

**The Challenge of High-Conflict Family Cases Involving a Child Protection Agency:  
A Review of Literature and an Analysis of Reported Ontario Cases**

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**February 17, 2015**

**INTRODUCTION**

Child protection agencies (CPAs) are increasingly becoming involved in high conflict custody and access cases.<sup>1</sup> High conflict cases often involve a number of dynamics that place children at risk of harm. Allegations of domestic violence (DV), child abuse, and alienation are common in high conflict cases. DV places children at risk of physical harm, and a child's exposure to DV is now recognized as a serious form of emotional maltreatment. Severe alienation is often common in these cases and is also a form of emotional abuse, with negative consequences for children spanning into adulthood.<sup>2</sup> Alienation can be manifested in repeated, unfounded allegations of child maltreatment, which pose a risk where the child is forced to undergo repeated investigations or comes to believe the allegations. Risk of emotional harm may also result where a parent consistently denigrates the other, exposes the child to conflict, or uses the child as a pawn

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<sup>1</sup> There are multiple, overlapping definitions of high conflict. See Bala & Birnbaum, "Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law" (2010) 48 Family Court Review 403-416. In this paper we do not attempt to operationalize high conflict. We use the term for descriptive purposes only.

<sup>2</sup> See Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties That Bind* (W.W. Norton, New York, 2007).

or ally in the dispute.<sup>3</sup> However, while CPAs are increasingly encountering high conflict cases, little information is available on how they manage these cases or what should be best practices for CPAs working with high conflict families.

This paper proceeds in two parts. The first part provides a review of the limited research available on domestic family law cases that intersect with the child protection system. The second part provides an analysis of information obtained from 210 reported cases from Ontario involving custody and access disputes where a report was made to a CPA. The paper concludes by offering observations about high conflict custody and access cases that intersect with the child protection system, and suggestions for future research. The next phase of our research will consider the issue from the perspective of various stakeholders, including family lawyers, judges and CPA representatives. Our hope is that this research will lead to the identification of best practice approaches in high conflict custody and access cases with CPA involvement.

## **LITERATURE REVIEW**

Despite increasing involvement of child protection agencies (CPAs) in custody and access cases, very little has been written about family justice cases that intersect with the child protection system.

Recently, the federal Department of Justice commissioned a series of reports on family violence cases that proceed in the criminal justice system with concurrent proceedings in the family or child protection systems in Canada. Bala & Kehoe wrote

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<sup>3</sup> Kelly, “Risk and Protective Factors Associated With Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications,” in Kuehnle & Drozd (eds.), *Parenting Plan Evaluations: Applied Research For the Family Court* (Oxford Press, New York, 2012), at 49-85.

about the issue of concurrent proceedings involving the child protection system and criminal or family cases;<sup>4</sup> the focus was on cases involving domestic violence (DV), but the paper also discussed child abuse cases, and especially those arising in the context of “high conflict” separations.

CPAs may become involved with a high conflict family when one or both parents report that the other parent (or a new partner) is abusing or neglecting the child. Anecdotal evidence suggests that allegations of alienation and estrangement are increasingly triggering child protection intervention. Bala & Kehoe recognize that reports of child maltreatment to CPAs made in the context of parental separation always need to be investigated; even though a relatively high portion of reports made in this context are unfounded,<sup>5</sup> many are substantiated. Further, even where allegations prove unfounded after investigation, there may still be risk of emotional harm to the children due to exposure to high levels of parental conflict. Their report identified the need for empirical research to gain a more complete understanding of the problems and challenges involved in cases of concurrent proceedings, including gaining perspectives from agencies, professionals and the courts on how to better address these cases.

According to section 37 (2)(f) and (g) the Ontario *Child and Family Services Act*,<sup>6</sup> CPAs have a duty to investigate cases involving “emotional harm” or “risk of emotional harm” to children. Emotional harm for the purpose of the child welfare legislation requires that the CPA establish that the child has experienced “serious” emotional harm;<sup>7</sup> the “ordinary” emotional distress that children and adolescents commonly experience as a

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<sup>4</sup> Bala & Kehoe, *Concurrent Proceedings: Child Protection Perspective* (2013, Justice Canada).

<sup>5</sup> See Bala, Mitnick, Trocme & Houston, “Sexual Abuse Allegations and Parental Separations: Smokescreen or Fire?” (2007), 13 *Journal of Family Studies* 26-56.

<sup>6</sup> R.S.O. 1990, c. C.11.

<sup>7</sup> *Catholic Children’s Aid Society of Toronto v MR*, [2003] OJ 4385 , at para 11.

consequence of their parents' separation will generally not meet the necessary test for finding that children are in need of protection.<sup>8</sup>

Separations involving high conflict, however, do raise concerns about emotional abuse. High conflict separations often involve allegations of domestic violence. According to the *Ontario Child Welfare Eligibility Spectrum*,<sup>9</sup> a policy manual for Ontario CPAs, children's exposure to partner violence is a risk factor for emotional harm. High conflict separations may also involve alienating behavior on the part of one or both parents. One component of alienation is repeat unfounded allegations of child abuse to CPAs or the police. Repeat unfounded allegations take the form of emotional abuse where the child is exposed to numerous investigations or comes to falsely believe the abuse occurred. Severe alienation, with or without repeat unfounded allegations, invariably involves the presence or risk of emotional harm.<sup>10</sup> Finally, co-parenting and access exchange conflict is common in high conflict separations.<sup>11</sup> Parents threaten their children's emotional wellbeing by making degrading comments about the other parent, using children as messengers or spies, exposing them to parental arguments, and co-opting them as an ally in the conflict.<sup>12</sup>

A recent study by Saini et al.<sup>13</sup> estimates that 12% of child protection investigations in Canada occur in the context of an on-going post-separation parental

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<sup>8</sup> Bala & Kehoe (2013) at 15.

<sup>9</sup> *Ontario Child Welfare Eligibility Spectrum* (2006).

<sup>10</sup> Fidler, Bala & Hurwitz, *Best Practice Guide: Emotional Abuse and Parent-Child Contact Problems in High Conflict Separations* (Toronto High Conflict Forum & Jewish Family & Child Services, 2013).

<sup>11</sup> Birnbaum & Bala (2010).

<sup>12</sup> Kelly (2012).

<sup>13</sup> Saini, Black, Fallon & Marshall, "Child Custody Disputes within the Context of Child Protection Investigations: Secondary Analysis of the Canadian Incident Study of Reported Child Abuse and Neglect" (2013) 92 *Child Welfare* 115-137.

dispute. Drawing on national data on reporting of child abuse to CPAs, the authors compared child protection files involving a custody dispute and child protection files without a custody dispute. Court proceedings were not necessarily on-going as a result of the custody dispute; rather, the CPA noted that the investigation involved a family in the midst of a custody and access dispute. The authors found that child protection files were more likely to be opened more than three times (27% versus 19%) if there was an ongoing custody dispute. They also discovered that children involved in cases where there was a custody dispute had high reported rates of emotional harm (19% versus 13%) and parental functioning issues (44% versus 41%).

Physical abuse was the most commonly investigated form of maltreatment in the child protection cases with custody disputes (32% of investigations), followed by neglect (23%), exposure to intimate partner violence (20%), emotional maltreatment (20%) and sexual abuse (5%). The most common referral sources in custody cases were custodial parents (24% versus 6% of investigations in non-custody cases), and non-custodial parents (19% versus 1% of non-custody investigations), compared to a referral from a child's school in non-custody cases (26% versus 8% of custody investigations). The authors also found that despite similar substantiation rates for both types of files, child protection cases where there was a custody dispute were substantially more likely to involve allegations that child protection workers classified as "malicious unfounded allegations" (13% versus 4%). Based on these findings, Saini and his colleagues argue for a differential approach to high conflict custody cases coming to the attention of CPAs. They recommend early assessment of custody cases and provision of appropriate services to reduce parental conflict, protect children's emotional wellbeing, and conserve agency

resources. They suggest the establishment of specialized child protection teams to work with high conflict families, and high conflict training for all workers.

An earlier study by Birnbaum suggests that Children's Aid Society (CAS) involvement in custody disputing families involved with the Ontario Office of the Children's Lawyer (OCL) may also be significant.<sup>14</sup> The study looked at closed OCL case files from 2002-2004. Birnbaum found that in cases involving legal representation by the OCL, the CAS had been involved with the family before OCL involvement in 51% of cases. For cases involving clinical investigations, a CAS had been involved in 56% of cases before the OCL became involved.

A 2012 study by Saini et al.,<sup>15</sup> based on the experiences of CPA workers involved in high conflict cases, made the additional recommendation to improve collaboration between the child protection and family justice systems. The study collected information from focus groups with 28 child protection workers involved in these cases. A number of themes emerged. First, it was clear that workers had difficulty articulating a definition of "high conflict," a problem also reported by researchers in this area.<sup>16</sup> Second, despite ambiguity of the concept, workers were able to identify three common characteristics of high conflict families: manipulation, lack of communication, and perpetual crisis. Third, workers reported how high conflict cases challenged their skills, emotional well-being, and time. They reported feeling as though high conflict parents were often manipulating the child protection system to gain an advantage in custody proceedings. They described

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<sup>14</sup> Birnbaum, "Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations" (2005) 24 Canadian Family Law Quarterly 167-189.

<sup>15</sup> Saini, Black, Lwin, Marshall, Fallon & Goodman, "Child Protection Workers' Experiences of Working With High-Conflict Separating Parents" (2012) 34 Children and Youth Services Review 1309-1316.

<sup>16</sup> Birnbaum & Bala (2010).

how a lack of communication exacerbated disputes and distorted allegations, making the workers' role of assessing the credibility of allegations more difficult. Finally, they discussed the difficulty of managing a caseload that includes high conflict cases, which demand greater resources than other cases.

Fourth, workers expressed frustration with the expectations of other professionals. Workers resented that the CPA was being seen as a "catch all" service for high conflict families, and resisted assuming the role of "case manager" when different agencies and professionals were involved. Fifth, workers expressed clear recognition of the need for CPA standards and policies to assess and respond to high conflict families, as well as specific training on alienation, domestic violence, and emotional harm. Workers in particular described great difficulty in assessing the extent and cause of emotional harm to children in high conflict cases, and in fact reported reluctance to substantiate risk of emotional harm in these cases. At the same time, workers reported concern about the welfare of children in high conflict families, noting that parents were often unable to see the effect of their behaviour on their children.

Finally, CPA workers were concerned about their role in high conflict cases. Some reported feeling pressured to take a "position" in the domestic proceeding, although none of the workers in this study had done so, explaining that in their view this was beyond their mandate. Workers also expressed concern that once a CPA became involved in a high conflict family, they had real difficulty taking a protective role. Instead, they were asked to take on the functions of a parenting coordinator. Some workers were resistant to any child protection involvement in high conflict cases. Some felt that high conflict cases did not raise child protection issues and should therefore be dealt with

exclusively by the family law system. Others were concerned that child protection intervention would exacerbate conflict in these cases.

## **METHODOLOGY OF THIS STUDY**

We undertook a search for reported Ontario court cases decided between January 1, 2010 and December 31, 2014 using the online database Westlaw (Canada) that had both a domestic proceeding (under the *Divorce Act* or *Ontario Children's Law Reform Act*) and CPA involvement and located 609 cases using these broad criteria.<sup>17</sup> Of these 609 cases, 210 cases were included for analysis. Only cases involving a custody and access dispute and report to a CPA were included. Other excluded cases were those in which the only child protection reports were made prior to separation, and cases where no information was provided on the report, or the nature or timing of CPA involvement, for example cases where the judge said only, "child protection has been involved with this family."

Of the 210 cases, 209 involved heterosexual couples (mother and father). One case involved a same-sex couple (custodial mother and access mother).

The 210 cases were divided into two categories: domestic cases (196 cases) and child protection cases (14 cases). Categorization was based on the decision reported. Domestic cases were those cases being decided under the *Ontario Children's Law Reform Act*<sup>18</sup> or federal *Divorce Act*,<sup>19</sup> while child protection cases were decisions made under the *Ontario Child and Family Services Act*. Of course some of these cases had a history of proceedings under the alternate regime. In 2 of the 196 domestic cases, and 2 of the

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<sup>17</sup> Search terms: ("child and family services" or "jewish child and family services" or "child protection" or "children's aid") & (divorce or "children's law reform act") (last search performed January 9, 2015).

<sup>18</sup> R.S.O. 1990, c. C.12.

<sup>19</sup> R.S.C., 1985, c. 3.

child protection cases, multiple decisions were reported in the five-year period. As a result, the 210 cases yielded 214 reported decisions.

