SCHEDULE C

Best Practices Where There Are Concurrent Criminal and Family Law Proceedings

Kristy Warren

I. Introduction

Canadian families impacted by family violence may have to navigate multiple systems of justice – specifically the family, child protection and criminal justice systems.[1] The lack of coordination between these justice systems presents a range of problems, for both the parties involved in multiple proceedings and the justice system itself. First, the lack of communication between the various court systems can lead to inconsistent and conflicting orders regarding contact between the accused and the victim and children.[2] Second, multiple proceedings lead to increased costs to both the parties and the justice system and delay.[3] Third, the parents and children have to navigate multiple courthouses, repeat their stories, and attempt to reconcile the final results.[4] Finally, the presence of both parents at multiple court appearances where there was a history of family violence can increase the victim's emotional trauma.[5]

This paper is intended to highlight best practices where there are concurrent criminal and family law proceedings. Part II identifies various practices courts can implement to facilitate the identification of pre-existing orders and proceedings. Part III

highlights approaches intended to increase coordination between multiple proceedings.

Finally, Part IV addresses best practices for both criminal court judges and family court

[1] Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems, vol 1 (2013) at 14 [Making the Links].
[2] Jennifer Koshan, "Investigating Integrated Domestic Violence Courts: Lessons from New York" (2014) 51 Osgoode Hall LJ 989 at 1008.
[3] *Ibid*.
[4] Department of Justice Canada, Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective by Nicholas Bala and Kate Kehoe (2013) at 3 [Concurrent Legal Proceedings].
[5] *Ibid* at 4.

judges when making orders regarding contact between the accused and the victim and children.

II. Identification of Pre-Existing Orders and Proceedings

The ability of court officials to access information regarding concurrent proceedings and pre-existing orders related to the same parties is critical to avoiding conflicting orders.[6]

In Ontario, there is no standard process for judges in criminal or family proceedings to obtain information regarding concurrent proceedings and pre-existing orders and thus judges are typically reliant on the parties to provide such information. Given that a large number of people navigating the court system are unrepresented, this reliance on the parties is likely inadequate.[7]

The authors of "Making the Links in Family Violence Cases" report that there is currently no jurisdiction in Canada that has the technological capacity to identify and match cases from different court systems involving some or all of the same parties on an ongoing basis. Criminal and civil case records are housed in different systems and to add further complication, the provincial and superior court databases are not linked. It is not technologically possible for the various systems to connect to one another.[8]

It is possible to manually search the various computer databases, for example, by taking a list of family cases and individually cross-referencing them by name and date of

[6] Making the Links, *supra* note 1 at 69.
[7] *Ibid* at 76.
[8] *Ibid*.

birth with criminal case files.[9] However, there are a number of challenges posed by this approach, the most obvious of which is that a manual search is a very time-consuming process. In larger jurisdictions, it may take up to several hours to search the new cases that appear on a court docket in a single day.[10]

Even if one is willing to put in the time to conduct a manual search, they may face additional challenges. First, the person who inputted the information into the system may have made an error, which can hamper the search. For example, they may have misspelled a name or entered the wrong birthdate. Second, an individual may be identified in the system by an unknown alias. Third, cases may not turn up if a keyword search is being used, as standard clauses or terms are not in common use. Fourth, the court registries may record different information about case files. For example, a family case file may be coded using the names of the parents, while a child protection case file may be coded using the child's name.[11]

A. Electronic Case Management

Di Luca et. al suggest that a computerized court order database that is accessible to judges through an online system "would be of great assistance to judges in family law, criminal law and child protection proceedings."[12] New Brunswick and New York provide examples of how such a database would work in practice.

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[9] *Ibid.*
[10] *Ibid* at 96.
[11] *Ibid* at 76.
[12] Department of Justice Canada, Best Practices where there is Family Violence (Criminal Law Perspective) by Joseph Di Luca, Erin Dann and Breese Davies (2012) at 14 [Best Practices].

- **New Brunswick:** In 2010, the province of New Brunswick began implementing an electronic court case management system called NOTA for use within the civil justice system. NOTA is currently being used by court services staff in conjunction with Justice Information Services New Brunswick (JISNB), an existing criminal justice database. The feasibility of integrating JISNB with NOTA is currently being explored, which would enable staff to conduct manual searches and link cases within the system.[13]
- **New York's Automatic Case Identification System:** The state of New York has implemented the Automatic Case Identification System, which reads and matches cases from the criminal and family law databases. Once the automatic matching is complete, a court clerk goes through the list of cases to verify its accuracy. After the clerk has confirmed a match, it is assigned a number which is used to track the family throughout the proceedings.[14]

B. Practices to Improve Manual Searches

There are various practices courts can implement to improve the efficiency and effectiveness of manual database searches:

