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Developmentally Appropriate Questions for Child Witnesses*

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Abstract: Recent legislative reforms have made it easier for courts to receive the testimony of children and for children to endure the experience of testifying. However, both lawyers and judges, unaware of the fundamentals of child development, often fail to question children effectively. Subjecting children to confusing and developmentally inappropriate questioning makes them unable to communicate accurately what happened to them and what they observed. Not only does this make the witnesses' experience upsetting, it makes it difficult to determine the truth.

The authors explore ways in which justice system professionals' interactions with children may be improved: lawyers and judges can learn to ask questions appropriate for the age and capacity of the child witness, and judges can play a larger role in monitoring and assessing the questions children are asked in court. First, the authors argue that effective questioning of child witnesses requires an understanding of child development in three critical domains (linguistic, cognitive and emotional) and the use of appropriate questions for children's specific levels of development. With education, practice and sensitivity, justice system professionals can effectively question a child witness. Second, they suggest that the courts have a role to play in monitoring and assessing a child's ability to testify. Judges may choose to give less weight to the evidence of children if it was extracted by confusing or aggressive cross examination. Lawyers may also have an obligation to call expert evidence on child development to assist the courts in assessing the evidence of children.

When children are questioned properly, most of them can be very effective witnesses. By learning to ask developmentally appropriate questions, lawyers and judges can improve the utility of children's testimony as well as reduce the likelihood that children will be traumatized by their courtroom experiences.

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Introduction - Children in the Courts

¶ 1 Until quite recently, the courts in Canada were a hostile and unreceptive environment for children. Children rarely testified in court, and when they did their evidence was viewed with suspicion. Gradually, the legal system's lack of accommodation for children came under attack. Psychologists and other mental health professionals challenged the belief that children are inherently unreliable, and critics of the legal regime argued that the difficulties that children faced in the courts left child victims unprotected and contributed to child abuse. In the late 1980's, a major process of law reform began, fuelled by a desire to have the Canadian legal system deal more effectively with child abuse. [See Note 1 below] Legislatures and judges changed the law to make courts more receptive to the testimony of children, and to make the experience of testifying less traumatic for children. It is now not uncommon for some children, as young as young as four, to testify in Canadian courts.

Note 1: See e.g. N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Queen's L.J. 3.

¶ 2 While the legal regime has changed, judges and lawyers still too often lack the education, training and sensitivity to work effectively with children. There continue to be many problems that children face in the courts, including neglect of their needs while waiting for court, failure to make sufficient use of screens or closed circuit television and inadequate preparation of children for court. [See Note 2 below] A major problem that children face, that goes to the heart of the trial process and its truth-seeking function, is that they are often questioned inappropriately.

Note 2: See e.g. L. Sas, I'm Trying to Do My Job in Court - Are You? Questions for the Criminal Justice System (London, Ont.: London Family Court Clinic, 1999) [hereinafter Sas]; and Child Abuse Prevention & Counselling Society of Greater Victoria, Children As Witnesses (Victoria, British Columbia, 1999) [hereinafter Children as Witness (1999)]; and L. Park & K.E. Renner, "The Failure to Acknowledge Differences in Developmental Capabilities Leads to Unjust Outcomes for Child Witnesses in Sexual Abuse Cases" (1998) 17 Can. J. of Community Mental Health 5.

¶ 3 Lawyers and judges frequently fail to adjust their questioning for children. They tend to use inappropriate vocabulary, double negatives and confusing sentence structure, even when questioning adults. The confusing use of language is always a concern in court, but is especially pronounced when children are questioned. Too frequently, legal professionals seem unaware of the fundamentals of child development. Too often a child is asked questions that no child of that age could be expected to understand or answer meaningfully. Yet, the fact that the child fails to answer, or provides an answer that

seems confused or contradictory, is used to discount the child's credibility. In some cases, inappropriate questions counsel cross-examining the child (almost always defence counsel in a criminal trial) are the result of a desire to confuse or discredit the child. However, it is frequently the lawyer who called the child, or even the judge, who asks the child developmentally inappropriate questions. One Ontario judge remarked, "[v]irtually all questions posed by lawyers are incomprehensible to a young child, even when the lawyer is not trying to outwit them. Young lawyers are worse than experienced ones." [See Note 3 below]

Note 3: We include in this paper some quotations and preliminary data from the Competence of Child Witnesses Survey [hereinafter Survey] of criminal justice system professionals in Ontario that was conducted in the summer of 1999 by the Child Witness Project research team at Queen's University (unpublished data and survey results on file with authors). These references are included for illustrative purposes. A fuller analysis of the Survey will be undertaken in subsequent papers. The Child Witness Project research team at Queen's University is Prof. Nicholas Bala (Law), Prof. Kang Lee (Psychology), Prof. Rod Lindsay (Psychology), Prof. John Leverette (Psychiatry) and Ms. Janet Lee (Kingston Victim Witness Program). Much of the work on the Survey was undertaken by Mandy Aylen, LL.B candidate 2000, Queen's Faculty of Law. The Survey was based on a written instrument and largely conducted by mail. Similar questionnaires were sent to judges (88 respondents), Crown prosecutors (53 respondents), defence lawyers (193 respondents) and victim witness workers (21 respondents).

¶ 4 In a recent survey [See Note 4 below] of Ontario judges, 48 per cent said that defence counsel often or always asked questions that a child would not be capable of answering because of sentence structure, vocabulary, or conceptual complexity, and another 41 per cent of judges reported that defence counsel sometimes asked such questions. The judges rated Crown attorneys slightly better at questioning children. Twenty per cent of the judges reported that the Crown lawyers often or always ask child witnesses questions that they are incapable of answering, and another 47 per cent of the judges reported that Crown attorneys sometimes ask such questions. The better performance of Crown attorneys in questioning children may reflect better training as well as differences in role. It is almost always the Crown that calls a child witness, and hence these lawyers generally have the opportunity to meet a child witness before court and establish a rapport that allows for more appropriate questioning. While most of the questions that children are asked during a trial are posed by lawyers, judges often take the lead in asking questions at the inquiry into the competence of a child to testify, held pursuant to section 16 of the Canada Evidence Act. [See Note 5 below] Similarly judges also ask children questions that are inappropriate.

Note 4: Ibid.

Note 5: R.S.C. 1985, c. C-5 s. 16 [hereinafter Canada Evidence Act].

¶ 5 Children are not just short adults; [See Note 6 below] they have different reasoning and communication skills. For them, words and ideas often have different meanings. Children also have more limited life experience than adults and often do not understand the reasoning or motives of adults. Additionally, they do not understand the legal system. For example, some children believe that they can go to jail if they give the wrong answer or do not answer a question. [See Note 7 below] Further, children do not have the same language skills as adults. As a result, complex questions are often beyond children's ability to comprehend. These factors affect how they understand the questions they are asked as witnesses.

Note 6: A.G. Walker, Handbook on Questioning Children: A Linguistic Perspective (Washington, D.C.: ABA Center for Children and the Law, 1994) at 5 [hereinafter Handbook].

Note 7: Children have a very limited understanding of the legal system. They often do not understand the roles of the people in the courtroom, the purpose of testifying or that they will not go to jail for making mistakes. See J.E.B. Myers, K.J. Saywitz & G.S. Goodman, "Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony" (1996) 28 Pacific L.J. 3 at 69 [hereinafter Myers et al.].

¶ 6 Children who are subjected to confusing and inappropriate questioning are unable to communicate accurately what happened to them and what they observed. This type of questioning can make the experience of being a witness deeply upsetting for a child. Some lawyers or judges may claim that a traumatic questioning process is justified to get at "the truth", but there are certain types of questions that may actually obscure the truth. Children have not yet developed the necessary language, observational and reasoning skills to answer such questions meaningfully. If a child is expected to answer a question that he has not understood, the answer will likely not be accurate. Children are reluctant to acknowledge that they do not understand a question or to ask for clarification. [See Note 8 below] Often, children do not even appreciate that they have not understood a question and as a result, they may give incorrect answers. Children want to be helpful and will often try to provide answers to questions that they do not understand, even if doing so results in misleading information. They will often answer the question based on the parts that they think they have understood. If the ultimate goal of the legal system is to find truth, then lawyers and other questioners should only put questions to a child witness that a child of that age can understand and answer meaningfully.

Note 8: K.J. Saywitz, "Improving Children's Testimony: The Question, the Answer and the Environment" in M.S. Zaragoza et al. eds., Memory and Testimony in the Child Witness (Thousand Oaks: Sage Publications, 1995) 113 at 124. Also, see generally M. Hughes & R. Grieve, "On Asking Children Bizarre Questions" (1980) 1 First Language 149.

¶ 7 This paper explores one aspect of the questioning of children in court: asking questions that are appropriate for the age and capacity of the witness. [See Note 9 below] The first section of this paper explores the concepts and language that children at different levels of development find difficult to understand. This section also discusses the types of questions that children at different levels of development should not be asked. We offer specific suggestions with respect to age-appropriate questioning of children.

Note 9: Another significant concern about questioning children, especially complainants, are questions that are intimidating or unnecessarily embarrassing. This issue is touched on in this paper, but it is not a central topic.

¶ 8 The second section of the paper considers the role that courts should play in assessing the level of development of child witnesses and the impact that such findings should have on the way children are questioned. We argue that judges have a duty to intervene when a child is questioned in a manner inconsistent with that child's level of development. Such an intervention would ensure that the child is asked questions that she can answer.

¶ 9 The main focus of this paper is the questioning of children in courts, especially in criminal proceedings, which is the context in which children most frequently testify in Canada. However, the courtroom is not the only forensically significant setting in which children may be asked questions. Investigators, physicians, social workers and mental health professionals frequently question children about abuse allegations. In cases in which a court is making a "best interests" decision (such as a parental dispute over custody or access), it is common for an assessor to question a child. In these situations, the child's out-of-court answers may form the basis of an opinion offered by the questioner in court. A child's out-of-court statements may also be admissible as hearsay [See Note 10 below] or if they are videotaped the video may be admissible in court if the child is also a witness. [See Note 11 below] Concerns about age-appropriate questioning of children are also highly relevant to the investigative and assessment processes, as are related issues of suggestibility. Issues related to non-court questioning of children, however, are beyond the scope of this paper. [See Note 12 below]

Note 10: See e.g. R. v. F.(W.J.), [1999] S.C.J. No. 61, [hereinafter F.(W.J.)]. A child's hearsay statement may be admitted if the court considers it "necessary" to do so and the statement is considered "reliable". "Necessity" may be established if the child is too young to testify or would be emotionally traumatized by testifying, or can testify but cannot provide a full account of the events. In criminal cases, concerns about "reliability" often preclude the admission into evidence of a child's statements to investigators.

Note 11: These videotapes can be admitted in criminal trials if the child testifies and adopts the statements on the tape: Criminal Code, R.S.C. 1985, c. C-46, s. 715.1. In civil cases, such as child

protection hearings, a videotape may be admissible even if the child does not testify: Children's Aid Society (Brant) v. E.R., [1993] W.D.F.L. 1521 (Ont. Prov. Div.).

Note 12: See K. Saywitz & L. Camparo, "Interviewing Child Witnesses: A Developmental Perspective" (1998) 22 Child Abuse and Neglect 825.

I. Child Development and Questioning of Child Witnesses

¶ 10 Effective questioning of children is a challenging task. A careless questioner may not connect with a child. When this happens, the two may carry on a conversation with neither one understanding what the other is saying, with neither aware of the problem in communication. The effective questioning of a child requires an understanding of the child's development in three critical domains: linguistic, cognitive and emotional.

¶ 11 Linguistic development refers to children's acquisition of language skills. It involves acquiring an understanding of the meaning of words (semantics), grammatical and sentence structure (syntax) and the rules of language used in different social contexts (pragmatics). Cognitive development refers to the acquisition of the ability to perceive and store information, to form concepts and to reason about various ideas. This development determines how well children function as eyewitnesses in court, because the court often requires children to make accurate observations, recollect past events, understand such concepts as space, time and size, handle abstractions and make inferences. Emotional development refers to a child's emotional maturity, including such issues as reactions to separation from parents and ability to deal with intimidation and frustration. A child's emotional development also affects the capacity to answer questions.

¶ 12 When dealing with child witnesses, it is useful to remember that there are essentially four periods of childhood development: (1) infancy, the period from birth to approximately age two; (2) early childhood, from about age three to age six; (3) middle childhood, from about age seven to age ten; and (4) adolescence from about age eleven to approximately age eighteen. The ages for the periods of child development are approximate because there are individual differences. Children develop at different rates and do not move from one stage to another at a specific age. Also, not all aspects of their development enter a new period simultaneously. For example, a child may develop a school-age linguistic ability a few months before developing some essential characteristics of school-age cognitive ability. In addition, gender, different cultural backgrounds, languages spoken at home, home environments and qualities of education may affect how fast and in what manner children develop. Some children have significant development delays due to injury, illness or genetic factors. There are, nonetheless, some general linguistic, cognitive and emotional characteristics shared by children within the same age bracket. The discussion that follows focuses on these general characteristics for each period of development.

A. Infancy (birth to about age 2)

¶ 13 Infancy describes the period between birth and approximately the child's third birthday. It is extremely rare for children in infancy to be called as witnesses in court because they are generally unable to communicate effectively in court, [See Note 13 below] although two-year-olds are sometimes interviewed by police or social work investigators. Canadian courts have admitted hearsay statements from children as young as two, and used such statements to convict in abuse cases, especially if some corroborative evidence exists. [See Note 14 below]

Note 13: See C.R.K. v. H.J.K., 672 S.W. 2d 696 (E.D. Mo., 1984) which held that a two-and-a-half-year-old child was "presumed incompetent but could have been qualified." See also a critical comment on that case by G. Blowers, "Should a two-year-old take the stand?" (1987) 52 Mo. L. Rev. 207.

Note 14: See R. v. Khan, [1990] 2 S.C.R. 531; and R. v. P.(J.), [1993] 1 S.C.R. 469.

¶ 14 By the age of one, most children can comprehend a dozen words and have already learned to make a few sounds that convey specific information to their caregivers. Their vocabulary develops very rapidly and by two years of age they know approximately 400 words. Comprehension also increases rapidly between the ages of two and three. [See Note 15 below] However, infants tend to over-extend the meaning of some words. For example, they may call any man "daddy" until they learn that "daddy" refers to a specific man. They also under-extend the meaning of some words. For example, they may only call their own dog "doggie".

Note 15: R.S. Feldman, Development Across the Life Span (Upper Saddle River: Prentice Hall, 1997) at 172 and 236.

¶ 15 Infants have yet to learn many grammatical structures of English. For instance, they generally have difficulty with past and future tenses and plurality. The ability to make a simple sentence is generally achieved towards the end of infancy. Given the limitations in infants' linguistic ability, it is important to use great caution when asking them questions or interpreting their answers.

¶ 16 Recent research shows that infants' cognitive abilities develop rather rapidly. [See Note 16 below] By the end of infancy, children are able to remember events, understand basic physical principles, and even have some basic form of "theory" about others' emotions, desires, intentions and thoughts. Such knowledge, however, is generally procedural in that they are only able to apply it in their day-to-day interactions with the environment. [See Note 17 below] Infants cannot yet articulate this knowledge, nor are they even conscious of it. Therefore, asking them to recall a precise piece of information

will be fruitless, and also the ability to verbalize cognitive skills develops during the pre-school years.

Note 16: See generally J.H. Flavell, P.H. Miller & S.A. Miller, Cognitive Development (Englewood: Prentice Hall, 1993).

Note 17: Feldman, supra note 15 at 169.

B. Early Childhood (ages 3 to 6 years)

¶ 17 Children as young as four testify in Canadian courts, and it is not uncommon for children who are five or six to testify. [See Note 18 below] Children in the early childhood, or "pre-school" stage, can provide clear accounts of events they have witnessed. However, children at this period of development are associated with some of the most notorious cases involving child witnesses. In several of these cases, such as the infamous nursery school cases, the evidence of pre-schoolers has been used to wrongfully convict an adult of child abuse. [See Note 19 below] However, it remains true that children of this age can clearly provide reliable evidence as long as they are questioned in a manner sensitive to their level of development and they have not been subjected to suggestive interviews. [See Note 20 below]

Note 18: There is no statutory minimum age for children testifying in Canada. There is an individualized assessment of competence to testify, with some children as young as four being found competent. By the age of seven, most children who are proposed as witnesses are ruled competent. The Canada Evidence Act, supra note 5, permits a child under fourteen to testify under oath if the child "understands" the oath. If the child is able to communicate, the child may testify "on promising to tell the truth."

Note 19: See e.g. State v. Michaels, 642 A.2d 1372 (N.J. 1994) [hereinafter Michaels]; and R. v. Sterling (1995), 102 C.C.C. (3d) 481 (Sask. C.A.) [hereinafter Sterling] (note these children were pre-schoolers during the abuse, but were school aged when they testified at trial). See also S.J. Ceci & M. Bruck, Jeopardy in the Courtroom (Washington, D.C.: Amercian Psychological Association, 1995); and F. Harris, Martensville: Truth or Justice? The Story of the Martensville Daycare Trials (Toronto: Dundurn Press, 1998).

Note 20: See generally Myers et al., supra note 7.

(i) Linguistic Development of Pre-schoolers

¶ 18 When questioning pre-schoolers, it is important to appreciate that there are many words and grammar rules that they do not understand. In particular, it is safe to assume that pre-schoolers will not understand even the simplest legal terms. A study by Karen Saywitz reported that some children she questioned thought that "court" was a place to

play basketball. [See Note 21 below] Many legal terms have other, more familiar, non-legal meanings. Some of these words include: appear, court, hearing, swear and statement. [See Note 22 below] Children will likely use these words in their non-legal sense. Legal terms should never be used when questioning children of any age, unless the questioner has verified that the child understands the word in the legal context.

Note 21: Ibid. at 55.

Note 22: Handbook, supra note 6 at 28.

¶ 19 Pre-school children may also confuse legal terms with similar sounding non-legal terms that they know. This is known as an "auditory discrimination error". For example, a child may misinterpret the word "jury" as "jewellery" or "journey". [See Note 23 below] Simply asking a child whether she understands a word is insufficient to avoid confusion. The child may give the word a different meaning from that used by the questioner. A misunderstanding along these lines caused a girl's crucial evidence to be excluded in one Canadian case. The girl refused to "swear" to tell the truth because "swearing" meant saying bad words and thus she was not permitted to testify. [See Note 24 below] Children often do not use technically correct terms for various parts of the body, especially the genitalia. Anyone questioning a child of any age about sexual abuse should clearly establish the child's vocabulary for different parts of the body, and should try to use the child's terminology during questioning.

Note 23: Saywitz, supra note 8 at 116.

Note 24: A.G. Walker, "Children in the Courts: When Language Gets in the Way" (January 1999) 35 Trial 50 at 51 [hereinafter "Children in the Courts"].

¶ 20 To ensure that the questioner and child witness are using the same definition of a word, the questioner should ask the child to use the word in a sentence. [See Note 25 below] Doing this will ensure that the child witness and the questioner are giving the same meanings to words. The fact that a child may have had "instruction" about the technical meaning of a word on a previous occasion does not mean that the child recalls the definition. Many non-legal terms also cause pre-school children difficulty. As children develop, they will increasingly understand words with more syllables. Pre-schoolers are most likely to understand words that have only one or two syllables. [See Note 26 below]

Note 25: M. Cole & S.R. Cole, The Development of Children (New York: W.H. Freedman, 1996) at 54.

Note 26: Saywitz, supra note 8 at 116.

¶ 21 During this stage of development, children frequently confuse the meaning of prepositions. They will mix up the meanings of "before" and "after", or "above" and "below", or "ahead of" and "behind". [See Note 27 below] A father was investigated for sexual child abuse because his daughter said "My bottom hurts, daddy put his hand in my bottom." What the child meant to say was that her daddy had put his hand on her bottom. He had spanked her and that is why her bottom hurt. [See Note 28 below]

Note 27: Handbook, supra note 6 at 22, 24.
Note 28: "Children in the Courts", supra note 24 at 50-51.

¶ 22 Young children also have difficulty with "pointing" words. They may not understand the difference between "this" and "that", or "give" and "take". Pre-school children have difficulty with these words because they do not understand that the object referred to changes depending on the speaker. [See Note 29 below] For example, who is coming and who is going depends on where the speaker is situated. The ambiguity in the meaning of these words is difficult for children to grasp. It is better to replace "this" and "that" with descriptive nouns and "here" and "there" with place names. [See Note 30 below]

Note 29: Ibid. at 22.
Note 30: Ibid.

¶ 23 Pre-schoolers understand words that refer to concrete objects better than words that refer to categories or abstract concepts. It is better to ask a young child if a person had a "gun" or a "knife" than to ask if that person had a "weapon". In the same way, children may not understand that they were "abused", but may understand that they were "hit" or "beat up". [See Note 31 below]

Note 31: Saywitz & Comparo, supra note 12 at 828-829.

¶ 24 Young children may interpret words literally and very narrowly (under-extension) or very broadly (over-extension). This can cause several problems for questioners. One such problem is associated with the word "touch". Adults understand that "touch" can include many types of contact. However, children may understand "touch" as something they do only with their hands. If someone made contact with the child using another part of his or her body, the child may say they were not "touched". [See Note 32 below] Since children may under-extend the meaning of words, it is important to choose words carefully. A frequently cited example that highlights this is the

girl who denied being in her abuser's "house" because she had been to his "apartment". [See Note 33 below] Conversely, young children with limited vocabularies may over-extend the meaning of a word. A child may call a "tractor" a "car" because both have wheels and the child does not know the term "tractor". [See Note 34 below] Literal interpretation of words can also cause confusion when a child does not understand the words in the first place. Consider the following example from a court transcript:

> Q: And lastly, Gary, all your responses must be oral. O.K.? What school do you go to?
> A: Oral.
> Q: How old are you?
> A: Oral. [See Note 35 below]

Note 32: Handbook, supra note 6 at 27.

Note 33: Ibid. at 11.

Note 34: Ibid. at 53.

Note 35: M.L. Gilman, Courtroom Bloopers, online:

Electronic Law Library <http://lectlaw.com/files/fun14> (date accessed: 19 February 1997).

¶ 25 Pre-schoolers have difficulty with pronouns. They may not understand sentences where the pronoun precedes the noun to which it refers. For example, "When he got to school, was John late?" might not be understood by a pre-schooler. However, the same child would probably understand "When John got to school, was he late?" It is even better to avoid using pronouns and ask: "When John got to school, was John late?" [See Note 36 below]

Note 36: Handbook, supra note 6 at 22.

¶ 26 Young children expect sentences to come in the subject-verb-object sequence. They will expect the first noun to be the subject. They will frequently misinterpret the passive voice because it places the subject after the verb. A question that uses the passive voice, such as "Were you chased by him?" may be interpreted as "Did you chase him?", because the child thinks the first noun is the subject. [See Note 37 below] Questions with embedded phrases which disrupt the subject-verb-object order will be difficult for children to understand. [See Note 38 below] A confusing question of this type is: "Was the man wearing the red coat the man who chased you?" The "man wearing a red coat" phrase is embedded in another question. Making that question into two questions would be better: "Did a man chase you? Was he wearing a red coat?"

Note 37: Ibid. at 30.
Note 38: Ibid. at 31.

¶ 27 Children of all ages have difficulty with negatives and pre-schoolers find it particularly hard to interpret sentences that include negatives. Such sentences only produce "correct" answers about half the time, even when children know the facts. However, if the same question is rephrased to omit negatives, children are much more likely to answer correctly. [See Note 39 below] When questioning children, one should avoid phrases such as: "isn't it true that", "do you deny that", or "wouldn't you say". If these phrases are replaced with "did", the question is more likely to receive an accurate response.

Note 39: Ibid.

¶ 28 Pre-schoolers have difficulty expressing degrees of certainty. Many young pre-schoolers do not have a good grasp of the different level of certainty expressed by "know", "sure", "think" and "guess". [See Note 40 below] They also have difficulty with "some" and "all". Pre-schoolers may deny knowing "some" of the alphabet because they know "all" of it. [See Note 41 below] Young children are also not good at comparing quantities or events. The words that adults use for comparative purposes may have different meanings for pre-schoolers. Young children, for example, may not correctly understand "more" in the "more than" context. Instead, young children are likely to use "more" as a synonym for "again". "Give me more milk" is likely to mean "Give me milk again" not "Give me more milk than I have".

Note 40: Ibid. at 25.
Note 41: Ibid. at 27.

¶ 29 "Before" and "after" cause a similar problem. A child who is asked if one event happened before another may interpret the question as asking whether the event happened at all. Asking what happened first usually provides a more accurate response. [See Note 42 below] Young children have not developed the mental ability to sequence or compare objects and events.

Note 42: Ibid. at 24-25.

(ii) Cognitive Development of Pre-schoolers

¶ 30 Young children think differently than adults because they have not developed the reasoning skills and mental strategies required to interpret the world around them. It is wrong to assume that something which makes sense to an adult makes sense to a young child. Also, simply because a child is able to use specific words, it is wrong to assume that he or she understands the concepts behind them.

¶ 31 Children learn the names of numbers before they understand what specific numbers represent. Initially, counting for children is just repeating words they have memorized in order. [See Note 43 below] Asking a young child for specific numbers in a question will probably not result in a meaningful answer. Although the child is likely to respond with a specific number, the answer is probably not significant to the child and should not be relied upon by the questioner.

Note 43: Saywitz, supra note 8 at 121.

¶ 32 Asking young children about the number of times they have been abused is not likely to be meaningful. Such children may answer "five" on one occasion and "twenty" on another occasion. To a pre-school child (and even to school aged children) the specific number is not a meaningful concept. The difference in responses signifies only that the child does not understand the concept of numbers and is communicating that the abuse happened more than once, not that the child is lying or even simply mistaken. For example, a four-year-old was asked in court how many times her father "had done this". She said "two times" and held up ten fingers. However, the same girl could recite the numbers from one to ten. [See Note 44 below]

Note 44: Ibid.

¶ 33 Pre-schoolers also have difficulty accurately comparing quantities. They probably cannot discern that two rows of objects of equal length may have a different number of objects. They frequently assume that when water is poured into a taller, narrower, glass it becomes greater in volume. This is because young children use only the most striking characteristics to estimate quantity. [See Note 45 below] For this reason, they assume that a longer line has more in it, taller people are older [See Note 46 below] and bigger objects are heavier. [See Note 47 below]

Note 45: Feldman, supra note 15 at 227, 229.

Note 46: Handbook, supra note 6 at 41.

Note 47: Feldman, supra note 14 at 231.

¶ 34 This quantification problem manifests itself in other areas as well. Pre-school children cannot tell time and do not understand the concept of time measurement. They cannot specify the duration of an event in terms minutes or hours, nor can they distinguish days of the week or seasons of the year. [See Note 48 below] A child will learn the names of the hours, days and months before she is able to use them accurately. She may answer a time question in a way that has no meaning to her but which may appear quite precise to a questioner.

Note 48: Saywitz, supra note 8 at 121.

¶ 35 To a young child, any event that occurred in the past is likely to be referred to as "yesterday". Similarly, "morning" might mean anytime before the child takes a nap, whether the child naps at 11:00 a.m. or 3:00 p.m. [See Note 49 below] Young children cannot tell whether an event occurred over a long or a short time. [See Note 50 below] However, pre-school children can usually identify whether two events happened simultaneously. [See Note 51 below] For example, children may be able to say something happened while they were watching Sesame Street. That information can be used to pinpoint times. While attempting to clarify dates and times, investigators should be careful not to ask a young child: "When did X happen?" "When" questions are too abstract. Young children need more cues about what type of answer is expected. "What" and "where" questions provide those cues. [See Note 52 below] To fix the time that an alleged event occurred one should ask questions such as: "What was on T.V.?" or "What were you wearing?" or "Where was Mommy?".

