items from the home. Over the course of time, Michael removed everything of value from the home, including Lily’s jewellery and her family heirlooms. She never recovered them. On one occasion, he entered Lily’s home while she was present, and raped her. She found different accommodation for herself and the children, but not before Michael had, one day, hired a truck and, with the help of his fellow firefighters, removed all the furniture from the matrimonial home. Upon the sale of the matrimonial home, although Lily contributed more than 70% of its purchase price, Michael received half the proceeds.

Lily had two golden retrievers, which she had raised since they were puppies. She was forced to leave the dogs behind in the matrimonial home. Michael would not allow Lily or the children to see the dogs.

He used the dogs to abuse my emotions mentally, because he knew they were my dogs and I couldn't see them. The younger dog died first and he never even told me. I found out one day and of course I went hysterical on the phone. Then, a couple of years later the other dog wasn't good. He brought the dog here for a couple of days and then took the dog back, and then one night he brought the dog here at midnight, brought a dead dog over to me so I could say good-bye to the dog. I'll never forgive him for what he did to me with the dogs.

Following their separation, Lily attended at her bank to draw her share of the \$200,000 on deposit in the joint savings account, but found her access had been "blocked". She discovered that Michael had been having an affair with the bank manager, who, at his bidding, blocked Lily's access to the account, and kept Michael apprised of Lily's banking activities. The bank manager set up a sham trust for the children, with Michael as sole trustee, into which the child support he was ordered to pay was deposited and then redirected back into his account. Lily was never able to recover the arrears of child support Michael owed her, which eventually totaled \$44,000.

Michael took every opportunity to manipulate the legal system to abuse Lily. The court file was replete with motions, initiated by Michael, on short notice or *ex parte*, which were usually adjourned at least twice, at Michael's or his lawyer's behest. He brought motions requesting the same relief, time and again, to which Lily was forced to respond, and at great expense to her. Upon receipt of the assessment report, Michael forwarded a scathing letter to the assessor, her governing body, the judge, his lawyer, and Lily, criticizing the assessor's professional qualifications, assessment protocols, ethics and competency. He rejected her findings and retained his own assessor to review the report and write his own, which, of course, disputed the findings of the first, although Michael's assessor failed to interview anyone but Michael.

During the course of their protracted litigation, Michael failed to disclose his considerable cash income from handyman jobs. He refused to abide by the child support order and amassed

substantial arrears. Although Lily garnisheed Michael's wages, the arrears were never paid. To add insult to injury, when the children eventually left her to live with Michael, Lily was order to pay *him* \$500/month in child support.

Despite his initial obsession with seeing his children while they resided with their mother, Michael thereafter "went through the motions" of exercising access, preferring to pursue his abusive campaign against Lily. However, Lily "let him see the children as often as he wished, because the time with your children is limited, and they grow up very quickly." Lily did not realize that her generosity gave Michael an entrée to insinuate himself deeply into the children's lives. He began exercising access in Lily's house and refused to leave. Without friends or family to assist her, Lily was forced to turn to Michael to care for the children, now teenagers, during her overnight flights. He used these opportunities to turn the children against Lily and her family. He told his children that their Chinese grandparents were "lower class because their grandmother couldn't speak English", and, eventually, they refused to visit them. He persuaded the children to allow him into Lily's house in her absence, during which times he continued to remove items from the home.

Michael instructed the children to challenge Lily's parental authority; "he told them they didn't have to listen to me, or go to school, and they could do whatever they wanted." He promised to purchase each a car, over Lily's objections. He told his daughter "she can do whatever she wants, once she's 16." He purchased each a cell phone to be used to contact only him. The children became defiant and abusive: they swore at Lily; her son caused \$8,000 damage to her property; her daughter lied to her; and both refused to attend school. Lily knew her children's bad behaviour was being encouraged by Michael, with the assistance of her brother.

In 2007, her son brought home some of his friends, who proceeded to "trash" Lily's house. She ordered them to leave. That same day, her daughter, who was habitually truant, failed to return home. Lily discovered that Michael, her brother, and the children had "set her up". Thenceforth, the children refused to have anything to do with Lily.

In October, 2013, I reviewed Lily's court file. No less than seven judges made endorsements in the court file. Lily advised me that none of the judges before whom she and Michael appeared ever alluded to the allegations of violence and abuse advanced by either party. My review of the file confirmed Lily's assertion. None of the judges ever referred to Lily's allegations of violence and abuse against Michael. Indeed, there is no indication that the allegations were ever taken into account, although the judge before whom Michael brought his final emergency, *ex parte* motion for custody in 2007 was obviously suspicious of the circumstances, stating in her endorsement:

The motion to change custody was served last night by putting the documents in the mother's door. The children, who are presently 14 and 16 are not living in the home of the mother, who presently has custody of the children by court order dated April 14, 2000. The father says they are at the mother's brother's home, but the mother is not aware of that. Clearly, it is important for the children to be in a parent's home. However, the father is in the process of moving to a new 4-bedroom home as of today. There is something I do not like about this situation that has come before me today as an emergency. I do not have sufficient sworn information to know what is best for the children who, in some ways, are able to decide for themselves where they want to live because of their ages. I decline to make an order for custody today.

Other than this entry, I was struck by the absence of any acknowledgment by the judges of the obvious indicators of Michael's manipulation and abuse of the court's process. Despite bringing his initial application, and all subsequent motions, as emergency matters, and all initially without notice, he was never subject to a cost order. His egregious allegations of Lily's psychiatric disorders, incompetence, child neglect, financial non-disclosure, physical abuse of the children, and perjury were never proven, but were reiterated time and again. He was never sanctioned for falsely reporting her to the CAS or the police. He was never accused of parental alienation, although this was clearly the case. There is no indication in the endorsements that any of the judges considered it necessary to ascertain which parent was more capable of serving the best interests of the children. In fact, it appeared that the court consistently took a 'hands off' approach in this case, despite the serious allegations of woman and child abuse alleged, and left the parties to 'fight it out', with the

spoils going to the victor. I suspected that Michael had successfully persuaded the judges that their conflict was “situational”, the violence and abuse symmetrical, and, thus irrelevant.⁸

In our interview, Lily admitted “it took a long time for me to realize that it was such horrendous abuse, a long time to realize I was subjected to that.” She admits to having been so badly damaged emotionally and psychologically she fears that “one day, I might have a breakdown.” She recognized that the the courts “just go by the children, that’s their main concern. I know the courts protect the children and I understand that, but if the adults are not in some way protected or they don’t see what is taking place, how are they going to protect the children?” Lily asserted that

I have absolutely no faith in the law. I’m totally and horrendously disappointed. I feel they’ve taken a big part of my life and I’ve lost a big part of my life. At this point I don’t believe in the system. I feel the system has completely failed me. I shouldn’t have to be dragged through the courts for ten years and nothing’s been resolved. It’s been financially, emotionally, mentally straining. I don’t think it will do the province any good if being dragged all this time and nothing happens, the system doesn’t work, and I end up in a mental home at taxpayer’s expense because I won’t be able to work.

Lily currently lives alone in a large home, purchased for her by her parents, with the hope that her children will return to her. However, at least up to October, 2013, Lily had not seen nor spoken to her children since 2007.

Natasha: Natasha, 54, was a university graduate and taught mathematics at the high school level in her native Bulgaria. She met her future husband, a mechanic, while working part-time in a store. She was Christian, but her husband, Ahmed, was Muslim and Iraqi. They began cohabiting and Natasha gave birth to the first of their two sons. Ahmed obtained Bulgarian citizenship, without which he could not marry Natasha. Their second son was born shortly after their marriage.

Natasha described the first year of their relationship as “great”. However, after the birth of their first son, Ahmed became distant, critical and demanding. He ordered her to quit her job. Natasha attributed his attitude to his cultural background, although she admitted it was not so different from that of Bulgarian men.

Ahmed's family lived in Toronto. He decided that he, Natasha and the children should join them, and he and Natasha applied for landed immigrant status, since his family refused to sponsor them. After waiting three years, Ahmed decided they should enter the country and apply as refugees. Their entry into Canada was uneventful. The family resided with Ahmed's brother while Ahmed and Natasha applied to stay in Canada on the basis of their being political refugees. Their applications were rejected.

Natasha was overwrought. She could not speak English, her support system was non-existent, Ahmed's family was hostile toward her and her children, and she feared deportation. Ahmed found employment for himself and Natasha as apartment custodians. At the same time, Ahmed controlled the family's income. He insisted that his and Natasha's employer give her paycheques to him. He did not allow her to contact her mother or friends in Bulgaria or have any friends in Toronto, although she did become acquainted with a fellow Bulgarian who had resided in Canada for thirty years. Through her, she began to realize that her isolation, and the physical, emotional, verbal and financial abuse to which Ahmed subjected her were not tolerated in her new country.

Natasha began to challenge Ahmed. She criticized his abject disinterest in his children. She opened her own bank account, and directed her employer to give her paycheques to her and not Ahmed. In response, Ahmed began to physically abuse Natasha. One day, he threw Natasha on their bed, produced a knife, and began to slash the mattress all around her while threatening to kill her. One night thereafter, Ahmed raped Natasha while the children were sleeping. A few months later, Ahmed threw a large wrench at Natasha, hitting her in the stomach. "It was so painful, I just started crying from the pain, and the shame and those kind of things. At that time, I remember it was just, that's it. Any time he can kill me and take the kids. Any time, any moment, I just realized at that time. I said, no way, that's it. Before, I was living in a fog."

Natasha and her sons lived in a shelter for one and one-half years. Within the first few days, Ahmed had located Natasha. Once on the phone, Ahmed threatened to murder her and take the children to Iraq (a threat he repeated throughout their marriage).

Natasha reported Ahmed's call to the shelter workers, who called the police. This was the first time Natasha had approached the authorities for assistance. Her experience in Bulgaria had discouraged her from expecting them to help her. Instead, she found them very supportive, and, with their encouragement, agreed to lay charges against Ahmed for one count of assault, one count of assault with a weapon, and one count of historical sexual assault. Ahmed had attempted to abduct his sons, twice, as they returned to the shelter from school, but they refused to go with him. Unfortunately for Ahmed, he chose the day the police were in attendance at Natasha's shelter to stalk her there. He was arrested on the spot, but was released the next day on bail. Ahmed was eventually acquitted on all three charges because, Natasha claimed, the court-appointed interpreter was incapable of translating her testimony properly.

Natasha commenced proceedings in the OCJ by way of emergency application for sole custody, a no access order, a restraining order and support. She was granted interim custody and restraining orders. Ahmed counterclaimed for sole custody, a restraining order against Natasha, no access, and an order prohibiting her from changing the children's last names. At the subsequent attendance, Ahmed himself demanded an order preventing Natasha from leaving Toronto and changing the children's last names. Both requests were granted. Natasha thought, "okay, that's it. I'm losing it. I was crying. I pray to heaven to change this judge because I said, I'm losing this case because of this, because I saw him as taking side of him. Whatever he want, it is so." Natasha believed the judge was siding with Ahmed. She feared the judge would award custody to Ahmed.

Ahmed was empowered by the positive reception he received from the court. He contacted the Office of the Children's Lawyer and got it involved in the case. The Children's Lawyer, to Ahmed's dismay, recommended that Natasha be given sole custody and Ahmed supervised access.⁹

Natasha's prayers were answered. A different judge, whom Natasha described as "a smart judge", presided over the return of the motion.

My lawyer said we couldn't get a better judge. She's so strict, she knows what she's doing, she never makes mistakes. Believe me, she know what to do. As soon as we came, she said, dropping her papers, "I know the case." She made it very clear she wrote everything [there were written reasons for the order made]. For me it was very important to hear someone go through my papers very well.

In accordance with the recommendation of the Children's lawyer, Natasha was awarded sole interim custody, child and spousal support, a permanent restraining order, and supervised access. Ahmed paid one month of support. He exercised access at an access centre, attending with gifts for his children. He insisted on speaking to them in Bulgarian, against the instruction of centre personnel. My review of the court file revealed that, as deposed in his sons' affidavits, he was attempting to coerce them into leaving their mother, whereupon Ahmed would take them to Iraq. The children eventually refused to attend at the access centre.

Ahmed persisted with his claims. A trial was ordered, with the Children's Lawyer insisting that supervised access was in the children's best interests and in accordance with their wishes. Natasha feared that, without a permanent custody order, Ahmed could abduct the children and remove them to Iraq. At the commencement of trial, Ahmed was not present. His counsel advised the Court he had been apprehended by Immigration and was being detained in the West Detention Centre pending deportation. She withdrew from the case, and it proceeded in Ahmed's absence.

Natasha was given the option by representatives from Social Services to either proceed with her support claims, in which case Ahmed would remain in Canada, or drop her claims, in which case he would be deported. Natasha chose the latter option, and Ahmed was deported to Bulgaria, having given up his Iraqi citizenship to marry Natasha. Natasha applied for a reconsideration of her rejected claim for refugee status on humanitarian grounds. I was delighted to receive a telephone call from Natasha nearly two years after her interview, in which she advised me her application had been granted.

Mercedes: Mercedes, 35, arrived in Toronto ostensibly to visit her sister, but with the intention of staying permanently. A women's rights advocate in Mexico, she had been investigating sexual harassment in the workplace and the unavailability of union membership to Mexican women, when she began receiving death threats. "I was in trouble because every step I took was full of corruption." She applied for asylum as a political refugee, but was refused. Her sister, fearful of the political forces in Mexico who had threatened her sister, and anticipating the arrival of immigration officers at her door, told Mercedes to leave.

Mercedes was desperate. She had no support, could speak no English, and had little money. "I was very independent, but I was in shock. I needed someone to protect me, to feel safe." While volunteering at the Scott Mission, she met Don, originally from Peru, and a support worker. Mercedes described Don as her "savior". Despite Mercedes finding Don uneducated and coarse, they were soon involved in an intimate relationship. Mercedes was collecting social assistance while working as an office cleaner. Don advised Mercedes that he rented out rooms in his house, and offered one to her. Don gave her his son's bedroom, which she rented for \$1,000/month.

Mercedes found that Don was very controlling. While she was at work, Don accessed her email. When Don's son returned home, Don ejected Mercedes from her room and threw a mattress on the kitchen floor between the table and refrigerator; this was now her 'room'. Don contacted her employer and threatened to expose him to the authorities for hiring illegal immigrants if he did not give Mercedes' pay directly to him. Mercedes, as her mother had done, began to resist Don.

In response to Mercedes' withdrawing from him, Don began sexually and physically abusing her. She was soon pregnant. Don assaulted Mercedes, kicking her in the abdomen, and incapacitating her. Don was charged with sexual assault and common assault. The charges were dismissed when Mercedes failed to appear at trial; her notice had been sent to her at Don's address.

Mercedes was homeless. She went to a shelter, but was evicted for complaining. She spent twelve days living in coffee shops at night, using the facilities at the YWCA during the day, and seeking assistance from social service agencies.¹⁰

She gave birth to a daughter, who, she feared, will bear the stigma of being the product of a rape. Mercedes was humiliated by what happened to her. Having been an advocate for women's rights, she felt like a "loser" for allowing herself to be manipulated and abused.

Mercedes brought an application in the OCJ for sole custody and support. Don immediately denied paternity. Mercedes was disgusted: "I told my lawyer I want to talk to the judge and say, what kind of man is that. But, there are no words for that. They are not interested in that." Don then embarked on a course of conduct designed to delay legal proceedings, undoubtedly with the hope that Mercedes would be deported before her claims were adjudicated.

The first time I see a judge was last February. It was very strange. She never watched my face. She didn't ask who I am. Of course she wasn't interested. All the time she was with in him. "Explain to me about your income. Explain to me about your utilities." I don't think the judge is not paying attention to the file, is not paying attention to the rest. I think she is very aware about domestic violence but she is not very concerned about it.

Don managed to delay the proceedings for nine months.¹¹ He eventually submitted to a paternity test, the results of which were positive. He then claimed custody of the baby whose paternity he denied, and refused to pay support. He then dropped his custody claim, but demanded access.

The judge, well aware of the allegations of violence and abuse from Mercedes' pleadings, nevertheless told them they would have to work out their own settlement. Mercedes' lawyer, a referral from the Barbra Schlifer Clinic, advised her that the court would insist that Don have access to the child. Mercedes was incensed:

He was demanding a record of everything. But he can't know that, because she is so young, and I don't want to reveal my activities, because he can find me. His lawyer was giving him bad advice. He wanted access every week, six hours a week. I said I don't like it. He said every two weeks. It was like,

every time I was asking for something, he demanded the opposite. I said I don't like every week, at least not until she is ten months, and he said ok.

However, the Minutes of Settlement, incorporated into an order, did not reflect the agreement Mercedes assumed had been made. Instead, they granted Don no less than six hours of access every week, effective immediately. Mercedes was ordered "to the best of her ability, ensure that the access is meaningful to both the child and the respondent." Don was entitled to attend the child's extracurricular activities. The parties were to arrange for the child's transportation between them. Mercedes was subject to a non-removal order. Don was ordered to pay \$157 each month in child support, based upon his declared (and misrepresented) yearly income of \$18,139, inasmuch as he never did provide his financial statement or records, as ordered. Mercedes' response was to go into hiding, awaiting the reconsideration of her application for refugee status, on humanitarian grounds. At the date of our interview, she still had not received a copy of the custody order.

Mercedes was disenchanted with Canada's legal system. She believed that the police and the judge in the criminal trial protected Don because he was a Canadian citizen and she was not. When I interviewed Mercedes in her new apartment, she was living in fear that Don would find her. She had neither a telephone nor a computer that he could trace. Her assessment of the civil family justice system was no more positive.

They don't want to hear my voice. They are not concerned about my rights. They are just doing this trial because they have to do it. They never took my needs or my daughter's need into consideration. I don't think the judge is not paying attention to the file, is not paying attention to the rest. I think she is very aware about domestic violence but she is not very concerned about it. She never ask me. She wasn't ever watching me.

They are ignorant and careless when it comes to domestic violence. They need to develop more skills. They need coaching on domestic violence.

I didn't get respect. I was not heard. It is about dignity. I need respect. To accept me as a person able to do my own request [claim]. To be able to act in my own benefit and for my own rights.

Rena: Rena, 23, was a graduate student in social work. She met David in Israel and they dated for a year before Rena and her family left for Canada. "We were going out, it was a beautiful,

beautiful... you know, the typical relationship where you have like, flowers almost every week, going out, and it's all pretty.” However, in retrospect, Rena recognized David's abusive conduct towards her during this period: “moments of extreme jealousy”; “he was trying to control me”; “he commented on the clothes I wore”; “we went out with a bunch of friends and this guy I was sort of involved with was there, and David called me right after saying, ‘oh, he looked at you this way, I'm going to commit suicide’.” After she moved to Canada, David called her every day, crying on the phone that he could not live without her. Three months after Rena and her family emigrated, David moved to Toronto and married Rena. She was sixteen. Within two weeks of her marriage, she was pregnant with Jordana.

David first physically assaulted Rena when she was pregnant with Jordana. Rena described contact as "almost like a slap", but, thereafter, “they were quite a few more serious incidents”. On various occasions, David punched her in the stomach, threatened her with a knife, threw a chair at her, and threatened to “get” her if she ever contacted the police.

Rena never considered David's conduct to be abusive, because she would sometimes hit him back, but his physical assaults caused Rena to experience anxiety attacks. Rena was inhibited from exposing David's abuse, not only out of fear that he might be deported, but also because of the stigma she would attract within her closed Russian Jewish community. “There is a huge misconception that abuse doesn't happen in Jewish families, especially Russian Jewish. I always felt like I'm causing it and if something is going wrong then it is my fault. I become damaged goods. I can definitely say now that so many people have turned against me.” David also subjected Rena to further psychological abuse by attacking her mothering skills, and threatening to take Jordana away. His constant refrain that she was not a good mother reinforced her fear of leaving David and subjecting herself and her abilities as a mother to scrutiny and condemnation both within the Russian Jewish community, and society at large.

David could not cope with Jordana's oppositional behaviour. On one occasion, he smacked her face, leaving a red mark, because she did not want to brush her teeth before going to bed. When confronted by Rena, who had rushed to her daughter in response to her screams, David announced that Jordana had hit him first. Rena observed David roughly handling Jordana, holding her in a choke hold when forcing her to brush her teeth. David complained that Jordana did not "listen" to him and that her disobedience warranted corporal punishment. Rena realized, after taking a graduate course in domestic violence, that

witnessing abuse constitutes abuse according to the CAS, and if anyone reports it, then I might lose my daughter. This happened at the same time as I was getting out of my apartment one day taking the elevator down with a couple of neighbours, who are also Russian, and the husband just smiled at me and said, "you know, we've heard you fighting." I realized this and their picking up the phone and calling CAS, it would be, not a second thought.

Rena's exchange with her neighbours, and the realization of the detrimental effect David's abuse of her was having on Jordana finally prompted Rena to terminate her relationship with David in March, 2009.

Rena retained legal counsel immediately after separating from David, but not before he had retained a lawyer of his own. She recounted her history of domestic violence and abuse, including instances when David appeared naked in front of his daughter, and Jordana's allegation that her father had inserted his tongue in her mouth on one occasion when he kissed her. She claimed child support and spousal support in recognition of her having retired his student loan. She also requested any access be supervised. "I was worried that he was going to tell her things - which provide to be true, he tells her every time now that her mother is lying or that her mother is this or her mother is that." David counterclaimed for unsupervised and liberal access.

Rena's first encounter with the civil family justice system was most gratifying. She felt the judge was informed and sympathetic to her position. Supervised access was granted to David, although he never exercised it because his lawyer failed to take out the order and provide it to the

access centre. Rena's second appearance, one month later, was an entirely different experience. Proceeding unrepresented, Rena found herself adrift in the family court. David's lawyer presented letters of support from individuals who barely knew either Rena or Jordana, but were prepared to attest to David's outstanding parental abilities. Other letters from both strangers and acquaintances of Rena stressed that she had never publicly alleged that David had abused her or that she had contacted the police. David's affidavit in support of his application for unsupervised access included allegations that, on several occasions, he had stayed alone with Jordana, which were untrue. In the absence of any affidavits supporting Rena's position, the judge was not prepared to accept her *viva voce* evidence. With both David's counsel and the presiding judge promoting David's "right" to access, David was granted unsupervised access every week, over the objections of Rena and a representative from Jewish Family and Child Services (JF&CS).

David's access visits were fraught with problems. Once, he "lost" Jordana at Union Station. He continually attempted to turn his daughter against her mother, and wooed her with gifts and treats her mother, a university student, could not afford. David antagonized the parents of Jordana's few friends. He was constantly in arrears of child support, and threatened to apply for joint custody if Rena sought to vary the access order or enforce the support order. Rena gave up trying to extract Jordana's extraordinary expenses from David, and was told by his lawyer that she had to consult with David before registering Jordana for any extracurricular activities, notwithstanding she was the sole custodial parent.

Prior to her parents' separation, Jordana was experiencing difficulties at school, displaying anti-social behaviour amongst her classmates, and oppositional behaviour with her teacher. After separation, however, Jordana's attitude and grades both improved. Unfortunately, she also utilized her intelligence to manipulate her parents and play one off against the other. She told her mother that she was being "brainwashed" against her father – no doubt her father's expression – while assuring her mother that she lied to her father to extract favors from him. Rena continued to be concerned

about the welfare of Jordana while in the care of David. “The only thing that makes me feel okay about it is now, knowing the system, knowing Child Welfare, I know that if anything happens I will be the first one to make the call.” Rena's goal was “to have as little conflict as possible” in her daughter's life, her own life, and in her ongoing relationship with David.

Adit: Adit, 50, found Dror “charming” when they first met in Israel. “He seemed to come from the same background. Our parents were very old school.” Adit owned a successful consulting firm before she met Dror, and was an Administration Officer in the Israeli army. Dror was a graphic designer, whom Adit employed. They were married for eight years, and had two sons.

From the outset, Dror was financially abusive. He amassed \$17,500 in debt in Adit’s name because he had no credit. “When things weren’t happening his way”, Dror physically abused Adit. He was also psychologically abusive. On one occasion, when the oldest boy was nearly 4, Dror threatened to jump from their fifteenth floor apartment. “When he didn’t get what he wanted, he jumped”, but, to the other side of the railing. To his wife and son, it seemed as if he had disappeared – until Adit saw his fingers, beckoning her to help him back up. On another occasion, Dror attacked Adit while she was carrying her infant son, beating her about the head. Inadvertently, in her attempt to escape, she closed a door on Dror’s fingers. Adit’s and Dror’s argument were so heated, their neighbours called the police. Dror showed the police his bruised finger, and accused Adit of assaulting him, but Adit, whose injuries included cuts and bruises, refused to file a complaint. The police charged both of them with assault, and Dror was made subject of a 30-day no contact order. Dror stayed with Adit’s brother and sister-in-law, from whom Adit was estranged.

At trial, Adit and Dror agreed to attend marriage counseling, after which the charges would be dropped. Their attempts at counseling were not successful.

We went to JF&CS. The counselor immediately grasped what the situation was. She saw how he shouted at me and how violent he was and how aggressive he was, and she saw me scrunching and making myself smaller and smaller in the chair, and my voice was going lower and lower. She said they were not willing to do counseling for us. They suggested we go to separate counselors, but I knew he would never

go, and it didn't cover what the court order required.

Their next attempts, with a psychiatrist and a psychologist were disastrous. Adit believed that they both supported Dror. Their last effort involved a rabbi, who agreed to one counseling session. He told them their problem was that they were not having enough "couple time". He advised them to go on dates. Adit was flabbergasted. "We explained that there was violence, it was evident from the conversation that there was a horrible situation, police were involved, Dror beat me. His response was, 'you need to go to a movie, or maybe a restaurant'." The rabbi confirmed their attendance for counseling, and the Crown withdrew the charges.

Dror continued to physically abuse Adit. He appeared to be jealous of the attention she gave to their children (whom he ignored) and not to him, inasmuch as he always assaulted Adit, with punches and kicks, when she had one of them in her arms. Despite his lack of paternal interest, he repeatedly threatened to take the children away, disappear, and never let Adit see them again. He told Adit he intended "to make the children orphans, and that made me understand that he's not going to stop, and one day could beat the kids, too." It was only when she realized, with the help of her counselor from JF&CS, that Dror could actually kidnap the children from their daycare, that Adit initiated custody proceedings in the OCJ.

Adit described her experiences with the OCJ as "bizarre". Adit was referred to two lawyers by the Barbra Schlifer Clinic. The first was prepared to support Adit's request that Dror's access be supervised. However, that lawyer left the country. Adit's second lawyer rejected Adit's request for supervised access, and attempted to coerce her into executing minutes of settlement to that effect.

I think that her perspective was it's very common amongst a lot of people that connection of the children with both parents is essential. It's what we call the *tova*, the basics must be done. That is what is best for the kids. I believed that for a very short time in the beginning of the separation but very quickly I understood that my children, especially my older one, is being very harmed and damaged by this inconsistency of relationship, the erratic behaviour of his dad. The main issue for kids is to feel safe and loved, and it doesn't matter if it's from both parents, one parent - it doesn't even have to be a parent - if a person feels safe and is loved, the idea that a child has to have both parents in contact is not true.

Adit changed lawyers once more. The parties appeared before the same case management judge four times. Although Dror had dropped his claim for joint custody, he began to allege that Adit was alienating him from his children. The judge asked Adit (acknowledging her presence for the first time) if she believed her children would benefit from seeing their father, to which she replied in the affirmative, but only if he could maintain consistency in his visitation. “I told him I believe that Dror is a loving father, but there is a difference between a loving father and a person who is able to care. There is a difference between loving and caring. Caring requires actually an effort, requires a person putting themselves secondary, and putting the child first.”

The judge directed the parties to agree to supervised access. Adit’s older son had been diagnosed with depression at the age of five, attributed, according to his therapists at the Hincks Centre, to his parents’ fractious relationship and his father’s rejection of him. He had learning difficulties, and required special education classes in school, to which Dror refused to contribute. Given his disregard for their welfare, Dror showed up only sporadically for his access visits, and gave no warning when he would not be attending. This behaviour contributed to their sons’ feelings of rejection and abandonment, and exacerbated his older son’s depression. Dror’s supervised access was eventually terminated as a consequence of his repeated failures to attend.

Adit brought a claim in the SCJ against Dror for payment of the \$17,500 he owed her. His response was to, again, demand unsupervised access. However, by the time of the motion, Dror produced a letter to Adit advising her that, if she dropped her monetary claim, he would not claim visitation. This time they were before a different judge.

The judge argued with him for half-an-hour about that, trying to convince him how important it is for him to see the children. I thought that was horrific. Seeing him arguing with Dror for 30 minutes in regard to how important it is, and even though Dror, at the end of the 30 minutes, said, “I don’t want to see my kids”, the judge said, “Are you sure? It’s very important.” He said, “No, I don’t want to.” Then he ran out of the room.

When Adit obtained a copy of the endorsement, she discovered that the judge had granted Dror supervised access at an access centre. As Adit suspected, Dror made a few attempts to see his sons, then disappeared. Once again, his older son was “devastated”. By the next conference date, Dror did not appear. His lawyer advised the court that he had moved to the United States and no longer wanted visitation, only telephone access. Dror was granted internet access. At the time of our interview, he had sent two emails to his sons, but “he doesn’t show, neither of them, any interest.”

Adit indicated that, at no time, did the judges raise the allegations of violence and abuse set out in her affidavits, “not from the perspective of what did I go through. That wasn’t relevant. And it’s essential. If you’re talking about abusive situations, a loving, caring relationship never occurs, because an abusive person, from his nature, is not safe, stable, caring, putting children as the first priority.”

Adit realized she never saw herself as a victim of woman abuse. “Seeing from the background that I came, from the way I was raised, and the way that I was treated and enabled people to treat me, I didn’t yet grasp then that abuse is abuse is abuse. I don’t think that my kids got a very good, clear example of how to treat people in the world around them.”

Devorah: Devorah, 35, is a freelance graphic designer and web-master. Her ex-husband, Alex, whom she met in Israel, is a truck driver. Although already married, he entered into an intimate relationship with Devorah. Devorah had a successful graphic design business in Israel, and ended up supporting Alex. When she discovered she was pregnant, she and her mother arranged for Devorah to have an abortion, but, when Alex (who, by this time, had immigrated to Canada) found out about the pregnancy, he forbade it, threatening to leave Devorah if she went ahead. In retrospect, Devorah recognized his response to her pregnancy as coercive control, but, at the time, she considered it an indication of his love for her. When their daughter, Naomi, was one year old, Alex brought them to Toronto, and Devorah and Alex were married. Their marriage lasted ten years.

Immediately after their marriage, Alex stopped coming home to stay between hauls. He provided Devorah with \$70 every two weeks, but bought the groceries himself. Devorah was not permitted to shop. She had neither a car nor money to get around. “With the baby, I couldn’t go anywhere. The baby had an ear infection, and I was going ballistic because I had no money to go and take her to the doctor.” Devorah was lonely, confined to the apartment with a baby. She did have friends living north of the city that she knew from Israel. They invited her for Passover, but, when she told Alex, he forbade her to go “without him” (he was on the road).

Alex demanded complete obedience from Devorah. When he did come home, “he used to get angry with me that I’m not standing at the door with my hand on my head and saying, ‘Hello, dear husband!’ I had to feed him, clean after him, and I had to do everything. If I wouldn’t do it, I would be in HUGE trouble.” In her loneliness, Devorah had gained weight. Alex criticized her, telling her she was too fat, undesirable and worthless. However, when he demanded sex, she had to comply. Once, he “choked” her. After every argument, he took her to Bass Pro to look at guns, which he threatened to purchase and “get her”. He looked through her computer, and found that she was searching out freelance design contracts to work on at home, but forbade those, as well. By denying Devorah access to money, he was able to control her completely. Further, he maintained Devorah in a state of financial destitution in order to demean and humiliate her.

If I tell him I need money to go buy clothes, he wouldn’t give me money to buy clothes. It was okay for me to buy clothes for the kids [she eventually had another child] because he can see that I am using the money for them and not for me. I didn’t buy any clothes for myself unless he came with me to buy me clothes. I could not go alone. If I needed a bra, I had to wait for my husband to come home to buy a bra with me, or underwear or socks, not to mention shampoo, deodorant, or anything I needed.

Devorah started to have anxiety attacks. Her health deteriorated following the birth of her second child, and, in succession, her appendix and gall bladder were removed, she developed septicemia, and miscarried. She became depressed, and Alex insisted that she had bi-polar disorder. He took her to a doctor who prescribed anti-depressants and sedatives. Alex began to repeat his

suggestion that she kill herself. When she eventually collapsed in response, he took her to the hospital and had her committed. She was discharged as an outpatient and forced to attend every day for observation “because they thought I was in denial.”

One of the social workers tending to Devorah during this period suggested to her that she was being abused, which she denied. Later, while attending a “bi-polar group” conducted by JF&CS, although she did not relate to shared stories of domestic abuse, she recognized in the stories of other group members the abuse her children were experiencing from witnessing their father’s treatment of her: “once they talked about kids, for me, my whole world just swiveled around. I said, ‘What the hell am I doing to my kids?’” That night, Alex abused his older child. She had soiled her pants, and, fearing her father’s wrath, attempted to flush them down the toilet. When Alex realized what she was doing, he took her pants out of the toilet, then forced her to stand in the shower and clean her underwear while he screamed at her, “telling her what a piece of shit she is and how dare she do that.” Ironically, Devorah had just arrived home from her group in which she was introduced to the concept of child abuse.

When she finally told Alex the marriage was over, Alex quit work. He refused to leave the house. He started drinking and his behaviour became even more aggressive. He threatened to kill her, placing his index finger against her temple. Devorah took her children to a shelter, and, with the assistance of support staff, brought an emergency *ex parte* application for custody and a restraining order in the SCJ.

Devorah obtained interim custody and restraining orders, and the motion was adjourned for two weeks. She was gratified by the trial judge’s apparent appreciation of her experiences of woman abuse. In the interim, she retained a lawyer with the help of JC&FS and Legal Aid. Devorah and her lawyer carefully prepared her affidavit, outlining the sexual, psychological, emotional and financial abuse to which Alex had subjected her, and completed her financial statements. Devorah claimed child support, but her main concern was that access be supervised. She was not prepared

for Alex's submissions. He claimed, through his lawyer, that Devorah was mentally ill, suffering from bi-polar disorder, and that she had kidnapped his children when she removed them from the matrimonial home. During the motion, "his lawyer said the word 'bi-polar' thirty times, that I'm sick, and that I'm making this all up, and I'm hallucinating. I counted. Thirty times in the hour and a half we were in front of the judge."

The judge quashed the previous interim custody order, ordered child support, but dismissed the balance of Devorah's motion. He granted Alex unsupervised, overnight access commencing immediately, ordered the sale of the matrimonial home and awarded costs to Alex of \$1,500. The judge also ordered the involvement of the Children's Lawyer to represent two children aged *seven and two and one-half*. Devorah sold the matrimonial home, but the proceeds of sale remained in escrow; Alex disputed Devorah's entitlement to any of it. Alex refused to pay child support for eighteen months, and remained in arrears. Some months later, Alex applied for a variation to his access order. He requested, and was granted "open" access, whereby he was required to give Devorah only 48 hours notice of his intention to exercise access, to which she had to agree. For two years, Devorah was, once again, Alex's prisoner, unable to make plans or stray too far from home lest he notify her of his intention to see his children two days hence.

The case proceeded to trial management. The Children's Lawyer recommended Devorah be granted sole custody. By this time, Devorah was unrepresented, but she had prepared her own trial brief and memorandum. Alex attended without counsel, and without a brief. "It was some judge that I'd never met. He just threw us out of the court and said, 'Go to mediation'", but Alex refused. At the time of our interview, Devorah was awaiting her trial.

Devorah's children were traumatized by their parents' battles. Neither of them enjoyed access visits with her father, and her older daughter persisted in asking Devorah when she could refuse to attend. Devorah fears Alex will accuse her of alienating the children from him. Her older daughter expressed her frustration by "doing a lot of anti-things. She cut her hair one day. That was

weird. There is jealousy, now, between them. He likes the younger one better, and I think they fight over that.” Her older daughter had become very aggressive, “a big mess, because she goes there and she is screamed at like you won’t believe.” Devorah fears both girls will require “a lot of counseling.”

Devorah felt “abused” by the civil family justice system. She did not believe that the judges before whom she appeared read her file, or took her allegations of abuse into consideration. “They say they are for children, but they just push it onto the Children’s Lawyer immediately.” She rejected the efficacy of mediation in cases of abuse. “When a couple is not able to agree on anything because there is an issue of abuse, that means there’s one side deciding everything and the other side is not capable of going against it. There’s no two sides here. There’s no common ground in abuse.” Her disregard for the judges before whom she appeared was palpable. “The judge tells people to go to mediation because they just don’t want to work hard. Because we don’t have even a lawyer, they don’t want to hear us. They just shut us down”.

Devorah realized that she was willfully blind to her husband’s abuse. “I was in such denial, such a bubble for so many years, I had no clue. My mum says to me, ‘You were sick because you made yourself emotionally sick to protect yourself. You had no choice. If you would be normal and aggressive like you really are, you would be dead’.”

Sharon: Sharon, 43, was a yoga instructor and personal trainer. She had been married twice, first, at 21, to “a good guy, a very simple guy”, with whom she had her daughter, Robyn. She attributed the breakdown of their marriage to fundamental differences in personality between them. Sharon met her second husband in a bar, two years after separating from the first. Rick, an accountant, was born in Israel and presented as the complete antithesis of her first husband. Sharon recognized in Rick many of her father’s traits that she found attractive. However, her bliss was short-lived. During their wedding ceremony, Rick “almost fainted”. After a “wonderful honeymoon” shared with Robyn, Sharon found herself pregnant. Sharon had two children with Rick.

Sharon enjoyed a lucrative position in the fashion industry, but Rick persuaded Sharon to stop working after their marriage on the representation that he would “hire” her to help him with his bookkeeping and filing, but that work never materialized. Sharon’s savings account was deposited into a joint account, but Rick forbade Sharon to access it. Rick controlled the family finances, providing Sharon with a set allowance every month to pay for the family’s groceries and the children’s needs. If she ran out of money, Sharon had to account for *all* of her expenditures; by the end of their marriage, Rick forced her to keep a journal in which she was required to write down every transaction and expenditure. Nor would Rick allow her to purchase the children’s clothes; he did. Ironically, “he was horrible with money. I was the one who came to the marriage with money, with no debts, with all my stuff paid. He came to the marriage with no money and with all kinds of debts.” Accordingly Sharon had to contribute the balance of her savings (RSPs) toward the purchase of the matrimonial home.

At first, Rick “took Robyn under his wing”, but, once his own children were born, he lost interest in her. Rick’s repudiation of Robyn alerted Sharon to her own mistreatment:

I didn’t like what I was feeling, and I didn’t like what I was seeing. I started to just not like what I was facing, what I was dealing with. I told him I didn’t like it, so we started fighting a lot because I was sticking up for myself, I was questioning things, and what was important to me in life, raising my kids with the morals, values, and all the things I wanted to instill in my children and wanted for myself. They were always there, but they became more important to me, especially when I started to see that he was the opposite. I lost respect for him.

As their relationship deteriorated, Rick began to psychologically and emotionally abuse Sharon: “he tried to take away my sense of myself and my confidence in myself as a person. There was a point in the end where, and I consider myself an intelligent person, but I couldn’t make a decision. I lost myself.” He told her she was “irrational” and “crazy”, and she started to believe him. The marriage became “a battleground”, but it was Robyn who was the catalyst for its termination: one night, she collapsed. The clinical diagnosis was stress.

During the course of their marriage, Rick had persuaded Sharon to build a large and luxurious house in a new subdivision near the matrimonial home, which was sold to save money for the purchase. The family moved into Rick's parents' house for six months. When the marriage deteriorated, they resiled from their purchase. Without advising Sharon, Rick took \$100,000 of the sale proceeds from the matrimonial home to invest in an unsecured business venture. He quickly lost the money.

After their separation, Rick told Sharon, "I'm going to destroy your family', and that's what he did. He dragged it out, dragged it out, dragged it out." He challenged her on every point in her claim for relief, in every interim proceeding and, eventually, during mediation. He demanded joint custody, to which Sharon reluctantly agreed. By this time, Robyn refused to have relationship with Rick. He attempted to alienate the younger children from Sharon, telling them the divorce was "mommy's fault". The children would return from their access visits with their father "beside themselves", distraught and crying. Her son's schoolwork deteriorated.

During the mediation proceedings, Rick threatened and assaulted Sharon. He was charged with two counts of uttering threats, one of assault and one of property damage. Sharon obtained a peace bond (which she called a "restraining order") in the criminal proceedings, and Rick pled guilty to the two threatening charges.

Their legal disputes were eventually disposed of through Minutes of Settlement. Sharon agreed to joint custody, and abandoned her claim to any part of the \$100,000 Rick had taken from the proceeds of sale of the matrimonial home. Rick agreed to pay both spousal and child support, but thereafter refused to pay the former, and was in serious arrears for the latter; at the time of her interview, Rick was \$50,000 in arrears. He was found in contempt of so many orders of support that he was stopped from responding to Sharon's motions, or bringing any of his own.

Rick advised the FRO he was unemployed, impecunious and had applied for social assistance because the FRO revoked his driver's licence for failing to satisfy his arrears. Once he started

receiving welfare, the FRO closed its file. However, Sharon hired a private investigator to follow Rick as he drove his Porsche every day from his new home (registered in his sister's name) to attend to his clients. Despite providing the FRO with this information, no action was taken against Rick. He refused to continue paying his children's private school fees, despite a court order that he do so, and the children were no longer allowed to attend their school.

Rick continued to slander Sharon to the children, despite being ordered by the court to cease and desist. Sharon's son began to parrot his father, complaining that "it's wrong that daddy only sees us on week-ends. He should see us half the time." Her son's grades continued to slide as he became increasingly oppositional to Sharon. She believed that Rick was now attempting to secure a co-parenting arrangement in order to obviate his responsibility for child support.

Sharon believed that the civil family justice system was complicit with Rick in abusing her.

There has to be a blending of the social issues in our society as well as the legal issues. The legal issues are too black and white. Life is full of grey areas and I understand how the law is there to protect because there are women who could be equally nasty, trying to get things from men that they shouldn't, but there's a lot of men who are doing the same thing, and the system doesn't protect the people who need the protection the most.

Gillian: Gillian, 45, is a community outreach worker with the district school board of one of Toronto's suburbs. She has two sons, now aged 18 and 12. She met Dwight, a Jamaican, through her cousin and "he swept me off my feet. He was a wonderful, wonderful, boyfriend in the early years, and that's how we got together." She was married to Dwight for 10 years.

Gillian was three months pregnant at the time of her wedding, and, even though she had previously been involved with an abusive boyfriend, she was shocked when Dwight shoved her during an argument prior to their marriage. Emotionally, Dwight's conduct toward Gillian changed on their wedding night; she described her honeymoon as "a honeymoon in hell. He was very distant, he ignored me, he wasn't that 'loving you, sweetheart' that he was five days prior." Dwight refused to do things with Gillian; he left in the evenings and failed to return night after night. Dwight also refused to participate in the birthing process. The day after his son's birth,

he was holding the baby, just staring at him, and he had the audacity to say to me, "That couldn't be my kid, his hair is straight." At that time I was new to the GTA, I didn't know anything about this cultural thing, the baby mama thing. I didn't know anything about a lot of these young black women having babies for several different men. I didn't know anything about that stereotype of these men who accuse the mother of it not being his. I mean, this was all new to me. I grew up in a household that was just normal, in my opinion..

Dwight's family background was rife with abuse. Two of Dwight's brothers were physically abusive, although Gillian was not aware if they were abusive toward Dwight. She attributed Dwight's misogynistic behavior to the Jamaican culture in which he was born and brought up, although "he didn't behave that way while we were dating. He worked really hard at convincing me that he was a good guy."

Dwight was not employed during Gillian's pregnancy. He had told her during their courtship that he was a salesman, but, upon overhearing a conversation between him and an acquaintance after their marriage, Gillian realized that Dwight was a drug dealer. When confronted by Gillian, "he came clean to me and told me about it, and said that he knows that I'm not that type so he needs to stop." Gillian realized that Dwight considered her his "way out of that life". My review of Gillian's court file revealed Dwight's CPIC report, which listed two pages of drug-related, firearms, theft and assault offences.

Following the birth of their son, James, Gillian's and Dwight's relationship continued to deteriorate. Dwight began to physically as well as emotionally abuse Gillian, to the point that their neighbours called the police. Dwight was arrested, convicted, and sentenced to 14 days incarceration to be served on weekends.

Gillian had no intention of reconciling with Dwight. She had secured a new position, which required her to work one evening a week. She asked Dwight to babysit their son during these times, and, upon her return home one night, found that he had moved all of his belongings into her apartment, and refused to leave. Even though it was "hell from there", Gillian followed through with her intention to buy her and their son their own home. "Of course, he didn't put one dime towards it

literally, because he didn't have any savings. He always accused me of having money saved so I used my savings, my investments, and my parents matched what I put in, and we bought this house.”

After their move to the new house and the birth of their second son, “things just got from bad to worse.” Dwight criticized Gillian for failing to have his dinner ready, the laundry done and the house spotlessly clean. Eventually, he accused her of having an affair. Gillian decided to terminate her marriage. She retained legal counsel, and began documenting Dwight’s conduct toward her and the children. She commenced divorce proceedings against Dwight, claiming sole custody, child support, an unequal division of net family properties, and exclusive possession of the matrimonial home.

Dwight contested every aspect of Gillian’s claim, except the divorce. His supporting affidavits were risible. He claimed to be the children’s sole caregiver. He alleged Gillian abused alcohol and prescription drugs which she purchased on “the black market”, was mentally unstable, and given to mood swings and unpredictable rage. He accused her of being an absent mother. He deposed he was the family’s breadwinner, and that Gillian did not contribute financially to the family. He claimed that any incident of abuse alleged by Gillian was a “direct result of the verbal abuse she directed at him in the presence of the children.”¹²

Dwight had fathered two children in a previous relationship whom he neither saw nor supported. However, in an attempt to avoid paying child support to Gillian, he claimed his first obligation was to his older children. He also relied upon his criminal record as his excuse for his unemployment, despite having been regularly employed previously with the same company for eight years. The judge was unmoved, and ordered child support of \$323/month. At the time of our interview, Dwight was three years in arrears of support, which, the week before, had been reduced by \$3,000 upon his application and without notice to Gillian, on the basis that he could not find employment, again, using his record as his excuse. Gillian was disgusted that “this time, they bought it.”

Dwight demanded one half the value of the matrimonial home (although he contributed neither to its purchase nor its mortgage). Gillian was forced to buy out his half interest in her home. She also reluctantly agreed to assume his debt to Legal Aid (\$5,400), secured by a lien on the matrimonial home incurred to defend against *her* divorce action.

Dwight was a distant and non-demonstrative father, particularly with his older son, but, nevertheless, sought joint custody of the children with Gillian. Despite his having been granted joint custody, over the objections of Gillian, he very quickly lost interest in exercising access to his children, and, at the date of the interview, had not seen either of his children for some time. As a result of Dwight's disinterest in his children, James had become chronically depressed and disinterested in his schoolwork.

Now he just doesn't call them at all ... you look at James and he just looks depressed, he looks like a sad little boy and all he ever wanted was his dad. Dwight actually accused James and said, "Well, he doesn't call me. I told them that if they want to see me all they have to do is call me." And this is a grown man, it's just disgusting. James has called him repeatedly, and Dwight will say, "I'll call you right back", or, "Call me at this time", and if James calls, he's turned off the phone or if he says he'll call, he doesn't call. The rejection this child has gone through! So the kids don't see him. So it's just a sad situation for the kids all around. Yes, I've been through my sadness but I'm done. It's not even about me, it's about the kids.

Gillian recalled that the judge addressed her directly. He asked her why she thought Dwight should not have joint custody, or, as she pleaded, custody at all.

He said, that (if my memory's correct) that "children need both their parents. It's a known fact that joint custody is better than sole custody if abuse isn't an issue", or something like this. He was talking about abuse of the kids. Everything that was said was discounting my experience. The abuse part of it was ignored.

None of Gillian's expectations of the civil family justice system were fulfilled. She never "felt there was any compassion or any kind of emotional response to anything that was said. I don't get this whole system." She was particularly adamant that "judges need to be hard-lined when it comes to certain issues related to child support. Whatever the expectations are, whatever the rules are of the court, they need to be followed black and white." Gillian believed that the judges did not

understand that custodial mothers needed adequate child support in order to meet the needs of their children. She found the civil family justice system, and the judges who represented it, hypocritical. “This court said it’s important for children to have both parents, and then it turns a blind eye to the fact that he’s not there for his children, either physically or financially.”

Elizabeth: Both of Elizabeth’s relationships with men were abusive. Elizabeth, 55, related that she became involved in her first abusive relationship at the age of 21. She was working in Toronto at that time, and became involved with Randy, the father of her eldest son. She described her relationship with Randy as physically abusive, not mentally, emotionally, sexually, or psychologically abusive; “you know what, physical was easier to deal with than all the rest of them.”

Elizabeth recounted that Randy’s physical assaults were egregious enough to put her in the hospital “a few times”, and because of the constant physical abuse, Elizabeth refused to marry Randy – “I was smart enough not to” – and left the relationship when her son John, was two years old. She successfully applied for custody and child support in the Provincial Court (Family Division).

Elizabeth had three children: a son aged 34, by Randy, and a younger daughter and son. Her next two relationships were characterized by “mental, emotional, sexual, physical and psychological ... I received all five abuses.” She married Gary in 1989, and he began abusing her almost immediately.

We had a honeymoon period. Every time we broke up (which was so many times I couldn’t even count), there was a honeymoon period every time. He knew how to act in the honeymoon period – charming, for a bit, and then right back to ... he played games with my head constantly, and I would forget what he had done whereas the physical, it was, like, I can see what my ex had done. The physical was very limited with Gary but it was everything else, and he really played games with my head ... nasty bastard ...

Gary controlled the family finances, taking Elizabeth’s paycheque and her baby bonuses. “I never had enough for even a coffee. He made sure that I was completely broke. I had someone else pay for my haircut one time because I couldn’t afford a haircut.” Gary gave Elizabeth a set amount

for grocery money, for which she had to account, “and if I overspent on it, which I kept telling him it’s not enough for groceries, he didn’t care.”

Elizabeth described Gary as "a control freak", her relationship with him as "so dysfunctional, you can't think ... you can't function. He took control of my whole life and I mean, really, it was his thoughts that I was going by." Elizabeth was so badly affected by Gary's abusive, controlling, and manipulative behavior that she suffered multiple nervous breakdowns over the course of their twenty year marriage, and was hospitalized numerous times.

Well yes, I was in the psych. ward a few times, and it's always hatred that will shoot out of me when I've been in them, and it's all because of what I've been tolerating from him. My hatred is directed at him. When they put me in the one time, that would have been after my daughter was born... even his name - I hate his name... I hated his name, I wouldn't even go by it if they called me by my last name.

Elizabeth's eldest son loathed Gary; Gary abused him as well. However, Elizabeth claimed that Gary’s control of her was so complete that she “put that out of my mind. I listened to what he had to say all the time.” Her son eventually left his mother and Gary to live with his father, Randy, but that, too, proved impossible for him, and eventually he moved out on his own. He is currently divorced, and lives east of Toronto. Elizabeth speaks to him on a regular basis, and spends time with him. Elizabeth’s other children are estranged from their mother. Upon separation, Elizabeth was granted custody of the two younger children but, because Gary was receiving social assistance, no order of child support was made. Nor did Gary later pay child support during his periods of employment or when collecting unemployment benefits, notwithstanding an order that he do so.