- **Consistent Coding of Files:** One way in which Canadian courts can improve the efficiency of manual searches is through the coding of files within each court system. As noted above, manual searches are hampered when court registries record different information about case files. If all court systems were to

[13] Making the Links, *supra* note 1 at 82.
[14] *Ibid* at 83.

implement uniform coding practices, manual searches would be improved and it would be easier to cross-reference cases between different court systems.[15]

- **Flagging of Cases Involving Domestic Violence:** While a number of Canadian jurisdictions flag criminal case files involving family violence, flagging of family cases is much less common. The flagging of all family violence cases would allow for easy identification and tracking through the system. All personnel responsible for flagging cases would require training to help ensure consistency.[16]
- **Standard Form Orders in Family Law:** The use of standard form orders in family law cases may assist in identifying concurrent proceedings in a different court system, as standard wording may improve manual keyword search outcomes.[17] In Manitoba, judges have electronic access to a comprehensive bank of standard clauses for family law cases, which they are required to use. The clauses were developed through cooperation among stakeholders, including the judiciary and government officials.[18]

III. Coordination of Court Proceedings

A. Joint Conferencing

Where there are concurrent proceedings, Bala and Kehoe suggest that consideration be given to a joint settlement conference with judges from both proceedings, all the parties in both proceedings, and other professionals involved with the

[15] *Ibid* at 77.
[16] *Ibid* at 77.
[17] *Ibid* at 68.
[18] *Ibid* at 69.

family.[19] Such conferences would provide the parties with an opportunity to resolve overlapping issues.[20] This approach was suggested by Justice Glenn in *Children's Aid Society of Huron (County) v. G.(R.)*. Justice Glenn explained that "the dynamics of a criminal case are often…diametrically at odds with those of the parallel protection case."[21] To ameliorate the situation, "all parties should explore the possibility of holding a combined settlement conference…in an effort to resolve the shared facts between each case."[22]

Bala and Kehoe advise that while joint conferences may assist in information-sharing, disclosure issues and avoid unnecessary motions for production, they present two significant challenges. The first challenge is the division between provincial and superior courts in Canada. If the family and criminal matters are proceeding in different levels of the court, it may be difficult to coordinate a joint conference.[23] The second challenge is scheduling. Given the number of stakeholders involved, scheduling a date for the joint conference may prove difficult.[24]

B. Case Management

Currently in family courts in Canada, one family may appear before multiple judges.[25] It is not unusual for families involved in family litigation to have hearings and

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[19] Concurrent Legal Proceedings, *supra* note 4 at 66.
[20] Making the Links, *supra* note 1 at 100.
[21] *Children's Aid Society of Huron (County) v G(R)*, 2003 CarswellOnt 3031 at para 9 (ONCJ).
[22] *Ibid*.
[23] Concurrent Legal Proceedings, *supra* note 4 at 66.
[24] *Ibid* at 66-67.
[25] Making the Links, *supra* note 1 at 90.

conferences before five or ten different judges before they reach trial.[26] Bala, Birnbaum and Martinson explain how "[t]his traditional approach to family cases can exacerbate the conflict, increase delay and expense, and contribute to the harm cause to children who live in a family experiencing significant conflict."[27] For example, *Geremia v. Harb*, which came before the Superior Court of Justice, involved eight different judges, 25 court orders and over 2,000 pages of transcript over a span of eight years.[28]

Bala, Birnbaum and Martinson stress the importance of a case management approach where pre-trial litigation involving one family is managed by one judge who is skilled and knowledgeable in family matters.[29] When there is one judge who manages a family's case, that judge can:

- Take charge of the process and limit unnecessary proceedings;
- Ensure that the parents are accountable for their behaviour, both in and out of the courtroom;
- Inform the parents about what is in the children's best interests and set parameters with respect to their behaviour;
- Gain additional relevant information and a better understanding of the family dynamics;
- Play a consistent and meaningful role in implementing the children's right to be heard;

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[26] Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" 26 Can J Fam L 395 at 402.
[27] *Ibid*.
[28] *Geremia v Harb*, 2008 CarswellOnt 2483 (ONSC).
[29] Bala, Birnbaum & Martinson, *supra* note 26 at 402.