Note 49: Handbook, supra note 6 at 28.

Note 50: Park & Renner, supra note 2 at 10-12.

Note 51: See Handbook, supra note 6 at 43 and Saywitz & Camparo, supra note 12 at 829.

Note 52: Saywitz & Camparo, ibid. at 839.

¶ 36 Pre-school children have difficulty putting events into chronological order. [See Note 53 below] Since children might mix up the sequence of events, asking a child if X happened before Y may not lead to an accurate response. They may only be able to remember what happened first and what happened last. [See Note 54 below] However, just because a young child does not remember the order of events, it cannot be assumed that his memory of those events is inaccurate. [See Note 55 below]

Note 53: Handbook, supra note 6 at 24-25.

Note 54: Ibid.

Note 55: Saywitz, supra note 8 at 122.

¶ 37 Physical dimensions pose similar difficulties for pre-schoolers to those caused by time estimations. Young children can say whether something is big or tall but often they cannot be any more precise than that. Although a child at this period of development may use units of measurement when speaking, it should not be assumed that the child is using those terms with any degree of precision. A pre-schooler might say someone is "seven feet tall" but that phrase only means "tall" or "big" in a generic sense and is not necessarily an precise estimation of size. Young children will not be able to compare accurately an object with another to say whether it is bigger, taller or longer. [See Note 56 below]

Note 56: See generally Park & Renner, supra note 2.

¶ 38 Young children reason differently from adults and this can lead to answers that seem strange or inaccurate. These answers, however, are rarely due to a young child's attempt to deceive. [See Note 57 below] Usually, they are the result of the child's egocentric perception of the world and her limited logic skills. At the pre-school age, children are just beginning to understand that other people see things from a different physical perspective and that other people have different thoughts, feelings and points of view. [See Note 58 below] This limits the types of questions that they should be asked. First, young children cannot accurately attribute motives to others. Children do not perceive aggressive or insincere motives, which explains why a child might not flee from an aggressor. [See Note 59 below] Young children generally believe that adults are always sincere. [See Note 60 below] For example, a child could not accurately answer a question such as: "Do you think he meant to put his finger in your bum?" or "Did he enjoy putting his finger in your bum?" Second, a child cannot speculate about what someone else may have seen or heard. A pre-school child could not accurately answer a question such as: "Do you think your friend heard the screaming too?" The child will only know what he or she heard personally. Third, young children are not aware how their body language and behaviour affect others. Observing a young child's demeanor when answering questions is important, since their body language will not hide their true feelings. [See Note 61 below] However, children can incorrectly believe that they are telling the truth, when, for example, their memory has been altered by suggestive questioning. Nothing about a child's demeanor will accurately indicate that his answer is incorrect if he believes that the answer is correct. [See Note 62 below]

Note 57: Saywitz, supra note 8 at 122.

Note 58: Feldman, supra note 15 at 227.

Note 59: Saywitz, supra note 8 at 122.

Note 60: Handbook, supra note 6 at 14.

Note 61: Feldman, supra note 15 at 227.

Note 62: M. Winter, "Children as Witnesses" (1998) 26 Human Ecology Forum 9 at 10.

¶ 39 Young children are unable to reason logically or abstractly. This means that pre-schoolers often have difficulty accurately attributing causation. [See Note 63 below] Young children may offer strange explanations or draw implausible inferences. For example, if a church bell rings every day while Sesame Street is on television, a young child may assume that Sesame Street causes the bell to ring. Despite the inaccurate inference, the child's rendition of the facts that form the basis for these explanations and inferences will generally be quite accurate. [See Note 64 below] The bell did ring while Sesame Street was on. When eliciting evidence from a child, care should be taken to avoid asking "why" questions. The child may provide bizarre answers to those questions, which will unfairly affect the child's credibility.

Note 63: Handbook, supra note 6 at 30, 39.

Note 64: Saywitz, supra note 8 at 122-123.

¶ 40 Young children can only focus on one idea at a time. As a result, questions should be kept very simple and each question should contain only one idea. "When and where was the first time you saw the man?" would be a question that is too complex for a pre-schooler. Another common type of double question is: "Are you saying it happened because it did or because your mommy told you that it did?" These questions actually contain two questions, but a pre-schooler can only focus on one part at a time. [See Note 65 below] The child will answer one part of the question, but will likely not say which part of the question they are answering. The only response may be "yes" or "no".

Note 65: Handbook, supra note 6 at 34-35.

¶ 41 Additionally, there are questions that appear to ask only one question, but which in fact ask many, such as "Do you remember" questions. "Do you remember" questions are very complicated and difficult to process. Consider the following: "Do you remember going for a drive with your father last Saturday?" This question appears to ask for only one piece of information. However, to answer it, the child must remember what happened last Saturday, what they did with their father, and the drive itself. If the event happened on Sunday, then the child must recognize that fact. The child must also figure out that the questioner must be corrected. Finally, the child must answer a modified version of the question. If the child can remember what happened on Saturday, but not the drive, then the child must figure out that they must say this.

¶ 42 Two other types of questions require concentration on several ideas at once. Any question that uses more than one verb tense will confuse a child. A simple question like "Did Mary ask you who I am?" uses both present and past tenses. A child may not recognize, or may not be able to interpret, the two tenses and may interpret the question as asking whether "Mary" is currently asking the question. [See Note 66 below] Another type of question that can confuse children is the "tag question". Tag questions make a

statement and tag a question onto the end. "It is true, isn't it?" is a tag question. This type of question requires several mental operations to process. [See Note 67 below] Young children have difficulty doing all these operations simultaneously, which can cause them to misinterpret the question.

Note 66: Ibid. at 39.

Note 67: Tag questions require the witness to complete at least seven mental tasks before answering. For a full discussion, see ibid. at 38.

¶ 43 If a child is asked a question that requires any use of reasoning or conscious thought to answer, it is advisable to ascertain his reasoning skills. Having a child elaborate or explain his thoughts leading up to an answer can bring errors in logic to the surface. [See Note 68 below] This ensures that a questioner understands that the child's answer is the result of poor reasoning skills, rather than an attempt to deceive.

Note 68: Saywitz, supra note 8 at 123.

C. Middle Childhood (ages 7 to 10)

¶ 44 The period of middle childhood lasts from about age seven to the onset of puberty at about age eleven. School aged children have a more sophisticated use of language and better reasoning skills than pre-schoolers. Sometimes, their use of language and their understanding appear similar to those of adults. School aged children can be very good witnesses. However, although they may sound like adults, their "adult-like" conversations may be the result of emulation, rather than a mature grasp of language and ideas.

¶ 45 Children in middle childhood face many of the same linguistic and cognitive challenges as pre-schoolers. Linguistically, they continue to have difficulty with negatives and the passive voice or other more advanced verb tenses. Questions that use more than one verb tense also confuse them. They may have difficulty with less common words, jargon or legal terms. They often misinterpret abstract or vague terms. School aged children also face many of the cognitive limitations found in pre-school children. They can carry out logical reasoning but only at concrete levels. Their memory is highly functional but continues to be susceptible to suggestion. They continue to have difficulty understanding time and space in unfamiliar or complex situations. They also have difficulty establishing causal relationships. [See Note 69 below] Nevertheless, in many aspects, children in middle childhood have made great advances over children in the pre-school stage.

Note 69: Flavell et al., supra note 16.

(i) Linguistic Development in Middle Childhood

¶ 46 The language children use during this period can sound very much like that of adults. The grammar of a well educated child of this age is generally correct. [See Note 70 below] However, children in middle childhood still have difficulty with the conditional and passive voices until the end of this stage, [See Note 71 below] which may lead to misunderstanding of questions. [See Note 72 below]

Note 70: Cole & Cole, supra note 25 at 309.

Note 71: Ibid.

Note 72: Handbook, supra note 6 at 30-31.

¶ 47 During this period, a child's vocabulary continues to grow. The average child will learn another five thousand words during this stage. [See Note 73 below] While this is a slower rate of vocabulary growth than for pre-schoolers, it reflects the fact that school aged children do not have the vocabulary of adults. Accordingly, adults must be careful to ensure that children understand the words the adults use. If the word is not common, the questioner should have the child use it in a sentence to ensure that the questioner and witness give it the same meaning. Jargon and legal terms should be avoided because it is unlikely that a school aged child will have much exposure to those types of words. [See Note 74 below] School aged children may not know the name of a colour if it is not red, orange, yellow, green, blue, purple, black, brown or white. [See Note 75 below] All the colours they see may be expressed in those terms. For example, a school aged child might say "tan" is "light brown." [See Note 76 below]

Note 73: Cole & Cole, supra note 25 at 309.

Note 74: Handbook, supra note 6 at 27-28.

Note 75: Saywitz & Camparo, supra note 12 at 829 (Figure 3).

Note 76: Ibid. Also, it should not be assumed that young children know all the primary colours. Even older children may not know less common colours such as mauve or turquoise.

¶ 48 Like pre-schoolers, school aged children frequently misinterpret questions involving negatives. Until about nine years of age, children may still apply negatives to the wrong part of the sentence. For example, a child asked "Could you see he was not home?" may interpret the question as "You could not see that he was home?" In addition, children at this stage may not understand that the negative form of a word is different from its usual form. To them, the word "unresponsive" may mean the same as

"responsive". School aged children also have great difficulty with multiple negatives. [See Note 77 below]

Note 77: Handbook, supra note 6 at 32.

¶ 49 Complex sentences pose problems for school aged children. During this stage, children develop the ability to think about more than one idea at a time. However, school aged children still lack the linguistic skills to put all the parts of the sentence together correctly. Also, their short term memory may not be developed enough to allow them to remember the beginning of a long question by the time the questioner has reached the end. [See Note 78 below] It is still important to keep questions simple and to the point. Long questions should be replaced by several short ones. [See Note 79 below] School aged children will understand questions better if questioners phrase them in the subject-verb-object order. Until they approach adolescence, children probably cannot interpret pronouns that precede the referring noun. [See Note 80 below] Also, school aged children still frequently misunderstand complex sentences that contain "Do you remember?" or tag questions. [See Note 81 below] Lawyers and investigators should avoid those types of questions.

Note 78: Ibid. at 35.

Note 79: Saywitz & Camparo, supra note 12 at 828 (Figure 2).

Note 80: Handbook, supra note 6 at 37-38.

Note 81: Ibid. at 37-38.

¶ 50 School aged children have made several linguistic advances over pre-schoolers. They no longer interpret words very literally, as pre-schoolers do. They understand generalizations and they can give more than one meaning to a word. A school aged child understands that a person's "house" can be an apartment and that you can "touch" something with a part of your body other than your hand. [See Note 82 below]

Note 82: Ibid. at 11.

(ii) Cognitive Development in Middle Childhood

¶ 51 Children make substantial gains in cognitive development during the school age phase. They become aware of differing perspectives, which allows them to consider more ideas. School aged children develop logical thinking, which allows them to reason and solve problems. Logic also allows them to predict events and foresee some consequences.

[See Note 83 below] They employ logical operations before they can identify or understand them. [See Note 84 below] However, school aged children cannot apply logical processes to abstract ideas. [See Note 85 below] This means that a child can reason about the consequences of running across the street, but he cannot theorize about the importance of traffic laws. When asking school aged children questions that require them to use logical thinking to predict events or consequences, giving examples is important. Children are more likely to give an accurate answer to the question "What if you told a lie?" than "What happens when people tell lies?".

Note 83: Feldman, supra note 15 at 487.

Note 84: Cole & Cole, supra note 25 at 304-305.

Note 85: Feldman, supra note 15 at 485.

¶ 52 The improved reasoning skills of school aged children help them answer questions in several ways. They can recognize similarities and differences between groups of objects or events. [See Note 86 below] Children at this stage can say whether something was "like" something else. They can say that one person was "taller" or "shorter" than another. They can also begin to compare time periods with other time periods with which they are familiar, such as the length of recess or a television program. [See Note 87 below] There are several common periods of time that school aged children now understand. They know the seasons and understand the difference between them. School aged children also learn the days of the week, and later in this stage, the months of the year. [See Note 88 below] This knowledge allows school aged children to give information to questioners that pre-schoolers cannot. School aged children can use reasoning skills to help isolate dates. A school aged child can reason "I was wearing shorts, so it must have happened during summer", or "The news was on, so it must have been around six o'clock". [See Note 89 below] This information can be useful.

Note 86: Handbook, supra note 6 at 11.

Note 87: Park & Renner, supra note 2. See also Handbook, supra note 5 at 43 and Saywitz, supra note 8 at 122.

Note 88: Saywitz, supra note 8 at 121-122.

Note 89: Ibid.

¶ 53 However, school aged children cannot accurately estimate distances or sizes. For example, it was not appropriate to ask a ten-year-old child: "How wide were the windows at Pizza Joe's?" And when the child could provide no answer, it was not meaningful to ask as a follow-up question: "Compare it to the screen [that is blocking the view of the accused] in front of you. How wide would the window be in comparison to the screen?". [See Note 90 below] The fact that a ten-year-old child cannot answer this type of question should not be a basis for discounting the child's testimony. The child's inability

to answer such a question accurately will rarely have forensic significance, and will not support the spurious argument that this inability to answer reflects the accuracy of the child's memory or the child's honesty.

Note 90: Park & Renner, supra note 2 at 11.

¶ 54 School aged children also have trouble comparing periods of time. [See Note 91 below] They may have difficulty constructing narratives and may relate events out of chronological order. Without assistance, narrative skills do not develop until adolescence. For example, although it was done in an Ontario court, it is inappropriate to ask a seven-year-old child: "Did you live on x street three years ago or four years ago?" [See Note 92 below] Even an adolescent would have considerable difficulty with this sort of question.

Note 91: Ibid. at 12.

Note 92: Survey, supra note 3 (a judge reporting on a developmentally inappropriate question asked by defence counsel).

¶ 55 School aged children have familiarity with numbers, but often use them in a very rough way. If an eight-year-old child who has been abused many times is asked how often this occurred, on one occasion the answer may be "fifty times" and on another "two hundred times". While counsel, on cross examination, may try to exploit this discrepancy, it would be wrong to consider it significant. The answers simply indicate that the event occurred many times.

D. Adolescence (age 11 to 18 years)

¶ 56 Children enter adolescence at about eleven years of age, but they may not complete it until as late as twenty. However, witnesses over the age of fourteen are not generally considered children for the purposes of section 16 of the Canada Evidence Act [See Note 93 below] and the corresponding sections of most of the provincial evidence statutes. When a child is under the age of fourteen, a court in Canada is obliged to have an inquiry into the capacity of the child to testify, and over that age there is an onus on the party challenging the witness to raise the issue of testimonial incapacity. Even for twelve- and thirteen-year-old children, the section 16 inquiry is generally quite perfunctory, as they are usually regarded as likely to be legally competent witness.

Note 93: Supra note 5.

¶ 57 However, up to age fourteen, adolescents may still have many of the cognitive capacities and linguistic capacities of school aged children. Children over fourteen continue to have many characteristics of adolescents. Even after age fourteen, their level of development is not equal to that of adults. It continues to be important to keep the stage of development in mind when questioning an older adolescent witness. Although witnesses over the age of fourteen are presumed to be competent, keeping their development in mind when asking questions will increase the accuracy of their testimony.

(i) Linguistic Development in Adolescence

¶ 58 Adolescents are very close to achieving the mastery of language that adults enjoy. Continued development during this stage is dependent on education. At school, adolescents learn narrative skills and complex grammar. Experience with reading may allow them to interpret long, complex sentences. Without continued education, adolescents will pass into adulthood still at a school aged level of linguistic development. [See Note 94 below]

Note 94: Handbook, supra note 6 at 4.

¶ 59 There are some areas where adolescents are continuing to develop. Their vocabulary continues to grow and they develop the ability to figure out the meaning of a word from its context or by making reference to familiar words. [See Note 95 below] However, because of their lack of experience with legal phrases and jargon, those terms may still be misunderstood. Questioners should avoid legal terminology. [See Note 96 below] Adolescents still struggle with complex forms of negation that involve multiple negatives or phrases where a negative must be applied to a different clause in the sentence. [See Note 97 below] They will probably not fully understand the passive voice until the end of this stage. Questions should be stated so that every verb has a clearly expressed subject. [See Note 98 below]

Note 95: Cole & Cole, supra note 25 at 676.

Note 96: Handbook, supra note 6 at 28-29.

Note 97: Ibid. at 32.

Note 98: Ibid. at 31-32.

(ii) Cognitive Development of Adolescents

¶ 60 During adolescence, children learn to think abstractly and understand generalizations. This increases their ability to solve problems. It also allows them to think about hypothetical situations and to contemplate how others think about them, as well as how they think about others. [See Note 99 below] This in turn allows them to speculate

about the motives of other people. The ability to consider abstract concepts allows adolescents to think about ethics and answer questions about whether an action was right or wrong. [See Note 100 below] Adolescents also become aware of their own thinking processes, which allows them to exercise more judgment in terms of how they act and answer questions.

Note 99: Cole & Cole, supra note 25 at 668.

Note 100: Ibid.

¶ 61 In later adolescence, children can accurately estimate times, distances and physical dimensions using measured units. [See Note 101 below] Adolescents also have a better sense of time than younger children. This allows them to estimate the date on which an event occurred when they cannot remember it exactly. However, they are much less likely than adults to take note of dates because they pay less attention to how time progresses around them. [See Note 102 below] That an adolescent did not note the date and time an event occurred should not affect her credibility as a witness.

Note 101: Park & Renner, supra note 2 at 8 (Table 1).

Note 102: Handbook, supra note 6 at 4.

¶ 62 It is also important to consider the adolescent's emotional and social development. Confusing or embarrassing questions can cause a reaction that may have negative effects; such questions can lead to a refusal to answer, an evasive or inaccurate answer or to an emotional outburst.

E. Summary of Child Development and Capacity to Answer Questions

¶ 63 Children have different speaking and thinking abilities than adults. Their stage of development will affect their ability to understand and answer questions. To maximize the accuracy of the evidence of children, they should be asked questions that are appropriate to their linguistic and cognitive skills. The chart on page 279 summarizes the information about the types of questions that cause problems for children of different ages.

¶ 64 It must also be remembered that a child who is upset may "regress" and be unable to understand or accurately answer a question which he might have been able to answer in a less threatening situation. Questioners should be sensitive to the fact that they might have to use simpler questions than this chart suggests if the child is upset. In court, many children will actually appear to be functioning at a lower level than suggested in the preceding discussion of child development.

¶ 65 It must also be emphasized that each child is unique. Information about linguistic and cognitive development is not only affected by a child's age and capacities, but also by education, home environment, culture and developmental delays.

¶ 66 It can be difficult to determine a child's level of development in every area. A child may be at a higher level of development in one area and a lower level in others. It is not possible to set specific age ranges where certain questions are inappropriate. Determining exactly what types of questions are appropriate requires consideration of the capabilities of each child witness.

> [Quicklaw note: Please see paper copy for graph titled "Words and Concepts that Cause Difficulties for Children".]

II. Suggestions for Questioning Child Witnesses

¶ 67 Obtaining accurate information by questioning children is a challenging task, but with education, sensitivity and practice, justice system professionals can learn to question a child witness effectively. Whether in or out of the courtroom, the questioner needs to be aware of several different concerns while asking questions. To ensure that a child gives accurate answers, questioners must not only consider the child's level of development and the phrasing of the questions, but also their own body language and the issues that the questioner wishes to cover.

A. The Introductory Phase of Child Questioning

¶ 68 Investigators and psychologists have developed a technique that can prepare children to provide more accurate and complete answers. [See Note 103 below] This technique is frequently used in investigative interviews and could be employed in a courtroom as well. The technique of questioning a child witness about neutral events to prepare them to testify has been called a "pre-interview". [See Note 104 below] This is not an accurate term because the technique is properly used at the start of an interview or when the child first enters the witness box. The technique refers to an introductory phase of the questioning, in which the questioner starts by asking the child about forensically unimportant events.

Note 103: R.P. Fisher & M.R. McCauley, "Improving Eyewitness Testimony With the Cognitive Interview" in M.S. Zaragoza et al. eds., Memory and Testimony in the Child Witness (Thousand Oakes: Sage Publications, 1995) 141 at 145.

Note 104: M.E. Lamb, K.K. Sternberg & P.W. Esplin, "Conducting Investigative Interviews of Alleged Sexual Abuse Victims" (1998) 22 Child Abuse and Neglect 813 at 818-819.

¶ 69 The goal of this introductory phase of questioning is two-fold. First, it allows the questioner and the court to evaluate the level of development of the child. Using this technique will help in the assessment of whether a child is able to function as a witness. If the child can function as a witness, it allows an assessment of what types of questions are inappropriate for the child's level of development. Second, asking questions about a non-threatening event allows the child to become more comfortable with the questioning process and more relaxed in the surroundings, which should enable the child to give more accurate answers. At this time, the questioner can also instruct the child about the importance of giving longer and more descriptive answers and also give the child some practice in doing so.

¶ 70 The technique used in the introductory phase of questioning, or the "pre-interview", is relatively simple. The questioner selects one or more events about which to question the child. These should be events that the child will enjoy talking about, but which have no relevance to the current proceedings. The child's last birthday party or holiday are some popular choices because they will likely have made an impression on the child. This allows the questioner to test the child's ability to remember an event and to report what is remembered. The event is also chosen because it is one that a child will feel comfortable and happy to talk about, allowing the questioner to build rapport with the child. [See Note 105 below]

Note 105: Ibid. at 819.

¶ 71 This rapport is important for several reasons. First, children, especially young children, may be shy. They may not like to talk with strangers. If a stranger asks them questions, they will either not answer or give very short answers. Discussing a "happy event" with the child allows the child to become familiar with the questioner. A child will be more willing to befriend someone who talks about pleasant topics than someone who talks about unpleasant ones. It is hoped that the child will "open up" to the questioner. If the questioner becomes a "friend", then the interview room or courtroom may be a less intimidating place for the child. Even if the child has previously met the questioner, for example a Crown Attorney who has met the child sometime before the hearing date, the introductory phase will be important to allow rapport to be re-established and to allow the child to become comfortable in the surroundings.

¶ 72 The introductory phase also gives the questioner an opportunity to "teach" the child how to answer questions. Children tend to give short answers, to some extent because they do not know how to string pieces of information together into a long narrative. Since the subject of this introductory phase is forensically irrelevant, it does not matter if the questioner uses focused questions or directs the child about which pieces of information the questioner wants to hear. The questioner can attempt to teach the child witness that answers should include a "who", a "what", a "where", a "when" and possibly a "how". [See Note 106 below] During the introductory phase of questioning, children can practice and develop these techniques. Later they may use them to construct longer,

more detailed answers when they are questioned about the events at the heart of the investigation or proceeding.

Note 106: Saywitz, supra note 8 at 128-129.

¶ 73 During this stage children can also be taught that "I don't know" and "I don't understand" are not only acceptable, but very appropriate answers to questions. For example, at this stage children may be asked questions to which they do not know the answers and also can be "corrected" if they "guess" an answer. Children should also be encouraged at this stage to ask for clarification or an explanation of questions that they do not understand.

¶ 74 It will be useful for the questioner to have spoken to a parent or guardian to learn about the events that are the subject of this initial questioning in order to assess how accurately the child is able to remember and report about events. During the questioning about forensically irrelevant, but known, events, the questioner can test how the child's level of development affects her ability to answer different types of questions. [See Note 107 below] The question, "how many presents did you get?" may test the child's understanding of numbers. "How long was your party?" followed by "how do you know?" could test the child's ability to quantify time. "What colour was the wrapping paper on your presents?" can test a child's knowledge of colours. "Did anything happen that you did not expect?" could test a child's ability to deal with negatives. A carefully constructed introductory phase to testimony can provide the questioner, and the court, with information about a child's level of linguistic and cognitive development in several areas. That information can then be used to create appropriate questions for the child.

Note 107: Lamb et al., supra note 104 at 819.

¶ 75 The court and counsel can also use the information gathered during the introductory phase to evaluate the questions that the child is asked when testifying about the legally significant event. Based on the court's observations of the child's ability to respond to different types of questions, if a judge feels that a child could not answer a question meaningfully, the judge can ask that the question be rephrased. For example, counsel might argue that the court should give no weight to the child's answer about the height of an abuser because the child demonstrated an inability to estimate accurately the height of someone in the court room during the introductory phase of questioning.

¶ 76 With younger children, some "introductory phase" inquiry is already made to assess the capacity of the child to testify, under section 16 of the Canada Evidence Act. This inquiry, however, focuses on the issues of whether a child understands the nature of an oath, and failing that, whether the child is "able to communicate the evidence" in court and can testify on "promising to tell the truth". It is not uncommon to ask a young child

who does understand the nature of an oath "simple questions" about an event like a birthday party or school attendance in order to determine the child's ability to communicate. However, the focus of this inquiry is to determine whether a child meets the minimum threshold of testimonial competence, and once this is established the inquiry ends.

¶ 77 The type of introductory phase to questioning of child witnesses proposed here is broader in purpose and scope than the present section 16 inquiry. In appropriate cases, a child might be ruled incompetent to testify, but if the child is ruled competent, as is commonly the case, the inquiry could be used to shape and assess the questions during the testimony about the matters at issue.

¶ 78 Legislative reform that not only allows for, but indeed requires, this type of introductory phase to the questioning of a child witness is desirable. However, there is no reason that counsel who is calling a child witness or a judge who is conducting a section 16 inquiry under the present Canada Evidence Act cannot have an introductory phase to questioning, such as that described above, when the child first takes the witness stand.

B. Suggestions for Questioning Children In and Out of Court

¶ 79 Ideally, the stage of development and capacities of a child witness should be determined during an introductory phase to questioning. Under the present legal regime, this may not be possible, since a judge might view this type of questioning as "irrelevant" or a "waste of the court's time". In that case, a questioner should assume that a child has only limited abilities and begin with simple questions. Before asking more "advanced" questions, the questioner should make sure that they are appropriate for the child witness.

¶ 80 The suggestions set out here are appropriate for younger children, and a good starting point for any child. Older children who display greater competence may be asked more complex questions.

-- Keep sentences in the subject-verb-object order. Do not embed phrases within that order.

-- Do not use the passive voice. Young children rarely understand it.

-- Keep questions short. Be sure that each question has only one idea.

-- Avoid using "do you remember . . . " questions.

-- Do not use tag questions. Examples of tags in questions are: "didn't you?" or "isn't it true that . . . "

-- Avoid using negatives. Asking a child, "didn't you go to the store?" may result in an incorrect response. It is preferable to ask a child, "did you go to the store?"

-- Avoid using the negative forms of words. A child might not understand the sentence that uses the word "incorrect", but the same child would be more likely to understand the sentence that uses the word "correct".

-- Avoid pronouns. Repeating the noun when questioning children is always better. For example ask: "when John arrived at school, was John late?", instead of, "when he arrived at school, was John late?"

-- Describe an object or place in relation to objective criteria. Do not ask, "did you go over there?". What is meant by "there" depends on who is asking the question. Ask, "did you go to the park.?"

-- When using any word that has a critical meaning, such as the names of genitalia, make sure that both the child and the questioner share the same meaning for the word. To check the child's definition for a word, ask the child to use it in a sentence. Use the child's terminology in asking questions.

-- If at all possible, use simple everyday terms instead of more complex ones or jargon. It is not just legal terms, like "hearsay", that cause problems for children, but also words like "altercation", "reside" and "previous statement". For example, instead of "proceed", use "go to"; instead of "the accused", use the name of the person.

-- Use concrete terms over general or hierarchical terms. For example, ask a child if he saw a "knife" rather than a "weapon". Children deal poorly with any type of abstraction.

-- Do not ask school aged or younger children to answer questions that involve abstract ideas like "justice" or "love". [See Note 108 below] Until adolescence, children cannot think in the abstract.