The cases were analyzed according to specific criteria. Information was collected from all 210 cases in the following areas:

- Case details (court, year, type of proceeding, disposition)
- Unrepresented litigants
- Children involved (number, age, gender)
- CPA intervention (reports, allegations, substantiations, outcomes)
- Presence or risk of emotional harm to child
- CPA evidence in domestic proceedings
- Domestic violence (physical violence between parents)
- Alienation (cases where the litigants or judges used the term “alienation”)
- Criminal justice system intervention (police reports, charges, outcomes)
- Police testimony in the civil proceedings (domestic or child protection)
- Involvement of “helping professionals” (medical professionals, mental health professionals, social workers and non-legal family justice professionals<sup>20</sup>)
- Court-ordered assessments (*CLRA* s. 30 or *CFSA* s. 54)
- Office of the Children’s Lawyer involvement
- Voice of the child

## **CASE ANALYSIS**

### **Case Details**

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<sup>20</sup> Family justice professionals included parenting coordinators, non-*CLRA* assessors, supervised access workers, and mediators.

## I. Court

In Ontario, domestic proceedings under the *Divorce Act* are heard in the Superior Court of Justice; child protection proceedings under the *Child and Family Services Act* are heard in the Ontario Court of Justice, as are most proceedings under the *Children's Law Reform Act*. In a number of Ontario communities, a branch of the Superior Court called the "Family Court" has been established; with jurisdiction to hear proceedings under all three pieces of legislation. In areas without a Family Court, cases involving proceedings under the *Divorce Act* and *CFSA* will be heard in different courts by different judges.<sup>21</sup> Because *CFSA* proceedings are protective matters, domestic proceedings involving the same family are usually stayed until the *CFSA* matter is resolved.

There were a total of 214 reported decisions in the 210 cases. Of the domestic proceedings (198 decisions), most were heard in the Superior Court of Justice (69%). (It was not possible to distinguish how many of these proceedings were heard in the unified Family Court.) The other proceedings were heard in the Ontario Court of Justice (30%) and Court of Appeal (1%). Of the child protection proceedings (16 decisions), 56% were heard in the Ontario Court of Justice, and 44% in the unified Family Court.

Judges in a few of the domestic decisions expressed frustration with the jurisdictional issues involved in custody cases that raise child protection issues where is no unified Family Court. In one case brought in the Superior Court, *F. (A.M.) v. W. (J.R.)*,<sup>22</sup> Harper J. invoked the Court's inherent *parens patriae* jurisdiction to find three children caught in the middle of a high conflict custody dispute also in need of protection

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<sup>21</sup> In locales without a (unified) Family Court, there is a concurrent jurisdiction for proceedings under the *CLRA* in both the Superior Court and the Ontario Court of Justice.

<sup>22</sup> 2011 ONSC 1868.

under the *CFSA*. The exercise of *parens patriae* was justified, according to Harper J., because of a gap in the *Courts of Justice Act*<sup>23</sup> which allowed unified Family Courts but not Superior Courts to make protection orders in custody and access cases decided under the *Divorce Act*. The fact that the CPA had not acted to protect the children, despite having an open file on the family for more than two years, also supported the use of *parens patriae* powers.

In *C. (A.) v. D. (O.)*,<sup>24</sup> the mother brought an application for custody in Superior Court after both parents had brought applications in the Ontario Court of Justice. As a result of s. 27 of the *CLRA*, the Ontario Court of Justice proceeding was stayed. While the CPA had an open file on the family, and its counsel had attended when the parents appeared in the Ontario Court of Justice, no protection application had been brought. Noting the challenges of cases involving *Divorce Act* and *CFSA* proceedings, Czutrin J. expressed that “it would be unfortunate that if [the Children’s Aid Society] decided to intervene by commencing any protection applications, then the parenting issues would be stayed in this court, not being a (Unified) Family Court, and then again returned to the Ontario Court of Justice.”<sup>25</sup>

## *II. Year*

There was an increase over time in the number of cases. There were 32 decisions in 2010, 46 decisions from 2011, 47 decisions from 2012, and a small decline to 39 decisions from 2013, but a rebound to 50 decisions from 2014. This increase could be the result of

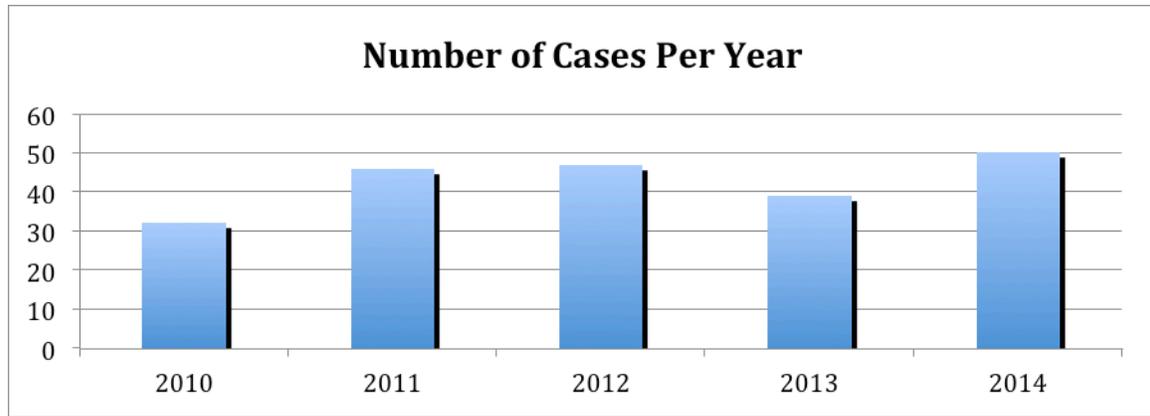
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<sup>23</sup> R.S.O. 1990, c. C.43.

<sup>24</sup> 2012 ONSC 2187

<sup>25</sup> *Ibid* at para 12.

greater awareness and more training within CPAs about high conflict families, and a greater willingness by the agencies to become involved in high conflict separation cases.



### *III. Type of Proceeding*

High conflict separations are often characterized by multiple contested proceedings and high levels of re-litigation.<sup>26</sup> The cases in this study lend some support to that proposition. Of the 198 domestic decisions, 15% involved motions to vary final custody orders. An additional 3% were based on motions to vary a temporary order. In 56% of the domestic decisions, the proceeding was a trial. Interim motions accounted for 17% of the domestic decisions.

Of the 16 child protection decisions, 37% were temporary motions, 25% involved trials, and 19% involved motions for summary judgment on protection applications.

### *IV. Disposition*

#### *i. Domestic Cases*

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<sup>26</sup> Johnston, "High Conflict Divorce" (1994) 4 *The Future of Children* 165.

Custody awards were made in 148 of the 196 domestic cases. In one case, *Law v. Law*,<sup>27</sup> Gordon J. refused to make a final custody award on the basis that neither parent had presented evidence at trial on the child's views and preferences, a matter the judge said he was required to consider in his determination of the child's best interests under the *CLRA*. Gordon J. instructed the parents to come up with a parenting plan themselves, perhaps with the services of a parenting coach. Were they unable to resolve custody, the judge was prepared to re-open the case to hear evidence on the child's views and preferences.

Final custody awards were made in 122 cases, and interim custody awards were made in 27 cases. The most common final custody award was sole custody (93 cases, totaling 76% of the 122 cases where final orders were made), versus some form of joint or shared custody (29 cases, 24% of final orders). The most common interim custody award was sole interim custody (19 cases; 70% of interim orders) versus some form of interim joint or shared custody (8 cases; 30% of interim orders).

Mothers were more likely than fathers to be awarded sole final custody (74% of sole final orders, versus 25% for fathers) and sole interim custody (79% versus 21% for fathers). In *Fielding v. Fielding*,<sup>28</sup> a final split custody award was made – the mother was awarded sole custody of one child (with access to the father), the father sole custody of another (with access to the mother). In *Richardson v. Lafrance*,<sup>29</sup> final custody was awarded to one lesbian mother, with access to the other.

Regular access was awarded in 35% of cases. In 29% of cases, the regular access award was made as part of a final order (8% of these awards went to mothers, 20% went

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<sup>27</sup> 2011 ONSC 2140.

<sup>28</sup> 2013 ONSC 5102.

<sup>29</sup> 2014 ONCJ 447

to fathers);<sup>30</sup> in 7% of cases regular interim access was ordered (2% to mothers, 5% to fathers). Supervised access was awarded in 12% of cases (10% were final orders; 2% were interim orders). Fathers were more likely than mothers to be awarded supervised access on a final basis (8% versus 2%) and an interim basis (2% versus 0.5%). In 8% of cases, the court placed a restriction on the access award. These restrictions included ordering that access would be at the discretion of the other parent, a professional, or the child, that access would resume following the access parent's completion of a parenting course or counseling, or therapeutic access. More restrictions were placed on final orders than interim orders (7% versus 1%). Fathers were more likely to be subject to a final access order with restrictions than mothers (5% versus 2%). Fathers and mothers were equally likely to be the subject of restrictions on an interim access order (0.5%). In 5% of all domestic cases, access was terminated. All of these cases involved final orders. Access was more likely to be terminated for fathers than mothers (5% versus 0.5%).

ii. Child Protection Cases

A custody order in favour of one parent disposition was made in 11 of the 14 child protection cases. Final orders were made in 6 cases; temporary orders were made in 5 cases. Of the final orders, 3 were for sole custody under the *CLRA*, as permitted by s. 57.1 of the *CFSA*. In 2 of these cases, sole custody was awarded to the father; in 1 case, custody was awarded to the mother. In the 2 cases where custody was awarded to the father, one mother received limited access and the other therapeutic access. In the 1 case where the mother received custody, the issue of the father's access was set for trial. The

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<sup>30</sup> Regular access was also awarded to one lesbian mother, and in the case where both parents received sole custody of one child (i.e. the other received regular access).

other 3 final orders were supervision orders – one parent received custody subject to a period of CPA supervision. In 2 of these cases, the father received custody; in 1 case, the mother received custody. In the 2 cases where the father received custody, 1 mother was granted access at the CPA’s discretion; the other was given limited access. In the 1 case where the mother received custody, the father was granted supervised access. Thus, in the child protection cases, fathers were more likely to receive full custody or custody subject to CPA supervision than mothers (4 cases versus 2 cases). This is an interesting finding since mothers were more likely to receive custody in domestic proceedings, though the number of protection proceedings was small.

Of the temporary orders, 2 were for society wardship. In *Jewish Child and Family Services of Greater Toronto v. K. (A.)*,<sup>31</sup> Sherr J. described the difficulty of making such an award in a case involving extreme parental conflict. In that case, the two children, ages 9 and 12, were living with their father and expressed a clear preference to remain in his care. While previously in their mother’s care, the children had demonstrated what Sherr J. called “alarming” behavior towards her, including significant physical and verbal abuse. The CPA took the position that the father was encouraging the children’s behaviours in an effort to undermine their relationship with their mother. The court accepted this analysis, finding in addition that the father was not responsive to one child’s serious weight problem. In making an order for society wardship, Sherr J. explained:

The court is not faced with attractive alternatives. It does not want to place the children in care. The children may suffer emotional harm by doing so. They will certainly be unhappy about this decision. There is a very real issue as to whether therapeutic intervention will be successful, given their family dynamics. However... the evidence informs the court that the children will likely be at *greater* risk of emotional harm if placed at this time with their father.<sup>32</sup>

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<sup>31</sup> 2014 ONCJ 227.

<sup>32</sup> *Ibid* at para 61.

Access to both parents was to be at the discretion of the CPA.

In the second case where an order for society wardship was made, *Jewish Family and Child Services of Greater Toronto v. K. (L.)*,<sup>33</sup> Spence J. continued a 14 year-old boy's placement with his aunt as a CPA placement, despite the child's wish to return to his father's care. The child had threatened to commit suicide, and the court found that this was a direct result of the parents' conflict. Spence J. refused to return the child to the father, reasoning that the father was the greater contributor to the "toxicity" between the parents, and that the father was showing no intention to shield the child from the conflict that had caused the child emotional harm. Supervised access was awarded to both parents, at the CPA's discretion.

In *Children's Aid Society of Waterloo v. L. (K.A.)*, McSorley J. considered the merits of awarding society wardship in a case the judge described as "exceed[ing] what can be described as high conflict."<sup>34</sup> The legal battle between the parents had been ongoing for 7 years, eventually taking on the character of what McSorley J. called "tribal warfare."<sup>35</sup> At least 20 referrals had been made to the CPA by the parents, police, and other agencies. The police had been called at least 14 times. At the time of trial, the case had been subject to an "unprecedented" 74 orders or endorsements.<sup>36</sup> During the course of earlier custody litigation, one of the children became ill with cancer and died, however "not even the tragic death [...] was enough to stop these parents from fighting about last days, funerals, burials and headstones."<sup>37</sup> While both parents shared responsibility for the

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<sup>33</sup> 2012 ONCJ 158.

