

# **Specific aspects of family law and court**

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## Presenting Evidence to the Court about Abuse

Court outcomes are based on the evidence and information presented to the court. This is especially true in cases involving abuse, because its importance is still misunderstood by many in the family law system and because abusers routinely minimize and even deny the abuse altogether.

Whether a woman is preparing her own paperwork or working with a lawyer who will prepare the court documents, she can play an important role in providing as much detailed information as possible.

For lawyers, detailed, accurate information will assist them in giving appropriate advice about realistic legal options. The lawyer will also be able to use her/his time more efficiently and work more effectively with the woman.

Judges must also have detailed information to enable them to make the best orders possible according to the needs of the family.

In gathering information and/or preparing documentation about abuse for family court, a woman should:

- be specific with such details as times, locations and names of those with supporting information
- describe events and the effects they had on her and her children
- stay focused. Her documentation should relate specifically to the claims she is hoping to make.
- be direct and give factual information
- be careful to avoid over-representing or under-representing the facts: Some women who have been abused tend to under-represent the facts due to their own minimization and denial. Ensure that the woman does not exaggerate or overstate the facts as this can damage her credibility.

Participating in the evidence gathering process can:

- empower her
- help her to remain or become involved in her case
- ensure that there is no miscommunication between herself and her lawyer
- aid in her recovery process

In the vast majority of cases involving violence against women, the perpetrator will deny or minimize the abuse. As a result, the court is left with what is known as the "he said – she said" problem. The court has the daunting task of trying to determine which version of the facts is true. In these cases, it is important to present persuasive evidence to the court so that the truth about the violence is exposed. This is an uphill struggle for a number of reasons. Since most abuse takes place behind closed doors, there are seldom witnesses to what has happened. Women often downplay or deny the abuse they have experienced because they are embarrassed, don't want anyone to know, or fear the children will be affected if the violence is discussed in court.

Some still believe that women make up or exaggerate abuse to try to give themselves an advantage in family court. The challenge is to obtain any credible evidence of abuse given that abuse mostly occurs behind closed doors in the absence of witnesses.

Be prepared that no matter how neutral and credible the woman's information is, the other side will make substantial efforts to discredit the information. The abuser will typically carry out one or more of the following strategies:

- deny or minimize the abuse
- blame the woman for his behaviour
- deflect the abuse onto the woman by alleging that she is the perpetrator
- attempt to demonstrate that the woman is incompetent (as a mother) or unstable (i.e. she suffers from alcoholism, depression, etc.)

Make the woman aware that her spouse is likely to adopt one or more of these tactics and that she will be met by strong opposition from the spouse's lawyer. A woman will obviously benefit from the assistance of an advocate and therapist to help her to remain strong.

#### *The importance of legal advice*

A woman should seek legal advice to assist her in gathering evidence. The lawyer will provide strategic advice about the following:

- Is the information relevant to a legal issue the woman is dealing with?
- What types of evidence can be introduced?
- When should the information be disclosed (i.e. in the court document that starts the case or at a later stage)?
- Is the information credible enough to be considered persuasive?
- If medical and/or psychological information is available, does the importance of the information outweigh the potential invasion of the woman's privacy on other matters in her medical and therapeutic records that may be disclosed within the court proceeding?
- How will this information be presented to the court?

#### *Review of the safety plan*

When a decision is made to introduce evidence of abuse to the court, a review of the woman's safety plan should be undertaken. What are the expected repercussions of disclosing this information? Should the woman take additional steps to preserve her safety after this information is disclosed?

#### *Requesting a custody and access assessment or the involvement of the Office of the Children's Lawyer*

Where the issue of custody of or access to a child is disputed, a court may order a custody and access assessment or the involvement of the Office of the Children's Lawyer to assist the court in gathering information. Custody and access assessors and clinical investigators through the Office of the Children's Lawyer may be able to determine what the impact of the abuse should have on the custody and access

proceedings. They meet with the parties and their children and also contact third parties to obtain any relevant documentation and information about the family. Even if no court case is in progress, a third-party professional can be retained by both parties to make recommendations about custody and access issues. This process also provides an opportunity for abuse issues to be factored into recommendations. A woman should ensure that any assessor undertaking this work is knowledgeable about woman abuse issues. Refer to the section in this manual entitled “Family Court Assessments.”

### *Evidence of abuse a woman can gather*

The following suggestions provide a brief and non-exhaustive summary of some of the evidence a woman can compile:

- evidence of previous criminal convictions for assault or other violent conduct arising during the relationship
- evidence that the spouse is charged with a criminal offence. Even if there is no conviction yet, it can be argued that the police believed there was enough evidence to lay the charge and that the Crown Attorney has decided there is enough evidence to proceed with the case.
- seek a family court order requiring the perpetrator to produce a copy of any police documentation related to the criminal charge. This is much easier than the woman trying to obtain a copy of her statement through the criminal process.
- transcripts of 911 calls made by the woman to the police. These tapes are only accessible for one year and should be ordered right away, even if she may not need them later.
- copies of any past police occurrence reports that the police have filed after coming to the home. If necessary, begin a Form 14B motion and serve the police with a copy of the motion to request that they release unedited versions of the occurrence reports and officer's notes.
- even if the criminal charge is dismissed, the transcript of the judge's reasons for judgment can be obtained. It may contain language indicating that the judge believed the woman but was not able to convict because of the higher criminal standard of proof. You can argue that there is sufficient evidence to meet the family court standard of proof.
- information from third parties (e.g. information reported to or observed by school officials, doctors, other individuals, counselling groups, etc.). The more neutrality there is, the better (i.e. avoid relatives and friends if possible). Letters from these individuals can be attached to an affidavit which must be sworn in which they state that the contents of their letters are true.
- photographs of injuries
- medical reports including doctor's letters and hospital records
- reports from counselors
- evidence of harassment post-separation
- notes the woman has made, perhaps in a diary, which she makes at or immediately after an incident. She can use these later in her affidavit and at trial to refresh her memory if she must testify.
- confessions of an abuser to the police statements of children, including

disclosure to a child protection worker (which is likely admissible as hearsay evidence in family court)

- diaries
- e-mails, letters and cards from the abuser
- information from previous or subsequent partners of the abuser

### *Presenting a history of the abuse*

A woman may have to provide the history of the abuse a number of times during the court process, including:

- when applying for legal aid
- to her lawyer
- during the mediation screening process or mediation itself
- in court documents
- during a custody and access assessment
- in the Children's Lawyer's intake form and to their representative
- in a Victim Impact Statement in criminal court
- at trial, in either criminal or family court

The most immediately recent information (for example, what led to the court proceedings) should be first, after which the history should be presented in chronological order, beginning at the start of the relationship.

Where there is a substantial amount of information to present, it may be helpful to summarize the abuse and then attach a chart which provides the specifics. The chart can summarize the type of type of abuse into categories (physical, sexual, financial, emotional, etc.), when it happened, whether children were present, the impact upon children, etc. A chart provides a visual image of the history of the abuse which can be very helpful in allowing the reader to quickly review the extent of the history without reading through lengthy paragraphs.

### *Affidavits*

An affidavit is a legal document that a person swears or affirms is the truth, in writing and in front of a witness. It is the chance for both people to tell their stories to the court, and a key piece of the evidence that the judge will rely on. Form 35.1 which is filed at the beginning of all custody and access cases is an affidavit, and further affidavits may be filed for motions during the course of the court cases.

An affidavit should be:

- clear
- detailed and precise
- written in logical order, like telling a story
- legible
- paragraphs should be numbered

An affidavit is written in the first person, using the word "I" to describe the person writing, as though she is talking directly to the court.

An affidavit should answer three questions:

- Who is my family?
- What do I want?
- Why should I get it?

