

# ***Evidence in the Family Courts About the Impact of Violence on Parenting***

## **Department of Justice Symposium On Family Violence: The Intersection of Family and Criminal Justice Systems**

**Sarah Boulby**

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### **I OVERVIEW:**

Domestic violence and abuse, whether physical or emotional, is by its nature usually an ongoing experience for family members. There are perhaps cases of a one-time uncharacteristic lashing out by a parent or a child but conventional wisdom, and my experience as a practitioner, is to find families in which the day to day experience over years is one of physical violence or emotional abuse expressed in various forms, often by more than one family actor, in a manner that ebbs and flows. Many of these families find their way into either the criminal justice system or the family justice system, or both. Longitudinal studies show the children raised in these families follow on the same path by becoming perpetrators of or victims of violence. As a family law practitioner, my task in advancing a custody and access application where my client is a parent alleging that domestic violence or abuse exists within that family, or responding to such a claim, is to lead sufficient evidence for a court to make an appropriate determination of parenting issues. The question for practitioners and the courts is what evidence is required to prove that violence or abuse has occurred and has had an impact on the children. One cannot assume that every allegation of violence or abuse is legitimate. False allegations and exaggerated claims do arise and do so at times of family breakdown. Nor does the problem end with a determination of whether violence or abuse has occurred. At that point, a court must still resolve what parenting terms are in the children's best interests and it will be the rare case indeed in which the appropriate answer is no contact between the child and the abusive parent. The question is how should the strands of custodial authority be allocated and how should the visitation schedule be structured? Evidence of the existence of and impact of violence and abuse on children also needs to address these questions. As a final point, the individual alleging violence or abuse

needs to keep in mind the legislative directive that awards of custody and access be made to the parent best able to promote the children's relationship with the other parent. While a proven claim of violence or abuse will absolve a parent from actively promoting the relationship with the other, a failed claim may open a parent to the charge of parental alienation with a possible loss of custody or primary residence. These cases are delicate ones in which the stakes are high and the collection and submission of proper evidence is challenging.

## II RECOGNIZING THE HARM OF INTRA-FAMILIAL VIOLENCE AND ABUSE

### 1. *The harm to children caused by violence*

A preliminary question is how the terms violence or abuse are employed. In this paper, I use "violence" to refer to physical assault, that is acts which our society criminalizes. I use "abuse" in a broader sense to incorporate insults, intimidation, and demeaning behaviour which is not criminal but which also can harm children's emotional and moral development. Violence or abuse may be experienced by a child directly or that child may simply be a witness to assaults or abuse directed at a parent or a sibling. The first question is not a legal one, but lies in the realm of psychological and sociological research. Does it harm a child to be exposed to violence or abuse directly and does it harm that child to be exposed to violence or abuse directed at another family member? The answers to these questions are not within my area of expertise but a significant amount of research has been conducted in Canada and internationally on these questions. For the purposes of this paper, I will refer to the excellent survey of family violence literature contained in the Department of Justice Report, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, authored by Peter G. Jaffe, Claire V. Crooks, and Nick Bala.

There is room to dispute the finer points of classification of family violence but in broad terms, certain points seem clear. Children exposed to violence, whether perpetrated on the child directly or on a family member are:

- i. More likely to be aggressive and have behavioural problems;
- ii. Have higher rates of Post-Traumatic Stress Disorder symptoms which include nightmares, flashbacks, sleeping difficulties, irritability, outbursts of anger, or efforts to avoid thoughts,

feelings or conversations associated with the trauma and inability to recall important aspects of it;

- iii. Are more likely to be abusive to a sibling; and,
- iv. May develop a “traumatic bond” meaning a longing for a relationship with the abusive parent.<sup>1</sup>

These effects of witnessing or experiencing violence and abuse are in addition to the direct physical harm a child may experience. The non-physical harm children experience seems not to differ significantly between those who have witnessed abuse of other family members and those who have experienced it against his or her person. In any event, families in which spousal violence or abuse occurs are more likely to also be families in which violence or abuse towards children occurs as well as violence and abuse between siblings.<sup>2</sup>

This is not to say that all children who grow to adulthood in violent and abusive homes can expect such outcomes. Some children are more resilient than others, whether by natural constitution or as the result of appropriate interventions and supports to assist them in overcoming their family experiences.<sup>3</sup> Broad surveys and research can guide us as to likely outcomes and risks on the macro level but cannot predict outcomes in a particular case.