<sup>34</sup> 2010 ONCJ 80 at para 8.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid* at para 12.

<sup>37</sup> *Ibid.* at para 108.

conflict, the mother was found to be the primary instigator, having embarked on a campaign to alienate the children from their father.

Justice McSorley stated that it would be “ludicrous” to find that an order was not necessary to prevent risk of emotional harm to the remaining child, then almost 13 years old.<sup>38</sup> The challenge was determining which order was appropriate. Crown wardship was not a viable option, according to the judge, since the child had a loving relationship with both parents and both were capable of meeting the child’s daily physical needs. Crown wardship, according to McSorley J., was properly restricted to those cases that could not be resolved by a less intrusive method or where there are no other options available for the child. Society wardship, on the other hand, was “an attractive option”:

First, it appears the parents are unable or unwilling to end their conflict and competition for [the child’s] love and, by removing her from the middle of the conflict; she would be spared any further involvement in it. Second this option is simple, quick and clean and results in providing the parents nothing more about which to fight at least between themselves... Perhaps removing [the child] from both parents might result in forcing them to analyze their actions over the past seven years and make the necessary changes.<sup>39</sup>

Despite these appealing features, McSorley J. determined that an order for society wardship would have little impact on reducing the parents’ conflict. The judge was concerned that the parents would “simply wait out the term of society wardship and then start the fight anew.”<sup>40</sup> Having ruled out both Crown and society wardship, the judge granted a supervision order with a change of custody to the father. The court was not prepared to allow the mother to continue her alienating behaviour, which the judge found would eventually result in the child losing all connection to her father, so the court

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at para 110.

<sup>40</sup> *Ibid.*

provided that contact between the child and mother was to occur only at the discretion and under the supervision of the CPA.

In the remaining 3 cases, one or both parents were awarded temporary custody under CPA supervision. In 2 of these cases, temporary care was awarded to the mother; in 1 case, both the mother and the father were to have alternating temporary care, subject to CPA supervision. In the cases where the mother received temporary custody, one father received regular access and the other father received supervised access.

There were no orders for Crown wardship in the 14 child protection cases.

### **Unrepresented Litigants**

A significant number of parents in the domestic cases were unrepresented. In 70 of the 196 domestic cases (36%), one or both parents was unrepresented. Fathers were most likely to be unrepresented (19% of cases), followed by both mothers and fathers (9%), and mothers (8%).

Of the 14 child protection cases, 4 (27%) involved an unrepresented parent. While the sample is quite small, this portion is relatively high for child protection cases, suggesting that these litigants may have greater financial resources than typical parents involved in CFSA proceedings and hence lack eligibility for Legal Aid, without being able to afford to retain counsel. Fathers were more likely to be unrepresented in child protection cases than mothers (3 cases versus 1 case).

### **The Children**

There were a total of 358 children involved in the 210 cases. The 196 domestic cases involved 332 children, while the 14 child protection cases involved 26.

The average number of children in the domestic cases was 2. The majority of cases involved one child. The highest number of children in a single domestic case was 4; the lowest number of children was 1.

The average number of children in the child protection cases was 2. The majority of protection cases involved 2 children. The highest number of children in a single child protection case was 3; the lowest number of children was 1.

## *I. Age*

### *i. Domestic Cases*

The average age of a child in the domestic cases was 7 years. The average age of the first child in a domestic case was 8. The oldest first child was 18; the youngest was less than one year. The average age of the second child was 7. The oldest second child was 17; the youngest was less than one year. The average age of the third child was 7. The oldest third child was 15; the youngest was 2. The average age of the fourth child was 5. The oldest fourth child was 11; the youngest was 1.

### *ii. Child Protection Cases*

The children involved in protection cases were, on average, a bit older. The average age of a child in the child protection cases was 9. The average age of the first child in a child protection proceeding was 11. The oldest first child was 19; the youngest was 3. The average age of the second child was 9. The oldest second child was 16; the youngest was

4. The average age of the third child was 6. The oldest third child was 8; the youngest was 5.

Table 1: Average Age of Children (rounded to nearest year)

	<b>Domestic Cases</b>	<b>Child Protection Cases</b>
<b>Average Age of Children</b>	7	9
Average Age of First Child	8	11
Average Age of Second Child	7	9
Average Age of Third Child	7	6
Average Age of Fourth Child	5	

## *II. Gender*

Gender information was available for 317 of the 332 children involved in the domestic cases. There were 169 girls and 148 boys. Of the first child born to a family in the domestic cases, 105 were female and 87 were male. Second children included 51 females and 47 males. Third children included 9 female and 13 males. Fourth children included 4 female and 1 male.

Boys outnumbered girls in the child protection cases. Of the 26 children, 10 were girls and 16 were boys. Of the first child born to a family in the child protection cases, 7 were female and 7 were male. Second children included 3 females and 7 males, and third children included 2 males.

Table 2: Gender of Children

	<b>Domestic Cases</b>		<b>Child Protection Cases</b>	
	Male	Female	Male	Female
All Children	148	169	16	10

First Child	87	105	7	7
Second Child	47	51	7	3
Third Child	13	9	2	
Fourth Child	1	4		

## **Child Protection Agency Involvement**

### *I. Reports to CPA*

#### *i. Domestic Cases*

The judgements recorded a total of 380 reports were made to a CPA in the 196 domestic cases. Only those reports specifically mentioned in a decision were counted. As a result, the number of recorded reports is clearly lower than the actual number of reports made. In many cases, judges referenced “multiple” reports to CPAs, but only provided details of one report. In these cases, only one report was counted. The average number of (recorded) reports per case was 2. The highest number of reports in one case was 7; the lowest was 1.

#### *ii. Child Protection Cases*

In the 14 child protection cases, there were a total of 40 reports to a CPA. The average number of reports per child protection case was 2, which was the same as for the domestic cases. The highest number of reports in one case was 8; the lowest was 0. This last number is misleading, since the case with 0 reports involved child protection

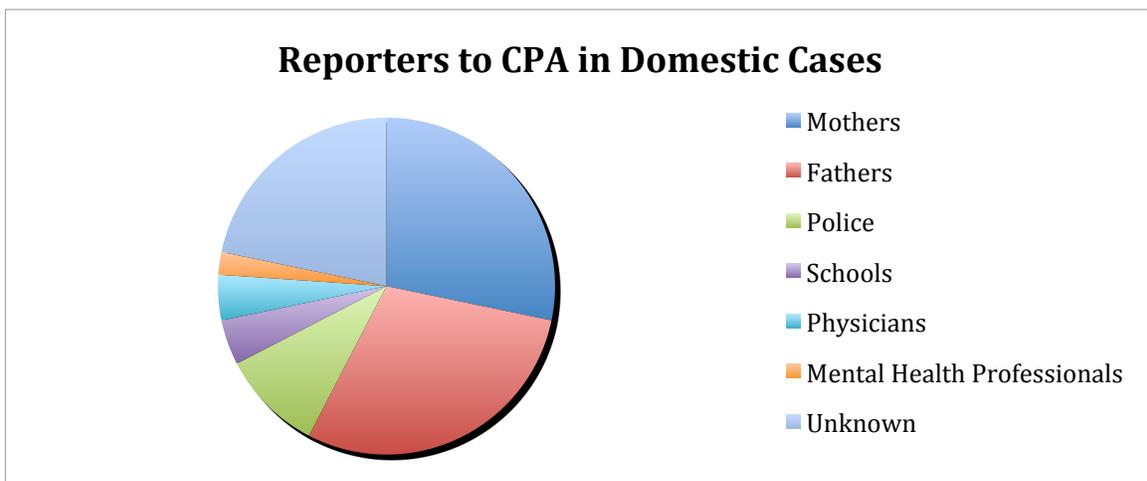
intervention that must have been based on a report. The 0 reflects the fact that the judge did not provide information about any report.

## II. Reporters

### i. Domestic Cases

In the domestic cases, information about reporters was available for 304 of the 380 reports (80%). Parents made the majority of reports to CPAs in the domestic cases (53%). Mothers and fathers were almost equally likely to make a report (26% versus 27%). This finding is consistent with earlier Canadian research on reports of separated parents to CPAs (Bala et al., 2007). The next most common reporter was the police (9%), followed by schools (4%) and physicians (4%), and mental health professionals (2%).

It is important to note that reports by individuals other than parents may be based on information provided by one parent. For example, a physician might report sexual abuse based on a mother's stated belief that the child had been sexually abused.



ii. Child Protection Cases

Reporter information was available for 34 of the 40 CPA reports in the child protection cases (85%). Again, parents were most likely to make a report (60%). Mothers, however, were much more likely than fathers to report (48% versus 12%). This is noteworthy, given that fathers were more likely than mothers to receive custody in the child protection cases. Police were as likely to report as fathers (12%). The next most frequent reporter was a child (2 reports, 5% of cases).

*III. Multiple Reports*

i. Domestic Cases

There were 90 domestic cases involving two or more reports to a CPA. Complete information on all reporters was available in 66 of these 90 cases (34% of all 196 cases).

Cases involving multiple reports by only one parent were most common (21 cases, 11% of all cases). Fathers and mothers were equally likely to be the sole reporters in these cases (6% versus 5% of all cases). Cases involving multiple reports by one parent and other people (family members, professionals) accounted for 14 cases (7%); these may well be cases where one parent was behind all of the allegations. Mothers were slightly more likely to be involved in these cases than fathers (5% versus 3%). Cases involving multiple allegations where both parents had made at least one allegation totaled 16 cases (8%).

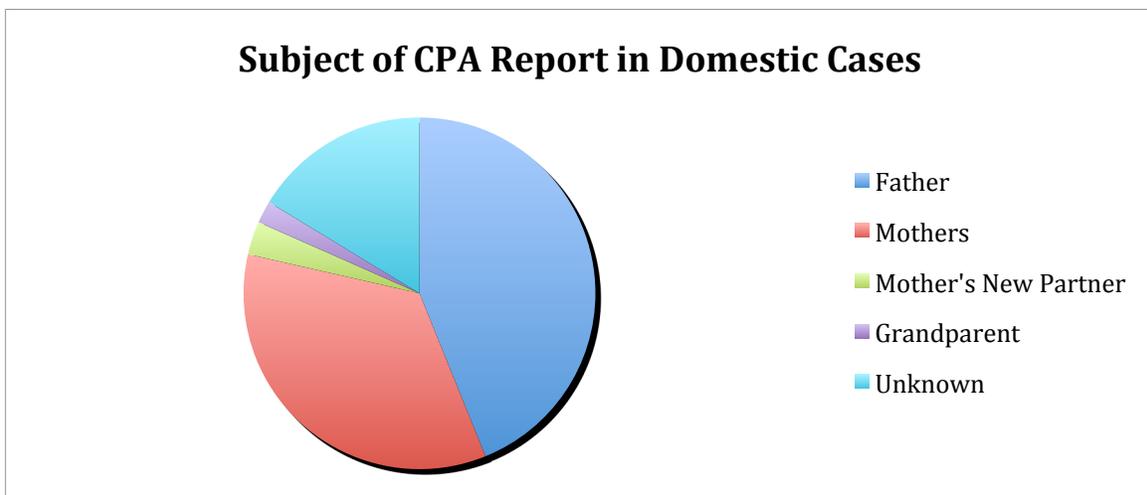
ii. Child Protection Cases

There were 5 child protection cases involving two or more reports to a CPA. From this limited data, it appears that mothers were more likely than fathers to make repeat reports in the child protection cases (3 cases versus 1). In one case, both the mother and father made reports to the CPA.

#### *IV. Subject of Report*

##### *i. Domestic Cases*

Information about the person subject to a CPA report was available in 321 of the 380 reports to a CPA in the domestic cases (84%). Fathers were more likely than mothers to be reported to a CPA (43% versus 34%). This discrepancy is similar to that reported in an earlier American study concerning CPA reports against mothers and fathers in high conflict domestic cases (Johnston, 2005). The next most likely subject of a CPA report was a mother's new partner (3%), followed by a grandparent or grandparents (2%).



##### *ii. Child Protection Cases*

Information about the person subject to a CPA report was available in 31 of the 40 child protection cases (78%). Again, fathers were more likely to be the subject of a CPA report than mothers (45% versus 23%). The next most common alleged perpetrator of a report was the child (3 cases), followed by the mother's new partner (1 case).