#### Who is my family?

- names, ages and dates of birth of all the children
- information about any children who are not part of the custody application (for example, a child from a previous relationship or a child who is over 18 years of age) and what the arrangements for them are
- the full names of both parents
- the type of relationship the parents are in (married, common law, never lived together)
- who everyone is living with right now
- any informal arrangements for custody and access that are in place right now and for how long
- when the parents separated and briefly why

*1. My name is Virginia Radcliffe. This affidavit supports my application for custody and child support. I am married to Joe Black. We have two children, Samantha Black, born July 10, 2005, who is 1½ years old, and Sarah Black, born November 13, 2001, who is 5 years old.*

*2. I separated from Joe on March 1, 2007, after he hit me in the face. I went to the women's shelter and have been living there ever since with both my children. Joe has seen the girls twice since I left. I made arrangements to drop them at his mother's house, where he visited with them for several hours. I am prepared to keep doing this until we sort everything out.*

#### What do I want?

- custody: joint/shared or sole
- access: how much time, supervised or not, scheduled or unscheduled
- child support
- spousal support
- division of property
- exclusive possession of the matrimonial home
- restraining order

*3. I am seeking sole custody of Samantha and Sarah, with my husband to have access every other weekend. Exchanges need to be supervised. My mother-in-law, Jessica Black, is prepared to do this for us. Access should begin Saturday mornings at 10:00 a.m. and end Sunday afternoons at 5 p.m. My husband can communicate with the children by telephone during the week.*

*4. I am also seeking child support as set out by the Federal Child Support Guidelines and spousal support for me.*

5. *We own our own house and some RRSPs and I am seeking 50% of the value of that property.*

6. *I am seeking exclusive possession of the matrimonial home, located at 3754 Ridgewood Drive, as well as a restraining order.*

Why should I get it?

This section of the affidavit, generally quite long, provides the evidence to support the earlier sections.

7. Custody: *I have always been the primary caregiver to our children. My husband and I agreed that I would stay home with the children until they were in school full time. His work as a salesman requires that he travel often. He is a good father, but is away from home approximately 10 overnights a month. I am responsible for all the day to day caregiving, attending to medical and other appointments, getting Sarah to soccer and swimming lessons, remembering birthday parties, helping with homework and the like. I realize that now we are separated, I will have to look for work, but I will look for a job that allows me to be home by 5 o'clock each day. When Joe is on the road, he would not be able to care for the children in the evenings and overnight if they were to live primarily with him.*

8. *I have also had primary responsibility for decision making related to the children. I found a pediatrician and dentist for them and have made most of the decisions about what recreational activities Sarah would become involved in. Joe is interested in spending time with the children but has never wanted the responsibility associated with making decisions about their lives.*

9. *I think the children should stay with me as I am the parent they are the most used to and this will create less of a disruption for them.*

10. *Because I have always made the major decisions and because I do not think Joe and I can communicate effectively, I don't think joint custody would work well for the children.*

11. *As well, Joe has become increasingly abusive to me over the past year and I do not think this makes him a suitable custodial parent.*

12. *Because I have been the main caregiver, he has never had responsibility for them for more than a couple of hours at a time. Joint custody is not appropriate because of his treatment of me.*

13. *Joe has always needed to have a lot of control over me and what I do. I think that was one of the reasons he was happy to have me stay at home with the kids. He likes to know everything I do in the day, where I have gone, who I have seen. Before the kids were born when I was working, he would drop me off and pick me up from work every*

day that he was not traveling, even though we have two cars. He really discouraged me from keeping up my friendships, going out with my workmates and even from spending time with my family.

14. When I was pregnant with Samantha, he developed an explosive temper and would yell at me and throw things around, even breaking some things, over very small disagreements. Sometimes this happened in front of Sarah, who would become very upset.

15. Last year, he became very angry because I had taken the girls to my mum's for the day and was not back when he got home from work. After yelling at me while I was trying to get the children out of their car seats, he grabbed me by the shoulders and shook me really hard. I was holding the baby, who was 9 months old at the time. She was not hurt physically, but she was very upset and screamed for a long time before I could settle her down. I had bruises on my shoulders the next day. He was very apologetic and said it would never happen again. However, he has grabbed, shaken or pushed me more than a dozen times since. On July 10<sup>th</sup>, he became very angry after Samantha's birthday party ended because he said I spent too much time talking and laughing with my friends and not enough time with him. He hit me very hard across the face. The girls were both in the room at the time, and I picked up the baby and took Sarah by the hand and ran out of the house. I went to our neighbour, who gave us a ride to the shelter.

16. Since then, Joe has told me how bad he feels about what he did, but he is not prepared to go to counseling – he just says that if I listened to him better he would not get so angry. He tries to call me more than 10 times a day at the shelter and won't leave me alone.

17. For all these reasons, I know that joint custody would not work for me or for the children.

18. Access: I think it is important for the girls to have a relationship with their father. I think if he has a relatively short period of time with them, he can manage fine. He will likely spend a lot of time with his parents, who are good with the girls. Because of his violence to me, I do not want to see him to exchange the children, so I would like to drop them off at his parents' place before he gets there and then pick them up after he has left. I think for now, given the ages of the girls, access every other weekend with one overnight is appropriate. I will be happy to discuss increasing the access once we see how this goes.

19. Exclusive Possession of the Matrimonial Home: I wish to remain in the family home to maintain some stability for the children. This will mean Sarah can keep her friends in the neighbourhood and attend the school she is already registered at. Our house is only a short walk from my parents-in-law, who are very involved with the children. Because there have been a few episodes of violence by my husband, I need the protection of an exclusive possession order.

*20. Restraining order: Because Joe has been so persistent in trying to contact me since I left, and because I am afraid he will be physically violent again, I need a restraining order to make sure I am safe.*

*21. Child Support: Joe makes good money as a salesman. His income is up and down a bit because of commissions, but in the last 4 years, he has never earned less than \$70,000 a year. He is well able to support the children.*

*22. Spousal Support: As soon as things stabilize a bit for the children and we get back into our home, I will look for work. I worked in the auto plant before having the girls, and will try to get hired back there. It was a union job and paid well. Until I find a job, however, I need spousal support. Since the decision for me to stay at home with our children was a joint one, I feel I deserve support until I can become re-employed.*

## **Custody and Access**

When parents separate, they have to decide on appropriate living arrangements for the children and how decisions about them will be made.

Until these issues are resolved, both parents have equal legal rights to have the custody of their children.

Legally, custody refers to decision-making responsibility. A parent with sole custody has the right to make important decisions about the child's upbringing without needing to obtain the agreement of the other parent. This typically includes significant decisions about the child's health, education or religion. Parents with joint custody make major decisions together.

Children often spend most of their time living with one parent, whether that parent has sole or joint custody. The other parent, in these cases, will almost always have access to the children. Courts generally believe that it is best for children to have as much contact as possible with both parents. Where there are concerns about the children's safety or serious concerns about the access parent's parenting skills, access may be supervised. It is only likely to be denied completely if the court believes there is a very serious risk of harm to the child.

Abusive men often use custody and access as a way to try to maintain control over or intimidate their partner. It is very important for a woman with children leaving an abusive relationship to move quickly to establish legal custody of her children to prevent the abuser from claiming she has abducted them and to prevent the abuser from simply taking the children and refusing to let her see them.

This is especially true for women whose husbands may be in a position to remove the children from Canada. While the Hague Convention offers some protection against international abductions of children, it does not apply in many parts of the world and, even where it does apply, getting a child back from another country is a time-consuming, expensive and complicated process.

#### *What is custody or sole custody?*

A parent who has custody has the rights and responsibilities to make major decisions about the child's upbringing. Sole custody means that only one parent makes decisions about the child, A parent with sole custody may still need the consent of the other parent to take the child outside Canada or to apply for a passport, unless the court orders otherwise.

In a sole custody arrangement, the children usually live with the custodial parent. This is often referred to as the child's "primary residence."

#### *What is joint custody?*

Joint custody means the parents share decision-making responsibility for the children. This means that both parents make all major decisions together, sometimes with the help of a mediator or other professional. Sometimes courts order that only some decisions must be made together, and other decisions may be made by one or the other parent.

With joint custody, the children may live primarily with one parent and have access with the other parent or they may live with each parent on a more or less equal basis.

#### *What is shared parenting?*

The phrase shared parenting is generally used to describe situations in which the children spend at least 40% of their time with each parent. This term is found in the child support guidelines and its use is often linked to a claim for reduced child support payments.

#### *What is access?*

Access is the time the children spend with the non-primary parent. An access parent also has the right to receive information about the child's health and education and to communicate with the child between access visits.