## 2. *Statutory Recognition of the harm to children caused by violence*

The research conclusion that both experiencing and witnessing violence and abuse cause harm to children has found its expression in some provincial custody and access legislation. The expression of this concept in legislation provides guidance to the courts and limits the requirements of specific evidence imposed on litigants. As an example drawn from my own province, Ontario, the *Children's Law Reform Act* directs a court to consider evidence of violence or

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<sup>1</sup> Peter G. Jaffe, Claire V. Crooks, Nick Bala *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, Department of Justice Canada: 2006 at 5-9

<sup>2</sup> *Making Appropriate Parenting Arrangements in Family Violence Cases*, *supra* at 7-8

<sup>3</sup> *Making Appropriate Parenting Arrangements in Family Violence Cases*, *supra* at 9

abuse in weighing the merits of an application for custody or access. The legislation provides:

**S.24(4) Violence and abuse-** In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

- (a) his or her spouse;
- (b) a parent of the child to whom the application relates;
- (c) a member of the person's household; or
- (d) any child.

(5) **Same** – For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.<sup>4</sup>

Similar language can be found in other provincial and territorial statutes governing custody and access.<sup>5</sup>

From the perspective of a litigant trying to establish an allegation of violence or abuse in a parenting dispute, this legislation is very valuable. It directs the court to consider the matter as directly relevant to the ability to parent. It does not abrogate the need to lead specific evidence of the conduct alleged or the appropriate parenting order in the particular case but it does lessen the need to establish the relevancy of harm directed at another family member.

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<sup>4</sup> *Children's Law Reform Act*, R.S.O. 1990, c. C12, as am.

<sup>5</sup> For example, Newfoundland's *Children's Law Act*, R.S.N. 1990, c.C-13 provides: "s. 31(3) In assessing a person's ability to act as a parent, the court shall consider whether the person has ever acted in a violent manner towards (a) his or her spouse or child; (b) his or her child's parent; or (c) another member of the household, otherwise a person's past conduct shall only be considered if the court thinks it relevant to the person's ability to act as a parent." Northwest Territories *Children's Law Act*, S.N.W.T. 1997, c. 14 provides: "s.17(3) **Further consideration – act of violence** In determining the best interests of a child for the purposes of an application under this Division in respect of custody of or access to a child, the court shall also consider any evidence that a person seeking custody or access has at any time committed an act of violence against his or her spouse, former spouse, child, child's parent, or any other member of the person's household or family and any effect that such conduct had, is having or may have on the child."

Our federal legislation does not contain similar terms. The *Divorce Act* custody provisions practice an economy of language, in contrast to provincial and territorial legislation. Courts are directed to make interim and permanent custody and access orders in accordance with a child's best interests after considering his or her conditions, means, need and other circumstances. The only legislatively prescribed factors are:

1. that a court shall not take into consideration the past conduct of a person unless the conduct is relevant to the ability of that person to act as a parent of the child.<sup>6</sup>; and,
2. The maximum contact principle which is that: "a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."<sup>7</sup>

Consequently, under the *Divorce Act* the party who wishes to argue that a parenting order be limited in some manner because of a history of family violence that has not been directed at that child must be prepared to demonstrate that the mere fact of witnessing or being victimized by violence is relevant to parenting as a preliminary matter before proceeding to demonstrate that the alleged events occurred and what outcome is appropriate for the particular family

## II EVIDENTIARY ISSUES

On a practical level in any particular case the litigant must prove:

- a. That a child has been victimized by violence or abuse by the other party; or,
- b. That a child has witnessed violence or abuse directed towards another member of his or her household perpetrated by the other party;

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<sup>6</sup> *Divorce Act*, R.S.C. 1985, c. C3 (2<sup>nd</sup> Supp.), as am., s. 16(9)

<sup>7</sup> *Divorce Act*, s. 16(10)

- c. In the latter case (b), unless the proceeding falls within a jurisdiction that expressly recognizes it as such, the litigant must prove that such conduct is relevant to the ability of the other party to parent;
- d. That the risk of harm continues;
- e. The details of an appropriate parenting regime that will foster the child's best interests in the circumstances, whether that be: no access to the perpetrating parent, access following a therapeutic intervention for the perpetrating parent and/or child, supervised access, a regular access arrangement, or even primary residence with the offending parent.

