Legal Scan

Caught in the Middle

Children's Involvement in the Court Process as it Relates to Intimate Partner Violence

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Introduction

A recent examination of custody and access cases involving intimate partner violence (IPV) reveals that lower courts often fail to protect children from harm. The Supreme Court of Canada (SCC) does provide guidelines for ensuring the best interests of the child in custody and access decisions[1]. Absent from these guidelines are specific provisions pertaining to cases where IPV is a factor. In 2021, amendments to the *Divorce Act* came into force that specifically direct lawyers and judges in divorce cases to consider the impacts of IPV on the best interests of the children. Despite the lack of specific guidance on IPV from the SCC prior to the 2021 amendments, appeal courts have generally taken the principles outlined by the SCC and applied them appropriately to situations involving IPV, recognizing the harm that children may suffer under dangerous circumstances. However, at the lower court level, presumptions surrounding the benefits of shared parenting, and maximizing contact with each parent, often lead to decisions that are not in the best interests of the child because IPV has not been considered.

Many of the principles derived from, and supported through, case law are intended to be beneficial to children, including the opportunity to create healthy relationships with each parent, to access to therapy in the event of a tumultuous divorce, and relief from the burden of making significant decisions at a very young age. However, without specific guidance from the SCC about their potential impact in the context of cases involving IPV, too much is left to the discretion of judges, who may, or may not, understand the full extent of the harm caused to mothers and children by family violence.

To ensure the best interests of children are prioritized by our legal system, the courts must engage in a thoughtful analysis that properly prioritizes children. Concepts including the maximum contact principle, parental alienation, legal bullying, and discriminatory views towards women have often been utilized in cases to produce outcomes that, at times, directly contradict children's expressed wishes and needs. These concepts also allow for blame to be shifted from the abusive and neglectful parent, to the parent who is most invested in protecting the child's interests. Failing to recognize these impediments can further perpetuate uneven power dynamics between abusers and their families, and create a culture where abusers feel emboldened[2]. It is, therefore, essential to assess the intricacies of custody and access cases involving IPV - particularly when considering the potentially dangerous consequences incurred by children embroiled in these disputes.

Methodology

The specific objectives of this legal scan are to determine: 1.) how courts handle custody and access cases involving IPV; 2.) how courts address allegations of parental alienation in such cases; and 3.) how courts have been interpreting the amendments to the *Divorce Act* concerning family violence.

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[1] In *Michel v. Graydon*, 2020 SCC 24, a case that was concerned with retroactive variation of child support for an adult child, Wagner CJC and Martin J discussed family violence in general terms as a factor that may cause a custodial parent to delay applying for child support. In *Colucci v Colucci*, 2021 SCC 24, another child support case, Justice Martin writing for the Court reiterated the same theme at paragraph 99: "Courts must also be cautious to distinguish bad faith on the part of the recipient from situations where recipient conduct results from safety concerns arising from a history of family violence."

[2] In *Balfour v Balfour*, 2019 ONSC 2892 the judge acknowledged that the father's litigation behavior significantly lengthened the trial and added to the mother's legal costs because he was "fixated on the parental alienation issue."[2] The judge found that while some of the mother's behaviours were indicative of parental alienation, the mother acknowledged her contributions to the poor relationship between the children and their father. The father, however, lacked insight into his own behaviour, which was a major factor in the estrangement of his children. This case exemplifies how parental alienation is a mechanism for legal bullying.

The scan was conducted using three different search methods to find relevant cases. The first method included a keyword search for the term "violence" in Canadian family law cases occurring between January 1, 2017 and December 31, 2020. This search rendered a total of 331 results; of which 25 cases (two SCC decisions, eight appellate court decisions, and 15 lower court decisions) were deemed relevant to the scan. Furthermore, older cases - particularly appellate court cases and SCC cases that were cited within relevant cases, were also considered.

The second method included a keyword search for the term "parental alienation" in family law cases between January 1, 2017 and December 31, 2020. This search rendered a total of 319 results; of which 28 cases (two SCC decisions, 13 appellate court decisions, and 13 lower court decisions) were deemed relevant. Cases deemed the most relevant to this search were those including allegations of alienation of behalf of a parent accused of neglect or IPV. The terms "abuse" and "domestic violence" were not specifically utilized in this search due to the risk of excluding cases that were not described in a such a manner or those that utilized different terminology. Additionally, an analysis of older cases cited within relevant cases was also conducted.

The third method was to search for cases that cited the recent amendments to the *Divorce Act*, including s. 2(1) concerning "family violence", s. 16(3)(j), and s. 16(4), from March 1st, 2021 to December 31, 2021.[3] This search led to 64 results. Of these cases, 26 were deemed relevant, including 23 trial-level cases and four appeal-level cases.

These searches produced a combined total of 801 results. Of these results, 12 cases, two SCC decisions, 24 appellate court decisions, and 37 lower court decisions were deemed relevant to this scan and were thus included in the ensuing analysis.[4] There was also a search for cases that relied on the key court of appeal cases examined in this scan, especially cases occurring after the amendments to the *Divorce Act*.[5]

Analysis

The Law in Custody and Access Decisions Involving IPV

Two SCC cases discuss the best interests of the child in the context of custody and access decisions: *Young v Young* (1993) and *Gordon v Goertz* (1996). While these cases make little to no explicit reference to situations involving IPV, they do offer a framework that appellate courts have utilized to appropriately deal with a wide array of circumstances, including family violence.

In *Young v Young*, Justice L'Heureux-Dubé stressed that assessing the best interests of the child must indeed be done in a child-centric manner, stating that it is "the positive right [of the child] to the best possible arrangements in the circumstances of the parties."[6] This decision underscores that the best interests of the child are highly contextual, and thus dependent upon "a myriad of considerations" unique to the child's situation.[7] Additionally, *Young v Young* emphasizes that unlike most issues before the court, custody and access decisions are "person oriented" rather than "act oriented" and thus require "an evaluation of the whole person viewed as a social being."[8]

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[3] *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) s. 2(1), s. 16(3)(j), s. 16(4).
[4] In January 2022, a search was done to see if any of these cases had been appealed. No appeals were found. Several cases had applied for appeals but were denied.
[5] Key Court of Appeal Decisions: *A.M. v. C.H.*, 2019 ONCA 764; *B.(V.M.) v. B.(K.R.),* 2014 ABCA 334; *Mattina v. Mattina*, 2018 ONCA 641, *S.(L.) v. S.(G.),* 2014 BCCA 334; *Williamson v. Williamson,* 2016 BCCA 87; & *Doncaster v. Field*, 2014 NSCA 39
[6] *Young v Young*, [1993] SCJ No 112 at para 119.
[7] *Ibid* at para 78.
[8] *Ibid*.

In *Gordon v Goertz,* the best interests of the child are discussed in relation to parents' mobility rights. The issue of IPV is briefly mentioned, stating that while "it would be appropriate for the custodial parent to notify the non-custodial parent of a proposed change of residence" there is an exception when "there is a threat or fear of violence to the custodial parent or the child, or some other circumstance where such notice would not be in the child's best interests or may not be possible."[9] Thus, there seems to be recognition of the fact that a threat or fear of violence toward the custodial parent is also a threat or fear of violence toward the child. Additionally, *Gordon v. Goertz* states that the best interests of the child test remains somewhat vague, as "a more precise test would risk sacrificing the child's best interests to expediency and certainty."[10]

While both *Young v Young* and *Gordon v Goertz* offer insight surrounding the best interests of the child test in custody and access decisions, they offer no specific guidance pertaining to cases involving IPV. Thus, a more detailed understanding of custody and access cases involving IPV can be derived from appellate court decisions that draw upon the best interest of the child analyses in *Gordon v Goertz* and *Young v Young*, as well as federal and provincial legislation.

Several appellate court cases have recognized the harm inflicted upon women and children at the hands of abusive fathers and have thus framed IPV within the context of the best interests of the child. In multiple cases, appellate court judges have reversed trial judge decisions due to a failure of the lower courts to recognize the detrimental impact of family violence on children.[11] Appellate courts have also recognized that awarding joint custody is inappropriate in situations where parents are not in contact due to instances of IPV.[12] In one appellate court decision, the father's abusive behaviour prompted a ruling affirming the trial judge's decision to grant sole custody to the mother with supervised access to the father.[13] In *VLM v. AJM*, decided after the amendments to the *Divorce Act*, the Court of Appeal deferred to the factual findings of the case management judge, and sent the case back to the Queen's Bench for further case management. In dissent however, Justice O'Ferrall provided extensive reasons recognizing the history of violence and stated, "Forcing reunification in the interest of

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[9] *Gordon v Goertz*, [1996] 2 SCR 27 at para 102, 134 DLR (4th) 321 [Gordon].
[10] *Ibid* at para 20.
[11] In *KW v LH*, 2018 BCCA 204 and *KW v LH*, 2018 BCCA 350, the father had committed various acts of abuse against the mother including verbal abuse. The father had also encouraged the child to be violent and abusive towards the mother, including directing child to urinate on mother's bed. Although the trial judge believed the father's conduct was only situational, in that it occurred while the parties lived together, the father's conduct could not be ignored in determining the child's best interests. While the trial judge had found that the father refrained from drinking while carrying out his parental responsibilities, and that he regretted speaking to the mother in derogatory language, the Court of Appeal made it clear that despite his "positive steps to curb his abusive behaviour" the "abusive conduct cannot be forgotten and treated as if it never happened." The court furthered that the father's behaviour "remains a significant factor that must be considered" in determining the child's best interests, "including his primary residence and other appropriate parenting arrangements." The trial judge's failure to consider family violence was found to be "a serious error in principle that fundamentally taints his conclusion that [the child's] best interests would not be served by a relocation to Nova Scotia."
[12] In *Kaplanis v Kaplanis, 2005 CarswellOnt 266* it was found that the trial judge had erred in awarding joint custody. There was no evidence of co-operation or appropriate communication between the parents and the judgment was made in hopes that it would improve the parenting skills of the parents. The Court of Appeal stated that in a custody case, the sole issue before trial judge should have been the best interests of the child, which meant that there should only have been an evaluation of what bonds the child had with each parent and their ability to care for the child. Furthermore, the Court of Appeal held that, the fact that both parents acknowledged the other to be "fit" did not mean that a joint custody order was in the best interests of the child, noting that up until the time the trial judge made the order, the child had not had an overnight visit with the father alone. Therefore, judges have to award sole custody, even in situations where an abused mother may still consider the abusive father a "fit" parent. This decision should safeguard children from fathers who only seek joint custody as a means of coercive control and ensure that children reside primarily with the parent who, to date, had provided the most care.
[13] In *Meadus v. Meadus, 2012 NLCA 59*, the father was self-represented in his appeal and held "the erroneous view that this Court should engage in a broad investigation of the child welfare and matrimonial laws of the province and a rehearing of all decisions to uncover alleged conspiracies against him and other single dads." The father in this case was clearly emboldened by the father's rights movement, and his choice to be self-represented, coupled with these assertions, signals his intention to use the courts as another arena for his abuse. This case is also riddled with other examples of how the father chose to exert control over his family, including parking his vehicle to watch the matrimonial home and telling the children to watch the house to see the mother's "new man" come and go. The children also witnessed their father verbally abuse their mother, only leaving when the mother threatened to call the police. The father's actions led the mother to file an emergency protection order which was ultimately granted. The court affirmed the decision of the trial judge, granting sole custody to the mother with supervised access to the father, as this was in the best interest of the children. The Court of Appeal held that the father had the burden of showing there was no danger to the children because of the threats he uttered prior to his admission to the hospital for mental health issues.