-- Avoid asking children to speculate. If speculation is necessary, use concrete hypotheticals such as, "what would happen if you rode your bike too fast around a corner?".

-- Remember that young children cannot determine another person's motives, no matter how obvious they may seem.

-- Do not use sarcasm. Children cannot understand it.

-- Children's understanding of time, space and size is dependent on their level of development. Only older children should be asked to estimate these quantities in terms of concrete units. School aged

children can probably compare quantities to other quantities they know. Pre-schoolers can only say that something is "big" or "small," "long" or short". An inaccurate answer can result from expecting a more accurate appraisal of time, space or size than a child is able to make.

-- Let the child know that he should tell the questioner when he does not understand a word or question. However, always remember that children are often unaware they have misunderstood. A child's failure to say that he did not understand a question should not be taken as an indication that he has understood it.

-- Either in an interview or in court, children should never be told that they cannot have a break or go to the bathroom until all the questions are over. Children who want, or need, a break will give the answers they think the questioner wants to hear, regardless of the truth, just to "get it over with".

-- Avoid asking exactly the same question more than once. Asking a child exactly the same question more than once may make the child think their first answer was incorrect, which can lead to inconsistent answers.

-- Questioners should refrain from praising particular answers. This gives the child a cue about which answers are "helpful". Children generally want to please adults and so they may provide "helpful" answers regardless of whether they are true.

-- Help the child to relax. Relaxed children can remember and relate events better than children who are experiencing stress.

-- Avoid topics that may unnecessarily upset children. Telling young children that they may not see their parents for a while is likely to upset them. School aged children may be afraid of death. Conversations about being disabled or disfigured will upset adolescents.

-- Speak slowly and clearly.

Note 108: Young children should not be asked questions that require a discussion of abstract concepts like "truth". Though judges generally think that some discussion of "truth" is required for an inquiry under s. 16 of the Canada Evidence Act, supra note 5, it is much preferable to ask a young child to identify in concrete examples a "truth" or a "lie" than to ask general definitional questions about these concepts. In the Survey (1999), supra note 3, respondents reported on children who were asked to explain the meaning of "perjury" and the "nature of God" during inquiries into their testimonial competence. These types of questions are not appropriate for a child.

C. Questions for Child Witnesses in Court

¶ 81 In court, counsel and the judge should try to ensure that the questions asked of a child witness are developmentally appropriate for that witness. For the most part, following the above general guidelines will help counsel formulate questions that child witnesses can understand and answer. However, there are a few points that are especially important for counsel who will be calling a child as a witness.

-- Prepare the child to testify. [See Note 109 below] Counsel who will be calling a child as a witness should always meet with the child at least once before the day that the child will testify. With young children, several meetings may be required. [See Note 110 below] At these meetings, counsel should: develop a rapport with the child; assess the child's level of development and determine what types of questions will be appropriate; determine whether it will be appropriate to make an application to the court to have the child testify by closed circuit television or from behind a screen [See Note 111 below]; and ensure that appropriate arrangements have been made to support the child though the trial process. [See Note 112 below]

-- Counsel should encourage the child to give answers to open-ended questions that are as long as possible and practice this with counsel. The child should know that she should try to talk about "what", "where", "when" and possibly "who". Children who can speak spontaneously about alleged events are much more credible as witnesses.

-- Make sure the child is comfortable with what will go on in court beforehand by ensuring, for example, that a young child is encouraged to bring a "comfort toy" or blanket. This will allow the child to be more relaxed when testifying.

-- Make sure child witnesses understand words they will hear in court. Remember that to a child the word "swear" often means "saying bad things". This is complicated by the fact that many parents have told their children "not to swear". Also, prepare the child for court by explaining the names of people and objects in the courtroom so the child will know who or what they are.

-- Child witnesses are often asked questions with religious significance during the capacity test under section 16 of the Canada Evidence Act. Knowing a child's religious beliefs will allow counsel or the judge to ask questions during the capacity test that will accurately

elicit the child's understanding of these religious concepts. A discussion with a child witness about religious education and beliefs will also make the capacity test go more smoothly.

-- Remember that the word "promise" is a special word. To ensure that a child understands it properly, the word "you", referring to the child witness, should be used close to the word "promise". Using the word "will" with the word "promise" may create a greater sense of obligation for children than using "promise" alone. The best way to ask a child to tell the truth is to ask: "do you promise that you will tell the truth?".

-- At the courthouse, help the child to relax. Relaxed children remember events more accurately than children who are experiencing stress. A relaxed child will give longer, more detailed answers than a child who is upset.

-- Avoid using legal terms when speaking to or questioning a child. This can be difficult in court, where many people present understand them. However, the child almost certainly will not understand legal terms. Using them may confuse and frustrate the child witness.

-- Keep questions short and simple. This too can be difficult when counsel are "thinking on their feet" in court, but short questions can help children understand

-- Avoid questions that will arouse a child witness unnecessarily. At different stages of development, children have specific "emotional buttons" that, if pushed, can result in a strong emotional response. Such questions may upset the child and can also make it difficult to elicit accurate testimony. In court, counsel will probably only get one chance to question a witness. Getting the witness upset may squander that one chance to get the witness' testimony.

Note 109: Some aspects of court preparation can most usefully be done by non-lawyers who work at the courts, when they are available. Critical aspects of court preparation, however, should be done by the lawyer who will be calling the child as a witness.

Note 110: At present, government policies in most provinces encourage or require meetings between young children and Crown prosecutors who are calling them as witnesses. However, for a variety of institutional reasons, too often these policies are not followed. For example, in Ontario the Crown Policy Manual (1994) has a policy that strongly advises the "red flagging" of cases with young victims or witnesses, to ensure that these cases receive special attention. A study revealed that the Crown prosecutor met with a child witness in only 70per cent of the "red-flagged" cases where a child testified. See Sas, supra note 2 at 43.

Note 111: R.S.C. 1985, c. C-46, s.486 (2)(1) [hereinafter Criminal Code].

Note 112: Ibid., s. 486(1)(2); this section allows an application to be made to have a support person present and close to a child who is under 14 years of age.

III. The Role of the Courts

¶ 82 The initial responsibility for asking developmentally appropriate questions of child witnesses rests with counsel, who ask most of the questions in court. However, judges also have a critical role in monitoring and assessing questions. In some cases, experts in child development may play an important role in helping the court determine how a child's stage of development affects the child's ability to be a witness and answer various questions. Trial judges also have a very important role, and should be monitoring the types of questions that children are asked to ensure that they are developmentally appropriate. If a question is not developmentally appropriate, judges should either require it to be rephrased or withdrawn or if it has been asked, ensure that any answer that appears to discredit the child is discounted by the trier of fact.

A. Expert Testimony on Child Development

¶ 83 In some cases an expert on child development or children's memory may be called as a witness to testify about a range of issues related to the appropriate questioning of children or their capacity as witnesses. This type of evidence can be very helpful to judges, lawyers or jurors who may know little about how a child's development affects her capacity to answer questions.

¶ 84 Experts on child development can be very helpful in assessing the evidence of children. However, judges have understandably set boundaries on the type of expert evidence that they will permit. In particular, courts are generally not prepared to admit testimony that a mental health professional "believes that a child is (or is not) telling the truth", since this type of generalized credibility assessment is the responsibility of the trier of fact. Further, in some cases a court will refuse to admit the testimony of an expert on memory issues on the basis that the expert proposes to testify about a matter that is within the "normal experience of the trier of fact". [See Note 113 below]

Note 113: R. v. McIntosh (1997), 35 O.R. (3d) 97 at 97 (C.A.).

¶ 85 The 1998 decision of the Ontario Court of Appeal in R. v. M.(B.) [See Note 114 below] considered the issue of when expert testimony regarding child development and children's memory could be admitted, and applied the four general criteria for the admission of expert evidence set out by the Supreme Court of Canada in R. v. Mohan. [See Note 115 below] First, the expert must be properly qualified. To be qualified as an expert in child development, the Ontario Court of Appeal held that the witness should

have expertise in this area which may be acquired through education, research or clinical experience. In addition, a recognized body of scientific knowledge must accept and support the witness' theories. Those theories must be supported by research using the scientific method, and not merely personal opinions or clinical judgement. [See Note 116 below] Second, the evidence must be relevant. It must help the court in determining an issue before it, but not at an unreasonable cost. [See Note 117 below] Third, the expert's opinion must be necessary for the trier-of-fact to assess the child's testimony properly. The expert must have useful knowledge that ordinary people do not have. That special knowledge must affect the way that the trier-of-fact assesses the child's evidence. [See Note 118 below] Many people do not realize the extent to which a child's level of development affects a child's answers. The expert's information could be special knowledge that would help a trier-of-fact accurately assess a child's testimony. Fourth, the possible prejudicial effect of the expert evidence against a party should not outweigh its probative value. [See Note 119 below] Counsel seeking to call an expert on child development should ensure that the expert's testimony will meet these criteria.

Note 114: (1998), 42 O.R. (3d) 1 (C.A.) [hereinafter M.(B.)].

Note 115: [1994] 2 S.C.R. 9.
Note 116: Ibid. at 25.
Note 117: Ibid. at 21.
Note 118: Ibid. at 23.
Note 119: Ibid. at 33.

¶ 86 A party may want to have an expert in child development testify that the child is, or is not, competent to testify in court. Such a witness may testify about the nature of childhood memory, and whether the child can accurately perceive, remember and report an alleged event. This testimony may be useful during the court's inquiry under section 16 of the Canada Evidence Act to determine whether the child has the legal capacity to testify as a witness in court, or to determine that the child is not legally competent to testify and hence that there is a "necessity" to admit the child's out-of-court hearsay statements. [See Note 120 below] An expert in child development and memory may also be able to provide an opinion that supports the finding that a child's out-of-court hearsay statement is sufficiently "reliable", justifying its admission in court under the rule in R. v. Khan, [See Note 121 below] or is unreliable, and hence should not be admitted. [See Note 122 below] Another important function experts can play is in assessing the effect that previous out-of-court questioning now has on the in-court testimony of a child. There have been cases in which it is apparent that well-intentioned but under-trained police interviewers have subjected children to repeated, highly suggestive questioning that may have affected their memories. [See Note 123 below] In other cases, a child's therapist or a parent may have influenced a child's memory. Expert witnesses can play an important role in assisting a trier of fact to understand the effect that prior out-of-court suggestive questioning may have had on the memory of the child and on the accuracy of any testimony that the child offers in court. [See Note 124 below]

Note 120: The usefulness of an expert to discuss a child's competence as a witness is discussed in J.E.B. Myers, et al., "Expert Testimony in Child Sexual Abuse Litigation" (1989) 68:1 Nebraska L. Rev. 1 at 92-107; and F (W.J.), supra note 10.

Note 121: Supra note 14.

Note 122: R. v. L.S. [1999] O.J. No. 877 at para. 9, online: QL (OJ).

Note 123: See Michaels, and Sterling, supra note 19.

Note 124: See e.g. R. v. R.(D.), [1996] 2 S.C.R. 291.

¶ 87 While experts in child development can play a useful role in helping with a court's assessment of a child witness, there are legal and practical limitations on this type of evidence. One problem with expert witnesses is that, due to several contentious issues in this area of psychology, experts' techniques for evaluating child witnesses often go uncontested. [See Note 125 below] There is controversy about whether psychologists and other mental health professionals can help assess the validity of a child's allegations of abuse or reliably determine whether a child's behaviour is indicative of the child having been abused. [See Note 126 below] Many behaviours, including how a child answers questions, are open to several explanations and the closer that an expert's evidence comes to an assertion that the child is "credible", the more problematic this type of evidence will be.

Note 125: D.M. Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21:2 Queen's L.J. 345 at 383.

Note 126: Ibid.

¶ 88 Another problem with using expert witnesses is that the trial can turn into a "battle of the experts". Both sides call several experts to testify to contest the testimony of several experts called by the other side. The trier of fact is left with a deluge of contrasting expert opinion, which can interfere with the trier of fact's ability to make an accurate assessment of the evidence and reach a verdict. Instead of evaluating the testimony of the witness, the judge or jury evaluates the credentials, research and opinions of the experts. That assessment may replace the careful examination of the testimony of the child witness that is at the centre of the dispute. [See Note 127 below]

Note 127: Ibid. at 385.

¶ 89 This search for a second opinion raises another problem with expert witnesses: expense. The Martensville daycare cases [See Note 128 below] brought in experts from across North America. Such a far-reaching search for expert witnesses was necessary because there are relatively few respected experts in children's testimony. It is often necessary to look far afield to find an expert with the particular experience and qualifications to comment on a child's testimony. In most cases one or both of the parties lack the resources to allow counsel to call these types of experts to testify. [See Note 129 below]

Note 128: See Harris, supra note 19. One of the decisions that reveals the problems with suggestive investigative questioning of children and the role of experts is reported in Sterling, supra note 19.

Note 129: Paciocco, supra note 125 at 387.

¶ 90 Experts in child development can have an important role in evaluating the competence of a child witness, and in explaining to a trier of fact, especially a jury, how children's memory functions. Arguably an expert could be called to explain to the court that no child of the age (or stage of development) of the child who is testifying could answer some of the questions that have been asked at trial. It is apparent that even many justice system professionals are not aware of the capabilities of child witnesses, so this type of knowledge would appear to be "beyond the ordinary experience of a jury" and would be useful to them. There may also be a role for child psychologists to advise counsel about the appropriateness of questions asked of a child, allowing objections to be made. [See Note 130 below] However, the legal limitations on the role of expert witnesses and the costs of having psychologists involved in the court process will limit the extent of their involvement.

Note 130: Judge C.B. Schudson, "Special Techniques to Assist Child Witnesses in Court: The Judicial Tradition of Flexibility and Innovation" in J. Bulkley & C. Sandt, eds., A Judicial Primer on Child Sexual Abuse (Washington D.C.: A.B.A. Center on Children and the Law, 1994) 56.

¶ 91 Judges and lawyers will continue to have a central role in dealing with inappropriate questions, and in ensuring that the questioning of children is closely controlled and monitored. This requires that judges and lawyers have an understanding of the fundamental principles of child development.

B. Judicial Control and Assessment of Inappropriate Questions

i) Controlling Developmentally Inappropriate Questions

¶ 92 Asking children developmentally appropriate questions is not just a courtesy to the child. Inappropriate questions can lead to inaccurate answers. The Supreme Court of Canada has clearly indicated that children should not be asked developmentally inappropriate questions, and if they are, any deficiencies in their answers should not be used to discredit them. It does not matter whether those questions were asked during examination-in-chief or cross-examination. [See Note 131 below]

Note 131: Fisher & McCauley, supra note 103 at 148.

¶ 93 The Supreme Court of Canada has recognized that the level of development of child witnesses affects the way they answer questions. In assessing the evidence of children, the court needs to consider more than just the answers they give. In R. v. B.G., [See Note 132 below] Madam Justice Wilson recognized that a child's level of development should be an important consideration in assessing the child's testimony:

> ... a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult . . . While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the reasonable adult' is not necessarily appropriate in assessing the credibility of children. [See Note 133 below]

Note 132: [1990] 2 S.C.R. 30.
Note 133: Ibid. at 54-55.

¶ 94 It is important to consider how development affects the way children answer questions. In R. v. W.(R.), [See Note 134 below] Madam Justice McLachlin recognized that there has been a change in judicial attitudes and agreed that the abilities of each child witness need to be considered when deciding a case. As Madam Justice Wilson emphasized in B.(G.):

> The evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant is an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid

> stereotypes, but on what Wilson, J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. . . [e]very person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. [See Note 135 below]

Note 134: [1992] 2 S.C.R. 122.
Note 135: Supra note 132 at 267.

¶ 95 In her recent decision in F.(W.J.), Madam Justice McLachlin commented on the "absurdity of subjecting children to examination on whether they understand the religious consequences of the oath." [See Note 136 below] She clearly recognized that this type of question about abstract concepts is not developmentally appropriate for a child.

Note 136: Supra note 10 at para. 42.

¶ 96 Treating children in a way that is appropriate to their level of development involves asking questions appropriate to their level of development. When a child is asked a developmentally inappropriate question, the child's answer may not be accurate. Not only can these questions confuse the witness and result in misleading answers, they can also unfairly discredit the witness. A child's testimony should not be discounted due to inconsistent answers to a few questions that the child did not understand. Children should have the opportunity to tell what they know about an alleged event by answering questions that they can understand. Only if a child gives poor answers to appropriate questions should their testimony be discredited.

¶ 97 Counsel should object to inappropriate questions. Whether or not counsel objects, judges should require that questions be asked in a manner that can be understood and answered meaningfully by a child witness. In R. v. L.(D.O.), [See Note 137 below] Madam Justice L'Heureux-Dubé, writing for the entire Supreme Court of Canada on this point, gave judges the authority to intervene whenever a child is asked inappropriate questions. She wrote:

> It is my view that, in the case at hand as well as in other cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the

> child is relaxed and calm. The trial judge, in this case, did not prevent the mounting of a proper defence, nor did he demonstrate favouritism toward the witness in such a way as to preclude a fair trial. I find that the trial judge in this instance did nothing more than "intervene for justice to be done". [See Note 138 below]

Note 137: [1993] 4 S.C.R. 419.

Note 138: Ibid. at 471 [emphasis added]. See also the concurring opinion of L'Heureux-Dubé, J. in F.(W.J.), supra note 10.

¶ 98 Not only is a judge permitted to require counsel to ask questions in a manner consistent with a child's level of development, but the judge has a duty to do so. If the judge does not realize that a question is inappropriate, opposing counsel should object to the question before it is answered. If a "pre-interview" or introductory phase of questioning was conducted at the outset of the child's testimony, the court or counsel may have a clear basis for asking that an inappropriate question be rephrased or withdrawn. According to Madam Justice L'Heureux-Dubé, the same approach applies to questions that unnecessarily upset a child witness by "adding to the tension" that the child experiences. Such an intervention ensures that the child witnesses are able to tell their story accurately in court.

¶ 99 Asking developmentally appropriate questions will allow children to give "strong" testimony that will be the "solid foundation for a verdict" described by Madam Justice McLachlin. Children understand developmentally appropriate questions, so they can provide accurate answers to them. The court does not have to wonder whether the child understood the question or what the child's answer would have been had understood the question. The court has a clear version of the child's story to consider when reaching a judgment. Unfortunately, questioners do not always ask developmentally appropriate questions.

¶ 100 It is also possible that the judge or counsel will not react to an inappropriate question before the child answers. In R. v. C.C.F., [See Note 139 below] the court faced a situation in which some of the evidence on cross-examination of a six-year-old girl was inconsistent with her videotaped statements in a pre-trial interview regarding some "peripheral details". Mr. Justice Cory, writing for the Supreme Court, wrote:

> A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight which should be attached to the videotape and not its admissibility. [See Note 140 below]

Note 139: [1997] 3 S.C.R. 1183.
Note 140: Ibid. at 1205.

¶ 101 In that decision, the court gave little weight to questions that may have "confused" the child and it was able to convict the accused. The Supreme Court's decision in C.C.F. suggests that when counsel ask child witnesses confusing or inappropriate questions, judges may give the answers to those questions little or no weight. In a jury trial, the judge may instruct the jury that they can do the same. Little advantage should be gained by eliciting inaccurate or contradictory statements from a child through inappropriate questioning.

¶ 102 A child's inaccurate or inconsistent answers should be given little weight if the problems with the child's testimony are due to poor questioning rather than the child's memory. In order to discredit a child witness, counsel should show that errors in the child's story exist despite proper questioning. There is a clear legal basis for judges to intervene when they believe that a child is being asked inappropriate questions. This is necessary to prevent the admission of inaccurate evidence that could mislead the court. The judges could base this intervention on the information gathered during an introductory phase of questioning like that described above. If the judge does not think that the child could understand a question, the judge should require counsel to rephrase it. If the judge believes that a child could not meaningfully answer a question, the question should be disallowed. If a child does give an answer to a developmentally inappropriate question, the judge should assign little or no weight to those statements. A child's answers to such a question may be inaccurate, confusing or inconsistent and may not be a true reflection of what the child knows or remembers.

ii) Controlling Questions that are "Just Wrong" for Children

¶ 103 In the course of examining witnesses, lawyers sometimes ask questions that appear offensive. For example, counsel may accuse a witness of being a liar, or may suggest that the alleged victim of a sexual assault consented to the abuse, or that the victim of an assault provoked the attack. Given the enormous consequences of the court process and the often intimate or personal nature of the incidents explored, there is a place in the justice system for questions that may be embarrassing or even offensive. However, there is a need for special sensitivity on the parts of lawyers and judges when a child is being asked questions that seem especially humiliating or insulting. The need to control potentially offensive questioning of children most commonly arises in the context of cross-examination. It should be appreciated that lawyers often do not plan their questions to be offensive. Some poor questions simply "slip out" because the lawyer has not given the subject or phrasing of the question enough thought.

¶ 104 In a British Columbia case, a child was asked in court: "did you enjoy the anal intercourse?". [See Note 141 below] Many people believe that this type of questioning is emotionally abusive for children and "just plain wrong". Unnecessarily insulting or

aggravating questions can produce an emotional reaction in the child that hinders the child's ability to answer accurately. The emotional effects of certain questions may make them inappropriate.

Note 141: Children as Witnesses, supra note 2 at 3. An Ontario judge also reports a case in which defence counsel asked an eight-year-old child whether she "liked" a sexual assault: Survey, supra note 3.

¶ 105 Testifying in court is usually a negative experience for child witnesses. It can cause them considerable anxiety, even terror, and disrupt their lives. [See Note 142 below] Many child witnesses experience a decline in school performance during testifying. [See Note 143 below] Child witnesses find cross-examination to be an extremely negative experience. In a London Family Court Clinic study, child witnesses reported specific aspects of their court experience that they found particularly unpleasant. They said that they were confused by lawyers using complex sentences and vocabulary. They resented accusations that they were lying or had enjoyed being abused. The children felt that defence counsel were attacking them, but no one would help them. [See Note 144 below]

Note 142: L. D. Sas, et al., Three Years after the Verdict:

A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project (London, Ont.: Child Witness Project, London Family Court Clinic, 1993) 113 at 168. [hereinafter Three Years After the Verdict].

Note 143: Ibid. at 146.

Note 144: Ibid. at 111, 117-118.

¶ 106 Many insulting questions asked of children in the courtroom are also inappropriate for their cognitive and linguistic level of development. One five-year-old boy in a Nova Scotia trial was asked how many times he had been abused. He said twenty-five times. Previously, the boy had told the police that he had been abused five times. The lawyer then proceeded to impeach the child's testimony. [See Note 145 below] Pre-school children, such as this five-year-old boy, do not understand the concept of numbers. They may not know that each number represents a specific quantity. From a young child's perspective, the boy's answers, "five" and "twenty-five", suggested several occurrences, not a specific number. The question about exactly how many times he had been abused was developmentally inappropriate. As a result, the answer seemed inaccurate.

Note 145: K.E. Renner and L. Park, "Documenting the Outrageous for Children", online: <http://www.carleton.ca/[tilde]erenner/nsap.html> (date accessed: 7 September 1998).

¶ 107 In a British Columbia case, a defence counsel attempted to impeach a child's testimony by asking: "I'd like to suggest to you that you are lying. Isn't it true that you have lied before? I would like to suggest that you are lying now." [See Note 146 below] The questions about whether the child thought that he was lying were also developmentally inappropriate. They contained complex sentence structures that a five-year-old would probably not understand. They used tag questions, switched verb tenses, asked about an abstract idea and posed several questions at once. The child probably could not answer these questions. The child's stumbling in answering an "are you lying" question could negatively affect the child's credibility. In addition, children become upset when counsel accuses them of lying. Impeaching children on their answers to questions that they could not understand is unfair and leads to inaccurate responses. Counsel may try to use apparent inconsistencies or inaccuracies to discredit or dismiss all of the child's testimony. A child's recollection of events should be tested in cross-examination, not his ability to understand inappropriate questions.

Note 146: Children As Witnesses, supra note 2 at 3.

¶ 108 It is also important to recognize that when counsel ask confusing or insulting questions, a child witness can become upset, and emotional arousal can cause a child to give inaccurate testimony. Children have agreed with a lawyer's suggestion that they were lying, not because they were, but because they wanted to get off the stand. [See Note 147 below] It is important to keep in mind what effect development has on the factors that upset a child. Development affects how the child reacts to stress, which can affect the child's answers.

Note 147: Ibid. at 4.

¶ 109 Pre-schoolers are vulnerable to suggestions that they are responsible for an unpleasant event. Their egocentric thinking makes it impossible for them to understand the motivation of others. They probably cannot see how anyone else could be responsible for the event. [See Note 148 below] Pre-schoolers will become very upset if they believe the punishment for the act they "caused" will be separation from their parents. In fact, any involuntary separation from a parent upsets a young child. When pre-schoolers become upset, they cry and become uncooperative [See Note 149 below] and an upset pre-schooler may refuse to answer any more questions. Even if a pre-schooler does continue to answer questions, the anxiety she is experiencing may lead her to make mistakes in her testimony. High levels of anxiety in pre-school aged witnesses are associated with decreased accuracy in their testimony. [See Note 150 below] In addition, a pre-schooler

who is upset may regress to the developmental level of an infant. [See Note 151 below] Pre-school children frequently fail to report an abuser's actions when they are testifying in the presence of that person. [See Note 152 below] School aged children become upset somewhat less easily than pre-schoolers. [See Note 153 below] Some of them are also able to understand the role of defence counsel in asking offensive or embarrassing questions, which may allow them to avoid taking counsel's comments personally. [See Note 154 below] However, they are still likely to blame themselves for anything they perceive as a personal failure. They also frighten easily. Like pre-schoolers, school aged children are terrified of being involuntarily or permanently separated from their family and friends. Any suggestion of this possibility will upset them. At this stage, children also start to fear death. The presence of an abuser may frighten school aged children enough to cause them to refuse to testify. [See Note 155 below]

Note 148: M.R. Eichelberger et al., eds., Pediatric Emergencies, 2d ed. (Upper Saddle River: Brady/Prentice Hall, 1998) at 9.

Note 149: Ibid.

Note 150: A. Kapardis, Psychology and Law: A Critical Introduction (Melbourne: Cambridge University Press, 1997) at 104.

Note 151: Eichelberger, et al., supra note 148 at 9-10.

Note 152: Ibid. at 103.

Note 153: Ibid. at 10.

Note 154: Three Years After the Verdict, supra note 142 at 118.

Note 155: Eichelberger, et al., supra note 148 at 103.

¶ 110 In its recent decision in F. (W.J.), [See Note 156 below] the Supreme Court of Canada considered how to deal with a six-year-old girl who was unable to answer questions during examination-in-chief. Madam Justice McLachlin, writing for a majority of the Court, acknowledged the difficulty that children can have in revealing "highly personal" events in the presence of "imposing and intimidating strangers". [See Note 157 below] In the circumstances of this case, the Court ruled that there was a "necessity" to admit hearsay evidence about the child's out-of-court statements, even without expert evidence about the child's inability to testify. It was also accepted that trial judges have "great flexibility" in dealing with child witnesses. This might require providing an upset child with a recess. [See Note 158 below] This might also extend to controlling abusive or inappropriate questioning.

Note 156: Supra note 10.

Note 157: Ibid. at para. 43.

Note 158: Ibid. at para. 44.

¶ 111 School aged children, who are typically very modest, can also become upset if they are asked questions about their bodies. Children in this stage may try to avoid answering embarrassing questions about their bodies.