The responding parent will need to marshal his or her evidence to demonstrate that the harm did not occur, or in the alternative is not relevant to parenting either because it was a one-time event, was minimal in character or other counter-vailing issues prevail such as other inadequacies of the parent alleging the violence or abuse or the children's own wishes.

I have been careful to avoid the use of gendered pronouns in setting out the evidentiary task for applicant and respondent in these proceedings because mothers and fathers may find themselves in either role. Although the vast preponderance of criminal domestic assault charges are against men, there are many against women.<sup>8</sup> Furthermore self reports by individuals surveyed as to whether they have been victimized by domestic violence are more evenly split between men and women.<sup>9</sup>

Certainly some admitted instances of violence or of verbal abuse may be situational, occurring for one-time only in the extreme stress of an immediate break up. Others may be reactive in nature. It is entirely possible that the perpetrator of a reactive incident of violence or abuse may become the subject of the custody and access proceeding although the real responsibility for the long term climate of violence or abuse lies with the applicant spouse.

The evidentiary options for litigants include calling direct evidence of adult witnesses, obtaining Children's Aid agency files, obtaining records and decisions from criminal proceedings, sociological reports, expert evidence in the form of assessments, and children's testimony. Each has a role in an appropriate case subject to the particular limitations of the form of evidence.

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<sup>8</sup> In Canada, reports of violent crime show women exceeding men as victims by 300%. *Making Appropriate Parenting Arrangements in Family Violence Cases*, *supra* at 3.

<sup>9</sup> *Making Appropriate Parenting Arrangements in Family Violence Cases*, at 3

## 1. *Direct evidence*

The primary means to bring evidence before a court, whether it be on an interim determination by way of affidavit or *viva voce* at trial, is direct evidence. The litigant will need to give evidence of his or her experience. The party alleging the domestic violence will need to provide a detailed and explicit account of what occurred. Where available, other adults with direct involvement in the family may give evidence including other family members, caregivers, teachers, and family friends and neighbours. The value of the evidence depends on the credibility of the individual giving it and the degree of involvement and opportunity to observe the family in close quarters.

Direct evidence from the parents presents particular challenges for both the parent alleging violence or abuse and the recipient. The parent alleging violence or abuse will likely face a challenge from the responding parent that the claim has been fabricated to gain advantage in the custody and access proceedings. There is no question that such dubious tactics are being adopted by litigants. A parent who alleges violence or abuse for the first time in the context of the proceeding will find himself or herself challenged for inconsistency. If there has been no previous complaint recorded to the police or to a child protection agency in the event of physical assaults, this may be used to challenge the credibility of the accusing parent. If a spouse cannot point to previous disclosures to a family doctor or therapist or to photographs of bruising then that also may be used to challenge his or her credibility.

Yet in many genuine cases a record of previous complaints will not exist. A parent may not report violence perpetrated by the other parent towards their child because he or she fears the intervention of the child protection agencies. The accusing parent may have tried to protect the other parent from the violence being uncovered. An accusing parent who has himself or herself been victimized by violence may not have reported it previously out of fear of the consequences. An intervention by the police will likely result in a charge but on a first offence the punishment will be nominal, if any, and the victimized spouse may reasonably fear that involving the authorities will worsen the violence without providing any real protection.

A further credibility issue may arise because of delays in reporting violence and abuse in the family process. A parent may raise these issues months or years after the separation. The longer the delay the more suspicious the allegations may look when finally raised. However, it is not uncommon for a person who has been victimized by family violence or abuse to fail to even recognize it as such until he or she has fully

withdrawn from the relationship. Furthermore, some individuals may take considerable time to develop the trust in others to confide in a lawyer or in the court.