Access may be arranged informally between the parents or the court order may spell out a detailed and specific arrangement. Unless there is significant cooperation between the parties, it is generally better to have a clear and detailed access arrangement.

Where there are concerns for the well-being of the children or that the father may not return the children at the end of the access visit, his time with them may be supervised, either formally at a supervised access centre or informally by friends or family members. If there are concerns for the safety of the mother, the exchanges of the children may be supervised, either formally or informally.

As stated above, until a court order or legal agreement about custody and access is in place, both parents have an equal right to have custody of their children. This means neither parent may make a unilateral decision to take custody away from the other parent.

For this reason, it is very important for women to get a written agreement setting out the custody and access arrangements or to begin a custody application as soon as possible after leaving an abusive spouse.

However, there is some legislative protection for women whose partners do not take any steps to contact or see the children after the parents separate. Section 20(4) of the *CLRA* states:

20 (4) Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement of custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides. R.S.O. 1990, c. C.12, s. 20 (4).

### *Main components of custody and access arrangements*

The main components of custody and access arrangements are as follows:

- Who has custody? Is it sole or joint?
- Where do the children live?
- What is the parenting or access schedule? When will the children be with each parent? Are they with one parent most of the time, or do they see both parents about half of the time, or is there some other variation?
- What are the arrangements for holiday or special occasion visits?
- Does each parent have an opportunity to care for the children if the other parent is unavailable (goes out of town for work, vacation etc.)?

Regardless of the parenting arrangements, each parent with custody or access is entitled to make inquiries and to be given information about the health, education and welfare of the child.

### *The legislation*

The *Children's Law Reform Act (CLRA)* and the *Divorce Act (DA)* are the two pieces of legislation that deal with what a judge is required to consider when making custody and access decisions. The rules set out in these laws govern all discussions and negotiations about custody and access, whether or not the family actually appears in front of a judge.

### *Best interests of the child*

The most important aspect of any legislation dealing with custody and access is the best interests of the child test, because this is the basis on which all custody and access decisions are made. This test appears in section 24 of the *CLRA*. It sets out the factors the court is required to consider when determining custody and access arrangements.

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Each case is decided on its own facts. A discussion of the numerous factors that a judge may take into consideration is outside the scope of this manual. However, the list set out in section 24(2) provides a summary of the main factors that a court will take into account:

- 24(2) *The court shall consider all the child's needs and circumstances, including,*
- (a) *the love, affection and emotional ties between the child and,*
    - (i) *each person entitled to or claiming custody of or access to the child,*
    - (ii) *other members of the child's family who reside with the child, and*
    - (iii) *persons involved in the child's care and upbringing;*
  - (b) *the child's views and preferences, if they can reasonably be ascertained;*
  - (c) *the length of time the child has lived in a stable home environment;*
  - (d) *the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;*
  - (e) *any plans proposed for the child's care and upbringing;*
  - (f) *the permanence and stability of the family unit with which it is proposed that the child will live;*
  - (g) *the ability of each person applying for custody of or access to the child to act as a parent; and*
  - (h) *the relationship by blood or through an adoption order between the child and each person who is a party to the application.*

Section 24(3)(g) is further expanded in later subsections, which address the issue of family violence specifically:

- 24(3) *A person's past conduct shall be considered only,*
- (a) *in accordance with subsection (4); or*
  - (b) *if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent. 2006, c. 1, s. 3 (1).*
- 24(4) *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.*
- 24(5) *For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse. 2006, c. 1, s. 3 (1).*

These provisions are relatively recent changes (2006) that acknowledge the reality of violence within families. In the past, judges were not specifically required to consider spousal violence and abuse in their custody and access decisions. Before the law changed, some judges would disregard evidence of violence or abuse because they believed that woman abuse had nothing to do with parenting skills and that it ended on separation.

The present provisions make it clear that violence or abuse perpetrated by a parent is relevant to his or her abilities to act as a parent and require the judge to consider it.

## **Considerations in determining custody and access**

The following is a general discussion about some of the factors that are considered by a court when it is determining custody and access. A woman should consult a lawyer to obtain specific advice about her own case.

### *Abuse*

Custody will rarely be granted to a parent who has abused the child directly, although access is not uncommon. Despite the legislation described above, partner abuse remains under-recognized by judges as a significant factor to be considered when determining appropriate custody or access arrangements. For instance, the presence of woman abuse does not necessarily rule out an order for joint custody or extensive access because it is perceived to be in the best interests of the children, even though such an arrangement can be extremely problematic for the woman. It is important to frame the abuse, within the context of the legislation, as having an impact on the abuser's ability to act as a parent.

### *Conduct/lifestyle*

The extent to which the courts are willing to examine a parent's conduct or lifestyle is limited to whether or not it interferes with that parent's ability to recognize and meet the child's best interests.

### *Interference with the parent/child relationship*

This can include preventing access, interfering with parenting, questioning the child about the other parent, putting down the other parent and otherwise undermining the child's relationship with the other parent. This is seen as being very harmful to the child. This is not only considered in the initial court order, but can also be used as grounds to limit access or to change custody. Additionally, parents who continue with this behaviour can face fines or even jail if they are found in contempt of court orders.

It can be very challenging for a woman to work cooperatively with her abusive partner on issues concerning the children. Parents are often asked to make changes or sacrifices to maximize the child's safe interaction with the non-custodial parent. There may be pressure on women to "get along" with their child's other parent, who is also their abuser because this is perceived to be in the child's best interests. This approach can minimize the woman's experience, which can be very challenging. The implication is that she should "just get over it" and move forward when, in fact, doing that could jeopardize her safety and that of her children. Her experiences need to be framed for the court as positive, protective parenting, based on her lived experience of her partner as a parent.

### *The alienated child*

Parental alienation refers to the systematic destruction of a parent-child relationship through one parent telling the children false information about their other parent. It is a controversial term based on the behaviour of abductors to make children believe that

there is no one who wants them or who can help them.

The idea that sometimes parents deliberately wage a perception war with their children has been suggested by some social service professionals, but generally the idea is discredited. However, when women raise the issue of abuse or refuse to follow court ordered access arrangements, sometimes even disappearing with their children, parental alienation syndrome (PAS) can become a convenient label for the father to put forward. Once raised, the case becomes refocussed on the mother's post separation behaviour and not about the underlying issues in the family that have led to this point. This labelling makes it even more difficult to raise legitimate issues of abuse, violence and control.

Janet Johnston's continuum of children's post-separation relationships with their parents is a very helpful way to look at the concept of parental alienation.

She sets out three overarching categories on this continuum, each of which has subcategories:

1. Child prefers contact with both parents:
  - child has equally positive relationship with both parents
  - child has a greater affinity with one parent
2. Child prefers one parent, with ambivalent feelings about the other:
  - child has an alliance with one parent
  - child is estranged from the other parent, because of abuse, violence or neglect "justifiable estrangement"
3. Child rejects one parent, with no ambivalent feelings:
  - child is estranged from the other parent, because of abuse, violence or neglect
  - child is alienated from the other parent, for no realistic reason: "alienated child"

As Johnston points out, even in this final category, a child may be alienated from one parent for no realistic reason or *for her or his own reasons* and not because of any actions or behaviour on the part of the non-alienated parent.

Family law, family court processes and professionals involved in the family court (including mental health professionals who are often called as experts in these cases) must understand and acknowledge the reality and prevalence of violence within families – both violence against women and violence, including physical and sexual abuse, against children. When this happens, court orders will better reflect the best interests of children and also the safety needs of women. There will be fewer opportunities for unsubstantiated allegations of PAS to be pursued.

Early case management by a judge with family law specialization can help as could ensuring that the family stays with the same family court judge from the beginning to the end of the case.

### *Health*

A parent's physical and emotional health can become a factor in determining custody and access if it interferes with that parent's ability to recognize and meet their child's needs.

### *Age/wishes of the child*

As set out in the best interests test, a child's wishes are one of many factors that a judge must take into account when determining best interests. In order to determine the children's wishes, the court can request the involvement of the Office of the Children's Lawyer who may appoint a lawyer to communicate the child's views and preferences to the court. Refer to the section "The Office of the Children's Lawyer" for more information. The child's age can be a significant factor in weighting her/his wishes – generally, the older the child, the more weight is given to his/her wishes.