maximizing parental contact requires weighing potential benefits against possible trauma or emotional harm which might result if the child fears the rejected parent."[14]

However, despite cases recognizing that family violence is indeed *not* in the best interests of the child, some appellate court decisions contain potentially harmful language that minimizes instances of abuse. For example, in *S(L) v S(G),* a 2014 British Columbia Court of Appeal Case, the judge emphasized that "there was no evidence that the children have suffered any physical or emotional harm as a result of the claimant's conduct."[15] Such a statement may be harmful because it suggests that if a child was indeed harmed, there would be sufficient evidence of this harm. However, research shows that many children do not overtly display signs of emotional harm or that the harm suffered by children is detectable. In some cases, children may not exhibit signs of emotional harm until far into the future (known as the "sleeper effect"). The judge's statement therefore demonstrates a lack of understanding about the wellbeing of children who have witnessed or experienced family violence and the harmful long-term psychological impacts on children exposed to such behaviour. For example, in the Ontario case of *Ahmed v Ahmed*, the judge operated under the false impression that "domestic violence does not have a bearing on a parent's ability to parent the child of the marriage and that such past difficulties would not pose a risk to a child's well-being."[16]

While it is apparent in lower court decisions that judges find it difficult to terminate access to a parent, even in the most egregious of cases, the stance in the appellate courts seems rather clear. The court is expected to arrive at such a decision cautiously but terminating access can be necessary in instances where an abusive parent's domineering, selfish, argumentative and cruel behavior is "at odds at odds with their parental responsibilities."[17] In BC, where the Family Law Act includes references to IPV, the Court of Appeal held in 2017 that a parent's perpetration of family violence can "impair their ability to care for their child and meet their child's needs" and are of "great importance in determining matters of custody, parental responsibilities, and parenting time.".[18]

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[14] *VLM v. AJM*, 2021 ABCA 267 at para 73.
In *VLM v. AJM*, 2021 ABCA 267, the father engaged in acts of family violence that were directed at the mother and witnessed by the child (para 67). The father claimed parental alienation based on a text conversation between the child and the mother where the child reached out to their mother due to fear of the father and the mother responded empathetically, rather than assuring him that all was well (para 64). The case management judge failed to consider the history of family violence or the factors listed in s.16(4) of the *Divorce Act* (para 68). The case management judge did not consider that the child was fearful of their father (*Ibid*). Due to the failure of the case management judge to consider these important factors, the appeal was allowed, and the matter was sent back to the Court of Queen's Bench (para 73)..

[15] *S(L) v S(G)*, 2014 BCCA 334 at para 26.

[16] In *Ahmad v Ahmad*, 2019 ONSC 6804 at para 40, the father, who was self-represented, used *M v F, 2015 ONCA 277* at para 5-21 to argue that domestic violence does not have to have a bearing on a parent's ability to parent the child of the marriage and that such past difficulties would not pose a risk to a child's well-being, and that the court should try to maximize the psychological and emotional bond with each parent. In *M v F* the court held that, "the parties' relationship has been aptly described as toxic. They have treated each other with cruelty and disrespect." Benotto JA went on to juxtapose the allegations of abuse by the father against the mother's attempts to protect her children. Benotto JA compared allegations that the father "strangling the mother during intercourse, ripping out of her earrings, dragging her down stairs and hitting her in the face"[16] with the mother installing video cameras to watch drop-offs and pick-ups of the child and the mother trying to hack her child's computer in order to find images that would undermine the father's credibility. The facts suggest that this was not simply a toxic relationship, but one with abuse and threatening behaviour exhibited by the father. Nonetheless, the Court of Appeal ultimately affirmed that the allegations against the father would not impair the father's parenting of the child.

[17] In *Abdo v Abdo*, 1993 CarswellNS 52 at para 126-127 the court held that decisions on access "must reflect what is in the best interests of the child" and that while the "decision to terminate access by a parent is one at which a court should be extremely slow to arrive, the evidence in this case dictates that result. The court affirmed the trial judge's conclusion that the father was "a domineering, selfish, argumentative, and at times cruel spouse and father, who was both unpredictable and uncontrollable, and that his lifestyle was at odds with his parental responsibilities."

[18] In *A(R) v A (W),* 2017 BCCA 126 at para 31-33, the court dismissed the father's appeal against the trial judge's order to give the mother sole custody of the children and restrict the father's parenting responsibility. The trial judge had concerns, later proven, that the respondent would "turn to physical force when he is angry or frustrated." The court in this case held that the trial judge was correct in treating "concerns of family violence as of great importance in determining matters of custody, parental responsibilities, and parenting time," stating that sections 37(1)(h) and 39 of the Family Law Act, S.B.C. 2011, c. 25 require the court, in determining the best interests of the child "to consider whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs."

Parental Alienation

Courts are increasingly being asked to consider the impact of "parental alienation" in custody and access cases involving IPV. Williamson v Williamson, from the British Columbia Court of Appeal, is often used to offer a broad definition of the issue, stating that parental alienation is used to describe the breakdown of a relationship between a child and their parent after a separation or divorce.[19] According to the Court, this breakdown can occur as an "unfortunate side effect" of the circumstances, or through "deliberate actions, both direct and indirect, on the part of the parent."[20] *Williamson v Williamson* also notes a distinction between alienation and estrangement, on the basis that estrangement arises due to the child's rational rejection of a parent based on their behaviour.[21] This distinction was further considered by the Nova Scotia Court of Appeal in *Doncaster v Field*, where it was found that claims of parental alienation will not be accepted in cases involving volatile parents without sufficient evidence of alienation occurring—seeing as a child's reluctance to see a parent does not, in itself, constitute alienation.[22]

This distinction would presumably protect children from abusive parents with unfounded claims of alienation. However, because each case is decided on its own merits, there have been numerous cases of abusive parents being granted access to their children based on successful claims of parental alienation.[23] Two recent Court of Appeal cases affirmed successful claims of parental alienation. In both *W.S. v. P.I.A.* and *JLZ v. CMZ*, the Courts held that a reversal of the status quo care was appropriate, and the father was given sole custody despite the children's reluctance and fear of their father.[24] Additionally, the issue encompasses a relatively new area of law, with claims of alienation primarily surfacing through the appeal courts in the last 15 years. Judges retain significant discretion in determining what amounts to alienation. This was confirmed in *B (VM) v B (KR)*, where the Alberta Court of Appeal confirmed that expert evidence is not necessary in making a finding of alienation, and that trial judges can conclude on that issue based on the evidentiary record.[25]

In *S. v. A.*, which was affirmed by *W.S. v. P.I.A*, the Court held, "No conduct by a caregiving parent that deliberately undermines a child's sense of safety or self should be sanctioned or permitted to continue."

Evolution of Case Law

A review of seven relevant cases occurring over the past 20 years suggests that appeal courts often appropriately consider IPV as a factor in custody and access decisions. In *S. v. A.,* the judge said that family violence has always been an important consideration to the court and that recent changes to *Divorce Act* serve to recognize this.[26] It is notable, however, that three of the most recent cases are from the British Columbia Court of Appeal,[27] likely due to the modernization of British Columbia's *Family Law Act* in 2013.[28] Although the previous family law statute allowed for judges to take family violence into account, they were "erratic in doing so and lacking in legislative guidance regarding how to do so."[29] The revised *Family Law Act* requires judges "to consider family violence as a factor under the best interests of the child,"[30] marking progressive changes that set British Columbia's legislation apart from other provinces. These provisions are similar to those included in the 2021

[19] Williamson v Williamson, 2016 BCCA 87 at para 39.
[20] Ibid.
[21] *Ibid* at para 41.
[22] Doncaster v Field, 2014 NSCA 39 at para 120-121.
[23] See Case Summaries.
[24] *S. v. A.*, 2021 ONSC 5976 at para 314 (affirmed by *W.S. v. P.I.A*, 2021 ONCA 923) & *JLZ v. CMZ*, 2021 ABCA 131 at para 158.
[25] *B (VM) v B (KR)*, 2014 ABCA 334 at para 16.
[26] *Supra* note 24 at para 24 & 25 [*S. v. A.*].
[27] This could also be an indication that these types of cases are more likely to be granted leave to appeal in British Columbia.
[28] Susan B. Boyd and Ruben Lindy, "Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence" (2016) 35 CFLQ 101 (WL) at 1.
[29] *Ibid*.
[30] *Ibid*.

amendments to the *Divorce Act*, signifying a more comprehensive approach to family violence—one that many provinces will hopefully follow. In several cases, the new changes to the *Divorce Act* have been used to reduce the parenting time of abusive parties,[31] including a case where parenting time was reduced where the violence was expressed in the form of coercive control.[32]

Unfortunately, a number of cases of parental alienation in the scan do not appear to follow the same trajectory in recognizing the bests interests of the child when IPV is a factor. With claims of alienation becoming increasingly prevalent, there is little indication—aside from the differentiation between alienation and estrangement in *Williamson v Williamson*[33]—that issues relating to IPV, coercive control, and legal bullying will be addressed.