Elizabeth recalled that she attempted to escape from Gary by moving from one jurisdiction to another; however, he pursued her. Elizabeth continued to carry the emotional and psychological detritus of her relationship with Gary, and, by her own account, suffered between eight to ten emotional breakdowns and hospitalizations from the time of her daughter’s birth. She would ensure that her children were put in the care of her brother during her hospitalization, and her emotional stability was not an issue in her legal proceedings. On the last occasion of Elizabeth's hospitali-

zation, six and one-half years ago, however, Gary contacted the CAS in the jurisdiction in which Elizabeth had last been living, and reported his children in need of protection. His actions precipitated a child welfare proceeding, and, in that hearing Elizabeth was found to be incompetent to care for her children, and their custody was awarded to Gary.

Upon her release from hospital, “I [didn’t] care what happened to my stuff up north. It’s a four bedroom apartment, small bedrooms, but four ... seven rooms altogether, and I just decided that’s it. I walked away from everything.” Elizabeth believed that she had failed herself. She grievously mourned the loss of her relationships with her two younger children. At the time of her interview, Elizabeth was content to live in a shelter for homeless women.

I’m just not sure what I’m doing for myself. I figure I’m just going to relax when I am at the shelter ... and just sort it out. I think I’ve pushed myself or I was pushed by him, Gary, and right now I’m just taking it easy one day at a time. I don’t care if I spend three hours sitting in the gardens with the trees or the plants because that’s what I’m used to up north, or somewhere it’s quiet and just chill out and not even think about what I’m going to do with the future, just relax. I think after what all I’ve been through for so many years, I’ve spent my life raising kids ... I actually tell people ‘no’ now, and I never did that, I always gave in.

I’m not sure whether I’ve had seven or eight, ten breakdowns, what I’ve had now. All I know is the stress level just gets to me and I mentally lose it. But it was the best thing to go homeless, in a sense, even though I was starving to death, for the fact that I needed all rules and regulations gone after being in a controlled environment with my ex.

Caroline: Caroline, 35, wanted to become a translator at the United Nations, but ended up as a training manager for a national dressware chain. At the time of our interview, she was enrolled in the law clerk course at her local community college. She married a man she met at a bar, following the termination of a six-year common law relationship with a “troubled” man who gambled away her inheritance and “ended up with a drug addiction at the end.” Steve, her second (and abusive) husband, was five years younger than she and, at first glance, the opposite of her former common law spouse: “he seemed so responsible and so together, and he was so kind. It was what I thought to be safe and practical.” They married eighteen months after their first meeting. Steve

came from an abusive background; his mother was a “hoarder – just like you see on T.V.”, his step-mother was “evil”, and his father was “shallow”. Caroline soon discovered that her appraisal of her husband as “responsible and together” was unfounded. Their marriage lasted two years.

Steve fought with Caroline about “everything: the volume of the television, the way that I made rice, the way I did the dishes, how I dress, how I wore my hair.” He was always critical and demeaning. If Steve did not like the dinner Caroline prepared for him, he threw it on the floor. It took only nine weeks of cohabiting with Steve for Caroline to realize that she was “going to hell in a hen basket.” Within three months of their marriage, “there was real anger showing, with screaming, yelling and breaking things.” Within the same time period, Caroline discovered she was pregnant. Steve’s abusive behaviour worsened thereafter. “I think that he resented me for it. He finally admitted a long time after, that he was resentful that I got pregnant because we couldn’t afford it financially.” When Caroline took maternity leave, Steve insisted that she pay her benefits into their joint account, which he monitored. By the end of her maternity leave, the joint account had been drained.

Steve needed to control Caroline. He refused to provide her with a key to their apartment door, the storage locker or the mailbox because she “didn’t need to know.”

He made me feel like a dodo all the time. Like, I’m stupid. I’m incompetent. “You can’t do anything right, why would I let you screw up the finances, we’ll be in the poor house” ... but that’s what he was doing to us. He was spending everything uncontrollably. He cashed out all the RSPs to pay down consumer debt without talking to me. I never got to see the credit card statements. Everything was kept in a locked box.

By the end of the marriage, Steve was insisting that Caroline provide him with her shopping list before she went out, and all of her receipts when she came home. In her misery, Caroline gained a great deal of weight, but Steve would not allow her to buy underwear “because if my ass wasn’t so fat, I would still fit in my old ones.” Caroline realized that Steve “hated himself”, and the only way he could make himself “feel better” was to make her “feel worse.”

Steve was a neglectful and disinterested father. “He wouldn’t have anything to do with the baby. He didn’t hold him, he wouldn’t touch him, he didn’t like the way he smelled. I was to keep him quiet.” The baby provided Steve with the means to isolate Caroline. He forbade her to go out with her friends or visit her mother. He threatened to abandon the baby in the house, alone, if Caroline went out for the evening. Caroline grew increasingly intolerant of Steve’s abuse of her, but it was only after he beat her cat in front of the child did she realize that she or the baby could be his next victim.

Caroline “felt completely justified in leaving and felt completely justified that my son should be with me.” However, she had difficulty envisioning herself as an abused woman because Steve had never physically assaulted her. In this regard, Caroline was mirroring her mother’s response to her marriage to Caroline’s abusive father. Despite her refusal to describe herself as abused, Caroline had already put a safety plan in place because she admitted she feared Steve.

Within one month of the separation, Caroline retained legal counsel, recommended by a counselor at Ernestine’s. Caroline found vindication for her actions from her counselor: “The very first words out of her mouth on the phone when I said that he hit the cat, she said, ‘Oh sweetheart, you would have been next’. And I just cried when she said that because, at that point, I still hadn’t really let myself think that.”

Caroline allowed Steve to see the baby as often as he wished, and he made a minimal effort to do so, exercising access only seven times in the four months prior to the first case conference. Steve refused to advise Caroline where he was living (she suspected a trailer in the woods). He refused to answer his phone while exercising access. He refused to accede to her request that he not leave the baby with his mother, father or step-mother. He refused to tell Caroline if, or what, the baby ate, if he slept, or what they did together. He verbally abused Caroline every time he picked the baby up and dropped him off. Despite her fears, and Steve’s apathy to their baby, Caroline believed she had no choice but to allow Steve access. “I was petrified that if I didn’t that somehow

it would be held against me because he hadn't hit me. The baby wasn't in any danger, still, all I wanted was sole custody and child support." Caroline thought that Steve was a "bad father", and "will be a bad father", leaving his son to grow up feeling abandoned emotionally.

Steve evaded service of Caroline's application in the OCJ. Her initial claim was limited to sole custody. His response was to immediately forward a demand for what Caroline described as "very standard, garden variety access": every other weekend from Friday, 6 pm to Sunday, 6 pm, and, on alternative weeks, 2 to 4 hours one evening during the week; one week at Christmas; and up to three weeks in the summer. However, he misspelled his child's name throughout, which Caroline found insulting and disrespectful of her son. Steve's demands for access were incorporated into his cross-application.

Caroline's experience at her first case conference was "very positive". Steve was ordered to produce his tax returns. His demand for immediate, overnight access was denied.

The judge seemed to sort of be cautious to what we were saying, so what she had set out in her recommendation after that first case conference was that access should be a long transition and she said verbatim, "When I say transition, I mean many, many months", and she said, quite pointedly at Steve's camp, "This is not going to happen next week. Let's see where your motivation is, sir. If this is really about seeing your son and building a relationship, then spend some time and build that relationship, but let's do it in short, frequent visits so that you get used to caring for him, mom gets used to him being away, and you guys build trust between you."

The judge continued, "And then, after six weeks, let's look at maybe the baby spends Saturday, comes home to sleep and you spend Sunday, but let's still have overnight with mom." Caroline was satisfied with these recommendations. The first week, Steve took the baby, once, for three hours between his naps. The second week following the case conference, Steve was a most attentive father, arriving at Caroline's apartment at exactly 8 am, and returning the baby at 6 pm. "So he saw his child in those two months more than he had seen him in his life." However, he never asked for more access. Every week, Steve attempted to broach the subject of overnight access with Caroline. She told him to speak to his lawyer.

Within six weeks of the first case conference, Caroline was served with a motion by Steve, reiterating his access demands set out in his cross-application. He accused Caroline of unreasonably denying access to him, refusing to communicate with him regarding the baby's needs, and being vindictive over the ending of their relationship. Steve "short served" an offer to settle the day before the motion, again setting out his original demands for immediate, overnight access. In all respects, his demands were identical to those the judge had rejected four weeks earlier.

Upon the return of the motion, the judge first admonished Steve for his continuing refusal to make financial disclosure, notwithstanding her order that he do so. She did not, however, find him in contempt.

And then in the next breath, she turned around and said that she is used to this level of conflict from much younger parents. I was completely blown away because, in one breath she sounded like she was supporting our argument and understanding that there was a real reason to doubt the quality of care the baby would be getting ... and then, to turn around and say that somehow I'm using my child as a pawn or that I am an active party in the game playing, was infuriating to me. It was beyond reproach.¹³

The judge granted Steve the access he sought. Immediately, Steve's lawyer produced the offer to settle and his bill of costs for \$5,000, which the judge reduced to \$3,000, although Caroline had advised the court that she only made \$200/week from babysitting.

From the point of view of someone that has been sitting back and taking it for a lot of years, and you go to the court with real information and real things to back up your claim and then they turn around and give your child to that person, and then make you pay money you don't have and give him all the power, that was a bitter, bitter pill to swallow.

Caroline felt like she had been re-victimized by the civil family justice system. "Up to that point, I had been getting much stronger in terms of my ability to cope and my ability to keep it together, and in that instant it was all gone." She was no longer prepared to risk continuing to "fight" and incur costs. She was left with the impression that it did not matter what she said in court, the outcome would have been the same. There was no "common sense".

After the judgment, my lawyer said, "the court views it as just because that man

abused that woman doesn't mean that he'll abuse another woman or that he'll abuse his child." Yet that flies in the face of every accepted sociological and psychological theory that if you come from a family of abusers, then you have a significantly increased chance of being an abuser yourself because that's where your comfort level is. She never really gave a reason for her judgment other than that she was disgusted by our behaviour and that the game playing had to stop, and how dare we put our child in the middle.

The court order directed that overnight access was to begin "immediately", in fact, that evening. However, within two hours of the hearing, Steve's lawyer contacted Caroline's to advise that Steve would not be exercising his access that night. Thereafter, Steve proved unwilling or unable to abide by his own terms of access, but Caroline felt compelled to be flexible lest Steve accuse her, once again, of denying access to him.

The judge did not make a custody order, only a "primary residence" order, on the basis that "sole custody is only awarded at trial". Caroline was both confused and aggravated by this omission.

At every turn the judge has sort of made clear that it doesn't matter what it's called, that custody is custody and it doesn't matter what it's called, that it's about relationships and it's about the access, which, to me, is irrelevant because I can manage the access. I can't manage trying to make decisions with this man.

Jean: Jean was married once, for eleven years, to a man five years her senior, and whom she met while working as a summer student at Canadian Tire. She described him as a "bad boy", and that attracted her to him. Glen, an electrician, was manipulative and abusive from the outset of their marriage, although Jean still refused to describe him as an abuser in her interview with me. They were married when Jean was twenty. Jean described him as a "master of the silent treatment." He refused to speak to her for weeks at a time. Occasionally, Glen was also physically abusive. He controlled the couple's finances, insisting that Jean put all of her earnings in their joint bank account, to which only he had access. Jean was not "allowed" to have a credit card, and was not permitted to go shopping. Glen bought all the groceries. Jean and Glen had two sons, born in 1987 and 1990, in

whom Glen showed little interest. Once the children were born, Jean could write cheques on the joint account to accommodate their needs.

Tired of her impecuniosity, Jean studied to become a real estate agent. Glen belittled her efforts. After she started earning income, Glen was unaware that Jean held back some of her commissions and deposited them in a separate account. By the time Jean left Glen, she had saved \$15,000.

Jean's marriage to Glen ended after he pushed her down a flight of stairs, an episode of violence witnessed by their sons. Jean called the police and Glen was charged with assault, and was made subject to restraining and supervised access orders. His assault charge was dismissed, however, when Jean failed to show up for the trial, for which she never received notification.

Jean and Glen were involved in vicious and protracted legal proceedings after their separation, primarily over her entitlement to one-half his pension and the proceeds of sale of the matrimonial home. Glen also claimed custody of the children, spuriously alleging Jean to be an "unfit mother". Jean could not afford a lawyer, and did not qualify for Legal Aid. Eventually, she relinquished her claim for an interest in Glen's pension, but not before their equity in the matrimonial home had been eaten up in legal fees. Glen abandoned his custody claim and was ordered to pay \$1,400/month in child support. He remarried, but remained bitter about the breakdown of his marriage, and blamed Jean for alienating his children from him.

Jean met Harry on-line just before her divorce was finalized. Harry told Jean he had "retired" from teaching high school, but Jean eventually discovered a letter from his school board that indicated that he had been facing disciplinary action when he was instead offered the opportunity to take early retirement. She suspected that Harry had been accused of sexual impropriety with students. They dated for three months before Jean moved into Harry's house with her children, which she described as "a big mistake".

Harry was a “screamer”. He screamed at Jean and the children if they touched “his things”. When Jean moved into his house, Harry insisted that she not bring any of her possessions with her, except for the boys’ bedroom furniture. Although Jean and Harry were intimately involved, Harry charged Jean \$1,000/month in rent. He also demanded that Jean buy all the groceries, given that she had two boys to feed. Harry did not allow Jean access to his telephone, but installed a separate line for her use, for which she paid the monthly fee.

Jean’s family disliked Harry, who made them feel uncomfortable. He alienated all of Jean’s friends. When asked why she remained with him, Jean admitted that she was “blinded” by his occasional displays of affection, such as the few times he bought her flowers or took her out for lunch. Initially, she thought Harry’s incessant telephone calls at work were endearing, until she realized it was his way of controlling her. Jean soon dreaded answering her telephone at work.

Harry’s verbal abuse escalated to physical abuse after Jean began to challenge him. He would throw her against the wall and hold her there, screaming hysterically and covering her face with his spittle. Harry called the police every time he assaulted Jean and alleged she had attacked him, conduct that foreshadowed his systemic abuse of the civil family justice system.

Harry and Jean’s younger son by Glen, Ethan, had a close relationship, but Jean’s older son, Brian, disliked Harry. Harry dictated the boys’ daily schedule. They were expected to complete their homework every day between 4 and 5 o’clock, and shower and ready themselves for dinner between 5 and 6 o’clock. He insisted upon the boys ‘exercising’, which consisted of his driving around the block while they ran after his car. Jean finally demanded that he stop abusing her children. An argument and physical altercation ensued for which the police were called. Both Harry and Jean were charged with assault. Jean and the children moved out.

Jean and Harry received conditional discharges and were ordered to attend anger management programmes, which Jean completed, but Harry did not. He was involved in a new relationship with Darla – in fact, Harry had been involved with a number of women throughout his relationship

with Jean. He began splitting his time between Darla and Jean, in contravention of their mutual restraining orders. Harry suggested that he and Jean go for couples' counseling, which, in retrospect, Jean realized was a ploy to dissuade her from testifying against him at his assault trial.

Jean soon found out she was pregnant. Harry was unhappy about the pregnancy. He refused to attend Jean's obstetrical appointments. Once their daughter, Marley, was born, although they were no longer cohabiting, Harry insisted that Jean agree to the baby having his last name.

Initially, Harry showed considerable interest in the baby, although his enthusiasm did not extend to his wallet. During this period, Glen had left his employment to start his own business, hence fell behind in his child support payments. With only her maternity benefits as her source of income, Jean sent her sons to live with her parents. Harry took the opportunity afforded by Jean's precarious circumstances to initiate a claim for custody of Marley, who, at that point, was six months old. At the initial hearing, the judge refused to grant Harry custody, but did allow him interim access, to be supervised by Jean. He also ordered Harry to pay child support. In order to avoid paying child support, Harry induced Jean and her younger son, Ethan, to move back in with him. Six months later, Harry threw Jean out of his house. It was only after she was ejected did Jean discover that Harry had reattended at the return of his motion, notice of which he had withheld from Jean, and, in her absence, was awarded custody of Marley.

In order to eject Jean from his house, Harry initiated an argument with her. He became physically abusive, and Jean locked herself in the bathroom. She overheard Harry's call to the police, in which he alleged Jean had attacked him. Having taken her own cellphone into the bathroom with her, Jean, herself, called the police. When the police arrived at Harry's house, he accused Jean of striking him, then, suddenly, produced a court order awarding custody of Marley to him. Unable to produce her custody order for Ethan, Jean was escorted from the property without either of her children.

Jean was devastated. She retained a lawyer, paying for the retainer with money borrowed from her mother. She brought an emergency, *ex parte* application for custody, but the judge refused to grant the order and adjourned the matter for one week to allow for service. At the return of the motion, the judge granted Jean interim custody of Marley, child support of \$500/month and \$500 in costs. He also ordered access. When Jean arrived at Harry's house to retrieve Marley, Harry refused to allow Ethan to leave. The police were called, and, in the melee, Ethan escaped out the back door.

In the interim, unbeknownst to Jean, Harry had struck up a friendship with Glen. Ethan began spending more time with his father, which Jean found puzzling. During one of his access visits with his father, Ethan called his mother and announced his intention to remain with Glen. Jean began receiving harassing telephone calls from Glen and Glen's new wife. They refused to allow Jean to speak to Ethan over the phone. They reported Jean to the CAS, alleging she was negligent with Marley. At the same time, Harry initiated a campaign of systemic abuse in the OCJ. He repeatedly brought motions to reverse Jean's interim custody order. He insisted upon the appointment of the Children's Lawyer to represent his now two-year-old daughter. Harry was incensed when the Children's Lawyer recommended that Jean retain sole custody of Marley, and sent a letter of complaint. At this point, Glen sent Ethan to live with Harry.

Harry bombarded Jean with legal proceedings, all of which he lost. He brought twenty-five motions before one judge, alone. Frankly, I failed to understand how the OCJ could allow a party to abuse its process to that extent, but, when I attended at the court house to review Jean's file, the clerks produced two bankers' boxes of pleadings. The mere mention of Harry's name elicited smirks, and the clerks were able to describe him to me because, they claimed, he attended court almost every day to file another motion. Harry brought motions for more liberal access and contempt, as well as for sole or joint custody. None were successful. He brought an application for parallel parenting, which also failed. During this period, Ethan left Harry and returned to his mother.

At the time of our interview, Jean had just completed a four-day custody trial and was awaiting the decision. During the trial, Glen and his wife testified on behalf of Harry, alleging that Jean was an unfit mother, despite the fact that all of her children, whom she had raised and cared for, were thriving. Darla, Harry's girlfriend, attended court every day, and sat directly behind Jean. Despite the trauma induced by the trial and the antics of Harry, Darla, Glen and his wife, Jean was very pleased with the trial judge. She felt that he had read the file and had captured the true essence of the various relationships. He asked pointed questions of Richard and Glen, which Jean took to mean "he was interested in a little bit more detail" than they were prepared to provide. Jean felt that the judge believed her. She was awarded sole custody of Marley.

Jean forwarded a copy of the reasons for judgment in the custody trial. It is 43 pages long. In it, the trial judge described Jean's and Harry's relationship as "high conflict". He found that

sole custody is the only sensible option for Marley. These parties have no effective successful history of joint parenting. Their inability effectively to communicate and collaborate in her best interest leads me to the conclusion that they are unlikely, in the near future, without great effort, to achieve a sufficient level of co-operation between them on issues surrounding her parenting. Marley cannot wait. While I have considered some form of parallel parenting, in my view that is not viable here. There is simply no justification for shared or parallel parenting.

The trial judge quoted liberally from a paper prepared for the Department of Justice, which he undoubtedly obtained during a judges' education conference. He cited the work of Johnson and Leone (2005) and his research in which he described "high conflict" couples as presenting traits of character pathology and personality disorders. The trial judge attributed these descriptors to Jean and Harry, without the benefit of expert testimony in support. The trial judge also referred to *For the Sake of the Children* (1998), and numerous reported cases, including *Gordon v Goertz*, *Kaplanis v Kaplanis*, *Ursic v Ursic*, *Young v Young*, and *Baker v Baker*, amongst others. I was left with the impression that the trial judge believed he had to go to extraordinary lengths to justify his order for sole custody. He noted that the parties "spent an inordinate amount of time outlining past conduct and each other's past shortcomings", but, citing s. 24(3) of the *CLRA*, "found very little of this

evidence to be relevant with respect to the other parent's present ability to parent." He was persuaded that "the love, affection and emotional ties between Marley and both her parents are equally strong. Both these parents love her deeply and wish the best for her." It appeared from my reading of the judgment that the trial judge was swayed to favour Jean on three grounds: 1) Jean had always been Marley's primary caretaker; 2) "involving Marley with Glen and his children under the guise of 'getting even' was intolerable"; and 3) despite the complete lack of respect for Jean demonstrated by Harry, her parenting plan included "generous access". The judgment included a very detailed schedule for access and a list of 145 "Parenting Guidelines". No mention was made of Harry's systemic abuse. Costs were reserved pending submissions.

Jean resented that Harry was rarely made subject to an order for costs for the plethora of motions to which she was subjected, and could not understand how the judges allowed their process to be abused in that manner. She had calculated that, in one year alone, she had appeared before the same judge eleven times. She suggested that punitive cost awards would deter those who were intent on abusing their former partners through the legal system. Jean claimed that she felt more abused now, after having been subjected to the court's apparent condonation of Harry's engagement in abuse of the civil family justice system (apparently, without his suffering any repercussions), than she did when Harry was physically abusing her. At the conclusion of our interview, Jean (at that point, unaware of the results of her trial) asserted that, in her opinion, judges of the family court were more concerned with promoting "equality" between parents than the best interests of children.

There is no gender equality, so why should it be forced into one system if it's not forced in every other system? My counterpart at work will get more money than I will because he's male. People will argue, too, that women get custody more times than men. Well, maybe because we're the ones who are rightfully the ones that should be raising them.

Marie: Marie, 51, married her high school sweetheart. "I fell into it and it was one of those things, it was pretty flattering to have someone chase me." However, Joe was a "bad ass" who experimented with hard drugs, skipped school and avoided steady employment. He came from an

“extremely abusive background”. Joe needed someone to care for him, and Marie admitted that she, already an experienced caregiver, was the ideal fit for his needs.

Marie became pregnant almost immediately after her marriage, at 18, to Joe. She was also steadily employed, while Joe’s employment was far more precarious and unstable. Marie returned to work eight weeks after her daughter was born, hiring a babysitter, while Joe “partied” all night. “I knew that he was never going to be there for me, ever.” She tolerated his drug use, his disappearing for days on end, his drinking, intermittent employment, and adolescent behavior. She had a stable job, generous income, had saved sufficient funds to purchase a house, and was able to provide her daughter, whom she adored, with summer camp and dance lessons - all the trappings of the upper middle-class lifestyle to which she was accustomed. It was only after fourteen years of marriage, when Joe secured steady employment, that Marie considered having another child.

Marie’s second child, a son, was born in 1990. After the birth of his son, Joe became physically violent with Marie for the first time. While breast-feeding her new-born, Joe began berating their daughter’s choice of boyfriend, which Marie attempted to defend. Joe struck Marie, barely missing the infant. After this incident, Joe disappeared for one week. Upon Joe’s return, his relationship with Marie continued to deteriorate, and he left once again, this time for two weeks. Six weeks after the birth of their son, and following their numerous physical and verbal altercations, as well as Joe’s many absences, Marie (fearing the dissolution of her marriage), suggested the family do something together. Unable to secure a babysitter, Marie took her children and Joe to the local drive-in. “I remember, my daughter was so excited, she had a job and she’d got her first paycheck and she was so happy and so excited. I remember my husband just bitching about the most insignificant thing and I remember ... you are leaving him tomorrow, he’s out of here, this is it.”

On the way home from the drive-in, the family’s motor vehicle was involved in a horrific collision with an impaired driver. Marie's daughter was killed, her infant son suffered a serious brain injury, as did her husband, who almost died from massive internal injuries. Marie spent six

months in hospital and was discharged in a full body cast. Marie could not walk for three years. In that period, Joe recovered physically, and secured part-time employment. Marie was totally reliant upon caregivers to look after her and her son.

We weren't living, you know, and so at that point I thought, well, it doesn't really matter. I can't even ... I'm in no physical or emotional position to deal with this, I can't do this ... I did have guilt about the fact that I wish I had, like, never, never allowed him back into the house. Yes, because I do think that my choice ... of course, it's not responsible for what happened, but the history of how my life played out ... it was really the only choice.

At this point in her life, Marie did not consider herself to have been abused either by her father or her husband. She thought her father just didn't like her. She considered her husband's behavior merely indicative of his irresponsible nature. Marie was consumed, however, with thoughts of her daughter, and contemplated suicide. She contacted a representative of Bereaved Families of Ontario. "I got off the phone and that day I thought, maybe one day I'll be normal. I don't know when that will be but ... and that's when I decided to get myself to a psychiatrist". She became an advocate against drunk driving. Three years later, Marie return to her job, and decided to have another child, not wanting her son "to be alone in the world. That was probably my biggest reason for having a baby." Joe refused to participate in birthing classes with Marie, and nursing staff threw him out of the delivery room because of his abusive conduct towards her.

By the time he was three, Marie's older son already manifested the consequences of brain damage caused by the car accident. He exhibited signs of ADHD, and could never be left unsupervised. Both of Marie's sons were diagnosed with Tourette's Syndrome. It was Marie's responsibility throughout her marriage to secure the requisite therapy, counseling, and academic support for her sons.

The brain damage suffered by Joe in the accident exacerbated his violent and abusive conduct, but Joe refused to attend any kind of therapy recommended by his physicians. Although she now recognizes herself as a victim of spousal abuse and violence, Marie did not view her relationship with Joe as abusive, instead excusing his behavior as sequelae of his brain injury.

Marie and Joe received \$750,000 in cash in settlement of their personal injury claims. Joe's escalating abuse and violence toward Marie prompted her to give him \$425,000 from the settlement proceeds as an inducement to leave the matrimonial home, which she subsequently sold. Marie purchased another home for her and her sons, but found the demands placed upon her by her sons' special needs, and their attendant costs, to be overwhelming. In the meantime, Joe gambled away his settlement proceeds and begged Marie to take him back. She did.

I was making decisions based on survival ... now I had a kid that I couldn't even leave out of my sight, I was terrified he was going to hurt somebody, myself, or couldn't go to school half the time and it's just heart-breaking. So, I just said, come on back, and he came back and I knew the first day that he was back that I'd made the worst mistake of my life.

Marie and Joe stayed together, and Marie bought another house. Joe refused to work, although capable of so doing, but was receiving a disability pension for his head injury. Marie found a program for her elder son that allowed her free time, and she enrolled in the feminist studies program at York University. In her absence, Joe directed his abusive and violent behaviors toward his children. Joe was also chronically abusing drugs, particularly marijuana, over Marie's protestations. Her son found a pound of marijuana in his father's truck on Christmas Eve. Marie threatened to contact the police if Joe did not leave the matrimonial home immediately.

Marie contacted a family lawyer in her community. She instructed her lawyer to obtain a restraining order against Joe on the grounds of his drug use and abusive behaviors towards her and her children. Marie's application was denied, and Joe refused to leave the matrimonial home.

Following their separation, Joe's behavior toward Marie became even more violent. He would pick her up and throw her against the wall, spitting on her. He tried repeatedly to "choke" her. He hit her head repeatedly. Marie called the police on five occasions but they refused to lay charges against Joe. She pleaded with Joe to leave, and gave him \$15,000 of her savings as an inducement. Joe took the money, gambled it away and refused to leave. Around the same time, the couple's elder son, then in treatment at the Syl Apps Center, violently assaulted Marie, causing serious injuries.

The police had no difficulty responding to *that* assault, and charged the boy accordingly. Marie sought, and was awarded, damages for this assault from the Criminal Injuries Compensation Board.

It was only after Joe's sixth violent episode, and Marie's insistence upon speaking with the staff sergeant at the local police station that Joe was charged with assault, and Marie's twenty-five year marriage to Joe was over. Joe was released on his own recognizance and prohibited from contacting Marie or the children, which terms he violated immediately.

Joe refused to plead guilty to his charge of assault against Marie. As part of his plea bargain, the Crown persuaded Marie to accept a peace bond for one year from Joe; it was only after the hearing that Marie realized the Crown had not attached any conditions to the peace bond. Joe continued to harass Marie by phone both at home and at work, and repeatedly called the CAS to report spurious allegations against her.

Marie's divorce proceedings were "comical". Joe behaved inappropriately at every proceeding, flirting with his female counsel and putting his arm around her. Marie's affidavit outlined Joe's abusive history, his drug abuse, and their son's violent attack against his mother. Marie deposed that she had given Joe over half the settlement proceeds from their personal injury claim, as well as a further \$15,000, all of which he had lost through gambling or improvident investments. She explained how Joe's exposing her son to hallucinogenic drugs could have rendered him more dangerous. Marie demonstrated, through exhibits, how she supported the family, paid the mortgages and utilities, taxes and expenses. She sought restraining and exclusive possession orders, sole custody, and an unequal share of the proceeds of sale of the matrimonial home in her favour, with child support arrears (Joe never paid any child support) to be paid from Joe's share of the sale proceeds.

Joe denied all of Marie's allegations. He repeatedly referred to himself as "brain-damaged", in need of care, and unemployable, yet claimed to be the children's primary care provider while Marie pursued her education. He sought joint custody, child support, and \$1,000/month in spousal support.

Marie was prepared to agree to joint custody, “because I knew that he wasn’t going to do any parenting and that I’d be the main decision-maker which was what was put in the order.” Inasmuch as the children were teenagers, they were allowed to make their own decisions regarding access. The issue of money, however, remained litigious. There was no acknowledgment by the court that Marie had paid Joe \$15,000, although she had produced documentation to prove the transfer. Further, the judge arbitrarily ordered Joe to only six months’ of child support, even though he had paid nothing for two years. He was also only ordered to repay \$5,000 of the \$15,000 Marie had given him. The net family properties were divided equally, notwithstanding that Marie had purchased the home herself, from her settlement proceeds, and Joe had contributed nothing toward its property taxes, utilities, upkeep and maintenance. Marie believed she was not looked on favourably by the court.

I think I was regarded as being a hysterical woman asking for way too much. This was being treated like a he said/she said thing, not a case of abuse, despite documented evidence, and that because we both had some tragic events in our lives, they weren’t going to deal with it. There was something wrong with me because I was expecting my children to be looked after. It was just complete denial.

Marie was afraid of her sons, although they lived with her. When her older son was released from closed custody, he began using drugs and “being out of control”. He experienced a “psychotic episode” and almost killed Marie. Her younger son, “a very big guy”, “started acting out” as a result of pressure from his father.

I think because he’d witnessed the abuse of my son upon me, I think witnessing his dad beating me, he was completely confused. He’d broken down during this period and we were talking about where he wanted to live, he’d start crying and said, “Mom, I’m only 13. I’m only a kid.” It was just sickening because every time he went out with his dad, that’s what his dad was doing and telling the kids that I made him homeless, and that I had him arrested for nothing. He was telling the children that I was having affairs, that he was paying for my schooling, just completely blatant lies.

Her sons’ bad behaviour resulted in Marie and the children being evicted from their apartment. The boys insisted on living with their father in a “very dysfunctional relationship”. At

the time of our interview, Marie's younger son was attending an alternative school for students with behavioural issues. He was ejected from his hockey league for excessive violence. He attacked his older brother's girlfriend. Marie was circumspect: "I think my son is so damaged by his observations of his father's behaviour towards me and disrespect for women in general, and playing the victim role, there will never be any ownership for that." Marie believes she was "victimized by the system":

I was completely ignored. With all that the Family Court is saying about making sure children's needs are met and that they're looked after and provided for, there really was very little that ever considered that. The kids' needs are not being considered. The impact of abuse on a woman, and how it might impact her children, none of those things are being considered, or they're not being looked at realistically. I don't think I was given any validation for my role as a parent, what the experience was, and what I was providing for my children, and what was taken away from my children. So, I think my children were victimized. I think they were neglected through the system and they did suffer the price, so I guess, ultimately, that victimizes me, too, if you victimize my children. I would say that my kids were let down more than anything else, and, of course, anything that lets my kids down lets me down.

Lindsay: Lindsay, 35, a high school graduate, advised she was planning to enter the social service worker programme at George Brown College in the fall. It was her desire to eventually assist with the re-integration into society of those women who had recently been discharged from prison. In this respect, Lindsay had much experience. After her return to Toronto from Jamaica, where she had been incarcerated, Lindsay soon found herself in jail again, for petty theft. While in detention, she met a man, ten years older than she, who was jailed for assault, and with whom she would soon commence cohabiting. Julius was from Jamaica, employed full-time as a crane operator, and the owner of his own home. Lindsay moved in with Julius and immediately found herself pregnant with their son, Tyrone.

Julius would not allow Lindsay to work outside the home. Her responsibility, according to Julius, was to tend to his needs: cooking; cleaning; caring for Tyrone; and providing sex. Early in their relationship, Lindsay concocted a means of escaping from Julius that involved the pretence of visiting his family in Jamaica. While there, she re-acquainted herself with her old contacts, and

attempted to smuggle drugs back into Canada upon her return, only to be apprehended at the airport. While undergoing interrogation, one of the condoms of cocaine she had ingested began to seep, and she overdosed. Lindsay awoke in hospital, was charged and convicted of importing narcotics for the purpose of trafficking, and spent three years in penitentiary. "I did it for financial freedom. I was going to take the money that these people were paying me and put it away, and he wouldn't have known any difference."

Upon her discharge and return to Julius and Tyrone, Julius began giving Lindsay \$50 each week for her own needs; it was the only money she ever handled during the course of their relationship. Julius bought the groceries, paid for all of Tyrone's needs, and paid for Tyrone's extracurricular activities, which Lindsay arranged, and to which she always took Tyrone. Lindsay attributed Julius's financial control to his fear that Lindsay would leave him; "He knew, I think he could feel that I was always ready to take a hike, and he didn't want me to have any money to be able to do it."

During the nearly seventeen years of their common-law relationship, Julius was verbally and emotionally abusive, which abuse continued to escalate over the course of their relationship. When Tyrone was three years old, Julius began physically abusing Lindsay; by the time Tyrone was ten, Julius was beating and verbally abusing Lindsay in front of Tyrone. Julius once beat Lindsay for twenty minutes on their front lawn; neighbours called the police, but, in the face of their conflicting stories, left without charging Julius with assault. Lindsay referred to "police reports on top of police reports, not just of me calling the police, but the neighbours in general. They never took him". Julius was a sadistic woman abuser; he infected Lindsay with sexually transmitted diseases, plucked her pubic hairs with a pair of tweezers, and raped and sodomized her, on one occasion with such violence that she required eight stitches in her anus. However, it was the effect witnessing her abuse was having on Tyrone that finally prompted Lindsay to leave.

Tyrone started talking to me, like, he called me a bitch once. I could see the pat-

tern, I could see it, you know what I mean? This is like my dad, his dad before beating his wife, my grandmother, it was like, it's a pattern, it is, and that's what happens. It usually starts from as a child, you see stuff like that going on in the home, and as a child you follow that pattern, and this is what was happening with my son. By the time my son turned 14, he had smacked me once already in the face, when I told him he couldn't do something. "Who are you? You're just a fucking woman, you can't tell me what to do." So that's it, I had to get away from this man. My son was turning into a monster.

Lindsay contacted the Assaulted Women's Helpline, which sent a taxi to her home and transported her and Tyrone to a woman's shelter. Tyrone was 14. When Julius returned home from work and found Lindsay and his son missing, he contacted the police. The police found Lindsay and Tyrone at the shelter, but, because Julius and Lindsay were never married, and no custody order existed, Tyrone remained in Lindsay's care. Julius brought an application in the Family Court for sole custody of Tyrone.

I got a lawyer... he said to me he was going to do everything he could do to help me out. I said to him, you know, this is the situation, and he looked at me and said, you know what, Lindsay, I'm going to be honest with you. I've been practising a long time, he says, and 95% of the cases I've seen always goes to the father, especially if they are financially stable...whereas I would have had to go on social assistance, even with the child support payments that they would have had to award me, I still wouldn't have been able to survive.

The court awarded custody of Tyrone to the parent with the best financial capacity to care for him: Julius. While one can assume that Lindsay's past criminal activities would have had some influence in the decision-making process, Julius's own criminal record was ignored, as was his abuse of Lindsay.

His lawyer and him, saying I had mental issues, because of the abuse I took as a child. This is what they brought up for custody, the fact that I was raped by my father and then all this happened. It had nothing to do with the fact that he beat me for 17 years and raped me and all that, that had nothing to do with it.

Lindsay returned to court six times, demanding custody of Tyrone. Each time, she appeared before the same judge. She claimed the judge "got really angry" at her. "He finally said, 'I can see that you're a very persistent woman'", but still denied her motions. Julius maintained custody of Tyrone for only two years, during which time Lindsay had no contact with him. During the time

Tyrone remained with his father, he dropped out of his extra-curricular activities because his father refused to take him. After two years, Julius relinquished custody of Tyrone to Lindsay, claiming he could not “handle” him.

Lindsay reassured her son that she loved him and the separation was not his fault.

I tried to say, Tyrone, I never left you with your father. He took you from me. The court system took you from me. I said I never walked out. They said that I was not allowed to have any contact with you and if I did they were going to lock me up, and I wasn't willing to go to jail right then and there.

With the help of her stepfather, Lindsay bought a house for her and Tyrone, who now attends the University of Toronto, hoping to become a paediatrician. Lindsay obtained a Queen's Pardon for her trafficking conviction, and has found both peace and stability in her life, but will forever resent the way she was treated, as a common-law spouse, a victim of sexual abuse at the hands of her father, and as a felon – and not as the good mother she was – by the family court. Lindsay, who had experienced both the criminal and civil sides of the legal system, condemned the civil family justice system for ignoring domestic violence and abuse:

I think they heard me and they didn't care. They said no to mediation because of the extent of the abuse, but they never recognized the fact that he maybe hurt my son. Abuse is abuse, either way you look at it. Mental, physical, sexual, all of it. He abused me very, very badly, and what's to say, my son is alone in the home with him, he's got nobody else to take his frustrations out on so he starts pounding the shit out of my kid. My lawyer brought all this up, and that judge didn't care one bit. It didn't matter. None of it mattered. All the evidence that came out showed that he was an abusive husband, and it didn't faze that judge.

Diane: Diane, 62, recounted her stories of violence and abuse at the hands of multiple intimate partners. For the purposes of this research study, I have limited the discussion to the three partners with whom she had children: Roger; Mario; and Carlos.

Diane met Roger when she was nineteen and lived with him for three years, but never married him. She described him as financially and emotionally abusive. His abusive patterns resembled those of Devorah's husband; he would leave Diane for weeks at a time, without money for food. She made excuses for his behaviour: “maybe he's just busy”. After the birth of their son, Dane,

Roger left her so destitute she was forced to surrender her child into foster care for six months. Thereafter, Diane applied to the OCJ for sole custody and child support; by this time, Roger had moved to Alberta and did not contest Diane's application. Nor did he pay child support for fourteen years, until he needed his passport, which had been rescinded on account of his arrears. Diane was delighted to receive a cheque for \$5,000.

Diane lived with Mario for seventeen years, but never married him. He, too, was financially abusive. Diane and Mario had two children, Kate and Kyle. Although Mario was a systems analyst and supervisor for a large company, he insisted that Diane surrender her paycheque to him. Both he and Diane were drug abusers. Realizing she was incapable of caring for her son, Diane asked her parents to take him. Dane stayed with his grandparents for two years. Diane admitted that she rarely visited her son during this time because her parents "were still abusive to each other and a lot of drinking was going on in the home."

Mario was a womanizer. Although she was employed full-time, Diane was left isolated and alone with her children. Having 'come clean', she was afraid her depression would precipitate a return to drug and alcohol abuse. She felt like she was being used. "He never gave me credibility, any credit for being a good mom or even giving me any kind of indication that I was his common-law partner." When Diane finally left Mario and advanced a claim for child support, he denied paternity of Kate and Kyle. Diane advised that the family court judge before whom they appeared was the only judge who ever supported her. He refused to order DNA tests, but did order Mario to pay child support, which Diane had difficulty collecting.

Two years after leaving Mario, Diane met Carlos, "who was so handsome". She adored him. He had a good job and was a "very hard worker". He was also an "ex-heroin addict", although, from her narrative, it appeared that he never really kicked his habit. Diane was 38. Two years after they met, Carlos and Diane were married and cohabited for eight years. They had a son, Sean.

Carlos “adored” Sean, but found Kate “difficult”. He abused Kate before the marriage, but Diane excused the abuse with, “oh well, he doesn’t mean it. He never strapped her or physically punched her but he yelled and swore at her.” Diane recalled that Dane warned her against marrying Carlos, claiming he did not like the way he treated his sister. However, Diane constantly made excuses for Carlos’s bad behaviour to herself and others. Diane claimed that Carlos was not physically abusive, but he terrorized her and her children.

We were sitting at the dinner table, and I was so nervous around him, I used to get TMJ and my jaws would lock. And he would say, “Shut your fucking mouth. I don’t want to hear those noises.” And he would pick up the whole table and the table would go, with all the food. And then the kids would start crying. He would yank Kate out of her bed at 5 o’clock in the morning and say, “You’re doing your chores today, and if you don’t do them right the first time you’re going to do ... Honest to God, from 5 o’clock to 9 o’clock she was still doing the same things because he felt she wasn’t doing them right. He was so incredibly harsh.

Kate began to disappear from the home, which infuriated Carlos. In his rage, he abused the family dog. Just as her mother had done when Diane was a child, she gathered her children and slept with them in the basement because they were frightened of Carlos. He would call down to them, “You can run, but you can’t hide, and eventually I’m going to find you.” Diane found this behaviour “really spooky”. When Carlos accompanied Diane to watch Sean play one of his team sports, Carlos abused his son from the stand until he was asked to leave.

Diane began noticing that she was losing her memory and showing signs of aphasia. She noticed that I was having difficulty following her narrative, and that I constantly had to stop her and revisit her earlier comments in order to establish a coherent timeline of events. For example, Diane recounted the time her daughter accused her of ruining their family by marrying Carlos, and how angry she was at her daughter for failing to realize all the “nice things” she and Carlos had provided. In the same breath, Diane acknowledged that she had a responsibility to protect her children, but failed to do so.

Unlike the other survivor participants, Diane was not moved to leave her abuser for the sake of her children. They were removed from her by the CAS. One night, Kate refused to go to bed at the time dictated by Carlos. Fearing a confrontation with her husband, Diane ordered Kate to bed, whereupon Kate kicked her mother in the groin. Diane recognized in Kate the hatred she felt for her own mother. As she feared, when Carlos came home, he became violent and “choked Kate”. Diane did not go to her daughter’s aid because she feared Carlos, yet, she felt guilty for what was happening to “her Kate”. To make amends, Diane attended at Kate’s school the next day, and told her counselor, “There’s been a horrible incident at the house and I think my husband hurt my daughter.” Diane was shocked when the CAS apprehended Kate. Carlos was never charged for assaulting his step-daughter.

Kate went into foster care. Diane claimed she stayed with Carlos because he would not relinquish custody of Sean to her. When Diane finally left Carlos, both Kyle and Sean stayed behind. Diane applied for custody of Sean, and Carlos counterclaimed for custody of Sean and Kyle, which was granted.

The loss of her children drove Diane to in-patient psychiatric care. She felt that everyone had betrayed her: her various lawyers; the judges before whom she appeared; the Children’s Lawyer (who supported Carlos’s custody application); even the shelter and transient house workers with which she came into contact. Diane could not understand how Carlos, whose step-daughter had been taken into care as a result of his having attacked her, could be awarded custody of her sons.

Diane was, by her own definition, “a broken woman”. The last time I heard from her, she had left her present abuser, and secured a placement in a long-term shelter for abused women. She is estranged from her children. She has assumed the role of survivor advocate.

3. Conclusion

The stories of violence and abuse recounted by the survivor participants continue to haunt me. Meeting them, and hearing, reading and writing about their suffering gives this research study

an immediacy that mere theoretical inquiries directed at the phenomenon of woman abuse cannot provide. Reflecting upon their narratives, I have extracted some common themes from their experiences of woman abuse both within and without the civil family justice system.

First, for all but one of the survivor participants, their experiences as children growing up in families in which violence and abuse were the norm appears to have rendered them susceptible to duplicating those experiences in their intimate relationships. In turn, their children were exposed to woman abuse, or were, themselves, abused by their mothers' violent intimate partners. The transmission of domestic violence and abuse across generations has been well documented. However, it is quite another matter to realize that the phenomenon was revealed in the stories of sixteen of the seventeen survivor participants.

Second, the survivor participants presented as strong and intelligent women. However, they had been so conditioned by the prevalence of woman abuse in their families of origin to accept it as the norm that they failed or refused to recognize that they, themselves, were being abused by their husbands and/or intimate partners. Indeed, it was only after they had received counseling that many of them recognized themselves as victims. For all but one of the survivor participants, their realization of the negative effects their abusive was having on their children ultimately led them to leave their abusive relationships. This suggested to me that the assumption of the dominant social discourse that its 'zero-tolerance for domestic violence' message has not been universally heard or accepted.

Third, all of the survivor participants were disappointed with their experiences with the civil family justice system. Perhaps this is not surprising - after all, women who are satisfied with their legal outcomes might not necessarily respond to my request for participants for a study of abused women's experiences in the family courts. However, I suggest that Liane's hesitation to return to court to assert her entitlement to increased child support, notwithstanding her status as an insider

with the legal system, confirms that abused women should be skeptical of their chances of success in the family court.

Fourth, far from resembling the grasping, selfish harpies portrayed by the fathers' rights lobby, the survivor participants, as litigants in family court proceedings, advanced claims that were reasonable and justified in both law and equity. In most cases, despite the abuse they endured, they were prepared to facilitate the ongoing relationship between father and child. It was their abusers who took unreasonable positions, made spurious allegations, and abused the civil family justice system, all of which was confirmed through my court file review.

Fifth, the survivor participants were particularly astute. They recognized their judges' obsession with *sex equality*, a father's 'right' to access, and the court's promotion of *maximum contact* between father and child. They resented that their stories of their abusers' violent and abusive *conduct* were rarely acknowledged. I noted that many of these participants complained that their voices were not heard, while some thought they were heard, but not believed. Some of the survivor participants contended that the judges 'did not care' about their abusers' misconduct.

Sixth, the survivor participants were often denied the *entitlement* to the financial support they required to provide for their children, let alone themselves. Most, if not all, of their abusers engaged in financial abuse; the failure of the civil family justice system to recognize this form of spousal misconduct exacerbated the survivor participants' precarious existence, and empowered their abusers to engage in more nefarious activity, such as failing to provide financial statements, avoiding paying support, hiding income, ceasing employment, misrepresenting their income in order to obtain social assistance, declaring bankruptcy or moving out of the jurisdiction. It was evident from the survivor participants' stories that most of them remained with their abusers because of their lack of, or inability to access, funds.

Seventh, the survivor participants recognized that the judges before whom they appeared did not consider their evidence, but relied on stereotypical 'he said/she said' scenarios when assessing

their claims. From whence these stereotypes emanated was obviously dependent upon the personal proclivities and subjective opinions of each judge. Hence, the survivor participants were confused by the conflicting results they obtained in the same action, advancing the same claims, based on the same evidence, from different judges. In this regard, Caroline's experience is most startling, given that she received conflicting orders from the *same* judge for the *same* claim.

Eighth, the survivor participants stories revealed that parental alienation engaged in by fathers is not considered parental alienation per se by the courts. Accordingly, the judges differentiate parental conduct by *gender*. In comparison, the mere allegation of parental alienation, absent any supporting evidence, advanced by a father against a custodial mother may be enough to sway a judge in the father's favour, regardless of his history of abusive conduct toward the mother and questionable parenting skills, as in Caroline's case.

Ninth, the judges who dismissed the survivor participants' requests for restraining orders obviously had no appreciation of the danger posed by woman abuse. I was left to wonder once again just what evidence would be sufficient for these judges to make restraining orders. It appeared that issues of safety are of little concern to the family court judiciary.

Finally, the resilience of the survivor participants was amazing. At the same time, the damage wrought by a lifetime of woman abuse was evident in the current circumstances of Diane and Elizabeth, in particular. The violence and abuse to which they had been subjected in their relationships, and, for Diane, during her childhood, were egregious and outrageous, affecting both their minds and bodies. Yet, one was left with the assumption that their abusers benefitted from their misconduct, by obtaining custody of their children, avoiding support obligations, and ridding their lives of their children's mothers. The family court was complicit in these results by virtue of the orders that were rendered, and/or the allegations of violence and abuse that were ignored.

CHAPTER SIX

THE JUDGE PARTICIPANTS RESPOND

1. Introduction

My analyses of the narratives of the fifteen judge participants are presented in this chapter. As indicated in Chapter Four, in order to protect their identities, these participants are identified only by their sex, and the level of bench on which they sit. To that end, I have refrained from identifying the courts in which they preside. Five of the judge participants sit or sat in the Ontario Court of Justice, and ten sit or sat in the Ontario Superior Court of Justice as judges of the civil or family benches. Those judge participants from the civil benches had participated in at least one family bench rotation. Fourteen of the judge participants were still active; one was retired. All but four of the judge participants (three in the SCJ, one in the OCJ) had practised primarily or exclusively in the area of family law before their elevation to the bench. Two judge participants had been general civil litigationists, and two had practised both civil and criminal law. Six judge participants were male; nine were female.

2. Reflecting on the Judge Participants

The objective of phenomenology, operationalized through grounded theory, is to identify, extract, and group or categorize individual perceptions or 'ways of knowing' into common categories of meaning (Hancyz, 2003). The preponderance of the scholarly literature I reviewed either hypothesized or stated categorically that judges were most influenced by their personal opinions, experiences, beliefs and proclivities, imbedded through their socialization, gender, race, class and social locations, their legal training and judicial education, and whatever they had gleaned, or been exposed to, from the 'psy' sciences. All of these factors, I was led to assume, would be overtly manifest in their approach to the phenomenon of woman abuse, and the abused women appearing before them, whom, this literature concluded, were either not heard or not believed.

As I engaged with my data, I began to notice four, major, recurring themes in the narratives of the judge participants. These themes included:

1. the “settlement mission” of the civil family justice system (hereinafter referred to as the “system”) and the self-perceptions of the judge participants, themselves, as actors in it;
2. their assessment of users of the system, both litigants, including self-represented litigants, and lawyers. In this regard, reliance upon ‘experts’, and their theories and concepts emanating from the ‘psy’ sciences was determined to be relevant;
3. the relevance of “conduct”, more particularly woman abuse, to judicial decision-making;
4. the nature of the orders they made (or did not make), the examples they used to contextualize them (if any, whether they were cases appearing before them, borrowed from case law, or hypothetical), and the bases upon which they were made: case law; legislation; the *Family Law Rules*; personal practice and opinion; common practice at the particular site or throughout the system; and their understanding of theories from the ‘psy’ sciences concerning domestic violence and abuse.

The four issues that had previously emerged from my examination and analyses of the relevant legislation and case law - *gender*, *rights*, *conduct* and *entitlements* - were, once again, evident in the narratives of the judge participants. The theme of *gender* was most apparent in the examples they used to explain how they perceived the parties and the orders they made. The theme of *rights*, or, more correctly, *right* to maximum contact by the access parent, preoccupied the majority of my interview time with these participants. For some judge participants, what constituted *conduct* relevant for consideration was obviously influenced by the sex of the alleged perpetrators as well as their victims, and the nature of the conduct of which the alleged victims complained. My impressions of the judge participants’ narratives confirmed that concern for the legal *entitlements* claimed by abused women was superseded by their fixation on fathers’ right to access.

The balance of this chapter presents the four themes that emerged from my interviews with the judge participants and identified above. Within each theme, the theories that emerged from my analyses of the data are stated, and supported by reference to verbatim quotes from, or summaries of, the participants’ narratives. The issues of gender, right(s), conduct and entitlements are also

discussed within each theme, where relevant. This chapter closes with a brief commentary on my findings.