### *A child's traumatic bond/attachment to the abusive parent*

When considering the wishes of a child, clinical assessment is needed in cases where children have developed a "traumatic bond" with the abusive parent (a longing for kindness, leading to confusion between love and abuse).

While a child's views should always be considered, a child's stated desire to live with an abusive spouse should have less weight than in other contexts. The child's stated reasons for wanting to live with a parent who has perpetrated woman abuse may offer important insights. Consideration should be given to the possibility of one parent undermining another or of one parent exposing the children to inappropriate information.

In all high-conflict cases, parents should be strongly discouraged from asking their children directly about their preferences for living arrangements, as children feel intense loyalty conflicts, guilt or fear in expressing their preferences to their parents. In high-conflict cases, interviewing a child should be done by an appropriately trained assessor or by a lawyer appointed for the child. The professional must ensure that the child's views are shared with the parents and the court in a sensitive, contextualized fashion. This requires appropriate training for assessors and lawyers for children, including education about violence against women.

### *Separation of siblings*

Where possible, the courts keep siblings together to minimize the impact of the family breakdown.

### *Status quo*

In the interest of minimizing the impact of the family breakdown, courts will try to maintain the child's current patterns and routines as long as this can be done in

accordance with the child's best interests. It is important for women to have access to good legal information and advice before or very soon after they leave an abusive relationship because abusers will often attempt to establish a status quo in their favour in the early days of separation.

### *Welfare of the child*

A major factor for courts to consider is which parent can offer the child the most stability and is better equipped to meet the child's needs. This can be of particular concern where the child has special needs and where meeting those needs in the past has been largely the responsibility of one parent.

### *Religious and cultural upbringing*

The religious and cultural needs of the child are identified as well as the ability of each parent to meet those needs.

### *When is joint custody appropriate?*

Joint custody is rarely appropriate in cases involving violence against women.

Experience in working with woman abuse survivors suggests that joint custody is inappropriate where:

- it places women and children at risk of ongoing harm
- it places children in the centre of a high level of conflict that cannot be resolved
- the violence continues during and post separation
- there is a clear history of poor communication, coercive interactions, inability to problem-solve and a lack of a child-centred focus by one or both parents
- there is a serious mental health or substance abuse problem

Some advocates believe that the best interests of the child are always served by both parents collaborating on decision-making. However, joint decision-making on all issues provides opportunities for conflict in any relationship. In abusive relationships, it provides an opportunity for ongoing violence.

Because the *Divorce Act* contains a section that encourages maximum contact with both parents that has sometimes been interpreted as a bias in favour of joint custody, it is important to frame the decision-making component of custody in terms of minimizing conflict or opportunities for abuse within the family.

There is an increasing body of case law that accepts the following principles with respect to joint custody:

- it is only appropriate when there is evidence that parents are able to communicate and cooperate with each other
- it should only be ordered where the parties agree and have demonstrated that they are capable of working together to make decisions relating to the children

### *The pressure to agree to joint custody/shared parenting*

Family Court Support Worker Program Resources © Luke's Place Support & Resource Centre, 2011

Joint custody and shared parenting are often promoted as being the best post-separation arrangements for children. On the surface, they appear attractive. They allow children to benefit from close relationships with both parents and allow parents to share the joys and stresses of parenting with one another. However, it is now clear that, while joint custody and shared parenting may be appropriate for some families, this is not generally the case in situations involving woman abuse.

Nonetheless, women who have left abusive partners often feel pressured by their lawyers, the judge, the mediator and even family and friends to “get along” with their abuser and agree to joint custody. The concern is that the concept of being a “friendly parent” may take priority over the woman’s need for separation from her abuser in order to be safe and to keep her children safe, both physically and emotionally.

Joint custody requires ongoing contact with the other parent and an ability to communicate effectively and negotiate when differences arise. Many abusive men use custody and access arrangements as a way to control, harass and/or assault their former partner. A court order for joint custody may force the woman into ongoing contact and abuse – the very things she left her partner to get away from.

A joint parenting arrangement in these circumstances is also contrary to the best interests of the children who must continue to live within a dysfunctional parenting arrangement.

Such orders can place women and children at risk of ongoing serious harm, including death.

Joint custody and shared parenting plans are almost never appropriate resolutions for high-conflict situations or cases involving violence against women.

#### *Other parenting arrangements*

The following are other types of custody and access arrangements that are used less frequently.

- **Shared parenting** (sometimes called co-parenting): Because shared parenting doesn’t have a specific definition, there can be a variety of arrangements for decision-making and living arrangements for the children. As in joint custody, the success of this arrangement depends on the parents’ cooperation and communication and generally works best where the parents’ lifestyles and parenting styles are similar or compatible. It is not an appropriate option where there is a history of abuse or power and control.
- **Shared custody:** Shared custody is a term from the Child Support Guidelines to describe situations where the children spend at least 40% of the time with both parents.
- **Split custody:** This refers to an arrangement in which some of the children live with each parent and have access to the other.
- **Parallel parenting:** The objective of a parallel parenting order is to give both parents an opportunity to participate in decisions about the child, even if they

cannot get along well enough to communicate with one another. Each parent makes the day to day decisions relating to the children while the children are in the care of that parent. This is intended to minimize the need for parental contact and to protect the children from being exposed to ongoing parental conflict. It seems unlikely that parents can raise their children in this way without communicating, particularly if each parent has different values and ideas about parenting or if abuse was present during the relationship.

- **Bird's nest order:** Under this order, the children stay in the family home and the parents rotate in and out. This can be a very expensive arrangement, as the family may need three homes. This order is often temporary, as assets eventually require equalization. This order is not suitable for parents whose relationship is high in conflict.
- **No contact:** Orders denying one parent any contact with the children are extremely rare. A judge would consider such an order where the parent presented an ongoing risk of violence or abuse to the child, was considered to be at high risk of abducting the child, or where there was little likelihood of a meaningful parent-child relationship. In very rare cases, a no contact order could result where there was an extremely high risk of violence to the custodial parent.

## Access

Access is the right to visit with the child and be visited by the child.

The construction of an access schedule takes into account both the parents' and children's schedules. Parties are encouraged to work out their own arrangements, but if an agreement cannot be reached, the court will make an order.

No one has an absolute right to access. Access, like custody, is decided based on the best interests of the child. The courts currently place a high importance on the parenting participation of both parties and attempt to maximize the child's contact with the access parent, unless it is shown not to be in the best interests of the child.

A non-custodial parent's behaviour and lifestyle will only be considered if it affects that parent's ability to meet the child's needs while the child is with him.

When a parent poses a threat or risk to the child, the court can order that the access be supervised or the court can deny access on a temporary, long-term or even permanent basis, although it is extremely rare for access to be terminated permanently.

If there are serious concerns for the mother's safety, the court can order that the exchanges of the children take place in a supervised setting.

Most communities in Ontario have supervised access and exchange centres, where professionals provide the service. In some cases, judges may order (or the parties may agree) to informal supervision of access and/or exchanges. The supervision could be

provided by an agreed-upon family member, friend, or member of the community. In some cases, exchanges take place unsupervised in a public setting such as a library or shopping centre because it is thought that this will reduce the likelihood that the abuser will engage in overtly abusive or violent behaviour.

### *Common access challenges*

Even with a clear custody and access order, many women find that their abusive ex-partners create real difficulty over access.

It can also be difficult for a woman who has just left an abusive situation to accept that her ex-partner may do things differently with the children.

Women are often concerned about the safety and well-being of their children when they are on access visits, and at times want to deny access because of these concerns.

This is a tricky area, because courts do not take lightly any attempt by a parent to interfere in the relationship between the children and the other parent or to act contrary to a court order.

The law requires the custodial parent to support and encourage access by the access parent, even if the children do not want to go or the mother has some concerns about what goes on during the visits. It also requires parties to comply with court orders.

However, if the mother believes the children are being harmed or are at risk of being harmed, especially physically or sexually, it is recommended that she alert the authorities (police/CAS) and take steps to ensure the safety of her children, which should include speaking to her lawyer as soon as possible about the steps that she can take. For example, her concerns may justify a change being made to the access order on an urgent basis.