¶ 112 When school aged children become anxious, they offer less information spontaneously. [See Note 159 below] Their answers become shorter. Under stress, school aged children require more cues to remember details. These child witnesses do not necessarily make a conscious decision to behave in this way. Upset school aged children may act like pre-schoolers in that they may cry and try to be uncooperative. [See Note 160 below]

Note 159: Kapardis, supra note 150 at 104. One Ontario judge (Survey, supra note 3) reports a case in which defence counsel was cross-examining a "very distraught" eight-year-old and asked: "Why are you looking at your mother? Does she give you the answers? Don't look at her." Unless the judge has a concern that someone in the court is signalling the child (not the case here), this type of intimidation of a child is clearly upsetting and not appropriate.

Note 160: Ibid. at 10.

¶ 113 Adolescents can be very emotional and may be easily upset. They are very sensitive about their bodies. They do not want to imagine, remember or discuss any damage that has been done to their body. They may also be very modest and may avoid answering embarrassing questions. Adolescents can become angry and uncooperative when provoked. Since emotional turbulence is common during this stage, their anger may present in a way that seems like an "overreaction". [See Note 161 below] This can be damaging to their credibility if the trier of fact does not appreciate that there is likely not an ulterior motive behind an angry outburst.

Note 161: Ibid. at 10-11.

¶ 114 It is rare for children to suffer long emotional effects from the experience of testifying in court. Many children actually find it cathartic to tell others, especially the judge, about what happened to them. [See Note 162 below] Although it is distressing that children can become very upset during the process of testifying, it must be remembered that they usually get over that emotional upheaval. [See Note 163 below] The real concern with unnecessarily insulting or embarrassing questions is that they may also be developmentally inappropriate questions which a child can neither understand nor meaningfully answer. Additionally, such questions may unnecessarily upset the child and

disrupt her testimony. For these reasons, judges have a responsibility to control offensive questioning of child witnesses. [See Note 164 below]

Note 162: Three Years After the Verdict, supra note 142 at 115.

Note 163: Ibid. at 168, 172.

Note 164: It was apparent from the Survey of Ontario judges, supra note 3 that many of them already see themselves as having the responsibility to intervene when a child is being asked inappropriate, embarrassing or intimidating questions, but clearly many judges do not share this view of their role.

Conclusion

¶ 115 When children testify, it is usually in regard to a matter that affects them personally. The cases frequently involve allegations of abuse and the child was often the only person present. Children often have vitally important evidence about very serious crimes. It is important that children be given the opportunity to provide evidence in a way that allows them to tell their stories accurately. Developmentally inappropriate and suggestive questions prevent a child from doing this. Unless the child is questioned properly, the child and others can suffer injustice.

¶ 116 All of those involved in the process of questioning children need to be educated as to how to ask children appropriate questions. Judges and lawyers need education about the fundamental principles of child development and how a child's stage of development affects the capacity to understand and respond to questions. They should have the opportunity to practice questioning children.

¶ 117 An introductory phase of questioning should be conducted immediately before the child speaks about the alleged events. The purpose of this type of questioning is to put the child at ease, teach the child how to answer questions and allow the questioner and the judge to assess what types of questions are appropriate for that child. This type of questioning should be required by both the Canada Evidence Act and its provincial counterparts. The court should be required to conduct this type of questioning whenever there is a concern that a witness' level of development may affect his understanding of the questions he is asked or the answers that he gives.

¶ 118 Judges should intervene to require that counsel ask questions in a manner appropriate for the child's level of development. If a child does answer an inappropriate question, the inappropriateness of that question should be a factor in determining how much weight should be given to the answer. When children are questioned properly, it will become clear that most of them can be very good witnesses.

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Legal Responses to Domestic Violence in Canada and the Role of Health Care Professionals*

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Abstract: This paper provides an overview of how the police and the courts in Canada respond to spousal abuse, including consideration of the relationship of the justice system to other community institutions, such as shelters for abused women. The paper offers a basic introduction to the role of the legal system in dealing with spousal abuse. The paper discusses criminal, family law and tort issues, providing health care professionals with information about how the legal system operates, and explaining their role in it. The paper describes changing professional attitudes and legal responses. The Canadian legal system no longer views spousal abuse as "private matter" and responds much more effectively than in the past, though there remain many deficiencies.

Legal Responses to Domestic Violence in Canada and the Role of Health Care Professionals

Scope of the Paper

¶ 1 This paper provides an overview of how the police and the courts in Canada respond to spousal abuse, including consideration of the relationship of the justice system to other community institutions, such as shelters for abused women. The paper offers a basic introduction to the role of the legal system in dealing with spousal abuse, with a particular focus on providing health care professionals some information about how the legal system operates, and to explain their role in it.

Introduction & Historical Context

¶ 2 Almost one third of women in Canada are assaulted at least once by a husband or intimate partner. Children are more likely to be abused or killed by parent or a trusted adult than by a stranger. Yet until recently the legal and social system in Canada denied the realities of spousal and child abuse. On a social level, there was a tendency to treat the family as a "private sphere" with the police and courts reluctant to intrude in all but the most serious cases of family abuse, and professionals like doctors slow to recognize or respond to issues of family violence. Reports of child sexual abuse were frequently dismissed as fabrications. Victims of child abuse were very reluctant to come forward.

¶ 3 The law viewed women and children as unreliable witnesses, and society would often blame the victim for "provoking" acts of physical abuse or sexual exploitation, or dismiss reports of abuse as fabrications. Even when victims came forward to disclose abuse, a variety of legal rules made it very difficult to prove that there had been abuse. Although largely unreported at the time, reports from adult survivors now make clear that physical and sexual abuse of children were common, especially in institutions, such as residential schools for aboriginal children and in facilities for juvenile delinquents. It is also clear from the stories of older women that many cases of spousal abuse were not reported, or that women were encouraged to return to abusive partners.

¶ 4 These attitudes to child and spousal abuse, which were prevalent throughout society including processionals and the courts, seriously undermined efforts to have a society in which females and males are equals, and which nurtured its most vulnerable children. In recent years there have been very significant changes in the way in which Canada's social and legal systems respond to child and spousal abuse. While there is much still to be done to improve how we deal with domestic abuse, there is much greater recognition of the extent and seriousness of the problems, and of the human and social costs of failing to respond.

Increased Awareness and Law Reform

¶ 5 In the past thirty years there has been a much greater awareness of the realities of spousal and child abuse in Canada. Much of the initial support for victims and recognition of the widespread nature of abuse came from the feminist movement, as women began to come forward with their stories of abuse at the hands of husbands and fathers. Many of the most important community based resources for the support of victims still have a strong feminist orientation, such as shelters for temporary accommodation for victims of wife battering, telephone support lines and counseling services for victims of sexual assault. Sexual assault and violence of a sexual nature is now recognized as crimes of power and domination.

¶ 6 While the majority of perpetrators of family violence are men, there is a growing recognition that boys as well as girls can be the victims of abuse and sexual exploitation perpetrated by trusted adults, such as fathers, uncles, teachers or coaches. Further, there

is a recognition that in some heterosexual and same sex relationships, violence perpetrated by women can be a serious problem.

¶ 7 Until 1983 a man in Canada could not be charged with the rape of his wife, even if the couple were separated. This reflected a patriarchal view of marriage, with a man having property-like rights in regard to his wife, and he did not need her consent to have sex with her. In 1983 the law was changed so that it is now a crime for a married person to force their partner to have sexual relations. It is still quite rare for a husband to be charged with sexual assault in connection with his wife, as women are reluctant to complain to the police about sexual abuse. However, in some cases where the partners have separated, sexual assault charges are being prosecuted against husbands, along with physical assault charges. [See Note 1 below]

Note 1: See e.g. R. v. T. (J.C.) (1998), 39 O.R. (3d) 26 (C.A.); and R. v. W. (G.), [1999] S.C.J. No. 37.

¶ 8 Though the justice system in Canada is most concerned about physical and sexual abuse, stalking is also an invasion of a woman's personal security. Until very recently, stalking was not considered a crime in Canada. The Criminal Code prohibited certain types of harassment, but until something physically happened to a woman, she had little recourse to the law for protection. In 1993 the federal government passed a law creating a new offence of criminal harassment to deal with stalking. [See Note 2 below] This provision can be used if a woman has been followed around by a man, or has been subjected to repeated unwanted phone calls. Criminal harassment was added to the Criminal Code as this is a form of psychological intimidation and control that can be very distressing, especially to women leaiving an abusive relationship, and can be a precursor to physical violence.

Note 2: Criminal Code, s. 264

¶ 9 There have been a number of important government commissions and reports about issues of spousal and child abuse [See Note 3 below], and the justice system has begun to deal more effectively with family violence. Professional groups like doctors, nurses, social workers, judges, prosecutors, police and even teachers now receive education about issues of family violence, though the amount and receptivity to this type of education varies.

Note 3: The Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence Achieving Equality. (Ottawa: Canada Minister of Supply and Services, 1993); The Report of Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada, Reaching for Solutions (Ottawa, On: Minister of Supply and Services, 1990).

The Nature & Incidence of Spousal Abuse in Canada

¶ 10 Spousal abuse is an area that is difficult to research because of the tendency of victims and abusers to deny or minimize the extent of the abuse. In 1994 Statistics Canada reported on a telephone survey of 12,300 women which revealed that 29% of married women (including those in common-law relationships) had been subjected to physical and sexual violence at the hands of a present or former partner. [See Note 4 below] However only one-quarter of the these women ever reported the abuse to the police.

Note 4: "Wife Assault: Findings of a National Survey" (March 1994) Juristat 14:9 (Ottawa, Statistics Canada)

¶ 11 According to records kept by police services and by the Office of the Chief Coroner for Ontario, 1,206 women aged 15 and older were killed in the province of Ontario between 1974 and 1994. It is estimated that 75 per cent of these women were murdered by current or former spouses, common law partners or boyfriends. Over 100 children were killed along with their mothers. These statistics illustrate that further reform is still necessary to eliminate spousal abuse and prevent it from continuing in our society. [See Note 5 below]

Note 5: Joint Committee on Domestic Violence (Chair Judge Lesley Baldwin), Working Towards a Seamless Community and Justice Response to Domestic Violence (Ontario Attorney General, 1999)

¶ 12 Spousal abuse is a complex phenomenon and there are many different patterns of abuse. In some marriages there may be only a single incident of assault, though often there is a repetitive "cycle of abuse." In some relationships there is an interactive pattern of abuse with each spouse having a significant role in initiating the violence. Professionals also need to recognize that there are relationships in which the female may even be the more violent partner. [See Note 6 below] Violence is also an issue in lesbian relationships.

Note 6: See e.g. R v. Arsenault, [1998] B.C.J. No. 2990 (Prov. Ct.)

¶ 13 Most commonly, however, the male partner is the more abusive partner, and due to their greater strength, men pose a much more serious risk to their partners than women. In some relationships, there may only be a single act of violence, but often there is a "cycle of abuse," with an abusive episode followed by a "honeymoon" or contrition phase, and then tension building towards another abusive attack.

¶ 14 From a social and medical perspective, abuse includes physical, sexual, financial and emotional abuse, as well as controlling a partner's relationships. While the law tends to focus on physical and sexual violence and threats of violence, for many victims the psychological effects of abuse are more serious than the physical injury. Violence and threats are used to intimidate, humiliate or frighten victims, or to make them powerless. An abuser will often insult and verbally abuse his wife, as well as physically assault her, and often will isolate her from family and friends. Most individuals who are victims of spousal abuse suffer much more than from the physical violence. The abuse can result in lowered self-esteem, depression, drug and alcohol abuse, suicidal tendencies and diminished capacity to parent.

¶ 15 While in many cases the violence ends if the spouses separate, in about a third of relationships in which a woman leaves her abusive partner, violence and intimidation increase after separation as the man fears that his control will end. Women and children may be at the greatest risk after the spouses separate, and this is the time when women and their chidren have the greatest risk of being killed.

¶ 16 It has also been recognized that spousal abuse not only affects the victims directly, but is also harmful for children who may witness their mother being abused. It is estimated that between 60% and 80% of children who live in homes where there is spousal abuse witness the violence, and in other cases the children will hear the abuse going on or be aware that their mother has been beaten by their father.

¶ 17 Domestic violence is different from other acts of violence in that the abuser is breaching a trust, and the victim is particularly vulnerable. Due to the relationship between the victim and the abuser, in some cases both may want the relationship to continue. The victim may love the abuser and want to continue to reside with him, and therefore may not want to see him punished, especially if she and her children rely on him for economic support. The victim would like the violence to cease, but may want to preserve the relationship. Many women remain in or return to abusive relationships, and some women leave one abusive relationship only to enter a relationship with another abusive man.

¶ 18 In some cases, the woman is ambivalent, wanting to leave her husband after the abusive incident, but then being "courted" by him and deciding to return to the relationship, only to have the abuse reoccur. Women often stay in abusive relationships because they feel the need for the financial support of their husband, or because of

pressure from family or friends to stay in the relationship. And the man may threaten that if the woman leaves he will follow her and bring her back, abduct the children, or even kill her. Given the history of violence in the relationship, these may be a very credible and intimidating threats.

¶ 19 Professionals also need to be aware that there are cases in which there may be allegations of abuse that are exaggerated or even fabricated, for example if there is a high conflict divorce with spouses arguing over custody of children or property issues. However, even in divorce cases where there is on-going controversy over various issues, the vast majority of allegations of spousal abuse are true, and the reality is that perpetrators of abuse are much more likely to deny or minimize abuse than "victims" are to fabricate. Indeed, the problem of false recantations by genuine victims due to intimidation, pressure or guilt is more common than fabrication.

¶ 20 It is clear that domestic violence and spousal abuse are "differentiated" phenomena, with different patterns, risks, effects and prognosis in different relationships. Janet Johnson observes: "All violence is unacceptable, however, not all violence is the same. Domestic violence families need to be considered on an individual basis when helping them to develop post divorce plans." [See Note 7 below] Individual cases must be assessed taking account of the nature and extent of the abuse, its effect on the victim and children, and its likelihood of recurrence.

Note 7: Janet Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995), 9 Aust. J. Fam L. 12-25, at 24

The Role of Shelter, Police, Health Care Professionals and Other Agencies

¶ 21 While there is much more awareness of spousal abuse in Canada than in the past, and there are many more social agencies and resources to deal with this problem, too many victims, especially women and their children, continue to be injured, terrorized and even killed. Victims need greater access to essential services, and those services should be provided in an "integrated" or "seamless" fashion. [See Note 8 below] Increasingly local communities, supported by the provincial government, are establishing domestic violence co-ordinating committees to encourage co-operation between agencies and different professionals. It is also clear that professionals who work with domestic violence cases need to be more interdisciplinary education and training in order to be able to deal effectively with these cases and work better with one another.

Note 8: Joint Committee on Domestic Violence (Chair Judge Lesley Baldwin), Working Towards a Seamless Community and Justice Response to Domestic Violence (Ontario Attorney General, 1999)

¶ 22 Many women do not leave abusive situations because they have no where else to go, and they fear for their safety and the safety of their children. In most Canadian cities and large towns there is one or more "shelters" that plays a critical role in providing counselling and support, as well as crisis accommodation and security for women and their children who are leaving an abusive relationship and have nowhere else to reside. The shelters usually provide "crisis or transitional accommodation" and support for a period of two to six weeks, but there is an urgent need for long term accommodation and support.

¶ 23 Most of the shelters have security measures in place, such as locked doors, barred windows and security cameras, though men not infrequently attempt to gain access, and there was recently a tragic incident in Quebec where a man forced his way into a shelter where he shot and killed his wife in front of a horrified group of women, children and staff.

¶ 24 Many of the shelters also have programs for children who have been traumatized by the violence in their home, even if they are not direct victims.

¶ 25 The shelters receive most of their funding from the provincial governments, as well as some from private donations. They are generally operated under the direction of local volunteer boards. Shelter staff may have degrees in social work or psychology, though some do not have formal educational qualifications, and some are abuse survivors. Most shelters have a feminist orientation, though a few of them have religious affiliations. The shelters are also advocates for abused women, and are sometimes critical of how governments, the police, courts or professionals deal with issues related to abuse.

¶ 26 Women's shelters often play an important initial step for women wishing to leave an abuse relationship. Although it is recognized that only a relatively small percentage of abused women stay at these shelters, usually women with few resources and no family who can take them in, these shelters often play and important counselling, educational and coordinating role. Statistics Canada reported a one day count of 6,100 people staying in 422 shelters across Canada, 48% of them women and 52% children, [See Note 9 below] but it is clear that if more spaces were available there would be greater use.

Note 9: See "When love turns deadly", Globe & Mail, 7 Dec. 1999.

¶ 27 Shelters staff, working with the police and lawyers, can have a critical role in assessing the risk for an individual woman and helping her to develop a "safety plan" that may protect her and her children. In the most serious cases, the federal government may

help an abused woman and her children move to another city and assume a new identity in order to escape from a violent man who is not incarcerated.

¶ 28 In addition to counselling and treatment that may be provided by health care professionals, important counselling and support are provided for female victims by community crisis centres, sexual assault centres and toll free telephone help lines. Counselling services are provided by shelter, but in larger communities there are separate but related agencies that do this type of work. This type of counselling can be crucial for helping an abused woman to leave her partner. Many women have to be counselled many times before having the courage to leave an abusive spouse.

¶ 29 There are also counselling services provided for abusers. Many of the programs operate on a group model, with groups (usually of men) with a history of abuse gathering with one or two group leaders to discuss and confront their problems. One of the realities that is that few abusers will voluntarily seek help, and most need to charged by the police before they recognize that they have a problem. Often counselling will be required as a condition of part of a court sentence imposed on an abusive man. While participation in counselling and other forms of individual and group therapy can reduce the incidence of violence, it is clear that some men do not respond to these programs and continue to abuse their partners. Some critics argue that limited government resources should be focused only on victims and should not be spent on abusers. However, it is important to recognize that an abuser will rarely stop unless he receives counselling, and acknowledges that his behaviour is wrong and unacceptable in our society. There is a large gap between available places and demand for these programs directed at abusers.

¶ 30 Increasingly doctors, nurses and other health care professionals are receiving education in university and professional training about the identification and treatment of spousal abuse. [See Note 10 below] Health care professionals can have a critical role in working with both victims and abusers. Doctors are being encouraged to ask every woman patient if she has been a victim of domestic abuse, as well as to be alert for signs of abuse in trauma cases that women may report as "accidents."

Note 10: See e.g Searle Women's Health Care, Violence Against Women Empower Education Program (1996); and Judith Brown et al, "Development of the Child Abuse Screening Tool for Use in Family Practice" (1996), 28:6 Family Medicine 422-28.

¶ 31 The police play a critical role in responding to spousal abuse. At one time, police were reluctant to be involved in these cases, and expected a woman who had been abused to launch a "private prosecution." (A criminal prosecution brought by a woman rather than the police). There have been significant efforts to improve training and policies of the police to deal with spousal abuse.

¶ 32 In 1986, the Royal Canadian Mounted Police adopted a wife assault charging policy and other forces have adopted similar policies. Police officers are no longer expected to ask a woman who has been beaten by her husband or partner if she "wants" the man charged, but rather the police are expected to charge the man with a criminal offence. Police officers have better training and the police are a key agency for responding to spousal abuse. The police officers are now much more likely to lay charges if they are called to a spousal assault, although some police officers may be still reluctant to lay charges in cases where they cannot seen any injuries or where there are no witnesses to a woman's abuse.

¶ 33 The police can have a critical role in coming to a home where abuse is occurring and preventing the escalation of violence. The police are aware that "domestic calls" have the potential to be violent, with a risk to the victim and the police. The police are learning techniques to reduce tensions and the potential for violence. They will often arrest and remove the abuser, and require him to spend the night in jail. Unless he has a serious criminal record, a judge will likely release him until the case can be fully dealt with by the courts, but the judge may make it a condition of his release that he move out of the home. The request for conditions on release requires the police and prosecutor to communicate with the victim about what type of conditions are appropriate, and then persuade the judge to impose these conditions.

¶ 34 The Supreme Court of Canada has recognized the importance of a swift police response to domestic violence in its 1999 decision in R. v. Godoy. [See Note 11 below] In this case the police received a telephone call to their emergency (911) telephone line. The caller hung up before the caller could speak, but the police could locate the place from which the call was made. Four police officers went to the residence where a man partially opened the door. They asked to enter, but the man tried to close the door. The police prevented him from doing so and entered the apartment; as soon as they got inside they heard a woman crying. A police officer entered the bedroom, where he observed the man's common law wife curled up in the fetal position, sobbing with swelling above her left eye; she told the officer that the man had assaulted her. Based on these observations, the police decided to arrest the man. A scuffle ensued in which the man broke the finger of an officer, and the man was charged with assaulting a police officer with the intent of resisting arrest. The trial judge dismissed the charge, concluding that the entry by the police into the premises was unauthorized and that all subsequent actions of the police actions were illegal. This decision was reversed on appeal and a new trial was ordered. The Supreme Court of Canada accepted that there is "unquestionably a recognized privacy right that residents have in the sanctity of the home" but that this must give way to interest that the police have in protecting "life or safety." A disconnected 911 call gives the police the right to enter premises, and they cannot be denied entry by the person who happens to answer the door. Chief Justice Lamer wrote:

> ....the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the

> hallmarks of this crime is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response. The 911 system provides such a response. Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation. Without making any comment on the specific facts of this case, it takes only a modicum of common sense to realize that if a person is unable to speak to a 911 dispatcher when making a call, he or she may likewise be unable to answer the door when help arrives. Should the police then take the word of the person who does answer the door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not.

Note 11: [1998] S.C.J. No. 85.

¶ 35 Police are increasingly working with women's shelters and other agencies, and refer abused women to these agencies. Increasingly police are working with social workers and community volunteers or have specially trained police officers who do counselling and support work with victims of crime.

¶ 36 Although official policies call for mandatory charging and prosecution in domestic abuse cases, in practice individual officers have a discretion about how to deal with cases, and for a variety of reasons charges may not be laid, or they may be discontinued before a case is resolved in the courts. Research indicates that a rapid police response involving arrest of abusers can bring home to some abusive men the message that their conduct is unacceptable and will reduce the repetition of violence. [See Note 12 below] However, there are limitations to the effectiveness of the police and the criminal justice system in protecting women. This response is most effective with men who are employed and have respect for the justice system. For some abusive men, especially those with a criminal history, involvement of the police may heighten the danger to a woman as the man may retaliate against the woman for having contacted the police. Some women mistrust the police because of their own negative experiences with the police, or becasue of their own criminal histories. Immigrant women may be especially reluctant to involve the police, fearing social ostracism within their communities or possible deportation, or because of their experiences with the police in their native countries. [See Note 13 below]

Note 12: Jaffe, Wolfe Telford & Austin, "The Impact of Police Charges on Incidents of Wife Abuse"(1986), 1 J. Fam Violence 37. The 1994 Statistics Canada survey indicated that only 26% of women

assaulted in intimate relationships reported to the police; reporting to the police was more likely if the violence was more serious, more frequent, or witnessed by children. Of those women who reported, in 45% of cases the violence stopped or decreased, in 40% it remained the same, and in 10% the violence increased.

Note 13: Martin & Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-criminalization of Wife Abuse" (1995), 8 Can. J Women & Law 3- 44

Criminal Prosecutions:

¶ 37 A primary legal response to family violence is through the criminal justice system, and there have been significant reforms in the past two decades in how the criminal justice system deals with familial abuse. Since 1983, the Criminal Code has made it a crime for a husband to sexually assault his wife. Reforms have helped children to come to court to testify about their abuse, or the abuse of their mothers.

¶ 38 The police have become much more aggressive about investigating and Crown prosecutors now are usually responsible for spousal abuse cases, recognizing that it is unfair to the victim to leave her in the position of deciding how to deal with a case. Without police and prosecutorial support, a woman is likely to feel pressured or intimidated into discontinuing a prosecution.

¶ 39 While the criminal response is important, there are limitations to it use. In Canada, a person charged with a crime has significant legal rights guaranteed under the Charter of Rights. Respect for rights is an important aspect of Canadian life and protects accused persons from inappropriate state intervention, but it can be frustrating for victims and may expose them to further danger. A person who is charged with a crime, like assault (threatening or striking a spouse) can only be convicted if the prosecutor proves "beyond a reasonable doubt" that the accused is guilty of the offence. The accused has the right to retain a lawyer, and if he is poor may have a lawyer paid by a government legal aid scheme. The accused has the right to disclosure of the prosecution's evidence before the case is tried, to allow him to prepare for a trial. The accused has the right to call evidence and to cross-examine any witnesses, including the "complainant" (victim of the alleged offence), but the accused has the right not to testify if he does not wish to, and his silence is not to be considered evidence of guilt.

¶ 40 The accused is normally entitled to be released pending trial, sometimes with conditions on release such as that he stay away from the family home or surrender any fire arms. If the accused has previously been convicted of assault and appears to pose a serious threat, there may be grounds to try to persuade a judge to detain him in custody pending trial, but this does not happen frequently.

¶ 41 In practice, relatively few cases are resolved by trial, as the accused often pleads guilty, or the prosecution drops the charges due to the victim recanting and telling the

police that the offence did not occur. However, it normally takes several months for a domestic violence case to be resolved.

¶ 42 While there is an increasing number of successful prosecutions for domestic violence, there are a range of practical difficulties in prosecuting these cases. Many of the difficulties relate to the fact that victims are often intimidated, embarrassed, pressured or feeling guilty about the case, and hence may not appear in court or are reluctant witnesses. In most cities there are also social workers at the courts who support women and children who are going through the court process and may have to testify against abusive men; these victim- witness workers provide emotional and practical support to women and children who may testify against abusive partners.

¶ 43 If an accused pleads not guilty to the charges, the prosecution will have to prove "beyond a reasonable doubt" that the abuse occurred. Credibility may be a major issue. It will help the prosecution if there is medical evidence to corroborate that injuries were sustained. Ordinarily in criminal cases, evidence of the "bad character" or the previous criminal conduct of the accused is not admissible to prove that he is guilty of the particular act with which he is charged. However, in spousal and child abuse cases, the courts have recently displayed a more realistic approach to admitting evidence that allows the court to "understand the relationship between the parties and the context in which the abuse has occurred." Accordingly the victim or other witnesses may be permitted to testify about the entire history of abuse in a relationship to put the charges in context. [See Note 14 below]

Note 14: R. v. F. (D.S.), [1999] O.J. No. 688 (C.A.)

¶ 44 The police are increasingly aware that a woman who has called the police may be reluctant to testify against her husband in court. She may have reconciled with her husband by the time a case comes up for trial, or she may have been intimidated by him into recanting her allegation, or she may feel pressured by family members or economic circumstances to deny that the abuse occurred.

¶ 45 Some police forces are starting to investigate domestic abuse cases with a view to proving an assault occurred without having to rely on the victim's testimony in court. The gathering of evidence such as photographs of the victims injuries, 911 emergency telephone tapes, statements from the victim and other witnesses permit what is called a "victimless prosecution". The idea behind this form of evidence collection is that the victim may feel less pressure from the prosecution going forward, though she will normally be called to testify if the case goes to trial.

¶ 46 The police may take pictures of the injuries that a victim has suffered, and will sometimes audio or videotape statements from the victim and abuser. Canadian courts have now accepted that an audiotaped statement by a woman to the police may be the

basis for proving the abuse, if she takes the witness stand to deny that her husband abused her and say that her injuries were accidental, provided that the judge is satisfied that the earlier statement is true and that she has been pressured into recanting the earlier statement. [See Note 15 below]

Note 15: R. v. Mohamed, [1997] O.J. No. 1287 (Prov. Div). Prior to the Supreme Court of Canada's decision in R. v. B.(K.G.) (1993), 79 C.C.C. (3d) 257, past statements given by witnesses that were inconsistent with their evidence at trial could not be used as evidence for the truth of its contents unless the witness adopted the statement as the truth while testifying. The court in B. (K.G.) held that prior inconsistent statements might be admitted for their truth if they met the dual requirements of necessity and reliability. Although the court would prefer these past statements to be in the form of a videotape, this will not always be necessary. This ruling makes it possible for prosecutors to admit prior statements given by the complainant after an attack by her abusive partner even if she were to recant her story in court.