3. Theme One: The “Settlement Mission” of the Civil Family Justice System and the Judge Participants’ Self-perceived Roles within It

Evaluating the civil family justice system: All of the judge participants were eager to discuss the system with me, although I did not intend to conduct an institutional ethnography (Smith, 2005). However, on their own volition, each of the judge participants managed to include his or her own views in this regard while responding to the questions set out in my Interview Guides (Appendices H and I). This information revealed the foundation for my analyses.

For some of the judge participants, the current system in Ontario is one of, if not the best, civil family justice systems in the world. SCJ G asked, “This system is not perfect, but where in the world would you go to get a better system?” OCJ N asserted that, “I think everyone agrees that we have a great justice system compared to the rest of the world. We have one of the best justice systems in the world.” It was described by a majority of the judge participants as “rights-based”. For some of the judge participants, a “rights-based” justice system was viewed negatively; the pursuit of “rights” in family law disputes was damaging to the parties, prolonged litigation, and overloaded the system. For other judge participants, litigants’ ability to pursue their “rights” was the *raison d’être* of the legal system from which parties to family law disputes should not be excluded. Regardless of their view of the system, the judge participants unanimously agreed that its paramount concern (and, thus, *their* paramount concern) was the welfare of children.

OCJ N expressed the consensus amongst the judge participants that the system was not without its flaws: “I don’t know anyone who would, if given the chance to create a system from scratch, make it look like this. The adversarial system is wrong. But, on the other hand, there’s a certain kind of clientele that’s not realistic. For a lot of these people, that’s what they need.”

Accordingly, this judge participant, amongst others, identified a disconnect between the system and those who avail themselves of it, discussed under the next heading.

OCJ N identified one fundamental contradiction in the system to which all the judge participants referred: the underlying adversarial nature of the civil justice system, in which litigants are expected, and judges are mandated, to achieve mediated outcomes. SCJ F described the current civil family justice system as “a conciliatory system grafted onto an adversarial system.” OCJ K expressed her frustration with the system in this regard:

So we exist in an adversarial kind of process, and as far as I am concerned, particularly in family law, that is probably the most destructive thing about dealing with families in crisis. No matter what it is, whether you are looking at caring for children, whether you are looking at financial support for the family, whether you are looking at how you are going to divide the property, you start out in a situation where people are hurt, angry, fragile and what do you do? You ask them to be an adversary. Once we get them there, oriented that way, we throw them into the mandatory information programme, then we throw them into the case conference system, particularly where it's case managed, and we say to them resolve, resolve, resolve. That's bullshit.

Notwithstanding the criticisms of the system expressed by OCJ K and shared by many of the judge participants, they were unanimous in their understanding of the system as one dedicated to promoting and achieving settlements. This was accomplished through the case management and case conference systems set up by the *Family Law Rules*.¹ Even those judge participants for whom the case management system was not available, such as SCJ F, were also strong proponents of mediated settlements of family law disputes and used the case conferences over which they presided to achieve settlements, or move the cases toward settlement, if possible:

I am not a fan of trial judges solving things. I think party-imposed settlements, no matter how frustrating they are, are better than judge-imposed judgments, because they are arbitrary. Why should I tell this family how they should solve their issues, if I can get them to agree?: SCJ F

SCJ G lauded the promotion of mediated settlements in the system as a means of enhancing the credibility of the legal system, generally, and particularly in an area of law so fraught with personal conflict and high emotion:

I think that the people who leave here with a settlement, by and large, feel that they've been heard and I think it enhances the administration of justice because I think what's really important for most people is the process. The result is important but I think if they can walk away feeling they've been heard and understand why they should be dealing with matters in a certain way, and they've actually agreed to it, I think they walk out with more respect for the system. And, at the end of the day what we really want is buy-in by the population into the system that we've created.

Some of the judge participants appeared to be particularly ardent proponents of the case conference/management systems as the means of achieving mediated settlements. SCJ C, who sat on a dedicated family bench, defined case conferencing "in its purist form" as "traditional mediation. It presumes rational, sequential-thinking litigants who at the end of the day want to do what's best for them and their family, and who are peace-seeking."

For SCJ C, "mediation has to be able to identify what the wellness levels are, what the other supports are, what the contexts are. It's an extraordinarily nuanced and complicated and individualistic skill. It really is a form of health care. Family law to me is 90% health care and 10% law." Far less enthusiastically, SCJ A admitted that, under the case conference system, 70 to 80% of his time was spent "not in a traditional adjudicative role, but in trying to meet with parties with or without counsel and if they do have counsel, in conferences, so the effort is in assisting in trying to settle cases." SCJ A expressed his frustration that "90% of our time is taken up by 10% of the cases."²

For SCJJ C and G, and OCJ K, a mediated settlement was the only acceptable resolution of legal disputes initiated in the system, and thus they were supporters of the settlement mission. However, SCJ C and OCJ K, who sat exclusively in family courts, expressed frustration with their inability to give effect to the settlement mission under the *Family Law Rules*, which, while directed toward mediated outcomes, could actually prolong the litigation, particularly in the case of high conflict parties. In the opinion of SCJ C, for whom the case conference system represented opportunities for behavioural regulation, rehabilitation, and restoration of good mental health, it was

the *process* (and not her determined pursuit of mediated settlements in all cases) that frustrated the settlement mission.

With all the pressure on process, you never actually get to the endpoint. Even final orders are subject to motions to change six months later ... there's a motion to change every year or two until the kids age out. It never ends. It's a life-long affliction and the case conference gives it voice ... but case conferencing has put all the focus on process, and the process ends up becoming the highway that never ends, and you never actually get to the outcome.

SCJ C envisioned a better case conference system that provided for even greater engagement between judge and litigant, but appeared to redirect control of the "process" away from the judge to the litigant. "The file that could be better managed, for example, for a young mother who does not want to give access, you start off with something very simple in a public centre. Come back in two or three weeks. 'How did it go? Let's expand it.' She comes back in a month. 'How did it go? Let's expand it'." Given the scenario SCJ C presented as her vision of the ideal response to family law disputes, it did not surprise me that she claimed "we need a case conferencing system that is not judge-led" and would prefer if all but the most litigious cases were referred to mediation.

OJ K wished litigants would "come back in front of me in two weeks so I could say, 'What did you do? Why did you not do that? Why did you not obey my order?'" In that capacity, she asserted that the role of a judge in family cases is "to set a tone for problem-solving from the word go. It's like a situational leadership matrix.³ As the parties gain more ability to self-manage in an appropriate way, the judge backs away. If they're not capable of doing that, the judge steps forward". OJ K envisioned the ideal family court where a judge would be assisted throughout proceedings by a child psychologist who would warn parents of the damage their legal battles were inflicting on their children; in this case, OJ K was prepared to abdicate her adjudicating role to an expert from the 'psy' sciences.

There is nothing in the *Family Law Rules* to suggest that the system was designed to be used for this purpose. These judge participants appeared, unfortunately, to contribute to their own

malaise by the ways in which they used the system primarily to monitor the parties and direct them toward settlement. There was little indication these judge participants used conferences to hear motions, make findings, issue orders, or direct cases to trial, all of which detracted from their one, desired outcome: mediated settlement. There was no recognition of the frustration litigants might feel (and the costs they might incur) under the model proposed by these judge participants.

SCJJ C and G, and OCJ K appeared to make a great personal investment in their cases, and the lives of the litigants appearing before them. They descended from the dais by ascribing to themselves the roles or personae of ‘mother’, ‘social worker’, ‘health care provider’, and/or ‘wise elder in the family’, all of which connote a far more personal, or intimate connection with the parties than assumed by a traditionally remote judiciary.

In comparison, OCJ N, while a strong proponent of the case conference system, insisted “I didn’t go into this job to be a mediator. I’ve never been trained as a mediator, and judges are supposed to make decisions.” He insisted that “we can’t regulate behaviour”. The most we can do is create consequences for bad behaviour”.

OCJ N’s definition of case management was decidedly different from that of SCJ C:

Case management means one judge manages the case. We’re not mediators. We don’t conduct mediation. We’re decision-makers. We do try to see if there’s a way to settle. But that’s not the basis of case management. What case management is about is making decisions to resolve it. But you’re making decisions, you’re not working that hard on trying to get a consent. Once you’ve given your opinion, you see (and especially with the clientele we have, we know they’re not going to agree) they’re not going to agree. We don’t have trials for domestics. We resolve them. We use the rules. We use the *Family Law Rules* that give us the power to make orders at case conferences. We use summary judgment. We have Rule 2 hearings where we have focused hearings on one issue. Other judges think what they are doing is seeing if they can resolve [legal disputes] in a kind of mediatory way.

Other judge participants, including SCJJ A, D, E, F and H concurred with this approach to varying degrees. SCJ H, a proponent of mediated settlements who described his judicial persona as “grandfather”, utilized his judicial authority to direct the parties toward settlement. “I will give them an opinion as early as I possibly can based on the material that I have read ... I set the agenda ... I

will tell [the lawyers] that I want [them] to go outside and tell these people what it's going to cost them to go through the trial." SCJ F, while a strong proponent of party-driven settlements, nevertheless considered his "obligation, as a judge, is to make sure the vulnerable get their day in court, they get a proper voice, and they get the proper remedy, if deserved". He accomplished this through the orders he made, discussed later in this chapter. SCJ D rejected the notion that litigants can "just come back". He remarked that "they don't want to come back," and the backlogs in the system and prohibitive costs associated with litigation usually precluded many from so doing. SCJJ D, E, F and H described hearing *viva voce* evidence on motions ("mini-trials") for emergency restraining orders. It is interesting to note that all but one of these judge participants rotated through their respective family benches, and thus may have brought with them a greater tolerance and receptivity for litigation than did SCJJ C, G and OCJ K, who were assigned exclusively to the family benches.

SCJ E was cognizant of the possibility of conferences "getting out of hand" if the presiding judge retreated from "being in charge". SCJ A advised "I'm a big believer in acts of justice and I believe that the courts are a critical piece in family law." He was not averse to issuing orders, if necessary, during conferences to "move the matter along" and/or protect the interests of the parties. He believed the settlement mission imposed "great pressure" on litigants to settle their differences, even when it was not in the best interests of one or both of them. Both SCJJ A and E presided primarily, but not exclusively, over family law disputes, and, in this regard, were more likely to maintain carriage of their cases than were other Superior Court judges who only rotated through the family bench.

Other OCJ judge participants, like OCJ N, emphasized their role as judicial arbiters and decision-makers within a mediative system. OCJ O, who identified the goal of the system to be "a fair settlement", was unequivocal in this regard:

First of all, the legal system has to deliver legal orders. That's our first responsibility. And so our first responsibility is to look at the evidence, weigh the evidence and make legal decisions. So the legal decisions are custody, access and support, spousal sup-

port, restraining orders, so, whatever those are, we give reasonable decisions based on that. That's our defining responsibility.

OCJ O supported the concept of mediated settlements as the ideal resolution of family law disputes, and recognized the value of the case management system with which he was involved in that it allowed him to become familiar with litigants, over time. This familiarity with the litigants facilitated OCJ O's ability to address the inevitable power differential that exists between the "unreasonable" litigant and his/her opposition by acting adjudicatively: "The more experience I have with the family helps inform my decisions. So if I'm reading something and I see that somebody's being unreasonable, that's information for me. I don't have to learn that all over again, as a new judge does. I can recognize that a lot quicker. I can take steps to deal with that situation."

However, OCJ O recognized that the case management system exposed judges to allegations of bias from litigants dissatisfied with their rulings. "You don't get to shop for your judge, so you better get in line with what that judge wants, and if you don't then, that judge isn't going to be happy with you and you can't shop and get another judge. That's your judge. You're stuck with that judge during the case management process."

Reflecting upon this narrative, I realized that those litigants fortunate enough to draw OCJ O could, indeed, request a hearing from him without his being affronted, as might be other judges, such as SCJ C or OCJ K, who appeared more personally invested in achieving mediated outcomes in their cases. OCJ O did expose another major drawback in those sites having a case management system: litigants are "stuck" with the judges assigned to their cases and must accede to their preferences. As my analyses of the judge participants' narratives will demonstrate, for abused women, this can have deleterious consequences.

OCJ N, like OCJ O, was prepared to assert his role of adjudicator in an adversarial system:

You have to be very, very rigid and very disciplined, and you have to make consequences for every failure to comply [when the mediative approach is inappropriate or breaks down]. It's a different kind of judging. You're not going to reach consent. You're not going to talk them into realizing that they've got to let go of their

emotional problems. You have to assume that they need a decision and they're likely not going to comply with it and you're going to have them back over and over again.

SCJ D, who, like SCJ A was a member of the civil bench, a senior judge and experienced family litigator, supported mediated settlements, where appropriate. He described himself as “a helper, a resolver” in the court room, but never as the litigants’ “friend”. He criticized those who utilized the system in the ways promoted by SCJ C and OCJ K:

To me, [the most common abuse of the system he’s witnessed is] using the court for the wrong purpose rather than to get resolution, using the court for therapeutic purposes. And, you know, it just isn’t the proper venue, but people think that [returning again and again to] the court system and churning it out will somehow change things for them, and it doesn’t, necessarily. I think we do hope that people will, at some point, be able to take charge and manage their own affairs, but they can’t. They’re incapable of doing that.

For SCJ D, “mediation doesn’t work for everybody.” He found the current system “aspiring to be complicated and complex”, and “shudder[ed] to think that we have all of these conferences”, which, for him, were best suited to providing litigants with “insight into the judicial mind, and what may be the judicial result in this case” (like a civil pre-trial conference) and not forcing them to accept settlements.

Other judge participants took the concept of “being in charge” to a higher level. For these judges, the case conference system provided regularized opportunities to render decisions and make orders. These judges had no hesitation in admitting that “high conflict” litigants, that is, those who took adversarial positions, “just need to go to court.” For OCJ L, the case conference system, having removed from the dockets all those cases amenable to settlement, has “allowed us to have a little more time with some of these people to see if we can get through it, and if not, set up a motion. It’s an adversarial system. A lot of people that are in high conflict, in my own view, they need a judge. They need authority.” She claimed to be “a big advocate of case management. I think that you can see through people. You can do a lot more settlement when you’re managing your cases because you can see what these people are like *and you can start crafting your orders*, incrementally to try to

deal with that” (my emphasis). Thus, for OCJ L, case management provided her with the necessary insights into, and familiarity with, litigants to allow her to make orders which, she implied, she used to maintain control over her own process, not to facilitate mediated settlements or address any power imbalance between the parties.

OCJ L, like OCJ N, believed that judges have little control over litigants outside of the court room; they cannot regulate human conduct. Similarly, SCJ B admitted “at the end of the day, we don’t have much power. People will do what they want to do. I make orders that are ignored, so, what’s the point?” Far from assuming the role of “community leader”, or “social worker” or “health care provider”, SCJ B advised

I often will say to parties, “I actually don’t care what you do, because my job is dispute resolution and I can do it in one of two ways. I can assist you in a case conference settlement to reach a resolution consensually. Or, alternatively, we’ll give you a trial.” Like, I frankly don’t care.

There seemed to be little evidence that these two judge participants were ever actively and personally engaged with litigants, or took a vested interest in the outcomes of the cases before them, short of their authority being recognized and their dockets being cleared.

Many of the judge participants asserted that family law fails to get the respect they believe it deserves from judges on the criminal and civil ‘sides’ of the bench. For SCJ E, this lack of respect resulted from a widely held misapprehension of the nature of family law.

There’s this perception that there’s not a lot of law in family. It’s all emotional, which is a completely inappropriate perception. The misconception from a lot of people is there is no law and then you get there and there is a ton of law, having to know tax, and real estate, and criminal law, a lot of areas of law. So I think that scares people, and I think the conferencing scares people as well because they need to make a difference in conference, and if they don’t know enough about family law, it’s hard to do that.

However, for OCJJ L and M, who were not amenable to attenuating the role of judge in pursuit of the settlement mission, the diminution of family law within the pantheon of legal subjects

(and, by extension their own marginalization as family judges within the judiciary) was a particular affront:

Most of the judges that are appointed in the last ten years or so have a pretty good background in family law and they don't believe (and they want to very clearly elevate the family court) that this is not second-class justice; this is an important court and it is the most important court because it deals with families ... This isn't some place where we just throw around rules and everything goes in. We have tried very hard to say family law is law and it's law that is really, in my view, one of the most complicated laws because you have to consider criminal law. You have to consider tax law. You have to consider property law. For us to be treated like second-class citizens in the justice system, I think, is very concerning: OCJ L

For these judge participants, it would appear that their criticisms of the system were directed more at their own sense of inferiority as OCJ judges than at the inadequacies of, and contradictions within the system (identified by other judge participants) that frustrated due process and negatively impacted litigants.

Constructing a continuum: Judge participants obviously differed in their understanding of the system, the extent of their role as judges within it, and their mandate to facilitate settlements. The establishment of the case conference system and the degree to which the judge participants embraced and promoted the settlement mission, reflected in their comments, allowed me to create a continuum along which I could place each of the judge participants, based upon my analyses of his or her individual narrative.

The Continuum

<i>Group 1</i>		<i>Group 2</i>		<i>Group 3</i>		<i>Group 4</i>		<i>Group 5</i>	
Most mediative		Somewhat Mediative		Mediative & Adjudicative		Somewhat Adjudicative		Most Adjudicative	
SCJ G (f)	SCJ C (f)	SCJ A (m)	SCJ H (m)	OCJ O (m)	SCJ E (f)	SCJ D (m)	SCJ J (f)	OCJ L (f)	SCJ B (f)
OCJ K (f)				SCJ I (f)	SCJ F (m)	OCJ N (m)		OCJ M (f)	

Judge Participants

I constructed this continuum for the purpose of identifying how each of them understood and approached his/her role in the system. The continuum ranged from those judge participants who appeared compelled to ensure every case on their dockets was settled without recourse to trial (most mediative judges), to those who believed that the case conference system is an adjunct to trial (most adjudicative judges). I divided the judge participants amongst five groups along the continuum, based initially upon the degree to which they subscribed to the settlement mission.

The continuum clearly illustrates that the majority of the judge participants tended toward the centre and “somewhat adjudicative” side of the continuum, but this does not mean that they, nor the most adjudicative judge participants, were less amenable to effecting settlements than were their more mediative counterparts. It does mean that, from my critical deconstruction and analyses of their narratives, they were more inclined, with increasing conviction as one moved along the continuum to the right, to concede that not all cases could be settled and that the parties in such cases had to be made subject to orders or directed to trial. I found that, as I moved along the continuum toward adjudicative judgeship, the judge participants appeared far more familiar and comfortable with the parties assuming an adversarial stance in family law disputes. I perceived that, the more adjudicative the judge participant, the less he or she seemed to be personally invested in the outcomes of the cases to which he or she was assigned.

I reflected back on comments made by my judge participants regarding their own views of the case conference system, with its settlement mission, and their opinions of their brothers and sisters whose positions differed from their own. It was clear that, amongst the judiciary, the degree to which judges pursued the settlement mission was an issue about which many of the judge participants held strong views. OCJ N cast a jaded eye on his peers who pursued a primarily meditative role.

I think some of that is a show that they put on for people who are researching it, because it sounds good, and it sounds therapeutic. But I don't think that's really

what's going on. From what I see in the other courts and when I talk to my colleagues, they're preparing for trial. Remember, when you're a judge doing case management and you've got to see these people over and over again, and you see you're getting nowhere, the fastest way to get rid of them is send them to trial.

SCJJ B, C and E suggested that older, male judges would be most uncomfortable in the role of family court mediator. SCJ B identified "personality" as the determining factor in whether or not a judge would be able to "deal" with the system. However, for SCJ B, the determinant was not gender or age, but the degree of personal investment of the judge that informed his or her pursuit of mediated settlements: In her opinion, "some [judges] are very invested or become very invested in getting a deal ... and some members of the judiciary, being solely invested in settlement, [believe] that to send a case to trial is considered a personal failure on the part of the judge".

OCJ N, himself, was under no such illusion, but did recognize it in some of his peers:

I think some of my colleagues, when they get together with other judges, they give you this impression that they get such satisfaction from their work because they've done such good work for children and they've helped so many people resolve their conflicts. And it's as if they're living in some kind of dream world. You know that, chances are, we haven't really changed what's going on for those kids. I don't have any illusions that they've suddenly seen the light and they're going to be nice to each other now or insulate the children from their conflict.

I realized that the most mediative judge participants presented themselves as conciliators and facilitators, but their narratives revealed that they directed considerable animosity at recalcitrant parties. This raised an interesting contradiction: they professed to assume a conciliatory stance in the cases over which they presided, but they were, in fact, draconian in their insistence that the parties must settle their differences. They projected a sense of impotence when their abilities to obtain settlements were thwarted by litigants who refused to adopt their mediative approach and instead pursued their own adversarial agendas. They seemed to take litigants' rejection of their efforts to mediate settlements as personal rejections and/or failures.

I also began to appreciate how the most mediative judges could exact settlements in cases in which the efforts of a judge were so forcefully and persuasively directed at settlement that it could

further tilt a power imbalance between an abuser and his victim to the benefit of the former. The victim as weaker party, already conditioned to recognize condemnation in her perpetrator, would retreat from her adversarial stance and acquiesce to unfavourable terms if it meant she could avoid the judge's disapproval – a stance OCJ O recommended. These most mediative of judge participants, could, I presumed, thus leave abused women feeling mistreated by the *system*.

At the opposite extreme, the most adjudicative of judge participants appeared to me to be complicit in contributing to the further victimization of abused women. For these judges, there was little or no room for judicial discretion; if the parties could not agree, these judges would strictly apply the law as they defined and understood it. In so doing, of course, they were oblivious to the extent to which their personal subjectivities were, in fact, at play in their decision-making. During the course of much of my interview with OCJ L, one such judge participant, she led me to believe, through eye-rolling and shoulder shrugging, that she thought little of my questions – that the answers were self-evident from a simple reading of the legislation and case law. How the most adjudicative judge participants dealt with the balance of the three themes raised in this chapter, and the issues of gender, right(s), conduct and entitlements, is discussed later in this chapter.

Judge participants who appeared both mediative and adjudicative admitted to having a certain degree of personal investment in the cases before them, described as concern for the welfare of the children involved and, for some, the “safety” and well-being of their mothers. They were also concerned with ensuring fathers enjoyed “appropriate” access arrangements, which were dependent upon the relationships between the spouses, and the fathers with their children, and took into account any history of physical and/or emotional abuse. These judge participants, whom I included in group 3, appeared to be the most sensitive and receptive to abused women and their stories, and, for the most part, attempted to address their concerns *as far as the law allowed*.

The emergence from the continuum of other themes and theories: I readily acknowledge the construction of the continuum and the placement of the judge participants along it was, and is, fun-

damentally subjective. However, my critical analyses of their narratives revealed marked similarities amongst members of the different groups, and differences amongst groups. I began to see definite correlations between the judge participants' placement along the continuum and the four major themes mentioned earlier in this chapter. The most significant aspect of my analyses, I suggest, was that the overriding determinant of how open was a particular judge participant to acknowledging the phenomenon of woman abuse, and how responsive he or she was to abused women, was not the judge participant's gender, age, religion, years of experience or social location, *but the degree of his or her personal investment in the settlement mission*. I recognize that how and to what degree a particular judge buys into the case management/conference system and settlement mission will necessarily be informed by all of these variables, as well as others, particular to each individual. Without identifying my participants, I can state that their age, ethnicity, religion and years of experience were not significant, as these variables were represented in each of the five groups across the continuum.

Given that the judge participants located at either end of the continuum were women suggests that gender is significant, however, not necessarily in the way proponents of gender diversity on the bench envisioned it. That the majority of female judge participants were included in groups 1 and 5 did not surprise me, given that my review of the case law in Chapter Three in which woman abuse was alleged revealed that female judges are as likely as male judges to reject abused women's claims. What was surprising, however, was the revelation that the two judge participants who were *most* inclined to unequivocally reject women's allegations of violence and abuse were women. Given the small sample size, it is impossible to determine if the female judge participants identified as most mediative or most adjudicative represent outliers amongst the general population of female family court judges. However, most importantly for this research study, the placement of the judge participants along the continuum appeared to be strongly correlated to their understanding of the

phenomenon of woman abuse and abused women's experiences, and their assessment and determination of claims advanced by abused women who have appeared before them.

4. Theme Two: The Judge Participants' Assessments of Family Court Litigants

Prolonged engagement with the judge participants' data revealed to me that their assessments of litigants appearing before them were correlated with their placement along the continuum. These assessments, in turn, determined how the judge participants received and assessed evidence and disposed of their cases. It allowed for the most mediative judge participants to characterize litigious parties as emotionally unstable and promote theories emanating from the 'psy' sciences, as well as from what I call 'junk science' as explanations for their rejection of the settlement mission.⁴ At the other extreme, the 'psy' sciences and/or 'junk science' appear to have had little or no bearing on the most adjudicative judge participants' decision-making, inasmuch as they believed they were directed to issue orders in accordance with "the law", regardless of their assessment of the parties.

Describing family court litigants: OCJ L posited that the settlement mission has offered opportunities to negotiate settlements of post-separation disputes to those who could not otherwise afford private mediators or arbitrators. "There are certain segments of people that absolutely can settle. And that's where the mediation has been so helpful to these people, especially with it being free, so that they can use those facilities, because before, it was a middle-class phenomenon."

However, the settlement mission appears to have ensured that only the most litigious of parties pursue their legal remedies in the court room.

Reasonable people have left the system. They're into collaborative law, parenting coaches, arbitration. So we are left with only high conflict couples now in Family Court. Now you're dealing with people with personality disorders who don't have any insight into their behaviour. They're very draining people. They don't have any filters. They don't have any self-governance. They're ungovernable. So it's a different kind of judging. You're not going to reach consent. You're not going to talk them into realizing that they've got to let go of their emotional problems. So 100% of our case load is now high conflict, where it used to be 25%. We always had them. It's just that we used to have all the reasonable people, too, that you could actually get somewhere with. And the job of being a judge was much more gratifying: OCJ N

Many of the judge participants concurred in their assessment that the vast majority of litigants who appear before them were “high conflict” parties. OCJ L described them as “tough people” who

can’t go to mediation; you can’t deal with them at the case conference level because they don’t listen. If you’re not going to get anywhere, then you set up a motion and you just make an order. That’s what you need to do. So you have to be able to ferret out the cases where people really do want to settle, even on a temporary basis, where they’re rational.

The “settlement mission” of the system appears to be contraindicated for the population of “high conflict” parties who reject mediation in favour of litigation, calling into question the efficacy of a legal process directed toward settlement.

Mediative judges: The most mediative judge participants held very negative views of parties who rejected the settlement mission in favour of litigation. The impediments to achieving settlements were attributed by them to perceived failings and/or inadequacies in the litigants, themselves. The more negatively these participants viewed litigious parties, the more pathological were the characteristics they attributed to them, and the greater the frustration and futility they expressed with the system. SCJ C complained that the case conference system “presumes rational, sequential-thinking litigants who are peace-seeking and, who, at the end of the day, want to do what’s best for them and their family”, but that she saw those litigants only “about 10% of the time.”

The most mediative judge participants were more likely than their more adjudicative peers to refer to theories emanating from the ‘psy’ or junk sciences to pathologize litigants appearing before them. SCJ C was a “disciple” of Bill Eddy, described as an American lawyer and social worker (credentials insufficient to qualify him as an expert for the purpose of giving opinion evidence at trial in Ontario courts) who had “made the rounds” at judges’ education conferences and seminars in Canada. Given the legal formalities mandated by both legislation and case law to qualify an expert for trial, I was surprised that this individual would be promoted by the various

judges' associations and continuing judicial education institutions as an 'expert' upon whose lay opinions the judiciary should rely (and that they would do so). I was instructed to read his books and visit his website for my own edification. SCJ C admitted that "he's not an academic and he doesn't pretend to be, but what he's been able to do is categorize a lot of the patterns that we see in a way that's helpful."

There's the four personality disorder types that you will see in court. So he has a book called *High Conflict People in Court*, and he gives you the general profiles and they're dead on. Dead on. And then, he's not doing this to label or say people are good or bad. It's how this group of people processes information this way, perceive conflict that way. This is the best way to work with them. And the groups are the borderline personality, histrionic, sociopathic and narcissistic. And all four of those groups relate to authority in very, very different ways.

SCJ C described the system as complicit in "high conflict" litigants' inability or refusal to submit to the settlement mission:

Law becomes a place where you can validate emotional claims. It is a very, very powerful thing. It is so powerful it can become an addiction. So a lot of times you see cases become chronic because of the excitement that comes from making a person accountable ... There's nothing that is quite as exciting as that ... So the claiming basis of family law distorts what's really going on in families to being with ... the high conflict people will actually increase the litigation the more time that is available to them.

Curiously, SCJ C did not acknowledge that her mediative approach contributed to the systemic abuse she described. It did not appear that she could consider litigants who persisted in advancing their positions litigiously (particularly in the highly mediative atmosphere of her court) as anything other than pathological.

OJ K described family litigants as "hurt, angry, and fragile" and criticized those parties as "manipulative" (from the examples she provided, these were always women) who chose to litigate rather than settle their post-marital disputes. She was particularly exercised over the "very harmful stereotype judges have when we hear domestic violence":

It's either that it's really not that bad and that somebody is making it up as leverage for a custody case, for example, or that the abuser is a monster. There is absolutely, I think a relatively small subsection of women who are brutalized, terrorized their

whole lives. They are outliers. And there is also I think a relatively small percentage of women or men, but mostly women (it is really a gender oriented kind of thing, I think) who make this up, or who use this as leverage for other things. The vast majority of cases fall in the middle. I think we tend to think, if we are looking at women as the sole victims here, we tend to think of them as being very powerless. I think I understand that even the literature on dealing with male abusers is that that is how *they* [men] see themselves. They see themselves as powerless.

I immediately recognized that “the literature” to which OCJ K was referring was that which promoted the “masculine mystique” theory and was embraced by the fathers’ rights movement.

They [married men] see themselves as powerless, and it’s as a result of that powerlessness that they end up abusing in a lot of cases. Men feel powerless. I think there are men who feel powerless emotionally ... where he feels that he is not able to influence his world, and I think that men unfortunately are socialized when they have those feelings is to act out in violent ways in a lot of cases ... Men are simply more aggressive. I know it’s not fair to think that way but men are socialized that way and I think to some degree, are hormonally that way, absolutely. So a man who is feeling powerless like that may act out with his family because it’s safe for him to do that. It isn’t safe to go out and beat the shit out of somebody off the street.

The remaining “most mediative judge”, SCJ G, allowed that, in all her years on the Superior Court bench, she had never encountered a case of domestic violence, suggesting that the parties who came before her in “property cases” did not engage in such conduct. Instead, they attorned to the jurisdiction of the lower court. For SCJ G, therefore, domestic violence was an issue of socio-economic *class* and never a factor in her decision-making.

SCJ H concurred with his more adjudicative counterparts that the vast majority of parties appearing before him are “just full of anger and resentment and they are entitled to their day in court.” However, he was not prepared to pathologize all litigants as were SCJ C and OCJ K. He was cognizant that abusers can be “sociopaths”, or that one or both parties “can be a little bit off”. A mother who denied access was described as “a bright lady but there is just something missing”. SCJ H did not indicate that he received any direction from expert witnesses when making these assessments. SCJ H, and OCJ K apparently also made their assessments of the litigants appearing before them without any input from duly qualified experts. Theirs were their own assessments, informed

by their understanding, as laypersons, of psychiatric disorders, and, as such, reflected their personal opinions and biases.

Adjudicative judges: Unlike their more mediative sisters, OCJJ L and M showed little interest in the psycho-dynamics of the parties who came before them. OCJ L recognized that not all emotional responses to marital separation and the resulting litigation were born out of psychological disorders, although chronic abuse might indicate their presence.

If the emotional difficulties are - there's no capacity to change and they are somehow part of, let's say, an underlying personality disorder that - or a seriously abusive person who doesn't have any insight into abusive behaviour, you have to sift through the normal emotional devastation that people have when their relationships fall apart, that needs time to recover and heal and grieve and move through the six stages of separation or whatever they are, plus the, you know, emotionally abusive personality disorders that are never going to change and are going to be harmful. And, you know, it's hard to do that, but we have to do that. You have to start applying the law immediately. Discretion doesn't matter at all. The test is still the test.

Indeed, OCJ L demonstrated impatience with the emotional plight of those appearing before her.

The other day in case management court, it was an issue of the father wanting to move to a shared parenting arrangement after a period of four years where it was not the status quo at all. He asked, "Can I say one more thing, Your Honour?" And then he pulled out this letter and he started talking about "when she left me for another man and how she ruined my life". He clearly was devastated. But this happened four years ago and he obviously hasn't moved beyond that. He clearly wanted to vent, you know, bla-bitty blah. But, I mean, at some point you have to cut that off because that's not really helpful. And yes, I'm sad for him that he hasn't moved on, and I suggested he get counseling and, you know, all of that, but you can't really listen to that. He had, like, three pages there, and I just couldn't listen to all of it.

I compared OCJ L's response to an emotionally distraught litigant to that of SCJ C:

[Litigants] need an authority figure to project onto, because they need to feel powerful in a situation in which they have no power. You need someone there who can say, "I get that". If you can project that onto a figure of authority that by itself is a calming influence. I invite both people to talk to me directly, and if they would rather do it on their own, I caucus. And I do my active listening. I don't tell them what the answer is. I don't *tell* them I'm on their side, but I do the active listening, and it's an incredibly useful approach from my point of view, and the feedback I get is that quite often that settles the case, because both of them needed to be heard.

I noted that SCJ C engaged in “active listening” as a means of encouraging settlement. In comparison, OCJ L engaged in “active listening” to better inform the orders she made.

Mediative and adjudicative, and somewhat adjudicative judges: The judge participants attributed to groups 2 and 3 neither pathologized nor ignored litigants’ behaviours. Their comments revealed that they considered parties in dispute to be just that: individuals utilizing the system to assert their claims. This did not mean, however, that they did not recognize that litigants could be unreasonable or manipulative. OCJ N put his observations in this regard quite simply: “people hurt each other.” Nor did it mean that these participants failed or refused to recognize when a litigant was in emotional distress.

OCJ O advised that

some people present as very passive, very cowed. That’s the traditional approach that everyone expects someone who has suffered domestic violence to have, but other people who have suffered domestic violence also present as very aggressive. They can be very angry, and, in fact, one of the dynamics that you can see with clients who suffered domestic violence is that they’re the aggressive ones in court, they’re the demanding ones. They might come off as shrill, whereas the abuser might come off as very calm, very controlled.

He asserted that abusers are readily identifiable: “I see how people behave. I look to see if there is control. You’re looking for signposts. Is there controlling behaviour going on? Is somebody being totally unreasonable? I have that situation when someone is obviously controlling and interrupting and using physical intimidation in the court.”

SCJJ D, E, and F, and OCJ N, like OCJ O, recognized that litigants’ behaviours in the court room can reveal much about the relationship between the parties and the presence (or absence) of a power differential. SCJ E advised that some litigants can be “difficult”, in which cases she will make the appropriate orders, and not encourage the parties to mediate. SCJ D admitted that “within the family law area, people do play games, they are manipulative, and a relationship may have always been a manipulative one. I really look to see whether I can actually be convinced one way or the other. But I’m never sure that I’m necessarily right.”

I suggest that these excerpts reveal that the most mediative judge participants could, by pathologizing litigants, choose to ignore the allegations and claims of the party whose position interfered with the settlement mission. Instead of recognizing the power imbalance that inevitably exists between litigants, particularly those whose presentation OCJ O described as “controlling” (endemic amongst woman abusers), the most mediative judges promoted mediation and settlement as the panacea for intransigent parties. They rejected as unreasonable litigants’ desire to avail themselves of the adversarial process.

If one accepts that mediation is contraindicated in cases of woman abuse, the tack taken by the most mediative judges exposes abused women to further manipulation and intimidation during the settlement process from their abusers as well as from these judges. Given the self-identification of the most mediative judges as “mother”, or “wise elder”, one might expect them to have assumed they know what is best for litigants, whom they perceived as misguided, misdirected, and otherwise delinquent. These participants’ reliance on junk science and/or discredited theories emanating from the ‘psy’ sciences (as well as their own lay understanding of human behaviours) to justify their characterization of litigants as pathological allowed them to concoct generalizations and stereotypes about the men and women who appear before them which probably had little or no relevance to the parties, themselves.

In comparison, the apparent rejection or refusal of the most adjudicative judge participants to engage on a more personal level with litigants precluded their appreciation of the “context” in which allegations and claims were being asserted. There was little evidence that these participants were interested in, or even noticed, when a litigant might be intimidating his opponent or abusing the process, unless the behaviour delayed these most adjudicative of judge participants from rendering their decisions.

The judge participants were in agreement on one point, regardless of their placement along the continuum: the cultural and ethnic diversity of the population posed significant problems in the

system.⁵ They had no difficulty identifying the oppression and marginalization of women evident in various cultural/ethnic communities. However, only four (SCJJ A, B, C and F) referred to the ways in which women had been marginalized and oppressed, historically, and been blamed for the misfortunes that befell them within their *own* society and, by extension, the legal system. Of these judge participants, only one, SCJ F, acknowledged that the system, and the judges who presided in it, might still be culpable in this regard.

I hope that the Victorian approach that victims who get involved in abusive relationships are responsible for what happens to them is gone from family law. I know it's gone from criminal law, the idea that a woman really doesn't say 'no', or a woman is provocative by the way she dresses. That's pretty much gone from criminal law. Maybe that 1940s or 1950s ideology is still in family law to some degree.

Self-represented litigants v legal representation: There did seem to be a correlation between those judge participants who preferred that parties be represented by counsel and their placement along the continuum, when I took into account in which courts the judge participants sat: the SCJ or the OCJ . The judge participants' comments regarding self-represented parties reflected, for the most part, the level of comfort each felt when dealing directly with litigants. The more mediative SCJ participants preferred the presence of legal counsel, while those in groups 3, 4 and 5 either preferred self-represented parties (SCJ F), or were resigned to their presence (SCJJ D, I, and E). The latter's ambivalence may have reflected the small percentage of self-represented litigants appearing in their courts. In comparison, the most mediative OCJ participant preferred dealing directly with self-represented parties (OCJ K) while OCJJ L, M and N from groups 4 and 5 longed for the days when counsel were present in their courts. The credibility of my observations on this point might have been impacted by my small sample size, but they suggest that the presence or absence of counsel may influence a judge's response to litigants' claims, depending upon whether or not the judge enjoys interacting with self-represented parties.⁶

I did suggest to one judge participant, who found litigious self-represented parties particularly bothersome and criticized legal counsel who, in this participant's opinion, belaboured their

clients' allegations of violence and abuse and refused to engage in mediation, that perhaps the former were merely asserting their legal rights, and the latter were doing their job of protecting their clients, who were, in fact, victims. It was evident, from the change in this participants' facial expression that these explanations had never occurred to her.

5. Theme Three: The Relevance of Woman Abuse in Family Court Proceedings

Acknowledging conduct – or not: I admit to having difficulty with the idea that conduct is irrelevant in family court proceedings, since it is relevant in every other area of law. However, I was cognizant of the dictate of federal legislation since 1968 directing the judicial mind away from concern specifically for women's adulterous conduct which, historically, had precluded them from most rights and entitlements at common law and in statute. From my review of the relevant case law set out in Chapter Three, I concluded that the judiciary chose to ignore not just adulterous conduct, but woman abuse, as well. I assumed my judge participants might do so on the basis of legal precedent. It appears that the majority of the judge participants did, indeed, claim to ignore conduct in their decision-making. Inasmuch as woman abuse is a form of *conduct* (or, more properly, *misconduct*), I initially directed my inquiries into the relevance of conduct to the judge participants' decision-making to see if they would make the association on their own. I did not want to be perceived as having suggested to them that woman abuse, or even domestic "violence" or "violence and abuse" (the first term used in s. 24(4) of the *FLA*, and both terms used in s. 24(3)(f) of the *CLRA*) constituted the only conceptualization of conduct in which I was interested. However, I need not have worried; the judge participants appeared to associate conduct almost exclusively with domestic violence and abuse without any assistance from me.

Despite their assertions to the contrary, those judge participants who denied entertaining any consideration of conduct nevertheless repeatedly illustrated their comments by attributing various types of *misconduct* to highly gendered stereotypes of litigants. Indeed, the more adamant was a judge participant in rejecting conduct as a factor in his or her determinations, the more likely he or

she was to employ examples of *misconduct* to justify his or her position on any of the issues under discussion. In most cases, it was the female litigants to whom the examples of misconduct were attributed in these instances.

Other judge participants were very selective in describing the nature of misconduct they were prepared to accept. My grounded analyses of these participants' narratives revealed that they insisted that conduct, generally, was irrelevant to their decision-making, but, in this regard, they were only referring to violence and abuse, more particularly, woman abuse. Some neutralized the relevance in their determinations of domestic violence and abuse as conduct by relying on the gender symmetry apparent in the concept of 'situational partner violence' to define the phenomenon. However, these judge participants expressed no hesitation in considering allegations and evidence of parental alienation, usually within the context of wife/mother as perpetrator and husband/father as victim. Apparently, and inexplicably, these judge participants did not appear to regard parental alienation as a form of *conduct*.

The association of *conduct* with *adultery* in the minds of some of the judge participants suggested to me that they could not conceive marital *misconduct* separately from the old, common-law notion of *fault*. Having embraced 'no-fault divorce', these judge participants assumed that consideration of conduct was incompatible with the existing no-fault family law regime. When faced with allegations of spousal misconduct, these judge participants found *fault* on both sides, thereby neutralizing the misconduct and negating the necessity of taking it into consideration. Indeed, OCJ N remarked that "it's about sex. If you let these people fight long enough, you will hear about their sex lives". Curiously, marital infidelity was rarely identified by the judge participants as a form of emotional abuse, even though adultery continues to be available under s. 8(2)(b)(i) of the *DA 1985* as a means of establishing marital breakdown, with its attendant, historically sedimented moral outrage intact.

OCJ N advised that almost all allegations of spousal misconduct brought in family court proceedings are made by women (OCJ N estimated “99%” of such allegations brought in his court were advanced by women). Although a few of the judge participants suggested that men, too, could allege being victims of spousal abuse (and thereby paid ‘lip service’ to gender equality), all of them agreed with OCJ N.

Conduct and the most mediative judges: The most mediative judge participants appeared to have the greatest difficulty expressing how and to what extent the issue of conduct factored into their decision-making processes. They were unanimous in their opinion that conduct was not a relevant factor, *generally*, in their assessments of parties, the direction each took in facilitating settlements, or in their determinations. Given that all of the judge participants acknowledged that the preponderance of abuse claims was advanced by women, it was the misconduct of husbands and fathers that the most mediative judge participants ignored.

SCJ G asserted that, for litigants appearing before her, conduct “wasn’t really an issue”, but SCJ G conceived of the type of *conduct* in marriage to which her attention might be drawn in matrimonial disputes strictly in terms of adultery.

My experience was that there rarely was a situation where a marriage broke up where one of the parties wasn’t involved with someone else. And what I found is the leaver (the party who left), by the time they left, had already emotionally and psychologically separated from the relationship, and they were always the ones who were prepared to be very rational, very businesslike, very matter of fact, and they just wanted to get on with the rest of their lives, and they wanted to get, sort of, this baggage behind them. Generally, it was men.

I confess to have been quite offended by the use of the term “baggage” to describe a deserted wife. I also noted the distinction SCJ G appeared to make between the “rational” husband in her example and, one must assume, his “irrational” wife. In her brief commentary, SCJ G reflected back to me my fourth preliminary assumption upon which I based my first theories about the law: that the law (hence, the judiciary) constructed men differently from women, hierarchically,

and in a ‘male voice’. While I was gratified that my assumption was, apparently, correct, it provided little comfort to have a female judge prove it to me.

SCJ C continually avoided addressing the issue of *conduct* directly and was uncomfortable with the word “abuse”, finding it “such a loaded term”. She claimed conduct was primarily an issue relevant to custody and access. She never acknowledged that conduct could and should be taken into consideration in claims for spousal support and/or property division, despite its attribution to both in statute and/or case law, and the authority granted in ss. 5(6) and 33(10) of the *FLA* to do so. Accordingly I was not surprised when she claimed to have adopted, with approval, the image of the intact family promoted by the fathers’ rights lobby, one which has little basis in the reality of most women’s, particularly abused women’s lives: “One thing that’s brilliant in its simplicity, this whole 50-50 business that the men’s group support: when people are living together, intact parenting is a 50-50, right? So whatever dynamic has pushed this couple toward separation, it’s one that’s de-veloped over time and one that never – it hasn’t crystallized to date.”

I inferred from SCJ C’s commentary that she promoted the notion that “the family” survives marital separation; spouses in the throes of family litigation can be made receptive to mediation and settlement by a judge, such as SCJ C, whose process included addressing the “dynamic” (the conflict between the parties) and diffusing it before it “crystallizes” (that is, before the parties partake of the adversarial process). I found SCJ C’s embrace of this element of the fathers’ rights platform to be antithetical to my understanding of the “dynamic” of woman abuse, which is endemic in the intimate relationship and “crystallizes” for the victim the moment she is no longer prepared to tolerate the abuser’s misconduct.

SCJ C’s disposition of custody, access, and emergency applications for restraining orders, discussed later in this chapter, suggested to me that she might be one of those judges, identified in the scholarly research studies I had reviewed, who did not believe abused women’s stories. Indeed, at the conclusion of our interview, she admitted to “a measure of wilful disbelief when it comes to

domestic violence. It is so truly horrible, that one's first reaction is to hope that is it less than it is. But it often isn't." Unfortunately, SCJ C was not alone in doubting the veracity of abused women's claims; SCJ F advised that "I've had other judges tell me, 'Don't really believe women' for whatever reasons. It scares the hell out of me."

OCJ K and had no difficulty acknowledging that domestic violence was prevalent in marriage and claimed that she "did not condone domestic violence in any way, shape or form". Having attended the Wingspread Conference and eagerly embracing Johnson's "situational partner violence" theory, she identified spousal abuse as symmetrically gendered *physical* violence. She had obviously adopted three of Johnson's four different categories of domestic violence, without explaining why she did not accept Johnson's categorization in toto and include the fourth category, "intimate terrorism", which is asymmetrically gendered. I noted her insistence that we only discuss physical violence. Johnson, himself, had cautioned against using his theory in the face of emotional and/or psychological abuse (2006). Upon reflection, I wondered if OCJ K was even aware of the limitation in application of his theory to which Johnson had admitted, given that her understanding of the concept appeared to be dependent upon whatever she had gleaned from the Wingspread Conference, and not upon her review of primary sources. Her description of women who alleged being victims of spousal abuse as "manipulative", and the examples she used to illustrate her narrative suggested to me that she, too, had great difficulty believing abused women's stories, and her disposition of custody, access and restraining order applications, discussed below, validated my suspicion in this regard.

Although she insisted that conduct was irrelevant to her deliberations, SCJ C had no hesitation or difficulty in identifying parental alienation as being of great concern to her.

The ones I see most often is when the mother or the father uses the child relationship to control the spousal relationship. And I've seen women do it as well. So that the best interest becomes a false mantra for spousal control and abuse. And those ones are very powerful dynamics.

Despite her allusion to fathers' misconduct, it is obvious that SCJ C was describing mothers as the perpetrators of parental alienation (she mentioned women twice), their refusal to allow access being based upon false allegations (the "mantra" to which she referred) of woman abuse. Given that SCJ C admitted that she does not believe women's allegations of abuse, there was no reason to assume she would find any justification for a mother denying her alleged abuser access to their children. For SCJ C, therefore, conduct was not irrelevant in family law, just abusive men's conduct. One must assume that she would condone or ignore woman abuse, but punish abused women who attempted, by denying access, to shield themselves and their children from their abusers by refusing to grant access to them. Indeed, this was the case, discussed below.

SCJ G suggested that women should assume responsibility for the consequences of their decisions to marry "the wrong partner":

So, where is the personal responsibility for the actions that one takes? Or, you know, you say to somebody, "Well, you know what? I don't get it. You knew from the get-go that this was a troublesome relationship. So you went ahead and you had one child, and the problems were compounded, and then you had two and three children. Like, what were you thinking? Did you think it was just going to get better?" And very often there's no answer to that.

I wondered if the questions SCJ G was posing were rhetorical, or whether she would actually ask them of women who appeared before her, alleging abuse. Frankly, if SCG G is correct in her belief that she had never adjudicated a case involving domestic violence, I was grateful that, apparently, she had never been given the opportunity.

Conduct and the most adjudicative judges: SCJ B was quite dismissive of claims of "family violence", considering them, in many instances, to be advanced as a form of "manipulation. It's a very easy accusation to make, and it colours everything from that point on. [But] you don't want to make the mistake of saying, 'oh yeah, it's just one of those things', and then, the next thing you know, you've got a horribly injured or dead spouse."

In comparison, OCJ L was confident that she could objectively determine and assess an allegedly abusive spousal relationship. She identified two types of abusive relationships, that, although not attributed, I recognized as Johnson's "intimate terrorism" and "situational partner violence", respectively (2006). To which category OCJ L subjectively ascribed a particular fact situation determined the orders she issued. "You have to understand the dynamics in those two different relationships when you're trying to determine parenting arrangements, etc. That's your job."

OCJ M also recognized domestic violence and abuse as *conduct*, but offered a different conceptualization of domestic violence and abuse from OCJ L, distinguishing between physical and emotional abuse. This judge participant suggested that

I sometimes think an emotionally abusive relationship can be worse, I mean, depending on what kind of emotional abuse. You know, threats, isolation, financial control, making the person feel worthless after years and years and years so they can't even make their own decisions. That might make me more concerned than, "I told him that I'm leaving and he got really upset and he pushed me, but this has never happened before".

I was elated during the course of my interviews with these participants, believing that I had encountered two judges who understood the phenomenon of woman abuse and were prepared to protect abused women and their children and recognize their rights and entitlements. At no point during their interviews did OCJ L or OCJ M allude to the possibility of men being victims of women's violence and abuse during marriage. For these participants, the phenomena were definitely *not* gender symmetrical. Both recognized that s. 24(3) of the *CLRA* directed judges to consider the past conduct of one partner against the other in claims for custody and/or access. They understood the detrimental impact of violence and abuse on children:

All the education we've had really talks about the longstanding impact on children of living in homes where there's physical or emotional abuse. They don't have to see it but, you know, you can hear it, you can sense it from what's going on: OCJ L

However, despite their obvious appreciation of the consequences of woman abuse on both victims and their children, OCJJ L and M subscribed to the theory that “some people can be in very abusive relationships with [their partners]. And, somehow, when they separate, and they get some assistance, they do better. And so outside of that situation, they can be fairly good parents” (OCJ L). This subjective conceptualization of abusive husbands as, nevertheless, loving fathers was shared by many of the judge participants across the continuum. What was significant in OCJJ L’s and M’s position that diverged from their more mediative counterparts was their suggestion that an abuser would “require assistance” to be a “fairly good parent”, the more typical response being that abusers can be good, even great parents without intervention.

In comparison, SCJ H rejected the notion that a woman abuser can be a good father.

If you are beating the crap out of the mother of your children, you can’t be a good father because, first of all, if the children see that, they are getting the wrong message. What message are you sending to your son? It’s okay to beat the crap out of your wife. Well, then, your son is going to repeat it. If you are beating the wife up, it is going to impact her parenting ability, it’s going to impact her self-esteem. If she has a young daughter, it is going to have an impact there, so you can’t be a good parent and beat the crap out of your wife.

In this statement, SCJ H managed to address many of the sequelae of woman abuse identified in the scholarly literature.

Unlike the participants from group 1, OCJJ L and M required any theories emanating from the ‘psy’ sciences to be adduced by qualified experts at a trial.