Where the complained of conduct is verbal abuse rather than physical violence, the victimized spouse may not have identified it to himself or herself as conduct that is harmful in its early stages. In the case of conduct that is not criminalized, the avenue of a police complaint is not available.

On the responding side, presenting direct evidence poses its own problems. If criminal proceedings have been initiated, the responding parent may be facing severe consequences. A criminal conviction may affect an individual's livelihood, for example lawyers or teachers may have accreditation problems. A criminal conviction may prevent an individual from travelling that becomes more than an inconvenience to someone whose work requires it. The responding parent may be concerned to avoid inconsistencies whether major or trivial in filing evidence in the family and criminal proceedings. This may tie the hands of the family lawyer representing that parent in custody and access proceedings who must either file inadequate materials or wait until the criminal process is resolved.

There are also significant pressures in the criminal proceeding for a first time accused of a domestic violence charge to enter into a peace bond and participate in an anger management course in exchange for the withdrawal of the criminal charge. That provides a reasonable resolution of the criminal process and mitigates legal fees which may be an overwhelming drain for a recently separated spouse. On the other hand, once that peace bond has been entered into, even if it involved no admission of guilt, the parent risks being considered guilty as originally charged when the incident is considered in the family process.

If it is available, corroborating evidence by third parties is invaluable to bolster the credibility of both the parent raising the allegations and the parent responding. It may also be possible for the court to call a witness in a custody proceeding despite a decision by both parties not to call that individual. In *Stefureak v. Chambers*, Quinn J. Ordered a child's grandparent to give testimony in a custody proceeding under the provincial legislation, finding that he had authority to do so under the court's *parens patriae* jurisdiction in order to determine the best interests of the child.<sup>10</sup> Although *Stefureak* was not a case concerning domestic violence or abuse, it may be a useful precedent to the courts in this field if an obvious witness has been overlooked by the parties, whether because of inexperience or possible family pressures.

## 2. *Child Protection Agency files* -

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<sup>10</sup> *Stefureak v. Chambers* (2005) CarswellOnt 1935 (Ont.S.C.J.)

In a case in which a child protection agency has a history of involvement with the family the files may be accessible and may be of assistance to either party in the case. A child protection investigation will include social workers' notes of interviews with the various parties, the children and, where involved, the police. Where there is legitimate concern of violence or abuse, a child protection agency may well not commence a protection application if it is determined that one of the parents is capable of providing a safe environment. In that situation, the parent may be told by the agency to ensure that the children are removed from contact with the abusive or violent parent and use a private proceeding in the family court to achieve that end. If so the agency files may contain useful information for the family court.

The Responding parent may also benefit from drawing on child protection agency files where the accusing parent has a history of making false or trivial allegations. There will be a record of each allegation made, notes from the investigation and evidence of a decision to close the investigation.

Both parties must consent to the release of child protection records concerning the agency and in the absence of the agreement of one party, the other will need to apply to a court for an order to release the files.

### 3. *Evidence from Parallel Criminal Proceedings*

Depending on the stage of the criminal proceedings, there may be a wealth of evidence available that may be of value in the family action. If the criminal proceeding has come to a conclusion then there will be potentially a decision, reasons and a transcript concerning the very incident that is also a focus of the custody and access claim.

In many cases, the separation is precipitated by a domestic assault charge of greater or lesser severity. The charged parent will likely be released on a recognizance that imposes a physical separation of the parent from the rest of the family. Either parent may then commence a family law action to address financial issues and the care of the children. In these cases the two proceedings will carry on at the same time and interim parenting decisions may be made at a stage at which the accused parent has not resolved the criminal action. As part of the disclosure process in the criminal action the accused will receive the Crown Brief containing the evidence in the criminal action. That evidence may be of assistance to either one of the parties in the family action. It will include the police notes that may contain inconsistent statements. It may also include information from third party witnesses. There may be photographs of injuries and a videotape of the complainant's statement. All this could be of assistance to the court

and to the parties in sorting out the truth of allegations in the family action. There are, however, restrictions on use and access to the brief.