Themes in Lower Court Decisions

Legislative History: Moving Towards Gender Neutrality

The family law system in Canada views parties before the court as equal individuals, leading to cases being assessed in a gender-neutral manner. However, a gender-neutral approach can erase the long history of social and legal inequality between men and women that has resulted in gendered oppression, discrimination, and violence. Therefore, assessing custody and access cases involving IPV in this manner may "blind us to the social and cultural reality in which men and women lead gendered lives of unequal power and influence."[34] This practice can also minimize the lived experiences of women and children subjected to IPV at the hands of abusive men, whilst perpetuating anti-feminist narratives that view fathers as being disadvantaged in the family law system.

A parliamentary study of Bill C-41 in 1997 (which amended the *Divorce Act* to provide for mandatory child support guidelines) included anecdotes from father's rights activists characterizing their ex-wives as "uniquely vindictive, malicious and vicious in their attempt to destroy men and their relationships with their children."[35] These statements ignored the fact that women shouldered the majority of childcare responsibilities, and instead, idealized the father-child bond.[36] This led to father's claims being "cloaked in a rhetoric of children's rights and of male victimization,"[37] with the unfortunate side-effect of diminishing women's claims of male violence as "self-serving and false."[38]

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[31] In *D.S. v. J.S.*, the father engaged in acts of family violence, including pushing, shoving, and spitting on the mother (para 242). The father also subjected the children to family violence and attempted to alienate the children from their mother (*Ibid*). The father's parenting time was limited due to the judge's concern that unsupervised parenting time with the father would be used to further alienate the child against their mother (para 246).
See Also: *Bell v. Reinhardt*, 2021 ONSC 3352, the mother alleged that the father has an abusive history with his children and that she is concerned he is going to be violent with her (para 3). The judge recognized the inability of some people to co-parent due to trauma from family violence (para 15). The father in this case is granted limited supervised access since there is the potential for friction between the parties (para 23 & 27).
[32] In *Pierre v. Pierre*, 2021 ONSC 5650, the judge decided that even though there was no evidence of physical violence, the father had displayed coercive and controlling behaviour (para 47). The mother was frightened by the father, both during the separation and during the exchange of their child after separation (Ibid). The father was given parenting time with the child with the mother as the primary caregiver (para 52). Family violence was a consideration in reducing the father's parenting time (Ibid).
[33] *Supra* note 19 at 39 [*Williamson*].
[34] Marie Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 Can J Fam L 229-282 at 237.
[35] *Ibid* at 236.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

Prior to the passing of the Federal Child Support Guidelines in 1997, the Joint Committee's *Report* addressed some major issues concerning custody and access law—mainly the idea that "involvement with both parents following divorce is by definition in the best interests of the children."[39] This was later labeled the "maximum contact principle" by Jonathan Cohen and Nikki Gershbain, who authored several critiques of the approach including considerations regarding the best interests test and violence against women.[40] However, many father's rights activists (and their supporters), argued that the low number of men receiving sole custody of children, even with the gender-neutral approach, was indicative of "judicial bias,"[41] and the maximum contact principle was necessary to mitigate this perceived injustice.

Themes in Cases Involving IPV, 2017-2019

There are several important themes arising from trial court custody and access decisions involving IPV included in this scan. The first theme involves the way acts of "coercive control" are judged in custody and access decisions involving IPV. The term "coercive control" describes the ways abusers control and regulate the behaviour of their partner, which can be done "without using a great deal of violence."[42] This includes regulating "how women dress, cook, clean, socialize, care for their children, or perform sexually."[43] These behaviours have been described as "domestic captivity" for women,[44] and may also extend to the mother's new partner if she has separated from her former abusive relationship.[45] Unfortunately, issues of coercive control are often minimized due to narrow understandings of IPV as consisting primarily of physical violence, which in turn lead to coercive actions being "considered independently instead of as a larger pattern."[46] This misconception has been perpetuated by the legal system and society in general—including institutions designed to protect people from harm like child welfare agencies and the police.[47] When compounded with the work of father's rights activists, and the gender-neutral approach of courts, the diminishment of coercive acts has fueled the narrative that fathers are "victims of judicial decisions that privilege mothers' care time over fathers."[48] Therefore, displays of coercive behaviours are not always judged as abusive or dangerous, but "as a sign of paternal love and devotion"—particularly when done in the pursuit of a closer relationship with children.[49] Interestingly, a pattern often seen in these cases involves father's seeking joint custody and decision making authority despite lacking the experience to be involved in the day-to-day responsibilities of parenting.[50]

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[39] Jonathan Cohen and Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 CFLQ 121 (WL) at 1.
[40] *Ibid.*
[41] *Ibid* at 3.
[42] Lori Chambers et al, "Paternal filicide and coercive control: Reviewing the evidence in *Cotton v Berry*" (2008) 51 UBC L Rev 671 – 704 at 675.
[43] *Ibid.*
[44] *Ibid.*
[45] In *T.B. v. S.S.*, 2017 BCPC 217, there were several examples of how the father exerted coercive control over the family. In the months after the separation, the father engaged in stalking the mother, threatened to kill her and the children, and threatened to burn their house down (para 54). He also told the mother that "if she ever received any child support from the court, he would throw her into the Skeena River and nobody would ever find her" (para 54). During the trial, the mother argued that the father "ignored any of the Court's Orders he disagreed with but would ensure he adhered to them immediately before any court appearances" (para 55). The father continued in his violence and threats of violence even though he knew he was being closely scrutinized during the course of the trial (para 137). This included, entering the mother's house with permission and shouting at her in front of the children, as well as threatening physical harm against the mother's new partner and attempting to involve the children in this pursuit (para 137). Despite these issues, the daughters who had become estranged from their mother and refused to stay with her, were allowed to remain with their father because they were "more easily able to remove themselves from situations involving family violence" while the young sons remained with their mother (para 177). The father also self-represented in court.
[46] *Supra* note 44 at 675-676 [Chambers].
[47] *Ibid*.
[48] *Ibid* at 681.
[49] *Ibid*.
[50] In *L.M.S. v. W.D.U.*, 2018 BCSC 1154, the judge stated that "while the father considers the mother's requests that he respect the children's regular routines and schedules to be overly controlling, he generally relies upon the mother to provide the children's schedule, to advise him of the children's activities and status, and to ensure that the children are rested and that their needs are being met" (para 173). **SEE ALSO**: In *Davis v. Kim*, 2019 ONCJ 151, the father was granted access even though he was charged with domestic assault against the mother during an access visit (para 11). The mother feared that given his unwillingness to accept responsibility for his actions, it was inevitable that the child would be exposed to her father's abusive behavior and be harmed as a

Another theme based on sexist stereotypes within the legal system arises when women are unable to protect themselves, and their children. This includes the "friendly parent" rule, which often puts children at risk by placing the abused parent in a double bind. Such situations occur when parents who fail to protect their children from abuse risk having their children apprehended by the authorities, while those who do try to protect their children from an abusive parent by withholding access risk being judged as not acting in the child's best interests and losing custody to the abuser.[51] Abused mothers are therefore expected to go to impossible lengths to respect and facilitate access for an abusive father, risking their own re-victimization, as well as their children's safety.[52]

There is also a false presumption that women are just as violent as men. However, research supporting these claims fails to "account for the difference in gender response styles, particularly women's tendency to over-report their own aggressive acts and men's tendency to under-report theirs."[53] It is also important to note "the relative destructiveness and lethality of male violence" in comparison to female violence—with researchers drawing an analogy with a head-on collision compared to a fender bender.[54]

Another major theme in custody and access cases involving IPV is the minimization of male violence towards children—a risk that is consistently downplayed by the legal system. Statistics demonstrate that men perpetuate a disproportionate amount of violence, committing 95% of murder-suicide cases in Canada.[55] A review of paternal filicide cases also reveals that despite the presence of physical violence in many cases, "controlling behavior is a particularly important feature of separation filicides."[56] Although research demonstrates these patterns, judges often note that violence is directed at the mother and not the child.[57]

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result (para 27). The mother was concerned that the father's "anger and physical and emotional abusive behavior toward her will spill over onto [the child] in situations of stress" and that given his lack of engagement in parenting the child in the past, he would be "unable to responsibly deal with anything more than a series of short day visits" (para 19). Still, the judge found "no compelling reasons" to deny the father overnight access (para 43). The judge emphasized that there was no evidence of the father ever having been violent towards the child (para 35).

[51] *Supra* note 36 at 245 [Laing].

[52] In Zhang v. Guo, 2019 ONSC 5381, allegations of abuse by the mother, against the father, resulted in criminal charges. However, it was held that "the existence of criminal charges respecting allegations of violence is not determinative of issues of temporary custody and access and that the focus of the analysis remains the best interests of the child" (para 37). This stance is confusing. It was held that "the mother has an obligation to actively encourage access and that the residential parent's responsibility goes beyond simply accommodating access, making the child available for access, and encouraging the child to comply."

[53] *Supra* note 36 at 266 [Laing].

[54] *Supra* note 27 at 279 [Laing].

[55] *Supra* note 44 at 672 [Chambers].

[56] *Ibid*.