The custody and access cases that go to trial, they’re very high conflict, advancing allegations of alienation and all that stuff. You get that whole group of men’s rights advocates saying, ‘it’s joint custody, 50/50’, or they throw around the alienation word with no expert evidence whatsoever. (OCJ L)

SCJ B was a proponent of eliminating conduct from judicial consideration, because, “in the olden days, it was all about conduct, and it was ugly and it was time-consuming and it was useless”. She recalls that the removal of conduct from the *DA 1985* was

considered to be really progressive because, now, we were looking at an economic partnership of marriage. And when you look at an economic partnership, what

you're looking at is, what is the spouse giving up to further the goals of the partnership? And that really has not very much to do with whether or not a woman has been abused within the marriage.

Frankly, I could think of no situation in which conduct would be irrelevant in an economic partnership. I was reminded of SCJ E's comment that "a bad marriage is like a bad law partnership. But it's your life." I am sure that SCJ B's rationale would come as a surprise to litigants in commercial law suits whose claims were stimulated by the alleged misconduct of their partners.

In summary, for the most adjudicative of judge participants, who insisted that "the law", alone, was their guide in their decision-making, their personal proclivities and subjectivities played as large a part in their determinations as they did for the most mediative of judge participants, who offered up junk science and 'psy' theories as the premises for their decisions. However, their adoption of the "legal theory of judging", allowed the most adjudicative judges to hide the imposition of their discretion behind "the law". In either case, the welfare of abused women and children were clearly at risk.

Conduct and mediative and adjudicative judges: Judge participants in groups 2, 3 and 4 on the continuum expressed differing views on the relevance of conduct in their determinations, with two judge participants denying its relevance (SCJ D and OCJ N), others suggesting it was somewhat relevant (SCJJ A, H and I), and still others finding it highly relevant (SCJJ E, F, J and OCJ O). I found that, despite insisting that conduct was somewhat or completely irrelevant, SCJJ A, D, H, I and OCJ N revealed through their positions on custody, access, restraining orders, and costs that they always took conduct into account in their decisions.

I pondered why a judge would deny the relevance of conduct in family law disputes, particularly when he or she revealed in his/her narratives that it was, in fact, central to his/her deliberations. It occurred to me that a judge who took this position was reiterating the mandate of both legislation and case law directing judges *not* to take conduct into account. So ingrained had that

prohibition become, *all but one* of the judge participants had forgotten, or ignored, those statutory provisions that allowed them to consider conduct, such as s. 33(10) of the *FLA*, in particular.

SCJ F was most adamant of all the judge participants in groups 2, 3 and 4 in his expression of outrage against woman abusers. “I can’t stand that kind of crap. Can’t stand it at all. And I can’t stand the revictimization of women.” He was critical of the legislators’ removal of conduct from judicial consideration from the DA 1985:

It all goes back to the evolution of the *Divorce Act*, when the government introduced no-fault divorce. They threw the baby out with the bath water. There’s no recognition of what they’re losing by doing that. I understand their principle perspective on no-fault, but, when you say ‘no-fault’ universally, it punches everything out, and they should have kept ‘fault’, which is ‘abuse’. That should have been recognized as an exception - fraud is the other exception.. There should have been that there is no tolerance for abuse.

The position of other judge participants in group 3 on woman abuse, although supportive of victims, was more equivocal and, thus, problematic, inasmuch as their narratives revealed that they appeared to distinguish, like their counterparts in groups 1 and 4, between types, frequency and degree of conduct they would take into consideration. For these participants, as for those in groups 1 and 4, allegations of domestic violence and abuse had far less impact in their decision-making than did those of parental alienation.

SCJ H stated that domestic violence and abuse were relevant in family law disputes, but “we have to start analyzing if the level of abuse [alleged] is dangerous, because if you say he only slapped you once, [I] have to preface my remarks by saying ‘of course we don’t condone it, but fortunately you didn’t require medical treatment, fortunately you don’t have scars’.” SCJ H admitted “we need to counteract [abuse], but again the difficulty is we can’t validate the abuse for the victim. That’s an important factor, but the focus is always on what is in the best interest of the children.” SCJ A was critical of the removal of conduct from consideration in family legislation.

There have been statutory changes [in the last twenty years] and there has been an increased awareness about the issues relating to domestic violence issues ... A recognition that violence should be part of the consideration when it comes to

parenting issues. I am not so sure if it so much has made its way into financial issues. In fact, there is some question as to whether or not it should be there. There has been some suggestion that conduct has been taken out of so many things ... I don't think that the statutory law has been explicit on [the relevance of conduct] with respect to support issues, financial issues and that type of thing, and even in the area of parenting.

Accordingly, he was surprised and "personally stunned" by the number of litigants who continued to advance allegations of domestic violence and abuse. He suggested that "that might be reflective of the people who come to court to begin with and who look for help in the courts." If SCJ A's assessment is correct, then directing litigants in the system toward mediation is contraindicated for the safety and security of abused women and their children.

O CJ O recognized that consideration of conduct was fundamental in every case in which domestic violence and abuse were alleged. He had no difficulty acknowledging that it was overwhelmingly a gendered problem of which women were the victims. This judge participant relied on his extensive family law background and many years on the bench when assessing the alleged victims and perpetrators before him. "Everything informs your work. You understand the dynamics. You understand that there's no consistency in presentation with how somebody who suffered domestic violence presents to you." I was reminded of SCJ G's characterization of adulterous men as "rational" and their 'deserted' wives as depressed and hopeless, without any recognition that she might have actually been witnessing the presentation of abusers and victims O CJ O identified.

O CJ O explained his checklist for determining the presence of violence and abuse:

I'm looking for evidence of control. Is the woman isolated? Is she allowed to speak to friends and family? Is she allowed to go out? Does she have any idea what's happening in the family finances? Does she have any control about that? So I'm looking for evidence that indicates that there's some kind of control going on, too. That gets me worried when I see that type of evidence.

O CJ O advised that allegations of situational partner violence were common occurrences in his court. However, he believed that it was the father who was the perpetrator in these cases,

“because you usually don’t find women who have controlling violence issues. If they have a violence issue, it’s generally a one-off.” In this regard, SCJ D concurred.

Similarly SCJ F rejected the concept of situational partner violence:

The psychologists talk about situational partner violence. Abusers are abusers all through their lives. There are many reasons why they are abusers (that’s something for the psychologists) but you if find abuse, [it’s] probably been there from the second date. The poor woman gets caught up in that hopeless, helpless situation and can’t help herself. She marries an abuser, and it just carries on. And it could expand. It could start out as psychological abuse, and that hoodwinks her into marrying him, and then it spills over into all other kinds of abuse. It’s endemic [to the relationship]. And that abuse isn’t going to stop. When the divorce happens, he’ll carry on into the next relationship. He’ll always be an abuser.

SCJ E was unequivocal in her position that “conduct is pervasive in family law. It’s always there. Behaviour of the parties is relevant for all areas.” However, she readily admitted that the concept of conduct has been marginalized in family law, because “the family has a lot to do with ongoing relationships. Maybe the thinking behind [the marginalization or exclusion of conduct as a consideration in family law disputes] is, because these relationships continue with children, etc. we need to focus less on the conduct of the past and move away from that. I don’t know.” This position appears to contradict s. 24(4) of the *CLRA* that directs judges to consider “past conduct”.

SCJ E advised that she had never heard of the concept of situational partner violence. In response to my explanation of the theory, SCJ E decided that situational partner violence does not occur in isolation but that “the control is always there. There’s always some form of control there, and a power imbalance. And it may manifest itself in a physical altercation routinely, or it may only be one time. But there’s always something behind the scenes.”

SCJ D agreed with SCJ F that abusers *are* abusers throughout their intimate relationships: “it starts right away and it perpetuates in the relationship.” However, SCJ D did not consider domestic violence and abuse relevant in family law disputes. He did acknowledge that *conduct* was relevant under s. 5(6) of the *FLA* where one spouse dissipated assets, or in a case of fraudulent conveyance, and under s. 24(3) of the *CLRA*, “if a parent has been abusive of the other parent. I want to

know that. I want to know what impact that has had on the child, or may have on the child who is privy to it; or the other harm, too, is that it may be simply misreported or fabricated. Those are all very concerning.” However, he repeatedly asserted that “conduct doesn’t matter” even while explaining that, in fact, it did.

I used the phrase “marriage is a partnership” today and I tried to explain to the parties that if you and I are partners, our partnership will continue until something happens. In a marriage partnership we have to have some sort of an end date, and end time; conduct of one sort or another that, then, terminates the partnership. So conduct does factor into it. We take into consideration not necessarily abusive behaviour but we do take all of the other factors of what constitutes a marriage, you know, socializing, having conjugal relationships. An economic relationship as well, a support relationship, emotional support relationship. In my enumeration of all the factors, [domestic violence] isn’t one of them.

SCJ D thus distinguished between domestic violence and abuse and *all other types* of marital conduct. He dismissed a common reason for marital breakdown: woman abuse. Perhaps realizing the untenability of his position, he then attempted to rationalize his stance by suggesting that it might actually be detrimental to include domestic violence and abuse as a factor for consideration when adjudicating family law disputes. For example,

the couple married yesterday and they’re now living together, and generally domestic violence rears its ugly head almost immediately. And it will go on for 10, 20, sometimes 30, 40 years. And then, finally, the light comes on and something really traumatic happens, and the abuse has gone on forever and ever. So if the abuse terminated the relationship, my concern would be that you would say, “well, you know, you were never really married. You didn’t have a relationship.” So, we now have to look at it differently - for property reasons, for example. If there wasn’t a relationship, what does that do to your proprietary rights?

I had never contemplated, nor expected that any judge participant (particularly SCJ D, a very senior judge and experienced family litigator) would suggest that consideration of evidence of chronic abuse in a marriage could void it *ab initio*. His comments reflected those of SCJ G; both appeared to be ‘blaming the victim’ of spousal abuse. I refrained from pushing SCJ D further on this point by suggesting obviating factors relevant to his proposition, such as fraudulent misrepresentation and/or *non est factum* on the part of the abuser in negotiating the “partnership” agreement. I

noted that SCJ D's hypothetical fact situation led him to conceive a result that would deny to the victim (the abused wife) her "proprietary rights", rather than finding against the abuser as a consequence of his misconduct. I found this aspect of his scenario particularly troubling, given that he had advised me that conduct could be relevant in determinations of "proprietary rights" under s. 5(6) of the *FLA* – just not woman abuse. What concerned me most was that SCJ D seemed to pick and choose what contract principles to apply: the "swords", but not the "shields". His comments did, however, confirm my contention that the importation of only selected commercial law concepts into family law has had, and could conceivably continue to have, deleterious consequences for abused women.

OCJ N was familiar with the concept of situational partner violence, cases of which he "ignored" because of the alleged mutuality and isolation of the incidents. He did not believe that woman abuse necessarily lead to child abuse. He described the situation where an abused mother "can't separate a bad partner from a bad parent, and many women who have suffered abuse can't accept that [the fathers] never treated the children that way. That all of the issues are with her and not the kids, and that he's actually a pretty good father." Here, then, was another judge participant who did not associate woman abuse with bad parenting; in his case, OCJ N presumed a woman abuser was a "pretty good father" even while he was actively abusing his spouse. I contrasted his position in this regard to that of SCJ F, whose response to the assumption that a woman abuser could be a good parent was, "just because you provided the seed doesn't make you a good parent." I noted that none of the judge participants who ascribed to the position of OCJ N spoke of the need to inquire into the abusive father/child relationship in order to determine if, in fact, he was "pretty good".

Conduct as fault: OCJ N was adamant that conduct should remain irrelevant in matrimonial proceedings, except with respect to custody, access and applications for restraining orders.

Imagine if conduct was relevant to the issue of property or support, and the realities of human nature are that everybody self-identifies as a victim, we would have a court system jam-packed with people, each trying to convince the judge, who has to dissect

the relationship - convince the judge of who the victim is. Who's the perpetrator? And let's say that infidelity is the main issue there, which is about 80% of the cases we see, they broke up because of infidelity. And because of the internet and the ease with which you can meet new people now, it's probably 90%. Well, did someone have an affair because it was a bad relationship? Or did the affair cause the relationship to go sour? Who knows? And because we never really know what goes on in a relationship between two people, the policy of not considering conduct is a very good one, because it's impossible to find fault in most relationships.

Like SCJ G, OCJ N appeared to associate *conduct* first and foremost with the old common law *fault* ground of adultery for divorce (and erroneously rejected its relevance to spousal support). Frankly, I was astounded that he and SCJ G (and, perhaps other judge participants who might have harboured similar sentiments but did not express them) adopted such a narrow interpretation of conduct, given that the concept of *fault* is relevant in other areas of law, such as tort law, in which a finding of fault is fundamental to the attribution of liability in civil negligence law, or in contract law, where the attribution to one party of fault for breach of contract is required to award damages to the injured party. Therefore, conduct could encompass a notion of fault without offending the 'no-fault' principle of divorce and/or the presumption of gender equality that inform/s current legislation governing marital separation and divorce. If nothing else, I assumed the judge participants learned this in law school.

OCJ M, like OCJ L, on the other hand, attributed the association of fault with marital misconduct to the parties, themselves.

You have to acknowledge it. People always want to have information before you: who was the person that was responsible for the breakdown of the marriage? People still want that out there. People want that and you have to validate and acknowledge, "I'm so sorry. That must have been devastating for you." Obviously the betrayal is a devastating thing, but, unfortunately, although I acknowledge that, I have to be focused on the legislation and what's the best interest of the children. You know, I have to follow the law. You have to let them know it is not going to change things. They're not going to get more money. The guy's not going to not see the kid less because of that.

The connection made by aggrieved wives and mothers between conduct and fault, identified by OCJ L and M, may represent a fundamental disconnect between the legal system and abused

women. That SCJ G and OCJ N might have associated conduct with fault, I suggest, reflects the position of the dominant social discourse that domestic violence and abuse are *wrong* and must be condemned. However, those judges who ignore the phenomena altogether might be seen to be condoning them, and abused women who expect the family court judges before whom they appear to attribute fault to abusers and take their misconduct into consideration will be sorely disappointed. From SCJ A's observation, that many of those who pursue their claims within the system allege domestic violence and abuse, one must assume that these litigants believe the system reflects the dominant social discourse, even if the legislation, or, at least, the judiciary's interpretation of it, does not.

Summary: There appears to be a clear relationship between a judge participant's placement along the continuum and his/her identification of woman abuse and whether or not it is factored into his/her decision-making. It is certainly difficult to reconcile the reality of domestic violence, represented in the statistics presented in Chapter One, with the position of the most mediative of judge participants that the phenomenon does not exist, or is gender-neutral, or can be explained away by reference to junk science or discredited theories, or by the judge participants' subjective views and opinions. It is equally, if not more difficult to fathom how the most adjudicative judge participants were able to acknowledge woman abuse, but refuse to take it into consideration in their determinations. I have concluded that the former were so directed toward achieving settlements that they were not prepared to consider any allegations that stood in their way, while the latter were more than eager to ignore misconduct in order to expurgate it from their decision-making.

6. Theme Four: Rendering Decisions and Making Orders

Generally the judge participants acknowledged that their process of decision-making was directed by their personal experiences and opinions, sometimes enhanced by information gleaned from the 'psy' sciences or elsewhere, and directed by statute and case law. They referred to their "gut feeling", "intuition", "instinct", and/or "common sense" as that upon which they relied in

assessing the parties, their evidence, and in coming to their decisions. Some of the judge participants recognized the value of their experience as family litigators and/or senior family court judges in assisting them in their process. One judge participant, admitting she had no personal experience with separation and divorce, advised that, in the course of her deliberations, thought of her nieces and nephews, whose parents had separated, and the emotional trauma they suffered from that experience (although their family inter-relationships had not been characterized by violence and abuse). Given the wide discretion afforded family court judges, it was not surprising that the judge participants offered different perspectives and understandings of the phenomenon of woman abuse and abused women's experiences.

a. Support Determinations

The judge participants were not particularly interested in discussing support and/or property issues in family law disputes. OCJJ L and M advised that few spousal support claims are advanced in their courts, inasmuch as litigants "can barely pay child support", according to OCJ L. However, OCJ judge participants concurred that conduct would be relevant to entitlement to spousal support, if the dependant spouse were unable to achieve economic self-sufficiency as a consequence of the conduct of the payor spouse. Only one OCJ judge participant (OCJ O) suggested that s. 33(10) of the *FLA* gave judges the authority to grant spousal support on the basis that woman abuse constituted "an obvious and gross repudiation of the relationship". None of the OCJ judge participants indicated that they relied on this section to determine the quantum of spousal support, which I suggested in Chapter Two, and Campbell, J, in *Melanson v Melanson* intimated could be a possible reading of the section.

OCJJ N and O acknowledged that claims for spousal support were made in their courts. The clientele of OCJJ N and O were similar (urban, ethnically and socio-economically diverse, likely to be middle-class) but different from the clientele of OCJJ L and M (suburban, ethnically diverse, and predominantly working-class first generation immigrants). This could explain why the former saw

support claimants, while the latter did not, although I am more inclined to think that OCJJ L and M rarely saw support claims because they were handled directly by duty counsel at their sites. In this regard, OCJJ L and M indicated that their duty and advice counsel were particularly pro-active in clearing the dockets of those cases in which the parties could work out their issues without appearing before the court.

OCJ N was not averse to making committal orders for non-compliance with support orders. He found the following technique particularly effective in ensuring that defaulting payors satisfied their arrears once they were made aware of his proclivity in this regard:

On the days we're doing child support enforcement, the protocol here is you get the enforcement counsel from the FRO to bring you your worst case first, and you bring in all the pairs. When they see that first guy going to jail, then they're all asking for a recess. They go across the street. There are three banks there. They come back with the money. Everybody has to see this is how it works here. That's how you get results. That's how you achieve change in behaviour.

For OCJ O, non-payment of child support constituted a form of parental misconduct that could negatively affect a delinquent parent's claim for custody:

If a father doesn't pay child support, it says something about him. Part of custody and access is the ability to act as a parent. Parents often come here and focus on their 'rights'. "This is my right." You know, "this is my child. I get to decide. I have the right as a father. You can't keep me away from my child." They focus on their rights. What I talk about are responsibilities and obligations being part of parenting, too, and, in fact, the legislation talks about the ability to act as a parent. One of the major responsibilities of acting as a parent is to be financially responsible and to be able to support your child, to be generous. For me, that's a very important point. If you're not paying child support that tells me about your level of responsibility and commitment to a child. It might affect their access. It might affect whether or not they get joint custody, if they're asking for it.

Some judge participants from the SCJ agreed with the OCJ judge participants that spousal misconduct could affect a claim for spousal support if the dependants spouse were unable to achieve economic self-sufficiency as a consequence of the conduct of the payor spouse. Again, none of these judge participants indicated that they invoked s. 33(10) to assess a woman abuser's misconduct to determine the quantum of a support award, let alone entitlement to support.

The SCJ judge participants admitted that litigants who found themselves in the Superior Court usually had property to protect (or claim against) and sufficient income to pay the support claimed. In every example cited, the judge participants described husbands engaging in financial abuse of their wives, either by refusing to pay support, hiding their assets, or declaring bankruptcy. The antipathy of these litigants was not limited to paying spousal support; SCJ H found that men who attempted to retreat from their financial responsibilities to their children chafed under the *CSG*, which imputed income to them. SCJ J advised that men, after having agreed that an equalization payment was due and owing to their wives, will deliberately declare bankruptcy “all the time” in order to avoid payment. She found such conduct reprehensible, but “the difficulty is you don’t know it is happening until you’re in the middle of the case”.

SCJ C’s comments about support claims reflected her ambivalence toward litigants, generally (and female litigants in particular) who advance such claims.

Someone who, if you use Bill Eddy’s personality disorder type, somebody who is histrionic at the thought of their marriage ending will often frame that claim in terms of, for example, spousal support, when really what they want is just some financial security. But, because it’s now in the claim form and it is a claim that has a lot of connotation to it, it becomes a weapon rather than the shield it was intended to be.

It was not clear if SCJ C was characterizing spousal support applications as manipulative “weapons” wielded by “histrionic” women seeking to punish their husbands who had deserted them (I was reminded of SCJ G’s description of abandoned wives), or as a means of extracting sufficient funds from them to provide a comfortable lifestyle without the necessity of employment. In either case, it was clear that SCJ C was expressing some antipathy toward female claimants and would not be predisposed toward their spousal support applications.

Very few of the judge participants recognized the importance of adequate financial support to the welfare of children. SCJ B was one of them who did:

The thing about family law is you’ve got so many issues and they’re all inter-related. It’s like a puzzle, because they can’t decide who gets the house until they know who

gets the kids. And you don't know who gets the kids until you know sort of what the financial circumstances are going to be and where everybody is going to be living.

SCJ I was another:

[The issues] in family law are largely driven by financial circumstances, and the reason the family is in crisis is there's not enough money, and the parties who are suffering don't have enough money between them.

SCJ F, self-described as a "punitive judge" not only recognized the importance of adequate spousal support to the well-being of custodial mothers; he was prepared to "punish" abusers by awarding the maximum support within the appropriate ranges set out in the *CSG* and *SSAG*, but did not appear to appreciate that s. 33(10) of the *FLA* allowed him to do so.

you do it implicitly, based on, for example, the woman can't work anymore, she will get a lot more support if she has been abused by him. If she has to go and see a psychiatrist four times a week and that disables her from doing anything except work at Walmart, she'll get a lot more money from me in terms of spousal support and child support than she would otherwise. So there is a reflection of that in the law. You can't articulate that as fault, but the reality is that this poor woman is disabled now because of the abuse that she has suffered and that disability translates into extra support.

For the judge participants in group 3 and 4, financial non-disclosure was a form of misconduct with which they regularly dealt, and viewed it as systemic abuse. Some participants, like SCJJ D, F, E and J also recognized that financial non-disclosure put the opposing party at a serious disadvantage, and, in this respect, was a form of financial abuse:

It's tough as a judge to just jump from one person saying, "I've got \$50,000 in assets to "I've got a million dollars in offshore accounts." So that poor person is victimized because they don't have that information. But you're never going to get that information from someone like that. That's one of the biggest issues I find in our system. I was reading Justice Laskin's decision in *Dickie* the other day because I was writing a contempt decision. I'm thinking, "Boy, did he ever get away." He's lived his life overseas. He did his 45 days in jail or whatever, but never paid support: SCJ E

These participants expressed no hesitation in condemning this type of conduct, expressed through punitive costs awards. SCJ E advised "I'm particularly good with [awarding punitive] costs awards." SCJ F claimed, "I'll hit [the woman abuser] with a punitive cost award." For the balance

of those judge participants who did not subscribe to this method of controlling the integrity of the system and their process (the most mediative judge participants), I assumed that abusers would be emboldened and empowered by an apparent condonation of their misconduct, to the detriment of both their victims and the system.

That so few of the judge participants acknowledged that family litigation is usually driven by financial disputes suggested to me that the others did not recognize how fundamental is adequate support to the well-being of the custodial mother and her children. There certainly was no indication from any of the judge participants that they had followed the suggestion of L'Heureux-Dubé, J in *Moge v Moge*, to take judicial notice of the systemic economic oppression of women. On the contrary: a number of them suggested that, because most women are now employed outside the home, spousal support was unnecessary.

The issue of support was raised by some of the judge participants in our discussions about the possible inclusion of tort in family law disputes. SCJ H suggested that periodic “compensatory support” be considered in the nature of structured settlement payments utilized in tort claims to pay out damage awards to permanently injured claimants. SCJ C agreed that “many people see child support or spousal support as a form of damages, or the connotation is one of damages. Certainly payors feel that way. They feel that they’re being harmed intentionally.” In either case, the identification by the payor and/or the judge participants of support as a form of damages deformed its purpose, and, I presumed, could encourage a judge who subscribed to this view to deny damages in tort claims advanced by abused women as a form of ‘double-dipping’.

b. Property Issues

Only three of the SCJ judge participants were interested in discussing issues related to property. SCJ H claimed “property is the easiest thing to settle because it’s really valuing. So, if you can’t come up with a value, you can’t get it.” He did not think that s. 5(6) of the *FLA* contemplated conduct (that is, domestic violence and abuse). However, upon further reflection, he suggested

conduct might be relevant because “there is the bottom clause in 5(6), I think, that speaks of such other grounds as the court may deem appropriate.”

As discussed earlier, SCJ J despaired over the misconduct of financially abusive husbands who appeared before her. She described how they managed to deprive their wives of their financial entitlements. She claimed there was little she could do in this regard, given the current state of the case law. She offered no solutions to this problem, short of the need for statutory amendment.

In comparison, SCJ D, who had no difficulty asserting that conduct was irrelevant in family law proceedings, claimed that spousal conduct *was* relevant under s. 5(6) of the *FLA* in these forms: dissipation of assets; and fraudulent conveyance. However, he tempered this position:

You know, you need to have the history, who did what to whom, and then how do you get to this point to make the claim? I think what we’re saying is, you’re not going to be disentitled to what the law affords you because of conduct, be it good conduct or bad conduct.

Once again, I was struck by the apparent disinterest of the SCJ judge participants in matters that affected the economic well-being of abused women and their children.

c. Custody and Access

Given that all of the judge participants asserted that their primary concern was the welfare of children, it was not surprising that custody and access dominated our discussions. The placement of the judge participants along the continuum was strongly correlated with their positions regarding these issues, which, in turn, provided the loci where their understanding of woman abuse and abused women’s experiences were most evident. I have presented the themes that emerged from the judge participants’ discussions of custody and access as discrete sub-headings.

Judges hear victims’ stories: Many of the judge participants, regardless of their stance on the relevance of conduct in their decision-making, found value in litigants being able to “tell their stories”. Judge participants believed that parties, particularly victims of abuse, felt “validated” when given an opportunity to “vent”, and further, that their “venting” facilitated settlement.

SCJ H believed that it is important to all litigants to tell their stories. “I do that in conference. I will put them in the stand and put them under oath and say, ‘you have got fifteen minutes, now tell me whatever you want to tell me, I have my sashes on.’” He advised, “in a way, you vindicate their story that you need to hear. A good judge has to listen and say, ‘I don’t walk in your shoes. I think you have valid concerns’. There has been some behaviour there that is just totally inappropriate.” He claimed “abused women need to be heard that much more. I will, to the best of my ability without being biased, I will address it, and I will let the guy know that we just never condone this behaviour.” His modus operandi, however, was designed to “grab [his] audience to let them know that you are there to help them” in order to persuade the parties to settle.

While OCJ M concurred with OCJ L that allowing litigants to “vent” did not advance the case, she did find some value in hearing litigants’ stories as a means of providing “context” for their claims, “then you understand what’s going on. But you have to let them know it is not going to change things.”

We might let them talk, like at a case conference, and just vent a little bit, just to get the emotion out. But at the back of our minds, we are looking at, what is the legal test? And that’s what we’re doing all the time. So, even if it’s an *ex parte* motion, I’m still applying the law. I may understand the emotional context, but I’m still applying the law.

SCJ D, after having claimed that “conduct doesn’t bear on the result, and I think you, as a judge, instruct yourself to not bear conduct in mind, and deal with the issues only to the extent that the conduct is relevant”, described how he handled litigants who need to relate their stories of abuse:

I had to address the conduct issues today only because the parties needed to know that when I read their material, I was aware of what they were respectively saying. I just had to make them aware that I was aware of their respective positions, and in these cases, their hurt and their vulnerability as a result. We, as judges, need to hear their stories and need to give them an opportunity to tell their stories.

I asked him if he advised these litigants that their stories were irrelevant to his determination. He paused: “No ... not necessarily. I think at some point you do, but they want to tell their story, and I hope that hearing them makes them feel better, but I don’t know, I’m not sure.”

My questions obviously prompted him to consider how his apparent concern for litigants' stories might appear obviated by the decisions he rendered and directions he gave that appeared not to take their concerns into account:

I think part of the problem is an understanding of the way the system works and that the individuals are treated equally in the process. And I think that quite often the victim does not want you, or would prefer, that you not hear from the abuser, and quite often they question why does she/he have any standing when you know what has happened here? Why does that person even have a voice? Why does that person have any rights? And our system is very rights-based and rights-conscious. That's one of the hallmarks of our society, I think: that we don't automatically make findings. Whether it be the authorities, or whether it be the individual who makes the allegation, the court is very, very reluctant to treat the individuals before the court any differently. And I have had negative feedback from someone who feels clearly that she/he has been victimized, and yet, I am listening.

Two of the most mediative judge participants, SCJJ B and C, were not receptive to receiving victims' stories. SCJ B advised

it's very easy to get distracted by what's essentially an irrelevant consideration. I know it's not irrelevant to that party, by any means. But for the purposes of what it is that I need to know in order to properly adjudicate the issue, it's a distraction, and it's – to call it a time-waster demeans it, which I don't mean to do. But it's hard to get things back on track in terms of what it is that I need to know. So, if that creates a feeling in the abused woman that she's not being heard and is being belittled and all of that, I can understand that. And I suppose, to some extent, her lawyer is not doing a proper job by not explaining that to her before she comes to court.

SCJ C was not convinced that “venting” was actually beneficial to litigants, but only to those who “would fit into an array of mediation services”. She found legitimacy in her opinion in a “new theory” being advanced by Bill Eddy. “So the people that get better when they talk about it, so that they can process it and think it through and see themselves on either side of it, you can help them create a goal and work toward that goal, those cases, I think, are better served outside of the court room.” Evidently, SCJ C's “active listening” did not extend to adversarial litigants.

The apparent receptivity of my judge participants, with the exception of SCJJ B and C, to victims' stories being told in their courts stood in stark contrast to the findings of the various research studies I reviewed that purported to examine abused women's experiences in family courts

and found that they were not “being heard”. Clearly, those victims of woman abuse who appeared before the judge participants referred to in this section were invited to “tell their stories” of woman abuse. However, their stories of abuse had no probative value for these participants. In some instances, I wondered what the judge participants were, in fact, “hearing”, given their propensity to discount or disbelieve women’s allegations of abuse. However, I postulated that, generally, this issue was not so much that abused women’s voices were not being heard in family court proceedings; it was just that what they had to say did not matter, and thus had little to no effect on the outcomes of their claims.

Custody and access orders and the most mediative judges: It was clear that the more mediative judges tended to resile from making “custody” and “access” orders, particularly interim orders. OCJ K reported that she did not always make custody orders: “I think it’s really important to get away from the words ‘custody’ and ‘access’ because they are very, very adversarial words, they are win/lose words, zero sum, right? And people fight tooth and nail to say ‘I didn’t give up custody, you know I fought for you!’”

SCJ C also held “custody” and “access” to be “loaded” terms that connoted a ‘winner’ (the custodial parent) and a ‘loser’ (the access parent). She was particularly adamant that the terms “custody” and “access” were antithetical to facilitating settlements in family law:

In the vernacular, custody is ownership. You never stop being somebody’s parent, and you never stop being somebody’s child. You can be fifty and these are still your parents. So custody is really not about the relationship or the ownership; it’s about decision-making and access to information. Custody isn’t really even about a residential arrangement. I prefer the word, “decision-making”.

SCJ C offered a vision of parenting in the intact family that could have been taken directly from the fathers’ rights platform. It glorified the contributions of fathers, real or imagined. She described how her understanding of child development was informed by “emerging literature” (not attributed)

that talks about different roles, but important roles. For example, play is just starting

to be understood as a fundamental building block for children in brain development. A father who plays with the children is benefitting those children. Now, if the father is playing with the children while mom is making dinner, cleaning up dinner, making school lunches, vacuuming, doing three loads of laundry, you look at that and you say, "Mom should have custody. Mom's the better housekeeper. Mom's doing all the work. Mom's running the household. Always has, always will. She's always made the decisions." Why does she suddenly now not have that ability because they're separated? But what it assumes is that the mother's role in that child's life is pre-emptive and so important that the father's role should be discharged.

I was not surprised, therefore, that SCJ C was suspicious of mothers' claims for custody.

So when you come now to your second or third month of separation and somebody wants custody ... Why do you need it? So you feel better about yourself? So you can tell all your friends? Why do you need it? Do you need it to enroll a child in school? Do you need it to sign him up for sport? Do you need it to get a passport? If you need it, then give me the information around that need and I can make a decision. But if it's just so that you can win, no.

Misconduct does not preclude access: OCJ K appears to have limited the application of ss. 24(3) and (4) of the *CLRA* such that she would not consider woman abuse, per se, to be relevant to a person's ability to act as a parent to a child unless the child was demonstrably damaged as a result:

I think that this section was enacted because they were trying to get at the damage to children that was caused by witnessing domestic violence. So I think, obviously, if there is domestic violence against a child, that is going to be very relevant to custody and access. But I think that the harm that they were trying to get at was (I don't think it happens much now) people would say, as long as it didn't involve the kid, it's fine. But it's not fine. Whether they actually witness the domestic violence itself or whether there is an atmosphere in the home of tension and intimidation and fear that it causes them chronic stress, we know that that has a detrimental impact on their brain development. This is where I think this section was coming from. Your participation either in initiating *or receiving* domestic violence is absolutely relevant in terms of custody and access (my emphasis).

I suggest that this was not the intention of this section. It is directed at violence and abuse suffered by a parent, not the child. OCJ K was referring, in her interpretation to children's 'witnessing' abuse; this is a very narrow, and thus misleading interpretation of the section. This interpretation allowed OCJ K to consider an abusive spouse to, nevertheless, be eligible for access once the object of his (or her) violence was no longer present to be victimized in the presence of the child.

She was not prepared to accept that allegations (or, for that matter, evidence) of abusive conduct were sufficient to preclude access to an abusive parent. OCJ K's position is all the more concerning given her apparent awareness of the sequelae of spousal violence for children. I noted that OCJ K likened supervised access to a type of "engagement", which a *child*, and not an abusive parent might need to maintain contact.

The avoidance of consideration of conduct and their pre-occupation with fathers' access "rights" by the most mediative judge participants resulted in their legitimizing parental misconduct.

In this regard, they were able to rely on *stare decisis*:

the case law talks about a parent who is a stripper, or a parent who, you know, engages in some other morally questionable kind of conduct. As long as the parent is not bringing the kid to the strip club or in some other way acting inappropriately with the child, then what's the problem, right? I mean, even a drug dealer is okay - may have access or supervised access to the child even though what they are doing is illegal and morally reprehensible. I think the crux of the issue is, what impact does this behaviour have on the child and the ability of this parent to act as a parent? (OCJ K)

While sole custody orders were, generally, avoided by the judge participants, so, too, were joint custody orders. All of the judge participants were adamant that there was no presumption of joint custody in their courts. It was, however, difficult for me to differentiate the effect of a joint custody order from the non-orders for custody and access many of the judge participants favoured. Only OCJ O addressed the concept of parallel parenting, which he summarily dismissed: "It can work if you have parents who are cooperative, but, if they were cooperative, they would probably not be going all the way to a trial."

SCJ C avoided discussing whether an abusive spouse should be entitled to access. Despite her apparent willingness to employ generalizations and hypotheticals on every other topic raised in her interview, she refused to entertain the issue of spousal abuse and its impact on access with, "I don't know [the validity of an allegation of abuse] on an affidavit from the mother". Instead, SCJ C referred to *Gordon v Goertz*, asserting (incorrectly) that "it's the child's perspective of best interest"

that will determine whether or not a parent is entitled to access. In this regard, both SCJ C and OCJ K, the most mediative of judge participants, agreed that it is in children's best interests that they maintain relationships with both parents (not surprising, considering the former did not believe women's allegations of abuse, and the latter had never adjudicated a case in which woman abuse was alleged).

Custody and access orders and mediative and adjudicative judges: An aversion to using the terms "custody" and "access" in their orders was not limited to the most mediative judge participants; SCJ D and E, who were both mediative and adjudicative, also professed their unwillingness in this regard. SCJ D indicated

I don't like the labels but we're stuck with them. So, in the legal context, I don't have a problem. But when I'm speaking to the parties, I try to avoid the labels. It's all about parenting and time. And I talk about mom's house and dad's house and time with the children and time with the parents, and care, responsibilities, obligations. And I really do skirt around custody and access. Again, I try to avoid making them until I absolutely have to. I am loathe to make a temporary custody order. I generally make a division of time order and try to apportion, if need be, who will be responsible, or who will be a primary parent or primary caregiver.⁷

SCJ E advised that she "certainly" made custody and access orders at trial, but preferred to "leave primary residence with one parent" on an interim basis. Despite acknowledging the reality of woman abuse, SCJ E indicated that allegations of domestic violence and abuse give her pause:

it's a he said/she said type of thing and you really have to use your best judgment. And it's hard to say; if I have an allegation so that somebody's abusing alcohol, somebody's abusing drugs, or physically assaulting children, I would bend to err on the side of caution to protect the kids.

Elaborating this point, SCJ E explained "so, if there's an allegation that somebody has struck a child, someone has said inappropriate things to a child, condescending, demeaning, those type of things, I want more information *before I'm going to allow that to continue*" (my emphasis).

I admit to being surprised when SCJ H advised, "I prefer to call 'custody orders' 'parenting orders'. I think custody is a power word that sometimes can be misconstrued." However, through the examples he gave me, I realized that SCJ H avoided making "custody orders" for a completely

different and opposing reason from that advanced by SCJJ C, D, and OCJ K. In this regard, SCJ H refrained from using the term ‘custody’ in order to avoid empowering the parent who might claim, but be disintitiled, to an order for joint custody in order to avoid paying child support.

I get dads coming in, saying they want joint custody, and I laugh and I say to them, “alright, what is joint custody?” “I want them 50% of the time”, and I say, “that’s shared parenting, first of all ... I don’t have to call it joint custody but I can give you all of that if that is what you really want.” “Well, I want to have them at least 40% of the time.” And I say, “well, how about we give them to you 39% of the time, that’s pretty good isn’t it?” You see right through them.⁸

In comparison to other judge participants in groups 2, 3 and 4, SCJJ A, F and OCJJ N had no hesitation in making “custody” and “access” orders. SCJ A’s curt justification was “those are the words in the statute.” When asked if he made such orders, SCJ H queried, “why not?” Similarly, the most adjudicative judge participants expressed no hesitation in making custody and access orders, including interim custody and access orders. OCJ L explained

if you look at the *CLRA*, those are the words that are used: custody and access. So my own view is that when they’re in court and I’m making an order, I make a custody order. I make an access order. I know that in the mediation world, you know, they’re not using the term “custody” and there’s all these parenting things. If they go to mediation and work out some kind of, quote, unquote ‘parenting plan’ or, you know, primary parent, secondary parent, whatever the wording is, that’s fine because those people have decided to get along that way.

OCJ N rejected the practice of judges like SCJ D of avoiding making custody and access orders. He described it as an “abdication of judicial responsibility”, and “a lost opportunity for [litigants] to hear from somebody in authority that what they’ve done is wrong, or what they’ve done is good. Because you also have to praise the good.” His response to supervised access was, “it’s better than nothing”, suggesting he believed he had no alternative but to award access to abusive spouses in all cases.

The utility of supervised access orders was disputed by many of the judge participants in the case of woman abuse. I, too, admit to being skeptical of the benefit a child might derive from

continuing contact with his/her mother's abuser, given the sequelae of woman abuse on children outlined in Chapter One.

Granting access to abusers benefits their victims: SCJ C and OCJ K (as well as OCJJ L, M and N at the other end of the continuum) posited it was in the best interests of *mothers* that their children be allowed to continue their relationships with their fathers, even in those cases where their fathers chronically abused their mothers. OCJ K based her opinion in this regard on "a significant amount of research" (not attributed) that "kids do idealize a parent who isn't there":

so, in order for a kid not to idealize the parent that they don't see, not to have huge fantasies about them being very scary or very wonderful, or that it was the mother's fault, or really things that are not based in reality, the only way to address that is to have some kind of *therapeutic contact* (my italics).

Thus, continued access was supposed to ensure that the child would not resent the mother *in the future* for denying him/her a relationship with the father. Apparently, these judge participants never considered that a child who feared his/her father, or did not want to maintain contact with their mother's abuser, might resent their mother if they believed she had willingly agreed to (or could not protect them from) supervised access. They also assumed that they could protect victims of woman and child abuse through the imposition of supervised access, limited telephone or internet access, and similar interventions that were designed to limit direct contact between abusers and their victims. This assumption was disproven by Natasha's, Heather's, Adit's and Jean's experiences with supervised access.

SCJ F chafed at the dominant legal discourse that held it is beneficial for children to maintain contact with a parent, even one who abused their mother, lest they "idolize" him and resent the mother for denying access:

That premise is idiotic. I can accept that's what the law says [that maximum contact with both parents is in children's best interests]. But I'm not going to buy into that if he's an abuser because, the bottom line is, if the man has been an abuser of his spouse, at the bare minimum, he's going to abuse and take advantage of his relationship with his child by poisoning the well toward the mum. That's guaranteed. That's axiomatic. So how have I accomplished anything good out of that? What

I've done is I've ruined three relationships.⁹

Limitations on access as 'punishment': Many of the judge participants rejected the notion that a reduction or elimination of access should be employed as a form of "punishment" for an abusive father/spouse, no doubt channeling *Talsky v Talsky* and *Baker v Baker*. OCJ K posited that, in the case of a chronically abused woman whose victimization has reduced her ability to parent, "clearly joint custody is not going to fly, neither is sole custody going to apply." However, even in this scenario, the chronic abuser would not be denied access lest it be construed as "punishment".

I think what creeps into this inappropriately is punishment. We punish him for what he did to her by saying, "you made it difficult for her to be a parent, you left emotional scars on her and therefore you don't get to see your kids. That's your punishment." I think that ignores the child, and I think it's inappropriate. The issue is the child. So if you have a kid who this father has been able to have a good relationship with, if you can say that, outside of what goes on with the mother, then we don't want to have a break in the child/parent bond if we can avoid it.

SCJ G asserted that "if you're going to reduce or eliminate access because the father abused the mother, I think that would a terrible outcome." She believed that limiting access to an abusive spouse punished not only the access parent, but the child. "So, that's the difficulty with saying, 'Okay, we're going to punish the abuser by using the child and limiting the access of the child to that parent'." She, unlike OCJ K, would be prepared to award sole custody to an abusive father whose misconduct was so egregious that it had rendered the mother incapable of caring for the child. It was clear that the stance of the most mediative judge participants regarding access was that, while spousal abuse was a form of misconduct that, itself, did not warrant any kind of punishment, it was the *perpetrator* who should be *protected* from the punishment of limited or restricted access.

Parental alienation: Regardless of their insistence that conduct in the form of woman abuse had no place in their decision-making, many of the judge participants expressed no hesitation in considering evidence of parental alienation as a form of misconduct that could detrimentally impact the rights of the custodial parent. Given her antipathy toward women's allegations of spousal abuse, it

was not surprising that SCJ C indicated she would have no hesitation in reversing or awarding custody to fathers in cases of mothers' parental alienation.

Now, there are many, many cases in which sole custody (and the sooner you get there the better) is the right decision. The ones I see the most often is when the mother or father is using the child relationship to control the spousal relationship. [She reiterated] And I've seen women do it as well. So that the best interest becomes a false mantra for spousal control and abuse. And those ones are very powerful dynamics, and as soon as you can get a whiff of that, then the sooner they're at trial and there's a sole custody order, the better.

Despite his rejection of *conduct* as a factor to be considered in his decision-making, OCJ N advised that allegations of parental alienation are relevant in custody and access claims. Abuse in relation to access was "huge". OCJ N distinguished between cases in which the alienation was ill-founded and those where the child "had a memory of it and has an independent reason" for not wishing to see the father. OCJ N outlined the steps he would take to enforce access in cases in which parental alienation was present:

There's a whole slew of structures that you have to put into place if you find that there's been alienation, and the child's resistance to the other parent is not justified. You order the access and you order police enforcement. And then when it doesn't take place, then you order joint custody so that now *she* (my emphasis) can't make any decisions without him. And the next step is sole custody. And I find that the access happens, because, when they realize that you mean business and they're going to lose their children if they don't allow access, they comply.

It was clear from SCJ C that a mere "whiff" (I took to mean an allegation) of parental alienation was sufficient to induce her to order sole custody to the alienated parent (I presumed the father). But, in cases of parental alienation, OCJ N described a course of increasingly punitive measures designed to coerce the alienating parent (he indicated mothers were the antagonists in these cases) into allowing access. He did allow, however, that in those cases in which the access parent embarked on a campaign of alienation, he would "cut off the access. We won't tolerate it."

SCJ A, F, E, H and OCJ O condemned one parent who alienated his/her children from the other, but, in their scenarios, it was primarily the abusive father, as access parent, who attempted to alienate his child from the custodial mother during access visits. SCJ E advised that she would deny

access to a parent who “willfully withheld the child contrary to court order” or “who abused the child.” However, she expressed some trepidation with allegations of parental alienation. “Those are tough cases. They’re hard. They’re harder than you think at trial because, even though you might have the evidence, it’s tough. But I never want to put a child in a situation where parents can’t get along.” I inferred from these comments that SCJ E was not convinced of the legitimacy of Gardner’s PAS.

Similarly, SCJ F found that it was the abusive husband/ father who usually advanced allegations of parental alienation against the victimized wife/ mother, as he so logically averred, “it’s almost axiomatic, because, if he has abused, he’ll carry on.”

O CJ O, like others in groups 2, 3 and 4, challenged the very validity of parental alienation syndrome.

What Justice Harper said is very interesting. He talks about parental alienation and [having] an undue focus on that, on the term. People spend a lot of time, “Is it alienation? Is it not alienation?” And it’s definitely seeped into the pleadings where virtually it seems to be argued in 50% of the cases. And what’s being pleaded is not anything near what people like Barbara Fidler are talking about. What she’s talking about probably occurs in a very small percentage of the cases. I prefer to think of it as either good behaviour or bad behaviour.

SCJ E did not consider situations in which a custodial parent actively discouraged the child from seeing the access parent as “real abusive situations.” In cases in which parental alienation has been pleaded in her court, SCJ E claimed “dad always attributes it to mom.”

SCJ H concurred with SCJ C that custodial parents who alienated their children from the access parents should be “punished”. SCH H seemed to have an equally negative view of parents who engage in “parental estrangement”. For SCJ H, an access parent who interrogated his children about their custodial mother’s life and thereby discouraged the children from wanting to see him was guilty of “estrangement”: an inevitable consequence of *his* abusive conduct. He distinguished “parental estrangement” from parental alienation because, he claimed, if he found the latter, he was bound by the decision in *A.G L. v K.B.D.* While McWatt, J had not indicated in his judgment that he

intended to “punish” the mother for alienating her children against their father, I suspected that SCJ H had captured the underlying tenor of that decision.

Unlike his most mediative counterparts, SCJ H was not concerned that limiting access would “punish” an abusive non-custodial parent, because an access parent whose rights were restricted or denied because he had engaged in “parental estrangement” was responsible for his own conduct and the consequences flowing therefrom.

The opposite of alienation is estrangement. When the parent gets the kids that first weekend following separation, he asks, “What is mommy doing? Who is she talking to? Are you checking her cell phone? I want you to check her cell phone. I want you to check her e-mails and let me know if she has a boyfriend.” After a while, the kids don’t want to be there. Is that alienation or estrangement? If it’s alienation, it matters big time because [I am bound by] the McWatt decision.

Once again, the extant case law had imposed a finding on this judge participant that may not align with his understanding of woman abuse, in this case, when the abuser uses his children to “keep tabs” on his victim. I thought that SCJ E might benefit from adopting SCJ H’s theory of “parental estrangement” when dealing with her “tough cases”.

Avoiding appeals: Two of the judge participants expressed some reservations in rendering orders that did not reflect the current statutory and judicial discourses. SCJ K allowed that “we can be creative as we need be [in making orders that are premised on spousal misconduct] because if we get overly creative, this is why we have the nice folks at 130 Queen Street to take care of it.” SCJ F was considerably more circumspect:

The recourse [to base his decisions on woman abuse] is low, regrettably, because of the lack of fault in the *DA* and *FLA*. The recourses I have without being overturned by the Court of Appeal: if I make a decision and premise it on the fault and abuse of the husband, I would be overturned in a heartbeat by the Court of Appeal, because that fault and that conduct have been pretty much excluded from the *Acts*. So, what recourse do I have? The recourse is to reprimand the husband in front of the wife, and to make sure that his access is limited. He won’t get custody. Whatever the range of support is, he gets to pay the highest level, although I can’t articulate it, because that would be unlawful.

Custody and access orders and the most adjudicative judges: Despite their devotion to “the law”, both OCJ L and M appeared to resent being bound by “the law” when making access orders: “the case law is pretty hard - I mean, it’s a pretty hard test to have no access” (OCJ L). Even with a parent whose “personality makeup” makes him abusive to both his spouse and his child, “it’s always a family ... We start with the presumption under the *Children’s Law Reform Act* that both parents have equal rights to contact with their child.” These judge participants would still feel compelled by “the law” to grant some sort of access to a woman abuser, albeit, with restrictions.

If you look at the kinds of orders we make, by and large, if there has been an abusive relationship, there would be some very strict parameters around access. They’re [custodial mothers] not going to get a no access order, but certainly there’d be supervised access or there’d be supervised pick-up and drop-off so there’s no contact to protect the woman: OCJ L

I could not help but sense that OCJ L felt compelled to rationalize her stance by reiterating the assumption commonly read into s. 16(10) of the *DA 1985*: “you start with the premise that it’s a good thing for children to have contact with their parents, both parents, and so you have to look at that and try to fashion access orders that still keep that in place.” OCJ L, like all the other judge participants who ascribed to this interpretation of children’s best interests, left no room for considering whether or not the facts of each case - that is, the spousal misconduct alleged - warranted a decision that access to the abuser was, in fact, in the child’s best interests, because conduct, at least in the form of woman abuse, was irrelevant.

Accordingly, her adherence to “the law” resulted in deformations of what constituted the best interests of the child. OCJ L had no hesitation in granting supervised access to *child abusers* in accordance with her interpretation of “the law”, fully expecting the child to be further abused during visits. She recounted having granted and continued supervised access to one child abuser who, “even in the supervised access visit, never recognized what he was doing, was just interrogating the children about the mother. He had no ability to have a positive relationship with the children.” She was only prepared to terminate access after receiving the access centre’s supervisor’s observation

reports, the report of the Children’s Lawyer, and statements from the children, themselves, that “access was not benefiting the children. It was causing them more anxiety and trauma.” She indicated that access parents who abuse their children in this manner “are those people that *eventually* get no access. We all know that.” There was no recognition by OCJ L that her pre-occupation with upholding ‘the law’ as she interpreted it could have profoundly serious consequences for the children whom she had ordered to be exposed to their abusive parent. I reimagined my continuum more as an ellipse, rather than a straight line, when I recalled that OCJ K, too, was a proponent of supervised access even when the children might suffer: “unless the kids are actively afraid of a parent, they should have contact, I think, unless there is *real* harm coming to them” (my emphasis).

Summary: The settlement mission promoted by the civil family justice system obligated my judge participants to pursue mediated settlements. Some judges embraced this mandate to the exclusion of the exercise of their judicial functions as triers of fact and law. In order to achieve mediated settlements, and accord with statute and case law, many judge participants were prompted to deny the relevance of conduct, particularly domestic violence and abuse, to their decision-making, even where the legislation directed them to consider it, lest it subvert the settlement mission.

The welfare of children was, according to my judge participants, their primary concern. In this regard, they were mandated by statute to make custody and access orders which ensured that both parents enjoyed “maximum contact” with their children. Where joint custody was untenable (in most cases), this could only be secured by promoting the “right” to access. In the case of an abusive spouse/father, this directive was problematic, unless their conduct was considered irrelevant to the best interests of their children. Having rejected spousal misconduct as a relevant consideration in their determinations, generally, and specifically with respect to the “right” to access, the judge participants were thus able to promote that right, and thereby marginalize custodial mothers, who believed their stories of abuse were either not heard or not believed.

Their pursuit of the settlement mission, rejection of the relevance of spousal abuse to their adjudication of claims, and their promotion of fathers' "right" to access resulted in the deformation of custody and access law. While allegations of woman abuse were ignored (acknowledging them could frustrate or obviate access), allegations of parental alienation were assessed, inasmuch as parents who attempted to alienate their children from their access parents interfered with the "right" to access set out in the legislation. To realize that "right", in the absence of consideration of the access parents' misconduct, it appeared that some judge participants were capable of putting children in harm's way, despite their obligation to promote children's best interests. In this regard, their decisions aligned with that in *Young v Young*. While this result could not have been the judge participants' intention, when they chose to ignore spousal, and even parental violence and abuse when considering applications for custody and access, I suggest it was the inevitable result.