#### *V. Allegations*

##### *i. Domestic Cases*

In the domestic cases, information about the type of allegation was available in 364 of the 380 reports (96% of reports). In 48 of these reports, multiple allegations were made. As a result, there were a total of 415 allegations in 364 of 380 reports.

Allegations were sorted into 13 categories:

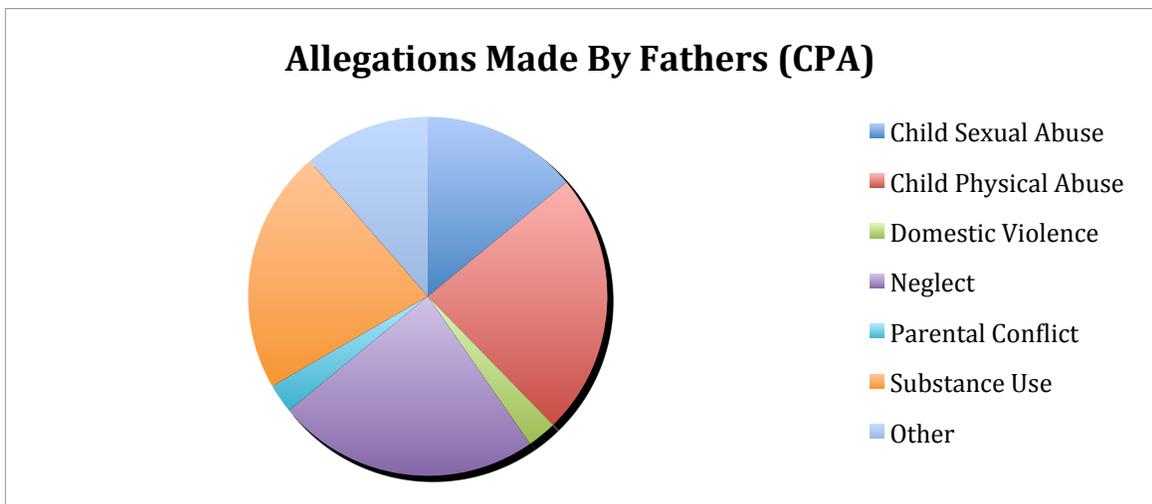
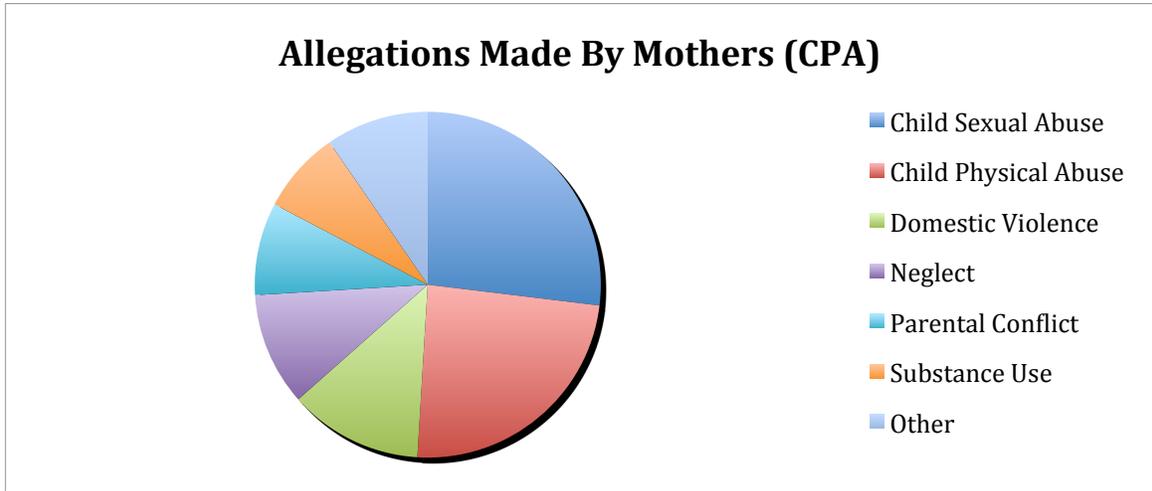
1. Physical abuse of child (including inappropriate discipline)
2. Sexual abuse of child (including sexual comments to the child, exposing the child to adult sexuality, or sexualized behaviour of a child suggestive of sexual abuse)
3. Neglect
4. Emotional abuse of child
5. Mental health of parent
6. Substance use (alcohol or drugs)
7. Threatening behavior toward child
8. Child exhibiting concerning behaviour
9. Domestic violence between parents (physical violence)
10. Parental conflict/high conflict (including parent-child contact issues)

11. Threatening behaviour toward parent
12. Conflict/violence involving another
13. Unspecified (i.e. “protection concerns”)

The most frequent allegations in domestic cases were for physical abuse of a child (20%), followed by neglect (15%), parental conflict/high conflict (14%), sexual abuse of a child (14%), substance use (11%) and domestic violence (11%). These were followed by threatening behaviour toward parent (4%), emotional abuse of the child (3%), mental health of the parent (3%), conflict/violence involving another (2%), child exhibiting concerning behaviour (2%), threatening behavior toward child (1%), and unspecified (0.5%).

Information about the person who made the allegation was available for 338 of the 415 allegations (81%). Mothers were most likely to make allegations of sexual abuse (7% of all allegations, 48% of sexual abuse allegations) (sexual abuse allegations by fathers accounted for 4% of all allegations and 28% of sexual abuse allegations), whereas fathers were most likely to make allegations of neglect (8 of allegations, 52% of neglect allegations) (neglect allegations by mothers accounted for 3% of all allegations and 18% of neglect allegations). Fathers were also more likely to make allegations of parental substance use (6% of all allegations, 56% of substance use allegations) than mothers (2% of allegations, 18% of substance abuse allegations). Mothers were more likely to make domestic violence allegations (3% of allegations, 31% of all DV allegations) than fathers (1% of allegations, 7% of DV allegations). Mothers and fathers were about equally likely to make allegations of child physical abuse (mothers made 6% of allegations and 30% of

child physical abuse allegations; versus fathers making 7% of allegations and 33% of child physical abuse allegations).



Looking specifically at allegations involving DV and parental conflict/high conflict where information on the person making the allegation is available (60 of 415 allegations), the data suggest that mothers were the most frequent reporters (5% of all allegations), followed by police (4%), and then fathers (1%). Other reporters of DV or

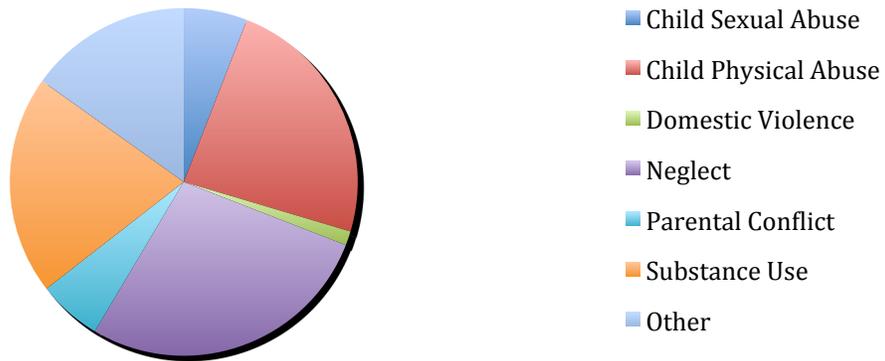
parental conflict included physicians (1%), the Office of the Children's Lawyer (1%), courts (0.5%), and mental health professionals (0.5%).<sup>41</sup>

Information about the *subject* of the allegation was available for 360 of the 415 allegations (87%). Fathers were slightly more likely to be accused of physical abuse of a child (10% of allegations, 49% of physical abuse allegations), however this percentage was similar to the number of mothers accused of physical abuse (9% of allegations, 43% of physical abuse allegations). Mothers were most likely to be accused of neglect (10% of allegations, 68% of neglect allegations). Fathers were much less likely to be accused of neglect (4% of allegations, 24% of neglect allegations). Mothers were more likely to be accused of substance use (8% of allegations, 69% of substance abuse allegations) than fathers (3% of allegations, 24% of substance use allegations). Fathers were much more likely to be accused of domestic violence (8% of allegations, 73% of DV allegations) than mothers (0.5% of allegations, 4% of DV allegations). Fathers were also more likely to be accused of child sexual abuse (8% of allegations, 60% of child sexual abuse allegations) than mothers (2% of allegations, 16% of sexual abuse allegations).

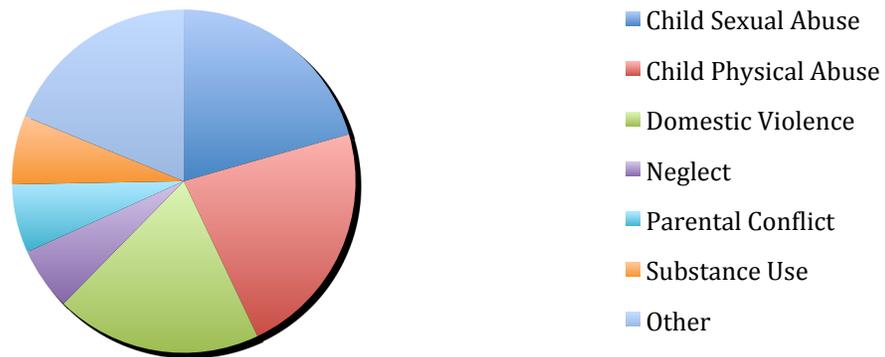
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<sup>41</sup> See also Birnbaum (2005) who found that mothers were also more likely than fathers to make DV allegations on an OCL intake form.

### Allegations Against Mothers in Domestic Cases (CPA)



### Allegations Against Fathers in Domestic Cases (CPA)



#### ii. Child Protection Cases

In the child protection cases, information about the type of allegation was available in 30 of the 40 reports (87%). In 1 of these reports, two allegations were made. As a result, there were a total of 31 allegations in 30 of the 40 reports.

Given that there were fewer allegations in the child protection cases, it was not possible to group the allegations into all 13 of the categories used to group the allegations in the domestic cases. The following 11 categories were used:

1. Physical abuse of child (including inappropriate discipline)

2. Sexual abuse of child (including sexual comments to the child, exposing the child to adult sexuality, or sexualized behaviour of a child suggestive of sexual abuse)
3. Neglect
4. Emotional abuse of child
5. Mental health of parent
6. Substance use (alcohol or drugs)
7. Child exhibiting concerning behaviour
8. Domestic violence between parents (physical violence)
9. Parental conflict/high conflict (including parent-child contact issues)
10. Threatening behaviour toward parent
11. Conflict/violence involving another

The most frequent allegations in child protection cases were for sexual abuse of a child (26%), followed by physical abuse of a child (19%), mental health of a parent (13%), threatening behaviour toward parent (10%), substance use (2 reports, 7%), domestic violence (2 reports, 7%), parental conflict/high conflict (2 reports, 7%), and neglect (1 report, 3%), emotional abuse (1 report, 3%), conflict/violence involving another (1 report, 3%) and child exhibiting concerning behavior (1 report, 3%).

Information about the person who made the allegation was available for 25 of the 31 allegations. As in the domestic cases, mothers were most likely to make allegations of sexual abuse (13% of allegations, 50% of sexual abuse allegations). Mothers made 4 allegations of sexual abuse, compared to 1 by a father. Mothers were also more likely to make allegations of child physical abuse (10% of allegations, 50% of child physical abuse allegations). Mothers made 3 allegations of physical abuse, compared to one by a

father. Other allegations made by mothers included child exhibiting concerning behaviour (1 report), mental health (1 report), threats toward a parent (1 report). Other allegations by fathers included neglect (1 report), emotional abuse (1 report), and substance use (1 report). Police made the 2 domestic violence allegations. No information was available on who made the parental conflict/high conflict allegations.<sup>42</sup>

Information about the *subject* of the allegation was available for 29 of the 31 allegations (94%). Fathers were more likely to be accused of physical abuse of a child (16% of allegations, 63% of physical abuse allegations) and sexual abuse of a child (16% of allegations, 84% of sexual abuse allegations). There were 5 allegations of child physical abuse and 5 allegations of child sexual abuse against fathers, compared to 1 allegation of child physical abuse and 1 allegation of child sexual abuse against mothers. Mothers were more likely to be accused of substance use (2 reports). There were no substance abuse allegations made against fathers.