If her partner has threatened in a believable way that he will not return the children, she may be able to deny access. Again, she should seek legal advice immediately in these circumstances.

If the children do not want to go, this can place the mother in a difficult situation.

There is no specific age written in the law at which children can make their own decisions about whether or not to visit their father. However, judges will rarely force adolescent and older children to engage in visits they are opposed to.

There are strategies women can use if they are having access troubles with an abusive ex-spouse:

- Get as much precise detail in the access terms of the order as possible.
- Have multiple copies of the order so one is always available to show the authorities if a problem arises.

- Orders should include a condition that the terms of the order are enforceable by the police. In some areas the police will only enforce orders if it is specified that they do so.
- Document any and all problems – complaints the children return with, suspicious injuries, comments made by the kids about what went on in the visit, times he missed or was late for access, any threats he has made to keep the children.
- Report any times their access is denied to her lawyer.
- Depending on the circumstances, consider counselling for the children so they can have an outside third party with whom they can talk through their concerns.
- Have a witness present for access exchanges.
- In situations where there are serious concerns for the children's safety, contact child protection authorities.

Women can face accusations of parental alienation if they withhold or appear to withhold access from the father, which makes the issue of access even more complicated. Women can also face contempt of court charges, fines and jail time if they act contrary to a court order and, in extreme cases, custody can be transferred to the access parent if the custodial parent has not complied with the access order. For more information about parental alienation, please see above.

Child support and access are not linked. Parents who fail to pay child support or who are unable to pay child support are still entitled to access. A parent who has not been granted access is still obligated to pay child support.

### *Strategies to address custody and access challenges*

It is difficult, time consuming and expensive to return to court every time an abusive ex-partner refuses to comply with a custody and access order. There are both formal and informal ways to address the kinds of challenges that commonly arise when dealing with an abuser over child-related issues.

At the formal end of the spectrum, if the parties agree, a judge can order that the parents work with a parenting coordinator. This is a method, still new and in the early stages of development, that can be used to resolve disputes about children's issues after separation.

It is intended to be a child-focused process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs and, with prior approval of the parties and the court, making decisions within the scope of the court order or appointment contract.

There are a number of potential concerns about parenting coordination. The parties pay

for the coordinator's services, which can be expensive, as many abusers disregard the custody and access order or intentionally flaunt it, while also challenging every decision and action of their former partner.

As well, there is no one body that regulates all parenting coordinators or to whom a complaint can be made, although most parenting coordinators belong either to the Ontario Psychological Association or the College of Social Workers and Social Service Workers.

If the decisions of the parenting coordinator are binding, the parenting coordinator must also follow the arbitration rules relating to secondary arbitrations.

Screening tools and protocols for parenting coordination for woman abuse cases have not yet been developed. Accordingly, a woman who has experienced abuse should seek advice about the appropriateness of the parenting coordination process for her situation.

At the informal end of the spectrum, a woman may wish to set her own boundaries with her former partner to limit his ability to continue to control and harass her and/or her children. She could:

- try to get an access order that is as specific as possible about all aspects of access: when it is to take place, what telephone access is permitted, how exchanges are to be handled, etc. The more specific the order is, the less opportunity for the abuser to manipulate the arrangements.
- monitor the children's phone/email contact with their father and end calls/exchanges that become inappropriate (for example, if the father begins questioning the children about their mother, sharing inappropriate information about the legal system, etc.); however this approach may lead to an allegation that she seeks to alienate the child.
- have caller ID installed so she can screen calls and only access calls from the abuser at times the children are available to talk to him.
- limit what can be spoken about during telephone calls with the abuser and end the call if it becomes intrusive or abusive.
- not respond to every text message, phone call or email immediately. This will help the abuser learn that he is no longer in charge of her contact with him.
- (if telephone contact is not working) limit contact to email. This provides a record of what was exchanged and she does not have to check it every day, which can limit the frequency of the contact.
- open a new email account/address just for communication with her former partner.
- arrange access exchanges away from her home. Even if access is unsupervised, exchanges can take place at the children's school or day care or in another public place.
- resist the temptation to spend special occasions such as children's birthdays and cultural/religious celebrations with the abuser. Even if the children appear

to want this to happen, they can learn the advantages of being able to celebrate these events separately with each parent.

- let him receive information regarding the children's health, education and general welfare directly from the children's care providers.
- limit contact with former in-laws and family members who behave in an abusive or disrespectful manner. Anyone from her ex-partner's family who wishes to spend time with the children can negotiate this with him. These boundaries can help to ensure, as much as possible, that he does not obtain information from third parties.
- adjust Facebook settings to ensure privacy. Consider who is on her "friends" list to ensure that no one will pass on sensitive information to her former partner. Also consider the children's use of Facebook and other social media.

### *Access by non-parents*

An order for access can be made for a non-parent, such as a grandparent, guardian or other significant person in that child's life, pursuant to the child's best interests, but these requests are not made in most cases. Most commonly, grandparents see the child at the time they have access with their own child.

If a parent objects, the decision of whether or not access will be granted will be determined based on the best interests of the child and where there is no obvious benefit to the child, the courts, typically, do not grant the request for access.

### *Supervised access and exchanges*

For reasons already discussed, women who have left abusive partners are often justifiably concerned about leaving their children alone with their former partner and/or about their own ongoing contact with him in order to exchange the children. Women have been killed during unsupervised exchanges, and children have been killed during unsupervised visits. Even in non-lethal situations, both children and women can be exposed to a host of safety issues during exchanges and access when it is not supervised.

For this reason, supervised access and supervised access exchanges are available in most communities in Ontario. Some supervision programs are funded by and accountable to the Ministry of the Attorney General and others are private.

However, women report that they have a challenging time trying to convince a court that they require this kind of protection. Women are often asked to prove that the father is a direct threat to the children and that there is no other way to ensure the children's safety.

Some judges are concerned that supervising either exchanges or access can have a negative impact on the child's relationship with the access parent and have expressed concern that supervised access centres are a costly, unnatural environment that is unnecessary where an alternative (having access or exchanges supervised by family or community members or take place in public settings) exists.

While there are certainly challenges associated with supervised access, it is also the case that supervision can allow non-custodial parents to spend time with their children that might not be possible otherwise because of safety concerns. The physical safety of children is increased because physical discipline is prohibited. This gives parents the opportunity to develop more appropriate approaches to discipline and problem solving.

Supervised access can lead to improved parenting skills generally, which then has a positive impact on children's relationships with that parent. It can also increase the amount and regularity of access.

When exchanges are supervised, the opportunity for verbal and physical aggression and overall conflict is decreased, which increases the safety of women.

### *Options for Access Exchanges*

#### Supervised access programs

Many communities have formal supervised access and supervised access exchange services.

The Ministry of the Attorney General's Supervised Access Program is delivered by a variety of local non-profit organizations, in child-friendly places. Through this program, parents can exchange children in a neutral, safe location and not have to see each other.

Supervision takes place during drop-off and pick-up. Children can also stay at the site for a two-hour visit with their non-custodial parent that is fully supervised, that is, the child is never left alone with the parent while at the site. Staff at the centre can provide the court with factual, unbiased observations about the participants' use of the service.

There is a fee for this service that is shared equally by both parties. Fees are based on the individual's ability to pay and may be waived if necessary.

Access exchanges and visits must occur within the centre's hours of operations and are subject to availability. Many argue it is not flexible enough to accommodate all of their access needs.

There are also private supervision services available in some communities. Care should be given before hiring a private service, as these programs are unregulated and unsupervised.

A woman who needs formal reports from the supervised access program would be advised to use a Ministry program.

#### Public place

Exchanges of children can take place in any public location such as a restaurant, shopping mall or library. To maximize safety, it is advisable to conduct the exchange

inside rather than in the parking lot. Also, it is important to pick a venue small enough that people will notice if the situation begins to escalate. A mall is so large and crowded that individual people tend not to stand out; a public library, on the other hand, is quiet enough that an outburst would likely be noticed.

Picking a public place where the children will feel comfortable and where there is something for them to do in the event the access parent is late is a good idea.

### Police station

Generally, this option should be used only where significant safety issues exist and there are no other alternatives. This is not an ideal situation for the child to be exposed to, nor is it an official access exchange venue.