By ignoring misconduct in the form of woman abuse, the system has directed its judges from considering the most important factor relevant to children's welfare, and, in the process, has potentially exposed their mothers to further violence and abuse. This was the experience of my survivor participants in all cases. The narratives of those judge participants, who conflated the right of access over children's entitlements to live free from harm, revealed their personal subjectivities, beliefs and opinions under the guise of judicial "discretion", evidenced by the stated bias of SCJ C, for example.

SCJ F identified with brilliant clarity how this has come to pass:

I'm worried about the naiveté of my colleagues. I'm worried about their natural biases. I understand that to some degree because of the constraints of the language of the statutes, how it is easy to end up in that position. Once the *Act* says, "thou shalt forget the words 'conduct' and 'fault'", and they, and abuse, really don't matter, according to the *Act*, it is really easy to lose your compass, and your purpose. Because, as a judge, you're acting as a court of law and equity, and it is absolutely essential, regardless of the language, not to condone and not encourage and not to enable the abuser at all.

d. Restraining and Exclusive Possession Orders

The wording of s. 46(1) of the *FLA*, wherein an order for a temporary or final restraining order *may* be issued in those cases “if the applicant has reasonable grounds to fear for his or her own safety “or the safety of children in his/her custody” invites the judiciary to assess the level of “reasonableness” set out in the applicant’s claim. The section requires the judiciary to assess the conduct allegedly inducing the fear. These assessments are entirely subjective. Accordingly, as one would expect, the responses of the judge participants to claims for emergency restraining orders were reflected in their placement along the continuum. However, I still found it disconcerting that only four of the judge participants identified victims’ safety as their first concern in family court proceedings.

Section 24(2) of the *FLA* allows a court to make a temporary or final exclusive possession order, taking into account “any violence committed by a spouse against the other spouse and children” (s. 24(3) (f)). It would appear that different tests have been established for restraining and exclusive possession orders. Although judges “may” issue either order, the “violence” referred to in s. 24(3)(f) has been defined by the judge participants as physical violence. Judges are not required to assess the “reasonableness” of an applicant’s “fear for her safety”, because, if the judge participants were correct that the “violence” referred to means physical violence, I suggest reasonableness is presumed. Accordingly, I must assume that the legislators, themselves, considered domestic violence, per se, to be dangerous. However, the test for the issuance of a restraining order is, at least in theory, more onerous. A judge must be persuaded of the “reasonableness” of the applicant’s “fear for her safety”. The judge participants indicated that a history of domestic violence had to be present and the threat imminent to justify a finding of “reasonableness”. In these respects, therefore, there was little difference in the nature of the threat required in the minds of the judge participants in both instances.

However, it would seem that the judge participants were even less inclined to make exclusive possession orders than they were to issue restraining orders, inasmuch as the former, in the words of OCJ N, “set a precedent for the status quo” with respect to custody, assuming the children remained in the matrimonial home with the custodial mother. Further, the judge participants, generally, were far more concerned with the issue of the proprietary “rights” of the respondent in these proceedings than the safety of the applicants and their children since, they asserted, possession (of both the matrimonial home and the children) was, for all intents and purposes, ownership.

The most mediative and somewhat mediative judges: Both SCJ C and OCJ K misconstrued the relevant section of the *FLA* (s. 46(1)) dealing with restraining and no contact orders. OCJ K asserted that the danger referred to in the sections was danger to “the child”, and not his or her parent (“the applicant”). This misreading of the legislation was not shared by others of her bench whom I interviewed, notwithstanding her assertion that they concurred with her interpretation.

Admitting to only granting 20% of emergency motions for restraining orders and interim custody (most often advanced by women alleging violence and abuse) SCJ C asserted

you’d be surprised how many people will come to court because they’re mad at their spouse, and they’ll come to court on a Monday without serving them because they want custody of their kid. And by Wednesday they’ve mended fences and it’s all over with. So we need to have some sense if the *child* is in danger in order to give – in fact, we tend not to give custody orders. We’ll give a temporary care and control order on the basis that the *child* is in danger and that risk has to be ameliorated. If there’s no sense of any risk, it’s more of a victory claim, then they don’t get the order. *So there actually has to be harm or danger to the child* (my emphasis).

OCJ K estimated that she, too, granted only about 20% of the emergency applications for restraining orders that came before her. Her rationale: “a lot of times there are criminal charges, there is a no contact order, so my order is not going to have any greater effect than a no contact order as a bail condition, so I don’t have to issue that order”. She did admit to being “very cynical” about these types of applications, which she described as “very troubling because you think either it was very, very much exaggerated, or there is still a huge amount of intimidation going on.”

I reflected upon OCJ K's narrative. I wondered how she could justify her position, given that the burden of proof is much higher in the criminal justice system than in the civil justice system. I recalled OCJ O's assertion that the apprehension of danger by an applicant for a restraining order did not have to be "immediate" for his order to issue: "often there can be, based on an incident that happened three or four years ago, and it's just a look, and that person is intimidated." I recognized in his example that OCJ O understood the nature of "coercive control". I doubted that "a look" would be sufficient proof in criminal court to support an assault or threatening charge to which bail conditions would attach. Thus, I determined that OCJ K's reliance on the criminal courts to protect victims of woman abuse was probably indicative of her reluctance to subject abusive men, for whom she had expressed sympathy, to the restraining orders she might be obliged to make were she required to entertain applications from abused women.

Mediative and adjudicative judges: OCJ K's reliance on criminal no contact orders to protect alleged abuse victims was not the practice espoused by other judge participants. SCJ A recounted that he had encountered:

people who are acquitted in the criminal world and then come here, and I know that there has been something going on and I know it's continuing. So, even though the evidence may not go beyond a reasonable doubt, it's pretty convincing for me. All the signs are there.

OCJ O agreed with SCJ A that the absence of a police report did not negatively impact his adjudication of an allegation of abuse:

You would often have one person saying, "this is what happened", and the other person saying, "it didn't happen. She never went to the police. There's no police reports. How could I be an abuser if none of these things happened?" But the reality is that, for many people, it's a brave step just to step forward and come to the court in the first place. There could have been years of abuse and no reports.

OCJ O advised that the typical response of respondent fathers ("it's usually the father") to applications for restraining orders is to deny they were abusive, accuse the applicant mothers of having mental health or substance abuse problems, and allege that they were the ones who cared for

the children. He went further: “on the other hand, I have the mother who says, ‘I’ve been a victim of domestic violence for the last five years. He’s abusive. He’s controlling. We’re all afraid of him’.” I recalled that this scenario occurred and reoccurred in the narratives of my survivor participants.

In comparison, SCJ H advised that applications for emergency restraining orders appeared regularly on his dockets. As he explained his approach to these motions, I inferred that he regarded them with initial skepticism:

I read the material, and remember, I’m only getting one side of the story, so I will look and say this: with respect to a knee jerk reaction, but they just had an argument last night and in an argument where he said to her “you go and see a lawyer and I will get you.” Gotta make a judgment call sometimes, but, “I will get you”, what does that mean? I clearly don’t want to ignore it and then have it on the front page of the *Toronto Sun* two days later.

He advised that the timing of the application was relevant to his determination; the threat had to be imminent, or he would “say just serve the materials in the normal course.” SCJ H suspected that women brought emergency restraining order applications in order to give them “an upper hand if it is a custody battle.” However, when confronted with a peace bond and probation due to expire, SCJ H indicated that he would be prepared to issue a restraining order to keep the abuser “out of the house” but would not issue an exclusive possession order. “I’m not going to oust someone because by ousting you are also giving the other party an upper hand if it is a custody battle.”

SCJ F and I asserted that they tended to err on the side of caution when considering emergency restraining order applications, and rarely refused them. The applications had to be returnable within forty-eight hours, however, lest the respondents accuse both applicant and judge of infringing on their “rights”. To this end, SCJ I qualified her response if the consequence of her order meant ejecting somebody from the home. “To send out the police to eject someone for one person’s safety overnight and bring them back the next day, as a general rule, I would say find a safe haven for tonight, come back tomorrow. I would issue the restraining order, but I wouldn’t necessarily

order exclusive possession.” Indeed, none of the judge participants indicated when they would issue exclusive possession orders.

SCJ D advised that he regularly granted emergency restraining orders, “always short-lived, so I can hear the other side”. He issued these orders when he had “fear for the physical safety of the applicant and the children”. He was the only judge participant to indicate that his concerns would be restricted to the applicant’s “physical safety”. Section 46(1) of the *FLA* has no such limitation. In contrast, SCJ E, who sat on the same bench as SCJ D, claimed she rarely saw emergency applications for restraining orders, but considered many emergency applications for the preservation of *property*.

Adjudicative judges: OCJJ L and M, two of the most adjudicative judge participants, indicated that they rarely heard emergency applications for restraining order. Instead, these applications were “handled” by duty counsel. I found this astounding; these most adjudicative of judges were prepared to abdicate their jurisdiction in these cases to others without any judicial oversight. I was reminded of OCJ N’s condemnation of judges who refused to make orders as a “derogation of duty”.

The requirement of evidence: All the judge participants referred to in this section indicated that they required some evidence from the victim applicants to substantiate the “reasonableness” of their “fear”, pursuant to s. 46(1) of the *FLA*, in order to grant emergency restraining orders. The evidentiary requirements varied from judge to judge, but was, with respect to mediative and adjudicative judge participants, generally, minimal. SCJJ D, E, F and H indicated that they looked for “details”, although OCJ O advised “sometimes, unfortunately, all I get from somebody is the scrawl on a piece of paper, ‘My spouse is abusive. I’m afraid. Please grant me a restraining order’.” I detected considerable frustration emanating from SCJJ D, F, and H when they admitted that they could not issue these orders without sufficient evidence lest they be accused of “bias” or acting “unfairly” against the alleged abusers, even though they “knew” the allegations of abuse were true

and the apprehension of the applicants was “reasonable”. I suggest that self-represented parties are particularly disadvantaged when advancing emergency applications for restraining orders if they assumed a judge would accept their ‘say so’ of fear for their safety.

OCJJ L and N gave me the impression that they would be skeptical of the veracity of an applicant who brought an emergency application for a restraining order in family court rather than in criminal court. OCJ N indicated that “the fear has to be imminent”, and “you never get the proof you need. The risks of *ex parte* orders are legendary. My threshold is high. My view is, if the police have reasonable grounds to lay a charge, that is enough for me to make a temporary restraining order. I need some kind of independent proof, if you can get that.” Although OCJ N advised that he issued “lots” of restraining orders, this claim seemed to be contradicted by his reliance on a criminal charge to legitimize a victim’s entitlement to an order *from him* and struck me as untenable in law: he was, in essence, applying the criminal standard of proof to applications made in his (civil) court. He also appeared to be unaware, despite his seniority on the bench, that abused women are often reluctant to report their abuse to the police (see Chapter One), and/or do not want their husbands to be incarcerated and thereby be deprived of their financial support. Obviously OCJ N had a different appreciation of woman abuse and abused women’s experiences from those of OCJ O.

7. Tort

The judge participants were divided on the efficacy of promoting tort claims in the family courts. SCJ D advised he had adjudicated tort claims and awarded damages. However, SCJ H was not receptive to the inclusion of tort claims in family court because “they prolong the litigation”. SCJ I rejected the inclusion of tort claims for domestic violence and abuse because “if it’s women going after men, they then need to be able to devote their resources to earning an income to pay the support. There’s only so much money to go around.” In comparison, SCJJ A, E and F believed there was a place for tort in family law, but they had reservations, as well. “I don’t think that the family lawyers who appear before me right now would be capable of bringing tort actions, because

the practice of law has become so specialized they don't have the capacity to bring a tort actions":
SCJ F.

SCJ E expressed concern that some family court judges were "uncomfortable" with the inclusion of tort in family law because they, too, were "specialists" who might not feel themselves qualified to conduct trials in tort. On this point, SCH H, who, I indicated earlier in this chapter, suggested that compensatory support could be described as damages, asserted "we are capable of assessing [damages] because I will go to my civil colleagues and say, 'what's this worth?'"

SCJ E acknowledged that, even if defendants might not have "deep pockets", tort claims offered "another opportunity to be heard". SCJ C recalled seeing damages having been pleaded "once in a long time. They almost never go through." But she was a proponent of tort claims for damages from domestic violence and abuse.

I'll go out on a limb here and say I think it's the better place because that's where you can talk about damages. The linkage hasn't matured yet, but it will. The problem is too many people see child support or spousal support as a form of damages, or the connotation is one of damages. Whereas, tort, it is all about damages, and you can actually have an honest conversation, and that's what it's really about. So, absolutely! I think tort law may be, ultimately, the savior of family law, because that's the place we can put these things and actually develop some thinking and critical analysis around them, rather than have them masquerade in family court.

I suspected that SCJ C saw the advancement of a tort claim the means by which the issue of conduct could be severed from the family court action, which could then proceed, "peacefully" through mediation to settlement.

8. Conclusion

OCJ M asserted that litigants do not come to court to be "rehabilitated". "They come because they want to get some relief. Custody, access, restraining orders, child support". Within the current civil family justice system, victims of woman abuse do not always obtain this relief. It is true that, in some cases, a victim's story of abuse will not be believed. That will depend upon the subjectivities of the presiding judge, as my analyses demonstrated. The settlement mission, case law

and legislation are also complicit in denying abused women the “relief” they seek from family courts.

Some of the judge participants suggested that any dissatisfaction with the system experienced by abused women was a consequence of their unrealistic expectations. These judge participants opined that such litigants just did not “understand how the system worked”. I suggest that the wide variation in approach to litigants, evidence, and claims taken by my judge participants (and, undoubtedly, by those judges I did not interview) has rendered the system unfathomable to litigants and lawyers alike, if not to the judges, themselves.

OCJ L’s self-assuredness melted away when I suggested to her that abused women did not believe that their voices were being heard.

If they want some kind of validation that [the abuse] has gone on, I don’t know what they expect. I guess what I’m saying is we do protect women and we do validate that because, if we didn’t validate, we wouldn’t be making these kinds of orders that we’re making [for supervised access to child abusers, I assumed]. It would just be a normal – even if it’s custody to one person, access to the other, it would be very normalized in terms of allowing contact – I mean, in cases of chronic abuse where it’s really a power imbalance (which I think is the big one, actually) and emotional abuse. You know, we even regulate emails. You can’t text. You can’t email. You do it once a week. It can only be about the child. You know, we try to sort of micromanage, and that’s all to protect the abused spouse. So that’s validation, so I’m not – like, I don’t quite understand what more we could possibly do because, if the expectation is he’s not going to have any contact with the child, that’s just completely unrealistic, and, in my view, in the long term, not good for the child.

It may be, in fact, that judges “don’t know” what abused women expect from them. Perhaps, like OCJ L, they purport to care, but feel bound by “the law” to reject evidence of misconduct in order to enforce the abuser’s “right” to access even when convinced the access parent is a *child* abuser. None of these explanations are sufficient or satisfactory for abused women and their children who turn to the system for safety and security. They do, however, help to inform the theories I extracted from the judge participants’ narratives, and which have been examined in this chapter. They also help to explain my grand theory, discussed in the following concluding chapter .

CHAPTER SEVEN

CONCLUSION

1. Identifying the Disconnects

When I set about formulating the research questions guiding this study, I made certain assumptions about the legal system in general, and the civil family justice system in particular, including its responses to those abused women who pursue their legal and equitable rights and entitlements in its courts. I recognized that there were substantive, conceptual, structural and procedural impediments inherent in the system that prevented abused women from obtaining their rights and entitlements, but I had never regarded them as *disconnects*, which I now believe they are. Further, these disconnects establish the playing field of the court room in which the *interpersonal* disconnects between abused woman as litigant, and judge as trier of fact and law, are established. These interpersonal disconnects result in the orders and judgments I have identified in this study as non-responsive to the lived experiences of domestic violence and abuse to which the survivor participants, as well as the abused women represented in the case law, were subject by their intimate partners. It is my contention that the extant literature examining abused women's experiences with the law and in the court room has been directed solely at the interpersonal disconnects between judge and litigant, and has failed to examine the conceptual, structural and procedural disconnects within and without the civil family justice system.

Therefore, the following list contains all of disconnects I have been able identify from my critical analyses of the scholarly literature, relevant case law, and the narratives of my participants. They are arranged so that those previously identified as substantive, conceptual, structural and procedural *impediments* to the recognition and satisfaction of abused women's claims are now listed as the substantive, conceptual, structural and procedural *disconnects* which inform the interpersonal disconnects between abused woman and judge:

1. The civil family justice system is disconnected from the rest of the legal system. Its procedures are unique to it. Unfortunately, they have proven to be oppressive to abused women and their children. Due process (procedural fairness) is absent. The rules of evidence have been relaxed, and the almost unlimited discretion afforded family court judges allows for the imposition of a degree of personal subjectivity and opinion that would not be tolerated in other areas of law. This, too, has been revealed to work to the detriment of abused women.

2. Many of the judge participants asserted there is a structural disconnect between the underlying adversarial nature of our legal system, and the “settlement mission” promoted by the *Family Law Rules*. They might be correct. However, I dispute the suggestion that there is no place within the civil family justice system for contested claims; indeed, the very nature of relationships characterized by domestic violence and abuse demand that they be dealt with in a court of law. Abusive men should not be allowed to intimidate their victims into submission to settle contrary to their and their children’s interests. Highly contested cases in which the parties’ stories are wildly divergent must be tried in a court of law if there is no possible alternative resolution. L’Heureux-Dubé, J has asserted that “the adversary process provides a set of rules designed to ensure that trials run smoothly and to guarantee due process of law to all parties involved ... One cannot underestimate the great importance of the adversary system in the search for truth” (1983:310).

3. There is a disconnect, conceptually, between the civil family justice system and the rest of the legal system in its legislative and practical disregard for *conduct* in the determination of legal rights and entitlements. Conduct is an essential ingredient in judicial decision-making, and, as such, it is fallacious to assume that judges come to their decisions without taking it into account. The consequence of disregarding conduct in the determination of legal rights and entitlements has resulted in the formulation of orders and judgments that cannot reasonably or logically be supported, and, can be oppressive to abused women and children.

4. There is a further disconnect, conceptually, between the original rationale for excluding *misconduct* from the determination of claims for corollary relief under the *DA 1985*, and the current meaning and intent ascribed to the term. By expunging *misconduct* from statute, the legislators intended to remove the association of *conduct* with *fault*, antithetical to a “no-fault” civil family justice system founded primarily on granting divorces without requiring proof of marital ‘fault’. Unfortunately, in so doing, a “new ethos” emerged within the family justice system “which seems incapable of grasping the significance of violence against women” (Smart, 1995:174). It would appear that conduct is now defined in family law as *violence and abuse committed against children*; hence, the legislative mandate to ignore misconduct is directed to violence and abuse of *women*. “It is a palpable injustice to ignore certain extreme wrongdoing between spouses. When wrongdoing is not only ‘fault’ but physical abuse or extraordinary and outrageous emotional abuse causing severe distress, the legal system must provide an outlet for adjudicating such harms” (Laufer-Ukeles, 2010:214-215).

5. Further to point 4, there is both a structural and conceptual disconnect between the use of gender-neutral language in family law determinations adopted both by the relevant legislation and the courts, and the gendered nature of all human experience. “Where the legal system avoids overt references to gender by adopting gender neutral legislation, the reproduction of gender relations may nevertheless be enhanced by another social institution, such as the judiciary” (Boyd, 1989:128). The legislative reference to “past conduct” in s. 24(3) of the *CLRA* is a case in point. My analysis has revealed that the judge participants construed “past conduct” to mean, predominantly, parental alienation syndrome, and not domestic violence and abuse. In so doing, they directed their inquiries into

“past conduct” primarily at custodial mothers, and not of abusive husbands, thereby exacerbating this “palpable injustice”.

6. There is a disconnect, conceptually, between the the promotion in the Preamble of the *FLA* of marriage as a “partnership”, and the power differential inherent in intimate relationships characterized by woman abuse, as identified by SCJ D. Abused women are not, nor can they be, the “partners” of their abusers, simply because they cannot escape the power and control the latter wields over them. It has been well established in the scholarly feminist literature that mediation is contraindicated in cases of woman abuse.

7. There is a disconnect, procedurally, between the requirement of repeated contact between a woman abuser and his victim and the ongoing danger such contact presents to the victim, and the requirement of multiple attendances under the case conference system employed in the civil family justice system. The statistical evidence presented in Chapter One of this study is unequivocal: women are more likely to be abused (and more badly injured) by their intimate others after separation than during cohabitation. The disconnect between the demands of the case conference system and the reality of abused women’s lives endangers them.

8. There is a disconnect, conceptually, in the ethos of the settlement mission that drives the family court process (the promotion of mediated settlements) and the inappropriateness of referring cases to mediation in which woman abuse has been alleged. First, as indicated in disconnect 2, abused women should not be subjected to their abusers in mediation. Mediated outcomes achieved in cases of woman abuse usually inure to the benefit of the abuser and the detriment of his victim. Second, woman abuse is a social issue, and thus should be examined in a public forum, not relegated to the realm of private negotiation. Third, judges as mediators must, themselves, screen for domestic violence and abuse.

9. There is an obvious structural disconnect between the adoption by both legislators and judges of the fathers’ rights platform (recognized in the primacy of the “right” to access, the “friendly parent rule” and the “maximum contact” provision) and the realization of the rights and entitlements of abused women and their children. The influence of this lobby can also be seen in the identification, through the appropriation of language, of the word *conduct* (as in, conduct not to be taken into consideration in judicial decision-making) primarily with the phenomenon of woman abuse. It has long been the agenda of fathers’ rights advocates to discredit their feminist counterparts who sought recognition of woman and child abuse as serious, social problems. The position of the fathers’ rights platform that fathers’ rights can only be advanced at the expense of mothers’ rights is antithetical to the best interests of both women, particularly abused women, and their children and the promotion of sex equality under the *Charter*.

10. There is an obvious conceptual disconnect between what judges learn about domestic violence and abuse, and abused women’s and children’s lived experiences of the phenomena. Judicial reliance on discredited psychological theories and/or unreliable junk science in this regard is unacceptable. Given that judges have been entrusted with pursuing their own continuing education in family law, one might challenge the criteria employed in the selection of speakers at education conferences for judges, when the examples provided by the judge participants so clearly lack the requisite expertise to address the topics being discussed. Those organizations that purport to provide continuing education in family law to the judiciary have failed miserably in discharging their mandate, to the detriment of abused women and children who rely upon judicial ‘knowledge’ and ‘wisdom’ to understand their experiences of violence and abuse. This problem was most apparent

with mediative judges who regularly attend these conferences and appeared enamored with the speakers.

11. There is a conceptual disconnect between judicial acceptance of the naturalness and incontrovertibility of 'settled' concepts such as "co-parenting", "joint parenting" and "parallel parenting", and the reality that they, as social constructs, merely represent the latest iteration of popular theories promoting the best interests of children. Instead, these concepts have been embraced by members of the judiciary with a surety and conviction no less vigorous or compelling than that which accompanied their antecedent, the "tender years doctrine". It is likely that these concepts, too, will be rejected, as more questions are posed concerning their efficacy (Shaffer, 2007). History has demonstrated that theories promoting the best interests of the child are not immutable. Thus, judges should be open to other 'ways of knowing' about how the best interests of children might be served, other than through maximum contact with an abusive parent.

12. There is an apparent procedural disconnect between the obligation of the judiciary, prescribed by their mandate as triers of fact and law, and inherent in judicial language that conveys the "powers of their office" to render decisions and orders (Chng, 2002:42), and the current practice of some to retreat from their adjudicative function by refusing to make orders altogether. Another tactic in this regard is to employ language in their orders that imparts meanings not recognized by statute, such as in making "primary residence", rather than "sole custody" orders. In this case, judges who make these orders reject the terminology used in the legislation because it offends their subjective opinions and beliefs about the nature of the family. In both instances these judges are, in the words of OCJ N, "abdicating their judicial roles" while imposing their individual biases on litigants. Further, they are failing or refusing to assume the persona of the objective, impartial and rational judge promoted in the dominant social discourse, and which litigants have come to expect.

13. There is a fundamental conceptual disconnect between the assumption that the best interests of children can be determined without reference to, and without ensuring that, their custodial mothers' welfare is also taken into consideration. It was evident from the narratives of the survivor participants that the failure of the civil family justice system to ensure mothers received adequate financial support from payor fathers put the wellbeing of their children at risk.

14. There is a conceptual disconnect between judges' assumption that children will benefit from continued exposure to their and their mother's abusers, and the lived experiences of the children of the survivor participants who were subjected to a continuation of their fathers' abusive conduct during supervised access. Indeed, in this regard, one need only recall the experiences of Lindsay, whose violent father sexually abused her for nine years during his *unsupervised* overnight access visits. The fallacious conceit that judges can alter human conduct through their orders, such that abusive, violent and apathetic fathers will become nurturing and attentive through the imposition of supervised access was challenged by Natasha's narrative, in which she described how her abusive husband attempted to coerce her sons into leaving her during his supervised access visits. Family court judges continue to rely on anecdotal, subjective stories of children rejecting mothers who deny them relationships with their abusive fathers, rather than statistically credible evidence that continued exposure to violence and abuse (and abusers) has catastrophic consequences for victims.

15. There is a further procedural disconnect between the reluctance of the judiciary to "punish" woman abusers, and their apparent willingness to "punish" custodial mothers who, in their attempts to protect themselves and their children from further exposure to their abusers, deny them access. This form of self-defence has been construed as parental alienation, which might attract an order for:

supervision by the CAS; increased or unsupervised access to the abuser; or a reversal of custody. Under threat of this “punishment”, abused custodial mothers are coerced into agreeing to access, and thus potentially exposing their children, if not themselves, to further abuse.

16. Accordingly, there is a profound substantive disconnect between the judges’ assertion that their overriding concern is the protection and promotion of the best interests of the child, and their insistence in exposing children to continuing contact with violent, abusive, manipulative and/or disinterested non-custodial fathers. This disconnect is particularly galling when judges’ acknowledgement of the negative sequelae of woman and child abuse is taken into consideration.

17. There is a fundamental conceptual, structural, procedural and substantive disconnect between the disregard of conduct by the judiciary, and the importance abused women ascribe to it. For abused women, their abusers’ misconduct matters a great deal. If, as asserted by OCJ L, abused women “just do not understand how the system works” because they expect the family court judiciary to take woman abuse into consideration when adjudicating their claims, then, I submit, what they do not understand is how what is so obvious to them has been rendered so opaque to the judges who preside over their claims.

18. There is an obvious substantive disconnect between what abused women expect to gain from initiating or responding to a family court application in which woman and/or child abuse has been alleged, and what they ultimately achieve. Studies conducted that purport to examine abused women’s (and children’s) experiences with the legal system have concluded that their stories are not heard and/or not believed. Feminist legal scholars have pointed to the androcentric nature of “the law” in which there is neither space nor place for abused women’s voices to be heard. I do not dispute these assumptions; indeed, I support them. However, despite their persuasiveness, they have done little to effect substantive changes in the civil family justice system to the benefit of abused women and their children. This research study has led me to formulate a somewhat different theory, which is presented under the next heading.

2. The “Grand Theory”

“No research methodology is legitimate unless it provides sufficient flexibility to adapt to unexpected information” (Hanyecz, 2003:280). I recall my response at the conclusion of my first two interviews with judge participants; I was overcome with despair, not because my interviews had confirmed, as most of the relevant literature I had reviewed led me to assume, women’s stories of abuse were not being heard in the court room, or believed, *but because their stories didn’t appear to matter*. I questioned this response to these interviews with the data I obtained from subsequent interviews with the remaining judge participants. I re-read some of the scholarly studies and articles I had reviewed in preparation for this undertaking. I recalled that many of my survivor participants had inferred from their legal proceedings that the judges presiding over their cases “didn’t care”

about their stories. But, “not caring” was not the same as “not mattering”. Most of my judge participants professed to care about the experiences of violence and abuse experienced by the women who came before them, although in the absence of any action on the judges participants’ part to provide redress to the abused women whose claims they adjudicated, it was difficult to know what they ‘heard’ and how their ‘caring’ benefitted victims. By “not mattering”, however, I assumed the survivor participants believed the judges found their stories irrelevant; it did not “matter” if the judges “cared” at all. Nowhere in my literature review, or in my discussions with lawyers or academics prior to, or during this research study, had I encountered this explanation for the disconnects between abused women’s expectations of and from the civil family justice system, and what they ultimately realized. The rationales, explanations and theories I found in the position papers and research studies for the marginalization of abused women in the civil family justice system no longer seemed sufficient to me; there must be other factors at play.

That the law speaks in a ‘male voice’ has long been recognized by feminist legal theorists. My critical discourse analysis of the cases included in Chapter Three revealed to me how legal *discourse* muted or silenced the ‘female voice’ as it promoted the ‘male voice’ by: discounting or rejecting abused women’s allegations of their spouses’ misconduct; minimizing or rejecting their claims; inflating the contribution of fathers to their children’s lives, even abusive and apathetic fathers; marginalizing mothers’ importance in the lives of their children; and discounting their fears for their and their children’s safety. Having conducted my case law review after interviewing my judge participants, I could recognize the language of the legal precedents in the narratives of the judges, although very few of them actually cited reported cases. Some of the judge participants appeared to reflect the attitudes and opinions of the judges whose cases I reviewed: attitudes and opinions that are not founded upon the *law*, but upon *personal subjectivity*. I was not surprised; my investigation into how judges are chosen, how they are taught, and what might inform their ‘thinking’ revealed considerable homogeneity amongst members of the bench, all of whom are

expected to reflect and promote the dominant social discourse. I realized that some of the judge participants might be contributing to the perpetuation of those precedents established in the case law I reviewed and, through them, the continued oppression of abused women and their children.

Further, the legal discourse represented in case law, as legal precedent upon which the judiciary relies under the common law, provides the foundation for the relationship between a judge and those appearing before her/him because *stare decisis* is the basis of judicial decision-making. The experiences of many of the abused women who appeared as litigants in the reported cases were reflected in those of the survivor participants. However, my analyses of the narratives of my judge participants prompted me to reject the androcentrism of law as the *primary* reason for my survivor participants' dissatisfaction with their interactions with the family courts, given that the judge participants whose opinions, attitudes and beliefs, subjective interpretations of the law, and processes and procedures were most oppressive to abused women and their children were *women*.

As I engaged further with my data, and began extracting themes and developing theories, I realized that my "a-ha moment" represented the nucleus of my grand theory (Strauss & Corbin, 1998; Glaser & Strauss, 1967):

This research suggests that abused women who appear in the family courts of Ontario with the expectation that the judges presiding over their claims will hear, acknowledge and validate their stories of violence and abuse and adjudicate their legal rights and entitlements on the basis of their evidence, are often left feeling unheard, disbelieved or that their stories do not matter, because judges believe woman abuse is irrelevant to the determination of the claims they advance in the civil family justice system.

The experiences of the survivor participants supports my grand theory. They related stories of terrible physical, sexual, psychological, emotional and financial abuse at the hands of both their abusive and violent fathers (and other male relatives) as well as their abusive and violent spouses. They were kept in isolation from their families and friends. Their property was destroyed. They were sexually abused. They were threatened with death. They suffered, and many continued to suffer, from post traumatic stress disorder, anxiety, insomnia, depression, and emotional,

psychological and physical disabilities. Their self-esteem was non-existent. They had difficulty establishing positive and nurturing intimate relationships.

Their children were also victims of physical, emotional and psychological abuse. They, too, manifested the consequences of victimization, both as recipients of and witnesses to the abuse of their mothers by their fathers or step-fathers. In some instances, they mimicked the abusive and violent conduct of their fathers. They had trouble establishing friendships at school, experienced learning difficulties, suffered from a variety of physical ailments, and exhibited signs of depression, insomnia and self-harm. Some grew up to be woman abusers. The survivor participants were adamant that the judges who presided over their claims rarely, if ever, addressed the allegations directed at their abusers, except, on occasion, to dismiss the evidence adduced as “insufficient”. The survivor participants were left with the sense that they were neither heard nor believed, although some of them intimated that they felt it did not matter what they alleged, or what proof they produced of their abusers’ misconduct; *the judges did not care*.

Those who might challenge this theory will argue that I am merely stating the obvious, since the legislation governing marital breakdown (s. 16(9) of the *DA 1985*) excludes “conduct” from consideration in claims for corollary relief. They might point to s. 24(4) of the *CLRA*, or ss. 5(6), 24(3) and (4), 33(10) or 46(1) of the *FLA* which draw judicial attention, to “conduct” or, rather, the misconduct of a respondent to an application brought under one of these sections, to repudiate my grand theory. But I suggest that “conduct” does not automatically compute with “domestic violence and abuse”, let alone woman abuse, in the minds of family court judges, even when they are specifically directed to consider it pursuant to ss. 24(4) or s. 46(1), for example. It is possible that the erosion of the importance of conduct as a consideration in denying women’s legal entitlements upon marital breakdown (with its extinguishing in s. 16(9)) along with the presumed incompatibility between misconduct and the current no-fault civil family justice regime, have been responsible in

large measure for the judges resiling from taking domestic violence and abuse into consideration when alleged by abused women.

It appears that conduct has become so marginalized as a determinant in judicial decision-making in the civil family justice system that judges seem unaware of those statutory provisions that might allow them to consider woman abuse in certain instances beyond claims for custody or access. Only one of the judge participants referred to s. 33(10) of the *FLA* as the authority allowing them to take “unconscionable conduct” into consideration when determining the quantum of spousal support to be awarded. None of the judge participants recognized that s. 33(10) could be read as allowing consideration of marital conduct in determinations of *entitlement* to spousal support, even though the reported case law (*Melanson*) legitimated this interpretation. Further, the requirement that they consider the “past conduct”, including a history of “violence and abuse” committed against “his or her spouse” upon a person’s application for custody or access to a child has not precluded them from granting access to both woman and child abusers.

The adjudication of conduct, intentional or otherwise is, I submit, fundamental to the process of judicial decision-making throughout common law. The consequence of ignoring spousal misconduct denies to abused women the remedies available to other claimants in all other areas of law. Ignoring conduct is truly a deformation of existing law rendered coherent only because it serves the purpose of the settlement mission. The failure of the civil family justice system to recognize the pre-eminence of conduct as *the* (let alone any) determinant of legal rights and entitlements has, I suggest, rendered the system unresponsive to victims and brought it into disrepute. Indeed, the survivor participants were unanimous in their condemnation of the civil family justice system, in which, they asserted they had “lost faith”, and which they “no longer trusted”.

Those litigants who rebuke the settlement mission expect judicial decisions to determine their legal rights and entitlements. However, they may be demonized and pathologized by those judge participants who promote mediated settlements. The survivor participants were incensed that

their abusers could advance the most outrageous and egregious allegations of mental illness, alcoholism and drug addiction against them in open court, apparently with impunity. Depending upon the judge before whom they were appearing, the survivor participants' pathologization by their abusers appeared to be assumed by the presiding judge as a matter of course.

The negative consequences resulting from ignoring spousal conduct in family law disputes are particularly detrimental to self- and unrepresented parties who now make up the majority of litigants in the civil family justice system. The dominant discourse has expressed its abhorrence of domestic violence and abuse for many years, despite attempts by the fathers' rights movement to discredit abused women's claims. Accordingly, those who avail themselves of the civil family justice system expect that the violence and abuse that has characterized their intimate relationships in various ways will be criticized and condemned, their experiences of violence and abuse will be validated, and their legal rights and entitlements realized. Tragically, as the experiences of the survivor participants demonstrated, these expectations are often not fulfilled.

Self-represented and unrepresented litigants cannot be expected to recognize that their pursuit of their rights and entitlements in the adversarial system offered by the family court might antagonize those judges who are so personally invested in the settlement mission that they consider any result other than a mediated settlement a personal defeat. This is probably true for those litigants who are represented by legal counsel as well, if not legal counsel, themselves. For those who have been socialized to regard judges as objective, rational, neutral and otherwise 'above the fray', the reality of the influence of their individual proclivities, subjectivities, opinions (discriminatory or otherwise), and reliance on stereotypes would be revelatory.

Abused women who are compelled to relate their stories of abuse in the courtroom before such judges may be acting to their detriment. Certainly this was the experience of most of the survivor participants, who believed their credibility was undermined by the courts' rejection of their allegations of violence and abuse. Further, legislation and case law that directs the judicial mind

away from consideration of misconduct – a mind already predisposed to minimize, ignore, reject and/or disbelieve such allegations – has not encouraged an institutional environment for which the safety of women is its paramount consideration, notwithstanding the recommendations of Mamo et al (2008).

However, it would be facile to suggest that judicial bias alone is an adequate explanation of the legal response to women, particularly abused women and their children (Smart, 1984). Large-scale, randomized surveys that reveal a proclivity within the majority of the population to deny the existence of woman abuse underscore the challenge abused women face, generally, to be heard and believed. Despite the conceptual disconnects between the judiciary and abused women identified in this conclusion, it would appear that family court judges are cognizant of what abused women do *not* want: that they and their children be forced against their best interests – their physical, emotional and psychological well-being – to maintain any relationship with their abusers. For harbouring this expectation, the victims of woman abuse are condemned by the judiciary as being unrealistic and unreasonable.

Judges should also be aware that abused women demand that their claims for spousal and child support *not* be ignored; their evidence of their financially abusive husband's hidden income and assets *not* be rejected; and their very real fear for their safety and that of their children *not* be disbelieved. While the courts seem prepared to accede to severing spouses' economic relationships such that payor husbands and fathers are relieved from their support obligations, they will not, and believe they cannot, sever the physical, emotional and psychological ties presumably established during the life of the intimate relationship, which, at best barely subsist after its breakdown. The consequence of maintaining abusive relationships on 'life support' is to jeopardize the welfare of victims and their children financially, physically, emotionally and psychologically. Devorah's assessment of the civil family justice system resonates here: "it's all about the abuser".

It is not sufficient that abused women be “heard”; their claims must be upheld. Granting access, whether or not it is supervised, to their abusers does not persuade victims of woman abuse that their stories have been heard or believed. Denying a restraining order because the applicant’s subjective fear or her safety is not considered “reasonable” by the presiding judge implies a degree of disbelief, or lack of concern, antithetical to the spirit of the section. Considering the welfare of children as distinct from the welfare of their custodial mothers defies the “common sense” upon which the judge participants purported to rely in their decision-making. Disregarding a claim for support, or an unequal division of net family properties on the basis of spousal misconduct flies in the face of legislation allowing consideration of such conduct.

I reiterate: regardless of whether those litigants who reject the myriad of opportunities to settle their differences offered by the case conference system, or refuse to attorn to the “settlement mission” are demonized as “high conflict”, or worse, by the judiciary of the civil family justice system, they are entitled to ‘their day in court’, to pursue the rights and entitlements to which they believe they are entitled through the adversarial processes upon which the common law system is premised, and to have their claims adjudicated in open court. This forum offers abused women and their children the opportunity for their voices to be heard, their experiences to be validated, and their rights and entitlements to be realized. Further, by recognizing woman and child abuse as a form of *conduct* they are not prepared to tolerate, the judges who preside in the civil family justice system will have eradicated most, if not all of the disconnects between them and the abused women and children who appear before them. However, as long as the fundamental precept of law to take *conduct* into consideration in the adjudication of legal claims is deformed by and in the civil family justice system as a rationalization for *not* considering woman abuse as a relevant consideration family law proceedings, there can be no *justice* for abused women and their children.

3. Recommendations for Change and Suggestions for Further Research

The following recommendations and suggestions have arisen from this research study. I do not intend to reiterate the recommendations already advanced by the Ontario Status of Women Council (1983) or the National Association of Women and the Law (2003, 1994), with which I concur.

Statutory change: Proponents of joint parenting eagerly awaited second reading of Bill C-560 in the federal House of Commons on May 27, 2014.¹ The Bill proposed changes to the *DA 1985* that would have: entrenched a preliminary presumption of joint custody (to be called “joint parenting”). However, if the presumption were rebutted, the court would nevertheless have to “give effect to the principle that a child should have maximum practicable contact with each spouse”. Section 7(16), entitled “additional considerations”, included c) “family violence committed *in the presence* of the child” (my emphasis). Not surprisingly, s. 16(9) of the *DA 1985* was reiterated as s. 19. The Bill was defeated on second reading. However, it reflects the continued presence of the fathers’ rights lobby and its influence over legislators.

Women’s rights advocates, whom Mossman describes as “de-funded, exhausted and ridiculed”,² were markedly silent in their opposition to this bill. It was clearly not in the best interests of abused women and children for all the reasons discussed in this study. Without the voices of those who support abused women and children being reflected in the media, the public could not have been aware of how dangerous the proposed amendments would have been to victims of domestic violence and abuse. The amendments purported to reflect current social discourse concerned with parenting after marital breakdown, but, contrary to assertions of its sponsor, it did not represent a consensus in this regard. However, one can only imagine that the supporters of the fathers’ rights agenda will continue with their attempts to sway politicians and, through them, public opinion, to their favour.

“The most problematic question for feminist law reformers is: ‘Does passing a law have a prophylactic or preventative effect?’ A law constitutes a symbol of society’s disapprobation of the impugned conduct and it may prescribe a remedy or course of conduct once the harm has occurred” (Thornton, 2009). Therefore, I suggest the following statutory amendments to the following statutes:

With respect to the *DA 1985*:

1. Sections 15.2(5), 16(9) and 17(6) should be repealed;
2. Sections 15.2(4), 15.2(6), 17(4), (4.1), and (5) should be amended to include reference to “domestic violence and abuse”;
3. Sections 16(10) and 17(9) should be repealed;
4. The heading “Joint custody or access” should be removed.

With respect to the *FLA*:

1. The Preamble should be amended to qualify the reference to marriage as a “partnership” to exclude relationships in which domestic violence and abuse are present;
2. A comprehensive definition of “domestic violence and abuse” should be included in s. 1(1);
3. Section 5 should be amended to include a declaration that, during the course of the marriage, the spouses shall be considered to be equitable trustees of each other’s net family property. Further, upon separation or divorce, the spouse entitled to an equalization payment will be deemed to be a preferred, as well as secured creditor of the other spouse and the claim should take priority over that advanced by other creditors;
4. Section 5(6) should be amended to include consideration of domestic violence and abuse, and the five-year period of cohabitation restriction should be removed;
5. Section 9 should be amended to include a provision that property acquired by a spouse after separation or divorce shall be subject to inclusion in that spouse’s net family properties if the proceeds of acquisition would otherwise have been included in his/her net family properties;
6. Section 24(3)(f) should be amended to include “and abuse” after “violence”;
7. Section 33(10) should be included as a “determination of amount for support of spouses, parents” as ss. (e), and not be a separate section;
8. Section 33(10) should be amended to provide greater clarity and state that domestic violence and abuse may be considered when determining the obligation to provide spousal support (I would prefer to use the word “shall”, but acknowledge that one must

proceed with ‘baby steps’ when advocating for legislative changes which promise to be controversial);

9. Section 46 should be brought forward in the statute as s. 28.

With respect to the *Bankruptcy and Insolvency Act*:

1. A residence registered in the sole name of the payor and identified as the matrimonial home should be exempt from his/her estate upon his/her bankruptcy, save and except for the claims of creditors registered on title, including mortgagees and the Canada Revenue Agency, but the claims of a spouse or former spouse would be secured and preferred before all secured other secured or preferred creditors;
2. The spouse or former spouse to whom an equalization payment, child or spousal support order, and/or costs award are/is owing shall be considered a secured creditor of the bankrupt with respect to his estate in bankruptcy.

With respect to the *Land Titles Act*:

1. A declaration executed by both spouses that the property constitutes a matrimonial home should be registered on title.

With respect to the *Family Court Rules* and *Rules of Civil Procedure*:

1. The *Family Court Rules* should be amended to allow for a preliminary determination before a judge of competent jurisdiction of the presence of domestic violence and abuse, including any allegations of parental alienation syndrome. If so found, further amendments which allow those cases to be expedited and removed to the civil lists to continue under the *Rules of Civil Procedure*. Parties to cases in which domestic violence and abuse have been alleged should not be referred to mediation. Winkler, J recommended this model be adopted within the civil family justice system, but I suggest that, as these cases represent outliers within that system, it would be more efficacious if they were removed from it altogether.

With respect to the *Courts of Justice Act*:

1. The Ontario Court of Justice should be granted the same jurisdiction as the Small Claims Court as granted by s. 23 regarding the payment of money and recovery of personal property to a value not exceeding that prescribed in the Regulations (currently, \$25,000).

Legal education: In 2012, the Law Commission of Ontario (LCO) released its report,

Curriculum modules in Ontario law schools: A framework for teaching about violence against

women. The Commission recommends that topics about violence against women be included in law

school courses, including family, criminal, immigration and refugee, social welfare, tort and

international law, as well as real estate, contracts, wills and estates and administrative law. (LCO,

2012). While I certainly support these recommendations, I am faced with the reality that my alma mater, Osgoode Hall Law School of York University, has not provided its intensive family law programme, in which I participated, for many years. This suggests to me that the school, if not the student body, is not interested in promoting family law as an area of specialization.

1. First, I suggest that the exercise be directed to teaching about violence against and *abuse of women*;
2. Further, before the law schools implement the recommendations of the LCO, they must first recognize the importance of family law as a legitimate area of study in the academy and reinstate (or establish) intensive family law programmes to demonstrate their commitment to this area of legal practice.

Judicial education: It is evident that judicial education concerning woman and child abuse is sorely lacking. There is little public information available about what constitutes judicial education, so I must presume it does not include the following, but should:

1. Judicial education concerning domestic violence and abuse should inform judges about the statistical evidence of woman abuse, the gendered nature of the phenomena, their sequelae, including the risk of brain damage and loss of executive functioning for victims, and their short and long-term consequences to child witnesses;
2. Judicial education concerning domestic violence should be delivered by *recognized experts* in the field of domestic violence and abuse, medicine, psychology and social science who offer different research paradigms. It should take the form of round table discussions of representatives from the various disciplines. The representatives should be selected to provide different, and competing, views on the subjects of concern within the domestic violence discourse. For example: a psychologist who is a proponent of PAS and a child psychologist who rejects PAS would provide a lively debate; a neurologist who has studied the effects of head injuries on cognitive dysfunction, and a clinical psychologist familiar with the consequences to executive functioning of head injuries and dementia, along with a representative from the shelter community who could speak to her experience with abused women who seek refuge in shelters, could illuminate family court judges about the correlation between brain trauma and woman abuse. Judges would take away from these discussions the realization that there is not just one persuasive theory of domestic violence and abuse;
3. Survivor advocates should be invited to speak at judicial education sessions concerning domestic violence and abuse. The Woman Abuse Council of Toronto could provide appropriate participants.
4. Workshops should be conducted during judges' conferences on *critical self-reflection* in order to familiarize them with the necessity of recognizing their personal subjectivities, opinions, beliefs, and 'ways of knowing', including the stereotypes upon which they rely

in their practice, in order to identify those that may be discriminatory, marginalizing, and/or oppressive.

Generally:

1. Actors in the civil family justice system, including legislators, must realize the hazards to abused women and children imposed by the settlement mission;
2. Tort claims should be brought as a matter of course in cases involving woman and child abuse. I would expect the family lawyers of the future to be able to conduct these cases, given the mandate of the OLC curriculum guidelines. These claims would represent society's repudiation of violence against women and children, and provide impetus to abusers to abstain from their misconduct under threat of monetary sanctions. The Ontario Court of Justice should therefore be given jurisdiction to adjudicate these claims. Granting the same jurisdiction as the Small Claims Court regarding the payment of money and recovery of personal property to a value not exceeding that prescribed in the *Regulations* would allow tort claims to be brought in the OCJ, as well as claims for an equalization of net family properties, or a variation of same under s. 5(6) of the *FLA* for all types of property excluding real property.

Suggestions for further research: I would suggest that mediators and assessors who work in the system be the subjects of research similar to that conducted for this study. Theory building that comes from credible research is necessary for developing a comprehensible understanding of the concepts that can guide and inform policies directed at protecting victims of woman abuse through utilization of the civil family justice system. Another avenue of research could involve case analyses of family court judges to identify, if possible, evidence of bias against abused women.

Those who are concerned with the rights of women and children must recognize that social, political and economic changes must take place in society in order to address woman abuse. At this point, after decades of feminist engagement with the issue, this statement is rather trite. Unfortunately, these changes have yet to come to pass. Those who witnessed, and benefitted from, the herculean efforts of second wave feminists understand what is required to alter social practices that are sedimented in the collective consciousness. My literature review is replete with stimulating and informative scholarly articles written in the 1980s and 1990s by feminist theorists, but sadly lacking in more current material, because there is far less of it being written. Other concerns now dominate the academy. This is unfortunate. Without the impetus provided by women's rights advocates, we

must ask ourselves if there will be the requisite will amongst legislators and the legal professions to give effect to the necessary changes in the system to protect and promote the interests of abused women and their children.

Finally, but not exhaustively, both lawyers and judges must be reminded of their roles as social change agents influencing both individual and collective responses to woman abuse. Family lawyers must be prepared to advocate on behalf of those of their clients who are abused women for greater recognition of their legal rights and entitlements. They should not agree to mediate, even if the presiding judge insists, if it is not in their clients' best interests. They should be prepared to take claims to trial if their opponents attempt to manipulate the system, refuse to provide financial disclosure, make unreasonable claims or unsupportable allegations. They should not refrain from challenging judicial interpretations of statute and case law that are untenable. Most importantly, they should ensure that their clients' stories of woman abuse are put before the court in affidavit form or through *viva voce* evidence..

Family court judges, in turn, must be receptive to new 'ways of knowing' about woman abuse and abused women's experiences. They must critically examine their own subjectivities, opinions, beliefs and assumptions, particularly those that are potentially oppressive. They must be prepared to repudiate sedimented deformations of case law and statute and thereby risk their decisions being scrutinized by the Court of Appeal. They *must* be prepared to consider woman abuse in their deliberations. The willful insistence of many of our judiciary to continue exposing women and children to the perpetrators of violence and abuse, I respectfully submit, implicates them in the perpetuation of domestic violence and abuse from generation to generation.