Specialized Criminal Courts for Domestic Violence

¶ 47 In a few big cities specially trained prosecutors deal with family violence cases, in specially designated courts. [See Note 16 below] These specialized domestic violence courts have the resources such as victim assistance programs to familiarize the victim with the court process and to provide support to them throughout the trial process. Videotape and audio facilities are also available. By having a specific domestic violence court, prosecutors are given better strategies to deal with the issue of a recanting victim. These efforts are coordinated with the police, as the police will have the initial contact with the victim. The main advantage of this type of specialized court is that the prosecutors, police and support staff have the resources training and sensitivity to deal with domestic violence cases. To ensure fairness to accused persons, judges are not "specialized" but rotate in from a general criminal court.

Note 16: See e.g "New court tough on domestic violence, "Toronto Star, July 13, 1997; "Ontario adding more courts to deal with domestic abuse," Globe & Mail, July 3, 1997

¶ 48 For some women, especially if they have not separated from their husbands, criminal prosecution, with the prospect of jail for the abuser is very unsatisfactory. Despite the fact that Canadian judges in theory have said that a jail sentence is normally appropriate for an abusive husband, in practice first offenders usually receive a sentence of probation unless it is a very serious assault. There are now a few specialized domestic violence courts that try to deal with the underlying causes of abuse. Their goal is to reduce the number of repeat offenders. These innovative programs allow an abusive husband to plead guilty and receive counselling rather than punishment. This is only available to offenders who have not caused significant harm to their victims and did not

use a weapon. The offender must plead guilty to the assault. Then, if he completes a sixteen week counselling program, the accused is eligible for a conditional discharge, which means he or she would not have a "criminal conviction" though there would still be a criminal record that would appear on police records. At some later point the criminal record may be erased if there are no further offences. In some cases, the abuser may be required to enter into a "recognizance" (or peace bond) promising to forfeit a sum of money if he further assaults or harasses the victim.(discussed below).

¶ 49 The hope is that the abuse will stop and the family can remain intact, if this is what both parties want. Obviously this will not be an effective way of dealing with more serious or repeat situations of domestic violence.

¶ 50 The results of these two types of innovative programs have been positive. On July 9, 1999, the Woman Abuse Council of Toronto released the results of its Women's Court Watch Project. This project monitored judges' decisions and outcomes in domestic violence cases and compared the effectiveness of these two specialized courts to non-specialized courts. The results indicated that the specialized courts were better able to successfully prosecute domestic violence cases, had lower raters of withdrawals, dismissals and peace bonds, as well as higher rates of guilty verdicts and higher rates of victims attending courts. The success of these courts was attributed to the coordination between the Police, Victim/Witness Assistance Programme, Crown Attorneys, batterers' program, probation, and community agencies.

Sentencing in Criminal Court

¶ 51 In the past, sentencing practices have revealed a high level of tolerance for crimes of violence against women. Physical and sexual assault of women by intimate partners were not treated with the same degree of seriousness as other assaults, and sentences did not reflect adequate concern for these crimes. Judges often failed to appreciate the nature of the crime or its impact on the victim; often an intimate relationship between the victim and the accused was treated was a mitigating factor.

¶ 52 More recently, however, the appeal courts have clearly reflected a change in the legal attitude and response to domestic violence. In its 1989 decision in R v Inwood, [See Note 17 below] the Ontario Court of Appeal imposed a thirty day jail sentence on a first offender in a domestic violence case and stated this principle:

> This court has acted on the principle that where there is a serious offence involving violence to the person then general deterrence must be the paramount considerations in sentencing in order to protect the public. In my opinion, this principle is applicable not only to violence between strangers but also to domestic violence. Domestic assaults are not private matters, and spouses are entitled to protection from violence just as strangers are. This does not mean that in every instance of domestic violence a custodial sentence should be imposed, but that it should be normal where significant bodily harm has been inflicted in order to

repudiate and denounce such conduct"

Note 17: [1989] O.J. No. 428 (Ont. CA.).

¶ 53 According to the 1992 Alberta Court of Appeal decision in R. v. Brown, [See Note 18 below] sentencing in wife assault cases should consider the hope of rehabilitation of the accused as well as the prospect of deterring him from repeating his conduct in the future. However, the most important principle in determining a sentence should be to deter other men from similarly conducting themselves toward women who are their wives and partners. Therefore the principle of general deterrence should be key in spousal assault cases. The Court went further and stated that the sentences should express the community wish to repudiate such conduct in a society that values the dignity of the individual, thus implementing a denunciation principle. The sentencing judge should also consider whether the assault was relatively minor, isolated incident, or part of a pattern of abuse. It is appropriate for a judge to consider if a wife requests that a custodial sentence should not be given as she would like to continue the relationship and that the family requires the accused's income, but this factor should not prevail over concerns about denunciation, deterrence and breaking the cycle of violence. The Court stated in Brown: "Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape."

Note 18: (1992), 73 C.C.C. (3d) 242 (Alta. C.A.).

¶ 54 An amendment to the Criminal Code in 1997 makes clear that Parliament intends that the fact that an offender abuse his spouse or child, or abused a position of trust in relation to the victim are to be treated as "aggravating circumstances" that should increase the sentence above what it would otherwise be.

¶ 55 In practice, however, it is still common for abusers to receive probation for a first domestic violence conviction, unless there is serious injury. Often there will be a condition that the abuser attend a counselling program, if one is available, and there may be conditions about not contacting the victim, if this is what she desires. In cases where there is significant injury to the victim or there has been a previous conviction, the courts are now likely to impose a jail sentence.

¶ 56 Higher sentences are imposed in cases of domestic assaults involving escalating violence. For example, in a Toronto case where a man with a history of violence against his wife, after their separation seriously injured her in the presence of their children,

including causing extensive scarring burns, received a sentence of three and a half years imprisonment, even though the woman testified on his behalf at the sentencing hearing to say that he was a "loving and caring" person who continued to provide support for her and the children, as well as sending money to her parents in Somalia. [See Note 19 below]

Note 19: R. v. Mohammed, [1997] O.J. No. 1556 (Prov. Div.)

¶ 57 In cases involving sexual assault it would appear that sentences below four years are most often imposed on accused who rape women with whom they have had a prior relationship. Sentences also appear to be generally lower where the victim has kept company with the accused over the course of an evening during which alcoholic beverages may have been consumed. The reasoning for this may be that the assault has an element of impulsiveness, rather than making calculated effort to stalk a victim. [See Note 20 below]

Note 20: Clayton, Ruby, Sentencing, Fifth Edition, 1999, Butterworths Canada Ltd. p. 704. See also R v. T. (J.C.) (1998), 39 O.R. (3d) 26 (C.A.)

¶ 58 In one recent case from Newfoundland a man was convicted by a jury of three counts of physical and sexual assault based on an abusive intimate relationship that extended over almost six years, and culminated in an assault in which he broke the woman's arm. He was also convicted of obstruction of justice as a result of having threatened to kill the woman if she proceeded with her allegations of abuse. He was sentenced by the trial judge to four years imprisonment. He appealed his conviction, but not his sentence. The Newfoundland Court of Appeal upheld the conviction, but took it upon itself to express "unease" over the sentence, and ordered that there should be a hearing to review the sentence. The Appeal Court felt that the woman had exaggerated her complaints, and may have been motivated in making the charges because the man had entered into a new relationship. The Appeal Court also assumed that since the two were no longer involved in an intimate relationship, there was no need for a sentence that would be "specific deterrence" to the man. The Supreme Court of Canada reversed the Court of Appeal and restored the trial judge's sentence of four years. [See Note 21 below] In the Supreme Court Madame Justice L'Heureux-Dubé pointed out that decision of the Court of Appeal raised a "reasonable apprehension of bias, all the more so since such comments may be perceived as reflecting myths and stereotypes about complainants in sexual assault cases."

Note 21: R v. W. (G.), [1999] S.C.J. No. 37.

¶ 59 In spousal homicide cases, the courts also say that the fact that there was a violation of trust is an aggravating factor in sentencing. In many cases, however, the death is viewed as "accidental" and there is only a conviction for manslaughter rather than murder, and a likely sentence will be in the range of three to ten years imprisonment. If the prosecution can prove that there was an intent to cause serious bodily harm or to kill, there will usually be a conviction for second degree murder, with a sentence of life imprisonment with no eligibility for parole for 10 to 15 years. [See Note 22 below]

Note 22: R. v. McKnight (1999), 44 O.R. (3d) 263 (C.A.)

¶ 60 While the courts are taking domestic violence cases more seriously, there is still substantial variation in sentences imposed in cases of spousal assault. Judicial discretion and individual judicial attitudes coupled with incidences where the victim requests that no custodial sentences be given may explain why custodial sentences of significant length are generally not imposed in spousal abuse cases.

Peace Bonds (or Recognizance)

¶ 61 Under s. 810 of the Criminal Code, it is possible for a person to be required by a judge to enter into a "peace bond" (technically called a "recognizance") if another person has "reasonable fears" that the first person will harm the second person or her children. Although part of the criminal process, this type of proceeding only requires a finding on a "civil standard" of proof for the judge to impose a peace bond. The person who is feared is not convicted of a criminal offence, but is required to forfeit a sum of money if he "fails to keep the peace" or fails to abide by other conditions that the court may impose on his behaviour, such as requiring him to refrain from communicating with the victim, stay a certain distance from her residence, or surrender firearms.

¶ 62 A person who fails to keep the conditions of his peace bond will forfeit a sum of money, and also is committing a criminal offence. A practical advantage of the peace bond (which can be in effect for a maximum of 12 months) is that the persons name is entered on the police computer system and any police officers called by the victim will be alerted to the potential danger.

¶ 63 Typically peace bonds are used in cases where the prosecutor feels that the evidence of abuse is not strong or the victim is unwilling to proceed and the prosecutor decides to "plea bargain" with the accused to drop the charges if he agrees to enter into a peace bond. In some cases in which the police have not laid charges, a victim may decide to seek a peace bond on her own, and in some communities a legal aid clinic may

help her do this. The person goes before a justice of the peace, usually at the local criminal court or police station, to make a sworn statement (called an "information") to commence the process of obtaining a peace bond.

¶ 64 Requiring a person to enter a peace bond is most likely to be an effective deterrent against further abuse if the abuser is an individual wants to preserve his reputation in the community or his relationship (either with victim or access to his child). The psychological and deterrent effect of appearing in court and being told by a judge "keep the peace" and perhaps obey other conditions, is most likely to be effective if history of violence is limited and there is no prior criminal record or history of defying court orders. Some victims may feel more comfortable with "preventative justice" than a criminal conviction for the abuser, because of psychological and financial reasons, as well as concern about children.

¶ 65 This type of order may give the victim the sense that she is entitled to protection. However, it has been said that a recognizance is "not worth the paper it is written. " It is not uncommon for men with a history of abuse to violate the terms of a recognizance, and sometimes the police are not aggressive about enforcing the terms of this type of "quasi-criminal" order. Traditionally peace bonds have not been effectively enforced by the police, and the process of obtaining a peace bond could actually increase a woman's danger by lulling her into a false sense of security. Presently, very few charges are laid for "breaching a recognizance."

¶ 66 In some cases, the woman's risk may increase after the man enters into a recognizance as he feels his control is threatened, and the recognizance only provides protection if the police are willing and able to enforce its terms.

Battered Woman's Defence

¶ 67 The acceptance by Canadian courts of the "battered woman's" defence reflects a changing legal understanding of the effects of spousal abuse on its victims, especially women, in situations where in a moment of terror or despair kill or injure their abusers.

¶ 68 In 1990 in R. v. Lavallee [See Note 23 below] the Supreme Court of Canada ruled that when a woman is charged with murdering her abusive partner the court could take account of the "battered woman syndrome" [See Note 24 below] Her acts might be considered "self defence" even though at the time she killed his back was turned and she faced no immediate threat to her physical safety, if taking account of her mental state as an abused woman, she had a "reasonable apprehension of death or grievous bodily harm." It is not what an "objective observer" would have reasonably perceived, but what the accused reasonably perceived, given her situation and her experience. The jury could hear expert evidence about the mental state of abused women to determine whether this particular victim of battering was acting reasonably, taking account of all of her circumstances and the context of the abusive relationship.

Note 23: [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97. In coming to this conclusion, the Supreme Court relied heavily on the work of the American psychologist Lenore Walker. These developments in the courts coincided with the appointment of more women judges, with Lavallee written by Bertha Wilson, the first woman appointed to the Supreme Court of Canada. In R. v. Malott, [1998] S.C.J. No. 12 the Supreme Court reaffirmed that merely because a women had been battered, did not mean that she had a defence. Rather the jury could receive expert evidence to explain why an abused women might stay in an abusive relationship, the effect that being in such a relationship might have on her perception of danger from her abuser, and whether she reasonably believed that her acts were necessary to protect herself from death or grievous bodily harm.

Note 24: Some critics have argued that being a victim of "battered woman" syndrome should mitigate a sentence, but should not result in an acquittal. The defence can be used for assault charges or even welfare fraud, if the victim of abuse has been coerced into committing this offence. This defence pose special tactical problems for the Crown after the death of the (alleged) abuser. The fact that most victims of spousal battering do not kill their assailants raises moral and policy questions about whether those who respond most violently should have a full defence. See Alan Dershowitz, The Abuse Excuse, (1994, New York, Little Brown). See also R. v. G.A.M., [1996] N.S.J. No. 52 (C.A.) where the Court did not accept that the woman had been assaulted by the male partner she killed, though it accepted the fact that she had been abused by previous male partners as a mitigating factor for sentencing her to only five years imprisonment for manslaughter.

¶ 69 By allowing expert evidence (from a psychiatrist, psychologist or other professional) on the issue of the effect of abuse on the mental state of women (sometimes called "battered woman's syndrome"), the jury will be able to understand why this particular woman did not simply flee when she perceived her life to be in danger. This decision was also important as it dispelled misconceptions surrounding why women stay in abusive relationships.

Divorce & Family Law

¶ 70 In Canada, physical or mental cruelty has been a ground for divorce since 1968, but until about a decade ago, relatively few reported family law cases raised spousal abuse issues. Increasingly, however, abuse is a factor that judges consider when dealing with a range of issues that arise in the context of spousal separation.

¶ 71 Divorce and family law is "civil law" with an onus on parties to hire their own lawyers (or represent themselves), marshall their evidence and present it in court. This may pose special challenges for women who have been abused, and lack self esteem and resources. Women with limited resources may be eligible for a lawyer paid by legal aid, and Ontario Legal Aid gives a priority to cases involving spousal abuse. There is also a special legal aid clinic in Toronto that specializes in assisting victims of domestic violence. But there are still delays in getting legal aid, and the funding for these cases is limited, sometimes affecting the nature or amount of representation that may be provided.

¶ 72 There are concerns that women who have been intimidated by abuse may sometimes feel pressured into accepting unfavourable property settlements, even if they have good lawyers. Women with a history of abuse should not be referred to mediation

unless there is a high degree of assurance that her interests will be protected and the mediator has training in dealing with cases where there has been abuse.

Family Separation-Exclusive Possesion of the Home & Restraining Orders

¶ 73 When there is a significant risk of post-separation harassment or violence, it is often appropriate to seek a civil "restraining order", such as under Ontario's Family Law Act s. 46 which permits a court order to be made "restraining a person from molesting, annoying or harassing" the applicant or a child in her care. The order may be more explicit and require the abuser to stay a certain distance from the residence or place of work of the applicant, or to refrain from direct or indirect communication. These orders are made as part of the civil process, and are generally sought if the applicant is also seeking other civil remedies such as custody or support. Judges will generally expect some evidence of recent violence or harassment to obtain such an order, and, for example, a single incident of abuse two years prior may not be sufficient.

¶ 74 For some abusers, the mere fact that a court order has been made will be a significant constraint on their behaviour, but for other abusers enforcement may be a serious problem. The violation of a restraining order is an offence and the police should arrest the person who violates the order. While there are sometimes difficulties in getting the police to enforce this type of civil order, as their training about domestic violence issues increases, the police are becoming more responsive. Some police forces have policies to monitor the family courts for the making of these orders, and ensure that they are entered on the CPIC computer, but counsel for a victim of abuse would be well advised to send the police a copy of any order, and set out any special concerns.

¶ 75 A "restraining order" is similar in effect to a "recognizance" (or peace bond), except that the restraining order is obtained by the victim as part of a civil action in family law proceedings. The recognizance (discussed above) is obtained as part of the criminal process; a Crown prosecutor may only seek a criminal conviction or a recognizance. If there is a concern about police reluctance to enforce a civil order, it may more be useful to obtain a recognizance under the Criminal Code s. 810, which only requires an applicant to establish "reasonable grounds" for a fear of injury to herself or her children. Some police are more willing to enforce such Criminal Code orders that "mere" civil orders.

¶ 76 Ultimately court orders only provide protection if the abusive spouse has a basic respect for the legal system, which is often not the case, or has a realistic fear of a quick police response.

Order for Exclusive Possession of the Home

¶ 77 Many female victims of domestic violence leave their spouses and seek accommodation in a women's shelter or with relatives. Leaving the home generally has the advantage of obtaining moral and other types of support, as well as accommodation. However, obtaining an order for exclusive possession of the home -- and excluding the

abuser -- is often the least disruptive alternative for the children, as well as for the abused parent. Canadian courts may grant an abused woman exclusive possession of the family home, ordering the abusive husband to leave, regardless of which spouse owns the property or whether they lived in a rented property. The best interests of any children are an important factor in an decision about possession of the home.

¶ 78 All provinces have legislation which allows such orders, generally with a specific reference to the "best interests of children" and domestic violence as factors for a court to consider, as well as permitting for orders to be made on an interim basis. [See Note 25 below] It may, however, be difficult to obtain an interim order without clear evidence of abusive conduct. It is necessary to have a situation where there is sufficient evidence to persuade a judge that continued cohabitation is no longer appropriate, and the other parent is at fault and should be excluded.

Note 25: See e.g. Ontario Family Law Act, R.S.O. 1990, c. F 3, s. 24(3) & (4). Alberta, Saskatchewan (Victims of Domestic Violence Act, S.S. 1994, c. V-6.02) and Prince Edward Island (Victims of Family Violence Act, S.P.E.I. 1996, C. 47) have legislation that specifically needs some of the needs of victims of spousal abuse for civil orders and that makes it easier for victims to obtain these orders.

¶ 79 If a criminal prosecution has been commenced as a result of an incident of domestic abuse, it may be possible to contact the police or prosecutor and try to have a bail condition inserted to have exclusive possession of the home for the victim and children.

¶ 80 Some court decisions indicate that the mere fact that there has been an assault at some point in the relationship may not be sufficient to obtain a civil exclusive possession order. It must be a relatively recent assault with some evidence that violence may reoccur. [See Note 26 below] The better view is that the fact that there has been a recent assault creates an environment in which it is psychologically unfair to expect a victim to remain, and that even significant emotional abuse should be a basis for obtaining exclusive possession. [See Note 27 below] There may be difficulties in proving abuse or violence, especially at the interim stage, in the face of what will often be the emphatic denials of the other party; evidence from independent sources, including health care professionals will always be helpful.

Note 26: See e.g. Dolgopol v. Dolgopol (1994), 10 R.F.L. (4th) 368 (Sask. Q.B.); Skrak v. Skrak, [1993] O.J. No. 2642 (Gen Div.) per O'Connor J.

Note 27: Hill v. Hill (1987), 10 R.F.L. (3d) 225 (Ont. Dist Ct.)

¶ 81 With some abusive spouses, an exclusive possession order may not be sufficient protection, and the victim will only be safe if more secure accommodation is found.

¶ 82 In Alberta, Saskatchewan and Prince Edward Island legislation has recently been enacted to facilitate the making of civil orders that deal with family violence, in particular to try to give victims better access to the courts and provide better police enforcement. Ontario should also enact this type of law.

Family Separation - Access & Custody Issues [See Note 28 below]

¶ 83 There is growing recognition that spousal abuse should be an important factor when the family courts are dealing with issues relating to the care of children after parental separation.

Note 28: See Bala, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach" (1998) http://qsilver.queensu.ca/law/bala/papers/spousal.htm

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¶ 84 Children have a special role in situations of spousal abuse. In some cases, men do not start to become abusive until the woman is pregnant, or serious arguments may develop about the children. Sometimes an abused spouse, usually the mother, may decide to stay in an abusive relationship "for the sake of the children." Although Canadian research suggests that abused women whose children are witnesses to assaults are more likely to ultimately leave their partners than those women whose abuse "remains between the grown ups." There is now a substantial and growing body of research on the negative effects on children of growing up in a home where there is interparental abuse, even if the children are not direct observers of the abuse.

¶ 85 Research [See Note 29 below] indicates that at least one quarter of those men who physically abuse their partners also physically abuse their children. In some studies as many as three-quarters of abusive husbands also abused their children; at least some of variation in rates depends on type of population studied, with higher degrees of spousal abuse making abuse of children more likely. [See Note 30 below] Young infants caught in situations of spousal abuse or conflict may be dropped or accidentally injured. Older children may be injured trying to protect an abused mother.

Note 29: In general in this section, see P. Jaffe, D. Wolfe & S. Wilson, Children of Battered Women (1990, Newbury Park, Ca., Sage); and E. Peled, P. Jaffe & J. Edelson (eds), Ending the Cycle of Violence: Community Responses to Children of Battered Women (1995, Newbury Park Ca., Sage); and Geffner, Jaffe and Sudermann eds., Children Exposed to Family Violence: Current Issues in Research, Intervention and Policy Development (1998, Binghampton N.Y., Haworth Press).

Note 30: Straus, Gelles & Steinmetz (1980) 28% of children in couples classified as having high levels of violence were abused in year prior to the interview, and 77% had been abused at some time in the past. An American study based on a large population survey reveals that the greater the use of violence by a spouse against a partner, the more likely that person will also physically abuse children; the correlation was especially strong for male abusers: Ross, "Risk of Physical Abuse to Children of Spouse Abusing Parents" (1996), 26 Ch. Abuse & Neglect 589.

¶ 86 There is also the possibility of abduction by an abusing spouse. Sometimes the abusive spouse will threaten abduction of the children to intimidate or control a partner, and if separation occurs, the abusive parent may abduct the child. The abducting parent may leave the country with the child. Although parental abduction is a crime, and Canada has signed treaties to try to deal with the problem, in practice it can be very difficult to locate a parent who has abducted their child, especially if the parent has gone to another country. Parental abduction is very disruptive to a child, and the abductor invariably lies to child about what has happened, sometimes saying that the other parent has died. If there is a possibility of abduction, this may be grounds for supervising or denying access. [See Note 31 below]

Note 31: See eg Zahr v. Zahr (1994), 24 Alta. L.R. (3d) 274 (Q.B.). Although beyond the scope of this paper, it is submitted the judges should consider spousal abuse as an important factor justifying relocation by a custodial parent; see Guthro v. Guthro, [1997] N.S.J. No. 91 (C.A.); and Ikem, "You Can Run But Can You Hide: Relocation Rights and Domestic Violence", [1996] Clearinghouse Review 308.

¶ 87 In the most serious cases, an abusive parent - invariably the father - may kill both his spouse and his children, or may kill his children and commit suicide; such homicides are likely to occur in the context of marital breakdown or separation. [See Note 32 below]

Note 32: Wilson & Daly (1994) report that 94% of "familicides" (killing of one's spouse and children) in Canada were committed by men, compared to 76% of nonfamilicidal spousal killings. For a description and analysis of a familicide arising out of an abusive marriage, see R. Busch and N. Robertson, "I Didn't Know Just How Far I Could Fight: Contextualizing the Bristol Inquiry" (1994), 2 Waikato Law Review 41-68.

¶ 88 There is a growing body of research on the negative effects on children of observing or hearing one parent being abused by another. Children who observe interparental abuse are often terrified by the experience, and may not understand it. In the 1994 Statistics Canada study, 39% of women who were victims of abuse reported that their children witnessed at least one assault. Some American studies indicate that most children in homes where there is spousal abuse will witness it. In some cases witnessing

even a single serious incident of abuse can produce post-traumatic stress disorder in child. [See Note 33 below] Even if a child does not directly observe spousal abuse, living in a home where there is spousal abuse can have serious negative effects. One American researcher observes: [See Note 34 below]

> Hiding in their bedrooms out of fear, the children may hear reported threats of injury, verbal assaults on their mother's character, objects hurled across the room, suicide attempts, beatings, and threats to kill. Such exposure will arouse a mixture of intense feelings in the children. These feelings include a fear that the mother will be killed, guilt that they did not stop the violence, divided loyalties, and anger to the mother for not leaving.

Note 33: D.G. Saunders, "Child Custody Decisions in Families Experiencing Woman Abuse" (1994), 39 Social Work 51.

Note 34: Saunders, supra at 54.

The worst outcomes for children to be associated with both observing spousal abuse and being directly abused.

¶ 89 There is now a substantial body of research from experts in child development that children from homes where there has been spousal abuse have:

- -- more behavioural problems and lower social competence; boys tend to externalize and have school difficulties or be more aggressive, including the commission of offences for adolescents, while girls tend more towards depression;
- -- lower self esteem and higher anxiety, as evidenced by sleep disturbance and nightmares;
- -- greater risk of abusing drugs or alcohol;
- -- substantially more likely to be involved in abusive situations as adults, boys as abusive partners and girls as abused women. [See Note 35 below]

Note 35: H.A. Davidson, "Child Abuse and Domestic Violence:

Legal Connections and Controversies" (1995), 29 Fam.L.Q. 357-373, at 359; V. Masliansky, "Child Custody and Visitation Determinations When Domestic Violence Has Occurred," [1996] Clearinghouse Review 273, at 275.

¶ 90 Fortunately, there is evidence that for most children, [See Note 36 below] there will be substantial improvements in behaviour and emotional state when the child ceases to live with the abusive parent, and that therapy for the child can be helpful. There is a need for more research into long term effects on children of spousal abuse, as well as on the effects of different types of legal arrangements (e.g. no access vs. supervised access vs. open access). There is also a need to research the effect of different patterns and types of spousal abuse on children, since most of the research to date has been based on situations where the abusive parent has not had contact, and where the women lived in a shelter for a period of time, situations that are likely to involve more severe abuse and lower income families. Some children seem relatively immune to growing up in a violent home, and there is also a need for research into this resilience.

Note 36: P. Mertin, "A Follow Up Study of Children From Domestic Violence " (1995), 9 Aust J. Fam. L.76-85

¶ 91 An abused spouse often suffers from lowered self-esteem, depression, drug or alcohol abuse or may take out feelings of powerless by mistreating their children. A history of physical aggression in the family is "strongly associated with mother's diminished parenting, in that mothers from violent relationships are less warm and more coercive with their children." [See Note 37 below] While it is clear that children suffer from the diminished parenting capacity of an abused parent, there may be difficulty for judges in deciding how to take account of this in a custody dispute. It may be argued that it is unfair for an abusive parent to be able to "hold against" the abused partner inadequacies that are caused by abuse, though a focus on the "best interests" of the child may weaken this argument. Another response may be for the abused parent to adduce evidence on the positive effects of therapy for victims of spousal abuse, in particular for improving parenting capacity. It may also be important to adduce evidence of the controlling possessive, nature of abusive spouses, and the negative effect that this can have on their parenting capacity.

Note 37: J. Johnston, "High-Conflict Divorce" (1994), 4(1) The Future of Children 165 -182, at 175.

¶ 92 Recently the courts in Canada have begun to take account of spousal abuse and have tended to deny an abusive man custody of his children, recognizing the negative effects that spousal abuse has on children, and the high likelihood that the man may also directly abuse his children.