### Third party access exchange

Often families will use a friend or family member to facilitate access exchanges. Problems can arise if the person acting as a third party is or becomes involved in the conflict. It can also be problematic if the third party is unable to enforce the terms of the access exchange.

This option requires a significant commitment from the third party, and conflict can arise about what to do if that person is not available.

In abuse situations, it is problematic if the third party does not acknowledge the abuse or the seriousness of the abuse and, as a result, participates in or condones the abuser's use of controlling and abusive behaviours.

### School

In some cases, the access parent picks the child up directly from school which avoids the necessity for any contact between the two parents.

## **Mobility**

It is not uncommon for a woman to want or need to move to a new community after separating from an abusive partner: she may need to do so for her own safety, she may have better employment opportunities elsewhere and/or she may wish to live closer to her family.

If her ex-partner consents to the move, she is free to do so, but should get his consent in written form, preferably as a clause in the custody agreement or order or, if there is already an order in place, an amendment.

If he does not consent, she will need to establish to the court that the move is in the best interests of the children, that she is not moving just to interfere with the father's access, and that she will make extra efforts to support long distance access with him. This could include allowing longer visits during school holidays, paying part of the cost of the children's travel, paying for long distance calls or skyping between the children

and the father and/or agreeing to a reduced level of child support in acknowledgement of the father's travel costs to exercise access.

Considerable deference may be given to the wishes of the custodial parent for a move as long as it is in the best interests of the children, but this area of the law is always changing. A woman should speak with a lawyer before beginning the process of relocating, unless the court order or agreement already sets out a specific process which must be followed in these circumstances.

### *International movement of children*

Many women have concerns about an abusive ex-partner removing their children from Canada.

This is especially so for women whose partners have family, resources, assets and other connections to another country.

There are also situations where the custodial mother may wish to ensure her ability to travel outside Canada with her children.

With respect to the legal movement of children, there are a number of ways to ensure this happens smoothly:

- the custody order can state that the parents both consent to some travel outside Canada
- parents should provide one another with a notarized travel consent to facilitate crossing borders – see Passport Canada site at [http://www.voyage.gc.ca/preparation\\_information/consent-letter\\_lettre-consentement-eng](http://www.voyage.gc.ca/preparation_information/consent-letter_lettre-consentement-eng)
- it could also set out a requirement that the traveling parent provide a detailed itinerary and that the other parent provide documentation such as passport, birth certificate, health card
- the parents should have certified copies of the custody order to present to border officials
- both parents should discuss safety issues with the children

It is more difficult to protect against illegal movement of children, but there are some steps that can be taken:

- the custody order can state that international travel is prohibited or place conditions on the travel
  - either or both parents can be required to surrender travel documents
  - the child's passport can be deposited with the court
  - the parent who has concerns should obtain a number of certified copies of the order
  - the parent can visit the passport office to have a passport alert issued, which would create a "red flag" if anyone tried to apply for a passport for the child.

If a mother has taken these steps and believes the father is taking the child out of the

country through the United States, she can ask for an American border alert to be issued by calling 613-990-8585 or 613-993-5959.

For emergency assistance, the mother can call the Consular Affairs Bureau, 24 hours a day, 7 days a week, at 1-800-382-3124 or 1-800-267-6788.

The Hague Convention on International Child Abduction is an international treaty signed by 75 countries that ensures cooperation among those countries in finding and returning children who have been illegally moved across international borders.

## **Family Court Assessments**

The purpose of an assessment in family court is to present unbiased recommendations for planning for the best interests of the child usually where there are issues outside the expertise of the judge like child development or the impact of parental behaviour on children. Assessors are often viewed as experts on these matters.

A parenting capacity assessment can be requested in both family and child protection court under section 54 of the *Child and Family Services Act*, often in cases where children are suspected or known to be at risk from one or both of their parents.

Parenting capacity assessments investigate a parent's ability to meet the health and developmental needs of the child. Parenting capacity assessors use psychometric testing and interviews with family members and others with information about the health, welfare or best interests of the child. The investigation covers a wide range of the child's emotional, sociological, educational and physiological needs, and the ability of the parent to provide for them. Parents do not select the assessor in this case. These assessments are usually paid for by the child protection agency.

A parenting capacity assessment can make recommendations about the required level of intervention and what measures the parent(s) can take to ensure family unity and alleviate the risk to the child.

Custody and access assessments can be obtained on consent of both parents or ordered by the court at the request of one party in order to assist in the development of a parenting plan that is in the child's best interests. The *Children's Law Reform Act* says the purpose of the assessment is to report to the court on the needs of the child and the ability and willingness of each party to meet those needs. The assessment is paid for by one or both of the parents.

A custody and access assessment examines the child's needs and the way in which the family functioned before and since separation. The preferences of children who are able to articulate their wishes are considered. Once the child's needs have been identified, the assessor will make recommendations to the court and to the parties on how to best meet the child's best interests.

(For more information, visit [www.yoursocialworker.com/s-articles/critique.htm](http://www.yoursocialworker.com/s-articles/critique.htm))

A custody and access assessment differs from a parenting capacity assessment in that it identifies the best interests of the child and makes recommendations on how to meet these needs based on evidence collected from family members and others with information about the best interests of the child.

The court can also request the appointment of the Children's Lawyer when there is a dispute before the court about a child's custody or access and the court requires independent information and representation about the interests, needs and wishes of the child. If a case involving custody or access is accepted by the Children's Lawyer, the Children's Lawyer may prepare a report by a social worker in order to assist with the resolution of these issues.

### *Assessment critiques*

Assessors can sometimes fail to consider all relevant areas or may consider factors beyond those allowable by statute or case law.

Assessments can be critiqued. However this can be a long, costly process that can present significant challenges. Difficulties with critiques include the following:

- there are no mandatory standards of practice
- they cannot be presented as an alternative assessment
- evidence presented for the assessment critique may be seen as biased
- the person providing the critique may be seen as biased in favour of the referring party
- the other party is not always aware that an assessment critique is underway. This can increase the level of tension between the parties.

Assessments can potentially be challenged based on:

### *Reliability*

The first step in challenging the assessment is to examine the reliability of the report by looking for procedural or factual errors and how those errors may have affected the recommendations.

### *The assessor's education and experience*

Other challenges may be based on an assessor's educational or theoretical orientation (e.g. are they qualified to address the issues? Has the assessor addressed issues of domestic violence that continue after separation that can have an impact on the arrangements?).

A critique may support the original assessment and its recommendations, even where errors are identified. Alternatively, a critique may offer other alternatives based on the data presented for the assessment.

## **The Office of the Children's Lawyer**

The Office of the Children's Lawyer is an independent office within the Ministry of the Attorney General. It represents the personal and property rights of children under the age of 18 in such legal matters as child custody and access disputes, child protection proceedings, estate matters and civil litigation. Its services are free of charge.

### *The role of the Office of the Children's Lawyer in Family Court Cases*

The OCL provides two different kinds of services in family law cases, either legal representation of a child or the appointment of a clinical investigator. Where they are providing legal representation, the role is to independently determine the needs, interests and wishes of the child and to ensure that those needs, interests and wishes are placed before the court. The OCL does not make decisions about custody and access.

In addition to legal representation, the Office of the Children's Lawyer also uses clinical investigators to investigate and prepare reports in custody and access disputes and/or to assist a children's lawyer. The recommendations of their clinical investigators can be highly influential and are generally difficult to contest.

The OCL will generally be appointed:

- in cases of child custody and access, if the court requires independent information and representation about the interests, needs and wishes of the child who is the subject of the proceedings
- in cases of child protection, where the court believes a lawyer is needed to represent the interests of the child

A clinical investigator may work independently or with a lawyer and will collect information from family members and others who have been involved with the family to obtain information about the best interests of the child and the patterns of the family.

A clinical investigator can:

- help families develop strategies to meet the needs of the children
- prepare recommendations to the court, based on the interests and wishes of the children
- provide evidence at court

A custody and access report will:

- focus on the best interests and needs of the children
- consider the ability of each parent to meet those needs
- contain information about past and present family arrangements as well as parenting plans for the future
- contain recommendations about ongoing or future parenting plans

Remember that:

- the OCL representative represents the child, not the parties

- parties should have legal representation or legal advice throughout this process
- even if the court asks the OCL to investigate in a custody/access dispute, the OCL is not required to take the case if it does not meet its intake requirements.