NOTES

Introduction

1. *Paradigm*: “A paradigm represents a specific type of cognitive framework from which a discipline or profession views the world and its place in it ... [it] is not a fixed or rigid social category, but rather an abstraction” (Mullaly, 2007:34).
2. Among the common law doctrines, some of which were codified by statute, to have been eliminated or repealed under Canadian and Ontario legislation in the latter half of the twentieth century were the *dum casta* provisions of statutes governing spousal maintenance and custody and/or access claims, the doctrine of *coverture* and the concept of dower, and the prohibition against tort claims between spouses, and spouses and their children.
3. *Triangulation*: Triangulation is a term used in qualitative research and refers to the use of two or more sources of data to achieve credibility and rigor. These sources might include in one research study the use of multiple theories to interpret a single set of data, the use of multiple methods, the use of more than one observer, the use of more than one data source, the incorporation of more than one discipline, and *member checking*, that is, the referencing of data obtained from previous participants to subsequent participants for their input (Padgett, 1998).
4. *Intersubjectivity*: Intersubjectivity, in its most basic sense, involves the sharing of subjective knowledge and experiences by two or more individuals (Sheff, 2006).
5. The “Power and Control Wheel” includes:
 - a. “using coercion and threats” (to harm her or those close to her, to commit suicide, to report her to welfare or child services, to force her to drop charges or commit illegal acts);
 - b. “using intimidation” (by destroying property, through threatening gestures or facial expressions, by harming pets, by displaying weapons);
 - c. “using emotional abuse” (name-calling, demeaning, humiliating);
 - d. “using isolation” (controlling; isolating; limiting contact with friends and family);
 - e. “minimizing, denying and blaming” (minimizing and/or denying abuse, shifting blame);
 - f. “using economic abuse” (preventing her from employment, withholding money, secreting money, refusing to share information about family finances, taking her money, demanding an accounting of all money she spends, making her ask for money, using money as a reward or punishment);
 - g. “using children” (in this regard, the authors were notably brief in their descriptors, limiting them to “making her feel guilty about the children” and “using the children to relay messages”. Abused women and their children are more fully discussed, below); and

- h. “using male privilege” (treating her like a servant, making all the important family decisions, acting like the ‘man of the castle’), and defining the gendered roles to which the parties to the relationship must subscribe) (Pence & Paymar, 1993).
6. For example, one cannot utter the expression ‘domestic violence’ without immediately formulating a comprehensive category of meaning that will be informed by accepted social norms, values, practices, beliefs and symbols – those identifiers of the dominant ideology governing social relations as the ‘dominant discourse’ – as well as personal experience.
7. “Statutory directives to the judge to exert the power of their office are indicated by the inclusion of ‘shall’” (Chng, 2002:42). For example, under the *DA 1985*, a judge *may*, upon application, make a support order, or custody or access order, but *shall* not take spousal misconduct into consideration in either case. Similarly, a judge *shall* apply the ‘maximum contact’ rule under s. 16(10). These directives, one discretionary and the other mandatory, reflect the use of language to: impart ideological meanings; direct attitudes; inform cognitive processes; and achieve socially desired outcomes (van Dijk, 2009). In the first instance, the discretionary “may” directs the judiciary away from making custody orders at first instance as a matter of course which have, since the late nineteenth century, sedimented the custodial status quo at the time of separation most often in the mother’s favour. In so doing, ‘equal’ entitlement by either father or mother to custody is enhanced.

As discussed in Chapter Six, the current practice of making no *custody* orders, encouraged under this section, is particularly problematic for abused women. In the second instance, the mandatory directive reinforces de facto joint custody, or something closely resembling joint custody, even if the legislators were reluctant to expressly include it. Language usage, therefore, just as it empowers the judiciary, disempowers those who appear before the courts. Parties are rarely imbued with power before the law – when ‘shall’ is directed at them, it is in the nature of an obligation to submit – to file a document, meet a limitation period, or complete a Record. Parties are not proactive, as are judges, but submissive; they ‘plead’, or ‘submit’ or ‘request’ invariably, ‘with respect’. Judges, on the other hand, ‘order’, ‘adjudge’, ‘determine’, ‘allow’, ‘do not allow’, ‘dismiss’, ‘adjourn’, or ‘deny’ – these words denote powerful acts. Language usage can also affect the import of actions; usage of the term ‘intimate partner violence’ de-genders male violence against women in intimate relationships. So too, has the introduction of the term ‘domestic dispute’ in legal proceedings minimized and marginalized violent acts perpetrated by men against their female intimates. ‘Dispute’ alludes to the private nature of domestic violence and abuse, thereby effectively releasing social responsibility from considering violent and abusive acts between spouses through the use of language (Langer, 1995).

Chapter One

1. For the purposes of this study, the most recent statistical data concerning domestic violence in Canada was released in 2013 by Statistics Canada and consists of a series of research studies conducted on the 2009 General Social Survey (GSS). The General Social Survey (GSS) on victimization is a sample survey, conducted every five years, of Canadians aged fifteen years and older. It excludes residents in institutions (prisons, long-term care facilities), individuals unable to speak English or French, and households without landlines or only cell phones. One component of the survey interviews individuals on their experiences of victimization over the previous twelve-month period. Eight offence types are captured, three of which are violent offences. The incidents are examined along a range of

socio-demographic characteristics of victims, providing twelve-month estimates of the prevalence of self-reported violent incidents against women, which are then expressed as a rate of incidents per 1,000 of the population. Since 1999, the GSS on victimization has contained a module on spousal violence. Subjects who had contact with a spouse within five years prior to the interview are asked a series of questions relating to violence by their current or previous intimate partners. Twelve month and five year estimates of spousal violence are then produced (Sinha, 2013).

- .2. In Canada, there are several types of shelters available for women leaving abusive relationships. The most prevalent type is the “transition home/shelter/first-stage emergency housing” offering short-term to moderate (one day to eleven weeks) secure housing for women with or without children. “Second stage” housing offers long-term (three to twelve months) secure housing with support and referral services to assist women while they seek permanent housing. “Women’s emergency centre/shelter” provides short-term (one to three days) respite housing for a wide range of the population, not just abused women. A “safe home network” is a network of private homes located in rural or remote areas where no formal shelters exist, which offer short-term (one to three days) emergency housing for women. “Other” refers to other types of residential facilities for abused women with or without children, not otherwise classified. In Ontario, these facilities include family resource centres and other types of shelters such as those offered by the YWCA. These services may not be exclusive to abused women (Burczycka & Cotter, 2010).
3. Reggie Fleming, a former National Hockey League, was the first hockey player to be diagnosed with chronic traumatic encephalopathy, a degenerative brain disorder, as a consequence of repeated blows to the head. He died at the age of seventy-three in 2009 (CBCSports/NHL, Dec. 18,2009). Bob Probert was another professional hockey player and noted ‘enforcer’. He died on July 5, 2010, having suffered a heart attack. His family donated his brain to the Sports Legacy Institute of Boston University, where investigations revealed evidence of chronic traumatic encephalopathy (Wikipedia, June 13, 2013). Rick Martin, another professional hockey player, died in March, 2011 from hypertensive heart disease. However, a post-mortem examination of his brain also revealed chronic traumatic encephalopathy; what was “alarming” about the presence of this disease in Mr. Martin’s brain was that he was not an on-ice brawler, and had only had one known concussion in his life – in 1978, when he hit his head on the ice surface during practice, was knocked unconscious and went into convulsions. It has been suggested that his brain disease may have been caused merely by the “jostling” his brain experienced during the course of play (CBCNews, Oct. 5, 2010). Derek Boogaard was a professional hockey player who was celebrated for being an ‘enforcer’. He died on May 13, 2011, aged 28, from an accidental drug and alcohol overdose while recovering from a concussion. A post-mortem examination of his brain revealed that he had suffered from chronic traumatic encephalopathy. His family filed a lawsuit against the National Hockey League in May, 2013 (CBCSports/NHL, May 12, 2013).
4. Of the total estimated costs of domestic violence in 2009 to Canadian society of \$7,420,301,324, \$4,839,873,271 was attributed to violence against women, and \$2,580,327,603 attributed to violence against men. The negative impact of domestic violence on children was estimated to cost \$235,241,890, including medical costs, missed school days, lost future income and delinquent acts against property. Further, the total estimated costs of domestic violence in Canada also included \$32,066,911 attributed to the criminal justice system, and \$225,117,826 attributed to the civil

justice system (Zhang et al, 2012:xv-xvi).

5. Per Dr. Brigitte Kitchen on innumerable occasions.
6. Personal communication with a member of the Ontario Superior Court bench in 2010. In this discussion, I was advised that some members of the family court bench were considering making recommendations to the Rules Committee that would have created a separate set of family law rules directed at litigants from identified cultural communities that, in the opinion of the bench, condoned, if not promoted gender inequality. I was told that the judges' experiences with male litigants from those communities convinced them that these litigants did not respond to the current *Family Law Rules* promoting negotiated settlements because they refused to settle any legal disputes with their wives and, instead, sought judicial orders. The judges attributed the male litigants' refusal to negotiate as an indicator of culturally prescribed gender inequality that could not be overcome and was unreasonably using up court time and resources. Accordingly, the judges intended to recommend that, in these cases, the conferences set out in the Family Law Rules be dispensed with, and the cases be sent directly to trial if it appeared that settlement negotiations would fail. It did not appear from my conversation with this judge that she or her peers had ever considered that creating a separate set of procedural rules to be applied on the basis of ethnic or cultural difference, subjectively identified, would be contrary to the *Charter*, and accord to one set of women 'of difference' deemed subject to gender inequality a different form of justice than that accorded to other women who might also be affected by gender inequality, such as abused women, generally. Nor was there any recognition that treating members of ethnic and/or cultural communities 'of difference', either male or female, the same based on their perceived difference homogenized individual experiences which, itself, was oppressive, marginalizing and discriminatory. Nor was there any indication that the judges had created a set of criteria with which to identify the communities that would be subject to these other rules, or that any such set of criteria would be considered anything other than discriminatory. These recommendations, at best, appeared ill-conceived and untenable at law, but, perhaps, reflect the degree of frustration experienced by the family court judiciary when confronted with what they believe are indicators of cultural 'difference'. See Note 5, Chapter Six.
7. A study conducted between November, 2001 and March, 2003, in which 64 women who were being, or had been, abused by their male partners were interviewed at length about their involvement in the Ontario Works and Ontario Disability Support Programmes (Mosher, et al, 2004). Of these participants, 38 (60 per cent) were immigrants of colour. As well, questionnaires were mailed to all area administrators of Ontario Works (48), 35 of which were returned (73 per cent). Mosher, et al (2004), found that women who flee abusive relationships and turn to welfare for refuge and support usually find neither. "Women's experiences of welfare are often profoundly negative ... For many the experience of welfare is like another abusive relationship" (Mosher, et al, 2004: v). Virtually all the participants reported that the amount of money they received from social assistance was totally inadequate to meet their basic needs, with all, or nearly all, of their monthly allowance being put toward shelter costs. Of the 64 women interviewed: 9 remained in abusive relationships because they knew whatever they would receive from social assistance would be inadequate; 7 returned to abusive relationships when they could no longer survive on welfare; and 6 (representing one-third of all survivor participants), contemplated returning to their abusers (Mosher, et al, 2004).

Chapter Two

1. Mill acknowledged that *The Subjection of Women* was co-authored by his wife, Harriet Taylor Mill, whose 1851 essay, *The Enfranchisement of Women*, undoubtedly influenced him (Fawcett, 1912:xviii).

2. ... the wife is the actual bond-servant of her husband ... She vows a life-long obedience to him at the altar, and is held to it all through her life by law ... She can do no act whatever but by his permission, at least tacit. She can acquire no property but for him; the moment it becomes hers, even if by inheritance, it becomes *ipso facto* his ... The two are called 'one person in law', for the purpose of inferring that whatever is hers is his, but the parallel inference is never drawn that whatever is his is hers; the maxim is not applied against the man, except to make him responsible to third parties for her acts, as a master is for the acts of his slaves or his cattle ... however brutal a tyrant she may unfortunately be chained to – through she knows he may hate her, though it may be his daily pleasure to torture her, and though it may be impossible for her not to loathe him – he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations ... [regarding children] They are by law *his* children. He alone has any legal rights over them. Not one act can she do towards or in relation to them, except by delegation from him. Even after he is dead, she is not their legal guardians ... This is her legal state. If she leaves her husband, she can take nothing with her, neither her children nor anything that is rightfully her own. If he chooses, he can compel her to return, by law, or by physical force; or he may content himself with seizing for his own use anything that she may earn, or which may be given to her by her relations ... Surely if a woman is denied any lot in life but that of being the personal body-servant of a despot ... since all in her life depends upon her obtaining a good master, she should be allowed to change again and again until she finds one (Mill, 1960:463-464).

3. Coverture was defined by the legal authority of its day as follows:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything (Blackstone, 1979:433).

The concept of coverture was not abolished in Ontario until 1975, and “still haunts the law of both Britain and the United States” (Shanley, 1999:21), and, I would add, Canada.

4. This scenario describes the lives of middle and upper class women; the lives of women of the lower classes were considerably different. The underlying premise of coverture and its attendant property laws that women were incapable of providing for their own subsistence stood in stark contrast to the realities of the lives of women in the lower classes during the same period. Poor women had no dower interests with which to be concerned. The costs of obtaining a divorce were prohibitive for all but the monied classes, hence marital breakdown

amongst the lower classes usually took the form of desertion. Without a decree of divorce, deserted married women were not free to legally marry, and any subsequent relationships were considered immoral. The immorality of the lower classes was of particular concern to members of the upper classes, for whom the impoverished, single mothers and their children, in particular, were considered threats to social stasis (Chunn, 1992).

5. Allegations of imprisonment were advanced in the common law court of King's Bench by advocates of women confined to insane asylums by their husbands. Upon the grant of an application for a writ of *habeas corpus ad subjiciendum*, the wife would be brought before the court for an adjudication of the reasonableness of the grounds for her confinement (Foyster, 2005). It is interesting to note the lower standard of proof allowed to support the confinement of women by their husbands – one of 'reasonableness'.
6. The peccadilloes of Henry VIII in the sixteenth century necessitated the promulgation of laws governing separation and divorce, the first of which created two main grounds for annulling marriage: civil grounds, consisting of infancy, lack of reason, lack of free consent, or a previous marriage; and canonical grounds, which included disabilities such as impotence, consanguinity and affinity (Arnup, 2001).
7. The grounds that would preclude a woman from securing a divorce under the *Marriage and Divorce Act, 1952* included her misconduct on the basis of: adultery; cruelty toward her husband; willful neglect or misconduct; which conduct to the adultery; desertion or separation before the adultery complained of and without reasonable excuse; delay in presenting or prosecuting her petition; connivance, condonation, or collusion with respect to her husband's adultery (s. 5).
8. Through a series of *Married Women's Property Acts* (1872; 1884; 1887, 1927 and 1970), women's entitlement to own and manage their property was extended; a married woman was to be treated as a *feme sole* regarding her own property after 1877; the role of the husband as trustee over his wife's estate was abolished in 1884; and women were deemed capable of acquiring, holding and disposing of any real or personal property that they acquired through estate, deed or otherwise (except through marriage) without interference from a trustee, could enter into contracts, and sue and be sued in their own names. Pursuant to the 1884 *Act*, married women could keep for themselves any earnings acquired through employment, trade or occupation free and clear of any proprietary interests of their husbands. Expressly excluded from coverture as a consequence of the *Act* was any real or personal property a wife may have owned before marriage acquired by inheritance, devise, gift or intestacy or in any other way after marriage. Mere registration of title in the wife's name alone was considered *prima facie* evidence that the property in question was hers.

Under the *Married Women's Property Act, 1884*, a woman living apart from her husband on the basis of cruelty or other cause, which by law justified her leaving him was entitled to "support". If circumstances existed by which her entitlement to her property might be compromised, for example, if he were a "lunatic", imprisoned, habitually drunk or profligate, or neglected, refused to support, or abandoned his family, a woman was entitled to an order of protection of her proprietary interests, notwithstanding coverture. The *Act* also spoke to the lower classes; working women would henceforth be allowed to keep for themselves their wages from employment. These sections reflect the reality of women's lives in the nineteenth century (Chambers, 1997).

9. The inability of legislation to protect women from their husbands' financial improvidence inspired the judiciary to engage in creative law-making that identified omissions in existing legislation or inequities in common law that law-makers were eventually required to address. The equitable law of trusts regarding marital property provides one example. Until 1884, married women in Ontario were deemed incapable of managing equitable property held in their names without benefit of a trustee (Arnup, 2001). However, in certain instances, a father conveyed to his daughter an interest in property by way of bonds, which interest was intended to survive her marriage and the automatic vesting of the her legal proprietary interests in her husband under coverture. Courts of Chancery, in turn, were prepared to perfect and uphold these otherwise legally 'imperfect' dispositions of property by treating them as trusts which could be enforced in equity by a trustee, other than the husband, appointed by the court on the woman's behalf (Pearlston, 2000). This kind of 'creative adjudication' identified errors and omission in legislation that could be remedied through amendment; the role of the husband as trustee over his wife's estate was abolished in 1884 with passage of the *Married Women's Property Act*.
10. Married women, deserted by their husbands, could bring summary applications for support under the *Deserted Wives' Maintenance Act*, 1888, and its successor legislation. Those who had been deserted by their husbands, or had left their husbands "because of repeated assaults or other acts of cruelty", or because of his refusal to supply her with food or other necessities of life, could claim support – but only if she remained chaste both before the application, and *after* the order were made. A woman collecting maintenance found to have committed adultery would be disqualified from any further claim of maintenance (s. 5). An applicant would be denied a maintenance order if it was deemed that she had left her husband "voluntarily", and regardless of the husband's ability to pay. Accordingly, women who left their husbands (as opposed to women whose husbands left them) had to prove that they had left the marriage for fear of their own safety; this stipulation echoed the English common law requirement of 'extreme cruelty' as a ground for divorce.
- Later legislation included: the *Married Women (Maintenance in the Case of Desertion) Act*, 1924, which allowed a summary procedure for maintenance applications and authority to enforce the order with criminal sanctions (Chunn, 1992); the *Deserted Wives' and Children's Maintenance Act*, which persisted, as amended, until 1975; the *Parents Maintenance Act*; and the *Married Women's Property Act*, all enacted in 1927.
11. The *Infants Act*, 1877 allowed the mother to make application for custody of her infant(s) "having regard to the welfare of the infant, the conduct of the parents, and to the wishes as well of the mother as to the father" (s.1). Mothers who were found to have committed adultery (but not fathers) were precluded from obtaining a custody order. The *Infants Act* of 1927 expanded the entitlement to make application for custody orders to the father as well as the mother (the erosion of the paternal prerogative over children being well concretized by this time), and allowed for access orders to be made on application of either parent. Any decisions regarding the child's 'welfare', and the "conduct" of the parents would require the exercise of judicial discretion, overtly recognized in the 1927 legislation. "In questions relating to the custody, control and education of the infant, the rules of equity shall prevail" (s. 3). Over time, a series of presumptions were established at common law to assist judges in making these determinations, and are discussed further in the next chapter.
- Further, under the 1927 *Infants Act* the court could order maintenance of an infant to be paid by the father having regard to "the pecuniary circumstances of the father" (s. 2).

12. The *Children's Protection Act*, 1888, represented the first time provincial legislation afforded juvenile offenders different treatment from adult offenders. The federal *Juvenile Delinquents Act* of 1908 established the first specialized children's court in Canada, thereby expanding the jurisdiction of the lower court, which assumed jurisdiction under the Act, and further, enhancing the powers of social agencies. The Act increased the number of children who were potentially subject to it, as well as the number of adults who could be charged with neglect. The Juvenile Court incorporated non-legal personnel and informal, inquisitorial procedures in cases of juvenile deviance and or dependency, reflecting its roots in the social reform movement of the day (Chunn, 1992). 'Treatment', rather than the punishment of delinquent children necessarily required examining and remediating the failings of their single and impoverished mothers in providing a suitable home and nurturing upbringing (Stewart, 1971). Reliance upon psychiatry and, later, psychology by Juvenile Court judges for direction in the treatment of wayward youth sedimented the 'psy' sciences in family law, where they remain the pre-eminent 'scientific' resource in child custody and access disputes.
13. Established in 1913, the specialized 'women's court' was given jurisdiction over domestic relations and morals cases, and abandoned women and their children sought legal recourse against their irresponsible husbands and fathers (Chunn, 1982; Bottomley, 1985; Stewart, 1971). The early incarnations of the 'family court', later become Magistrates Court, then the Provincial Court (Family Division), and currently the Ontario Court of Justice.
14. Much has been written about the changing roles of men and women in society during the latter quarter of the twentieth century, particularly the advent of gender equality discourse in family law (Amyot, 2010; Collier & Sheldon, 2006). The prevalence of divorce and increased participation of women in the workforce have been cited as responsible for the "fragmentation of fatherhood" (Collier & Sheldon, 2006:10), or diminution of the role of men in the lives of their children – akin to a kind of social emasculation. Amyot has suggested that "changes to existing family structures, most spectacularly the increase in the divorce rate, have upset the normative pattern of family life that many men had come to expect" (2010:31). However, I am not persuaded that such alleged social seismic shifts have occurred in the nature of intimate relationships that could have resulted in the realities of family law today. It should come as no surprise that the fathers' rights advocates lobbied (and continue to lobby) for fathers' rights outside of marriage and after divorce rather than for greater fathers' 'rights' to parent in the intact family (Drakich, 1989). Research concerned with examining and evaluating change in fathers' participation in contemporary family life has found minimal change from the levels historically associated with fatherhood, with mothers still discharging the preponderance of responsibilities (Drakich, 1989).
15. The issuance of a divorce petition, for example, could be frustrated by the spouse, whose conduct constituted the grounds, by his (or her) 'reconciling' for longer than ninety days with the aggrieved spouse within the three-year period of separation establishing that ground, and thereafter resuming the offensive conduct. This course of action frustrated the basis of the petitioner's claim, and she (or he) was thus required to 'reset the clock' on the separation period.
16. See *Murdoch v Murdoch* (1975).
17. The Preamble of the *FLRA 1978* satisfied the requirements set out in s. 8 of the *Interpretation Act* of the period: "[t]he preamble of an Act shall be deemed a part thereof

and is intended to assist in explaining the purport and object of the Act”. The current *Legislation Act* is similar: “[a] preamble to a new Act is part of that Act, and may be used to help explain its purpose” (s. 69.1). To the extent that statutory preambles are rare, the contents of this Preamble was particularly noteworthy, inasmuch as it identified the fundamental changes having taken place within marriage under a new social order of equality.

18. The following subsections of s. 18(5) of the *FLRA 1978* appear to be directed specifically at women’s entitlements: (a) the needs of the dependant having regard to the standard of living enjoyed during cohabitation – women usually earned less than men, held lower status or part-time jobs, or were not employed during marriage, thus were likely unable to afford the standard of living they enjoyed during marriage; (i), (m), and (n) spoke directly to the responsibilities of child care (more often than not, shouldered by women) as a negative correlate in the attainment of financial self-sufficiency; and (p) obliquely acknowledged the (then) newly recognized phenomenon of the feminization of poverty (see Chapter One) by promoting the ex-spouse over “public money” as the preferred payor of spousal and/or child support. It could be argued that these legislative reforms were directed at relieving the public purse from shouldering the financial burden of sustaining single mothers and their children, and redirecting it to husbands and fathers, where it was deemed to belong (Boyd & Young, 2002).
19. See Chapter Three.
20. While the provisions governing spousal support appear to defy the promotion of gender neutrality, the circumstances under which family assets could be divided unequally under s. 4(4) of the *FLRA 1978* were decidedly gender-neutral: pursuant to the terms of an agreement; having regard to the length of cohabitation, duration of the period of separation; the date of acquisition of the property; whether the property was acquired by inheritance or gift; and “any other circumstance”.
21. Non family property was exempt from equal division, except in certain circumstances, including where a spouse (usually the wife) had assumed child care and household management responsibilities that allowed the other spouse (the husband) to “acquire, manage, maintain, operate or improve property that is not a family asset” (ss.7(6)(a) and (b)). The *Act* thus ascribed value to ‘women’s work’, hitherto unpaid and deemed valueless. These sections also recognized the reality of the lives of most married women, whose assumption of the majority (if not all) duties of housework and child care, regardless of their being employed outside the home, relieved their husbands of those responsibilities and freed them to pursue paid employment.
Further, the *Act* referred to “a husband or wife” when dealing with any interest in property acquired, maintained, managed, improved or operated by him or her by reason of the relationship of husband and wife, “or that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances”. This section referred directly to the *Murdoch* decision which hastened passage of the legislation in the first place.
22. The type of partnership arrangement contemplated by the *FLRA 1978* and *FLA* mirrors that reflected in the mutual responsibilities, duties and obligations assumed by partners in equity, common law, and under the *Partnerships Act*, wherein “there is a general duty of partners to observe good faith. This also extends to persons who have dissolved their partnerships but

who have not completely wound up and settled the partnership affairs” (Coombs, 2013:unpaginated).

The Preamble establishes, I suggest, a preliminary and rebuttable presumption of partnership in every marriage. Any fundamental breach of this relationship through conduct deemed in partnership law (and pursuant to the *Partnerships Act*) to constitute a repudiation of the relationship (such as woman abuse) should rebut that presumption *ab initio*. Given that the sum total of limitations the *Acts* place upon the parties’ ability to contract freely and as they deem fit – a fundamental precept of contract law (Waddams, 2010) – are creatures of statute, they represent legislative restrictions upon the otherwise unfettered right of the parties, in law, to contract freely. Upon the rebuttal of the preliminary presumption of partnership by reason of woman abuse (or other malfeasant conduct), these legislative restrictions, such as the mutual obligations of support, and all limitation upon the determination of entitlements (custody and access and property division) are rendered inapplicable.

If marriage is, indeed, a partnership, then the law of partnership should apply in toto to marriage. Unfortunately, unfettered judicial discretion has allowed judges to pick and choose those aspects of commercial legal doctrine that may or may not apply in the context of family law, described in Chapter Three.

To the best of my knowledge, no court has considered the establishment of the marital partnership to be a condition precedent to the application of the *FLRA 1978* or *FLA*. In contrast, Killeen, J, in *Linton v Linton*, described the partnership contemplated by the *FLA* as “not a full economic partnership, but only a form of partnership” in order to defeat the wife’s claim for an equalization payment under that *Act*.

23. Historically, the family was

the domain of non-contract, female in its distinctive occupancy and feminine in its personal rather than impersonal mode, affective rather than instrumental – and, for that reason, also associated with forms of power, archaic or/and brutal, incompatible with contractual presumptions of equality. As Unger, though not exactly a feminist, puts it, the family appears as both ‘too good’ and ‘too bad’ to be included in the realm of contract (Brown, 1996:6).

Thus, the law refused to recognize that the marital relationship was, in essence, a contractual one (thereby denying to women basic rights of citizenship) with the rationale that the operation of public laws had no place in the private sphere (Taub & Schneider, 1998). What inherent contradiction the law failed to recognize is that the legal and equitable relief afforded to parties to a marriage, like those of business associates, crystallized upon dissolution of their relationship (Taub & Schneider, 1998). The legitimization, through inclusion in the *FLRA 1978*, of the relevance of contract law to the family corrected the long-standing misapprehension of the point at which the law is invoked in family relations. Family members, like business associates, could establish the terms of their contractual relationship and would be expected to forego legal claims against each other during the life of their relationship, until such time as they (or one of them was) were convinced that harmonious relations were no longer possible. ‘Consideration’ offered by ‘women’s work’ was elevated from the realm of the invisible (and worthless, or, at best, unremarkable or nothing more than was expected) to that of valuable consideration in contractual terms – probably because men were now expected to engage in these activities, as well. Like busi-

ness associates, spouses had no legal right to unilaterally and without cause frustrate or resile from the marriage contract and advance claims during the life of the relationship. Hence, no longer could domestic relations be relegated to the “domains of affection and subjectivity” (Gooderich, 1996:22).

24. The number of divorces in Canada had risen exponentially since 1968, marriages were ending earlier than previous, Canadians were divorcing at a younger age than before, less than 1% of divorce applications were being rejected by the court, and only one in twenty divorce cases actually went to trial (Minister of Justice, 1984).
25. The only time domestic violence is referred to (obliquely) in the brief is in the recommendation that the government increase its funding for the establishment of battered women’s shelters, particularly in rural areas (Ontario Status of Women Council, 1983).
26. See Chapters Three and Six.
27. The ‘rights’ model adopted by both women’s and men’s rights groups envisions not just a male norm, but a male norm the ‘rights’ of which are those afforded only to a particular class, race, ethnicity and socially located category of men. This norm excludes poor men, men of colour, disabled men, racialized men and older men, for whom the intersection of these various sites of oppression subverts their ability to achieve equality (Jhappan, 2009:231).
28. See the Introduction and Chapter Three.
29. According to Archibald, J of the Ontario Superior Court, the courts, *in practice*, limit the protection afforded by s.7 of the *Charter* to accused persons in their interactions with federal institutions, such as the legal system and penal system. The right set out in s. 7 is not considered to apply to victims of criminal offences.
30. An examination of the criminal justice system and its response to battered women lies outside the scope of this study, as does a comparative analysis of the criminal and civil justice systems in this regard. Suffice it to say that abused women can find themselves embroiled in both the civil and criminal justice systems, courtesy of their abusers. The gendered nature of criminal law – which the women’s rights movement fought to impose with respect to crimes against women – stands in stark contrast to the ‘ungendering’ of family law.

One of the ironies of social change in Canada has been that, as women’s advocates were fighting for a better social and legal response to wife assault in criminal court, the family law system was becoming more gender-neutral. Many hard won-cases – like mandatory arrest policies where the police arrest the man whether or not the women want them to – which have made a positive difference for many battered women, are effectively undermined by the male bias women encounter when they are separating from the abuser, and must deal with the family law system (Taylor et al, 1996:27).

31. Examining the results of contested custody applications during the latter half of the twentieth century is illuminating. Far from exposing any ongoing maternal presumption, the cases reveal that, increasingly, fathers have been regarded by the courts at least as favourably as mothers. Boyd and Young (2002) found that Statistics Canada reported that, during the 1970s, when father/husbands petitioned for divorce, they had a 43% chance of obtaining custody. Reports from *The Daily* from 1986 to 2004 also challenge the allegation of fathers' rights groups of a judicial 'maternal presumption' in custody disputes. In 1986, Statistics Canada reported that 15% of fathers, and 75.8% of mothers were awarded custody in disputed claims (Statistics Canada, *The Daily*, 2002). In 1999, *The Daily* of May 18th reported that mothers were awarded custody in 61.2% of disputed cases, and fathers 11% of cases, with joint custody awards constituting 27.6% of determinations (Statistics Canada, *The Daily*, 1999). By 2000, 53.5% of mothers were awarded custody of their children in disputed claims, but 37.2% of cases resulted in joint custody awards, with fathers receiving sole custody in 9.1% of cases (Statistics Canada, *The Daily*, 2002). In 2002, for the first time, mothers were awarded sole custody of their children in less than 50% of contested cases; 49.5% of mothers were given sole custody, 8.5% of fathers obtained sole custody, and 41.8% of parents were subject to joint custody awards (Statistics Canada, *The Daily*, 2004).
32. See Chapter Three.
33. The judicial definition of 'joint custody' originally clearly differentiated between actual physical, or *de facto* custody (read as daily care giving and child-rearing, including the provision of: food; a clean environment; clean and well maintained clothing; transportation; emotional support; assistance with homework; arranging extra-curricular activities and play dates; making doctors' visits; and the myriad of other chores and responsibilities associated with taking care of children regularly assumed by the custodial parent in our society), and the 'joint legal custody' enjoyed by the parent who does not have *de facto* custody. In the case of the latter, 'joint legal custody' empowers the 'joint legal custodian' to 'share' the 'co-decision-making power' exercised by the *de facto* custodian, thereby, it is assumed, encouraging greater contact and involvement of the 'joint legal custodian' with the children of the marriage as well as on-going financial support (Krell, 1983).
34. The sub-title in the *DA 1985*, "Joint Custody or Access", identifying s. 16(4), is the only reference to joint custody in the statute. However, the *Cromwell Report* recommends the adoption of a presumption of joint custody.
35. Amendments to the *Divorce Act, 1985* were announced on December 16, 2002 as Bill C-22. In these amendments, the Minister of Justice sought to "establish a middle ground" between the extreme positions of fathers' rights lobbyists and women's rights advocates (Cross, 2002). The amendments proposed replacing "custody" with "parental responsibility". It did not introduce the term or concept of "shared parenting", nor mandatory mediation (although it did embody a preference for alternative dispute resolution and mediation). These recommendations were promoted by fathers' rights groups. The "maximum contact" principle was to be replaced with that of "parenting responsibility" and "parenting time", the latter of which was viewed as potentially very beneficial for women (Cross, 2002). The "best interests" test was to be expanded to include the history of care giving (benefitting primary caregivers), the ability of each parent to communicate and cooperate, and consideration of other court orders or criminal convictions. Further, a definition of family violence was to be added, entirely non-gendered and focused on physical harm. Although the definition did not

specifically refer to women, victims included “the child or another family member”. The recommendations did not acknowledge that “the interests and safety of children are tied to those of their mothers” (Cross, 2002). In all, the recommended amendments were perceived as generally positive in promoting the interests of women, particularly abused women. However, the amendments were never passed.

36. See Chapter Three.
37. Section 16(9) of the *DA 1985* has never been repealed. “Strictly speaking, principles of constitutional law preclude the courts from invoking any provincial statutory criteria when interpreting and applying a federal statute” (Payne, 1983:30). The *DA 1985* contains no guidelines (“factors”) directing custody and access decisions (as it does for support applications), save and except s. 16(9) “past conduct of any person unless the conduct is relevant to the ability to that person to act as a parent of a child”. Hence we are left with a serious conflict between the federal and provincial legislation regarding the relevance of domestic violence to claims for custody and/or access advanced by perpetrators in family law proceedings. Query if these differences in language between the *DA 1985* and *CLRA* as amended in 2006 suggest that the courts are to apply fundamentally different criteria in determining custody and access in divorce proceedings from those brought under the provincial legislation (Payne, 1983). I suggest in the next chapter that the courts have dealt with this conundrum by, even in the most egregious of cases of woman abuse, ignoring such conduct altogether, regardless of the nature of the proceedings in which the applications have been brought, or, equally as egregious, failing or refusing to make a custody order of any kind. That the courts ignore woman abuse in custody and access claims is untenable, given the requirement mandated by s. 21(2) of the *CLRA* (pursuant to the *Family Statute Law Amendment Act, 2009*), which requires anyone requesting custody of or access to a child file a “parenting plan” with the court and an affidavit setting out the applicant’s current or previous involvement in family law proceedings, including child protection or criminal proceedings. Information is also required relevant to ss. 24(2), (3) and (4) of the *CLRA* (having to do with domestic violence and abuse). I suggest that the judges’ failure to adequately investigate the ability of parties appearing before them in custody and access applications “to act as a parent” flies in the face of the seriousness with which the legislators intended applicant (and judges) to take custody and access proceedings, as evidenced by these sections of the *CLRA*.
38. See Chapters Three and Five.
39. Kondo (1978) has suggested that the application of provisions such as those found in the *DA 1985*, s. 15.2(5) and the *FLA 1990*, s. 33(10) are of limited importance and, being “syntactically isolated” from the “main list” of criteria for making support awards, the legislators intended that conduct be the last concern in deliberations. However, she also pointed out that, as the conduct subsections follow directly after the lists of criteria for awarding spousal support, they govern the entire list and reinforce the court’s discretionary powers to make these awards (Kondo, 1978). Interestingly, the Ontario Status of Women Council recommended that ‘bad conduct’ be excluded altogether from relevant consideration in determinations of entitlement to or quantum of spousal support (Ontario Status of Women Council, 1983), so sedimented is its association with the *dum casta* provisions of long-repealed statutes. Indeed, domestic violence and abuse are singularly absent from both statute and judicial decision-making with regarding entitlement to spousal support.

40. Statistics Canada recently reported that, while issues of custody and access figured prominently in active divorce cases in Ontario in 2008/2009, by far the greatest percentage of cases involved disputes over support claims (75%), with at least one-quarter of all divorce cases involving issues of custody, access and support simultaneously (Kelly, 2010). Despite the expansion of ‘fathers’ rights’ to custody and access since passage of the *DA 1985* in order to encourage compliance from fathers obligated to pay child support, it would appear that this policy has failed to achieve much of its objective. The response of the legislators has been to invigorate government collection agencies and promote the enforcement of support orders, particularly child support orders, in order to relieve the social welfare rolls of single mothers and their children – those for whom the path to presumed self-sufficiency under the *DA 1985* and *FLA* has been, and continues to be, unrealistic (Bourque, 1995). However, as of March 31, 2012, of the 89,000 support cases filed with government collection agencies in four provinces and the territories (excluding Ontario), children constituted the only beneficiaries in 93% of cases. Of these cases, 96% of payors were fathers (Steeves, 2012).
41. The “social responsibility model” of spousal support (Engel, 1993:8; Eichler, 1990-1991) is characterized by three assumptions: 1) every adult is considered responsible for his or her own economic well-being, otherwise, the support obligation shifts to the state; 2) for an adult in need of care, it is the responsibility of the state to pay for the cost of care; and 3) the cost of raising children is shared by the father, the mother and the state, regardless of the marital status of the parents (Eichler, 1990-1991). The model presents a rationale for the diminution of importance of spousal support in current family law informed by the patriarchal discourse of ‘men’s rights’. This model nicely complements the conceptualization of marriage as a contractual arrangement between equal parties – a “joint venture” – in “purely private terms. The question is not what the supporting spouse owes society. The only question is what one spouse owes the other” (McLachlin, 1990:4). Eichler characterizes this approach as “neo-conservative, in so far as it points backwards rather than forwards, although in a different guise than we have had in the past” (1990-1991:69).
- Under this model, there is no greater obligation than that which exists between the spouses – that is, there is no obligation undertaken to ensure that a spouse does not become financially dependent upon the state. “In effect, the social responsibility model is endorsing a self-sufficiency model supplemented by a social safety net” (Engel, 1993:8).
- Eichler’s commentary is an interesting historical artifact. Written at a time of intense legislative change (the current incarnation, subject to amendments, of the *FLA* was passed in 1990), Eichler acknowledged that the statutory reform realized in the *Act* was directed to “reduce the impoverishment of women and children” (1990-1991:78). She prognosticated that the reforms would only assist a small percentage of women: those with family property to evaluate. Without assets and with income so low that one or both spouses will fall below the poverty line if divided, she recognized that the reforms would not solve the problem they were instituted to address. While she welcomed partial solutions, Eichler recognized their limitations, particularly the recognition that any support poor women received would reduce their social assistance payments, maintaining them in a deficit position.
42. Such behaviour is referred to in the case law, was observed during the Family Court Watch Pilot Project (See the Introduction), experienced by me in my capacity as a practising family litigator, and reported by both the survivor and judge participants here: see Chapters Five and Six.

43. The stated objectives of both the federal and provincial (Ontario) *Guidelines* are:
- to establish a fair standard of support for children that ensures that they benefit from the financial means of their parents, and in the case of divorce, from the financial means of both spouses after separation;
 - to reduce conflict and tension between parents or spouses by making the calculation of child support more objective;
 - to improve the efficiency of the legal process by giving courts, and parents and spouses, guidance in setting the levels of child support and encouraging settlement; and
 - to ensure consistent treatment of parents or spouses and their children who are in similar circumstances.

The federal and provincial *Guidelines* base liability for support on the payer's ability to pay, thereby establishing a 'means test' to determine child support (Robson, 2008). Section 8 of the *Guidelines* provides that , where each spouse or former spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each would otherwise pay if a child support order were sought against each of them (Payne & Payne, 2013). Where parents have split custody, and one parent cannot fulfill his/her child support obligation under the *Guidelines*, the other parent will be required to pay the full table amount (Payne & Payne, 2013)..

44. It is interesting to note that Rollie Thompson, in his study of applications to vary child support where 'second families' were involved found that '0 awards' (that is, no support awards) were granted upon application of the putative payer in more instances where the applicants were women than when they were men, although "[m]any of the hardship cases find fathers with similar low incomes, *although admittedly few with the responsibilities of a single parent*" (2001:242, my emphasis). Thompson went on to say, "in my view, there is a serious possibility of a gender bias affecting these child support awards, which require further investigation and more time to assess" (2001:242).
45. Part I of the *FLA*, entitled "Family Property" sets out the new regime: pursuant to s. 4(1), "net family property" is defined as "the value of all the property, except property described in subsection (2) that a spouse owns of the valuation date, after deducting the spouse's debts and liabilities and the net value of property, other than a matrimonial home, that the spouse owned on the date of the marriage. "Property" includes any interest, present or future, vested or contingent, in real or personal property, including the imputed value of that spouse's interest in a pension plan from the date of marriage to the valuation date. The definition of "valuation date" includes the date of separation, or the date the divorce is granted (ss. 4(1.1 and 1.2).
Section 5(1) mirrors the recommendations of the Ontario Status of Women Council regarding the distribution of property following marital breakdown: the spouse whose net family property is the lesser of the two net family properties (of the spouses) is entitled to one-half of the difference between them (equalization payment).

The purpose of an equalization payment is set out in s. 5(7):
to recognize that child care, household management, and
financial provision are the joint responsibilities of the spouses

and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

Section 5(6) of the *FLA*, setting out the circumstances when, in the court's opinion, "equalizing the net family properties would be unconscionable" are discussed in Chapter Three. Amendments to the *Act* in 2009 provided for the determination of the "imputed value of a pension plan entitlement for family law purposes" (s. 10.1), and for the immediate transfer of a lump sum payment from a pension plan in satisfaction of a spouse's interest in the plan (s. 10.1(3)).

46. See Chapter Three for judicial interpretation of s. 5(6) of the *FLA*.
47. McCallum (1994) is referring specifically to the decisions in *Caratun v Caratun*, in which MacKinlay, JA distinguished property from non-property; in this case, the husband's licence to practice dentistry. On appeal, MacKinlay, JA overturned the trial decision giving the wife \$30,000 as her interest in her husband's professional licence (that conferred the right to practice dentistry). Instead, she awarded the wife \$30,000 as lump sum compensatory support. The husband's dental practice was valued at \$379,965. The inability of the licence to be transferred was the basis for its low evaluation. If the value of the licence were based upon projected future earnings, an order requiring the payor husband to pay one-half of that value to the payee wife would, in the opinion of the court, preclude the payor from ever giving up his practice in favour of a new career, should he wish to do so in the future.

As pointed out by McCallum, "judges sometimes order [child] support payments that impose limits on the payor's lifestyle" (1994:204). By refusing to characterize a professional licence as family property, the court denied the wife any interest in her husband's projected future earnings from his practice, notwithstanding her assumption of all the child care and household responsibilities during the marriage. As well, the wife gave up a career of her own. One might imagine those cases where a payor spouse might be able to successfully reduce his professional income to '0' by valuation day, leaving nothing to divide, only to realize a stunning reversal of financial fortune following settlement or trial, all of which would accrue solely to him. Also, see Chapter Three.

48. The absence of definitions of the meaning of "debt" or "liability" in the *FLA* is problematic (Raphael, 1999). "Put simply, the easiest way for a propertied spouse to escape a marriage financially unscathed is to claim the value of the property owned is fully offset by debts and liabilities" (Raphael, 1999:386). Further, what will or not constitute "family property" has been a question of considerable judicial interpretation, sometimes resulting in definitions of the term which have been described as 'tortured'. While commercial law appears to have little difficulty in evaluating intangibles, this is not the case in the civil family justice system.

Raphael (1999) asserts that separated spouses should be regarded as creditors of one another regarding settlement of their financial affairs at the date of separation. She also notes that, whereas the property of a bankrupt immediately vests in his/her trustee, a propertied spouse continues to own his/her property until such time as the parties finalize their financial claims, either by agreement or court order. This allows a spouse to encumber or waste assets to the detriment of the other, subject to s. 5(6).

Further, “if necessary to avoid hardship” an equalization payment may, by court order, “be paid by instalments during a period not exceeding ten years or . . . all or part of the amount be delayed for a period not exceeding ten years” (s. 9(1)(b)). Relief from such an order, or an inquiry regarding the propertied spouse’s financial information (including, one presumes, the state of the property) can only be obtained upon further application, the costs of which would be necessarily born by the spouse who has yet to obtain any realization on the property. It would appear that the “hardship” attributed to the propertied spouse trumps that of the spouse whose entitlements have been delayed, if not frustrated, by the operation of this section, and whose lack of funds resulting from that very delay could preclude an application being brought to protect and preserve the property in question.

49. Raphael (1999) also draws an analogy between separated spouses and bankrupts. While a trustee in bankruptcy may apply to a court for an order that a bankrupt’s salary and wages be payable to the trustee “having regard to the family responsibilities and personal situation of the bankrupt” (at p. 383), the *FLA* does not identify salary and wages as ‘property’, nor does it specifically provide for salary and wages to be used to preserve property. Nor does the *FLA* identify an equalization payment as a vested interest in real or personal property of the payor spouse. See Chapter Three for further discussion.
50. Section 8 of the *FLA* states that “each party shall serve on the other and file with the court, in the manner and form prescribed by the rules of the court, a statement verified by oath or statutory declaration” a financial statement outlining the party’s property, debts and other liabilities as of the date of marriage, valuation date, and date of the statement, as well as the deductions the party claims under the definition of “net family property”, the exclusions claimed under subsection 4(2) (“excluded property”), and all property disposed of during the two years immediately preceding the making of the statement, or during the marriage, whichever is shorter.
51. The *Domestic Violence Protection Act* was introduced by the Harris government in 2000 but was never proclaimed. Impetus for the *Act* had come from agitation by feminist organizations after an unprecedented number of women in Ontario were attacked and/or murdered by their intimate partners or former intimate partners (Cross, 2001). The *Act* was to replace the provincial system of restraining orders and allow applicants to seek a protection order from the Family Court at any time whether or not criminal proceedings had been commenced against the perpetrator. Most importantly, the perpetrator was to be charged under the relevant provisions of the *Criminal Code* and not the *Provincial Offences Act*, reflecting the seriousness with which the legislature and the courts were to regard domestic violence. The *Act* was repealed, without much remonstrance by women’s organizations, by the provincial Liberals in 2009.
52. One of the survivor participants interviewed for this research study was successful in this regard – against her abusive son.
53. The Family Court, being part of the Ontario Court of Justice, has not been given jurisdiction over property or claims in tort, as has the Small Claims Court of Ontario. Accordingly, a tort claim cannot be initiated in the Family Court, but would have to be commenced in the Superior Court of Justice or the Small Claims Court, resulting in two separate actions, involving two sets of pleadings, double the demand made upon legal counsel (if retained at all), and greater legal expense.

54. The meaning of “discovered” is, itself, the subject of much judicial rumination. An exception to the limitation period set out in s. 4 is found and relates to “assaults and sexual assaults”:

10(1). The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

10(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

While it would appear that these sections speak specifically to situations of interspousal assault and sexual assault, and allow for extensions of the basic limitation period in those cases, whether or not s. 10 would apply would necessarily be a matter of judicial discretion in assessing the evidence adduced – in other words, a battered wife would have to prove her incompetence during cohabitation to be excused from bringing her claim in a timely fashion.

55. See Chapter Three.
56. In this regard, as well, family law is treated differently from other no-fault laws, including no-fault automobile insurance law, no-fault workers compensation law, and strict liability in tort law, all of which have incorporated a number of fault-based exceptions to their general no-fault framework for serious or egregious conduct (Swisher, 2001). The concept of ‘no-fault’ divorce has altered the context from merely one intended to facilitate divorce proceedings on the basis of marital separation to a blanket exemption from legal consequences for spousal misconduct. It is for this reason alone, as well as the consequences resulting therefrom that have effectively allowed abused women (and men) to be treated differently from other victims of tortious acts, the legislative abolition of the concept of marital ‘fault’ may be ill-conceived.

Chapter Three

1. For the purposes of this study, child welfare applications and proceedings brought under the *Youth Criminal Justice Act*, both of which lie within the purview of the OCJ, have been excluded.
2. Pursuant to Rule 1(2) of the *Family Law Rules*, the Rules apply to the Family Court of the SCJ, the SCJ and the OCJ. However, of importance to this study, Rule 39 (the case management rule) does not apply to the SCJ or the OCJ in Toronto or Brampton, neither of which has dedicated and specialized family judges (although certain judges do hear primarily family cases). It is ironic that the two largest municipalities in the province do not benefit from the preferred case management system for family law disputes. From the judge participants, court personnel and family lawyers to whom I have spoken, it does not appear that this will change anytime soon for a number of reasons. First, there is no political will to

institute a unified family court in these jurisdictions. Second, the impetus for change is determined to some extent by the proclivities of the regional senior judge (Colman, 2004). Third, there is great resistance for change emanating from the senior members of the family bar in Toronto, whose self-perception is tied to the Superior Court (per a judge participant). Fourth, at present, there are neither funds nor space for the establishment of centralized courts in these jurisdictions.

3. Ten “purposes” for case conferences are set out in Rule 17(4). Judges presiding over conferences may make orders, if appropriate, pursuant to Rule 17(8) for document disclosure, and, upon notice, for the preservation of assets, to preserve documents or property, for an accounting for the maintenance of health and medical coverage for the children or a party by the other, and for the continuation of child and spousal support. Further, any unopposed or consent order may be made, as well as, on consent, a referral of any issue for alternative dispute resolution.

Times set out in the *Rules* may also be lengthened only by order of the case management judge and not by the parties’ consent (Rule 39(3)), although cases may be “fast tracked upon application or consent (Rule 39(4)).

4. Martinson (2010) has identified various ways abusers manipulate the family justice system to further abuse their victims. The parties view each other with contempt and blame. Inflammatory language is used in pleadings, and facts are distorted. Friends and relatives are recruited to help “join in the mudslinging” (p. 182). Proceedings are delayed by changing or firing legal counsel late in the proceedings, filing materials late, coming to court late or being unprepared. Efforts are made to sabotage professional assessments by undermining their credibility or enlisting other professionals to counter the findings, and/or by refusing to cooperate. The police and child welfare agencies are involved without justification. There are unjustified and unsubstantiated complaints about opposing counsel and the judge to their respective professional disciplinary bodies. The media can be enlisted to support the ‘cause’. I would add that abusive men often bring motions *ex parte*, or on short notice, and/or repeated (and unnecessary) court applications when it is improper to do so, resulting in adjournments, further delay and increased legal costs. Seraphim has noted that the implication of the family law system by abusers in the perpetuation of their misconduct following marital separation has been termed “court harassment” by the B.C. Ministry of Women’s Equality (2010:467). Amongst the woman abusers identified in the case law review and those of my survivor participants, all of these techniques, and more, were employed.
5. Semple defines the “settlement mission” as

the informal and unregulated encouragement or pressure to settle that judges and other family justice system workers apply to litigants. It goes beyond the (accurate) expectation that most cases will settle; it is the active effort on the part of these workers to bring about this result. It is not necessarily accompanied by screening, triage, or power balancing ... the informal settlement mission is therefore potentially more dangerous than formal family mediation [for abused women] (2012:234).

There are certain underlying assumptions with respect to the promotion of mediation in cases of woman abuse, namely: that the abuse can be identified; the abused woman is

capable of volunteering to participate in the process; and the mediator can address any power imbalance between the parties through the exercise of his/her mediation skill and expertise in order to achieve the requisite equality in bargaining positions necessary to mediate (Pearson, 1997; Raitt, 1997; Landau, 1995; Benjamin & Irving, 1992). Mediation, as a mode of intervention, is expected to modify the power relation, resolve problems of physical and psychological violence, and bring about social adjustments in the family (Imbrogno & Imbrogno, 2000). However, most studies focusing on mediated outcomes in family law disputes in which woman abuse was present have concluded that mediation is not appropriate in those cases, nor do the results flowing from those mediations protect abused women and their children from the possibility of suffering further abuse (Johnson et al, 2005; Tishler, et al, 2004; Greatbatch & Dingwall, 1999; Mathis & Tanner, 1998; Raitt, 1997; Zorza, 1995-1996; Pagelow, 1993).

6. Justice Omatsu observed that

[middle- and upper-class judges'] lack of experience of the daily lives of working-class people ... deprive them of potentially relevant information on which to make impartial judgments ... Women judges ... are likely to be more sensitive to all aspects of situations involving sexual harassment and its effects than those who have never personally experienced harassment. People who have encountered racial or ethnic prejudice will be better able to identify its various manifestations than those who have not. To the extent that gender, class, race or ethnicity affect one's behaviour on the stand, direct experience will also help judges to interpret a witness's demeanor, for instance to assess credibility (Omatsu, 1997:7-8).

7. Historically, Canadian judges have tended to be over-represented by British and French ethnicities and be under-represented by members of the provincial bars who could not be so described. This is especially true in the older, more established provinces like Ontario and Québec, in which British and French populations settled longest and were better established, members of which groups had the financial resources to afford law school for their children and the political connections to secure judicial appointments (McCormick & Greene, 1990). Judges were found to come disproportionately from upper-class backgrounds, and be the children of lawyers. "Judges, like all elites, tend to be drawn more from the established sectors of society" (McCormick & Greene, 1990:66). That judges have been required to have well-established legal careers before being eligible to apply for the bench has meant that judges, again historically, have been well into their fifties by the time of their elevation; McCormick and Greene (1990) found that the average age of federally appointed judges in Canada was about sixty at the time of their study.