## *VI. Substantiation*

### *i. Domestic Cases*

Of the 196 domestic cases, 53 involved substantiation of the grounds of protection by the CPA (27%). Of the 415 allegations made in these cases, only 64 were substantiated (15%). The substantiation rate in these cases was lower than substantiated rates using national data from child protection files in cases where parents separated.<sup>43</sup> This may in part be due to the fact that only those grounds of protection recorded in a judicial decision

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<sup>42</sup> See also Birnbaum (2005) who found that mothers were more likely than fathers to report DV on OCL intake forms.

<sup>43</sup> Bala et al. (2007); Saini et al. (2013).

as substantiated were counted. It is possible other grounds were substantiated by the CPA but not reported in the decision. It will, however, be important to do further research to determine whether substantiation rates in litigated domestic cases are lower than in other types of cases.

The most frequently substantiated protection ground was presence or risk of emotional harm due to due parental conflict (19 cases, 10% of all 196 cases). In 5 of these cases, the original allegation was not related to parental conflict but was instead physical abuse of a child. Parental conflict/high conflict was substantiated in an additional 6 cases (3%), and domestic violence in a further 4 (2%). After presence or risk of emotional harm, the second most frequently substantiated protection ground was inappropriate physical discipline (10 cases, 5% of all cases).

A small number of cases were found by the CPA to involve malicious reports. Malicious reporting was confirmed in 4 of the 196 cases (2%). Other research has placed the rate of malicious reporting between 3% and 30% of unfounded allegations in high conflict separation cases (Bala et al., 2007).

Some judges expressed concern that in some cases child protection reporting was being used to manipulate the domestic proceeding. For example, in *Barrett v. Barrett*, Kane J. found that both parents used reports to the police and the CPA as “tools... to advance their position.”<sup>44</sup> In *Behe v. Behe*, Ellies J. concluded that the mother’s allegations of sexual abuse against the father were “an attempt at gaining an advantage in the custody battle.”<sup>45</sup> Not all reports to a CPA made in the context of a parental separation were viewed as suspicious, however. In one case where a mother made

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<sup>44</sup> 2010 ONSC 5312 at para 67.

<sup>45</sup> 2014 ONSC 24 at para 32.

repeated calls to the CPA about the father, the court commended her for attempting to protect the child and admonished the CPA for failing to take the mother's complaints seriously: "The mother's complaints and concern were well founded. The mother did everything she could to bring the lack of care and lack of safety of her child to the attention of the authorities, about which nothing much was done."<sup>46</sup> In another case, *Blanchard v. Walker*,<sup>47</sup> Curtis J. relied on the father's repeated calls to the CPA about the mother in awarding him custody, as this reflected the father's concern about the child.

ii. Child Protection Cases

In all 14 of the child protection cases, a CPA would have substantiated at least one ground of protection. However, specific information about substantiation was only available in 6 of the 14 cases. All 6 cases were substantiated for risk of emotional harm due to conflict. Mental health of a parent was also substantiated in one of these cases.

*VII. CPA Response*

In all 14 of the child protection cases, the CPA response was to initiate a child protection application.

In the domestic cases, some CPA response was recorded in 57 of the 196 cases. A total of 78 responses were specified (in some cases, the CPA responded multiple times to different reports). The most common response was to caution the parents about potential harm to a child (17 times), followed by a referral or recommendation for counseling or

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<sup>46</sup> *B. (S.) v. C. (C.)*, 2014 ONSC 2903 at para 74.

<sup>47</sup> 2012 ONCJ 798.

outside service (12 times) and a warning that contact with one parent needed to be limited (or the agency would file a protection application) (12 cases).

In 8 of the domestic cases, the CPA took a position in the domestic proceeding (i.e. recommending supervised access or custody with one parent). In 7 cases, the CPA engaged parents in a voluntary service agreement. Protection applications were filed in 4 cases (in 2 of these, the child was apprehended).

### **Presence or Risk of Emotional Harm**

#### **i. Domestic Cases**

There were 19 domestic cases where a CPA substantiated presence or risk of emotional harm due to parental conflict.

Information was also collected on the number of cases where a judge determined that parental conflict was harming or posing a risk of harm to the child. In 31 cases, the judge specifically found that a child was being negatively affected by parental conflict. In 4 of these cases, the CPA had also verified presence or risk of emotional harm. This left an additional 27 cases where judges were concerned about the risk posed by parental conflict to children but the CPA apparently did not verify such a risk.

Judges often used the language from the *CFSA*, i.e. “emotional harm,” to describe the negative effects of parental conflict on a child. Judges also said parental conflict was “badly hurting”, “affecting”, and “impacting” children. In *Intoci v. Intoci*, Graham J. found that the evidence “was clear and compelling that [the child] has suffered *trauma* as a result of considerable conflict between his parents before and after separation.”<sup>48</sup>

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<sup>48</sup> 2011 ONSC 3677 at para 30 (emphasis added).

In a few cases, judges were critical of CPAs for not verifying risk to children caused by parental conflict. In *Hayes v. Goodfellow*, Mackinnon J. faulted the CPA for focusing solely on the child’s allegation of physical abuse by his mother instead of seeing the case as a “high conflict custody and access dispute.”<sup>49</sup> The CPA should have paid attention to the child’s disclosure that the parents hated each other, evidence that the father was providing the child with details of the litigation, the fact that the child did not express fear of his mother despite the allegation that she had abused the child, and the child’s disrespectful behaviour toward the mother but not the father. Had its investigation been more thorough, the trial judge explained, the CPA would have realized that both parents were contributing to the conflict between them, and between the child and his mother. By focusing on the mother, the CPA improperly absolved the father of responsibility, reinforced the child’s exaggerated claims, and validated the father’s negative stance toward the mother.

In *C. (W.) v. E. (C.)*, MacPherson J. criticized the CPA for not identifying alienation by a mother in a case where the evidence of such alienation was “overwhelming.”<sup>50</sup> The trial judge noted the child’s extremely negative view of her father, which was contrasted to her idyllic opinion of the mother (whom she called her “hero” and “protector”),<sup>51</sup> the mother’s clear belief that it was up to the child, age 12, to determine if she wanted to see her father and support of the child in refusing to visit the father, the fact that the mother had misled the CPA into believing that the father had not been awarded access, and multiple unfounded reports to the CPA and police by the mother alleging that the father had sexually and physically abused the child. Finding that

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<sup>49</sup> 2011 ONSC 2476 at para 67.

<sup>50</sup> 2010 ONSC 3575 at para 96.

<sup>51</sup> *Ibid* at para 99.

the CPA's decision not to take steps to protect the child "fell far short of the standard that is expected,"<sup>52</sup> MacPherson J. recommended that specialized training in alienation be mandated for all CPA workers, and the CPA's protocol for dealing with alienation cases be reviewed.

In *F. (A.M) v. W. (J.R.)*, the case where Harper J. relied on the court's *parens patriae* jurisdiction to find two children in the midst of their parent's custody dispute in need of protection, the CPA had "constantly coded" the child protection file as "risk of emotional harm due to high conflict" but failed to consider whether the children had suffered or were likely to suffer emotional abuse as defined by s. 37(2)(f) and (g) of the *CFSA*.<sup>53</sup> Harper J. determined that this failure resulted in the CPA falling short of its statutory responsibility to investigate cases where a child may be in need of protection and, if necessary, protect that child from harm. Cases involving risk of emotional harm due to high conflict needed to be investigated: "All too often [CPAs] code files in this manner and then do not proceed to investigate emotional abuse as defined in the [*CFSA*]."<sup>54</sup> It was not enough to code files in this manner and then leave the case to be resolved by a domestic proceeding. According to Harper J., "[the CPA's] duty to investigate children who may be in need of protection requires much more than that."<sup>55</sup>

Specific information was collected about the CPA response in the 19 cases where presence or risk of emotional harm due to parental conflict was substantiated. In 4 of these cases, no information on the CPA response was provided. In 5 cases, the child protection file was closed. In 1 case, the file was closed because the father refused

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<sup>52</sup> *Ibid* at para 177.

<sup>53</sup> 2011 ONSC 1868 at para 127.

<sup>54</sup> *Ibid* at 127.

<sup>55</sup> *Ibid*.

voluntary services. In 1 other case, the file was closed because the child was continuing to be monitored by a physician. In 4 cases, the file was kept open. In 3 cases, parents were engaged in a voluntary service agreement. In the remaining cases, the CPA took a position in the domestic proceedings (1 case), recommended outside counseling (1 case), and cautioned the parents about high conflict (1 case). In 13 of these cases, presence or risk of emotional harm was verified after the first report to a CPA.

Information was also collected on the number of decisions that reported that the CPAs sent letters to both parents warning them of concerns about the effects of high conflict for their children. There were 10 such letters noted in the 196 cases.

ii. Child Protection Cases

In 5 of the 14 child protection cases, the children were found in need of protection on the basis of presence or risk of emotional harm. In one other case, *Children's Aid Society of Nipissing and Parry Sound v. (L.) T.*,<sup>56</sup> children involved in a high conflict separation were found to be in need of protection based on neglect, pursuant to s. 37(2)(b)(ii) of the *CFSA*, which was the protection ground alleged by the CPA.

In 4 of the 5 cases, the presence or risk of emotional harm was attributed to parental conflict. In the remaining case, *Hastings Children's Aid Society v. L. (J.)*,<sup>57</sup> discussed below, the risk was attributable to the mother and maternal grandmother's entrenched and erroneous belief that the father had sexually abused the children.

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<sup>56</sup> 2012 ONCJ 779.

<sup>57</sup> 2011 CarswellOnt 15075.

In *Children's Aid Society of Simcoe (County) v. A. (M.)*,<sup>58</sup> a motion by the agency for summary judgement, the mother raised the issue of allocating fault for the child's clear emotional distress. The mother argued that it was unfair for the child to be apprehended from her care based on risk of emotional harm, given that the mother herself was a victim of domestic violence. Eberhard J. did not accept fully accept the mother's version of events, and the judge was not prepared to decide which parent had primary responsibility for emotional harm to the child:

[T]he issue is not blame. Cause of the children's emotional harm is an issue. Domestic discord is without doubt one of the causes, amply recorded, of the child's emotional state. Blame for the discord, even if I were to put it entirely on the shoulders of the Respondent Father, even if it is characterized as a triable issue and a trial ordered to explore who was at blame for domestic conflict, could not add whatsoever to the determination that ... [the child was] suffering emotional harm from, at least in part, the very fact of continuing, obvious, ongoing, much discussed in her presence, domestic conflict.<sup>59</sup>

Eberhard J. granted the CPA's motion for summary judgement, which resulted in the child being placed in the father's care, subject to agency supervision.

A few of the child protection cases discussed the challenge of establishing presence or risk of emotional harm under the *CFSA*. In *Children's Aid Society of Algoma v. S. (A.)*,<sup>60</sup> the CPA brought a motion to withdraw its child protection application. The original application had listed risk of emotional harm due to alienation by the mother. The CPA argued that the children were no longer in need of protection, since they were living with their father. Kukurin J. believed there were other practical grounds supporting the CPA's decision to withdraw, the first being that "risk of emotional harm' grounds are very difficult to prove, even to the civil standard of the balance of probabilities." "I

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<sup>58</sup> 2011 ONSC 5115.

<sup>59</sup> *Ibid* at para 37.

<sup>60</sup> 2010 ONCJ 741.

suspect,” the motion judge continued, “that a closer look at its evidence might have driven home to the [CPA] the practical difficulties that it would encounter in proving this ground, to say nothing of the time and expense.”<sup>61</sup> To the CPA, a finding of risk of emotional harm might not be worth the effort. Given the litigation history of the couple, there was, according to Kukurin J., “enough handwriting on the wall to infer that this will be a long, expensive, adversarial and unpleasant case to litigate with no assurance of victory at the end of the day.”<sup>62</sup>

The threshold for “emotional harm” under the *CFSA* was also considered in *Children’s Aid Society of Simcoe (County) v. A. (M.)*, mentioned above. The mother claimed that a finding of emotional harm should be based on a clinical finding of “anxiety, depression, withdrawal, self destructive or aggressive behavior or delayed development.”<sup>63</sup> While Eberhard J. agreed that a finding of emotional harm requires “more than transitory sadness in reaction to hard circumstances,” a clinical finding was not necessary.<sup>64</sup>

In *Jewish Child and Family Services of Toronto v. K. (A.)*,<sup>65</sup> Sherr J. described the different thresholds to be met in protection proceedings and proceedings for temporary care and custody where presence or risk of emotional harm is alleged. In the finding phase of a protection application, Sherr J. explained, “expert evidence will *usually* have to be produced to establish this protection ground. It is not a mandatory requirement and there are many cases where the emotional harm or risk of emotional harm to children will

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<sup>61</sup> *Ibid* at para 35.