¶ 93 Sometimes an abusive father will be denied the right to visit his children after separation, though some judges appear to accept that even an abusive husband has the right to visit his children, posing a risk to mothers, especially at the time when the father comes to pick up the child for a visit. Judges will be most inclined to terminate access if there is clear evidence that abuse is continuing or escalating after separation. [See Note 38 below]

Note 38: See e.g Abdo v Abdo (1993), 50 R.F.L. (3d) 171 (N.S.C.A.); B.P.M. v B.L.D.E.M. (1992), 42 R.F.L. (3d) 349

¶ 94 If there has been post-separation abuse, then visitation can pose a serious risk to the mother as well as the children. The exercise of access rights can be used to control a former partner. There are especially great risks for verbal or physical abuse of a parent at the time that care of the child is being changed. In some communities there are programs to supervise visits, or at least supervise the exchange of the children, to minimize the risk to mother and children. Courts are increasingly recognizing that a child's welfare is "inextricably tied" to the "mother's psychological and physical security" and that placing a custodial parent in a situation of risk poses a risk to the child. [See Note 39 below]

Note 39: Pollastro v. Pollastro (1999), 45 R.F.L. (4th) 404 (C.A.)

¶ 95 Children's wishes on access and custody can also be problematic. An abused parent may be viewed as weak and "ineffectual," while the child may view the abuser as "stronger". There can also be a great deal of manipulation and denigration of the abused spouse. Unfortunately, some judges may view the wishes of the child to reside with the abusive father as determinative.

Child Protection

¶ 96 Women who live in relationships where there has been serious spousal abuse, and in particular violence, may find themselves involved in child protection proceedings commenced by a child protection agency (the local Children's Aid Society). Some abused women are reluctant to call the police as they are concerned that this may result in the involvement of the child protection authorities and possible loss of custody of their children.

¶ 97 In Alberta, New Brunswick, Nova Scotia, Newfoundland, Saskatchewan and Prince Edward Island, child protection legislation specifically refers to domestic violence as a factor in finding that a child is in need of protection For example the New Brunswick

Family Services Act s. 31(1)(f) states that the "security or development of a child may be in danger when ... the child is living in a situation where there is severe domestic violence." The courts in other provinces have also demonstrated a willingness to take account of spousal violence as a factor in child protection proceedings. Spousal violence is rarely the only factor operative in protection proceedings, but rather is often combined with a family environment involving other types of child abuse or neglect. When there is a high degree of spousal abuse, the abusive partner is often abusive towards the children, and the parenting capacity of an abused person often suffers.

¶ 98 In some cases where the father is abusive of his spouse and children, the child protection agency may become involved and allow children to remain in the mother's care only on condition that the father has no contact. In some abusive relationships, in the "cycle of violence," the abused mother may allow the man to move back in during his next "contrition phase," again endangering children and provoking the agency to apply to remove the children from mother's care. In abusive relationships, the agency will want evidence that the mother understands the cycle of abuse and has broken the pattern, for example by seeking counselling, leaving the relationship and moving into a shelter.

¶ 99 In some situations the concerns of the agency are not limited to abuse of the mother by the father, but rather it is a violent relationship involving mutual abuse, often combined with neglect or abuse of children. If there is an ongoing pattern of spousal violence in these mutual abuse cases, the instability of both parents and the lack of protection for the child may make removal of the children more likely.

Tort Law [See Note 40 below]

¶ 100 As lawyers and judges become more aware of domestic violence issues, victims have begun to make tort based damage claims to seek financial compensation for a range of physical and psychological injuries that occur in a familial context, principally as a result of wife abuse or child abuse. These cases are still not common, but Canadian courts are receptive to these claims if there has been serious abuse; as judges and lawyers gain awareness of the nature and effects of abuse, damage awards have substantially increased. A tort action can provide financial compensation for a victim of family violence. It may also provide a victim with an important forum for social vindication and for holding an abuser accountable.

Note 40: See Bala, "Tort Remedies & the Family Law Practitioner"(1999), 16 Can. Fam L.Q. 423 -460.

¶ 101 It is possible for an abused spouse to join a claim for financial compensation with a claim for matrimonial relief, such as a division of property. In one 1993 Ontario case a woman left her alcoholic and abusive husband after sixteen years in an abusive relationship. During an altercation at the beginning of an access visit, the man kneed her in the groin, causing her considerable pain but no permanent injury. The judge set aside

an earlier property settlement that she had signed, concluding that it was the result of duress and threats from the man, awarded her $4,000 damages for pain and suffering and another $4,000 for punitive damages, even though the man had also received a criminal sanction for the assault. The judge emphasized that the attack was a "breach of trust" and that "the woman suffered from the humiliation of the attack [from a] ...once trusted companion." [See Note 41 below]

Note 41: Surgenor v. Surgenor, [1993] O.J. No. 2940 (Gen. Div.)

¶ 102 In a 1995 Ontario case a man terrorized his estranged wife for four months following their separation, threatening to harm the woman and abduct her daughter; the man stalked the woman and harassed her friends and professional advisors. Medical evidence established that the woman suffered post-traumatic stress disorder, severe depression, insomnia and suicidal tendencies as a result of the abuse The court awarded her $105,000 in compensation as she suffered psychological injury that impaired her employment, required extensive therapy and had expenses to improve her home's security system. [See Note 42 below]

Note 42: MacKay v. Buelow (1995), 11 R.F.L. (4th) 403 (Ont. Gen. Div.)

¶ 103 As with other types of family litigation, credibility issues and expert evidence are likely to be central to any tort claim . As soon as litigation is contemplated, counsel should begin to seek out evidence to corroborate a client's position, preferably from such "independent" sources as police reports and medical doctors. Various experts such as doctors and mental health professionals may play a key role in establishing injuries or damages caused by abuse. Evidence in the possession of the parties like photographs, letters or diaries may also be significant for establishing a claim. Victims of abuse should be aware that tort litigation may be a highly intrusive process, with defendants attempting to challenge credibility, for example by seeking access to therapeutic records of a plaintiff. [See Note 43 below]

Note 43: A.M. v. Ryan, [1997] 1 S.C.R. 157, accepted that a claim of privilege might attach to records of the therapist of a plaintiff in a civil abuse suit, but appeared to place significant weight on "ascertaining the truth" in a civil case based on allegations of abuse, suggesting that any therapist-patient privilege claimed by a party is narrow in civil abuse cases.

¶ 104 In many situations of family breakdown related torts, there is the potential for the victim to seek redress in either the civil or criminal justice systems, or both. The possibility of parallel or sequential proceedings poses challenges to counsel, but also provides certain opportunities. For a victim, the advantage of the criminal process is that the state will bear the costs of investigation and prosecution of the case, and there may be a certain sense of vindication in having society prosecute a case on one's behalf. However, victims often complain about a sense of lack of control over and involvement in the criminal process. Further the criminal standard of proof, the criminal rules of evidence and the Charter of Rights make it more difficult in a criminal proceeding than in a civil action to prove that abuse has occurred, and a criminal judgment offers no compensation to a victim. As a result, victims may want to seek redress in the civil system, either in addition to or instead of contacting the police in order to have a criminal prosecution commenced. [See Note 44 below]

Note 44: There may be situations in which a victim of spousal or sexual abuse contacts the police and they do not respond in an appropriately protective fashion, allowing further abuse to occur. In these situations, victims may be able to pursue a civil action against the police, as well as against the abuser. This type of claim will be strongest if it can be shown that the failure of the police to respond appropriately was related to sexist assumptions about victims of domestic violence. See Doe v. Metropolitan Toronto Police, 39 O.R. (3d) 487, and "Officer acquitted in spousal abuse case", Globe & Mail, 21 April 1998, p. A8. Such suits have been launched in the United Sates, see e.g. Hynson v. City of Chester, 864 F. 2d 1026 (3d Cir 1988); Balistreri v. Pacifica Police Dep't., 855 F. 2d 1421 (9th Cir 1988); Watson v. Kansas City, 857 F. 2d 690 (10th Cir. 1988).

¶ 105 There are special legislative provisions that stipulate that limitation periods for torts allegedly committed against minors, such as assault and battery arising out of child sexual abuse, only commence at the age of majority. The Supreme Court of Canada has recognized that adult survivors of childhood abuse often lack an awareness of the fact that emotional and psychological difficulties experienced as adults may be attributed to earlier childhood abuse, and so may not seek legal redress until they reach their mid 20's or later. The Court has articulated a rule of "reasonable discoverability" for the commencement of the running of a limitation period. Accordingly the limitation period does not begin to run until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's conduct and of understanding the relationship between the earlier abuse and the plaintiff's condition. In practice, for adult survivors of childhood abuse the limitation period may not commence until they are in therapy and appreciate the connection between their psychological condition and earlier abuse. There may be situations in which victims of spousal abuse may be able to make similar arguments to extend limitation periods if they are not aware of the psychological effects of their abuse. Expert evidence from a mental health professional will usually be necessary to establish the right to extend the limitation period.

¶ 106 In a number of Canadian jurisdictions, including Saskatchewan, British Columbia, Nova Scotia and Newfoundland, there are special legislative provisions to

extend limitation periods where a victim of sexual abuse was dependent upon the alleged perpetrator or not aware of the harm they suffered from the abuse. [See Note 45 below] These provisions are most obviously applicable to victims of child sexual abuse, but may also be relevant for some spousal abuse situations.

Note 45: See e.g. Saskatchewan Limitations Act s. 3(3.1), enacted as S.S. 1993, c.9, s. 2(3); British Columbia Limitations Act, R.S.B.C. 1996, c. 266, s. 3(4)(K)(1); Nova Scotia Limitation of Actions Act s. B22(5), enacted as S.N.J. 1993, c.27, s. 1; and Newfoundland Limitations Act, S.N. 1995 c. L-16 c, s. 8(2).

¶ 107 An initial consideration in deciding whether to commence a civil action is whether any judgment that is obtained is likely to be satisfied by the defendant. This requires some assessment of the assets of the potential defendant. In most situations of intrafamilial torts, criminal acts form the basis for civil liability. In these cases, where the defendant lacks resources to satisfy a judgment, an application can be made for a claim under provincial criminal injuries compensation legislation. These applications do not require a criminal conviction; it is only necessary to establish on a civil standard of proof that a crime has occurred. While the amounts recoverable in a criminal injuries compensation claim is limited (for example in Ontario $25,000 is the maximum lump sum), a person who has been granted government compensation may still pursue a civil tort action against the perpetrator (subject to reimbursing the fund from any judgment enforced). There are limitation period provisions for making a compensation application -- 1 or 2 years from the date of the alleged offence -- but the Board responsible for administering the fund has a discretion to extend the limitation period, and is likely to do so if a victim of a domestic crime lacked the social, psychological or financial resources to bring an earlier claim. Again, medical evidence to explain the delay in making a claim may be important. While applications to a compensation fund are generally less adversarial and formal than a full civil trial, the defendant will be notified of the claim and can contest the claim before the Board. This could result in an adversarial tribunal proceeding, in particular in cases where there has not been a criminal charge.

Role of the Health Care Professional in the Legal Process

¶ 108 Health care professionals may have a critical role in identifying and treating victims of spousal abuse and helping to ensure that they are protected by the police and legal system.

¶ 109 One important task is for health care professionals to carefully note and document any physical or psychological injuries that a child or spouse may have suffered as a result of abuse. If there are visible injuries, they should be photographed, with consent. If any statements are made relating to abuse, these should be carefully noted. A statement by a victim that she has been abused may be used to refute a later allegation that she "fabricated" a claim of abuse to gain tactical advantage in divorce proceedings, or to cast doubt on a later recantation by the victim. If an abuser is a patient who admits

to having threatened or abused a partner or child, this should also be noted in the chart, and may be an admission that can be used in later proceedings. It is to note the type of questioning that led to any statements about abuse; were the statements spontaneous or did the professional engage in suggestive questioning?

¶ 110 If a professional is called as a witness in court, while testifying the professional may be able to use any notes or records that the person made, to enable the witness to "refresh memory" and to help the witness provide a fuller account of what occurred. [See Note 46 below] Health care professionals should appreciate that in some circumstances their records may be subject to examination by the lawyers involved in a court case, and may be used to cross-examine a victim or the professional.

Note 46: Professionals who are called as witnesses may want to refer to publications like Vogl & Bala, Testifying on Behalf of Children: A Handbook for Professionals (Toronto: Institute for the Prevention of Child Abuse, 1992), Queen's Law Library, reserve KE8472 .V63 1992; and Finlay & Cromwell, Witness Preparation Manual(Canada Law Book, 1991)

¶ 111 The health care professional needs to be prepared to testify to support victims of abuse in a range of legal contexts. Such professionals will often be regarded as credible witnesses, having expertise, insight and more objectivity than the spouses and their relatives or friends. Often the professional will have crucial information to help support the claim of a victim of abuse for compensation or protection. A health care professional with knowledge and experience in dealing with domestic violence cases may be permitted to testify as an "expert witness," testifying not only about the specific case but also providing general information that may be important to assess credibility, such as explaining why a woman may have not reported the abuse and stayed in an abusive relationship. [See Note 47 below]

Note 47: R v. F. (D.S.), [1999] O.J. No. 688 (C.A.)

¶ 112 It is important that any evidence be communicated in balanced and professional fashion; a witness who seems partisan rather than professional may lack credibility. The experience of participating in the legal process is sometimes frustrating for a busy professional, but it can be a vitally important part of ensuring patient welfare. Frequently a letter or sworn statement (affidavit) can be sent to the court (through a lawyer) which may obviate the need to come testify, though in a contentious case a professional with critical evidence can expect to be called to testify and will be subject to cross-examination.

¶ 113 While records should reflect what was said to, observed by and done by the professional, one should avoid including uncontextualized statements that may later be unfairly used in litigation. It is, for example, not uncommon for a victim of abuse to wonder whether she may have "provoked" an assault by something she said or did (or failed to say or do). Any statements by a person suggesting that they provoked an assault, should be recorded in a fair and balanced fashion, remembering that verbal comments or marital conduct (liked alleged infidelity, let alone allegedly poor housekeeping or poor grooming) is not a legal or moral justification for an assault. [See Note 48 below]

Note 48: In some cases "provocation" may affect the sentence that is imposed, or result in the reduction of a murder charge to manslaughter, but "provocation" should be used with care by the courts in the context of domestic violence cases, since abusers all too frequently try to justify their conduct as having been "provoked" by their partners' perceived inadequacies.

¶ 114 Victims of spousal abuse need information about community resources that are available to help protect them. In particular, they should be advised about local shelters and counselling programs. If they have been the victim of an assault or other criminal act, they should normally be encouraged to call the police to get protection, and to seek legal advise. Health care professionals should discuss with a patient concerns about future abuse and risk.

¶ 115 Generally the involvement of the police is the most likely way for abuse to stop. However, without the express direction of a patient, a health care provider cannot directly contact the police to report spousal abuse. [See Note 49 below] Victims of abuse may have a range of social, economic and psychological reasons for not wanting to involve the police or the justice system. [See Note 50 below] While they should be counselled about the value of a legal response, the police can never guarantee a woman's safety, and some women wish to preserve their relationships with abusive partners.

Note 49: A recent government report recommends that legislation should be enacted to make it mandatory for professionals to report spousal abuse.Ontario Joint Committee on Domestic Violence (Chair Judge Lesley Baldwin), Working Towards a Seamless Community and Justice Response to Domestic Violence (Ontario Attorney General, 1999)

Note 50: See e.g Martin & Mosher, "Unkept Promises:

Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995), 8 Can. J. Women & Law 3 - 44.

¶ 116 An important exception arises if the spousal abuse or other familial circumstances result in a situation in which a child is considered to be in "need of protection" or a victim of abuse. Health care providers need to be familiar with the exact wording of the child abuse reporting legislation in their jurisdiction. In some provinces spousal abuse itself may be a rise to an obligation on a professional to report suspected abuse to the child welfare authorities (Alberta, New Brunswick, Nova Scotia, Newfoundland, Saskatchewan and Prince Edward Island), while in other provinces the may be other circumstances in a situation of spousal abuse that give rise to an obligation to report suspected child abuse.

¶ 117 It is important for a health care provider to be familiar with local resources for dealing with domestic violence, such as shelters, crisis lines and police. Some communities have special legal aid clinics for battered women or family law.

¶ 118 If a victim of abuse decides to stay with an abusive partner, the health care professional should deal with the patient in a non-judgmental fashion, recognizing the emotions and pressures that may keep her in the relationship. The professional should educate the patient about the risks of escalating violence , and should be encouraged to develop a "safety plan" to respond to any future incidents of abuse. Women who are returning to an abusive situation should be given information about emergency community resources, and should also be encouraged to return to the treatment provider.

¶ 119 Professionals need to be sensitive to the special problems and stresses that may be faced by victims who are immigrants or members of minority communities. They may have limited resources, special family, community or economic pressures to stay in an abusive relationship. They have fears about police involvement in their lives, and may be concerned that the conviction of an abuser may result in his deportation. They may be illegally in Canada, or have their own fear of authorities. It is ultimately for the victim to decide whether to call the police. In some cases, for example for a family physician who has both the victim and abuser as patients, there may be a role for some type of marital counselling or working directly with the abuser to eliminate his abuse. A health care provider who is treating both an abuser and victim must respect the confidentiality of both patients.

¶ 120 Education for health care professionals about the dynamics of spousal abuse, its identification and treatment are vitally important for professionals who are going to deal effectively with domestic violence cases.

Conclusion

¶ 121 While Canada has made significant progress in dealing with issues of family violence, many important issues remain to be addressed. Some changes need to be in legislation, for example to explicitly require all judges in custody and access disputes to take account of domestic violence factors. In most provinces (including Ontario) legislation dealing with civil restraining orders is also inadequate.

¶ 122 Too often the services to help victims do not have adequate financial resources, and victims continue to face delays in the courts, lack of access to services and insensitivity from professionals. Services need to be provided in a more co-ordinated fashion, which requires better co-operation between agencies and disciplines.

¶ 123 Often women remain intimidated and isolated in abusive relationships, and when they leave too often the courts and police fail to protect them. Problems are especially acute for women in rural areas, poor women, immigrant and aboriginal women, and those with disabilities. Even though there have been a great many improvements in our society's handling of spousal assault issues, more needs to be done.

¶ 124 Unfortunately societal attitudes often lag behind the innovative programs available. Education and awareness is key if the problem of spousal abuse is to be prevented and eliminated.

Further reading:

Bala, Spousal Violence in Custody and Access Disputes: A Differentiated Approach (June 1998) http://qsilver.queensu.ca/law/bala/papers/spousal.htm (This is a revised version of a paper by Bala et al for Status of Women Canada, on their website http://www.swc-cfc.gc.ca)

Bala, "Tort Remedies & the Family Law Practitioner"(1999), 16 Can. Fam L.Q. 423-460

Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence Achieving Equality (Ottawa, 1993)

See e.g Martin & Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995), 8 Can. J. Women & Law 3-44.

Ontario Joint Committee on Domestic Violence (Chair Judge Lesley Baldwin), Working Towards a Seamless Community and Justice Response to Domestic Violence (Ontario Attorney General, 1999)

Syrtash Collection of Family Law Articles
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Rights of Divorced or Separated Parents*

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* This article was posted by John Syrtash with permission of the author. It deals, in part, with the Role of Schools in custody access disputes.

Introduction

¶ 1 Family breakdown is a reality faced in every Canadian community. Incidents of divorce or separation can be extremely difficult and divisive, not only for the individuals involved and their children, but, in many cases, school personnel as well. Since teachers and principals have contact with children in their classrooms on a day-to-day basis, they are invariably caught up in the incidents of family breakdown which affect their students.

¶ 2 Teachers and principals are often called upon to give emotional support and attention to students who are attempting to deal with the difficulties and anxieties of a family breakdown. In addition, marriage breakdown can complicate the relationship between the school and parents by adding a variety of legal duties to the already onerous responsibility of teachers and principals. Furthermore, the separation or divorce of parents may draw teachers or principals into a role of attempting to mediate disputes and confrontations which is not within the normal scope of their duties or expertise.

¶ 3 In the event of a separation or divorce, the custody of a child is determined either by agreement of the parents or a court of law. Although the "custodial parent" may be responsible for the daily care of the child, the decision making power with respect to issues such as the child's religion, health and education may be shared by the parents in different ways. As a result, one cannot assume that a non-custodial parent has given up control over certain aspects of a child's life.

¶ 4 In many schools, concerns have arisen regarding the rights of a non-custodial parent to: (a) obtain information from the child's teacher or student record maintained by the school board; or (b) visit the child at school.

Relevant Legislation

¶ 5 In Ontario, the relevant legislation regarding a parent's right of access to her/his child is the Children's Law Reform Act. Subsection 20(5) of the Act provides: "The entitlement to access to a child includes the right to visit with and be visited by the child

and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child."

¶ 6 On June 13, 1983, the Ontario Ministry of Education issued Policy Memorandum No. 76 entitled "Custody and Guardianship of Minors". The Ministry's position is summed up on page 2 of the memorandum, which states:

> "In general, this means that a non-custodial parent of a child is entitled to examine the child's pupil record, under the provisions of subsection 237(3) [now s. 266(3)] of the Education Act, unless a court order or separation agreement states that such parent is not entitled to access to the child; but that only a parent or other person having custody can claim for the child the right to attend school without payment of a fee."

¶ 7 The Memorandum provides that in accordance with subsection 20(5) of the Children's Law Reform Act, a non-custodial parent is entitled to visit with the child or make enquiries and be given information as to the health, education and welfare of the child, unless a court order or separation agreement states that such parent is not entitled to access to the child.

¶ 8 In my view, the right to educational information includes the right to make reasonable enquiries of the teacher or principal concerning the child's behaviour and performance in the school.

¶ 9 An example of instruction given to school personnel from a board is as follows:

> "A separated or divorced parent who does not have custody of his/her child...may have access to...child or children's school records...unless a court order or a separation agreement prohibits such access and the school has been supplied with a certified copy of the court order or the separation agreement as the case may be."

¶ 10 Therefore, if a custodial parent requests that a school restrict the rights of a non-custodial parent regarding access to a child in that school, the onus is on the custodial parent to produce a certified copy of the court order or separation agreement which substantiates the request.

Role of the School

¶ 11 The onus is on the parents to inform the school about any family matters that may affect their children and govern the relationship between parents, their children and the school. The registration forms provided by the school should ask whether there are any family matters, custody, guardianship or access order or separation agreements of which the school should be aware. The school may request certified copies of such orders or agreements and should place a copy of those documents on file. It is clear that parents or guardians are not obligated to provide those documents.

¶ 12 Where a custodial parent objects to access being given to a non-custodial parent providing information as to the health, education and welfare of the child, the school should require that the custodial parent support her/his claims with appropriate documentation.

¶ 13 If such documentation is not provided, schools should attempt to act in the best interests of the child. In the absence of information to the contrary, schools are entitled to treat both parents as if they are married and have joint custody.

¶ 14 Subject to any limitation in court orders or agreements as between the parents, the custodial parent has the right to control his or her children's education, medical treatment or residence. Accordingly, on a day-to-day basis, the school must deal with the custodial parent as primary contact person and when making decisions about the child's education and health care.

¶ 15 When there is joint custody, those rights and responsibilities are shared and both parents are entitled to take part in important decisions affecting their children. Where there is a dispute which cannot be resolved by parents with joint custody, such as whether a child should be enrolled in a French immersion program, the school should avoid involvement. The principal or teacher should attempt to maintain the status quo until agreement is reached by the parents and conveyed to the principal or teacher or they are provided with a court order which alters the status quo.

Rights of Non-Custodial Parents

¶ 16 Under the Canada Divorce Act, the children of a marriage are entitled to "as much contact with each spouse as is consistent with the best interests of the child" and for that purpose, the courts must take into consideration the willingness of the person seeking custody to facilitate such contact. Accordingly, parents who do not have custody of their children are usually granted "reasonable" access to them unless it is in the best interests of the children to restrict or deny access.

¶ 17 At common law, unrestricted access simply allows the non-custodial parent the right to visit with the children, including the right to visit with the children away from the custodial home. The right of access does not allow the non-custodial parent the right to control or interfere with the upbringing of the children and it does not confer on the non-custodial parent the right to be consulted about or participate in decisions about the education of the children. Notwithstanding the fact that a non-custodial parent may have unrestricted access to her/his child, it is recommended that all contact with the child on school premises be supervised by school board personnel.

¶ 18 Where the access of a non-custodial parent has been limited, the parent's rights will depend on the exact terms of the court order or separation agreement. For example, where a court order requires that a non-custodial parent must have supervised access, this does not mean that the parent has no right to information about the health, education and welfare of her/his child. In attempting to interpret a court order or separation agreement,

principals and other school board officials cannot be expected to know the fine points of family law. If there is any doubt about the terms of a court order or separation agreement, clarification should be obtained from the board solicitor (A.F. Brown, Viewpoint, March 1990).

¶ 19 The case may also arise where a non-custodial parent, who is only entitled to visit the child on weekends, enters on the school premises on a weekday asking to see the child. In this situation, the parent is in breach of a court order or separation agreement. However, it is not the duty of the principal or other board official to monitor or enforce a parent's respective rights and obligations. It is advised that the custodial parent be contacted as soon as possible and be informed of the situation. It is the responsibility of the custodial parent to enforce the terms of the custody order or separation agreement. If the principal or teacher has reasonable grounds to believe that the child may be in danger, he/she should contact the police.

¶ 20 It is clear that not every visit by a non-custodial parent on school premises means that a child is in danger. The response of a principal or teacher in each individual situation will hinge on her/his knowledge of the family background. Is there a history of child abuse in the family? Does the child want to see the parent? Has the custodial parent warned school personnel that this visit might occur? Where a non-custodial parent arrives at the school to visit her/his child and the school officials have been provided with a court order denying access to the parent, board personnel should prevent contact with the student, pointing out that the visit is disruptive to both the child and the school. Where a parent is disrupting a school, the principal has the authority under the Education Act to have the parent removed. However, it is preferable for the board officials to utilize less drastic measures to resolve the situation. School board officials should not attempt to mediate between parents. Rather, the parents should be encouraged to resolve outstanding issues between themselves.

¶ 21 The rights and privileges of a non-custodial parent in a school context was examined in the 1990 Alberta decision Moss v. Boisvert. In this case, the father of two children had been granted access in a divorce, while the mother had custody. In the access order, the father was given the rights (a) to access, (b) to make inquiries and to be given information as to the health, education and welfare of the children, and (c) to be told by the mother in writing of the medical concerns and problems of the children.

¶ 22 The father sued, among other things, for a declaration that he was entitled to access to his son's school, to be involved in school activities and functions, and to be consulted before either of his children were taken on activities, such as field trips, that would conflict with his normal access time.

¶ 23 Master Funduk held that, as a non-custodial parent, the father's rights were limited to access, the right to make enquiries and to be given information as to the health, education and welfare of the children, and the right to be told by the mother in writing of the children's medical concerns and problems. With respect to the father's request to be consulted about field trips, Master Funduk held that the non-custodial parent had no right

to be consulted about these activities or to object to or prevent the children's participation in them. The Chambers Judge stated that the father's right to inquire into and receive information about the children's education and welfare could reasonably include the right to receive notice or information about the children's school activities.

¶ 24 The Chambers Judge held that the non-custodial parent did not have the right to prevent participation in school activities during his access time. He ruled that the best interests of the children are paramount and children must be permitted to participate in school activities including field trips which "occasionally" cut into the non-custodial parent's access time.

Conclusion

¶ 25 From a practical point of view, the onus is on the parents to inform the school about any family matters that may affect their children and govern the relationship between parents, their children and the school. As indicated above, it is advised that school registration forms specifically request information as to whether there are any family matters, custody, guardianship or access orders or court agreements of which the school should be aware. The onus rests with the parent who has custody to provide the school with a certified copy of any order, judgment or separation agreement.