[57] In *G.C. v. A.V.S.*, 2019 BCSC 2242, the mother suffered from a great deal of abuse at the hands of the father such as verbal abuse (para 23), including criticisms of her inability to breastfeed in an attempt to "domineer and control" her (para 26); the weaponizing of her mental health challenges, including previous treatment at a psychiatric hospital, which caused the judge to characterize the father as "self-centered, narcissistic and lacking empathy" (para 24); and argumentativeness, stating that the living arrangements the mother and child were occupying were "untenable and unstable," despite not having paid spousal support or adequate child support (para 3 and para 85). At trial, the father was self-represented and argued for equal parenting time, even though he hired a nanny to take care of the child while he was away at work (all while failing to pay the mother adequate child support despite making $80,000 per year) (para 41 and 59). The couple separated after the father was arrested for putting his hand around the mother's mouth, forcibly confining her and threatening to kill her (para 29). The mother resided in a subsidized housing community for single mothers and managed to take care of her child despite not being legally able to work due to her precarious immigration status (para 1). The judge held that the father's behavior amounted to "psychological and emotional abuse" (para 72) and ultimately justified an order of 70/30 split of parenting time, with the mother being given the majority. The judge stated that "notwithstanding that incidents of physical violence are serious matters, in the circumstances of this case they should not be given much weight as they did not have an impact on [the child]" (para 67). In the judge's view, "the physical violence did not affect, and is not likely in the future to affect the safety, security or well-being of [the child]" (para 67). **SEE ALSO**: In *B.C. v. R.B.*, 2018 NBQB 68, the mother was described as being "preoccupied with the past conduct of the respondent" which was "not pertinent to the access arrangements for the children today" (para 47). The mother included her correspondence with a social worker who specialized in domestic violence, who determined that "there was a great risk of violence and that both she and her children were in danger given the family dynamics" (para 3). Furthermore, the mother was also receiving services in regard to the domestic violence from Victim Services, the RCMP and the Child Protection Agency (para 3). The judge accepted that domestic violence did occur at the hand of the father (para 38). However, the judge dismissed the mother's motion for interim sole custody of the children with no access to the father and instead made an order for shared custody and access for the father set out with specificity in order to avoid disputes (para 64). **SEE ALSO**: In *K.L.B. v. S.W.B.*, there were allegations of sexual assault brought by one of the mother's children, the stepchild of the father (para 139). Charges were brought against the father, but the father was found not

Similarly, abusive fathers' threats of suicide, are often not considered by judges as indicative of a risk to the children.[58]

Susan Boyd and Ruben Lindy noted that British Columbia's *Family Law Act*" holds significant promise" in the sense that it allows a proper consideration of the best interests of the child including family violence even if directed exclusively towards a spouse, since such behaviour may also harm the child.[59] The authors noted that this is an issue that the courts have often failed to recognize prior to the new legislation.[60] Boyd and Lindy identified that BC courts now recognize that derogatory remarks about a partner, particularly when directed to, or made in the presence of the child, can constitute family violence.[61] Thus, there have been some gains in recognizing the gendered aspects of such abuse, and courts have begun to acknowledge their impacts on children.[62] These developments under the BC legislation auger well for similar advances with the new provisions in the *Divorce Act*.

Lastly, mothers face a major barrier in the push for shared parenting—even when the father has been violent toward the mother, or neglectful of the child.[63] Shared parenting can be ordered when IPV has not recently occurred, but these decisions do not protect the child's physical, psychological and emotional well-being to the

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guilty (para 147). The trial judge of the criminal trial said that they believed the child that something had occurred with the father but could not prove it beyond a reasonable doubt (para 140). The judge, in this case, did not take this into consideration for parenting orders for the biological child, only accepting that the father was not convicted of the charges against him (para 147). The child was not subjected or exposed to the vast majority of the family violence (para 132). The judge decided that the child should have gradually increased parenting time with the father, beginning with supervised visits and progressing eventually to unsupervised visits if appropriate (para 155 & 156). The judge held that in some cases, where violence is directed at the spouse instead of the child, unsupervised access can be appropriate since the risk of family violence is mitigated by the separation of the parties (para 128).

[58] In *ANM v. DRH*, 2019 ABPC 209, the mother suffered a great deal of abuse at the hands of the father including choking, acts of physical abuse during her pregnancy and threats of suicide on behalf of the father (para 5-6). On one occasion, the father threatened to kill the mother and to harm himself if she took the child away from him (para 23). In regard to the suicidal threats, the judge held that these threats were "made in the course of the domestic abuse to coerce or manipulate the mother" and therefore, on the totality of the evidence, the judge did not believe that the father posed an elevated risk to cause harm to himself or his child (para 48). The court acknowledge that, while both parties engaged in emotional abuse, "the father elevated the abuse to another level when he became physical" (para 36). However, it was ultimately held that the father could be granted unsupervised access after a period of supervised access because there were no allegations that the father "ever emotionally or physically abused his child, nor is there any evidence that the father has anger management issues regarding the child" (para 62). **SEE ALSO**: *Harvey v. Pocock*, 2018 BCSC 2139 This case concerns a stay of an order pending an appeal being granted for a mother who fled from her abusive spouse with her children but was ordered to move back. The mother's grounds of appeal were that the trial judge failed to give "sufficient weight to the presence of family violence, which is a mandatory aspect of any order involving parenting arrangements under the *Family Law Act*" and that the judge erred in concluding that prior court authorization is required for all relocations of children under the *Act* (para 9). The crux of the issue was the appropriateness of notifying the abusive spouse when doing so would not be in the best interests of the children (para 9). The mother had described an incident where the father "jumped over the back fence of her home and confronted her, making threats that encompassed suicide, causing harm to her, and burning down the homes of members of her family" (para 11).

[59] *Supra* note 30 at 1 [Boyd and Lindy].

[60] In Droit de la famille – 181110, 2018 QCCS 2244, the abusive father was granted access based on the maximum contact principle. The judge held that the courts should not conclude that a person is violent because of "violence towards their spouse, in the absence of violence or aggressiveness towards the child, even if the child is present during the incident" (para 5). The father had committed various acts of violence against the mother and on two occasions the child witnessed this violence (para 6). However, the judge characterized the father's behavior as "outbursts" and held that while the behavior should not be condoned, this was not justification for continuing supervision of the child's access to their father (para 6).

[61] *Supra* note 30 at 4 [Boyd and Lindy].

[62] *Ibid* at 5.

[63] Baran v. Baran, 2019 ONSC 2653 – In one instance, the father was observed to be assaulting the mother and police were called, but no charges were laid (para 15). In another situation, the father pushed the mother and she fell down the stairs (para 16). He admitted to intending to shove her but stated that he didn't intend for her to fall down the stairs (para 16). The father also pleaded guilty to assaulting the mother after he punched her in the face, pinned her to a wall and tightened the scarf around her neck until she couldn't breathe (para 17). The court should have read this domestic violence as attempted homicide given that strangling was involved. Furthermore, the father had shown he was neglectful of the son when he failed to inform the mother of an incident where child fell into pool and was quickly pulled out (para 39). The mother was justifiably concerned because of the possibility of secondary drowning and because the child had developed a fear of the water and she hadn't known why (para 39). Despite being incredibly violent, the judge granted the father overnight access with child. There are times when the mother does not argue that access should be terminated, but the court does terminate access with the father because of concern for the children's safety (see *Kaplanis v. Kaplanis, 2005 CarswellOnt 266*). Furthermore, the judge in this case cited *MacNeil v. Playford*, 2008 NSSC 268 (N.S. S.C.) at paragraphs 10 and 11, emphasizing that parental conduct, including domestic violence, denotes an inability to problem solve in a healthy manner, an absence of respect for the other parent, and that domestic violence is ultimately "emblematic of poor parenting skills" (para 52).

greatest extent possible.[64] While ordering shared parenting may be appropriate in certain cases, the case law shows that "courts are often willing to go to great lengths to preserve a child's relationship with the violent parent, even where it requires at risk family members to maintain continuing contact with the perpetrator of violence."[65] Interim applications provide yet another set of difficult questions in relation to how the court should "handle allegations of family violence when the evidence is largely untested."[66] Often, the courts will choose to err on the side of caution by ordering supervised access until trial.[67] However, this can continue to put mothers and children in danger from abusive fathers.[68]

Unfortunately, a good number of the cases in this scan still show that judges may not appreciate that "a parent who abuses the child's other parent cannot at the same time be a good parent."[69] This means that violence is downplayed,[70] and judges rely on the false assumption that separation ends family violence.[71] The recent amendments to the *Divorce Act* appear to have made no significant difference in this minimization and downplaying of violence against the abused parent.[72] In fact, in the case of *Pereira v. Ramos,* a case which has been cited over 25 times since it was decided in 2021, the judge held that the family violence was "situational" and "will not significantly impact the ability and willingness of both the parents to care for and meet the needs of

[64] *Supra* note 30 at 6 [Boyd and Lindy].
[65] *Ibid* at 11.
[66] *Ibid* at 7.
[67] *Ibid*.
[68] In *S.B.T. v. A.A.M.,* 2018 SKQB 43, the father was charged with assaulting the mother and was still granted interim joint custody. The mother remained the primary caregiver and sole decision maker (para 65). Access should have ceased, but instead, the abusive father given decision making power. The father had previously done time in jail for break and enters as well as domestic violence (para 13). The father was also on conditions of no contact with the mother that he breached on at least three different occasions (para 13). The mother's affidavit described an incident which involved the father temporarily taking the child from her before he turned himself over to the police (para 14). Furthermore, a "safety plan" supported the existence of domestic violence that put the children's physical and emotional well-being at risk. It was emphasized that no violence the father may have shown in the past towards the mother was directed at the children. There was no discussion of coercive control.
[69] *Supra* note 30 at 19 [Boyd and Lindy].
[70] In *L.M.S. v. W.D.U.*, 2018 BCSC 1154, In this case, the judge acknowledged that the father physically hurt the mother three times, but then stated that the incidents could be "entirely alleviated by the separation of the parties and greater clarity with respect to their parenting arrangements" (para 175). The judge also linked the father's use of force to his alcohol consumption (para 176). The judge then stated that "while the child was able to recall her father ripping her mother's shirt months later, there was no evidence that it has had a lasting impact on her relationship with her father" (para 177). These statement shows that not enough consideration was paid to the fact that he committed IPV in front of the child and that long lasing psychological effects can arise from witnessing that kind of violence inflicted upon one parent by the other.
[71] *Supra* note 30 at 11 [Boyd and Lindy].
[72] In *S.S. v. R.S.*, 2021 ONSC 2137, the mother described a situation where the father slapped the child when they were only one year old and said that the father sometimes ridiculed the child (para 85). One of the children was reluctant to spend time with their father (para 85). There were also some "violent" and "disturbing" situations described by the daycare (para 89). There were criminal charges brought against the father after the mother alleged sexual assault, assault, and uttering threats to cause death (para 93). The mother said she was comfortable with the children spending time with their father overnight and unsupervised (para 109). 16. The case of S.S. v. R.S. was decided just a few days after Pereira v. Ramos and had similar results. Despite these findings of very serious family violence, the judge decided that since there was no evidence of current abuse and/or the abuse appeared to be situational (paras 108-110) the father was granted unsupervised parenting time, including overnight visits (para 110). SEE ALSO: In M.W. v. N.L.M.W., 2021 BCSC 1273, the judge accepted that there was physical abuse that amounted to family violence, as well as one instance of financial abuse, but the family violence occurred within the context of the relationship, and now that the parties were separated, the risk of violence was minimized (para 128, 216, & 217).

the children."[73] Even in instances of extreme abuse resulting in charges being pressed against the father, the father's access to the child is still characterized as being in the best interests of the child.[74]