<sup>62</sup> *Ibid* at para 37.

<sup>63</sup> 2011 ONSC 5115 at para 27.

<sup>64</sup> *Ibid* at para 27-28.

<sup>65</sup> 2014 ONCJ 227.

be evident to the court, without the need for expert evidence.”<sup>66</sup> At the temporary care stage of child protection proceedings, the standard is lower: the CPA “only needs to show it has *reasonable grounds to believe* that there is an emotional risk of harm to the children. The court, at this stage, can rely on evidence it finds credible and trustworthy to determine if this threshold has been met.”<sup>67</sup>

In a few of the cases, judges expressed concern over CPA handling of cases involving risk of emotional harm. In *Hastings Children’s Aid Society v. L. (J.)*, Deluzio J. found that the CPA had failed to discharge its “positive, ongoing obligation to continue to investigate, assess and evaluate its protection concerns on the basis of all the relevant evidence and information.”<sup>68</sup> The CPA had filed a protection application against the father based almost exclusively on information provided by the mother, and without reviewing a protection file from a CPA in another jurisdiction involving the same family and the same allegations. Rather than dismissing the application, however, Deluzio J. found one child in need of protection based on the mother and maternal grandmother’s conduct, which included multiple, unfounded allegations of sexual abuse by the father and interference with his access.

In *Children’s Aid Society of London and Middlesex v. C.D.B.*,<sup>69</sup> after a remarkable 154-day trial, Harper J. found that the CPA had failed to discharge its duties under the *CFSA*, and that it had acted in bad faith in the manner in which it conducted the case. These mistakes and the judge’s concerns about the agency’s role in the case resulted in a costs award against the CPA in favour of the father of nearly \$1.5 million. (The costs

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<sup>66</sup> *Ibid* at 19.

<sup>67</sup> *Ibid*.

<sup>68</sup> 2011 CarswellOnt 15075 at para 251.

<sup>69</sup> 2013 ONSC 5556.

ruling is under appeal.) While Harper J. found that the mother had “set the stage” for the case’s “litigation marathon” by making false allegations against the father,<sup>70</sup> the judge apportioned greater responsibility to the CPA for its “failure to investigate objectively, taking a biased position throughout, and failing to reassess and adjust their position as they had a duty to do when faced with information that did not support their original position.”<sup>71</sup>

From the beginning, the CPA accepted the mother’s allegations that the father was violent and controlling. The CPA failed to corroborate these allegations, failed to interview material witnesses that would have offered a different story, and failed to investigate allegations made by the children that the mother abused alcohol and was engaging in erratic behavior. When new evidence was presented that challenged the mother’s story, the CPA failed to reassess its position and in fact attempted to squelch this evidence. One particularly “egregious” example was of a CPA supervisor removing hundreds of documents from the file for disclosure.<sup>72</sup> Harper J. found that throughout the child protection, family law and criminal justice proceedings involving this family, the CPA had acted in the improper role as advocate for the mother.

### **CPA Evidence in Domestic Proceedings**

In 54 of the 198 domestic *proceedings* (53 cases, 27% of all 196 cases), a child protection agency worker testified. The majority of these appearances were at trial (36 proceedings), followed by motions to vary (11 proceedings). In the majority of cases, judges reported

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<sup>70</sup> *Children’s Aid Society of London and Middlesex v. C.D.B.*, 2014 ONSC 1414 at 24.

<sup>71</sup> *Ibid* at 51.

<sup>72</sup> *Children’s Aid Society of London and Middlesex v. C.D.B.*, 2013 ONSC 5556 at para 62.

on and relied on the testimony of CPA workers, though in a number of cases the position of the agency was rejected.

In *B. (A.A.) v. J. (A.P.)*, Sherr J. discussed the benefit of having evidence from a CPA on a motion for interim custody, explaining the importance of “independent” evidence:

The court is often provided with limited independent information on temporary parenting motions upon which to make these important decisions for children. As a case moves forward, more information about a family becomes available and the best interests of children begin to crystallize. On temporary motions, the court has to make decisions based on the evidence available *at that point in time*. In this case, the court received more independent information than it normally has available to it at this stage of the case – in particular, the independent evidence from Peel CAS.<sup>73</sup>

Thus, while this evidence was “very helpful” to Sherr J., the court was “very aware that the evidence in this case will likely evolve.”<sup>74</sup>

In *Markall v. Markall*, however, Fregeau J. found the two CPA witnesses called by the mother “of little value,” since neither had any direct dealings with the father.<sup>75</sup> The agency’s failure to undertake an impartial investigation was deeply troubling to the court.

## **Domestic Violence**

### **i. Domestic Cases**

The judicial decisions indicate that domestic violence (specifically physical abuse by an intimate partner) was alleged in 73 of the 196 domestic cases (37%). Had the definition of domestic violence included emotional abuse, the number likely would have been

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<sup>73</sup> 2012 ONCJ 546 at para 23.

<sup>74</sup> *Ibid.*

<sup>75</sup> 2012 ONSC 687 at para 137.

higher. In 61 of the 73 cases alleging domestic violence, the mother named the father as the perpetrator (31% of all 196 cases). In 4 cases, the father claimed the mother was physically abusive (2%). In 8 cases, both parents alleged domestic violence (4% of cases).

Judges accepted domestic violence allegations in 25 cases (34% of cases involving allegations, 13% of all cases). In 24 of these cases, the judges accepted the domestic violence allegation against the father (33% of cases where such allegations were made). In one case a judge accepted a domestic violence allegation against the mother (0.5% of cases). Judges rejected domestic violence allegations in 11 cases (16% of cases where these allegations were made); 10 of these cases involved allegations against a father and 1 involved an allegation against a mother. In more than half of the cases where domestic violence allegations were made (37 out of 73 cases), the judge made no finding about the allegations.

ii. Child Protection Cases

Domestic violence was alleged in 7 of the 14 child protection cases (50%). In 5 cases, the allegation was against the father; in 1 case the allegation was against the mother; and in 1 case, both parents alleged domestic violence by the other. Judges rejected the domestic violence allegation in 2 of these 7 cases, and accepted it in 2 other cases. No determination was made in the other three cases. In the 1 case involving a domestic violence allegation against the mother, the judge accepted the allegation.

In the 2 cases in which the judge rejected the allegation, the allegations were made against the father. In one of these cases, *Children's Aid Society of London and*

*Middlesex v. C.D.B.*, Harper J. underlined the harm of false allegations for real victims of domestic violence:

Domestic violence is an evil in our society and a serious concern for any person caught up in these horrible and dangerous relationships. The toll on children for them to live in a home in which they even witness emotional and physical abuse is devastating. Systems and processes are in place and need to be in place in order to protect women and children from this horror. However, when false allegations are made and professionals do not conduct themselves in a manner that is objective, professional and thorough, the systems and processes that are needed are damaged and women and children who really need them become exposed to harm.<sup>76</sup>

## **Alienation**

### **i. Domestic Cases**

Case reports indicated that alienation was alleged in 24 of the 196 domestic cases (12% of cases). Mothers and fathers were almost equally likely to allege alienation (mothers alleged alienation in 13 cases; fathers alleged alienation in 11 cases). Judges accepted that alienation was occurring in 11 cases (46% of the cases where it was claimed). In 2 of these 11 cases, the judge found that alienation was occurring although neither parent had raised an alienation allegation. Mothers and fathers were found to be equally likely to alienate a child. In 1 case, both parents were found to be alienating the child from the other parent.

While identifying alienation was important for determining an appropriate disposition, in *F. (A.M.) v. W. (J.R.)*, Harper J. expressed concern that focusing on the presence or absence of “alienation” detracts from the real issue of whether a child is being emotionally harmed, and may in fact add to the child’s risk of harm:

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<sup>76</sup> 2013 ONSC 5556 at para 377.

The dynamic of this search for labels and fault deflected many professionals and increased the tension between the parents and their supporters. It also fostered actions and reactions between the parents that exacerbated the emotional stress on the children. In previous cases involving these high and chronic conflict cases I have urged everyone to stop searching for labels and keep focused on the evidence of how each parent and others' actions impact the children's functioning and their needs.<sup>77</sup>

The best approach in these types of cases, explained Harper J., was “early identification by focused assessment of what the clinical needs of the children are in order to at least give them the tools to withstand the actions of their parents.”<sup>78</sup>

## ii. Child Protection Cases

Alienation was alleged in 4 of the 14 child protection cases. In 3 of these cases, the mother alleged alienation by the father; and in 1, the father alleged alienation by the mother. In 2 cases the judge found that alienation occurred; both implicated the mother as the alienating parent; in one of these cases, the court found alienation had occurred, apparently without an allegation being raised by the parties.<sup>79</sup>

## **Criminal Justice System Intervention**

### *I. Reports to Police*

#### i. Domestic Cases

A significant number of the domestic cases involved at least one report to the police. Reports to the police were made in 144 of the 196 cases (74% of cases). A number of these cases involved multiple reports, bringing the total number of reports to 272. In the

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<sup>77</sup> 2011 ONSC 1868 at para 27.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Children's Aid Society of Waterloo (Regional Municipality) v. L. (K.A.)*, 2010 ONCJ 80.

cases where at least one report was made, the average number of reports was 2. The modal number of reports was 1. The highest number of reports in one case was 7. Again, only those reports specifically mentioned in the decision were recorded.

ii. Child Protection Cases

In the child protection cases, 8 of the 14 cases (57%) indicated at least one report to the police. A total of 19 reports were made in the 8 cases. The average number of reports in the cases involving at least one police report was 2. The modal number of reports was 1. The highest number of reports in one case was 6. These numbers likely understate the actual incidence of such reports. For example, one of cases mentioned 14 police reports, but none of these were counted in this study because no information was provided about the allegation, when it was made or whom it involved.

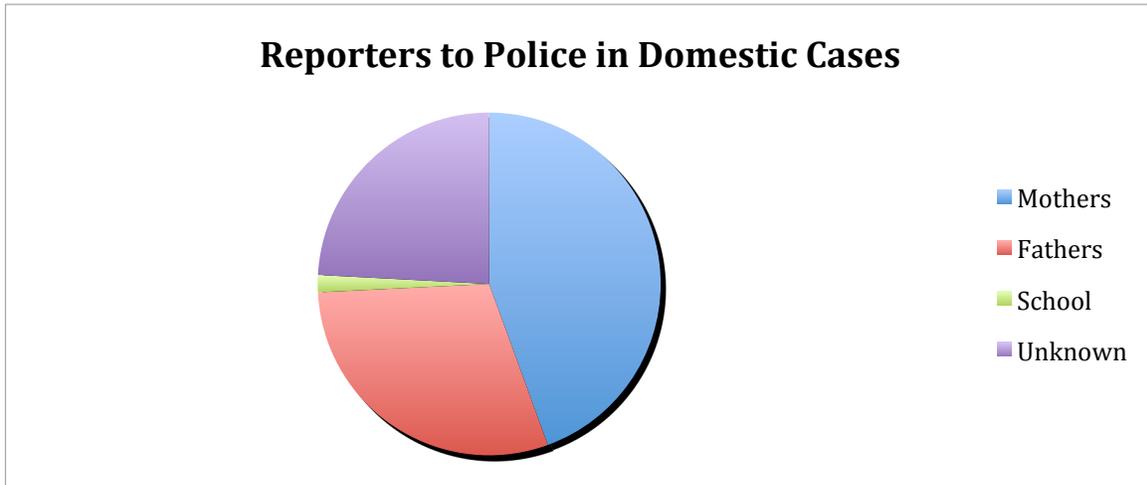
*II. Reporters to the Police*

i. Domestic Cases

In the domestic cases, information about reporters to the police was available for 211 of the 272 reports (78%). Parents again made the majority of police reports in domestic cases (69% of all reports). Mothers were more likely to make a police report than fathers (41% versus 28%). The next most common reporter was the school (2%).

ii. Child Protection Cases

Reporter information was available for 16 of the 19 police reports in the child protection proceedings. Parents were the most frequent reporters (10 reporters, 53%). Mothers were again more likely to make a police report than fathers (9 reporters versus 1 reporter).



### *III. Multiple Reports to the Police*

#### *i. Domestic Cases*

There were 69 domestic cases involving two or more reports to the police (35% of all 196 cases). Complete information on all reporters was available in 46 of these 69 cases.