¶ 26 Overall, school personnel have an obligation to make decisions in the best interests of the child. If a teacher or principal has reason to believe that a child may be in danger, a parent's request for access to the child should be denied. In certain cases, it may be necessary to call the police. Obviously, not every visit by a non-custodial parent means that there is danger to the child. The response of an individual teacher or principal will depend on a range of factors, such as her/his knowledge of the family situation, age of child, history of abuse and warnings from the custodial parent. In this situation, a teacher's or principal's people-skills and common sense may be put to the test.

¶ 27 While respecting the rights of both parents, and without interfering with the dispute, the principal may have an opportunity to bring to the attention of the parents the negative effects on the child's education caused by their conflict. To quote Anthony Brown, a lawyer with the Ontario Ministry of Education, "there is a proper place to resolve custody disputes, but it is not at the school."

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SFLRP/2000-002

The Valuation of Trust Interests in Family Law Matters*

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¶ 1 When it becomes necessary to calculate the net family property of an individual who has a beneficial interest in a trust, most family law lawyers find themselves treading in unfamiliar water. The primary cause of this uncertainty is related to the somewhat intangible nature of a trust interest and that traditional valuation principles are not available to enable its value to be determined.

¶ 2 The exercise would be less complicated if one were to adopt fair market value as the defining basis for determining the value of a contingent or vested trust interest. By adopting this definition, the value would be predicated on the highest price determined in an open and unrestricted market between an arm's-length willing vendor and purchaser. Under these rigid parameters the value of a trust interest would always be nil due to the nature of the property and the severe restrictions on its transferability. No form of third party sale would be possible.

¶ 3 Many family law case decisions have articulated that the valuation of property must reflect the peculiar features of a particular property. This requires that different definitions of value be considered. Fair value is a notional concept that is used in family law and in oppression and dissent remedy cases. In family law, the concept is not defined but the general sentiment is to arrive at a just and equitable price for the asset. The decision in Brinkos v. Brinkos [See Note 1 below] indicated a preference for fair value as a valuation basis more than ten years ago. A fair value definition provided the court with the flexibility to determine the value of an income interest in a trust. In many circumstances, fair market value, a more common standard, does not permit results that meet the objective of equitable distribution that is the essence of the Family Law Act. Fair value is now the valuation standard in Ontario family law.

Note 1: (1989), 20 R.F.L. (3d) 445, 69 O.R. (2d) 225, 60 D.L.R. (4th) 556, 33 O.A.C. 295, 34 E.T.R. 55 (Ont. C.A.).

¶ 4 The courts have recognized that an interest in the capital or income of a trust is an asset to be included in a spouse's net family property, (see Brinkos, DaCosta v. DaCosta [See Note 2 below], Black v. Black [See Note 3 below], Grove v. Grove [See Note 4 below] and Sagl v. Sagl [See Note 5 below]). Although the traditional valuation techniques that are usually employed to value an operating business are not applicable, there are a number of factors one should consider when a fair value for a trust interest is to be established:

- -- whether the trust interest is contingent or vested;
- -- whether the distributions from a trust are discretionary or non-discretionary;
- -- the trustee's powers to manage and control trust property for its beneficial owners;
- -- the broad powers given to the trustee of a discretionary trust including:
  - -- the determination of when trust property is to be distributed and to which beneficiary(s);
  - -- determination as to the quantum of income to be paid if any, and to which beneficiary(s); and
  - -- in what proportion are payments made to a group of beneficiaries.

Note 2: (1990), 29 R.F.L. (3d) 422, 74 D.L.R. (4th) 491 (Ont. Gen. Div.).

Note 3: (1988), 18 R.F.L. (3d) 303 (Ont. H.C.).

Note 4: [1996] B.C.J. No. 658 (March 27, 1996, Doc. Vancouver D091687 (B.C.S.C.)).

Note 5: (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Ont. Gen. Div.).

¶ 5 One aspect of the valuation process is predicting the actions a trustee or group of trustees may take with respect to the distribution of income and capital of a trust. The probability of a distribution in favour of a particular beneficiary, its timing and the circumstances under which it will be made are critical factors to consider.

¶ 6 A beneficiary may have a capital interest and/or an income interest in a trust, as illustrated below:

Capital Interest
Beneficiaries

Trust Capital
E.g. public company shares

Trust Income
E.g. dividends

Income Interest
Beneficiaries

¶ 7 These two types of interests are valued separately as the cash flow streams differ for each.

Valuation of an Income Interest

¶ 8 An income interest may result in the payment to a beneficiary of a stream of future income that will be generated by the trust capital. The value of this interest to the beneficiary where the distributions are not discretionary will be calculated by determining the present value of the future stream of cash flow over the number of years during which the beneficiary is expected to receive the income. This amount represents the "value to the owner" of the trust income interest - the amount that a person would be willing to pay to retain his or her right to the stream of future income rather than be deprived of its ownership.

¶ 9 The value of an income interest in a trust requires consideration of many factors including:

-- the life expectancy of the underlying capital beneficiary (as this income usually stops when the trust is wound up on the death of that beneficiary);

-- the nature of the capital that the trust owns (ie. what does it yield in terms of return and is that return on account of income or capital);

-- an estimate of the future rate at which income will be generated by the trust capital;

-- the likelihood that the trustees will encroach on the corpus of the trust;

-- income taxes that the beneficiary would be required to pay by virtue of including the trust income in his or her income for tax purposes; and

-- an appropriate rate to discount the value of the future, after-tax cash-flow stream generated from the trust capital.

Valuation of a Capital Interest

¶ 10 The value of a capital interest in a trust may be determined by establishing the present value of the beneficiary-spouse's interest in the future value of the trust capital (see DaCosta [See Note 6 below]). The value of a capital interest in a trust requires consideration of many factors including:

-- expected date the capital will be distributed to the beneficiary;

-- expected annual rates of return on capital or expected appreciation rates;

-- capital planned to be reinvested;

-- anticipated capital contributions or distributions to other beneficiaries;

-- value of the underlying assets owned by the trust; and

-- prior decisions of the trustees regarding distributions.

Note 6: Ibid.

¶ 11 The objective of this calculation is the same as that for an income interest: to determine a lump sum amount of capital that the owner-spouse would agree to accept at the valuation date rather than wait to receive the funds. In both cases, one is attempting to determine value based on a value to owner concept. Fair value acknowledges the unique features of a trust interest and allows for this determination whereas the fair market value definition does not.

¶ 12 Predicting the actions of a trustee with discretionary powers will be key. Consideration should be made to the: 1) owner-spouse's overall estate planning; 2) expectations and legal rights of the other beneficiaries; and 3) obligation of the trustees to maintain an even hand amongst beneficiaries.

¶ 13 The value attributed to a discretionary trust interest is usually nominal due to the extraordinary difficulty in determining the likelihood that the trustees could exercise their power in favour of a particular beneficiary. Some are of the view that this uncertainty would render the value negligible.

¶ 14 The 1997 decision in Sagl was the first case in Ontario to address the valuation of a totally discretionary interest in a family trust. An apparently simple solution was ordered. After determining the after tax value of the property owned by the trust, the court assumed a deemed realization of the trust capital and prorated this amount amongst the seven capital beneficiaries that existed at the valuation date. The husband was required to include his share in the determination of his net family property. Although some legal practioners have objected to the conceptual aspects of this decision it does offer a solution that may have some appeal to those wishing to resolve the issue outside the courtroom.

¶ 15 Only future decisions will provide guidance on alternative solutions to this complex legal and valuation issue.

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SFLRP/2000-001

Taking Stock of Restricted Stock Discounts: Separating the risks related to restricted stock into two components allows for a more manageable discount quantification

*by James A. DeBresser**

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Introduction

¶ 1 Restricted stock in publicly traded companies is commonly issued to executives to encourage long-term loyalty to an organization. Publicly traded purchaser companies also commonly issue restricted stock as all, or part, of the consideration that is paid to acquire another company. Restricted stock is stock that cannot be sold during a specified period of time, known as the restriction period. Otherwise, restricted stock is the same as stock that trades on any public exchange. Following the expiry of the restriction period, restricted stock is allowed to trade freely.

¶ 2 Restricted stock awards are a popular component of today's executive remuneration package. Typically, the restricted stock issued to an executive is subject to a vesting period. Prior to vesting, the stock cannot be sold, and in most cases, the company is entitled to revoke the stock award if the executive leaves on his own accord or is terminated. In the "share-for-share exchange" transactions which are sometimes used to complete corporate acquisitions, the stock of the purchaser company is typically held in escrow pursuant to securities law, or pursuant to a purchase and sale agreement that may require certain targets or performance contingencies to be met by the existing shareholders of the acquired company. Whatever the reason, the ownership of restricted stock invariably involves additional risks not present with the same stock that is freely traded. Because of these additional risks, the value of restricted stock will be lower than the value of identical but freely traded shares. The starting point for the valuation of restricted stock is always the publicly traded stock price. The problem commonly faced by business valuators however, is: What discount from the publicly traded stock price should be established for stock which is currently restricted?

Risks Associated With Holding Restricted Stock

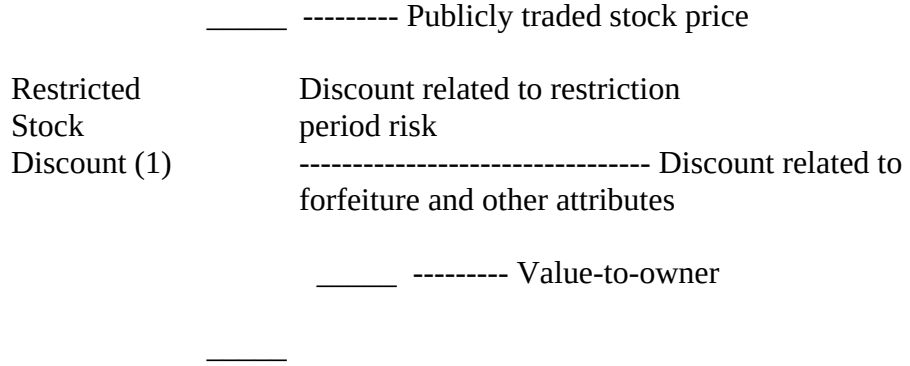
¶ 3 In an article that appeared in this column, three distinct risks associated with holding restricted stock were identified (see Restricted Value by Errol Soriano, January/February 1996 edition of CA Magazine, page 39). These risks include:

1) Restriction period risk, the risk that the stock may not be freely traded during the restriction period;
2) Risk of forfeiture, the risk that the stock may be revoked by the issuer prior to the restrictions being lifted; and
3) Other attributes, other terms and conditions of the stock or of the issuer that affect the ultimate benefit to the employee.

¶ 4 The severity of all three risks comprises the total restricted stock discount, which is always expressed as a percentage of the publicly traded stock price. For the valuation concepts and techniques discussed in this article, it will be useful to think of the restriction period risk separately, but consider the risk of forfeiture and other attributes together (see Exhibit 1).

¶ 5 Once the restricted stock discount is separated into two components as shown in Exhibit 1, quantification of the discount becomes more manageable. Techniques discussed later in this article can be used to estimate the magnitude of the discount associated with the restriction period risk. Risk of forfeiture and other attributes will always be a question of fact, though in many cases, these risks will be insignificant. This is often the case with restricted stock holdings of senior executives who have excellent track records with their companies. Because of their positions in an organization, and their past performance, the risk that these executives might forfeit their restricted stock is usually quite low, and it may be appropriate to ignore them. In many cases however, these risks will be quite significant and must be considered.

Exhibit 1 Components of Restricted Stock Discount



(1) The total restricted stock discount is comprised of both the discount related to restriction period risk as well as the discount related to the risk of forfeiture and other attributes.

¶ 6 Quantification of the discount associated with the risk of forfeiture and other attributes requires the use of professional judgment once all the facts have been obtained. For a summary of the issues that should be addressed in order to assess the risks associated with the risk of forfeiture and other attributes, see Restricted Value by Errol Soriano (CA Magazine, January/February, 1996).

Quantification of Discount Related to Restriction Period Risk: The Mercer Approach

¶ 7 An approach described by Z. Christopher Mercer, in his book entitled Quantifying Marketability Discounts (Peabody Publishing LP, 1997), can be used to quantify the discount related to the restriction period risk of a restricted stock holding. This approach equates the size of the discount to the cost of "hedging" the restricted stock during the restriction period. The rationale for this approach is based on the premise that the restriction period risk is directly related to the risk that the stock price might decline during the restriction period. If it was guaranteed that the price of the stock would not decline during the restriction period, holding restricted stock would be risk-free, except for the time value of money foregone during the restriction period. It is for this reason that the discount related to the restriction period risk should equal the cost of "hedging" (i.e. the cost of providing a notional "price guarantee", or insurance against a price decline during the restriction period). Investors frequently acquire "insurance" against price declines, by purchasing put options on the stock they hold. A put option is the right, but not an obligation, to sell a stock at a specified fixed price in the future, called the exercise or "strike" price. Accordingly, if the stock price declines, the holder of a put option can exercise his right to sell the share at the original price, thereby protecting himself against price declines (see Exhibit 2).

Exhibit 2 How Put Option Hedges Against Stock Price Decline

Assume an investor owns one share of CIBC that he cannot trade for some reason during the next four months. The investor is worried about a decline in the stock price during the restriction period. The stock closed recently at $30.

The investor purchases a single put option on CIBC with an exercise or "strike" price of $30, which expires coincidentally with the lifting of the restriction period, in four months.

If the stock price remains at or above $30, the put option, or right to sell at $30, is valueless. If the stock price drops to, say, $20, the put option is worth $10. As a result, the investor's total value of one share and one put option cannot decrease below $30.

¶ 8 The cost of this hedging strategy during the restriction period is equal to the value of the put options required to hedge the restricted stock holding. The value of the put options is directly related to the volatility of the underlying stock (i.e. the tendency of the stock price to rise and fall) on the day that the restricted stock holding is required to be valued. The volatility of the underlying stock can be gauged from stock market data or can be calculated based on historical stock prices.

¶ 9 The valuation of the discount related to the restriction period risk for a block of restricted stock can be illustrated using the example shown in Exhibit 3.

Exhibit 3 Example of Restricted Stock Holding

Assume that an executive holds 20,000 shares of restricted stock in his company. The executive separates from his spouse and must value all of his assets under family law in the province in which he resides. On the date of separation, the 20,000 shares have not vested. The stock ownership agreement with his company indicates that the restrictions on his holding will be lifted over a four-year period such that in each of the next four years, 25% of his shares may be sold. Assume further that the stock closed at $120 on the date that the executive separated from his spouse, and that the volatility of the stock, from published market data, is 40%. The executive is held in high regard by the Board of Directors of the company and has no intentions of leaving the company on his own accord. Accordingly, risks related to forfeiture and other attributes can be safely ignored.

¶ 10 The size of the discount related to the restriction period risk for the above restricted stock holding is determined by calculating the aggregate value of a series of put options that hedges the value of the entire holding over the restriction period. The value of the put options is calculated by making use of two fundamental equations from corporate finance.

Put-Call Parity and the Black-Scholes Formula

¶ 11 In order to calculate the value of any put option, one must first understand that the value of a put option is related mathematically to the value of a call option having the same terms. This equation, taken from corporate finance, is known as put-call parity. The put-call parity equation simply states the mathematical relationship between a put option and a call option having the same terms, which is shown in Exhibit 4.

Exhibit 4 Put-Call Parity Equation

Call option value Put option value = Stock Price Present value of Strike Price

Moving the terms around using simple algebra, one can solve for the value of the put option:

Put option value = Call option value Stock Price + Present value of Strike Price

¶ 12 From the put-call parity equation, the stock price and the present value of the strike price are easily obtained. The call option value is determined by using the Black-

Scholes equation derived by Professors Fisher Black and Myron Scholes, which is shown in Exhibit 5. This equation calculates the value of a call option for a non-dividend paying stock. If the stock under consideration pays dividends, adjustments to the formula are required to account for the dividend paying nature of the stock.

Exhibit 5 Black-Scholes Formula

[Quicklaw ed. note: This exhibit cannot be reproduced online.]

¶ 13 By substituting the three terms into the equation given in Exhibit 4 for each put option in a series which hedges an entire restricted stock holding, a valuator can proceed to determine the discount related to restriction period risk. The exercise prices of the put options in the series are selected based on the stock price of $120 on the date of separation, adjusted to compensate for the time value of money as the holding vests over the ensuing four years. For the executive's restricted stock holding example from Exhibit 3, that discount is calculated as follows:

Exhibit 6 Calculation of Discount Related to Restriction Period Risk for Example Given in Exhibit 3

Number of Shares (A)	Restriction Period (years)	Risk-free Interest Rate	Exercise Price of Put Required to Hedge Single Share*
5,000	1	6.00%	$127.20
5,000	2	6.25%	$135.00
5,000	3	6.50%	$143.40
5,000	4	6.75%	$152.40
20,000			

Value of Call per Black-Scholes	Value of Put per Put-call Parity (B)	Total Cost of Hedging Strategy (A) x (B)
$19.11	$19.11	95,549
$27.06	$26.65	133,233
$33.26	$31.97	159,848
$38.59	$35.95	179,735
		568,365
Total cost of hedging strategy (C)		
Total value of portfolio, but for restriction period risk (D)		2,400,000
Discount related to restriction		

period risk (C) / (D)	24%

*$120, adjusted for time value of money for 1 to 4 years

Conclusion

¶ 14 Quantification of restricted stock discounts requires careful analysis of all the components of risk that are associated with a particular holding. These risks always include the restriction period risk and may also include the risks related to forfeiture and other attributes. Arbitrary and unsupported discounts are only acceptable in the most general of circumstances. Quantification of restricted stock discounts in any other circumstances, particularly in litigation proceedings, requires a more careful and thorough review of all of the facts related to a particular holding. The techniques discussed in this article and the exercise of professional judgment can be used to develop supportable restricted stock discounts.

Syrtash Collection of Family Law Articles
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Post-April 30, 1997 Developments Concerning Family Law and the Income Tax Act*

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November 10, 1999

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NOTE: The statements offered herein are not universally accepted by the legal profession or revenue authorities as the only interpretation of income tax law

1. February 16, 1999 Budget

- the most recent Budget proposes an interesting (if complex) concessionary regime for the computation of income tax on retroactive lump sum payments of child support (made pursuant to a pre-May 1, 1997 written agreement or court order) or spousal support
- under the proposed regime, a recipient taxpayer will have the choice of paying tax on a lump sum payment not at the rate otherwise applicable in the year of actual receipt, but rather at a lower rate that would have been applicable if the amount in question had instead been received in the earlier year or years
- will only apply if the total lump sum payment in a year is at least $3,000
- the lower tax rate will not apply to any interest portion of the lump sum payment

EXAMPLE
An individual is entitled to spousal support payments (or child support payments made pursuant to a pre-May 1, 1997 written agreement or court order) of $12,000 per year for 3 years, but only succeeds in collecting $36,000 in year 4, at which time it is paid in one lump sum.
Depending on the recipient's other sources of income, it is possible that he or she will pay income tax on $36,000 at a higher rate than would have been exigible on each $12,000 annual amount.
The proposed system (as yet undetermined) will recompute the recipient's income tax owing as if the lump sum payment had been

spread over the earlier three (3) years.

- the government claims that it will not claw-back means-tested benefits (e.g., Child Tax Credits)
- will apply to lump sum payments received after 1994
- the Budget papers specify that taxpayers will be entitled to ask Canada Customs and Revenue Agency ("CCRA") (formerly known as Revenue Canada) to determine whether the proposed regime is advantageous to them
- no indication is given regarding how individuals will be able to claim any resulting income tax refunds for the 1995 through 1998 taxation years

2. Insertion of COLA Clause

- the insertion of a COLA clause into a pre-May 1, 1997 written agreement or court order via post-April 30, 1997 court order to automatically increase child support is not considered to be a variation (and, hence, does not affect deductibility and inclusion)
- the date of the first payment made pursuant to the COLA clause does, however, amount to a variation and makes the child support non-deductible and not subject to inclusion
- see Technical Interpretation 9812665

3. Deductibility of Legal Fees

- CCRA states (paragraph 17 of IT-99R5) that legal fees paid to establish a right to spousal support or child support are non-deductible
- in Donald v. The Queen, [1999] 1 C.T.C. 2025 (T.C.C.), the court held that legal fees incurred for this purpose are deductible because they do not establish a right, but rather quantify an existing right
- CCRA subsequently issued a release stating that it does not agree with the Donald case, though it did not bother to appeal the decision (see Technical Interpretation 9831477)
- the fact that child support is no longer subject to deductibility and inclusion does not affect the issue of the deductibility of the legal fees

4. Matrimonial Mediation Agreements

- the decision in Von Neudegg v. The Queen, [1999] 2 C.T.C. 2525 (T.C.C.), suggests that a mediation agreement regarding matrimonial issues, such as spousal support, is not a "written agreement" for the purposes of the Income Tax Act
- thus, spousal support paid pursuant to the mediation agreement was

not deductible

5. Subsections 56.1(2) and 60.1(2)

   - certain payments made to third parties in respect of spousal support are still deductible and subject to inclusion if the written agreement or court order includes references to subs. 56.(2) and 60.1(2) of the Income Tax Act
   - in Larsson v. The Queen (1997), 97 D.T.C. 5425 (F.C.A.), the court held that a subsequent order, which had retroactive effect, could be obtained to correct a previous order which did not contain these provisions

6. Spousal Support Received by Status Indians

   - spousal support received by a Status Indian is not subject to inclusion if he or she is resident on a reserve
   - CCRA, at one time, required both the recipient and the payer to be resident on the reserve before the spousal support was considered to be exempt (see Technical Interpretation 950258A)
   - the payer is still entitled to deduct the spousal support paid even though it is not subject to inclusion due to any Status Indian exemption afforded the recipient

7. Support Payable to Children

   - child support payable pursuant to a pre-May 1, 1997 written agreement or court order is deductible provided it is payable to the spouse or former spouse
   - in Smith v. The Queen, [1998] 1 C.T.C. 2715 (T.C.C.), the court determined that child support paid to the child (with the blessing of the former spouse and with her continued inclusion in income of the amount in question) eliminated the deductibility of the amount to the payer

8. Employment Wages Paid to Spouse

   - in some private corporations, a spouse may continue to receive wages (periodic salary or bonuses) from the corporation even though he or she no longer provides any services in return for the amount received (all of which may be part of the terms of a marital breakdown)
   - CCRA has accepted that, in these circumstances, periodic wages payable to the estranged spouse are still deductible to the corporation even though there is no service being provided by him or her (see Technical Interpretation 9805125)

9. Spousal Support Payable to Enforcement Branch

   - the decision in Chute v. The Queen, [1999] 2 C.T.C. 2864 (T.C.C.), holds that any spousal support payable, pursuant to a written agreement or court order, to a provincial enforcement branch should include references to subs. 56.1(2) and 60.1(2) of the Income Tax Act to ensure deductibility
   - this case concerned the enforcement branch in Saskatchewan, which may limit its application to court orders issued in other jurisdictions

10. Deductibility of Arrears

   - CCRA regularly challenges the deductibility of the payment of arrears, given that they appear more to be in the form of a lump sum, as opposed to a periodic, payment
   - the payment of arrears by the taxpayer himself or herself causes the most problems
   - however, the courts have held that the satisfaction of arrears in a lump sum amount through garnishment (Carey v. The Queen, [1999] 2 C.T.C. 2677 (T.C.C.)) or through the provincial enforcement branch (Boucher v. The Queen, [1998] 3 C.T.C. 3014 (T.C.C.)) negates any argument that the arrears represent lump sum payments and, hence, are not deductible

11. Variation of Child Support for Arrears

   - if there are arrears of child support owing pursuant to a pre-May 1, 1997 written agreement or court order, any written agreement or court order made post-April 30, 1997 that deals only with the arrears does not affect the deductibility or inclusion of the otherwise periodic amounts of child support
   - see Technical Interpretations 9717896 and 9812307

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Humour, Laughter and Other Serious Matters, Part Two*

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¶ 1 In part one of this article I touted the benefits of humour in the practice of law, especially family law. These include creating rapport, busting stress, helping to convey a truth which may be unsavoury or difficult to otherwise convey and maintaining better health.

¶ 2 I also noted that a major problem we have is that many people, especially lawyers, are inhibited from using humour in view of the ambivalent status humour is accorded. You hear, "We need humour" along side with "Get serious." It is as if one excludes the other.

¶ 3 Well do you know how the public perceives lawyers? I have had several instances whereby I told people that I write humour and the response was, "A humourous lawyer? That's an oxymoron."

¶ 4 So much for trying to appear serious.

¶ 5 If you are now ready to consider shedding the humour inhibitors, I would like to suggest a few ways by which humour can readily be generated and then equally important I would like to offer my views on when it is or is not appropriate. Hint: it is always appropriate, in one form or another.

THE GENERATORS

¶ 6 What is humour? I don't know. It doesn't really matter. We need not know what yellow is in order to enjoy a banana. But I'll tell you what generates humour. In one word: "IMPERFECSHUN". If something is imperfect it is open to being viewed through our sense of humour. Examples include the weather, cheap people, snobs and of course lawyers. A flaw in any situation grabs our attention and sends a message to our sense of humour. If we have enough tension or feelings about the situation a spark or electrical charge or whatever you want to call it opens our humour shades.

¶ 7 If the weather say is stormy, we can readily generate snow or rain humour. You may say that perfect weather will be a harder sell. Not quite. If things are too good,they are also imperfect. I recall watching a "Leave it to Beaver" episode ages ago in which the Beaver edited a school daily newsletter, reporting news, weather, etc. He reported 3 or 4 rainy days in a row. The next day was sunny and he announced, "Today there was no weather."

¶ 8 Something too good is imperfect and ergo also humorous. These include, the Brady Bunch, the Anderson family (Robert Young et. al.) and of course Ward and June Cleaver.

¶ 9 Here are some devices we can all use to sharpen our sense of humour and help boot up that electricity. Yes, telling jokes is one method. But a joke should be appropriate to the situation. Otherwise you may have the elements of humour without that tension or electricity. A joke out in left field is a broken egg in a cold frying pan. There are other and better no risk methods of employing humour. Here are five methods.

a) Props

¶ 10 You can use these either to convey humour to others or to juice yourself up. I am an avid Far Side fan. I have a tear off calender and I start my day by reading the Far Side sheet for the day. If I love it, I post it on a cork board in my office.

¶ 11 My desk and office are also cluttered up by a couple of carvings and stuffed animals, including Foghorn Leghorn, the southern gentleman rooster. You squeeze his belly and he announces, "Ah say, don't bother me son".

¶ 12 I have seen clients in my office telling me about the road to hell they are travelling in their matrimonial disputes. In the course of our meeting they suddenly squeeze old Foghorn. They giggle. Then we have a short discussion about our favourite comedians, or sitcoms or whatever. We both feel better. And I even get to docket for all the laughing time. And that's exactly what I tell my clients. "Laugh all you want, you're paying me $250 per hour." Then I'll say, "Only kidding; I'll pay you for making me laugh."

¶ 13 The important thing is I have yet to lose a client for importing humour into our relationship. Nor has the Law Society ever walked in unannounced and seized my cartoon collection.

¶ 14 A second benefit of using props is that they loosen you up as well. They send a message to you that it's ok to lighten up.

b) Self deprecation

¶ 15 Comedy icon Phyliss Diller made a career of doing jokes about her alleged ugliness. Rodney Dangerfield makes an industry about him not getting any respect. But you do not have to tell jokes. You can just make comments about yourself. You see the threshold for successful humour is much lower when you yourself are the brunt of the situation.