## **Child Support**

### *What is child support?*

The law requires both parents to contribute to the financial support of their children. Most commonly, the primary parent will receive child support from the other parent. Persons who have acted in the role of a parent may also be required to pay support for a child.

Child support will continue until the child reaches the age of 18, unless the child gets married or withdraws from parental control before this. It may also continue past this age if the child remains a full time student or is unable to be independent because of illness or disability.

Getting child support is often a difficult battle for women who have left abusive partners. Some prefer not to seek support at all because of concerns that their abuser will become more violent or will try to take the children. In some cases, the abuser attempts to coerce or intimidate the woman into not seeking child support in exchange for getting sole custody of the children. Some abusive men quit their jobs, hide income and assets, and even live in poverty themselves to avoid their child support responsibilities.

Women who apply for Ontario Works (social assistance) will be told they are expected to seek child support. There is a temporary exemption available for women who have left abusive partners. It is a good idea to ask the woman's Ontario Works caseworker about this exemption.

### *.Child Support Guidelines*

The basic amount of child support to be paid is set by examining the payer's annual before-tax income and the number of children, using the Child Support Guidelines (C.S.G.), which are a set of legal rules about how to make these calculations. They are accompanied by the Child Support Tables and can be found online at:

[www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html)

[www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html)

As part of the calculation process, each party must provide financial information, including income tax returns for the past 3 years and proof of current income, to the other. People who are self-employed, in a business partnership, control a corporation or receive money from a trust are required to provide further information.

The guidelines and tables set out the amount of basic monthly child support to be paid based on the total income of the payer and the number of children. Where the support

payer's income is not properly reflected in his income disclosure, there are a number of considerations that can be taken into account when calculating his income to ensure that the fairest possible outcome is achieved.

The court can impute income when appropriate. This means that it can calculate an amount of child support to be paid by setting an income for the payer. For example, if the payer has persistently refused to provide financial information, the court can assign an income to him based on information the court has about his employment. Or, if employment is available to a payer and he chooses to decline it, the court can make a child support order based on the income the payer would have if he took that job.

While the tables provide a relatively straightforward means of calculating the amount of child support to be paid, the guidelines also provide direction for dealing with more complicated situations.

- **Extraordinary expenses:** In addition to the basic monthly payment, payers may also be responsible for contributing to what are called special or extraordinary expenses. The legislation sets out a number of expenses that are to be shared, including child care, medical or dental insurance premiums, health-related expenses such as orthodontal work, counselling, prescription drugs, speech therapy and hearing aids, unusual education expenses, including post-secondary education and unusual expenses related to extracurricular activities.

For families where at least the payer parent has a good income and where the children are involved in a variety of activities or have special needs, the issue of extraordinary expenses can be bitterly contested. Refusing to pay for these expenses provides an abuser with a way to control his ex-partner by limiting her access to financial support for the children.

There is a considerable body of case law, some of it conflicting, on what expenses are considered extraordinary.

- **Split custody:** In some families, not all the children live with one parent. In other words, the mother may have custody of one child and the father of the other. An alternate child support calculation is provided in the Guidelines for these situations.
- **Shared custody:** If the children spend 40% or more time with the non-primary parent, there is another method to determine how much child support should be paid. It takes into account the incomes and expenses of both parents.

If a parent has met the 40% rule, then the court must determine whether there should be an adjustment to the child support payment. It is important to note that child support payments are not necessarily lowered when the 40% rule is met.

The 40% rule has created an enormous battleground for abusers, who sometimes seek shared custody only to try to minimize their child support obligations and not out of any genuine interest in having a close relationship with their children.

- **Income over \$150,000:** The guideline tables only provide child support calculations up to a payer income of \$150,000. For payers with higher incomes, the table amounts apply to their first \$150,000 of income, but a different calculation is used for income above that level.
- **Undue hardship:** The guidelines may provide some reduction in the amount of child support to be paid by a support payer who is dealing with undue hardship; for instance, a subsequent spouse or child/ren with serious and expensive health care issues.

*Note:* A lawyer should be consulted for specific legal advice about how child support is calculated in any of these less common kinds of situations because each case depends on its own set of facts.

### *Enforcement*

Orders for child support are enforced through a provincial government agency called the Family Responsibility Office (FRO). Most often, FRO collects the support from the payer either directly or by way of payroll deduction, then deposits the money in the recipient parent's bank account. Due to FRO's high case load, you may wish to advise a woman that there can be a delay of several months between when an order is registered and when the recipient parent begins to receive the support money.

FRO has a number of options to collect money when the payer is late, misses payments or attempts to evade the order, including garnishing his bank account, registering a charge against the payer's personal property (e.g. a car or home), suspending his driver's license and/or cancelling his passport.

### *Changing the amount of child support*

Either party can seek to change the amount of child support by bringing a motion to change when the circumstances so require. For example:

- If the child reaches the age of 18 and is no longer enrolled in school, the payer can ask that the order be changed to remove support for this child.
- If the payer is laid off or receives a cut in pay, he can apply for a change in the order so the amount of child support he is required to pay reflects his new, reduced income.
- If the mother becomes aware that the payer's income has increased, she can apply to the court for an increase in the amount of child support to be paid.

## **Spousal Support**

### *What is spousal support?*

Spousal support is money paid by one spouse to the other after the end of the relationship. Both married and common-law spouses may receive spousal support.

A person is a common-law spouse if she has lived with her partner for at least 3 years or less than 3 years if they are in a steady relationship and have had or adopted a child.

### *How spousal support is calculated*

A number of factors are considered in determining whether spousal support should be paid, how much it should be and for how long it should be paid. These include:

- present and potential earning capacity of both spouses
- length of marriage or cohabitation
- ages
- roles each spouse played in the marriage
- roles of each spouse post-separation
- impact of these roles on each spouse's ability to generate income
- lifestyle during marriage and whether the lifestyle can and should be maintained.

Spousal support can be permanent or for a specified period of time. The amount of support often decreases over time or is subject to review in the future, although in some circumstances it will stay at the same level indefinitely.

The Spousal Support Advisory Guidelines (SSAGs) are available to assist parties in determining the appropriate range for spousal support payments. These guidelines are not mandatory, but most judges and courts will review them before determining how much spousal support should be paid in the circumstances. Where there are children, spousal support is calculated after child support. For this reason, there are two different formulas – with child support and without child support. The SSAGs can be found online at:

[www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html)

Spousal support orders are also enforced through the Family Responsibility Office. Contact information for the Family Responsibility Office can be found online at:

<http://www.mcsc.gov.on.ca/en/mcss/programs/familyResponsibility/howToContactUs.aspx>

## **Property division**

### *What is property division?*

**Important note:** Property division is different for married spouses than it is for common-law partners.

Marriage is considered to be a partnership, with each spouse making equal, if different, contributions and sharing equally in the family's property if the partnership ends. It is on this principle that division of property legislation is based.

Family property that must be included in calculating net family property includes:

- house, cottage or other real estate
- cars and other vehicles
- personal items (jewellery, collections or other items of value)
- household items (furniture, appliances)
- money (bank accounts, RRSPs, investments)
- pensions
- debts (outstanding amounts on credit cards, income taxes owing)

To calculate the net family property that must be shared, each person calculates the value of his/her own assets at the time of separation, subtracting first the amount of their debts at separation and then the value of any assets other than the matrimonial home owned at the time of marriage. There is also some excepted property which is not included in the calculation, including gifts, inheritances and personal injury awards, unless this property was used to buy the matrimonial home.

Once each person has made this calculation, the person whose net family property is higher must pay the other half of the difference. This is called the equalization payment.

Common-law relationships do *not* provide an automatic right to an equal sharing of the property, including the home. Generally, people leave with what they brought in plus whatever they can prove they bought during the relationship. In order to receive a share of property accumulated over the course of the relationship, the common-law spouse would have to prove to the court that she has made contributions, direct or indirect, to its value. This is called a constructive trust. It is very challenging to make a successful trust claim. It is a good idea to speak with a lawyer about this.