Silencing Children's Voices

Despite measures to ensure that children's voices are considered in decisions affecting them, there is a consistent pattern of children being ignored or silenced in custody and access cases involving IPV—particularly those where abuse has also been directed toward the child. The emphasis placed on the maximum contact principle in many of the cases reviewed, along with claims of parental alienation, often supersede the concerns of children facing dangerous environments.[75] For example, the Alberta Court of Appeal held that "it is appropriate for the trial judge to underemphasize the child's expressed wishes and fears when the trial judge makes a positive finding of alienation."[76]

In Ontario in *EH v OK*, the father had been charged with a sexual offence against the child. Approximately two years after the father was charged, the parties agreed for the child to have supervised access with the father.[77] When this was unsuccessful, the court ordered that the parties participate in therapeutic access programs in an attempt to persuade the child to have contact with the father.[78] The child, the mother, and the Office of the Children's Lawyer (OCL) objected to the visits.[79] The father then countered that he had "an excellent relationship with child" and attributed the child's reluctance to parental alienation by the mother, arguing that this had been a consistent theme since their separation.[80]

Throughout this time, the child objected to visits with their father and told the clinical investigator that they found the visits extremely stressful.[81] The child even asserted that despite wanting to cry or throw a temper tantrum during visits, they did not do so out of fear that the judge would not take their concerns seriously.[82] Although the judge ultimately ruled that the child's estrangement from the father was justifiable and that reunification therapy would not be beneficial, this outcome does not undo the trauma the child endured throughout the process.[83]

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[73] *Pereira v. Ramos*, 2021 ONSC 1737 at para 32.
In *Pereira v. Ramos*, both parties made claims of abuse against each other, and both parties denied or minimized the abuse allegations against them (para 29). One child reported that their parents argued a lot while living together, but she and her siblings no longer witnessed this since they rarely witnessed their parents together (*Ibid*). The judge said, "I am not deciding or making findings of fact regarding each party's versions of the family violence that has occurred. Instead, I am considering the 'impact' of any family violence on the 'ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child" (para 25). The judge held that it was in the best interests of children to both have a meaningful relationship with both parents and to avoid exposure to family violence (para 26). This was one of the first cases to be decided, just 9 days after the amendments to the *DA* came into force and therefore one of the first cases to interpret the amendments. This case set a precedent of focusing on the capability of the parents and whether there was any future risk of harm to the child or whether the violence was situational.
[74] In *Salim v. Safdar*, 2019 ONSC 200, the mother was subjected to years of torture and abuse at the hands of the father, his brother, and his mother, who were all ultimately charged in relation to these offences (para 4). The mother had "burn marks, scratches, cuts and bruises on her body, a damaged ear, and a broken jaw" when she fled the home (para 4). Despite the terrible violence that had been inflicted on the mother, and the ongoing criminal trials, the father was still granted supervised access with the child (para 689). Furthermore, the father was self-represented, which allowed him to continue to victimize the mother in court.
[75] This pattern is evident in the following cases: *AM v CH*, 2019 ONCA 764, where the court failed to adequately weigh concerns of the mother and Office of the Children's Lawyer and Leelaratna v Leelaratna, 2018 ONSC 5983, where the child suffered from extreme anxiety from having to visit with his abusive father.
[76] *B (VM) v B (KR), 2014 ABCA 334.*
[77] *EH v OK*, 2018 ONCJ 412 at para 21.
[78] *Ibid* at para 23.
[79] *Ibid* at para 24, 39 and 51.
[80] *Ibid* at para 25-26.
[81] *Ibid* at para 42.
[82] *Ibid* at para 42.
[83] *Ibid* at para 127 and 131.

Pathologizing Women's Emotions

Harmful mental health narratives are often used to reinforce gendered stereotypes in cases involving IPV.[84] The tendency to characterize mothers as mentally unstable can be traced to the advent of psychiatry, when women often outnumbered men in mental health diagnoses, including cases of so-called "hysteria."[85] Mothers are also plagued by the stereotype that they make false allegations of abuse, despite research supporting that victims often minimize, or cover up, instances of IPV.[86] Additionally, mothers can be portrayed as hostile and obstructive when they appear angry or emotional.[87] This 'hostility' is then juxtaposed against the violence perpetrated by the father, which often "invites judges to default to the 'neutral' position of assigning blame equally to both parties."[88]

While the actions of mothers are overly scrutinized, fathers face fewer consequences for abusive behaviours and neglect. In *O'Connor v O'Connor*, the father was shown to be negligent with his children's safety on multiple occasions. Both children described instances of their father's erratic driving while angry,[89] as well as an instance when the father left one child alone in a hotel room—a situation that frightened the child so much that they attempted to call for help on the hotel phone.[90] However, of particular concern was the occasion when the father chose to hitchhike with his children—an act for which he gave multiple excuses.[91] He then attempted to shift blame to the mother by stating that she was "making a whole barrage of complaints to demean his value as a parent to the children,"[92] and even argued that he normally took the children into taxis without booster seats.[93] The OCL then reiterated that the dangers of hitchhiking are not necessary related to booster seats, but accepting rides from strangers that may have ill intentions.[94] Overall, the father demonstrated little respect for court orders and frequently returned his children late.[95]

Despite the father's poor behaviour, the judge's language was oddly sympathetic. For instance, the judge wrote that "there are many indications that Mr. O'Connor is not coping well with the demands of parenting alone and is often putting his children at risk."[96] This begs the question: would the same language be used to describe a negligent mother? One would hardly assume that a mother displaying the same actions would be described as 'unable to cope'. In fact, mothers are not only expected to uphold their half of parenting duties, but also compensate for the father's poor parenting skills—demonstrating that it is far more acceptable for fathers to have shortcomings, or even dangerous tendencies, than it is for mothers.

In *Giron v Giron*, the mother was cross examined about the way she prepared her children for visits with their father. She stated that the discussions with her children were brief, since she operated under the assumption that her children knew they needed to be well behaved.[97] This response was deemed insufficient.[98] The father, on the other hand, only gave evidence of his parenting strategy when prompted by the court.[99] Little emphasis was placed on the father's history of aggression, including when he broke the children's toys and took a knife to the couch while the children were present.[100] There was also an incident of physical and verbal abuse

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[84] Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31 Can J Fam L 57 at 57 (WL).
[85] *Ibid* at 59.
[86] *Ibid* at 65.
[87] *Ibid* at 66.
[88] *Ibid*.
[89] *O'Connor v O'Connor*, 2017 ONCJ 48 at para 65.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid* at para 84.
[93] *Ibid* at para 65.
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid* at para 66.
[97] *Giron v Giron*, 2017 ONSC 3712 at 99.
[98] *Ibid*.
[99] *Ibid* at para 77.
[100] *Ibid*.

toward one child who was struggling with homework, noted in the Children's Aid Society (CAS) file.[101] The OCL clinician observed that although the father had not parented the children in years, he believed he could "step right in and take over without acknowledging the hurt and disappointment he had caused them."[102] The judge ultimately awarded the mother sole custody with supervised access for the father. Although the mother expressed that she wanted the father's access to increase, despite his many transgressions, the OCL stated that "neither parent stands out as being better than the other at meeting the needs of their children, as these parents appear to be preoccupied with their own issues and their resentment of one another."[103]

In another case, *Catholic Children's Aid Society of Toronto v TTL and SS*, the father had been incarcerated for several offences committed against the mother.[104] The mother stated that she met the father online in 2007, and that he later kidnapped her and held her hostage until 2011.[105] During this time he raped her, resulting in the conception of the child at issue in the case, and forced her into prostitution.[106] The father also had several similar allegations against him from other women.[107] He was sentenced to 15 months in prison, three years of probation, and was placed on the sex offender's list for 20 years due to criminal misconduct against the mother.[108] He was also prohibited from being within 100 meters of the mother's domicile, except in the exercise of access provided in the court's judgement.[109] However, these crimes were not enough to terminate access to the child, with the Honourable Justice Christiane Alary of the Quebec Superior Court making an order that the father have supervised access.[110] She stated that there was no reason to "totally suspend" his access and that "the child had a right to see her father and to develop a relationship with him."[111] This order prompted the mother to flee to Toronto, as she feared that her mental health challenges (PTSD, anxiety, and depression) would be triggered if she was forced to allow the father access to the child. Because the mother was unable to access experts to corroborate her mental health claims, the father was granted access.

In *S.N. v. B.N.*, the judge provided several adjournments for the respondent mother because of mental health issues, then later criticized her for this behaviour.[112] The judge determined that her fearful reactions to the hearing were out of proportion with the severity of the situation.[113] The judge said, "The respondent claims that her refusal to provide her address is because she fears for her safety. However, there is no evidence of any violence or attempted violence from the claimant since the separation. The evidence does not reasonably justify the respondent's fears for her safety."[114] The respondent said that she was worried that the claimant would come after her and "she was living in fear every day."[115] Due to this and some other concerns, the judge decided that the respondent's testimony was less reliable and therefore her evidence would be used "with caution."[116]

These cases demonstrate that judges, and others within the legal system, can be sympathetic towards fathers and overly critical of mothers, tending to apportion blame, rather than identifying the culpability of abusive fathers.[117] Mothers are then placed in an impossible situation, where they are expected to maintain contact with

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[101] *Ibid* at para 109.
[102] *Ibid* at para 110.
[103] *Ibid* at para 111.
[104] *Catholic Children's Aid Society of Toronto v TTL and SS*, 2018 ONCJ 403 at para 4.
[105] *Ibid* at para 17.
[106] *Ibid.*
[107] *Ibid*.
[108] *Ibid* at para 18.
[109] *Ibid* at para 19.
[110] *Ibid* at para 5.
[111] *Ibid* at para 144.
[112] *S.N. v. B.N.*, 2021 BCSC 2339 at para 42 & 43.
[113] *Ibid* at para 43.
[114] *Ibid* at para 44.
[115] *Ibid* at para 45.
[116] *Ibid* at para 51.
[117] Also see: *NH v JH*, 2017 ONSC 4867, Where despite many incidents of abuse, both the judge, and the clinical psychologist, made unfair criticisms and judgments that "pathologized" and diminished the mother's real concerns surrounding the safety of her children. The judge stated that there was no evidentiary support to suggest that the father might harm the children in that way and that this was an example of the mother's tendency to go to the worst possible scenario concerning the father. However, the mother recounted several instances where the father was violent to her and violent in front of the children. The judge should have properly considered these issues.

abusers, but are discouraged from expressing their fears or taking action to protect their children from harm. For instance, In *O'Connor v O'Connor*, the mother did not feel that the children were safe but abided by the court order mandating contact with the father.[118] The mother expressed a degree of anxiety regarding her children's safety, and the OCL advised that a counselor assist with safety planning procedures instead of the mother. It is not surprising that a mother would be anxious about handing her children to an irresponsible father in a situation where a safety plan is needed if the father's dangerous behaviour results in a compromising situation. The judge ultimately found that there was an "absence of evidence to satisfy that an order for sole custody and other non-access related relief should be ordered."[119]

Legal Bullying

Research has found that IPV does not end with the dissolution of a relationship—in fact, the risk of violence is usually heightened during the post-separation period.[120] For victimized women with children, the family court decides the extent of involvement each parent has with their children, making it difficult for women to cut ties with their assailants.[121] In these situations, abusers can continue to inflict harm in several ways including with threats, intimidation, and using the courts processes to control their victims.