However, more recent studies of the educational attainment of first and second generation immigrant children in Canada have revealed that they do better in terms of educational attainment than do their native Canadian counterparts even after the effects of individual characteristics, such as their parents' educational attainment, are controlled for. Further, ethnic background has been found to have no significant effect on schooling (Hansen & Kučera, 2004). This success of first and second generation immigrant children in completing post-secondary education will necessarily impact the racial, ethnic, cultural, and

religious affiliation of students applying to law school, and, by extension, entering the legal profession and eventually applying to the bench. In a study of federal judicial appointments commissioned by *The Globe and Mail* in 2012, Makin found that, in the previous two and one-half years, the federal government had appointed one hundred new judges to the superior courts of the provinces of which 98% were white, the exceptions being two Métis judges appointed in British Columbia and Nova Scotia, respectively. Only in the territories, where three aboriginal judges had been appointed since 2009, had the federal judicial appointment process better reflected the community (Makin, 2012). “The lack of diversity among judges raises searching questions in a country where one in five citizens belongs to a visible minority and where many people can expect to see a bench that does not reflect them” (Makin, 2012:A1).

8. Assumptions advanced by proponents of judicial diversity can be challenged on the basis that they essentialize the differences distinguishing judicial candidates as ‘other’. Essentialism has been defined as “a belief in a true essence – that which is most irreducible, unchanging and therefore constitutive of a given person or thing” (Fuss, 1989:2). Essentialism can take many forms – gender essentialism or race essentialism, for example – but each form assumes the existence of a particular social hierarchy through which individual knowledge and experience of the world vary according to her/his position within that hierarchy (Jhappan, 2006). The individual’s experience of her/his difference is thereby homogenized in a construction of the other as a representation of that category of difference in which there is no room for intersectionality. A female judge, for example, will be assumed to empathize with female litigants, judges of colour with litigants of colour, and so on, because their experiences of their difference are the same. The fallacy of the argument is self-evident.
9. *R. v. Ewanchuk* (1998) concerned a charge of sexual assault against the defendant who was alleged to have sexually assaulted a young woman during the course of a job interview. The defendant had prior convictions for sexual assault. The complainant refused his advances, but the defendant persisted, stopping short of penetration. Throughout the assault, the complainant pleaded with the defendant to stop, but was afraid to communicate the extent of her fear to her attacker. At trial, the judge found the complainant to be a credible witness, but acquitted the accused upon the doctrine of ‘implied consent’ – the victim had not communicated by words, gestures or facial expressions that she was ‘frozen by a fear of force’.

At the appeal level, Chief Justice Catherine Fraser of the Alberta Court of Appeal rejected this defence, remarking that it denied women’s sexual autonomy as well as the *Charter’s* equality rights, and further found that the complainant had never given an express consent. However, Fraser, C.J. was the dissenting voice, and the appeal was denied. The Supreme Court of Canada reversed the lower courts, and registered a conviction, returning the case to the trial judge for sentencing.

The majority decision was written by Major, J, holding that the defence of implied consent was not available in cases of sexual assault; in this regard, the majority overturned the appeal on a legal technicality. L’Heureux-Dubé, J, however, with the concurrence of Gonthier, J, wrote a concurring opinion “in which she identified the case as rooted in women’s and children’s equality rights and critiqued the adoption of sexist ‘myths and stereotypes’ that portrayed women who said no to sexual advances as ‘really saying ‘yes,’ ‘try again,’ or ‘persuade me’” (Backhouse, 2003:170).

McClung, J, the trial judge, accused L'Heureux-Dubé, J of having a “feminist bias” and condemned her “graceless slide into personal invective”, suggesting that her “personal convictions ... delivered again from her judicial chair” might be responsible for the “disparate (and growing) number of male suicides being reported in the Province of Québec”. He was reprimanded by the Canadian Judicial Council (cited in Backhouse, 2003:170).

10. The almost immediate availability of a seemingly endless supply of judicial decisions through websites such as *Quicklaw* and *CanLII* obscures the fact that law reporting is, itself, a type of editing process; prior to the advent of computers, the contributors to and editors of legal reporting series such as the *Dominion Law Reports* or *Reports of Family Law* determined which judicial decisions would be reported and thereby contribute to the body of legal knowledge upon which the doctrine of *stare decisis* depends. The longer the list of precedents, the more conceptualized will be the concepts, and thus more legitimated and validated will be the decision (Chng, 2002).
11. Chng (2002) has identified three categories of indicators that impact how a judge interprets the cases which come before him/her. First, a judge is influenced by her/his unique set of individual characteristics – age, ethnicity, race, religion, values, social location, gender, personality, ideology, prejudices (silences) and politics. Second, a judge is influenced by socio-cultural factors – public opinion, history, politics, prevailing ideology and values. Third, a judge is impacted by institutional factors – the law itself, other judges, legal discourses, legal tradition and institutions and precedents.
12. Posner (2008) has identified four predominant “theories” of judicial behaviour. “Economic” theory “treats the judge as a rational, self-interested utility maximizer” (at p. 34), who is inclined to pressure parties to settle before trial, excessively delegate judicial responsibilities to law clerks and other staff, and have a particular fondness for legal doctrines such as ‘harmless error’, waiver and forfeiture, all of which expedite hearings. The “pragmatic” theory informs those judges inclined to base their decisions on the consequences flowing therefrom rather than on the language of a statute or precedent. The “psychological” theory highlights the importance and sources of preconception, most evident in cases involving a high level of discretion – family law cases are prime examples. The last theory identified by Posner arises from his understanding of phenomenology, which “studies first-person consciousness – experienced as it presents itself to the conscious mind” (at p. 40). In this regard, Posner is alluding to judges who engage in critical self-reflection, who, he reports, are few. “[Phenomenology] is not of interest to most judges – or legal scholars, for that matter ... The judges who internalize the “official” line, which is legalism, take for granted what they do, so they feel no urgent need to explain it” (at p. 40).
13. The principles of legal method are identified by Mossman (1986) under three distinct but interrelated headings:
 1. the characterization of the issues;
 2. the choice of legal precedent to justify or legitimate the position of the preferred litigant;
 3. the process of statutory interpretation, particularly when the process is used to alter common law principles (at p. 38).
14. Blishen, J (2006) has provided five possible reasons for the phenomenon:

1. legal aid cutbacks and lack of duty counsel, combined with the increasing cost of litigation;
 2. a widespread mistrust of legal advice and contempt for lawyers amongst many litigants;
 3. a belief that the legal system may be inherently biased, unfair or too complex;
 4. a desire to control the legal process absolute;
 5. a deliberate strategy predicated on the assumption that self-representation affords an advantage in the proceedings.
15. Rule 38 deals with “appeals”: appeals to the Divisional Court; appeals to the Superior Court of Justice; the mechanisms of the appeal process such as the appeal book, transcripts, appeal record and setting down (these are different for appellants and respondents); motions in appeals; dismissals of appeals; motions for summary judgment in appeal; motions to receive further evidence; motions for dismissal for delay; withdrawal of appeals; deemed withdrawals; three different kinds of stay of appeal – in all, *thirty-eight* sub-rules govern appeals of orders and/or judgments made in family court proceedings. “Temporary orders” are available under Rule 14 of the *Family Law Rules*; the *twenty-four* sub-rules set out how motions may be made to vary existing orders – in the case of custody and access, of course, all orders are “temporary”. Rule 15, on the other hand, allows for motions to be brought to “change a final order or agreement”; there are *twenty-nine* sub-rules associated therewith. One must assume that the bewildering array of appeal options is, itself, enough to preclude the self-represented litigant from seeking recourse from a higher court.
16. Bradbrook (1971) found that judicial subjectivity was determined to a great extent by the age of the judge (Bradbrook’s twelve participants were a homogeneous representation of the universally white, male Supreme Court of Ontario and Ontario Court of Appeal benches). Notwithstanding that the DA 1968 eliminated marital ‘conduct’ (that is, wifely fidelity following separation) from judicial consideration, “two of the more elderly judges stated that they are members of the ‘old school’ which attaches considerable importance to adultery in all cases” (at p. 564). Five more participants admitted that “continuing adultery” was an adverse factor in the determinations of child custody (at p. 564). Interestingly, all the participants asserted that they had the authority to force a husband to pay a reasonable sum for maintenance of his children. However, five of six participants admitting to supporting a maternal preference in custody determinations stated that the preference would disappear if the mother worked outside the home. The judges were divided in their opinions regarding the importance of a father figure in the lives of male children, with two judges suggesting that they would “attempt to persuade the (custodial) father to send the boy to a private boarding school” (at p. 569), no doubt reflecting these judges’ own privileged backgrounds rather than any appreciation for the realities of most people’s lives.
17. In this study, observers attended court proceedings in order to ascertain the demeanor of the judiciary with respect to abused women. Eighteen judges were observed over a nine-month period. Interviews with the judges were also conducted, as were telephone interviews with sixty of the women who appeared in court seeking restraining orders. The female respondents related feelings of intimidations from the setting and process, and fear of retaliation from their abusers. They felt that their stories of abuse were not believed. Women related their experiences: of judges allowing respondent abusers to monopolize the proceedings; and of judges being sympathetic and helpful to respondents, even to the point of establishing a “wink, wink” relationship that undermined,

unnerved and isolated the applicants. Condescending and harsh judicial demeanor toward the applicants was most apparent when the respondent was present.

18. Ptacek's rubric of judicial demeanor is summarized as follows. 'Supportive' judges were described as educative and dismissive of respondents' defences to allegations of woman abuse. 'Bureaucratic' judges (the most common type of judicial demeanor) appeared to distance themselves from the proceedings by focusing on administrative and procedural issues, would not address the female applicants 'in the eye', nor inform them of their legal option, and spent insufficient time on their cases. These judges were described as impassive, impatient and lacking engagement. 'Firm' or 'formal' judges exhibited many of the characteristics of 'bureaucratic' judges, in their impatience, strictness, and lack of supportiveness, but 'formal' judges took an active stance and accentuated their power. 'Condescending' judges manifest these characteristics, and were also sarcastic, harsh, critical and dismissive, rendering the victim applicants unseen and unheard. Applications to these judges were usually dismissed. 'Harsh' judges were 'nasty' and 'abrasive', in a manner going well beyond firm or condescending demeanor, which reaction would be triggered against battered women for violating the rules of courtroom deference (1999).
19. "While judges may not be equipped to evaluate empirical claims in the way that a social scientist would, they nevertheless have the power to do so in their courtrooms. These evaluations, in turn, are consequential for not only the production and policing of knowledge, but for the cases themselves and the lives they involve" (Richman, 2005:4). There are those judges who promote their own theory of human behaviour; Brownstone, J of the OCJ in Toronto has explained his at length in his book, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*, in which he asserts that it is the presence of "maturity" that differentiates non-combative separated spouses from those whose *immaturity* fuels their hostile, protracted, expensive and ultimately emotionally and psychologically damaging family law disputes, particularly in relation to child custody and access claims (2009:4). In this regard, Brownstone, J might not be alone in his assumption. It should not be surprising, then, that many family law judges, "comparable to the other decision-makers in the formal system ... often assume that domestic violence victims provoke the abuse used against them and use the court system to resolve private family disputes" (Hartman & Belknap, 2003:352; Ptacek, 1999).
Even in cases involving "mental health problems", "substance abuse" problems, exposure to children of the "risk of harm, neglect or abuse", and/or a lack of full financial disclosure, it is, in the opinion of Brownstone, J, incumbent upon the other party to conduct him/herself "in a mature fashion" (p. 6). "The court will always be more favourably impressed with maturity than with immaturity, regardless of how the other parent is conducting himself or herself" (p. 7).
20. The "settlement mission", (see Note 5, this chapter) pursued by actors in the family justice system presumes that those cases amenable to negotiation and settlement are weeded out of the dockets, leaving the highest conflict matters mired in litigation. The push to settle even the most conflicted of cases, particularly those involving custody and access, relieves judges from the responsibility of making those 'hard' decisions. It appears irrelevant that the 'settlement' might have been obtained under duress, inasmuch as there is little incentive, and no directive, to judges to inquire how the settlement was reached.

21. It would also appear that at least some of the participants, particularly those involved with the mediation industry in Ontario, embraced the platform of Johnson (2006, 1995), Johnson & Leone (2005) and Johnson & Ferraro (2000) that promotes the concept of “situational partner violence”. It is no coincidence that this platform allows mediators to promote their services in cases involving domestic violence if their screening reveals that “most of the violence that is experienced in families is *not* battering, or ‘coercive controlling violence’” but merely “situational partner violence” (Madsen, 2012:353).
22. Bala (1999) has noted that “[i]t was perhaps inevitable that once the hearings began, they started to resemble the highly contentious court cases that were the subject of the hearings, with exaggerated claims and angry denunciations” (at pp. 190-191). The Committee crossed the country, conducting fifty-five hearings to receive submissions, both written and oral, from over five-hundred witnesses (Bala, 1999). From the outset, it was apparent that “not all presenters were treated equally and that some Committee members exhibited deeply held biases and hostilities” (Laing, 1999:238; Bala, 1999). While women’s advocacy groups and individual women’s advocates were treated with hostility and outright contempt, presentations made in the name of ‘fathers’ rights’ were received with sympathy and accepted without question (Laing, 1999). Father’s rights advocates were allowed to present sensationalized and unsupported stories of false allegations of abuse and access denial before a sympathetic Committee and voracious media (Bala, 1999). Child-centred and feminist presenters, on the other hand, asserted that, while it was ideally in the best interests of children to be nurtured by two loving parents, it was not in the best interests of children to be witnesses to, or victims of domestic violence and abuse, nor “to see the cycle of violence continue after separation and divorce” (Laing, 1999:243).
23. In *Re Orr* (1933), it should be noted, however, that, at trial, Kingstone, J. had found that it was in “the best interests of the child” to continue to reside with her grandfather “for the next two or three years”, as the grandfather was standing in place of her mother (his daughter), who was deceased. On appeal, the Ontario Court of Appeal (per Mulock, CJO) held that the child should reside with her grandfather “during the period of nurture” that is, until the age of seven, at which time “the father as against the mother becomes entitled to the custody and care of his child (para. 12).
24. Winnicott (1960) classified “satisfactory parent care” into roughly three overlapping stages: (1) “holding”; (2) “mother and infant living together”: here the father’s function (of dealing with the environment for the mother) is not known to the infant; and (3) “father, mother, and infant, all three living together” (at p. 588). Winnicott supports the continuation of the family unit as the optimal environment for child development while privileging the mother/child bond.
25. No father, no matter how well intentioned or how solicitous for the welfare of such a child, can take the place of a mother. Instinctively, a little child, particularly a little girl, turns to her mother in her trouble, her doubts, and her fear. In that respect nature seems to assert itself. The feminine touch means so much to a little girl ... This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of the Courts.: *Bell v Bell* (1955), per Roach, JA at 344

26. A compendium of papers presented at the Judicial Conference on Family Law in 1981, edited by Abella and L'Heureux-Dubé, JJ (Abella & L'Heureux-Dubé, 1983) included that of Joseph Goldstein, consisting of a re-assertion of his position in *Beyond the Best Interests of the Child* (Goldstein, 1983).
27. *Surviving the Breakup: How Children and Parents Cope with Divorce* (Wallerstein & Kelly, 1980) asserts that children benefit from the involvement of both of their parents in their lives in the form of joint custody *in all circumstances*, even though the researchers, themselves, admitted to the “tentativeness of much of the knowledge” informing their study, and that many of their findings were “paradoxical” (at p. 16). They found that “embittered men” had a “high likelihood” of physical violence and child-napping attempts post-separation, had poor pre-divorce relationships with their children, threatened custody battles, and “concentrated their efforts on convincing the children, and the court, that the mother was either morally bankrupt or emotionally unfit to continue mothering”, while “they hammered away at their children with a vision of the future happiness and safety that would result were the father to obtain custody” (at p. 28).

Fathers' bitterness and extreme anger were found to be more anxiety-producing to children and adolescents than were mothers'. Mothers, on the other hand, were characterized in the study as more actively helpful and more in touch with their children's needs. However, the researchers were more likely to condemn the behaviours of their female participants than their male participants; in every instance cited, the most profligate conduct of ex-husbands and fathers was excused or rationalized, or described as a reaction to deficiencies in the mothers or even the children, themselves. Indeed, the authors blamed fathers' erratic access on their children's negative feelings towards them consequent to fathers' disinterest, non-involvement, abuse and/or abandonment! Further, even “poor” father/child relationships were promoted as obviating children's feelings of abandonment and “total” rejection, diminishing the child's sense of “vulnerability and aloneness, and total dependency on one parent” (at p. 239).

A careful reading of this study reveals that, even in cases of child sexual abuse, the authors recommended that the child victim maintain contact with his/her abuser. Further, while the psychological and emotional sequelae to women of domestic violence and abuse were recognized by the authors, they tended to stress, and thus condemn, their *potential* contribution to childhood ‘depression’, at the same time expressing great sympathy for psychologically damaged, abusive men with whom these same ‘depressed’ children were encouraged to visit.

My impression of this study was that it was replete with mother/wife/woman/victim blaming, and sorely lacking in rigor and credibility, as well as methodologically flawed – as have similar studies which have not adequately controlled for or investigated the influence of the mother on the father-child relationship, the nature of the mother-father relationship or the father-child relationship, child effects, fathers' actual participation in childcare, heterogeneity of fathering roles, fathers' education and occupation, social class, etc. “Fathers *do not* parent in isolation, fathers *are not* the only source of influence in their children's development and *not all* fathers are the same” (Drakich, 1989:76, emphasis in the original). It is interesting to note that Wallerstein's and Kelly's conclusion that “divorcing with children requires of the adults who had once been together the capacity to maintain entirely separate social and sexual roles while continuing their cooperation as parents on behalf of their children” (at p. 318) seems to echo the promotion of “maturity” by Brownstone, J as the hallmark of responsible post-separation behaviour judges favour.

28. I was unable to find any judicial affirmation at the level of the Supreme Court of Canada for *Surviving the Breakup* similar to that extended to *Beyond the Best Interests of the Child*. Accordingly, I contacted the offices of McLachlin, C.J.C. and asked for direction in this regard. I was advised by her Executive Officer that Her Ladyship reported that she was unaware of any ‘expert’ treatises upon which the judiciary has been basing its presumption in favour of joint custody.
29. Professional witnesses from the ‘psy’ professions appearing regularly in family law proceedings, such as Barbara Fidler, Ph.D., who are proponents of Kelly’s subsequent writings as well as Gardner’s PAS, promote the relevance of PAS in judicial determinations of custody and access in high conflict custody cases in Ontario.
30. It is obvious from the decision that the trial judge did not like the mother in this case, but was very much impressed by the demeanor, socio-economic and professional stature and power of the father. He describes his professional prominence at some length. However, I suggest that it was the father’s stature that allowed him to control the mother throughout their relationship. McWatt, J chose to characterize the father’s involvement in the mother’s obstetrical appointments, and the fact that he insisted on delivering his children (he was not an obstetrician) as indicators of his attentiveness to the mother rather than a display for the benefit of his colleagues or a manifestation of his power and control, an inference I prefer given his apparent non-involvement otherwise both before and after the marriage.

It is apparent that there was a significant cultural divide between the parties; the father resented the maternal grandmother’s influence and failed to understand or refused to acknowledge her resentment toward him, although the fact that he had wanted her daughter to abort her fetus must have offended her greatly. The father was apparently content throughout the relationship for the mother to assume full-time responsibility for the children, save and except for the involvement of his mother-in-law, with which opinion McWatt, J concurred. McWatt, J portrayed the grandmother and mother as conspirators in their efforts to alienate a loving, involved and otherwise blameless father from the lives of his children during the marriage, of which involvement there was little evidence.

The marriage purportedly dissolved after a disagreement over her use of his credit card, which smacked of the father’s financial abuse of the mother, although the trial judge did not characterize the incident as such. The father alleged the mother was an incompetent care-giver – by emotionally smothering her children, failing to look after their physical health, adopting questionable food-related practices, alienating them from their father and his family, and interfering with their education – but failed to assert his custodial or access rights to protect his children for four years. One might have thought that the veracity of his allegations would be called into question as a consequence of his inaction, but it was not.

The trial judge failed to make any connection between the mother’s having become pregnant after separation, the father being unaware of her pregnancy, and her having had the children sleep in her bed with her; abused women who are raped by their husbands often have their children sleep with them as a means of preventing further sexual assaults. The trial judge – and Fidler – also failed to make the connection between alleged domestic violence and the mother’s allegation of sexual abuse of one of the children, although the scholarly literature is incontrovertible on this point. The trial judge alluded to the presence of domestic violence in the relationship, but did not investigate it, choosing instead to dwell upon the mother’s perceived derogation of the father to the children in her comment that he had “abandoned them” by moving to the third floor of his house and leaving the children entirely in her care.

Finally, having failed to give the mother's allegations any credibility, the trial judge drew a negative inference from her refusal to testify on her own behalf. I suggest that her conduct in this regard could reflect her experiences as a battered woman whose fears of her husband for her and her children's safety were well founded. However, any one of these alternative explanations for the mother's conduct would have obviated the relevance of the PAS, upon which the trial judge's *ratio* relied. One might wonder how subsequent child custody and access cases brought in Ontario would be decided differently if McWatt, J had believed the mother's allegations of woman and child abuse.

31. The involvement of the Children's Lawyer worked to the father's advantage regarding PAS. The report of the Children's Lawyer "point[ed] out how much damage the girls had experienced by the parental dispute": para. 34, and presaged the mother's alleged alienating behaviours as backfiring on her in the future:

It appears that M is the child who is most troubled by the custody dispute. It appears she is very protective of her mother and is basing her decisions and statements largely on what she has been told by her mother. While this is a very unhealthy situation for M, it can also have very negative long-term effects on her relationship with her mother. The day may come when M will blame her mother for her not having a relationship with her dad: para. 34.

In fact, the mother had encouraged access, and allowed generous overnight access to the father, which M rejected.

The Children's Lawyer failed to acknowledge that the mother was a victim of prolonged and serious woman abuse. It is not clear that, had he done so, he would not have alleged alienating conduct on her part, given that he obviously favoured the father.

32. Following separation, the father: had seized the family vehicle from the mother, leaving her and her children had no independent means of transportation for three years; had launched websites, disseminated flyers, opened twitter accounts, and sought publicity in his campaign against PAS and his pursuit of fathers' (that is, his) rights against the mother, all of which would be open for his children to view; and promoted himself as a victim of parental alienation in his websites and campaign literature as he embarked upon a vicious campaign to impugn the mother's caretaking abilities, her reputation in her community, and her relationship with her daughters' school. He had disseminated slanderous 'press releases'. Gareau, J posited, "[w]ould not a child with a 'totally irrational loyalty to mom' as described by the applicant, be upset to hear her mother being painted as a parental alienator which is really tantamount to being painted as a child abuser?": para. 49.

The mother was given custody, with generous, overnight access to the younger child being granted to the father. Gareau, J found M's reluctance to maintain a relationship with her father "problematic", given her age, but nevertheless imposed an access order "which provide[d] that M spend some guaranteed time with her father throughout the year": para. 95.

33. See Chapter Six for the judge participants' impressions of joint custody.
34. It should be noted that the mother had had primary care of the child and had resided in the matrimonial home with her since birth. Smith, J described the mother as having "many positive attributes and plenty to offer her daughter": para. 71. Referring back to the OCA decision in

Bell v Bell (1955), he observed that the five-year-old daughter “needs regular and substantial contact with her mother in order to grow into a well balanced and emotionally healthy individual”: para. 72 – attributes he apparently found lacking in the mother. His stated concern was that the mother had alienated *herself* from the *father’s extended family* so that the child was likely not have contact with them were she to be awarded custody. There was no evidence adduced (or, at least, referred to by the court) to suggest the father’s extended family had ever established a relationship with the mother.

There was nothing in the incidents referred to in the trial judgment of Smith, J to support his finding that the mother had demonstrated “a high degree of vindictiveness”. This assessment was based upon the following conduct: 1) the mother accused the father’s sister of writing in the communication book; 2) the mother wrote in the communication book that the father did not care enough for his child; and 3) the mother refused the father’s request for extra summer access to accommodate his extended vacation time. The “vindictiveness” of these incidents pale in comparison to the conduct of woman abusers that has been minimized, ignored and/or rejected in the previously cited case law.

35. Woman and child abusers do not always enjoy the largesse of the family courts. In *El-Murr v Kiameh* (2006), the child, aged ten, did not want to see his father. He had not seen him in four years, since being forced to testify on his father’s behalf at his criminal trial for child abuse (assault). Although the father claimed he was the victim of parental alienation, the court found the son’s estrangement had been caused by the father’s, not the mother’s conduct.
36. The issue of misconduct can still relevant to establishing grounds for marital breakdown. The *DA 1985* allows a petition for divorce to be based upon mental or physical cruelty of such a kind as to render cohabitation intolerable (s. 8(2)(b)(ii). Under the *DA 1968*, the courts were capable of acknowledging spousal abuse in various forms – physical, emotional, psychological, sexual or economic – as sufficient misconduct to support a petition for divorce. Psychological and/or emotional abuse, in order to be persuasive, must have constituted a prolonged course of conduct on a spouse such that the cumulative effect of such conduct on is the critical test of cruelty for the purposes of the *Act: Pongor v Pongor*. Excessive sexual demands were held to satisfy the test: *M. v M*. However, notwithstanding the availability of cruelty as a ground for marital breakdown under the *DA 1985*, allegations of ongoing financial (in combination with physical, emotional and psychological) abuse may be insufficient to prove marital breakdown: *Cernic v Cernic*. Perhaps because of the reluctance of the judiciary to make findings of misconduct, generally, in family law proceedings, s. 8(2)(b)(ii) is rarely invoked.
37. Kelly (2011), in her review of all cases (50) in which supervised access was ordered in Ontario and British Columbia over a two-year period (2006-2007) found in 32 of the 50 cases, the father was the access parent; in 22 cases there were “sustainable” allegations of domestic violence, 12 of which involved at least one criminal conviction. Medical reports supported the remaining allegations (2011:293). In 21 cases, there were sustainable allegations of child abuse where the child had either witnessed the father hitting the mother or, themselves, sustained injuries during an altercation. One father successfully applied for supervised access while incarcerated for spousal assault. Another father was granted supervised access notwithstanding having been found in possession of child pornography.

The cases involving access fathers were dominated by statements, ostensibly supported by (uncited) research, about the importance of

paternal access for the child's psychological and educational well-being. That children did best with their fathers in their lives was treated as "trite science", resulting in decisions where children were ordered to have access with their fathers ... In these cases, paternal access was presented as both the child's right and as virtually required by virtue of the "maximum contact" rule. By contrast, the cases involving mothers were virtually devoid of rights rhetoric or any reference to maximum contact. A child's right to maintain contact with his or her mother was not mentioned in any of the cases (Kelly, 2011:294).

In the 14 cases in which the mother was the access parent, Kelly found the reasons given for ordering supervision were poor parenting, mental illness, and/or substance abuse. In no case was the mother accused of domestic violence, physical abuse of the child or of being a threat to the custodial parent.

It is interesting to note that, while the *FLA* was amended by the introduction of s. 24(4) in 2006, half-way through Kelly's study period, this provision "received little attention in the 2007 cases studied" (2011:298). Kelly concluded that supervised access "has become the means by which courts attempt to ensure safety in an interpretive environment in which no access orders have virtually disappeared" (2011:298).

38. In their evaluation of Ontario's Supervised Access Pilot Project, Peterson-Badali et al (1997) interviewed 14 lawyers and 13 judges to ascertain their satisfaction with and recommendations regarding the supervised access centres in their areas. The researchers reported that the respondents said that, generally, cases involving supervised access issues involved more court appearances and took more court time than other family law cases because of the contentious nature of the cases involved. These participants were satisfied with their supervised access centres overall, and reported that the neutrality of the centre and its supervisors, as well as the structure the centre provided through its rules and expectations governing conduct, diffused parental hostility. Interestingly, the researchers did not interview direct users of these access centres to ascertain *their* approval or satisfaction.

Serious problems have been identified with supervised access centres. Kelly (2011), in her review of all cases (50) in which supervised access was ordered in Ontario and British Columbia over a two-year period (2006-2007) found that, although Ontario provides the greatest oversight for supervised access centres, there are numerous inadequacies, for example, there are no criteria for staff qualifications other than their being "trained professionals" (2011:289). Services are provided in partnership with other organizations, and thus vary according to the culture and existing facilities provided.

39. Recognizing that the realization of maximum contact and enforcement of the friendly parent rule were usually frustrated by the reality that couples unable to cohabit often disagree on many levels, 'parenting plans' were conceived as a means of ensuring adherence by both custodial and access parent to a prescribed set of rules and expectations governing their behaviour with respect to their children. To the National Association of Women and the Law, 'parenting plans' represented "presumptive joint custody arrangements by a different name" (NAWL, 1994:7). It has been the position of the NAWL that "if parents can work together, they don't need parenting plans, joint custody arrangements or court orders. They develop their own ways of dealing with the children and making decisions" (NAWL, 1994:8). For Taylor et al, "shared parenting is not a sensible option in the majority of

contested custody and access cases. Common sense dictates that if these parents could get along they wouldn't be in court in the first place" (1996:27).

40. In their study of 393 custody cases and 60 judges who had decided them in order to determine the effectiveness of statutes mandating a presumption against custody to a perpetrator of domestic violence, Morrill et al (2005) found that in those American states where this presumption existed, more sole custody orders were issued to mothers and fathers were subjected to restrictive conditions and a structured access schedule. In these states, as well, joint custody orders were less common; by comparison, orders granting joint legal custody were twice as common as orders of sole legal custody to the mother in states without this presumption. Further, in states in which there existed competing presumptions – a presumption of joint custody and a presumption against custody to a perpetrator of domestic violence (with the added imposition of a high burden of proof), orders granted joint legal custody four times as often as sole legal custody to the mother.

More than 86% of the judges in this study reported having received education on domestic violence within the past three years. Those judges professing to have received “judicial education” on domestic violence are likely to maintain commonly held misconceptions, with most believing that few battered women ever stand up forcefully to their husbands, that there is an established psychological profile of battered women who become involved with abusive men, that batterers do not usually threaten or injure the victim's friends and family members, and that women rarely required medical treatment for injuries received from their intimate others – none of which is true. The researchers found that there were no significant differences between those judges who received domestic violence education and those who did not, nor were there any differences in gender, age or years of experience.

Although judges' education about domestic violence appeared to be sorely lacking, the researchers determined that those who had received domestic violence education were twice as likely to give the mother sole physical custody and half as likely to give her primary residency or shared custody than those judges without domestic violence education. The researchers concluded that “domestic violence education enhanced judges' knowledge and attitudes. Judges who believed that a father's right of visitation is inviolable had lower levels of knowledge about domestic violence” (Morrill et al, 2005:1100).

41. In rejecting the view of Greer, J that, to allow the payor spouse to avoid (in this case) her obligations toward the payee amounted to an “unpalatable circumstance of a bankrupt seeking to use the bankruptcy system simply to avoid complying with his or her financial obligations on the dissolution of marriage”, Blair, JA found that “the concern is misplaced”: para. 54. Instead, he suggested that the court's “supervisory role” in bankruptcy did not extend to the property disputes within the context of the family justice system in order to “re-order the priorities in the bankruptcy”: para. 54. Nor did the Court of Appeal allow the husband's RRSPs, which were exempt from the bankruptcy to be transferred to the wife in partial payment of her equalization payment. As a final indignity, costs of \$10,000 were awarded against her.
42. From the standpoint of critical analysis, this decision reflects an institutional response to social change in which social actors - L'Heureux-Dubé, and McLachlin, JJ – represent two, conflicting positions, despite their apparent concurrence. For L'Heureux-Dubé, J, *Moge* provided a platform from which she could promote her feminist standpoint regarding women's oppression both inside and outside marriage. In this regard, she presented a funda-

mental challenge to social stasis. In comparison, McLachlin, J characterized the decision as an expression of Parliament's intentions, sedimented in statute, from which judges, hitherto relying on the trilogy to deny spousal support to deserving female applicants, have deviated. While L'Heureux-Dubé, J relied upon 'expert evidence' from the fields of sociology and statistics to support her decision, McLachlin, J retreated to "common sense" as defined, not in family law, but in tort: para. 115. Thus, not only did she reject reliance on opinions emanating from outside law – something which she obviously approved later on in *Gordon v Goertz* – she concretized her reasons in "civil law", not family law, thereby cloaking them with a heightened legitimacy (see Chapter Two). The identification of the law of spousal support with something other than and outside 'family law' exemplifies the marginalization of the area as a separate sphere, and subject to different legal 'rules' and considerations.

43. "Judicial notice", as explained by Drummond,

does not differ significantly in its operation from *stare decisis*. Judicially noticed facts are incorporated into the common law as law ... As law, judicially noticed facts are open to appeal where ordinary facts remain with the jurisdiction of the court of first instance. As law, they also open the theory of source up to extra-legislative and extra-judicial sources of law ... Judicially noticed facts serve as *prima facie* evidence open to rebuttal by changes in community standards on the judicially noticed facts, directly by dispute by and of the parties to the litigation, on appeal (2000:3).

44. In its 1990 study of 1,310 divorce cases in four sites across Canada, the Bureau of Review of the federal Department of Justice found that the general objectives of divorce legislation reform (culminating in the *DA 1985*) had not yet been realized. In particular, those sections of the Act promoting the objective of providing a "more humane and fairer resolution of the consequences of divorce, specifically with respect to custody and economic outcomes" (at p. i) had led to some unexpected results.

The researchers suggested that the fourth support objective set out in the *Act* had overridden the other three. They found that: women were more likely to be awarded support for a limited time when a permanent award would have been more realistic and appropriate; women's average income following divorce was found to be, on average, 67% of men's income, and between 46 to 58% of women receiving support (spousal and/or child) continued to live below the poverty line for one-person households; women obtaining child support experienced a decline, over time, in the amount of support paid despite the requirement (at that time) to index those payments; child and spousal support constituted between 24 and 34% of women's total income, but only about 17% of their male payors' income.

Surprisingly, the researchers determined that, although, on average, women were worse off than men following divorce and were often objectively in need of spousal support, a separate spousal support claim was rarely advanced, and even more rarely granted in divorce proceedings. The assertion by the researchers that the drafters of the *DA 1985* "wished ... to temper the presumption of equality in law with support provisions which, to some extent, recognize[d] systemic sexual inequalities in society (Bureau of Review, 1990:74) appeared to have not elicited this intended effect.

When asked why they chose not to claim spousal support, 63% of women responded that they felt they were self-sufficient and capable of supporting themselves; 24% did not believe in spousal support or aspired to a "clean break" from their ex-husbands; while 11%

would have preferred spousal support, but were not convinced they would receive it, or, if granted, that their ex-husbands would be able or willing to pay it (Bureau of Review, 1990).

45. 1) The distinction between child support and spousal support, with the former prioritized over the latter, has left many women in need of financial support from their former intimate partners without recourse to spousal support. While the distinction made between child support and spousal support claimed by the custodial parent has its roots in much earlier legislation, it continues to be promoted by the fathers' rights lobby, which has actively campaigned for the abolition of spousal support altogether (Bala, 1999; Laing, 1999). However, this distinction is fallacious. Abella, J, then of the Provincial Court (Family Division), described "the obvious economic symbiosis between the custodial spouse and the child. To separate the allowance between adult and infant beneficiary may have positive psychological value, but its economic value is dubious and largely arbitrary in effect" (1981-1:6).

Similarly, the primacy of child support over spousal support in the legislation is also problematic. As noted earlier, where the funds available to provide support on the part of a payor spouse are insufficient to cover both child and spousal support, priority must be given to the satisfaction of child support (*DA 1985*, s. 15.3(1)). The federal and provincial *CSG* reinforce the distinction between the two headings of support.

- 2) Entitlement to an equalization payment may also preclude women from being granted spousal support. Judges have expected women to utilize these payments – in effect, their equity – to pay their daily living expenses. "Judges seem to assume that equalization payments and employment (or potential for employment) are sufficient to ensure the economic independence of both parents" (Steel, 1987:162). This is reinforced by s. 33(8)(d) of the *FLA*. However, an equalization payment "does not necessarily result in an equalization of economic positions and a consequent minimization of the need for [spousal support]" (Steel, 1987:164). This is particularly true when the payor spouse is bankrupt and the payee spouse is unable to realize her equalization payment from the sale of the matrimonial home or the payee's other assets acquired post-separation. See Chapter 3, section 10(c).

- 3) Women who have been employed outside the home during their marriages are often hard-pressed to demonstrate the financial need necessary to invoke the spousal support provisions of the *DA 1985* and *FLA*. Women's own work – paid work, outside the home – has come to be seen as the foundation of their economic well-being, with the social welfare safety net, whatever its limitations, as their alternative recourse (Boyd, 1994; Langer, 1994). It should be noted that, in Ontario, the social welfare safety net also mandates economic self-sufficiency, "most significantly through mandatory participation in a variety of work-readiness activities" such as Ontario Works (Mosher, 2009:169). While an examination of the relationship between poor women, particularly single mothers, and the welfare state lies outside the scope of this research study, suffice it to say that the inadequacy of social support payments and subsidized childcare, the over-involvement of social service agencies in the lives of sole-support mothers, and the criminalization of conduct which amounts to no more than acts of survival (Mosher, 2009) often lead abused women back to their abusers.

The repositioning of single mothers as workers and the turn to the market, rather than the state, to meet needs – de-familialization – has not replaced, but conjoined, in often uneasy ways, the regulation of women as mothers and wives and the shifting of responsibility

to the private realm of the family – refamilialization (Mosher, 2009:167).

46. While a detailed examination of the SSAG lies outside the scope of this paper, it should be noted that the *Cromwell Report* released in April, 2013, appears to criticize the limitations of the SSAG to the amount and duration of spousal support, while the authors of this report (who included Rogerson and Thompson) suggest that “many (it is not clear who those are) would like these Guidelines to also provide formulas for entitlement to spousal support as well as other hard issues, like post-separation income increases, re-partnering or remarriage by the support recipient, retirement, illness and disability” (at p. 58). Perhaps not surprisingly, domestic violence and abuse are not listed amongst these “other hard issues”. Concretizing entitlement to spousal support in the SSAGs might preclude those few instances where judicial discretion could inure to the benefit of abused women when the legislation otherwise ignores them, and contribute to what L’Heureux-Dubé, J described in *Moge v Moge* as “a strait-jacket which precludes the accommodation of the many economic variables susceptible to be encountered in spousal support litigation”: para.89.
47. The 2010 audit found that: the FRO was slow in registering completed court orders for family support; payers and recipients did not have direct access to assigned officers; call volumes at the Office’s toll-free call centre were so high that nearly eighty percent of calls never ‘got through’ and, of those that did, only one in seven was answered; for ongoing cases, the FRO took almost four months from the date of the first arrears before taking its initial enforcement action, and for newly registered cases that were immediately in arrears, the delay was seven months from the issue of the court order; the FRO acted in only between 20 and 25 per cent of cases each year (‘acted’ referring to updating case information as well as taking enforcement action); there was no quality control process or effective managerial oversight to determine if staff were taking effective action against delinquent payers; staff could not provide a detailed listing by individual account in the amount of \$1.6 billion – the amount of all outstanding arrears as of December 31, 2009; security weaknesses in the FRO’s information technology system exposed sensitive personal client information to risk from unauthorized access (Auditor General of Ontario, 2012). The Auditor General’s *2010 Annual Report* had noted that “approximately two-thirds of all support-payers were either in non-compliance or only in partial compliance with their support obligations and that enforcement actions were often neither timely nor effective” (Auditor General of Ontario, 2012).
48. The exception is an application under s. 810 of the *Criminal Code of Canada*: “An information may be laid before a justice of the peace by or on behalf of another person who fears on reasonable grounds that another person will cause jpersonal injury to him or her or to his or her spouse or common-law spouse or children or will damage his or her property”.
49. Deborah Gide, Administrator of the Ontario Court of Justice at 311 Jarvis Street during the course of my research study conducted in 2003 on behalf of the Woman Abuse Council of Toronto, advised me that she estimated that, in her court, between 50 and 80% of emergency applications for restraining orders were denied.
50. Judges may grant restraining orders, but not exclusive possession orders if they are concerned with establishing a status quo in cases where there is persuasive evidence that the applicant has a reasonable fear for her and her children’s safety. One of the judge participants (SCJ I) indicated that she prefers to direct women seeking exclusive possession

orders to whom she has granted restraining orders to find a “safe place” to stay, rather than grant the exclusive possession order and establish a status quo

51. See Chapter Six.
52. The “May-Iles Inquest” investigated the murder in Oshawa, Ontario on March 8, 1996 of Arlene May by her estranged common-law husband, Randy Iles, who thereafter committed suicide. Mr. Iles’ had three previous marriages, all of which had ended in divorce. His post-separation conduct included instances of child abduction, stalking, threatening with a weapon, and custody disputes in Family Court. His relationship with Arlene May began after the dissolution of his third marriage. During the course of her subsequent pregnancy, Mr. Iles began to assault Ms May, who ultimately delivered a stillborn infant. From November, 1995 until her murder, Ms May endured repeated threats, incidents of harassment, and other forms of violence and abuse from Mr. Iles, against whom were issued a series of bench warrants for breach of his own recognizance. Ms May pleaded with the police to keep her safe from Mr. Iles, but they were unable to protect her. The inquest jury heard from seventy-six witnesses over 51 days of evidence, and produced 213 recommendations. The jury’s opening statement included a ‘Zero Tolerance on Domestic Violence’, recognition of the unique aspects of domestic violence as a crime, and a goal of a “seamless” programme across Ontario for victims of this crime (Porter, 1998).
53. The “trilogy” of personal injury actions (*Andrews v Grand & Toy Alberta Ltd.*; *Teno v Arnold*; *Thornton v Prince George School District No. 57*) heard by the Supreme Court of Canada in 1978 established the upper limit for non-pecunious loss (general damage) awards for the most catastrophic injuries (except in extraordinary circumstances: *Fenn et al v City of Peterborough et al*) at \$100,000 in 1978 dollars, the current value of which is \$394,000. This remains the “rule of law” in Canadian jurisprudence (Davidson, 2007). Judges tend to refer to *The Law of Damages* by Waddams (2012) for assistance in determining quanta of damages in personal injury actions. There is no indication in the tort actions brought by victims of woman abuse that the presiding judges reference Waddams.
54. The complaints and disabilities of which the wife complained are indicative of PTSD, if not brain injury (see Chapter One). Unfortunately, neither the wife’s counsel, nor, apparently, the wife’s doctor, was aware of the serious sequelae of woman abuse.

Chapter Four

1. My literature review (presented in the Introduction, Chapters One, Two and Three) was undertaken in three different stages in three different time periods. The portion of the literature review that examines phenomenology and grounded theory, woman abuse, including its definition, gender asymmetry, and sequelae, the theories associated with the phenomenon, and the sociological literature examining abused women’s experiences in the legal system was substantially completed while I was enrolled in the Ph.D. programme in social work at the University of Toronto. This portion of my research was undertaken for the purposes of preparing dissertation and ethics proposals. While enrolled in that programme, the thrust of my research was primarily sociological. After I transferred to Osgoode Hall Law School, the second stage of my research was directed at the relevant legislation discussed in Chapter Two as I expanded that aspect of my research in order to refocus my study on family law. The second stage of my research informed my dissertation

and ethics proposals submitted at Osgoode Hall Law School. The third stage of my research that examined the judiciary – who they are, how they are selected, and ‘how they think’ – as well as my case law review were conducted after I had completed my interviews with the judge participants and are included in Chapter Three.

The decision when to conduct a literature review (before or after data collection) is a matter of debate amongst grounded researchers. Glaser asserted that “the researcher is best advised to subject himself to theoretical training is sociology ... he or she must constantly read substantive and formal theory in whatever areas to develop within himself the understanding and style of theoretical codes used. Study theory constantly” (1992:28). In comparison, Strauss and Corbin appear to have taken the opposite stance:

... there is no need to review all the literature beforehand (as is frequently done by researchers trained in other approaches), because if we are effective in our analysis, then new categories will emerge that neither we, nor anyone else, had thought about previously. We do not want to be so steeped in the literature as to be constrained and even stifled in terms of creative efforts by our knowledge of it! (1990:50)

In the case of this research study, the decision to conduct a literature review before or after data collection was mediated by my engagement in phenomenological research. Whatever is known by the researcher about a particular phenomenon cannot capture the individual experiences of the phenomenon by each research participant. Glaser’s admonition to “study theory constantly” would not have provided me with an exhaustive list of categories because the individual experiences of survivor participants presented the possibility of an unlimited number of potential categories emerging from each unique set of life experiences and ways of knowing about woman abuse and engagement with the civil family justice system. On the other hand, some theoretical familiarity with the phenomenon before conducting qualitative interviews can provide the phenomenological researcher (who, herself, must have experienced the phenomenon) with some intellectual ‘distance’ between her understanding of her experiences of the phenomenon and the experiences of others; in other words, examining the literature surrounding woman abuse directed me to critically examine the limitations of my own experiences with the phenomenon and appreciate the many different ways other abused children and women experienced it.

The “a-ha” moments that constantly emerge from immersion in phenomenological research demand further investigation. Strauss and Corbin acknowledge this possibility. “It is only after a category has emerged as pertinent that we might want to go back to the technical literature to determine if this category is there, and if so what other researchers have said about it” (1990:50). I constantly updated whatever stage of my literature review I had completed. In so doing, I could explore the scholarly literature relevant to new categories that emerged from my data. In this respect Glaser, and Strauss and Corbin agree.

I decided to wait until after I had completed my interviews with my judge participants before approaching the research literature on how judges ‘think’ and what might influence their decision-making. For this reason, I also delayed conducting my case law review. Inasmuch as this phenomenological research study privileged the experiences of the survivor participants, I attempted to approach the judge participants ‘in the shoes’ of the survivor participants to the extent that I was able. I did not want to be “so steeped in the literature” that I might automatically categorize what I heard from the judge participants on the basis of what I had read. Instead, I approached the judge participants, not as a lawyer or legal researcher, but as an interested ‘civilian’ who engaged the judge participants in infor-

mal conversations about their perceptions of abused women and woman abuse. This technique allowed me to discuss these issues with the judges, I believe, far more openly than if I had attempted to utilize the various schema designed to explain judicial decision-making, or engage them in an examination of case law and the precedents upon which they relied, examined to in Chapter Three.

2. During the course of my study, I was contacted by a number of other graduate students from other universities, who requested assistance in locating participants for their studies in the area of domestic violence – some of which requests offended the ethical rules of graduate research, and to which requests I refused to respond. I was also surprised, and very disappointed, by the lack of cooperation I experienced from agencies purporting to promote the interests of abused women and children, particularly those run by York University, including Parkdale Community Legal Services, York University’s Centre for Women and Trans People (sic), as well as Ontario Legal Aid, the Y.W.C.A. , women’s shelters, and the women’s clinics of Women’s College, North York General, and Toronto General Hospitals and St. Joseph’s Health Centre. I received absolutely no contact from any of these organizations and agencies. In this regard, my experience was no different from that related by Se’ver in her study of abused women’s experiences (2009).
3. Aside from the central Registrar’s office for the SCJ located at 393 University Avenue, Toronto, the draconian regulations governing access to court files made reviewing them all but impossible. No other court location provides a place with a table and chair where court files can be reviewed. Files can only be reviewed in the presence of a clerk, at the counter. When the Registrars’ offices were busy, I was told that I could not look at the files, and would have to come back. This was particularly problematic at the North York site of the OCJ, which has limited counter space and even fewer clerks available to service those in attendance. In Brampton, the average wait time I encountered before being served was over one hour. The Jarvis Street location of the OCJ, at least, provided a chair and desk-height counter space for the disabled; no other Registrar’s office, except for the University Avenue site, could accommodate the disabled. Given the size of many of the court files I reviewed, many attendances at some of the courts were necessary, and the attendant wait times and discomfort I experienced over the hours it took to review the files were most aggravating to both mind and body. The clerks, themselves, however, were very accommodating, to the best of their ability under the circumstances, and I am most grateful to them for their assistance, interest and support.
4. I adopted the rubric of Mamo et al (2007) and considered the following factors when reviewing the court files of my survivor participants:
 1. the purpose of the proceeding or appearance;
 2. all relevant documentation had been filed in a timely manner and on notice;
 3. the parties and their counsel were ready and prepared to deal with the issues before the court;
 4. the subject matter of the appearance was essential to the advancement of the case toward resolution;
 5. how many judges touched the file;
 6. the number of adjournments granted, by whom each was sought, and reason given for the adjournment;
 7. the length of time the file was in the system, from commencement of proceedings to resolution;

8. involvement of the Children's Lawyer, mediator(s) and/or assessor(s);
 9. number of cases in which claims were advanced for: custody; access; child support; spousal support; variation of support; restraining order; equalization payment of net family properties (SCJ cases only); order for exclusive possession of matrimonial home (SCJ cases only); damages; and costs;
 10. how domestic violence was alleged, the response, and whether it was apparent that any judicial notice was taken of the allegation, e.g., was it mentioned in the endorsements/orders/judgments;
 11. number of case, settlement and trial management conferences held;
 12. number of motions, urgent motions and Form 14B motions brought during the proceedings.
5. What was missing from Mamo's investigation was a review of the number of adjournments granted in each file, and the reasons for them, which I included as item 6 in my own rubric. While I would have thought that the researchers, concerned as they were with the efficacious use of court time and expertise, would have been interested to know if adjournments were being used to delay or thwart proceedings, there is no indication in the study that Mamo et al ever considered examining the abuses of the court such as those engaged in by perpetrators of woman abuse and documented in the extant literature.
 6. I initially coded the transcripts by writing notes in the page margins to describe the emerging categories and their qualities. This process involved my reading the transcripts again, this time looking for meaning in relation to those categories as they revealed themselves for each survivor participant. My coding process involved my colour-coding the emergent themes by way of 'sticky notes' I attached to the transcripts at relevant points, each colour representing a particular theme. I kept a record of the correlation between colour and theme separate from the transcripts, and, in the process of coding, discovered sub-themes which were given their own colour designation. In this way, I was able to ascertain the recurrence of themes and subthemes throughout the transcripts merely by looking at the colour tabs affixed to each. Further, I used the tabs to identify the appropriate passages that underpinned my analysis for inclusion in each section by referring to the corresponding tabs in all the transcripts. This rather 'low-tech' process suited my preference for hard copies of my data which I could manipulate with hand-written margin notes and coloured attachments. Both of these techniques allowed me to engage physically with the narratives, something I find lacking in electronic data processing better suited, in my opinion, to quantitative research. The tactile representation of the emergent themes also reminded me that they were wholly constructed from my personal resonance with the data – even the colours I chose to correlate with the themes represented some form of socially contrived meaning: red for narratives of physical violence, for example.
 7. These 'borrowed categories' included: the participant's family history of abuse; the nature of the abuse she experienced from her intimate partner; her response to the abuse; the involvement, or exposure, of her children to abuse, and the consequences thereof; her experiences in the courtroom, including her impressions of her legal representation (if any) and the presiding judge(s); her impressions of how she, and her abuser, were perceived by the judge(s) before whom she appeared (whether or not she thought she was respected, heard, and/or believed); her satisfaction, or dissatisfaction with her legal outcomes; and, generally, her impressions of the family law process and suggestions for its improvement. Each category was provided with qualities and dimensions to define and limit it, as well as

to provide the criteria for identifying similarities in experience and ‘ways of knowing’ for my survivor participants. Further categories emerged from my engagement with my data elicited from this cohort, which both enriched and expanded these ‘borrowed categories’.

That the categories extracted from the data were my own invention, and entirely subjective, does not reduce the validity of this study, but my acknowledgment of this limitation of my analyses as personal merely reflects the phenomenological process of inquiry as a personal journey of discovery and enlightenment (Van Manen, 2011; Merleau-Ponty, 1962).