In Ontario in *D.P. v. Wagg*, the Court of Appeal concluded that a party to a civil action in possession of a Crown Brief concerning a related matter in which he had been the accused, was required to disclose possession of the Brief but need only produce it after a screening hearing in the Superior Court of Justice on notice to the Attorney General and relevant police service.<sup>11</sup>

In an earlier custody case, *Harbour v. Bangs*, the court had ordered a parent who was also the accused in a domestic assault case to produce to his spouse the crown brief that had been disclosed to him as part of his disclosure requirements in the custody application. The disclosure was ordered after a motion on notice to the accused, as respondent in the criminal proceeding, and to the Crown Attorney who opposed the disclosure.<sup>12</sup>

Overall, there is a strong interest in ensuring a full and complete evidentiary record to determine custody applications that I suggest weighs in favour of disclosure in these circumstances.

#### 4. *Assessment* –

To assist in determining any custody or access dispute, a party may ask for an order for an assessment by a qualified social worker, psychologist or psychiatrist on the needs and circumstances of the children. An assessor will issue a report following a detailed investigation of the family with recommendations for an appropriate parenting plan. At trial, an assessor will be called to give evidence and comply with the general rules for the admission of expert evidence. There is some question as to whether a court will consider and rely on a written assessment report at an interim stage when the parent who does not accept the assessor's conclusions has not had the opportunity to cross-examine.<sup>13</sup> Whether a court will accept the conclusions on an interim basis is discretionary.

In a case where a parent alleges domestic violence or abuse, an assessment may be a valuable tool to bring that evidence before the court. The dynamic of abuse may become evident to a trained mental health professional in the course of an assessment

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<sup>11</sup> *D.P. v. Wagg*[2004] O.J.No. 2053 (Ont.C.A.)

<sup>12</sup> *Harbour v. Bangs* (2002) CarswellOnt 3559 (O.C.J.)

<sup>13</sup> *See Forte v. Forte*(2004) CarswellOnt 1461 (Ont.S.C.J.)

because of the close contact with the parties. An assessor also will be able to meet and interview the children in a more relaxed context than the court and may be in a better position to assess both the sincerity of their views and wishes about their living arrangements and to determine what the impact of any violence or abuse on them has been. As discussed above, one of the consequences of living in a family rife with violence or abuse may be that a child identifies with the apparently stronger parent who is the abuser. If that is the motivation, it is much more likely to be exposed in an assessment process than any other means of drawing out the child's views and preferences.

An assessment has limitations. It is not appropriate in every case, particularly if there are no clinical issues. I would argue that given the mental health impacts of violence and abuse there are clinical issues raised in every case where violence or abuse is present. A more practical problem with an assessment is the cost. Only well-heeled litigants will be able to afford a private assessment and publicly funded options are very limited.

## 5. *Child Testimony*

A child may be able to give his or her own views about custody and access issues. This can be by way of formal testimony in open court or by speaking to the judge in chambers. A child may have access to separate legal representation, although again access to a children's lawyer varies tremendously across Canada. A child's lawyer may express the child's views and preferences as an advocate or may give an independent view of what is appropriate even if that is contrary to the expressed wishes of the child.<sup>14</sup> Madam Justice Martin's decision in *L.(R.A.) v. R.(R.D.)* provides an example of how evidence was employed to address allegations of abuse and counter-allegations of parental alienation.<sup>15</sup> In that case the thirteen year old child, represented by her own counsel at trial, expressed a wish to spend more time with her father. However, Martin J. while considering those wishes, discounted them on the grounds that the father had influenced those wishes by alienating the child from her mother. Martin J. had before her extensive evidence from various assessors and mental health professionals who had worked with the family over the seven years from the date of separation to trial. Her Honour also had evidence from police reports and child protection agency reports concerning a number of allegations of abuse by the child against the mother and by the

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<sup>14</sup> For example in the recent decision of *A.G.L. v. K.B.D.* [2009] O.J. No. 180 (Ont.S.C.J.) at 28, the Children's Lawyer advised that the children's residence should be changed from the mother to the father contrary to the expressed wishes of the children.