Within family law, legal bullying is defined as "a range of abusive behaviors and tactics intended to defeat or make inordinately difficult the resolution of a legitimate claim to child support, spousal support, access, custody, and division of property."[122] These abusive behaviours can escalate over time, and often manifest in environments where the bully expects that they will be successful, including court proceedings.[123] Court-related harassment may include behaviours such as using the court system improperly by bringing multiple disingenuous court applications in different jurisdictions.[124] Perpetrators have also been known to abuse the court process by filing long affidavits on holiday weekends, or only a few days before a hearing, in order to overwhelm women who do not have legal representation.[125] Furthermore, many abusers choose to be self-represented, which then allows them to berate their former partners in cross-examination, thereby continuing their abuse within the legal system.[126] Advocates have further argued that "deliberately using up a victim's legal aid time should be a criteria of court abuse" given that this is also a common strategy used by abusers.[127]

Many victims of IPV are understandably concerned for their children's safety when facing legal challenges. Zeoli et al. argue that "IPV-perpetrating fathers may use opportunities presented by physical custody arrangements or parenting time to victimize children post-separation," since IPV and child abuse are known to occur simultaneously in 30-60% of homes.[128] Barriers in the legal system can have severe consequences on mothers' ability to protect their children, often forcing mothers to employ strategies to reduce the likelihood of harm, for example, although somewhat counterintuitive, cooperating with court orders that they do not actually believe are in the children's best interests.[129] In a recent Newfoundland case of a woman who had been subjected to extreme abuse at the hands of the father she still prioritized access with the father despite her concerns.[130]

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[118] *Supra* note 93 at para 77 [*O'Connor*].
[119] *Ibid* at 99.
[120] April M. Zeoli et al., "Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers" (2013) 28 J Fam Viol 547 at 547.
[121] *Ibid.*
[122] Esther L. Lenkinski et al., "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2004) 22 CFLQ 337 at 1.
[123] *Ibid* at 6.
[124] Andrea Vollans, "Court-Related Abuse and Harassment: Leaving an abuser can be harder than staying" (2010) online: *YWCA Vancouver* <https://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf> at 5.
[125] *Ibid*.
[126] In L.M.S. v. W.D.U., 2018 BCSC 1154, although the judge rejected the assertion, the father, who was self-represented, argued that the mother was moving only to spite him and decrease his parenting time (para 223)..
[127] *Supra* note 128 [Vollans].
[128] *Supra* note 124 at 547 [Zeoli et al].
[129] *Ibid*.
[130] In C.H. v. A.B.S., 2018 CarswellNfld 106, the father assaulted the mother twice while she was pregnant and was still permitted reasonable and generous access to the child. The judge stated that "it is noteworthy that in spite of having been violently attacked on two separate occasions by the Applicant in the late stages of her pregnancy and despite his deception during the relationship", the

Martha Shaffer suggests that abusers use the threats to seek custody as "weapons of intimidation and coercion"[131] and that mothers' refusal to cooperate can lead to them being labelled an "unfriendly parent". The "unfriendly parent" label also shields the bad behaviour of abusive fathers in the courtroom.[132] Additionally, many mothers agree to use supervised access centers for visits when they are concerned about their children's safety out of fear that the court may institute custody arrangements that are even less safe.[133]

Despite bias against mothers in the legal system, there is still backlash against gender-sensitive responses to women's victimization.[134] Father's rights activists tend to construe women leaving abusive relationships as a loss of power and control for men who "are accustomed to patriarchal power relations within their families."[135] When women's legal rights are upheld in court, these activists characterize men's loss of power and privilege as discriminatory. [136] Unfortunately, these perceptions can exacerbate the bullying inflicted by abusers in court—and despite research documenting legal bullying, judges are not always unaware when these tactics are being deployed.[137]

Lastly, litigation can also place a high emotional and financial burden on women who are already overwhelmed in the aftermath of a violent relationship.[138] These issues can be further compounded by life stressors such as "poverty, racism, classism, disabilities, language barriers, undocumented status, and lack of access to needed services."[139] The use of "parental alienation" as a defense by men who have abused their partners, only serves to compound the vast set of barriers that victims of IPV already face in the legal system.

Parental Alienation and the Discrediting of IPV

American psychiatrist Richard Gardner first coined the term 'parental alienation syndrome' in 1985. He defined the 'syndrome' as:

> *A disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no*

mother was still reasonable and generous in allowing access to the father (para 60). The mother expressed that while it had been difficult for her to do so, she found it important that her daughter have a relationship with her father (para 60).

[131] Martha Shaffer and Sheila Holmes, "The Impact of Wife Abuse on Custody and Access Decisions" (paper presented to the National Family Law Program, 2000).

[132] In *L.L.H. v. C.C.H.*, 2019 BCSC 1346, the incident which led to the mother obtaining a protection order against the father involved the father arriving at the mother's parents' house where a confrontation ensued and the father then took the children (para 43). The judge characterized this as a "one-time incidence involving police" that was "very different than a years-long pattern" (para 43). The judge held that the evidence did not show a pattern of family violence by the father (para 43). There was no further analysis of the father's behaviour.The judge noted that "the respondent was argumentative and was unable to concede small, simple points", but still the judge accepted that he was a "responsible and loving parent" (para 191). The father's behaviour, as well as his decision to be self-represented in court, suggest the father was trying to extend his abusive behaviour into the courtroom.

[133] *Supra* note 124 at 548 [Zeoli et al].

[134] Molly Dragiewicz, "Patriarchy Reasserted Fathers' Rights and Anti-VAWA Activism" (2008) 3 Fem Criminol 121 at 121.

[135] *Ibid* at 133.

[136] *Ibid*.

[137] For example, in *C.D.M. v. K.M.A.W.*, 2019 BCSC 608, the mother was concerned about the safety of her child around the father because the father had been charged, though acquitted, for sexually assaulting teenage boys (para 98). The mother's counsel contended that the father's dealings with the mother "constituted a campaign of harassment, threats and intimidation amounting to family violence" (para 98). It was argued that the culminating act of this violence was the father's insistence upon bringing an application shifting custody of the child to himself as the primary parent and relocating the child to Winnipeg, which she characterized as "as a threat intended to intimidate, in the context of litigation involving a campaign of harassment through applications" (para 99). The judge did not agree with this assertion, instead opining that "the conduct of family litigation, including threats of applications in the course of family litigation, cannot constitute family violence" because "litigation involves a resort to the independent institution of the court for the resolution of a dispute" (para 101). The judge stated that, "litigation is the antithesis of violence" (para 101).

[138] *Supra* note 88 at 98 [Zaccour].

[139] *Supra* note 128 at 19 [Vollans].

justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.[140]

Gardner believed that the disorder arose from an increase in child custody litigation in the mid 1970s due to the "replacement of the tender years presumption with the best interests of the child presumption."[141] However, Gardner made no mention of the fact that "the tender years doctrine was an improvement over the earlier legal presumption that upon marriage breakdown, a father enjoyed property rights over his children."[142] He further stated that parental alienation syndrome arose from attempts to preserve the already stronger bond between mother and child.[143] He called the alleged tactics employed by women, "vicious, manipulative, and deceitful."[144] The primary solution was thus for courts to intervene, stating that "only the court has the power to order these mothers stop their manipulations and maneuvering."[145]

Gardner's theory of parental alienation syndrome is both problematic and misogynistic. In his writings, Gardner initially uses the word 'parent' to describe his theory of alienation, thus evoking a sense of gender-neutrality. However, Gardner then continues to paint a picture where only mothers are responsible for alienation, and fathers are subjected to their unjustified abuse. His theory is not based on any comprehension of healthy parent-child relationships, or of the parent's obligation to act in the best interests of the child. Rather than focusing on factors that create healthy and loving bonds, he describes the children he observed as having "a guiltless disregard for the feelings of the hated parent" and that "these children will want to be certain the alienated parent continues to provide support payments, but at the same time adamantly refuse to visit that parent."[146] He thus characterized mothers as manipulative, children as 'users', and fathers as helpless victims.

It is also apparent that Gardner infantalizes women and disregards their emotions—a pattern that is still seen in many court cases. A mother's legitimate concerns are often dismissed and reframed as misdirected anger, bitterness, or the age-old trope of a 'woman scorned'. Gardner utilized this stereotype, stating that parental alienation syndrome is rooted in the rage of women.[147] He also speaks of mothers as if they are incapable of mature, complex emotions, or any ability to comprehend what is actually in the best interests of their children, suggesting that a mother and child could have no legitimate reasons for resisting contact with a father.