Examples of financial contributions include:

- paying for utilities
- paying for groceries and other household expenses
- paying for renovations
- paying for family vacations

Non-financial contributions may include:

- raising the children
- entertaining the spouse's business associates
- assisting in the family business

## **Domestic contracts**

Both married and common-law couples can specify their rights and responsibilities with

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respect to property through a domestic contract. These are legal agreements entered into by couples wishing to set their own terms in their relationships with one another and include cohabitation agreements, marriage contracts and separation agreements.

To be legally binding, the contract must be in writing, dated and signed by each person in the presence of a witness.

A cohabitation agreement is an agreement between a couple that either lives together or is about to do so. These agreements most often deal with financial and property issues. They cannot deal with custody and access arrangements for children – these issues can only be determined if the couple separates. If the couple later marries, the cohabitation agreement becomes the marriage contract.

A marriage contract is very similar to a cohabitation agreement, except that it is for couples who are married or who are planning to marry.

Either of these kinds of contracts could limit or extend either party's legal property rights. For example, a marriage contract could set out that neither party will share in the property of the other and a cohabitation agreement could state that the parties wish to share their property equally upon the breakdown of the relationship.

A separation agreement, whether between a married or common-law couple, deals with the many issues that arise at the end of the relationship, including custody and access, child and spousal support and division of property.

Before signing a domestic contract, it is crucial that each person seek independent legal advice to ensure they understand the terms of the agreement, and in particular, how their rights under the agreement may be different than their rights under the law. People also have the right to full and honest information about the other person's financial situation, including income, property and debts.

A domestic contract will not be binding if it can be proven that it was signed under duress or is grossly unfair, but these are both very difficult to establish.

Women leaving abusive relationships are especially vulnerable to being coerced into signing separation agreements that do not protect their legal rights. Independent legal advice is particularly important in these situations.

## **Exclusive Possession of the Matrimonial Home**

If a couple is married, the court can grant one spouse exclusive possession of the matrimonial home (or part of it) for a period specified by the court. This means that the other spouse is not allowed to come onto or into that property and that the remaining spouse can change the locks.

The matrimonial home is wherever the family has been living. It can be owned, leased or rented by one or both of the spouses.

Exclusive possession orders are hard to get, but can be very important for the safety of a woman and her children, especially during the separation process.

Without such an order, if the lease or deed are in the name of both spouses or only the abuser, the woman cannot change the locks or prohibit him from coming onto or into the property.

An exclusive possession order does not affect either party's ownership rights to the home. In other words, even if a woman gets such an order, her partner maintains his ownership rights to the house.

In considering whether to make an order for exclusive possession, a court must consider what is in the best interests of the children, the financial position of both spouses, the availability of other suitable and affordable housing and any violence committed by one spouse against the other or against the children.

Common-law couples do not have the same right to exclusive possession orders. Anyone in a common-law relationship should consult with a lawyer for advice about any issues related to the family home, in particular before changing the locks or denying entry to a partner whose name may be on the lease or deed.

## **Child Protection**

Child protection authorities exist to protect children from abuse and neglect. Historically, their focus has been on situations in which the abuse or neglect were directed at the child herself or himself.

Under provincial legislation, the *Child and Family Services Act*, child protection authorities have the mandate to intervene when they deem a child to be in need of protection because of physical, sexual or emotional harm already inflicted or the risk that such harm might occur.

The harm to children of being exposed to woman abuse is now interpreted by child protection authorities as a ground to find them in need of protection.

Child protection authorities use a risk assessment model that includes an eligibility spectrum that rates adult conflict to make their determination about whether or not to intervene. The eligibility spectrum rates adult conflict on a scale from extremely severe (adult conflict that causes physical or emotional harm to the children) through moderately severe (adult conflict that creates the risk of physical or emotional harm to the children), minimally severe (adult conflict that creates a minimal risk that children may be physically or emotionally harmed) to not severe (no adverse effects on the child as a result of the adult conflict).

An intervention is only likely at the extremely to moderately severe levels of conflict.

In the decade since child protection authorities began to intervene to protect children in cases of woman abuse, there has been considerable tension between the child protection sector and the violence against women sector.

This is partly because both sectors have been working with new legislation and regulations, including an increased duty to report suspicions of child abuse, but also because the two sectors have different mandates and philosophies.

Child protection agencies have a legislated mandate and the authority to remove children from their parents. Violence against women agencies have no legislated mandates and work with women and their children on a voluntary basis.

At times, there have been concerns that some child protection authorities were focusing in a punitive way on women who were experiencing abuse by telling them that if they did not leave their abuser, they would have their children taken away.

This placed responsibility for protecting children unfairly on the woman rather than on the abuser. Often, women were not in a position to leave the abuser or, even if they did, were not able to keep him from having contact with her or the children.

Violence against women organizations have struggled with the increased duty to report requirements, trying to find a way to ensure the safety of children as well as to support and respect a woman's right to make her own choices, all while staying within the law. Many agencies have had serious concerns about involving child protection authorities because of the possible outcomes for women and because such involvement can have a negative impact on the level of trust women feel towards them. In fact, in the first few years after the changes to the duty to report, shelters reported a drop in the numbers of women with children coming to them for support.

While child protection authorities can play a positive role in a family, there can also be a negative impact for both the woman and the children:

- The woman may feel punished and re-victimized.
- The woman may live with the threat or reality of having her children removed. The abuser may have threatened this to control her, and she now feels he has won.
- The woman may have to go through the stress of proving her parenting skills when previously they weren't in question.
- This process puts the blame for the abuse on the abused woman, implying she made a choice to expose her children to domestic violence.
- If the children are removed, they lose their primary caregiver, and it compounds the damage already inflicted on the child.
- Foster care is not always a good alternative.

- The abuser is not held accountable for the abuse – the mother and children are punished, not the abuser.
- Being threatened with the possibility of losing her children can discourage a woman from reporting abuse, and the abuser will use this to his advantage.
- Reporting can put the woman and children at greater risk since the abuser is interviewed and allowed to present his side of the story.

In 2010, the Ontario Association of Children’s Aid Societies, which governs all child protection authorities in the province, produced a new woman abuse practice guide, which promises to offer a differentiated response to intervention in cases of children exposed to woman abuse. This approach appears consistent with research that shows children are affected differently and do not all require the same kind of intervention. This differentiated response also makes a commitment to holding the abuser rather than the mother accountable for the violence and its impact on the children.

### *Duty to report*

All professionals are bound by a duty to respect their client’s right to confidentiality. However, there are some exceptions to this. The law is very clear that professionals have a duty to report when they suspect a child may be in need of protection.

It is important for violence against women agencies to have policies and protocols that address the duty to report and client confidentiality.

### *Who is responsible for reporting a child in need of protection?*

Anyone who has reasonable grounds to suspect that a child is or may be in need of protection must promptly report the suspicion and the information upon which it is based to a child protection agency. This obligation extends to everyone in society, with very limited exceptions for lawyers working with their clients.

People working in a volunteer capacity are also subject to a legal duty to report requirements but they cannot be prosecuted for failing to report as professionals can be. However, many organizations have internal policies that require volunteers to inform a staff person if they have concerns about the safety or well-being of a child.

### *What are reasonable grounds to suspect child abuse or neglect?*

It is not necessary for you to be certain a child is or may be in need of protection to make a report to a child protection agency. “Reasonable grounds” refers to the information that an average person, exercising normal and honest judgement, would need in order to make a decision to report.

### *What is the “ongoing duty to report” child abuse or neglect?*

Even if a report has been made about a child, you must make another report if there are additional reasonable grounds to suspect the child is or may be in need of protection.

### *Can I rely on someone else to report?*

No, you have to report directly. You must not rely on anyone else to report on your behalf.

*Do professionals and officials have any special responsibilities to report?*

It is the same duty as any other member of the public. However, unlike for the public at large, any professional who fails to report is liable on conviction for a fine of up to \$1,000 if they obtained information on which their suspicion was based in the line of their professional or official duties.

There is protection from civil action for individuals who report, unless that person has acted maliciously or without reasonable grounds for the suspicion.

Professionals who are in contact with children who are exposed to their mother being abused should be aware of the harm and/or risk of harm that can be caused to children by perpetrators. Professionals, using sound and reasonable judgment, should intervene appropriately.