<sup>15</sup> *L.(R.A.) v. R.(R.D.)* (2007) CarswellAlta 183 (Alta.Q.B.)

father against the mother, which Martin J. concluded were false. This lengthy decision provides helpful guidance to the necessary evidence required to conduct a full investigation of abuse claims. Regrettably, the four day trial and 45 page decision provides a comprehensive resolution to the case but only after some 7 years of separation and numerous court and social service interventions in the family that encompassed more than half the child's life. Martin J.'s reasons review in some detail the harm done to the child over the course of this lengthy dispute. By the time a comprehensive evidentiary record had been assembled and the case came to trial, much damage had been done.

## 6. *Social Science Research*

Effective evaluation of the evidence in a parenting dispute involving domestic violence or abuse allegations clearly relies in no small part on an understanding of the particular pressures on parents and children in such cases. Assessing credibility or weighing the views and preferences of a child may be heavily influenced by an understanding of the social science research in this area. Yet there are practical problems in admitting such evidence. An academic research paper is not properly expert evidence nor is it realistic to suppose that individual litigants of average means can retain an expert to tailor a report or give testimony on these issues for a particular case. Even if prepared, such a report may not be admissible.<sup>16</sup> Nor is all research material published and circulated on this topic of high quality. Questions of domestic violence and abuse that includes parental alienation are open to potential politicization from various perspectives. Courts have resisted attempts to introduce “junk science” in proceedings in other contexts.<sup>17</sup> If the door is open too wide to permit parties to file social science material as evidence then “junk social science” may creep into the process. It is inconsistent with our system of individualized justice to expect courts to analyse social science research as presented by a particular litigant whether ostensibly as evidence or filed along with books of authorities. It may be that the more appropriate way to have these factors taken into account is expressly in the governing legislation.

## 7. *Evidence on the Appropriate Parenting Plan*

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<sup>16</sup> *Johnstone v. Brighton* (2004) CarswellOnt 3229 (Ont.S.C.J.) but also see *Wiegers v. Gray* (2007) CarswellSask 10 (Sask.C.A.)

<sup>17</sup> *Di Serio v. Di Serio* (2002) CarswellOnt 1963 (Ont.S.C.J.) at 6-8

A parent who alleges abuse will not succeed in his or her custody and access application merely by persuading the court that the other parent perpetrated violence or abuse. Even so, a court may conclude that it is in the children's best interests to remain with that parent. In *Shaw v. Shaw*, Pugsley J. reviewed in detail the predicament of parents charged with minor domestic assaults under Ontario's current system and concluded that there should be shared parenting despite the pending charges.<sup>18</sup> In *MacNeil v. Playford*, Forgeron J. granted custody to the father with specified access to the mother. The court did so in the face of the father's conviction for assault against the mother, based on findings that the father's assault was reactive to much worse conduct by the mother.<sup>19</sup> There are numerous cases all of which turn on their particular facts, the evidence presented and the court's assessment of the impact of violence or abuse. Whether the incident is reactive has clear relevance to the outcome.

## CONCLUSION

Proving a claim of domestic violence and abuse is challenging. On the other hand, advancing and failing to prove a claim of violence or abuse may well be fatal to a custody application. Making false or fabricated allegations of sexual, physical and/or emotional abuse is identified as one of the warning signs of an alienating parent.<sup>20</sup> The particular challenges of presenting evidence in custody cases involving domestic violence or abuse arise for experienced counsel. Yet many of these cases are dealt with in busy courts by unrepresented litigants. Decision-making in this area is difficult enough without a poor evidentiary record but I suspect that in many cases that is the reality. The challenge is not only to have best practices for legal counsel but to provide supports to the extent possible to unrepresented and low income litigants to present their custody and access cases for determination. In the best of worlds that would include access to legal advice and mental health professionals to investigate allegations of violence and abuse on a timely basis. At minimum, a more open policy with police records and child protection agency records might be of value. Certainly, inclusion of statutory direction in the *Divorce Act* where possible to ensure that the impact of domestic violence and abuse on children are considered uniformly by courts making custody and access orders would be beneficial. There are no easy answers to these issues, but there are changes worth debating and pursuing.

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<sup>18</sup> *Shaw v. Shaw* (2009) CarswellOnt 1626

<sup>19</sup> *MacNeil v. Playford*(2008) CarswellNS 457 (N.S.S.C.)

<sup>20</sup> A.G.L. v. K.B.D. *supra* at 19