Gardner also made alarming statements about child sexual abuse. He wrote that such accusations were often rooted in mothers "projecting their own sexual inclinations onto the father" and that the children would "normally entertain sexual fantasies, often the most bizarre form."[148] He also considered therapy to be unbeneficial for mothers, seeing as "[they have] absolutely no insight into [their] deep-seated psychiatric problems" and will thereby be "totally unreceptive to treatment."[149]

In 2001, American mental health experts Joan Kelly and Janet Johnston refuted Gardner's problematic notion of parental alienation syndrome—stating that an emphasis on the child discounts the actions of both parents in these situations.[150] They state that "it can be shown that some children (especially adolescents) develop unjustified animosity, negative beliefs, and fears of a parent in the absence of alienating behaviors by a

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[140] Richard Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals*, 2nd ed (Fresno, CA: Creative Therapeutics, 1998) at 61.
[141] Richard Gardner, "Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families; When Psychiatry and the Law Join Forces" (1991) 28:1 AJA at 14-21.
[142] Jonathan Cohen and Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 CFLQ 121 at 2 (WL).
[143] *Ibid.*
[144] *Ibid*.
[145] *Ibid*. There are numerous examples of mothers receiving differential treatment and being subjected to these stereotypes that are inherent in parental alienation syndrome. See: *Giron v Giron*, 2017 ONSC 3712; *O'Connor v O'Connor*, 2017 ONCJ 48; *NH v JH*, 2017 ONSC 4867; Children and Family Services for York Region (Applicant) and LM (Respondent) and JG (Respondent), 2018 ONSC 382
[146] *Supra* note 144 [Gardner].
[147] *Ibid.*
[148] *Ibid.*
[149] *Ibid*.
[150] Nicholas Bala and Patricia Hebert, "Children Resisting Contact: What's a Lawyer to Do?" (2016) 36 CFLW 1 at 5 (WL).

parent" and that "alienating behavior by a parent is neither a sufficient nor a necessary condition for a child to become alienated."[151] Although Kelly and Johnston attempt to move away from Gardner's misguided theories on parental alienation, their new writings have not yet influenced the courts to resist the negative stereotypes popularized by Gardner.

Parental alienation syndrome is not medically recognized but has gained traction in child custody disputes. It is not suggested that alienating behaviours never happen—but rather that there are often better explanations as to why children resist contact with parents in custody and access cases involving IPV. Parental alienation is inherently gendered in the way it characterizes mothers, reinforcing legal and social inequalities through stereotypes that mothers are spiteful and manipulative people who seek to undermine their children's relationship with their father.

The maximum contact principle has been a key tool in claims of parental alienation in the court decisions surveyed in this scan. This principle is enacted under the guise of neutrality and based upon the false assumption that fathers face bias in the legal system. These falsehoods are apparent in language used by organizations offering supervision services. For example, Men's Educational Support Association (MESA) in Calgary, which claims to offer supervised access in a neutral setting, states on their website that the "prevailing experience among fathers today is that fair and balanced outcomes involving the law are difficult to attain".[152] Furthermore, supervisors in the United States have reported that "perpetrators of violence use supervised access to continue to harass a spouse via the child" and that many are only "doing their time" in the program with the intention of continuing their abuse after supervision is lifted.[153] Fortunately, the 2021 amendments to the *Divorce Act* that explicitly reject the maximum contact principle may help to reduce this trend.

The cases reviewed here demonstrate that it is not uncommon for judges to order supervised access, even when a parent has "no previous relationship with the child; has displayed poor parenting skills in the past; has a history of child abuse, substance abuse, mental health issues, violence towards the custodial parent; or where the child is resistant to having contact with the access parent."[154] The justice system views supervised access as a "win-win situation" where children are able to "maintain post-divorce contact with both of their parents, even those with serious parenting deficiencies."[155] It does not, however, take into account the potential detrimental impacts of forcing children to maintain contact with an abusive parent. [156] Allegations of parental alienation often paint mothers as 'women scorned' instead of protective caregivers. It also measures mothers against unrealistic expectations while simultaneously enforcing patriarchal concepts through the legal system.

The concept of parental alienation is rooted in the following flawed assumptions: (1.) "that children do not ordinarily fear or resist a non-custodial parent without manipulation by the other parent," and (2.) "that a child's hostility toward or fear of the other parent, can in fact be caused solely by the favored parent's negative influence (or programming), regardless of the child's own experience."[157] The cases reviewed involving parental alienation, show that there are a myriad of reasons why children may be resistant to contact. Factors long identified in child welfare and development research, such as "parental warmth, exposure to parental or family violence and/or parental conflict", not only offer better explanations, but can directly refute the concept of parental alienation.[158]

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[151] Joan B. Kelly and Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2005) 39:3 Family Court Review at 249.
[152] "Introduction to MESA" (2018) at 1, online: *Men's Educational Support Association* <https://mesacanada.com/>
[153] Fiona Kelly, "Enforcing a Parent/Child Relationship at All Cost? Supervised Access Orders in the Canadian Courts" (2011) 49 Osgoode Hall LJ 277 at 287-288 (WL).
[154] *Supra* note 155 at 279 [Kelly and Johnston].
[155] *Ibid* at 280.
[156] In *Leelaratna v Leelaratna*, 2018 ONSC 5983, the mother blamed her son's anxiety and discomfort surrounding visits with his father on the father's behavior. On the other hand, the father blamed his son's fear on the mother's "alienating behaviors and lack of support for the father-son relationship".[156] The son was assessed by the family doctor, who recommended that access between the son and his father be suspended because of the extreme anxiety he was suffering because of the visits, which had resulted in vomiting and irritable bowel syndrome.
[157] Learning to End Abuse, "Collective Memo of Concern to: World Health Organization RE: Inclusion of "Parental Alienation" as a "Caregiver-child relationship problem" Code QE52.0 in the *International Classification of Diseases 11th Revision* (ICD-11)" (July 10, 2019) http://www.learningtoendabuse.ca/docs/WHO-September-24-2019.pdf < https://perma.cc/JUP2-3P5H> at 2.
[158] *Ibid* at 5-6.

Allegations of parental alienation show up in the form of legal bullying and coercion throughout many of the parental alienation cases analyzed in this study.

Skulason v Crackle

Skulason v Crackle, is a Manitoba Court of Queen's Bench case where the father made an allegation of parental alienation against the mother, despite the fact that his own actions were to blame for the estrangement of his children. The father last had contact with his children—ages 22, 16, and 14—seven years prior.[159] The mother testified that the father was abusive towards her and the children, and that any estrangement that occurred was not attributable to her interference, but his dangerous behaviour.[160] At the time of separation, the mother obtained a protection order for herself and her children, barring contact with the father.[161] Following interviews with the children, Family Conciliation delivered a Brief Consultation Report to the court indicating that "it is crucial that effort is made to help the girls be more open to safe contact with their father", while suggesting that the father return to counselling.[162] The father did not attend counselling and communication between the parties was never initiated.[163] However, the children themselves attended counseling where they disclosed being physically abused by their father and fearful of him.[164] The father denied these claims and took no responsibility for his alleged abuse.[165] Although the court ultimately ruled that the children in this case would not be forced to make contact with their father, it exemplifies the harm that the maximum contact principle can inflict. While it is important for children to have healthy relationships with both parents, it is first crucial to recognize if a healthy relationship is possible in the first place.

Parental alienation has also been used in multiple cases to discredit the concerns of children who expressed not wanting to be in contact with an abusive parent. In *C (S) v C (AS)*, it was found that the child's wishes could not be determinative in an order for custody due to years of psychological pressure on the child.[166] This concept was also upheld in *Letourneau v Letourneau*, where it was found that a child's wishes may be discounted if the judge makes a finding of parental alienation, seeing as their wishes may be "a vicarious expression of the controlling parent's wishes which should not be taken into account in crafting an access order in the child's best interests."[167] As discussed above, children may attempt to mask their true feelings, since they feel as though they will be negatively perceived by a judge.[168]

The following four Court of Appeal decisions from Ontario and Alberta show how situations involving parental alienation can result in vastly different outcomes for families.

S. v. A. (affirmed by W.S. v. P.I.A)

In *S. v. A.,* the mother made allegations of very serious abuse, saying that the father hit and kicked their child and was physically violent with her on multiple occasions.[169] One child was especially resistant to spending time with his father.[170] When transitioning into supervised care with the father, the child would kick, scream, punch, and bite his mother, refusing to leave the car.[171] The court decided that the mother had not

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[159] *Skulason v Crackle*, 2017 MBQB 103 at para 3.
[160] *Ibid* at para 4.
[161] *Ibid* at para 14.
[162] *Ibid* at para 18.
[163] *Ibid* at para 19.
[164] *Ibid* at para 20.
[165] *Ibid* at para 31 – 32.
[166] *C (S) v C (AS)*, 2011 MBCA 70 at para 21.
[167] Letourneau v Letourneau, 2014 ABCA 156 at para 10.
[168] In *EH v OK*, 2018 ONCJ 412, the father had been charged with a sexual offence against his daughter and consistently downplayed his actions. He instead alleged parental alienation by the mother as the reason his daughter was opposed to access with him. The child told the clinical investigator that she found the visits very stressful and that even though she wanted to go to the corner of the room and cry, she does not do so out of fear that the judge will view her as an immature child and not listen to her concerns. The child is aware of the narrative held in our courts – that her frustrations and fears will be deemed childish and irrational if shows too much emotion.
[169] *Ibid* at para 63.
[170] *Ibid* at para 76.
[171] *Ibid* at para 76 and 169.

done everything within her power to facilitate access for the father since she refused to physically remove her distraught child from the car.[172]
The child said he was afraid of his father because he had hit him.[173] The mother was also afraid of the father during these exchanges.[174] The mother alleged that one of her children had been sexually assaulted by their father.[175] This was later found to be false and probably induced by the mother.[176] Four criminal charges were brought against the father, but he was acquitted of all four.[177] The trial judge found, "No conduct by a caregiving parent that deliberately undermines a child's sense of safety or self should be sanctioned or permitted to continue."[178] The judge emphasized parental alienation, arguing that the mother was acting based on personal feelings toward the father rather than in the best interests of the child.[179] As a result, the children have suffered emotional harm.[180] The judge held that allowing a child to reject a parent was harmful to the child.[181] The father was ultimately ordered to be the primary caregiver and decision-maker, a reversal of the status quo.[182] The judge described the father as a "capable, good enough parent."[183]

S. v. A was affirmed in *W.S. v. P.I.A*. The appeal judge held that the trial judge engaged in "an assiduous review of the evidence" and that the trial judge's findings were correct.[184]

E. v. V-E. relies heavily on *S. v. A.* to consider matters related to family violence.[185] Like *S. v. A.*, parental alienation and, the harmful effect of parental alienation on the child, was emphasized.[186] The judge determined that the children did not have "independence of mind" so weight should not be given to the views of the child.[187] The children's voices were silenced. The judge decided a reversal of parenting terms was appropriate and that the children should be put with their father to try to repair the relationship between the father and the children.[188]

In *JLZ v. CMZ*, the mother alleged that her youngest child disclosed that their father had sexually abused them.[189] An RCMP investigation concluded that there was no indication of any abuse.[190] One of the children showed reluctance to visit the father.[191] The father argued that the mother was alienating the children against him and the case management judge accepted this and reversed the status quo parenting so that the father would have sole custody.[192] The mother argued that there was a failure on the part of the case management judge to consider all the factors of the best interest test, including in relation to family violence.[193] However, the appeal judge agreed that the father should have sole custody of the children and the appeal was not granted.[194]

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[172] *Ibid* at para 170.
[173] *Ibid* at para 183.
[174] *Ibid* at para 192.
[175] *Ibid* at para 200.
[176] *Ibid* at para 207.
[177] *Ibid* at para 65.
[178] *Ibid* at para 25.
[179] *Ibid* at para 307.
[180] *Ibid*.
[181] *Ibid* at para 30.
[182] *Ibid* at para 313.
[183] *Ibid* at para 314.
[184] *W.S. v. P.I.A*, 2021 ONCA 923 at para 4 & 9.
[185] *E. v. V-E.*, 2021 ONSC 7694 para 110-113, 132, & 149.
In *E. v. V-E.*, 2021 ONSC 7694, the mother alleges that the father has a history of abuse (para 108). The children make claims of paternal maltreatment, but the claims usually can't be proven (para 139).
[186] *Ibid* at para 111
[187] *Ibid* at para 143-144.
[188] *Ibid* at para 158.
[189] JLZ v. CMZ, 2021 ABCA 131 at para 27.
[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid* at para 33.
[193] *JLZ v. CMZ*, 2021 ABCA 200 at para 76.
[194] *Ibid*.