8. This time, however, I used my coloured tabs to identify categories of responses to those themes; for example, this time red denoted those parts of the judicial narrative in which the participants indicated that they rarely granted *ex parte* restraining orders; blue notes identified those judges who granted restraining orders more often than not. Yellow indicated passages in which judges advised that allegations of woman abuse are not relevant to their decisions regarding custody and/or access; green denoted passages in which judges asserted the relevance of woman abuse to their determination of custody and/or access.

As new categories emerged from the data, they were assigned different colours for identification purposes. Again, the dispersion of colours across the transcripts provided me with an embodied, visual representation of the meanings, as well as their frequency, ascribed to the themes by the judge participants.

Chapter Five

1. Jamaica is one of the most violent countries in the world, with a homicide rate of 54 per 100,000 (VPA, 2009). It is not surprising, then, that Jamaica has a high rate of domestic violence (Turner, 2008; Ascott-Mills, 2001). Cultural norms which seem to condone interpersonal violence prevalent throughout the Caribbean may have their origins in the historical trauma of slavery (Ascott-Mills, 2001). A 2005 survey of Jamaican families reported that only 11% of parents used ‘positive’ forms of discipline, and that corporal punishment continued to be the dominant form of punishment in both home and school (VPA, 2009). For women of Jamaican origin, corporal punishment of children is not viewed or experienced as ‘domestic violence’ in the context used in this study, but as a means of ‘correction’. Jamaican child-rearing practices have been described as particularly authoritarian, highly repressive, severe and abusive, with shouting, flogging and beating being the most common punishments (Mosby & Smith, 2003).
2. Asian immigrants have been socially constructed as “ideal minorities” (Yick, 2001:547), whose families embody the much lauded ethics of hard work, mutual support, intergenerational respect and strong ‘family values.’ The Chinese family, based on the Confucian model of relationships, views that of father and son as the most important, with power being transferred from the father to eldest son (Yick, 2001). Male children are socialized to view themselves as more important, and of greater value, than women, while female children are conditioned to see themselves as secondary and subservient (Yick, 2001).

Domestic violence is seen as having been precipitated by the female victim. The reality of violence and abuse within the Chinese family must be denied lest the family ‘lose face’ in the eyes of its community, and a woman who leaves an abusive relationship is considered to have placed her own self-interest over that of the family collective (Yick, 2001). When domestic violence is acknowledged, it refers to physical violence; psychological problems are down-played in Chinese culture, and therefore, may be more difficult to envision

(Yick & Agbayani-Siewert, 1997). Similarly, Chinese children are encouraged to practise self-control and restraint (Yick & Agbayani-Siewert, 1997), so emotional outbursts are discouraged – domestic violence, therefore, is always provoked, and a measured response to inappropriate female conduct. Consequently, “Western” feminist paradigms that emphasize self-actualization and individual autonomy do not necessarily resonate with victims of woman abuse from this community.

3. Societies in transition challenge traditional social institutions, values, beliefs, and practices, and, perhaps, nowhere in recent history have societies undergone ideological upheaval as violently as in the former Soviet Union. Marxism proclaimed the creation of the “New Woman” (Kotseva, 1999:85). Family violence was seen as a ‘Western problem’ endemic in decaying capitalist societies (Petkova & Griffin, 1998), a fiction that shrouded the reality of Soviet women’s experiences of domestic violence and abuse. Bulgarian society has been, and remains, patriarchal, and woman abuse a serious, if unacknowledged, social problem (Petkova & Griffin, 1998). The social discourse of modern post-Communist Bulgaria saddles women with a contradictory mandate: to work (yet to resent work as a relic of Communist ideology), while allowing themselves to be consumed in the roles of wife and mother as “real women” (Petkova & Griffin, 1998:450). There is no direction within the dominant discourse for Bulgarian women to navigate this apparent ideological dichotomy, and there is certainly no room for any discussion about domestic violence and abuse.
4. Certain cultural factors influence how Latina women experience abuse and violence. Domestic violence is considered shameful, and must be kept private (Edelson et al, 2007). Latina women are socialized to consider the family paramount in their lives, and are taught to accept dominance and control by their male intimates within the family (Edelson et al, 2007). Further, cultural values associated with *machismo*, “a set of beliefs about how Latino males should act” (Edelson et al, 2007:2) may enhance the risk of domestic violence in Latino families. Similarly, *respeto*, or respect, culturally enacted as the ultimate authority vested in the father/husband, exacts from Latina women self-sacrificing behaviours, submissiveness, and deference to others, all of which render them vulnerable to domestic abuse (Edelson et al, 2007).
5. Jewish communities are rarely mentioned in the literature on intimate partner violence as being sites of wife and child abuse, although the phenomena are not unknown within those communities. It has been estimated that domestic violence occurs in between 15 and 30% of Jewish families (Horsburgh, 1995). In one recent study of sexual abuse amongst Orthodox Jewish women in the United States ($n=380$), 26% reported having been sexually abused at least once in their lives, with 16% reporting having been sexually abused by the age of 13; these results are consistent with those from several national surveys (Yehuda, et al, 2007).

The Orthodox Jewish community has only recently acknowledged “that religious practice and commitment do not make one immune to suffering from domestic violence” (Sweifach & Heft-LaPorte, 2007:30). In 1994, the Rabbinical Council of America, representing most Orthodox sects in the United States (and Canada) passed a resolution establishing a ‘zero-tolerance’ for domestic violence and charged rabbis with protecting its victims (Horsburgh, 1995). However, Jewish women are entrusted with maintaining *shalom bayit* (domestic tranquility, including peace amongst family members), an artifice that has allowed domestic violence and abuse to remain hidden as abused women have sought to shield their abusive husbands from public condemnation for failing to discharge this tenet of faith, and protect their Jewish community from shame (Kaufman, 2010; Sweifach & Heft-LaPorte, 2007;

Spiegel, 1996). Challenges to these intractably defined gender roles are perceived as affronts to both Judaic law and the husbands' patriarchal supremacy, and often result in violence and abuse.

6. During her parents' violent quarrels, Diane would escape to the "safety" of her aunt's house, where her deaf/mute grandparents lived, but her aunt "was pretty violent herself, and she would come and physically attack my father, her brother." Her grandfather was a "really heavy drinker", but Diane did not recall any violence between her grandparents.
7. The assessment was conducted by one of the most respected forensic psychologists in Toronto. It described Michael as "very intense and preoccupied with detail, suspicious, exhibiting a high anxiety level, and a need to feel in control of a situation *or a person.*" (my italics) He admitted to the assessor of "making scenes at his children's school", monitoring Lily's behaviour, and repeatedly contacting Lily's physicians, relatives, friends, neighbours, the CAS, police and the children's teachers to express his opinions about Lily and his concerns for his children's welfare under her care." The assessor concluded that Michael exhibited the traits of "borderline personality disorder" and expressed her fear that, were Michael to be given access, he would alienate the children against Lily. She recommended that Lily have sole custody, and that access be carefully structured and monitored. I found this report in the court file, accompanied by a letter addressed to Michael from the assessor, in which she apologized to him for failing to find in his favour.
8. I also found a number of further pleadings, endorsements and orders, indicating that the file was still active in April, 2014. In 2010, following a settlement conference, and on consent, Lily agreed to "develop a plan to reintegrate herself and her children in each other's lives", and Michael undertook "not to interfere and to encourage [Lily's] efforts." Further, Lily's child support obligation was to continue. While Lily discharged her responsibilities under the order, Michael did not. I also ascertained that Lily apparently continued to pay child support to Michael after the children were living independently. When she sought repayment of the overpayment in 2012, Michael countered with a claim from Lily of one-half the children's extraordinary expenses, including their college tuition, despite Lily's having had no contact with the children, nor any knowledge about their activities. Lily was ordered to pay Michael \$16,500 on March 4, 2014, in full satisfaction of all child support. A divorce was granted, upon Michael's application, in April, 2014.
9. The Children's Lawyer continued to investigate, finding that the children wanted to see their father. My review of the court file produced affidavits by both children, each indicating, in fact, that they wanted no further contact with their father. It was obvious that the Children's Lawyer ignored Natasha's allegations of violence and abuse, the serious criminal charges pending against Ahmed, as well as the children's wishes in making his recommendation.
10. In reviewing Mercedes' interview, I was struck by the persistence and determination she displayed when demanding to be acknowledged. This was no "shrinking violet", but a woman whose life course had taken a tragic turn. She felt that many regarded her as someone whose status made her unworthy of the benefits extended to citizens. It did seem that her case worker was particularly disinterested in helping her; despite her inability to cash her support cheques because her name was misspelled, her welfare cheques continued to be reduced by the amount of support her abuser was ordered to pay. She assumed Social Services was paying her rent (she was living in subsidized housing), but it was not, and she

received an eviction notice. Far from providing assistance to Mercedes, the public social welfare safety net was allowing her to fall through the cracks at every opportunity.

Mercedes' experiences with her new country's social institutions reflected her invisibility as an illegal immigrant. Despite her intelligence, sophistication and resourcefulness, she found herself repeatedly denied that to which she was entitled from Ontario's social welfare and legal systems. Her limited facility with English was not her major impediment; it was her expectations that she would be respected and listened to, and that those who represented the human face of the government agencies and the law would have some capacity for compassion and understanding. She also expected that they would demonstrate some understanding of the phenomena of domestic violence and abuse. However, the depression and hopelessness that plagued her after the birth of her baby emanated from her realization that "ignorance about domestic violence" was endemic throughout the social welfare and legal systems and prevented her voice from being heard.

11. Mercedes described Don's delay tactics:

Because he came the first time without Legal Aid support. And then he said it was his right to have a lawyer. He did apply for a Legal Aid certificate. He had two homes, and two jobs, but he was wasting time. Everybody knows that Legal Aid will refuse.

He got three delays over nine months. The first time was, "I don't understand English." And no one around was able to provide support for him. He has been living in Canada, working in English, he was going to high school, but he said, "I need an interpreter." No one asked me if he could speak English. The judge believed him.

The judge adjourned it. I didn't get anything. "You get an interpreter for next time." They told him, if he didn't have an interpreter next time, they would go ahead. The next time he come, he says, "Oh, I forgot. I didn't apply for Legal Aid." The application for Legal Aid was dated three days before. He waited three months to apply. He was told if he was denied Legal Aid, you have to hire a lawyer to represent you. The judge told him to make sure to do his income statement, not wait to the last minute. Do it early. Every time it was a different judge.

The next time, he wasn't giving disclosure about his income. By February, we went to court with no statement. But the judge granted me full custody.

12. Similar allegations were repeated in many of the affidavits of the survivor participants' abusive husbands' pleadings, such that I began to suspect that they and their counsel used a template of 'boiler-plate' clauses of spurious denials and allegations.
13. Reflecting upon Caroline's narrative, I realized that the judge's sudden reversal of her previous position regarding access had probably been triggered by the suggestion that, if Steve were not enjoying "maximum contact" with his son, Caroline must be engaging in parental alienation. It occurred to me that the judges must have become conditioned to react negatively toward custodial mothers if the mere suggestion of PAS were advanced, as was done by Steve's lawyer at the return of his motion, even in the absence of supporting evi-

dence. There was nothing in either Caroline’s narrative, or in the court file, to substantiate the court’s reversal of its previous order of restricted access to the father. The punitive cost award may have reflected the judge’s intention of demonstrating the court’s disapproval of Caroline’s alleged ‘misconduct’, a tactic employed by some of the judge participants in cases in which one of the parents has engaged in PAS (see Chapter Six).

Chapter Six

1. The case management system was only available, for my judge participants, in those Superior Court sites having a dedicated family bench, and the Ontario Court of Justice.
2. The process exacted its toll on my participants. SCJ H described “carrying my brain home in my briefcase at the end of the day”, while SCJ F, who is not a proponent of case management without a dedicated bench to administer it, claimed “[family judges] get too jaundiced if you stay in one area. You get burned out”. That sense of burn-out was expressed by SCJ C and OCJ N, both of whom presided exclusively in family courts.
3. I confess to never having encountered “situational leadership matrix” theory in law school, practice, or the scholarly legal literature, although a brief *Wikipedia* search revealed that it was the brainchild of Dr. Paul Hersey, who was neither a lawyer nor a psychologist, but is described as “a behavioural scientist and entrepreneur” whose areas of specialization included organizational behaviour and industrial relations. In other words, OCJ K employed a model of judgeship she borrowed from a discipline wholly unrelated to law, and conceived by an individual with no expertise in it. I query whether his doctorate in education, MBA and BS would be sufficient to qualify him as an ‘expert’ for purposes of giving opinion evidence at trials in Ontario. Putting aside the efficacy of adopting an adjudication model from industrial relations, I suspect that OCJ K’s familiarity with the “situational leadership matrix” arises from a presentation at a judges’ conference she attended, and not from her own academic engagement and immersion.
4. By “junk science”, I rely upon the definition found at junkscience.com: referring to faulty research, data and/or claims fabricated and disseminated to promote specific agendas for financial or political gain.
5. The judge participants across the continuum concurred that cultural and ethnic differences can impact how litigants approach the system. SCJ H referred to the “real cultural mosaic” within the population serviced by his court house. “The backgrounds of some of these people are such that women are not always treated as equals and when they come here, they decide they are equal. It creates many problems.” SCJ B posited that “most of us judges, and lawyers, too, are quite ill-equipped to understand and deal with cultural differences where certain kinds of behaviour are concerned”. OCJ N allowed “we’re teaching Canada 101 in this court”. OCJ N, in comparison, was adamant that he was not prepared to countenance culturally-based misogyny in his court room. “We are trying to explain to people why their beliefs are not respected here, but we’re not very successful.”
 Inasmuch as I did not explore in any great detail with the judge participants how they responded to cultural and ethnic difference in their court rooms, I have not included a discussion of these issues in this research study.
6. The judge participants’ comments regarding self-represented parties reflected, for the most part, the level of comfort each felt when dealing directly with litigants. SCJ C and OCJ K

expressed considerable frustration with the legions of self-represented litigants appearing before them. SCJ G acknowledged that more self-represented litigants now appeared before her, but asserted that those appearing before her started out being represented, “and then they spend their first \$5,000 or \$10,000 and things haven’t gone anywhere and they either run out of money or they just don’t see they’re getting any value for their money. And that becomes a problem.”

SCJ C despaired over the self-represented litigants appearing before her: “self-represented people are a huge, huge challenge to the court system but even more so to judges who are not trained to deal with people directly ...when you have self-represented people, you have to be two people’s lawyers and the judge at the same time, and that removes you from the appearance of impartiality and bias.”

OCJ K claimed that “sometimes lawyers totally get in the way. It makes me crazy.” She described situations where she would have finessed the parties into assuming mediative positions, when the lawyers would “stand up, be histrionic, adversarial, oppositional, and they would undo everything that was accomplished in the last hour.” In contrast, SCJ C attributed the litigiousness of self-represented parties to the absence of legal counsel, “because if they had a lawyer, it would have been settled already.” She described lawyers as “by nature, rescuers and helpers. We desperately want to make our clients’ lives better.” SCJ C’s assessment of lawyers was not shared by the other judge participants, except SCJ E, a relatively new appointment, who found the lawyers who appeared before her “fantastic”.

In comparison, SCJ F believed that “self-represented people are already destroyed by their own lawyers.” He found lawyers “get in the way, obstruct, obfuscate, get angry, and are irritants beyond irritants. Quite frankly, I enjoy the self-reps more than I do the cases with lawyers, by and large.” However, SCJ F was alone in his opinion amongst the judge participants.

SCJ G found that unrepresented parties “become very invested in their case, and, because they don’t have the legal knowledge, they become much more difficult to deal with.” Similarly, SCJ H opined that “when the new rules came out, the forms became user-friendly, and now anyone with a computer feels that they can come to court.” These mediative judge participants, along with SCJ C, preferred the presence of legal counsel in family law disputes.

OCJ L, M and N attributed the absence of lawyers in the system to the unavailability of Legal Aid certificates to family law litigants. OCJ N complained that “85% of our litigants are unrepresented. Legal Aid made certain changes that caused a lot more people to have no lawyers. And now, it’s really pretty much an epidemic.” For OCJ L, the case conference process “trying to resolve things through any kind of alternative out-of-court resolution” was a consequence of cut-backs to Legal Aid funding in family law disputes that has “somehow encouraged people to come to court, and you meet with duty counsel and somehow you feel like that’s your lawyer, and then you come to court.”

The judge participants agreed that prevalence of self-represented parties in the system could be differentiated by fora: they predominated in the OCJ, while constituted, according to OCJ N, only 30% of litigants in the SCJ. According to the judge participants at both levels, having jurisdiction over property ensured that the SCJ saw far more financially secure litigants than did the OCJ, and, accordingly, more lawyers. In comparison, all of the judge participants from the OCJ, save OCJ O, claimed that those appearing before them could barely afford to pay child support.

7. SCJ D made the initial interim “primary residence” order in Lily’s case. The application had originally been brought, without notice and on an emergency basis, by her abusive husband. It was then adjourned three times. It is difficult to explain how a judge as experienced as

SCJ D could have been unaware of the abusive nature of the husband's tactics. It is impossible to ascertain if SCJ D's refusal to make the initial order a custody order empowered Lily's husband to embark upon his campaign of escalating abuse and violence.

8. In *LL v MC*, Czutrin, J recently identified how s. 9 calculations of the federal *CSG* are to be made in order to determine if the threshold for "shared custody" is reached when each parent has a minimum of 40% access or custody time with the child. He found that "the amount of child support that could be ordered under a given arrangement was a major consideration for the father": para. 15, notwithstanding the judge "initially ... accepted the father's desire to have increased access with [the child] as a sincere interest in spending the maximum time possible with his son": para. 15. Czutrin, J noted that the court must proceed with s. 9 when the 40% access threshold is achieved, the onus of proof for which falls on the spouse seeking to invoke it. He held that 40% is the minimum period of access time sufficient to trigger s. 9: 146 days per year; or 3,506 hours per year: para. 37. The relevant period is the amount of time the child is in the care and control of the parent: para. 38.
9. See Chapter Five, Lily's story.

Chapter Seven

1. In 2003, the federal government tabled its Bill C-22, being amendments to the *DA 1985*, its response to the findings of the Joint Committee on Parenting and Access. Its report, entitled *For the Sake of the Children*, elicited vociferous responses thereto from all sides. This Bill proposed to dramatically change Canadian family law on parenting after divorce,

by eliminating the concepts of "custody and access" and replacing them with the notion of "parental responsibilities", "parenting time" and "parenting orders". It provide[d] for an extensive definition of the "best interests of the child" test that takes into account the child's needs for continuity and the history of caregiving, his or her security interest, family violence and any relevant previous criminal convictions ... While the Bill makes explicit reference to family violence and to the need to ensure the security of the child and "other" family members, it is completely gender neutral and does not specifically refer to violence against women or to women's equality interests in family law (NAWL, 2003:7).

Inherent in the Bill was a de facto presumption of shared parenting (NAWL, 2003).

If badly interpreted, the proposed provisions on decision-making authority could lead to situations where women are once again subjected to marital authority and control, despite the fact that they are divorced. For an abuser, decision-making authority often provides the foundation to continue exercising control: to prevent their ex-partners from becoming independent and to ensure that they remain connected to them. Decisions made by someone who is involved for reasons of power and control and not out of genuine interests in the children will more likely

reflect the decision-maker's interest than those of the children. They will certainly not reflect the concerns of the mother, and they could jeopardize her security as well as that of the children (NAWL, 2003:14).

It should be noted that the replacement of "custody" and "access" with terms more redolent of shared parenting is currently being proposed in the *Cromwell Report*. Bill C-560 represented an even more comprehensive iteration of the fathers' rights agenda than was apparent in either Bill D-22 or the *Cromwell Report*.

2. Personal communication.

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R. (Mrs.) v Eve [1986] 2 S.C.R. 388 (*Re: Eve*) (S.C.C.)

R. v Ewanchuk (1998), 57 Alta. L.R. (3d) 235, 13 C.R. (5th) 324, [1998] A.J. No. 150 (QL); reversed [1999] 1 S.C.R. 3303, [1999] S.C.J. No. 10 (S.C.C.)

R. v K.C. [2002] O.J. No. 3162 (Ont. S.C.J.)

R. v Lavallée [1990] 1 S.C.R. 852 (S.C.C.)

R. v Maheu [1995] O.J. No. 2312 (Ont. C.J. Prov. Div.)

R. v S. (R.D.) [1997] 3 S.C.R. 484, 1997 CanLII 324 (S.C.C.); Note: The text of the original decision was revised to remove personal identifying information of the parties on August 18, 2008. See: [1999] 1 S.C.R. 3306

R. v S. (R.D.) [1994] N.S.J. No. 629 (Q.B.); appeal reversed [1997] 3 S.C.R. 484, 1997 CanLII 324 (S.C.C.)

R. v Sayyeau [1995] O.J. No. 2558 (O.C.J. Prov. Div.)

R. v Seaboyer; R v Gayme [1991] 2 S.C.R. 577, 4 O.R. (3d) 383, 83 D.L.R. (4th) 193, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117, 6 C.R.R. (2d) 35, 48 O.A.C. 81, 1991 CanLII 76 (S.C.C.)

- R.A. v J.R.* [2006] O.J. No. 810, [2006] O.T.C. 216 (Ont. S.C.J. – Fam.Ct.)
- Rawluk v Rawluk* [1990] 1 S.C.R. 70, 71 O.R. (2d) 480, 65 D.L.R. (4th) 161, 23 R.F.L. (3d) 337, 38 O.A.C. 81, 1990 CanLII 152 (S.C.C.)
- Re Armstrong* [1915] O.J. No. 594, 8 O.W.N. 567 (Ont. H.C.J.)
- Re Geremia and Harb* [2009] O.J. No. 30 (Ont. S.C.J.)
- Re Gilmour* [1997] O.J. No. 2900, 46 O.T.C. 81, 47 C.B.R. (3d) 256, 72 A.C.W.S. (3d) 983 (Ont.Gen.Div.); rev'd on appeal [1997] O.J. No. 6407, 9 C.B.R. (4th) 191 (Ont. S.C.J.)
- Re Lang, Michener and Fabian* (1987), 59 O.R. (2d) 353 (Ont. H.C.J.)
- Re Orr* [1933] O.R. 212 (Ont. C.A.)
- Reeves v Reeves* [2001] O.J. No. 308, 102 A.C.W.S. (3d) 116, 2001 CarswellOnt 277 (Ont. S.C.J.)
- Reisman v Reisman* 2014 ONCA 109, 118 O.R. (3d) 721 (Ont. C.A.)
- Renaud v Renaud* [1989] O.J. No. 1451, 22 R.F.L. (3d) 366, 17 A.C.W.S. (3d) 70 (Ont. Dist.Ct.)
- Renaud v Renaud* [1978] O. J. No. 1890 (Ont. Prov.Ct. - Fam. Div.)
- Rezel v Rezel* [2007] O.J. No. 1460, 73 R.F.L. (6th) 445, 156 A.C.W.S. (3d) 1123, 2007 CarswellOnt 2313 (Ont. S.C.J.)
- Richardson v Richardson* [1987] 1 S.C.R. 857, 38 D.L.R. (4th) 699, 7 R.F.L. (3d) 304, 22 O.A.C. 1, 1987 CanLII 58 (S.C.C.)
- Ross v Ross* [1984] M.J. No. 98, 6 D.L.R. (4th) 384, 26 Man. L.R. (2d) 122, 39 R.F.L. (2d) 51, 25 A.C.W.S. (2d) 22 (Man. C.A.)
- Ruscinski v Ruscinski*, [2006] O.J. No. 1274, 146 A.C.W.S. (3d) 1014
[2006] O.J. No. 2320, 149 A.C.W.S. (3d) 33 (Ont. Sup Ct. J – Fam. Div.)
- Sawyers v McKechnie* (2003), 2003 CarswellOnt 2650, 42 R.F.L. (5th) 165 (Ont. S.C.J.)
- Schreyer v Schreyer* [2011] 2 S.C.R. 605, [2011] S.C.J. No. 35 (S.C.C.)
- Scrivo v Scrivo* [2014] O.J. No. 2956, 2014 ONSC 3779 (Ont. S. C. J.)
- Serra v Serra* [2009] ONCA 105, O.J. No. 432, 93 O.R. (3d) 161, 246 O.A.C. 37, 307 D.L.R. (4th) 1, 61 R.F.L. (6th) 1, 2009 CarswellOnt 513 (Ont. C.A.)
- Shaw v Shaw (aka Brunelle)* [2012] ONSC 590, 2012 O.J. No. 314, 9 R.F.L. (7th) 354, 2011 CarswellOnt 531 (Ont. S.C.J.)

Shaw v Shaw [2008] O.J. No. 1111, 2008 ONCJ 130, 170 A.C.W.S. (3d) 310, 62 R.F.L. (6th) 100, 2008 CanLII 130, 2008 CarswellOnt 1626 (O.C.J.)

Skrak v Skrak (1993), 1993 CarswellOnt 1751 (Ont.Gen.Div.)

Snodden v Snodden (2004), 3 R.F.L. (6th) 184, 2004 CarswellOnt 1901 (O.C.J.)

Spurgeon v Spurgeon [2001] O.J. No. 1117, 53 O.R. (3d) 509, 198 D.L.R. (4th) 351, 15 R.F.L. (5th) 440, 143 O.A.C. 271, 2001 CanLII 38738 (Ont. S.C.J.)

Starzycka v Wronski [2005] O.J. No. 5569 (Ont. S.C.J.)

Stetco v Stetco [2013] O.J. No. 2455 (Ont. S.C.J.)

Stone v Stone [2001] O.J. No. 3282, 55 O.R. (3d) 491, 203 D.L.R. (4th) 257, 156 O.A.C. 345, 39 E.T.R. (2d) 292, 18 R.F.L. (5th) 365, 107 A.C.W.S. (3d) 269, 2001 CanLII 24110 (Ont. C.A.)

Strobridge v Strobridge [2000] O.J. No. 1382, 96 A.C.W.S. (3d) 643, 2000 CarswellOnt 1319 (Ont. S.C.J.)

Surgeoner v Surgeoner [1993] O.J. No. 2940, 44 A.C.W.S. (3d) 248 (O.C.J.)

Talsky v Talsky [1976] 2 S.C.R. 292 (S.C.C.)

Teno v Arnold [1978] S.C.J. No. 8 (S.C.C.)

Thibodeau v Thibodeau [2009] O.J. No. 1965, 70 R.F.L. (6th) 224, 2009 CarswellOnt 2638, 97 O.R. (3d) 618 (Ont. S.C.J.); rev'd on appeal 2011 ONCA 110, 104 O.R. (3d) 161 (Ont. C.A.)

Thomas v Percy (1993), 48 R.F.L. (3d) 407 (Ont.Gen.Div)

Thompson v Gilchrist [2012] O.J. No. 3313, 2012 ONSC 4137, 218 A.C.S.W. (3d) 598, 27 R.F.L. (7th) 83, 2012 CarswellOnt 8996 (Ont. S.C.J.)

Thornton v Prince George School District No. 57 [1978] S.C.J. No. 7 (S.C.C.)

Trudell v Doolittle (1984), W.D.F.L. 933 (Ont. Prov. Ct.)

Ursic v Ursic [2006] W.D.F.L. 3290 (Ont. C.A.)

V.K. v T.S. [2011] O.J. No. 4046, 2011 CarswellOnt 9144, 2011 ONSC 4305 (Ont. S.C.J.)

Van Roon v Van Roon [2013] O.J. No. 228 (O.C.J.)

Veighey v Veighey [1977] O.J. No. 1700, 3 R.F.L. (2d) 148 (Ont. Sur.Ct.); aff'd on appeal [1977] O.J. No. 1726, 3 R.F.L. (2d) 148 (Ont. H.C.J.)

Von Czeslik v Ayuso (2007), 86 O.R. (3d) 88 (Ont. C.A.), overturning [2004] O.J. No. 2521, 4 R.F.L. (6th) 229, 131 A.C.W.S. (3d) 688, 132 ACWS (3d) 729 (Ont. S.C.J.)

W (K.M.) v W (D.D.) (1993), 47 R.F.L. (3d) 378, [1993] O.J. No. 1344, 40 A.C.W.S. (3d) 1101 (Ont. Prov. Ct. Fam. Div.)

Wehbe v Wehbe [2007] O.J. No. 1053, 1546 A.C.W.S. (3d) 130, [2007] OJ No. 2805 (Ont. S.C.J.)

Wesley v Mosher [1990] O.J. No. 1025 (Ont. Dist. Ct.)

Wood v Miller (1993), 45 R.F.L. (3d) 244 (Ont. U.F.C.)

Wreggitt v Belanger [2001] O.J. No. 4777 (Ont. C.A.)

Young v Halverson (2006), 2006 CarswellOnt 5268 (Ont. S.C.J.)

Young v Young [1989] B.C.J. No. 2260, 24 R.F.L. (3d) 193; rev'd. (1990), 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46, 50 B.C.L.R. (2d) 1, 29 R.F.L. (3d) 113, 23 A.C.W.S. (3d) 902; upheld [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117, 1993 CanLII 34 (S.C.C.)

Zanewycz v Manryko [2010] O.J. No. 833 (Ont. S.C.J.)

APPENDIX A

PARTICIPANTS NEEDED***FOR A RESEARCH STUDY OF WOMEN WHO HAVE BEEN ABUSED IN INTIMATE RELATIONSHIPS AND THEIR EXPERIENCES AS LITIGANTS IN THE FAMILY COURTS OF ONTARIO***

If you have been involved in the Family Courts of Ontario a litigant in divorce, custody, access, support, restraining order and/or property division applications, and have been abused by your intimate partner, I would appreciate your participating in a doctoral research study to examine your experiences of the legal system and its responses to you.

You will be asked to participate in a confidential, one-on-one interview for approximately 1.5 hours, at a time and place that is convenient for you. You will not incur any expenses or costs by participating in this research study. Your identity will be held in the strictest confidence to the fullest extent possible in law.

By participating in this study, you will be contributing valuable information to the understanding and appreciation of abused women's experience in the legal process.

Thank you for your interest.

For further information, please contact:

Lois Winstock, B.A., LL. B., B.S.W., M.S.W.

Ph.D. Candidate, Osgoode Hall Law School of York University,
at (deleted).

APPENDIX B**LIST OF AGENCIES LOCATED IN AND AROUND TORONTO AND PEEL PROVIDING COUNSELING AND OTHER SERVICES TO WOMEN WHO ARE, OR HAVE BEEN INVOLVED IN ABUSIVE RELATIONSHIPS WITH THEIR INTIMATE PARTNERS****Agencies Located in and around Peel (Brampton and Mississauga):****Twenty-four Hour Help-Lines:**

Assaulted Women's Helpline	1-866-863-0511
Caledon/Dufferin Victim Services	1-888-743-6496
Credit Valley Crisis Intervention Team	905-813-2200
Distress Centre Peel	905-278-7028
Family Life Resource Centre	905-451-6108
Family Transition Place	1-800-265-9178
Interim Place (North Shelter)	905-676-8515
Interim Place (South Shelter)	905-403-0564
Halton Women's Place	905-322-7892 905-878-8555
Kid's Help Phone	1-800-668-6868
Mobile Crisis of Peel	905-278-9036
Peel Counseling & Consulting Services	905-567-8858
Peel Children's Centre Crisis Response Team	416-410-8615
Sexual Assault Rape Crisis Centre	905-273-9442
Tele-Care Brampton	905-459-7777 905-584-7770 (Caledon)
Victims Services of Peel	905-568-1168
William Osler Health Centre	905-451-1710

Agencies:

African Community Services of Peel 3461 Dixie Road, #504, Mississauga, ON. L4Y 3X4	905-206-9497
Catholic Cross-Cultural Services 3660 Hurontario Street, 7 th Floor, Mississauga, ON. L5B 3C4	905-273-4140
8 Nelson Street, #302, Brampton, ON. L6X 4J2	905-457-7740
Catholic Family Services of Peel (Brampton) 389 Main Street North, #207, Brampton, ON. L6X 3P1	905-450-1608
Catholic Family Services of Peel (Mississauga) The Emerald Business Centre, 10 Kingsbridge Garden Circle, #400, Mississauga, ON. L5R 3K6	905-897-1644 x 101
Chinese Association of Mississauga Gold Square Centre, 1177 Central Parkway West, Units 80-81 Mississauga, ON. L5C 4P3	905-275-8558
Family Life Resource Centre (Salvation Army) 535 Main Street North, Brampton, ON. L6X 3C9	905-451-4115
Family Transition Place 20 Bredin Parkway, Orangeville, ON. L9W 4Z9	519-942-4122
Family Services of Peel (Woman Abuse Program) 151 City Centre Drive, #501, Mississauga, ON. L5B 1M7	905-270-2250
India Rainbow 3038 Hurontario Street, #206, Brampton, ON. L6X 4H9	905-454-2598
Interim Place P. O. Box 245, Mississauga, ON. L5G 4L8	905-403-9691
Honeychurch Family Life Resource Centre P.O. Box 44017, Brampton, ON. L6V 4H5	905-451-4115
Malton Neighbourhood Services 3540 Morning Star Drive, Malton, ON. L4T 1Y2	905-677-6270
Muslim Community Services 3075 Ridgeway Drive, #5, Mississauga, ON. L5L 5M6	905-828-2001
Peel Committee Against Women Abuse 1515 Matheson Blvd. East, #103 Mississauga, ON. L4W 2P5	905-282-9792

Punjabi Community Health Centre 11730 Airport Road, Brampton, ON. L6R 0C7	905-790-0808
Salvation Army Women's Counselling Centre 150 Central Park Drive, Brampton, ON. L6T 2T9	905-820-2050
Sexual Assault Rape Crisis Centre of Peel P. O. Box 2311, Square One Post Office Mississauga, ON. L5B 3C8	905-273-3337
Trillium Health Centre 100 Queensway West, Mississauga, ON. L5B 1B8	905-848-7100
United Achievers Community Services 36 Queen Street East, Brampton, ON. L6Z 4P5	905-455-6789
Victims Services of Peel 7750 Hurontario Street, Brampton, ON. L6V 3W6	905-568-8800

Agencies Located in Toronto:

Twenty-four Hour Help-Lines:

Assaulted Women's Help Line	416-863-0511
Catholic Children's Aid Society	416-395-1500
Centre for Spanish-Speaking Peoples	416-533-6411
Children's Aid Society	416-924-5200
Distress Centre of Toronto	416-408-4357
Gerstein Centre	416-929-5200
GTA Assaulted Women's Hotline	1-800-863-0511
Jewish Family & Child Services	416-638-7800
Oasis Centre des Femmes	1-877-336-2433 1-877-FEMAIDE
Shelter Intake	416-397-5637
Shelternet	www.shelternet.ca
The Redwood	416-533-8538
Toronto Rape Crisis Centre	416-597-1171

Victim Services of Toronto	416-808-7066 416-808-7059
Women's Habitat of Etobicoke Crisis Line	416-252-5829
Agencies:	
Abrigo Dufferin Mall, 900 Dufferin Street, #104, Toronto, ON. M6H 4A9	416-534-3434
Access Alliance Multicultural Health & Community Services 340 College Street, #500, Toronto, ON. M5T 3A9	416-324-8677
3040 Danforth Ave., #6, Toronto, ON. M4C 1N2	416-693-8677
881 Jane Street, #200B, Toronto, ON. M6N 4C4	416-760-8677
Afghan Women's Organization 789 Don Mills Road, #312, Toronto, ON. M3C 1T5	416-588-3585
Arising Women 4125 Lawrence Avenue East, #101, Toronto, ON. M1E 2Z2 North Sheridan Mall, 1700 Wilson Avenue, Toronto, ON. M3L 1B2	416-281-6662
Barbra Schlifer Commemorative Clinic Counselling Services 489 College Street, #503, Toronto, ON. M6G 1A5	416-323-9149
Canadian Centre for Women's Education and Development 2296 Eglinton Avenue E., Unit 2, Toronto, ON. M1K 2M2	416-285-6881
Catholic Family Services of Toronto (North Branch) 5799 Yonge Street, #300, Toronto, ON. M2M 3V3	416-222-0048
Central Neighbourhood House 349 Ontario Street, Toronto, ON. M5A 2V8	416-925-4363 x 149
Centre for Spanish-Speaking Peoples (Women's Program) 2141 Jane Street, 2 nd Floor, Toronto, ON. M3M 1A2	416-533-8545 416-533-6411
Chinese Family Services of Toronto 3330 Midland Ave., #229, Toronto, ON. M1V 5E7	416-979-8299
COSTI Immigrant Services Family & Mental Health Services Sheridan Mall, 1700 Wilson Ave., #105, Toronto, ON. M3L 1B2	416-244-7714
Counterpoint (Women's Drop-In Group) 920 Yonge Street, #601, Toronto, ON. M4W 3C7	416-920-6516

Court Support and Counselling Services (Call for information)	416-789-9793
Elsbeth Heyworth Centre for Women 1280 Finch Ave. West, #301, Toronto, ON. M3J 3K6	416-663-2978
Ethiopian Association in the Greater Toronto Area 2064 Danforth Avenue, Toronto, ON. M4C 1J6	416-694-1522
Family Services Association of Toronto Counselling 185 5 th Street, Toronto ON. M8V 2Z5 Rexdale Community Health Centre 8 Taber Road, Toronto, ON. M9W 3A4 747 Warden Avenue, Toronto, ON. M1L 4A8 Lawrence Square Mall, 700 Lawrence Ave. East, #420, Toronto, ON. M6A 3B4 355 Church Street, Toronto, ON. M5B 1Z8	416-595-9618
Flemingdon Neighbourhood Services 10 Gateway Blvd., #104, Toronto, ON. M3C 3A1	416-424-2900
Greek Orthodox Family Services and Counselling (Wife Assault Program) St. Nicholas Greek Orthodox Church, 3840 Finch Ave. East, Toronto, ON. M1T 3T4 40 Donlands Avenue, Toronto, ON. M4J 3N6	416-291-5229 416-462-1740 416-462-1793
Heritage Skills Development Centre 400 McCowan Road, Ground Floor, Toronto, ON. M1J 1J5	416-345-1613
Interval House 131 Bloor Street West, #200, Toronto, ON. M5S 1R8	416-924-1411
Iraqi Canadian Society of Ontario 1057 McNicoll Avenue, Toronto, ON. M1W 3W6	416-494-1438
Jamaican Canadian Association 945 Arrow Road, Toronto, ON. M9M 2Z5	416-746-5772
Jewish Family & Child Service of Metro Toronto 4600 Bathurst Street, 6 th Floor, Toronto, ON. M2R 3V3 750 Spadina Avenue, 1 st Floor, Toronto, ON. M5S 2J2	416-638-7800 416-961-9344
Kababayan Community Centre 1313 Queen Street West, #133, Toronto, ON. M6K 1L8	416-532-3888
KCWA Family and Social Services 27 Madison Avenue, Toronto, ON. M5R 2S2	416-340-1234

Lighthouse Community Centre 1008 Bathurst Street, Toronto, ON. M5R 3G7	416-535-6262
Malvern Family Resource Centre 1371 Neilson Road, #219, Toronto, ON. M1B 4Z8	416-281-1376
Manantial Neighbourhood Services Emmanuel Church of the Nazarene, 1875 Sheppard Ave. West, Lower Level, Toronto, ON. M3L 1Y6	416-915-0997
Native Child & Family Services of Toronto 295 College Street, Toronto, ON. M5T 1S2	416-969-8510
North York Women's Centre 201 Caribou Road, 2 nd Floor, Toronto, ON. M5N 2B5	416-781-0479
Oasis Centre des Femmes College Park, Box 46085, Toronto, ON. M5G 2P6	416-591-6565
Opportunities for Advancement (Call for nearest group)	416-787-1481
Pothikai Tamil Women's Organization 4544 Sheppard Ave. East, #329, Toronto, ON. M1S 1V2	416-961-4691
Rexdale Women's Centre 23 Westmore Drive, #400, Toronto, ON. M9V 3Y7	416-745-0062
Riverdale Immigrant Women's Centre 1326 Gerrard Street East, Toronto, ON. M4L 1Z1	416-465-6021
San Romanoway Revitalization Association 10 San Romanoway, Main Floor, North Wing Toronto, ON. M3N 2Y2	416-739-7949
Scarborough Women's Centre 2100 Ellesmere Road, #245, Toronto, ON. M1H 3B7	416-439-7111
SEAS Centre 603 Whiteside Place, Toronto, ON. M5A 1Y7	416-362-1375
Sistering – A Woman's Place 962 Bloor Street West, Toronto, ON. M6H 1L6	416-926-9762
South Asian Family Support Services 1200 Markham Road, #214, Toronto, ON. M1H 3C3	416-431-4847
South Asian Women's Centre 800 Lansdowne Ave., Unit 1, Toronto, ON. M6H 4K3	416-537-2276

Springtide Resources Inc. The Robertson Bldg., 215 Spadina Ave., #220, Toronto, ON. M5T 2C7	416-968-3422
St. Christopher House Woman Abuse Program 248 Ossington Avenue, Toronto, ON. M6J 3A2	416-532-4828 x 236
St. Joseph's Health Centre (Women's Health Centre) 30 The Queensway, Toronto, ON. M6R 1B5	416-530-6850
Thorncliffe Neighbourhood Office 18 Thorncliffe Park Drive, Toronto, ON. M4H 1N7	416-421-3054
Tropicana Community Services Organization 670 Progress Ave., # 14, Toronto, ON. M1H 3A4	416-439-9009
University Health Network – Toronto General Hospital Women's Mental Health Clinic 200 Elizabeth Street, Toronto, ON. M5G 2C4	416-340-3048
Vietnamese Women's Association of Toronto 1756 St. Clair Avenue West, Toronto, ON. M6N 1J3	416-539-0152
Women's College Hospital (Counselling Service) 76 Grenville Street, Toronto, ON. M5S 1B2	416-323-6040
Women's Habitat of Etobicoke 140 Islington Avenue, Toronto, ON. M8V 3B6	416-252-7949
Working Women Community Centre 533A Gladstone Avenue, Toronto, ON. M6H 3J1 5 Fairview Mall Drive, #478, Toronto, ON. M2J 2Z1 Yorkgate Campus, 1 York Gate Blvd., Toronto, ON. M3N 3A1	416-532-2824 416-494-7978 416-491-5050 x 4763
Yorktown Shelter for Women – Women and Communities Against Violence 21 Ascot Ave., 1 st Floor, Toronto, ON. M6E 1E6	416-394-2960 416-394-2950 x 236
YWCA Breakthrough Program Lawrence Square Mall, 700 Lawrence Ave. West, #445, Toronto, ON. M6A 3B4	416-487-7151

All information contained herein is correct as of November, 2008.

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APPENDIX C

INFORMATION FORM FOR SURVIVOR PARTICIPANTS

Study Title: Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario

Investigator

Lois Winstock, B.A., LL.B., M.S.W.
Ph.D. Candidate
Osgoode Hall Law School of
York University
4700 Keele Street, Toronto, Ontario
M3J 1P3

Email: (deleted)

Supervisor

Professor Mary Jane Mossman
Osgoode Hall Law School of
York University
4700 Keele Street
Toronto, Ontario
M3J 1P3

Email: (deleted)

What is the purpose of this study?

The purpose of this study is to examine the experiences of women who have been victims of domestic violence and who appear before the Family Courts in Ontario. This study will form the basis for a doctoral thesis in law, and, potentially other scholarly papers and presentations.

What is involved in participating?

If you agree to participate in this study you will be interviewed on a one-to-one basis by the investigator. This interview will take approximately one to one and one-half hour(s). The interview will be audiotaped, and the investigator may take notes during the interview. The audiotape will be transcribed by the investigator following the interview. During the interview, you will be asked some questions about your relationship with your former partner, your involvement with and impressions of the Family Courts in Ontario, and your opinions about improving the legal system for the benefit of abused women and their children.

Are there any risks associated with participating in this study?

There are no apparent risks as a result of participating in this study. The investigator is aware that some of the questions asked may trigger an emotional response for some. The investigator will be sensitive to your emotional needs, and is prepared to speak you off the record at any time during the interview. You may refuse to answer any question, and may ask that the audiotape be turned off at any time during the interview. Every effort will be made to keep your responses and personal information confidential. At no time will your identity be revealed by the investigator to any other individual. If necessary, you will be referred to by a pseudonym. The pseudonym will be used to identify audiotapes, transcripts, and the investigator's personal notes. The audiotapes will be erased immediately after they have been transcribed.

If you disclose any information during the course of your interview that reveals the existence of child abuse, the investigator will be obliged to report the abuse to the appropriate authority.

What are my Rights?

Participation in this study is completely voluntary. Taking part in this study should not lead to any costs to you. Your safety is the investigator's most important consideration. The investigator will come to meet you at a convenient time and location. You may withdraw from this study at any time without negative consequences. Unfortunately, you will not be compensated in any way for your time for participating in this study. You will obtain a copy of your signed Informed Consent Form for your records.

Contact Information

For questions or concerns about this study, or participation in it, please do not hesitate to contact the investigator, Lois Winstock, by telephone, at (deleted), or by e-mail at (deleted), or her supervisor, Professor Mary Jane Mossman, Osgoode Hall Law School of York University, by email at (deleted).

Thank you for considering to participate in this study.

Lois Winstock
Ph.D. Candidate
Osgoode Hall Law School of York University

APPENDIX D

AUTHORIZATION AND DIRECTION

To: The Registrar, (Name of Court)

You are hereby authorized and directed to release to Lois Winstock, B.A., LL.B., M.S.W., Ph.D. Candidate, Osgoode Hall Law School of York University, the Record, pleadings and proceedings, reasons, endorsements, and reports contained in my Ontario Court of Justice (Family Division) File Number _____, and this shall constitute your full and complete authorization in so doing.

SIGNED AT _____ on _____

APPENDIX E

INFORMATION FORM (FOR JUDGES)

Study Title: Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario

Investigator

Lois Winstock, B.A., LL.B., B.S.W., M.S.W.
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Supervisor

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Email: (deleted)

Purpose of this Study

The purpose of this study is to examine the experiences of women who have been victims of domestic violence who appear before the Family Courts of Ontario in order to identify any areas in the delivery of services or administration of justice that could be modified or improved to help address the needs of this population. This study will form the basis for a doctoral thesis in law, and, potentially other scholarly papers and presentations.

Participant Involvement

If you agree to participate in this study you will be interviewed on a one-one-one basis by the investigator. This interview will take approximately one to one and one-half hour(s). The interview will be audiotaped, and the investigator may take notes during the interview. The audiotape will be transcribed by the investigator following the interview. During the interview, you will be asked a series of open-ended questions particular to your involvement in the legal process in the Ontario's civil family justice system.

Risks Associated with Participating in this Study

There are no risks to you as a result of your participation in this study. You may refuse to answer any question, and may ask that the audiotape be turned off at any time during the interview. Every effort will be made to keep your responses and personal information confidential. All names and identifying information will be removed from the transcripts, which will remain in the possession of the investigator and kept under lock and key. All data will be analyzed and reported without references being made that would allow for the identification of any individual participant. At no time will your identity be revealed by the investigator to any other individual. If necessary, you will be referred to by a pseudonym. The pseudonym will be used to identify audiotapes, transcripts, and the investigator's personal notes. The audiotapes will be erased immediately after they have been transcribed. If you wish your identity to be revealed in the study, please advise the investigator accordingly.

Costs Involved in Participation

Taking part in this study should not lead to any costs to you. The investigator will come to meet you at a convenient time and location. Unfortunately, you will not be compensated in any way for your time for participating in this study.

Rights of Participants

Participation in this study is completely voluntary. You may withdraw from the study at any time without negative consequences. You will receive a signed copy of the Informed Consent form for your records.

Contact Information

For questions or concerns about this study, or your participation in it, please do not hesitate to contact the investigator, Lois Winstock, by telephone at (deleted), or by e-mail at (deleted), or her supervisor, Professor Mary Jane Mossman, Osgoode Hall Law School of York University, by email at (deleted).

Thank you for considering to participate in this study.

Lois Winstock
Ph.D. Candidate
Osgoode Hall Law School of York University

APPENDIX F

INFORMED CONSENT

Study Title: Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario

Investigator

Lois Winstock, B.A., LL.B., B.S.W., M.S.W.
Ph.D. Candidate
Osgoode Hall Law School of
York University
4700 Keele Street, Toronto, Ontario
M3J 1P3

Email: (deleted)

Supervisor

Professor Mary Jane Mossman
Osgoode Hall Law School of
York University
4700 Keele Street
Toronto, Ontario
M3J 1P3

Email: (deleted)

This study has been explained to me in detail. I have been given the opportunity to ask questions about being a participant in this study, and my questions have been answered to my satisfaction. I have been advised that I may continue to ask questions about the study at any time.

I understand that a tape recording will be made of my interview, and that a type written transcript of the interview will be prepared. I understand that I may ask that the tape recording be stopped at any time during the interview. I understand that the investigator may take notes during the interview.

I understand that my identity will never, at any time, be revealed in this study, and that I shall, at all times, if necessary, be referred to by a pseudonym.

I understand that the results of this study may appear in future publications or presentations, and that the contents of my interview may form part of those publications and/or presentations.

I understand that my participation in this study is entirely voluntary and that I am free to refuse to answer any question or to withdraw from the study at any time, without negative consequences. I am fully aware of the nature and extent of my participation in this study. I hereby agree to participate in this study, and acknowledge that I have received a copy of the Information Form and this consent statement.

SIGNED at _____ on _____, 20__.

Signature of Participant

Signature of Investigator

APPENDIX G

INTERVIEW GUIDE FOR SURVIVOR PARTICIPANTS

1. What was the nature of the abuse you experienced from your partner?
2. Why did you end up in Family Court?
3. What were you involved in there?
4. What were your impressions of the Family Court?
5. Did you obtain the results you were seeking? If not, why?
6. How do you think the Family Court could be changed/improved to better serve your needs?

APPENDIX H**INTERVIEW GUIDE FOR OCJ JUDGES**

1. How many years have you sat on the bench?
2. What was the nature of your legal practice before assuming the bench?
3. How often are allegations of domestic abuse advanced in your court?
4. Who is more likely to raise an issue of domestic abuse: men or women?
5. What problems, if any, do unrepresented litigants pose in the family justice process?
6. What evidence do you require to prove an allegation of domestic violence?
7. Is conduct relevant to the determination of a claim for spousal support?
8. Regarding *ex-parte* restraining orders, how many do you see during an average week, and how do you dispose of them? Has the criminalization of the breach of a restraining order had any effect upon your willingness to issue or deny such orders?
9. What evidence do you require to be satisfied that the issuance of an *ex parte* restraining order is appropriate?
10. How important is the demeanor of the parties to you in making your determinations?
11. Is inter-spousal conduct is relevant to issues of custody and/or access?
12. Do you make “custody” and “access” orders?
13. How is the case management system facilitated in your jurisdiction?

APPENDIX I

INTERVIEW GUIDE FOR SCJ JUDGES

1. How many years have you sat on the bench?
2. What was the nature of your legal practice before assuming the bench?
3. How often are allegations of domestic abuse advanced in your court?
4. Who is more likely to raise an issue of domestic abuse: men or women?
5. What problems, if any, do unrepresented litigants pose in the family justice process?
6. What evidence do you require to prove an allegation of domestic violence?
7. Is conduct relevant to the determination of a claim for spousal support?
8. Regarding *ex-parte* restraining orders, how many do you see during an average week, and how do you dispose of them? Has the criminalization of the breach of a restraining order had any effect upon your willingness to issue or deny such orders?
9. What evidence do you require to be satisfied that the issuance of an *ex parte* restraining order is appropriate?
10. Regarding *ex parte* orders for exclusive possession of the matrimonial home, what evidence is required to trigger such an order?
11. How important is the demeanor of the parties to you in making your determinations?
12. Is inter-spousal conduct is relevant to issues of custody and/or access?
13. Do you make “custody” and “access” orders?
14. How is the case management system facilitated in your jurisdiction?
15. Should conduct be re-introduced into family-related legislation with respect to other potential claims for relief, such as spousal support, a determination of something other than an equalization payment, permanent exclusive possession of the matrimonial home, and a claim for damages?
16. Is there a place for tort in family law?
17. Do you ever award punitive costs?