¶ 16 I hope you all saw the movie Roxanne starring Steve Martin. The story is somewhat based on Cyrano de Bergerac, where Martin has this colossal nose. The movie takes place in the 1980's in a small Colorado town.

¶ 17 Martin often uses wit in the form of self insult whenever someone makes fun of his nose. There is a moving scene at a bar when some lout says to Martin something terribly witty like, "Hey, you have a big nose."

¶ 18 Martin is very sensitive about this subject and in front of a packed house he turns to the offender and says something like, "Surely you can be more creative than that." Martin then offers twenty alternate witty remarks the offender could have used other than the dumb words he did use.

¶ 19 Martin even classifies the different approaches. He says, "The geographical. It's so nice to be able to smell the coffee in the morning...from Brazil." or "The sexual. This way I can handle two women at once." etc. etc. He goes through twenty versions.

¶ 20 The bar patrons all laugh at each version but the laughs become directed at the assailant as he apparently is the only person not laughing.

¶ 21 The audience therefore simultaneously applauds Martin for easily and humourously fending off the aggressor and spurns the antagonist for his folly.

¶ 22 The reason self insult works is that few people will disagree with you assessment.

¶ 23 Be careful however not to overdo it. You may find your client referrals taking a hit if you consistently lament how bad a lawyer you are. You might occasionally say, "I'm not Perry Mason". But don't stray too far in that direction.

c) Beg, borrow or steal

¶ 24 Another useful method whereby you can generate humour without even telling a joke is by using a quote, or reciting a short poem, or simply reading a cute story from a publication. You'll have the people laughing and you will get all the credit. I once wrote an article entitled, General Wolfe v The Military Aid Plan. It told the story about Wolfe's estate billing England for his services in conquering Quebec. It was a lampoon on a lawyer billing Legal Aid. He even asked for a discretionary increase due to unforseen difficulties.

¶ 25 I was told that the Director of Legal Aid read the story out loud at some dinner and he had the audience in stitches. I believe the main reason for this was that by reading it rather than getting offended by it, he demonstrated that he was not a tight ass. He of course employed the self insult technique. How could the crowd not agree with him that legal aid had its shortcomings. As an aside for months thereafter Legal Aid decimated my bills by 35%. Only kidding.

d) Metaphors

¶ 26 You don't have to tell jokes. Just use an image laden example. If you can't lift something heavy, option one you say "I can't lift this desk". Or you can give some other excuse about having to rush off. Or you can say, "Who do you think I am, Samson?" And continue, "I'll lift it once my hair grows back." Have fun with it.

¶ 27 All you have to do is use an appropriate metaphor. The more imagery the better. Do you recall that rude Seinfeld restaurant owner character appropriately named, "Soup Nazi". That's the general idea. I am not suggesting however you call your learned friend a Nazi.

¶ 28 I recall a cute quip by eminent Toronto family law counsel Tom Bastedo at a full house seminar a few years ago. Professor James McLeod preceding Tom was shooting off case name after case name in support of his paper. Tom took the stage after him and he opened with something like, "It will be hard to follow Quicklaw mouth." I'm still laughing.

¶ 29 The issue is not really will the use of a metaphor make the person laugh. By resorting to metaphors and adding a smile you will demonstrate an eagerness to communicate with precision and humour. You are getting the listener to focus dead on on what you are describing and you are suggesting that you are taking yourself less seriously.

e) Ask questions

¶ 30 Have you noticed how many of Seinfeld's gags involve simply asking questions? "Why do people wear a helmet when they skydive?" Will a little helmet save your life when you fall from a height of 5000 feet?"

¶ 31 When I did stand up comedy a few years ago I used to do a bit about a Colonel Sanders Kentucky Fried chicken radio commercial. The ad went something like this:

> "Did you know only one out of three chickens passes the Colonel Sanders test?"

¶ 32 After quoting this line I would then ask, "What kind of test is it? Can you just see 1000 hens sitting in a large hall writing a multiple choice exam?

`How'd you do Agnes?'

`Not too good Cynthia. They're sending me to Swiss Chalet'."

¶ 33 The audience would be laughing after I popped that first question about what kind of test it was. There is no joke per se in the question. The humour lay in the fact that someone was curious enough or maybe nutty enough to listen to the ad and go through the trouble of wondering what kind of test it was. The listener then says to himself, "Yeah now that you mention it, what kind of test is it?"

¶ 34 The use of a question serves four purposes. It sets up the listener's mind putting it into the humour mode. Yes tell me more, I'm listening. Secondly it conjures up an image. Strong imagery is a major humour catalyst. It's what the listeners imagine but what you do not tell them that tickles the funnybone. Rewind a bit and compare that character's initial comment to Cyrano about the nose to Cyrano's colourful responses. What do you imagine? Exactly. Thirdly asking a question maintains the teller's humility by apparently sharing with the audience his ignorance. Hey, I'm with you. What kid of test is the Colonel talking about? Finally the questioning process itself is extremely useful in triggering the creative process itself. Your brain will scan for answers. And find them.

¶ 35 Now that you know how to generate humour without even resorting to jokes, as lawyers we have to be careful to ensure that we are in control and we use humour responsibly.

THE NO NO's

- yourself and your own

¶ 36 Firstly there should be no problems in making self deprecatory remarks. You are the foil. You are also in the safe zone if the remarks are by you against your own in group, at least vis a vis the outgroups. We can get away with remarks about our family or our kind that outsiders cannot.

¶ 37 Secondly you are safe when you notice humour in situations and appreciate it yourself in the absence of an audience and laugh to yourself. You can make humourous quips to yourself whenever your secretary buzzes you telling you it's Attila the Hun, the lawyer for Mrs. Monster, on line 2.

- the neighbour principle

¶ 38 In dealing with others to ensure propriety you must always be aware of the context of a situation and be guided by your golden rule. The one I live by was referred to by the ancient Talmudic scholar, Hillel, who said, "Don't do unto others what you would not want done unto you." If it sounds schmaltzy, so be it. But it's true.

¶ 39 Ask yourself if you care in any situation whether or not your goal is to clear some tension and promote goodwill or rather to wreak havoc. Know where it is you want to go. Is it all being said in a spirit of fun?

¶ 40 When a wife's lawyer sends me a nasty letter calling my husband client a rogue and a knave and threatening to Bobbit him, I sometimes start my reply as follows:

> "Thank you for your letter of October 15th. I know we are the bad guys. You do not have to remind me of this. I shall check out your allegations with my client and after no doubt getting an entirely different version of the horrific events you have ascribed to him, I shall call you to discuss a possible resolution and aversion of World War 3. I trust this is satisfactory."

¶ 41 My purpose is simply to admit that no doubt my good client may have done something but just maybe there are two sides to this story. Let's see if we can work it out. This is the engine driving my quips. I have not insulted the other counsel nor his client. I have only sought to deflate his adversarial or aggressive approach. Guess what. WW III hasn't happened yet.

¶ 42 Bob Hope has made fun of probably about a dozen presidents during his career. They all felt honoured by the attention he gave them.

¶ 43 When asked how he pulled this off, he said:

> "When you kid the President or anyone else, you use an angle. I kid them about some issue they have taken or something they've talked about. But I never, never insulted a President."

¶ 44 Think about that Quicklaw mouth comment. Tom Bastedo focused on the professor's uncanny ability to recall all those case names. He did not ridicule him. The quip was actually a compliment to his encyclopedic skills.

- Let's take sex, please.

¶ 45 The end to sexual humour in the office has not yet arrived. Let us recall that sexual harassment and not sexual humour is taboo. Sexual harassment has been defined in part as sexist jokes causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive.

¶ 46 I recall an incident in a previous office where I practiced where one of the assistants who had shall we say a noticeable bust wore a shirt with a design of a map of Europe on it. It was very colourful and graphic. She looked like a walking globe. All the people at the office were totally distracted by it but nobody said anything for a few minutes until one of the other lawyers Larry smiled and made the following comment, "I

was just studying your geographical shirt Betty. Please don't mind. I promise I was not staring at Denmark and Roumania."

¶ 47 Betty (not her real name; her real name was Ms. X) was not offended. We all had a good laugh. The humour lay in the fact that there had been some tension in the air. Everyone was checking out the shirt trying to read the different places and yet by doing so we were invariably staring at Betty's boobs. By making the comment fellow counsel deflated the tension, the focus being the unusual shirt. I cannot and will not say anymore on the subject of what might go on in the minds of any of the people who witnessed the event whenever anybody should ever mention the words, "Denmark and Roumania".

- follow the leader

¶ 48 Humour will also be safe if you respond in kind to the other person's humour or attempts at same.

¶ 49 The following incident is attributed to Professor Stephen Leacock. A student of his at McGill University was stumped on his winter first semester exam. He wrote on the paper in answer to a question, "I don't know, God knows, merry Christmas."

¶ 50 Leacock marked the paper and wrote back on it, "You fail, God gets 100, happy new year."

¶ 51 The student had set the rules, Leacock responded in kind. It would of course hardly have been humourous had the student simply have indicated on his paper, "I don't know" and had Leacock then responded, "You fail, God gets 100, happy new year." The student so to speak asked for a humorous response.

¶ 52 You will find that be using metaphors in fact others will often respond in kind. I once sought a bail review for a young robbery client who was one of a gang. I suggested to former Justice Haines that my client was not the top banana in the gang. His Lordship in denying our application said, "We'll just leave this banana on the stalk".

¶ 53 Humour begets humour. I never said it will win you all your cases.

JUST DO IT

¶ 54 Simply put humour is always useful, either in dealing either with oneself, one's own people, strangers or adversaries. You just have to use it with common sense and respect for the listener.

¶ 55 The beauty of it is we all have a sense of humour. As Leacock wrote in, "Humour as I See it, "The world's humour, in its best and greatest sense is perhaps the highest product of our civilisation."

¶ 56 When I concluded part one of this article, I indicated I would give the reader ideas on how to generate humour. I also said I would offer guidelines on how to practice safe humour.

¶ 57 Thirdly I suggested I would share my secret on how to win every family law case you ever had. Well two out of three is not too bad.

¶ 58 To humour!

Syrtash Collection of Family Law Articles
SFLRP/1999-027

Humour, Laughter and Other Serious Matters*

by Marcel Strigberger

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* Posted by John Syrtash with permission of the author.

¶ 1 As the man said, "And now for something completely different".

¶ 2 In the course of our law practice life we are exposed to countless courses and seminars on how to improve our advocacy skills. There are courses dealing with the future of the practice and of course the highlights of the previous year's jurisprudence. There is yet another course on these new rules or on this new practice direction. Fresh technology is introduced to move things a few nano seconds quicker and this is supposed to make the practice of law run smoother.

¶ 3 Yet do you get the feeling that something is lacking? You've heard it all before? Do you feel that you are having increasing difficulties in communication, not only with our fellow counsel but also with clients and even more importantly, with ourselves.

¶ 4 Is it possible that perhaps we take ourselves too seriously? That we are a bit over stressed practicing law, especially family law? That we are not enjoying ourselves as much as we would like to? Are you consistently finding that opposing counsel are getting nastier in response to our usual humane endeavours to take some things away from their clients? Are you often saying, "It's impossible to deal with that bitch (or the son of same)?"

¶ 5 Now ask yourself, when is the last time you had a good laugh at work? When is the last time you added a light note to your vitriolic correspondence? When did you last detach yourself from your cross and point the finger at yourself after opposing counsel refused you an adjournment, and you realized that you pulled a similar stunt on him or her just weeks ago?

¶ 6 I wonder whether your sense of humour is dusty, dormant or even worse, muzzled. Do you suppose you can benefit from using your sense of humour more? Read on why you should.

¶ 7 The practice of family law is perhaps the most stress intense. I'll tell you why. Firstly, you are dealing with raw emotions. The high school graduation pictures are useless to the husband and the wife may not have looked at them in 35 years. But heaven help the husband him if he shreds them. A deal breaker? You tell me.

¶ 8 We are dealing with people who are suddenly in a mess of despair. There used to be intense emotion the day they said, "I do" and this does not just disappear years later when it turns to "I hate you". Or as my daughter says until she needs the keys to my car fifteen minutes later, "I don't want to ever talk to you again" (followed by the sound of a door slamming.) The emotion is still there, it just changes faces slightly. And clients usually bring it pea soup thick into their lawyers' offices. And the tendency is often for us to run with it. How often have you seen letters such as these from opposing counsel?

> "I represent the wife. We are the good guys. We want your client's financial statement forthwith. And don't forget to refer to all his Swiss bank accounts. And his girlfriend's $300,000 annual income. As for access to the children, we think it would not be in the best interests of the children to have excessive contact with your client. Two hours per month is enough. This is all about the best interest of the children. We trust this is satisfactory."

¶ 9 Husbands' lawyers' letters don't sound much different:

> "We represent the husband. We are seeking a just and fair resolution. We see no reason for our client to pay spousal support. After all it is he and not your client who is earning all this money. We will not stand by and let your client fleece him like a goose. In any event your client can go out and find another job. So what if she is supposedly sick. Many people with MS are able to continue to work, even in construction jobs. Nor is age a barrier. She has another 5 years until she retirement."

¶ 10 Note that I say opposing counsel send these letters. You and I never do of course.

¶ 11 Next there are all these emergencies. I have yet to see plaintiff's counsel in a personal injury matter running to court at 9:30 in the morning trying to freeze State Farm's assets for fear that they are dissipating same to screw the plaintiff.

¶ 12 Yes you do find emergencies in criminal law practice but the situation is still dramatically different from family law. Firstly the emotions are generally one sided. The Crown won't lose sleep if your client gets bail. Secondly he's probably guilty in any event.(The accused not the crown). Most accused are. Chances are the Metro West Detention Centre is about as familiar to your client as the Ramada is to you. (Make that the Motel Super 8 if you have an extensive Legal Aid practice.)

¶ 13 The question you ask is, "What will use of humour achieve?" Good question. I would like to suggest not only what its use can accomplish, but also why you may be reluctant to use it, how to draw on it and how utilize it to the max.

¶ 14 Although I can probable list about two dozen benefits of humour, let me deal here with just a couple.

Rapport

¶ 15 Victor Borge, the Danish comedian icon said, "A smile is the shortest distance between two people."

¶ 16 We can't show a smile in our letters or over the phone but we can project it. I make it a practice on commencing a family law matter to telephone the other lawyer and simply introduce myself. I ensure that a giggle or two follow and then we discuss the case briefly. Not long ago after I responded to wife's counsel in this manner I was rewarded promptly when opposing console whose letter sounded like it was penned by Attila confessed that the wife was really not all that gung ho about spousal support and that if some property adjustments which seemed fair to me were to take place the matter would settle. The giggles by the way happened shortly into our conversation when I advised the other lawyer that his letter had terrified me and I wondered whether indeed they were written by Attila. He laughed. The ice was broken.

Tell the truth, ma'am

¶ 17 What happened here actually demonstrates a second use of humour. To tell the truth. The demeanour in his letter was heavy. The air had to be cleared and it was as soon as I admitted my feelings to the other counsel, with some humour. Humour is the easiest and most effective way of telling someone the truth. If I tell the other side his letter terrifies me, he'll probably think I am kidding anyway and yet I get my feelings off my chest. Win win? Imagine instead if I had responded with something like:

> "I represent the husband, Mr. Good. Your letter of September 15th is outrageous and overreaching. Any action you bring will be defended vigorously, etc. etc. ....cc. to Mr. Good"

¶ 18 I guess Mr. Good would have been impressed. But (when) would the case have settled?

Stress buster

¶ 19 Humour is a major stress buster. It will allow you to detach yourself from a situation for long enough to interrupt the negative pattern before you nose dive and it will enable you to think clearly and recover the situation. Dr. Viktor Frankl, noted psychiatrist who spent time in concentration camps during WW2 credits a sense of humour with saving not only himself but others who regularly deployed it. He in fact discusses a favourite device of his, logotherapy. If for example if you are afraid of sweating in public, he suggests that instead of telling yourself "I won't sweat, I won't sweat", do the opposite. Tell yourself, "This time in front of that CBA crowd as I address them I'll sweat 10 litres worth." This has worked for many of his patients who were afraid of screwing up one way or another.

¶ 20 I find many uses of this approach in family law practice. Sometimes I feel terrorized by a certain counsel. I had a lawyer opposing me once whom my office staff called "Dr. Fax". A day did not go by without him sending me a fax, or two, or three. This guy confirmed anything and everything. We'd chat about our case on Monday morning when he would tell me my client returned the kids 7:15 rather that 7:00 the night before. I'd say something like, "OK, my client is a rogue and a knave." Ten minutes later I'd get a fax from the good doctor confirming that I agreed that my client was a rogue and a knave.

¶ 21 Initially these faxes bothered me, a lot. It felt like that Chinese water torture. Drip...drip...bong. Eventually I decided to do something about it and have fun. We started an unofficial fax pool or lottery. People were to guess when Dr. Fax's next fax was to come. Our receptionist would say on Friday afternoon, "I'll take Monday morning at 9:01". This was usually a safe bet.

¶ 22 I similarly find it useful to use humour when some other Attila's presence puts me off. Rather than minimizing the terror, I rephrase it. I do indeed see a monster, with smoke snorting out of his or her nostrils. I imagine Lizzy Borden in a robe and tabs coming after my client and me with a cleaver. Seen this way it don't look so bad. Or as cartoon character Foghorn Leghorn would say, "Ah say, it don't look so bad".

¶ 23 You will note in the above examples that humour was used both in dealing with others and with myself.

For your health

¶ 24 You have no doubt heard about Dr. Norman Cousins, author of best-seller, Anatomy of an Illness, who had this nasty debilitating neuro-muscular disease. He recovered by ingesting large doses of vitamin C and daily doses of laughter. He would bring Marx Brothers or Three Stooges films to his hospital room. He once even switched a urine sample with a glass of apple juice which he drank in front of the startled nurses.

¶ 25 You see in addition to relieving stress, laughter releases endorphin, a natural pain killer, related to morphine.

¶ 26 And humour is contagious. Have you noticed how much better your clients who can laugh at their situation fair better and in fact make you feel better. I had a client once who was so moved by his wife's allegations about his wealth that in preparing a draft financial statement he overstated his assets. It sounded good to him. He listed among his realty the Brooklyn Bridge. I would have sent it along to the other lawyer but we didn't know the value of it. We had trouble finding an appraiser. In any event it was a wash because he claimed he got it as a gift.

¶ 27 The client was a pleasure to deal with and I encouraged his antics.

¶ 28 And recently I had to go to Family Court (Provincial as it then was) to get an emergency restraining and interim custody order. My poor female client and her children had been terribly abused by her spouse. I tried to cheer her up as best I could with an upbeat mood. I hoped that she sensed that I was with her all the way as I tried to make her smile. She was not a woman of many words or many smiles. Her story was horrific. At the motion before a female judge, we scored a grand slam getting everything we asked for. After we left the courtroom, my client smiled at me. Ah, she's grateful I thought to myself. Happy days are here again. Then she said to me, "I notice your fly is open. Is that part of the presentation?"

¶ 29 At first I started turning the colour of a box of wild cherry Chiclets. But suddenly I realized that I should be reaping the benefits of a tremendous reward. After many hours of previously working for her, and trying to make her feel better with humour, she was finally communicating with me at this level. Humour begets humour, although it may not be instant.

¶ 30 As for the presentation, I would like to believe that my strong written materials and cogent arguments were chiefly responsible for the outcome. Hmmmm. Hmmmm.

THE INHIBITORS

¶ 31 If humour is so useful why is there often a reluctance to use it. Actually or more accurately there is suck and blow, hot and cold, push me pull me attitude towards the use of humour.

¶ 32 We grow up with mixed messages. Please think about this comment for 30 seconds before reading on....You get "humour is good for us all", and "we need more humour", along with "don't be silly", and "get serious". On the one hand we are told that children are free and uninhibited and innocent and fun loving and that we must retain some of these qualities to enjoy a higher quality of life and on the other hand we are told, "Grow up" or don't be a child".

¶ 33 IN the bible Solomon said, "A merry heart merry doth good like medicine". Yet in the bible there is very little if any humour, unless you consider Noah's ark funny. Biblical life actually was quite stern. Mrs. Lot ventured to look back at the barbecuing of Sodom and poof, she turned into a pillar of salt.

¶ 34 Which brings me to sex. Is humour sexy? You don't think of Casanova or Don Juan as generally being reputed for their senses of humour. Yet when asked what women find most attractive or sexy about men, a sense of humour ranked near the top. (Penis size was at the bottom). Woody Allen in fact has been considered one of the sexiest men in the game. Yet humour is not considered macho. Hey you're smiling therefore you are not tough, or serious.

¶ 35 Is that a fact? Did you know that Many Fortune 500 businesses routinely hire consultants to bring some fun into the lives of their company's operations. Herb Kelleher

is the CEO of Southwest Airlines, the fifth largest in the U.S. and the only one to turn a profit for 24 consecutive years. He credits a large part of the company's success to his irreverent management style, or "managment by fooling around". He says, "We should take our jobs seriously but never ourselves." Kelleher propounds that there is a direct relationship between having fun on the job and productivity. He himself sometimes comes to work dressed like Elvis or the Easter Bunny. The employees are given a wide mandate to practice what he preaches. This includes flight attendants telling jokes over the loudspeaker and airline staff buying lunch for someone stranded at an airport. The company gets thousands of letters a year praising this philosophy. Herb by the way received his LLB at New York University.

¶ 36 Humour is anything but flippant or unserious. I had a pre trial meeting with a Crown attorney on a shoplifting matter where after some friendly banter we came to a deal for a small fine. The crown wrote in his brief, "a fine is fine". He then said, "No, this looks like I am making light of the matter." He changed his note to "A fine is OK." Now that's serious folks.

¶ 37 This is exactly my point. Why did he feel compelled to twig on the use of humour and backtrack? It's not like he was giving us a free absolute discharge. Surely his note would not have mocked the system or encouraged potential shoplifters? He was simply concerned that somewhere up high Mr. Serious would review matters and the notation would go to the Attorney General's office and a directive would come down removing him from future active duty pending investigation of his serious hormones.

¶ 38 Therefore the first step to benefiting from humour is the awareness that just maybe you have been subject to these mixed messages. Now take another 30 second break and think about it. If you feel you have then consider the benefits of letting go and doing what feels better and natural. You may find yourself having more fun and success. Do you dare to?

¶ 39 In the second part of this article I'll suggest guidelines on how to practice safe humour. As well I'll share my ideas on how to generate it. I'll also share my secret of how to win every family law case you have, guaranteed. How's that for a cliffhanger?

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Best v. Best Decision: Some Thoughts*

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* Posted by John Syrtash with permission of the author.

¶ 1 On July 9, 1999 the Supreme Court of Canada rendered its decision in the case of Best v. Best where a judgment had been previously handed down in the fall of 1993 by Mr. Justice Rutherford and upheld by the Ontario Court of Appeal. [Ed. Note: see Best v. Best, [1999] S.C.J. No. 40.]

¶ 2 Two of the issues considered by the Supreme Court were:

(a) the question of the age at which Mr. Best should be assumed to retire when determining the value of his accrued pension plan entitlements; and
(b) whether, in discounting for the fact that there was an appreciable period of pre-marriage service, the pro-rata or the value added method should be used.

Retirement Age

¶ 3 As has been decided in a number of other cases, the retirement age to be assumed in calculating the value of an individual's accrued pension plan entitlements is the most likely age at retirement, as envisaged at the date of retirement.

¶ 4 In taking that age (57.4 in this case), the Court concluded that the evidence at the date of separation pointed to retirement at that age as being the most likely, given Mr. Best's financial circumstances and what may have been said by him in the years leading up to that date.

¶ 5 Another point was upheld in that post-separation events cannot by themselves be taken as indicating, at the date of separation, what could have been considered as the most likely scenario. In other words, one cannot merely use the advantage of hindsight in coming to a conclusion on such a point.

¶ 6 It is worth recalling that, in the case of Weise, for example, despite what may have been said by the individual about retirement plans during the marriage, such an intention,

as envisaged at the date of separation, might reasonably be different because of changed circumstances which would include those arising from the separation itself.

¶ 7 In that judgment, it was acknowledged that such a change should be recognized in determining an equalization amount. Given all these factors, the Court decided that the most likely retirement age in the Best case, as envisaged at the date of separation, was 57.4 and that this criterion should be followed even though, with hindsight, it is now known that Mr. Best did not retire until age 61.

Pro-rata:Value Added

¶ 8 The question of pro-rata v. value added has been with us since the Family Law Act was promulgated in Ontario in 1986.

¶ 9 To the surprise of most involved in Family Law work, the Supreme Court concluded that use of the pro-rata method where a defined benefit pension is involved would normally be fairer and more equitable than the value added method and that the Ontario Family Law Act did not preclude its use.

¶ 10 This supported one of the May, 1995 recommendations of the Ontario Law Reform Commission and, in considering the relative merits of the pro-rata and value added methods, it is worth noting that:

¶ 11 (i) a number of Ontario judgments - such as those in Deane, Valenti and Sauder had also opted for the pro-rata method.

¶ 12 (ii) It is not difficult to visualize a situation where the efforts of an individual in his/her career before the marriage bring rewards that, at least in part, come to fruition during the marriage.

¶ 13 In such situations, use of the value added nethod would overstate the real increase in value during the marriage.

¶ 14 To take a vivid example with the same periods of marriage and employment as Mr. Best: an executive may have rapidly climbed the corporate ladder during the 12 years of marriage culminating in becoming the Company's chief executive with significantly higher earnings and possibly eligibility for supplementary pension benefits as a result of having attained that level in the Company.

¶ 15 It may not be difficult or unreasonable to envisage that some of that meteoric rise during the marriage was due to the contributions that were made to the career in the 20 years before the marriage - making the right contacts and establishing his/her own business reputation, for example.

¶ 16 (iii) In some cases, the value of accrued benefits may be predicated, at least in part, on the individual's continued employment after the date of separation and retirement upon qualifying for on an undiscounted pension.

¶ 17 It would seem, therefore, that, for any value determined in part on the basis of continued employment after the date of separation and thus outside the period of marriage, a reasonable argument could be made that use of the value added method without variation is not altogether appropriate.

* * * *

¶ 18 It should be noted that the Supreme Court held that the method of adjusting for pre-marriage service where a defined benefit pension was involved did not have to be the same as that used for other items of property and, in particular, pensions arising under defined contribution pension plans or RRSP's.

¶ 19 Two interesting situations come to mind:

¶ 20 (i) The Supreme Court drew a distinction between a defined contribution pension plan or RRSP and a defined benefit pension plan, indicating that the former were more in the nature of investment accumulations and that the benefits arising in a particular year were more closely linked to the contributions made in that year.

¶ 21 But consider a situation where there is a benefit under a defined contribution pension plan arising entirely from service before the marriage.

¶ 22 No contributions were made during the marriage and it may also be that investment decisions of a member's account balance were out of the hands of the account holder.

¶ 23 Under the value added method, all investment earnings during the marriage (less a deduction for tax) would be subject to division.

¶ 24 In the light of the Supreme Court's rationale, it could apparently be argued that the pro-rata method should be applied resulting in a nil value for equalization purposes.

¶ 25 Another problematic situation arises in the case of "hybrid" pension plans - like many sponsored by universities - where the pension formula incorporates both the defined benefit and defined contribution principles.

¶ 26 (ii) The Supreme Court left the door open for use of the value added method in certain defined benefit situations, although these would presumably be relatively rare - but not necessarily far-fetched.

¶ 27 One that has come to my mind would be where the pension was already in pay at the date of marriage.

¶ 28 The spouse would have presumably benefitted from the pension payout that took place during the marriage, so should the pensioner not benefit from the expected decrease in the capital value of the pension over that period?

¶ 29 The pro-rata method would result in no value applying either at marriage or separation, however.