Mattina v Mattina

In *Mattina v Mattina*, the father did not have meaningful contact with his children for four years after his separation.[195] Although he was able to attend the children's extracurricular activities, he was only able to do so as an observer because the children refused to interact with him. To repair this relationship, the father brought a motion for summary judgement for custody of all three children, and a no-contact order against the mother for a 90-day period while the children participated in a program called Family Bridges.[196] A representative from the program argued that an aggressive intervention program such as Family Bridges was necessary, stating:

> *Almost every case is hybrid, where both parents contributed to the problems. In that regard, according to Dr. Fidler, the seeds of parent-contact problems are sown in problematic parenting during the marriage or in long-term problematic relationships. If every case is hybrid, all cases are forward-looking. Children have to be taught that there are different perspectives, and blame is irrelevant.*[197]

While the father believed that the mother had alienated him from their children, the mother denied this accusation and stated that it was, in fact, the father's conduct that was to blame for the children refusing to see him.[198] There was evidence that the children suffered physical abuse at the hands of their father on numerous occasions.[199] The children reported in a Section 30 assessment (as per section 30 of the *CLRA*) that their father was extremely violent towards them, and their mother, and had also caused property damage by punching holes in walls.[200]

The Court of Appeal affirmed that the motions judge had appropriately decided that the children's views were genuine and that there was no parental alienation by the mother. The father's appeal was dismissed. The father argued that the motions judge erred by failing to adequately consider the best interests of the children in light of the maximum contact principle found under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).[201] The Court of Appeal judge disagreed, stating that:

> *The child's best interests are not merely "paramount"—they are the only consideration in this analysis: Gordon v. Goertz, [1996] 2 S.C.R. 27 (S.C.C.) at para. 28. The evidence in this case was clear that the children were suffering from the protracted dispute and conflict between their parents. Exposure to conflict has been called the "single most damaging factor for children in the face of divorce": per Backhouse J., in Graham v. Bruto, [2007] O.J. No. 656 (Ont. S.C.J.), at para. 65, aff'd 2008 ONCA 260 (Ont. C.A.). (ONCA para 20).*[202]

The Section 30 assessment did not make a specific finding of alienation and the father was incorrect that such a finding was implicit in the assessment.

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[195] *Mattina v Mattina*, 2017 ONSC 5704 at para 7.
[196] *Ibid* at para 2.
[197] *Ibid* at para 17.
[198] *Mattina v Mattina*, 2018 ONCA 641 at 6
[199] *Ibid* at 16.
[200] *Supra* note 199 at para 95-96 [*Matinna ONSC*].
[201] *Supra* note 202 at para 19 [*Mattina ONCA*].
[202] *Ibid* at para 20.

AM v CH

In *AM v CH*, the judge writes, "this is a sad case about a mother successfully alienating 3 children (18, 17 and 12 years of age) from their father" after the mother unilaterally decided to move the children from Toronto to Guelph after 15 years of marriage.[203] An examination of the facts in this case reveals that the trial judge failed to see the mother's actions as those of a woman fleeing an abusive relationship, and the appeal judge failed to see this error by the trial judge. This would offer plausible explanation as to why she moved without notice and left the father a letter rather than confronting him in person.

The father testified that prior to the separation, the mother had alienated the children in numerous ways including openly criticizing him for not making enough money or doing household chores, preventing him from eating with his family at the dinner table, and blocking him from entering the youngest child's room after an incident where he spanked the child.[204] The trial judge characterized the mother's assertions about family dysfunction and claims that the father beat the children daily, as "invented afterward" and "extreme."[205]

The mother testified that the marriage was both physically and emotionally abusive from its early stages, and that it took many years, and the support of counsellors, for her to leave.[206] Evidence of abuse also extended to the children, including the oldest child whom the father referred to as a "donkey" because of a learning disability.[207] They also stated that the father demonstrated racist behaviour, due to an incident where he demeaned Jewish people and praised Hitler—an instance that had a profound effect on the 18-year-old child because of his service in the Air Force Cadets.[208]

There were several witnesses offered by the father to support his good parenting. However, with the exception of the next-door neighbour, each of the witnesses was a client of the father's who only visited the house a few times a year for business meetings.[209] The mother argued that none of the father's client's had actually witnessed the father parenting the children.[210] In the trial judge's analysis of the credibility of both parties, there were no criticisms of the father concerning the reliability of his witnesses, or the abuse of his spouse and children. Instead, the trial judge credited the father for being soft-spoken, for admitting to certain instances of abuse, and for not becoming overly-emotional; as opposed to the mother who was characterized as being "argumentative" and giving her testimony in a "contentious and bitter manner."[211]

The OCL was involved in the case, to represent the interests of the children. They gave evidence stating that the children did not believe that the father had made any significant parenting gains based on his conduct. They also stated that evidence of the youngest child, as provided by the clinical investigator for the OCL, did not indicate that the child was alienated, but estranged from his father.[212] Despite this information, the trial judge found that there was parental alienation in this case, stating that "parental alienation is a legal concept as opposed to a mental health diagnosis."[213] The trial judge ultimately ruled that the youngest child should be in the sole custody of the father, with a bar on communication with the mother and maternal family for six months, in hopes that therapy could aid in reconciliation between the father and child.[214]

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[203] *Malhotra v Henhoeffer*, 2018 ONSC 6472 at 1 and 4.
[204] *Ibid* at para 26-27.
[205] *Ibid.*
[206] *Ibid* at para 38.
[207] *Ibid* at para 44.
[208] *Ibid* at para 47.
[209] *Ibid* at para 55.
[210] *Ibid*.
[211] *Ibid* at para 123-126.
[212] *Ibid* at para 85.
[213] *Ibid* at para 107.
[214] *Ibid* at para 182.

While in his father's custody, the 13-year-old child continued to communicate with his maternal family, was resistant to staying with his father, and refused to attend reconciliation therapy.[215] The mother and the OCL remained focused on appealing the trial decision and pursuing a motion to stay,[216] interpreting the child's rebellion while in the father's care as evidence in support of the motion.[217] The trial judge disagreed, stating that the child should only be permitted to re-establish a connection with his mother after he makes progress towards the goal of reconciling the relationship with his father. This denies the child agency and punishes them for not wanting a relationship with their former abuser.

The mother and OCL brought this case to the Ontario Court of Appeal, advocating for the child's wishes while not disputing the trial judge's factual findings. They argued for the trial judge's order to be set aside because of numerous mistakes including overemphasizing the mother's bad conduct in comparison to the father's, failing to properly consider the child's wishes, and failing to consider the "potentially catastrophic consequences of separating the child from his mother."[218] At the Court of Appeal, the trial judge's decision was affirmed. It was found that the trial judge had not erred in any respect justifying appellate interventions.[219] This case has been cited numerous times since the judgment, and because of its in-depth analysis on a multitude of issues concerning parental alienation, it is likely to have a profound impact on this area of the law. Unfortunately, this case encompasses a multitude of issues relating to parental alienation and anti-feminist conduct that does not serve the bests interests of the child.

Conclusion

With the newly introduced section 2(1) of the *Divorce Act* providing a definition for family violence,[220] determining the presence of such violence will not be dependent on the discretion of judges who may, or may not, be knowledgeable about issues relating to IPV. More importantly, section 16(3)(j) actually addresses the impact of family violence in relation to the best interests of the child,[221] noting the potentially dangerous "long-term impacts on the behaviour, development and physical, psychological and emotional health of the child."[222] It also ensures that the court must consider whether the perpetrator of family violence may be violent with the child, use their relationship with the child to be violent, use their relationship with the child to control another person, or cause the child to be fearful of them.[223]

While the changes to the *Divorce Act* should have enabled judges to understand the harm done to children whose mothers are subjected to IPV, in many cases the minimization of violence continues. There is a continuing trend of classifying family violence as situational and ignoring the potential long-term impact of violence.[224] There is also a continuing trend of pathologizing the emotions of mothers and claiming parental alienation in discredit claims of family violence.

Although the *Divorce Act* does not acknowledge the gendered nature of IPV, it does clearly outline its impact on children who witness it, or who are exposed to a parent who commits such violence. This type of clarity is necessary in order to protect mothers and children under the law. Cases like *VLM v. AJM* show that the amendments to the *Divorce Act* can be used to protect children and recognize the long-term impacts of trauma.[225]

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[215] *Malhotra v Henhoeffer*, 2019 ONSC 527 at para 5-6.
[216] *Ibid* at para 8.
[217] *Ibid* at para 16.
[218] *AM v CH*, 2019 ONCA 764 at para 3.
[219] *Ibid* at para 92.
[220] *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) s. 2(1).
[221] *Ibid* at s 16(3)(j).
[222] Canada Department of Justice, "The *Divorce Act* Changes Explained" (June 5, 2020) https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div60.html
[223] *Ibid*.
[224] *Supra* note 77 at para 32 [*Pereira*]
[225] *Supra* note 13 at para 73 [*VLM v. AJM*].