Cases involving multiple reports by only one parent were most common (25 cases, 17% of cases where police reports were made.). Mothers were more likely to be the sole reporters in these cases than fathers (13% versus 4%). Cases involving multiple reports where both parents had made at least one report totaled 15 cases (10%). Cases involving multiple reports by only one parent and other people (family members, professionals) accounted for 5 cases. Mothers and fathers were about equally likely to be involved in these cases (3 cases versus 2).

ii. Child Protection Cases

Since mothers made the majority of police reports in the child protection cases, it is not surprising that mothers were the only parent to be involved as a reporter in cases involving multiple police reports (3 of the 3 cases involving multiple police reports).

*IV. Subject of Report*

i. Domestic Cases

Information about the person subject to a police report was available in 248 of the 272 reports made in the domestic cases (91%). Fathers were more than twice as likely than mothers to be reported to the police (59% versus 24%). The next most likely subject of a police report was a mother's new partner (3%).

ii. Child Protection Cases

Information about the person subject to a police report in the child protection cases was available in 18 of the 19 reports (95%). Fathers were more likely to have been reported to the police in connection with the proceedings than mothers (61% versus 16%).

*V. Allegations to the Police*

i. Domestic Cases

In the domestic cases, information about the type of allegation made to the police was available for 270 of the 272 reports. In 17 of these reports, multiple allegations were made. As a result, there were a total of 293 allegations in 270 of the 272 reports.

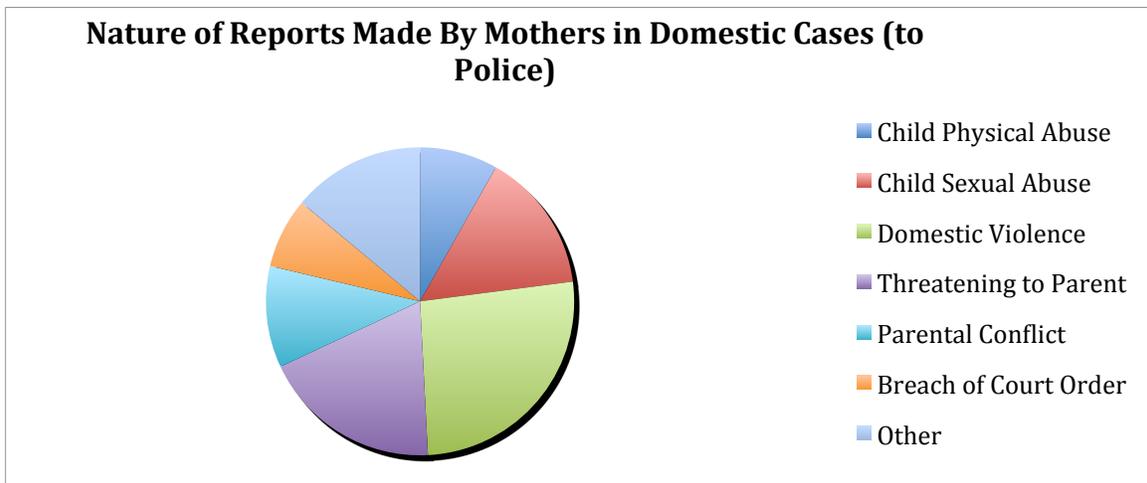
Allegations were sorted into 13 categories:

1. Physical abuse of a child
2. Sexual abuse of a child (including sexual comments to the child, exposing the child to adult sexuality, or sexualized behaviour of a child suggestive of sexual abuse)
3. Neglect
4. Substance use
5. Threatening behavior toward a child
6. Domestic violence between parents (physical violence)
7. Sexual assault of one parent by the other
8. Parental conflict/high conflict (including parent-child contact issues)
9. Threatening behaviour toward parent
10. Conflict/violence involving another
11. Property offences (theft, vandalism, trespassing)
12. Breach of court order
13. Other

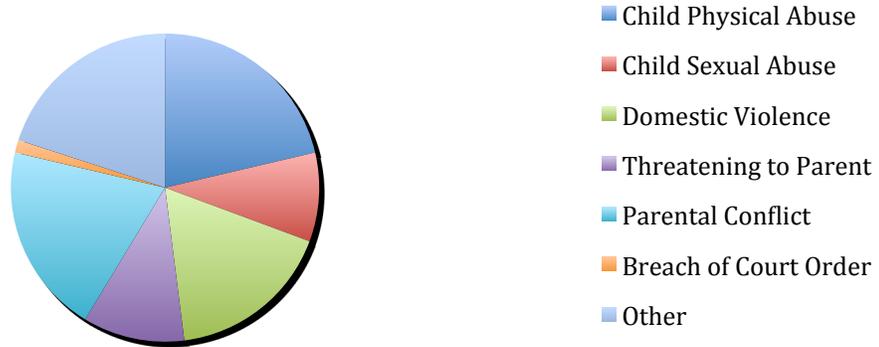
The most frequent reports made to the police in domestic cases were for domestic violence (24%), followed by threatening behaviour toward parent (16%), parental conflict/high conflict (15%), physical abuse of a child (11%), and sexual abuse of a child (10%). These were followed by breach of court order (8%), conflict/violence involving

another (3%) and property offences (3%), threatening behavior toward child (3%), neglect (2%), other offences (2%), substance use (2%), and sexual assault of a parent (1%).

Information about the person who made the allegation was available for 225 of the 293 allegations. Mothers were most likely to make allegations of domestic violence (11% of allegations, 46% of domestic violence allegations), threatening behavior toward parent (8% of allegations, 49% of all threatening behaviour toward parent allegations), and sexual abuse of a child (6% of allegations, 62% of sexual abuse allegations). Fathers were most likely to make allegations of physical abuse of a child (6% of allegations, 50% of physical abuse allegations), parental conflict/high conflict (5% of allegations, 35% of parental conflict/high conflict allegations), and domestic violence (4% of allegations, 20% of domestic violence allegations). Mothers made a similar number of allegations to fathers of parental conflict/high conflict (4% of allegations, 30% of parental conflict/high conflict allegations).

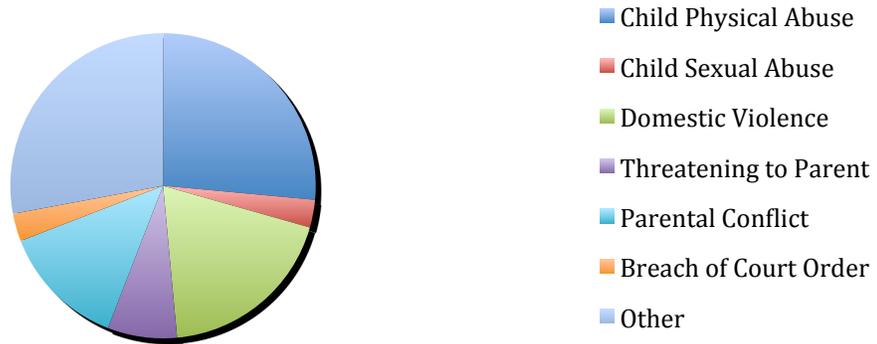


### Nature of Reports Made By Fathers in Domestic Cases (to Police)

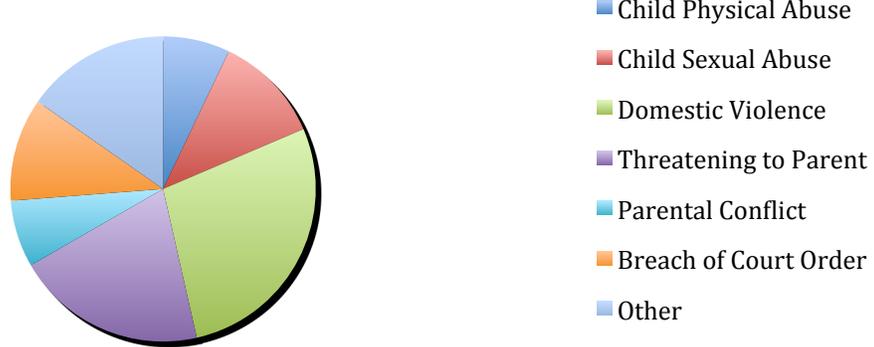


Information about the subject of the allegation was available for 271 of the 293 allegations (93%). There were more allegations against fathers than mothers (62% versus 23%). Fathers were most likely to be accused of domestic violence (17% of allegations, 74% of domestic violence allegations), threatening behaviour toward a parent (13% of allegations, 77% of threatening behaviour toward a parent allegations), and sexual abuse of a child (7% of allegations, 72% of child sexual abuse allegations). Mothers were most likely to be accused of physical abuse of a child (6% of allegations, 56% of child physical abuse allegations), domestic violence (4% of allegations, 19% of domestic violence allegations), and parental conflict/high conflict (3% of allegations, 21% of parental conflict/high conflict allegations). However, parental conflict/high conflict allegations were more often made against fathers (4% of allegations, 25%).

**Nature of Reports Against Mothers in Domestic Cases (to Police)**



**Nature of Reports Against Fathers in Domestic Cases (to Police)**



ii. Child Protection Cases

In the child protection cases, information about the type of allegation was available in all 19 of the cases where reports were made to the police. In 1 case, 3 allegations were made. As a result, there were a total of 21 allegations in the 19 reports.

Allegations were grouped into 10 categories:

1. Physical abuse of a child
2. Sexual abuse of a child
3. Mental health

4. Substance use
5. Domestic violence between parents
6. Sexual assault of parent
7. Parental conflict/high conflict
8. Threatening behaviour toward parent
9. Conflict/violence involving another
10. Breach of court order

The most frequent allegations made in a police report in child protection cases were for domestic violence (4 cases), followed by physical abuse of a child (3 cases), sexual abuse of a child (3 cases) and threatening behaviour toward a parent (3 cases), conflict/violence involving another (2 cases) and parental conflict (2 cases). The remaining allegations were made once: substance use, sexual assault of parent, mental health, and breach of court order.

Information about the person who made the allegation was available for 18 of the 21 allegations. Mothers made 11 of the allegations: three of these involved domestic violence, 3 involved threatening behavior by a parent, and 2 involved physical abuse of a child. Mothers also made allegations of breach of court order (1 case), parental conflict/high conflict (1 case), and sexual assault of a parent (1 case). The 1 allegation made to the police by a father was for sexual abuse of a child.

Information about the subject of the allegation was available in 20 of the 21 allegations. Fathers were the subject of 14 allegations. Three of these allegations were for domestic violence, 3 were for threatening behavior toward a parent, and 3 for physical abuse of a child. Fathers were also accused of conflict/violence involving another (1

allegation), mental health (1 allegation), sexual assault of parent (1 allegation), parental conflict (1), sexual abuse of child (1 allegation) Three allegations were made against mothers, for domestic violence, sexual abuse of a child, and substance abuse.

#### *VI. Charges Filed*

Criminal charges were laid in 73 of the 196 domestic cases (25% of all cases). Of the 272 reports made to police, 115 resulted in criminal charges (42%).

Criminal charges were laid in 7 of the 14 child protection cases. Of the 19 reports made to police, 10 resulted in criminal charges.

#### *VII. Criminal Outcomes*

##### *i. Domestic Cases*

Information was collected on criminal justice outcomes in the domestic cases where police reports resulted in criminal charges (115 reports). Outcomes were available for 90 of these reports (33% of all 272 police reports). The majority of charges resulted in a conviction or guilty plea (43% of cases where an outcome was reported). The next most common outcome was a dismissal or withdrawal of the charge (21%), followed by a withdrawal in exchange for a peace bond (13%) and no outcome or ongoing (13%).

In *Batsinda v. Batsinda*,<sup>80</sup> the court considered the challenges that arise when there are concurrent domestic and criminal cases involving the same family. In this case, domestic violence charges had been laid against the father but had not yet proceeded to trial. Chappel J. explained that while an allegation of domestic violence was a “very

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<sup>80</sup> 2013 ONSC 7869.

important” factor for the court to consider on an interim motion for custody and access, criminal charges and proceedings flowing from the allegation were: “not determinative of the issues of temporary custody and residence of the children. The focus of the analysis remains at all times the best interests of the children, and this involves a careful consideration and weighing of all the evidence and relevant factors.”<sup>81</sup> Chappel J. explained that a thorough consideration of the allegations and their strength was important to prevent manipulation of the family justice system: “Allowing the existence of criminal charges in such circumstances to dictate the outcome of the motion runs the risk of allowing a party to invoke the criminal law system as a tool to gain an unfair advantage and hijack the Family Law proceedings.”<sup>82</sup> The court concluded that because of concerns about the mother's willingness to allow the father to have a meaningful role in the children's lives, the criminal charges were “suspect” and established an interim parallel parenting regime moving towards equal time with each parent.

ii. Child Protection Cases

In the 7 reports of criminal charges in the child protection cases, 3 ended in a withdrawal of the charge, 2 had not ended and were ongoing, 1 resulted in a conditional discharge, and one in a guilty plea.

**Police Testimony**

Police officers testified in 8 of the 196 domestic cases, and 2 of the child protection cases.

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<sup>81</sup> *Ibid* at para 29.

<sup>82</sup> *Ibid*.

## **“Helping Professionals”**

In approximately one-third of the domestic cases (73 cases, 37%), the judge mentioned the family having some contact with at least one outside “helping” professional (not including professionals performing assessments under s. 30 of the *CLRA* or child protection workers). The professionals included medical professionals, mental health professionals, therapists, social workers and non-legal professionals working in the family justice system (parenting coordinators, non-*CLRA* assessors, supervised access workers, mediators). In 38 of the domestic cases (19%), more than one helping professional was involved. Multiple helping professionals were involved in 5 of the child protection cases.

There were 141 helping professionals involved in 73 domestic cases. The majority were mental health professionals (57%), followed by medical professionals (29%), family justice professionals (10%), and social workers (4%). There were 16 helping professionals involved in 6 child protection cases. There were 6 mental health professionals, 5 medical professionals, and 5 family justice professionals.

The involvement of helping professionals, even numerous helping professionals, does not necessarily result in a reduction in conflict or focused attention on the child’s wellbeing. In *F. (A.) v. W. (J.)*, a case Harper J. described as “the worst case of emotional abuse I have seen,” at least 14 helping professionals were involved with the family.<sup>83</sup> While “[m]any of the professionals identified a serious and increasing concern about the risk of emotional harm to the children,” none “did a comprehensive and critical analysis

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<sup>83</sup> 2013 ONSC 4272 at para 136.

of the root cause of the children’s ever increasing distress.”<sup>84</sup> In fact, as discussed earlier, Harper J. believed that the professionals’ “search for labels” actually exacerbated the conflict, placing the children at greater risk.

## **Court-Ordered Assessments**

### **i. Domestic Cases**

Under s. 30 of the *CLRA*, a court “may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.”

Assessments under s. 30 of the *CLRA* were completed in 23 of the domestic cases (12%). In another 6 cases, an assessment had been ordered but the report had not yet been completed. In 3 cases, the judge refused to order the assessment despite the request of one of the parents. In *Baetens v. Arthurs*, for example, Hackland J. refused to order an assessment three months after the parents’ separation:

I am not convinced of the utility of such an assessment at this point in time. The separation is very recent and the access as directed in this endorsement has not had a chance to operate. The plethora of recriminations between the parties about past aspects of their relationship do not constitute clinical issues and may be largely irrelevant to the issue of what custody and access arrangements best serve the children’s interests.<sup>85</sup>

Harper J. expressed a different view in *F. (A.) v. W. (J.)*, emphasizing the value of an early assessment in a high conflict case, and stating: “The desperate need in these types of cases is for an early identification by focused assessments of what the clinical

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<sup>84</sup> 2011 ONSC 1868 at para 29.

<sup>85</sup> 2010 ONSC 1955 at para 13.

needs of the children are in order to at least give them the tools to withstand the actions of their parents.”<sup>86</sup>

In a few cases, judges expressed concern with the conduct of the assessor. In *Rapoport v. Rapoport*, Whalen J. complained that the assessment took too long to complete (17 months) and faulted the assessor for attempting to make the report more readable by giving it a “literary flavour.”<sup>87</sup> The judge warned that the report’s “dramatic style removed some of the *gravitas* of the situation, giving it a feeling of being unreal.”<sup>88</sup> The style the assessor used, which included metaphors, made it difficult to understand what he was saying. Justice Whalen also objected to the report’s use of “psycho-babble,” which the judge doubted the assessor was qualified to provide. The judge offered the following recommendations:

[The assessor] would have done better to express his views in a more neutral and conventional manner. It would also have been better not to have embarked on metaphorical theorizing to explain personal history because it was difficult to separate one from other, and it opened him to the criticism that he did not understand or get the facts right.<sup>89</sup>

Notwithstanding these criticisms, Whalen J. determined that many of the opinions in the report were well founded.

## ii. Child Protection Cases

In child protection cases, judges have authority under s. 54 of the *CFSA* to order the child or parent to undergo an assessment by a “qualified person.” In 2 of the 14 child protection cases s. 54 assessments were ordered. In 2 of the other cases, a *CLRA* s. 30

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<sup>86</sup> 2011 ONSC 1868 at para 27.

<sup>87</sup> 2011 ONSC 4456 at para 409.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

assessment had been completed and was cited by the court. In one child protection case, a *CLRA* s. 30 assessment had been ordered, but the process was suspended due to the initiation of the child protection case.

## **Office of the Children’s Lawyer Involvement**

### **i. Domestic Cases**

The Office of the Children’s Lawyer (OCL) was involved in 79 of the 196 domestic cases (40%). A clinical investigator alone was appointed in 63 of these cases, a lawyer alone in 1 case, and a lawyer with clinical assist in 15 cases. In 11 other cases, a referral had been made to the OCL and the court was waiting to hear if the referral had been accepted. In 6 cases, the OCL had declined involvement. In 3 cases, the referral had been accepted but one parent refused to participate, and so no involvement occurred.

Although often influential, judges did not always find OCL involvement helpful. In *D’Angelo v. Barrett*, for example, Tzimas J. remarked: “the best that can be said about [the OCL investigator’s] report was that it was disappointing, deficient, and did very little to assist the court with an assessment of the issue of the [children’s] custody and access.”<sup>90</sup> The main problem was that the investigator had failed to consider all information equally, which the court attributed to bias in favour of the father. Tzimas J. was also critical of the investigator’s failure to update the report for trial to reflect changes in the parents’ situation.

### **ii. Child Protection Cases**

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<sup>90</sup> 2014 ONSC 6429 at para 41.

The OCL was involved in 12 of the 14 child protection cases; in some of these cases OCL involvement preceded the child protection proceeding. For example, in 2 cases, a clinical investigator was involved in the earlier domestic proceeding but no OCL representative was involved in the child protection trial. In the remaining 10 child protection cases, OCL lawyers had been appointed for one or more of the children.

The role of OCL counsel in a high conflict child protection case was considered in *Children's Aid Society of London and Middlesex v. C.D.B.* In that highly contentious case, three OCL panel lawyers were appointed to represent the three children. The lawyer for the youngest child was “in total support of the mother’s case from the start”.<sup>91</sup> The lawyer for the oldest child, on the other hand, was “in total support of the father’s case throughout.”<sup>92</sup> Harper J. explained that the OCL’s practice of appointing panel lawyers opened up the possibility for conflict in cases involving multiple children and explained that there is “no clarity in how the OCL might instruct their panel lawyers when they are adverse in order to avoid conflicts and regulate funding equally.”<sup>93</sup> Harper J. criticized the OCL lawyers for the oldest and youngest children for acting as “advocates” for the different parents. While the judge did order costs against the Society, which he found to be acting as an “advocate” for the mother, Harper J. did not find that the OCL lawyers, had contributed to the length or cost of the litigation, and so there was no costs order against the OCL.

While there are cases where the courts are critical of the role of OCL lawyers or investigators, these are not typical. Generally judges seem to value having these independent professionals involved.

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<sup>91</sup> 2014 ONSC 1414 at para 36.

<sup>92</sup> *Ibid* at 38.

<sup>93</sup> *Ibid* at 34.

## **Voice of the Child**

The child's views and preferences were reported in 47 of the 196 domestic cases (24%). In the majority of cases where children's views were considered, the OCL provided evidence of the child's views and preferences (15% of all cases). Other sources of evidence on the child's views and preferences came from a CPA (4% of cases), *CLRA* s. 30 assessors (4%), other professionals (2% of cases), and judicial interviews (1%).

In *K. (D.) v. K. (M.)*,<sup>94</sup> the child (17 years old) requested that he be allowed to speak with the judge so as to have his voice heard (he refused to talk to the OCL). The interview was conducted with the consent of all parties. It was agreed that the content of the interview would remain confidential and that it would not be included in evidence.

## **CONCLUSION**

High conflict custody and access disputes place children at risk of emotional harm. As a result, in Ontario, CPAs are increasingly becoming involved in these cases. However, little is known about how CPAs manage cases involving custody and access disputes. There is also little research on best practices for CPAs working with high conflict disputing families. Staff in CPAs in Ontario receive little or no training on how to deal with high conflict separations and their associated risks for children, although there have been some recent efforts to improve training in this area by the High Conflict Forum. Not surprisingly, recent research suggests that CPA workers feel ill equipped to handle high conflict custody cases. Workers also report feeling overwhelmed by the amount of time, energy and resources these families demand, a concern shared by others in the family

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<sup>94</sup> 2010 ONSC 4585.

justice system.<sup>95</sup> Some believe high conflict custody disputes to be the responsibility of the family law system, not the child protection system.

Our analysis of 210 domestic and child protection cases decided in Ontario over a five-year period offer some preliminary findings about high conflict custody and access cases that intersect with the child protection system. Because we looked only at reported decisions, and because some cases were excluded from our analysis on the basis of missing information, the total number of high conflict custody and access cases involving child protection intervention decided during this period is likely much higher.

One important finding is that the vast majority of reported cases are not actually child protection cases, but rather are domestic cases where the CPA (and often police) have been brought into the case as a result of allegations of abuse, neglect, domestic violence or alienation. The role of the CPA is primarily as an investigator and provider of services rather than as a party to litigation. CPA staff (and less often police) may testify in the domestic proceedings, though often it is the parents who provide evidence about the role of the CPA in their case.

A second important finding is that mothers and fathers are about equally likely to make a report to a CPA in the context of a parental separation. A significant number of domestic cases involved multiple reports to CPA, and doubtless on-going CPA involvement with the family, without child protection proceedings being commenced. Mothers and fathers were also equally likely to make multiple CPA reports. Mothers, however, were more likely than fathers to report to the police. Mothers most frequently report to the police about domestic violence, while mothers are most likely to report child sexual abuse to a CPA. Research clearly establishes that women are more likely to be

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<sup>95</sup> Fidler, Bala & Hurwitz (2013).

victims of serious domestic assaults than men, which may explain their higher reporting rates to the police. Risk to children may also be a factor in women's reporting.

A third important finding comes from the number of cases CPAs verified as involving presence or risk of emotional harm. Most of the reports to the CPA in these cases come from parents, and there are relatively low rates of substantiation of reports of abuse or neglect. Presence or risk of emotional harm was verified by the CPA in 24 of the 210 cases (domestic and child protection cases combined). However, there were an additional 28 cases in which judges expressed concern that parental conflict was harming or would harm the children. This suggests that CPAs may not be verifying presence or risk of emotional harm due to parental conflict in all cases where such a finding is warranted. This finding may reflect the same reluctance of CPA staff to verify risk of emotional harm in high conflict cases that was reported in the Saini et al. study.<sup>96</sup> If so, better training for CPA workers on high conflict separation and emotional harm is very important. This training could be part of a collaborative effort to train professionals across the different systems. While judges in domestic cases sometimes express concern about CPA involvement, particularly about one parent manipulating the CPA to "take their side", it is clear that judges generally appreciate having an "objective third party" involved, and value the possibility of involving the CPA in a parenting plan that will meet the needs of children. These children, and their parents, can often benefit from the counseling, support and supervision that a CPA can provide.

A final significant finding is that custody and access cases intersecting with the child protection system are also likely to intersect with the criminal justice system. Nearly three quarters of all the cases (152 of 210) involved a report to the police. This

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<sup>96</sup> Saini et al. (2012).

finding raises questions about police training on high conflict separations and how they respond to these cases. The intersection of high conflict custody cases with the criminal justice system also raises issues related to concurrent proceedings, such as lack of coordination between agencies and the potential for conflicting orders, and the potential value of integrated domestic violence courts that can deal with both the criminal and domestic proceedings that involve a single family.<sup>97</sup>

The literature review and case law analysis provide only limited insight into custody and access cases that intersect with the child protection system in Ontario. Further empirical research is clearly necessary. This research should consider how CPAs identify and respond to high conflict cases, how CPAs work with other professionals who handle high conflict cases (such as lawyers, the OCL, police, and custody assessors), and how CPAs could better respond to high conflict separations in order to protect children from emotional harm. With growing CPA involvement in high conflict parental separation cases, best practice guidelines need to be developed for CPAs and other agencies and professionals to reduce the human and financial cost of these cases for children, their parents and society.

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<sup>97</sup> See Bala & Kehoe (2013). See also Birnbaum, Bala & Jaffe, “Establishing Canada’s First Integrated Domestic Violence Court: Exploring Process, Outcomes and Lessons Learned” (2014) 29:1 Can. J. Fam. L. 117.