- Determine what therapeutic, social service or educational interventions may be effective, then persuading or directing the parents to participate, and monitoring their progress, and;
- When appropriate, facilitating settlement.[30]

The benefits of case management have been recognized in Canada and in many jurisdictions there is legislation allowing for case management by one judge.[31] In Toronto, the Superior Court of Justice uses a two-track case management approach in high conflict cases, with one judge dealing with all the conferences and the other dealing with contested motions.[32]

C. Case Management in Family Law Proceedings

The case management models described below demonstrate the benefits of case management in family law proceedings where family violence is an issue.

i. The Magellan Project

The Magellan Project (Magellan) is a case management model implemented by the Family Court of Australia for cases where one or both of the parties raise serious allegations of sexual or physical abuse of children in post-separation parenting matters.[33]

Magellan was conceived due to concern over the growing number of cases involving allegations of child abuse and the capacity of the traditional court process to

[30] *Ibid* at 407-408.
[31] *Ibid* at 412.
[32] *Ibid* at 412-413.
[33] Australian Institute of Family Studies, Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case-management model by Dr Daryl J Higgins (Family Court of Australia, 2007) at 12.

efficiently respond to these concerns.[34] Magellan was initially implemented as a pilot project in Victoria in 1998. Following the success of the pilot, Magellan was extended to all states and territories, except Western Australia, between 2003 and 2006.[35] Western Australia is not within the jurisdiction of the Family Court of Australia and implemented its own pilot project, discussed below.

Cases that come to the Family Court of Australia that involve serious allegations of sexual and/or physical abuse of children are referred to the Court's Magellan program.[36] A Magellan team, consisting of a judge, a registrar and a family consultant, manages each case with an aim of resolving the case within six months.[37] Ideally, the same team manages the case from start to finish.[38] The Family Court of Australia explains that Magellan includes:

- Rigorous judicial management including the imposition of strict timeframes;
- An early 'front loading' of resources such as the appointment of an independent children's lawyer;
- Making appropriate interim orders to protect the child until the matter comes to trial;
- Requesting information from the relevant state or territory child protection agency early in the process, including whether it intends to intervene in the family court proceedings and whether it has previously investigated these or other allegations;

[34] *Ibid* at 14.
[35] *Ibid*.
[36] Family Court of Australia, Magellan Program <http://www.familycourt.gov.au/wps/wcm/resources/file/ebe8ff4dcc2861f/MFS_Magellan_1208V1.pdf>.
[37] Australian Institute of Family Studies, *supra* note 33 at 14.
[38] Family Court of Australia, *supra* note 36.

- Order a detailed family report, where appropriate, which analyses the family dynamics and the needs of the children; and
- Close liaison on case management between external information providers and a small team of judges, registrars and family consultants.[39]

In 2007, the Family Court of Australia commissioned the Australian Institute of Family Studies to conduct an evaluation of Magellan to determine if it was achieving its stated objective of being an effective mechanism for responding to serious allegations of sexual and/or physical abuse of children.[40] The evaluation revealed several key differences between Magellan and non-Magellan cases:

- Magellan cases were resolved more efficiently, with the average Magellan case reaching completion 4.6 months faster;
- Child protection agencies had greater involvement in Magellan cases;
- Magellan cases had an average of 6.2 court events, compared to 10.9 court events for non-Magellan cases;
- Magellan cases were dealt with by fewer judges; and
- Magellan cases were more likely to settle early.[41]

The evaluation showed that Magellan was achieving the desired benefits of the Court, and that both staff and external stakeholders regarded it as a successful system.[42]

ii. The Columbus Pilot Project

[39] *Ibid*.
[40] Australian Institute of Family Studies, *supra* note 33 at 14.
[41] *Ibid* at 16.
[42] Family Court of Australia, *supra* note 36.

The Family Court of Western Australia conducted the Columbus Pilot Project (Columbus), a variation of Magellan, during 2001-2002. Whereas Magellan focused exclusively on cases involving serious allegations of physical and/or sexual child abuse, Columbus also included cases involving allegations of domestic violence where the safety of children was a concern.[43] As Pike and Murphy explain, Columbus "was conceptualised as an early intervention strategy whereby cases would be identified, confirmed, assessed, and then, case managed through a series of conferences."[44]

All matters involving allegations of child abuse and/or domestic violence were referred to the Director of Family Court Counselling for assessment of eligibility.[45] Eligible cases were individually managed through a series of case conferences, chaired by a Registrar and a Family Court Counsellor. The aim of the conferences was to achieve a negotiated settlement. Conference proceedings were confidential and therefore not admissible as evidence. This presented the parties with an opportunity to freely explore the issues without prejudice.[46] When appropriate, the Family Court Counsellor made referrals to community services and education programs.[47] There was no limit to the number of conferences available to the parties.[48]

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[43] Bala, Birnbaum & Martinson, *supra* note 26 at 443.
[44] Lisbeth T Pike & Paul T Murphy, "The Columbus Pilot in the Family Court of Western Australia: What the Parents Said" (2004) 10:2 J Fam Studs 239 at 239.
[45] Paul Murphy, Paul Kerin & Lisbeth Pike, "The Columbus Pilot: Catalyst for an emerging model of an integrated Family Court system in Western Australia" (2003) 64 Fam Matters 82 at 82.
[46] Murphy & Pike, *supra* note 45 at 82.
[47] Lisbeth T Pike & Paul T Murphy, "The Columbus Pilot in the Family Court of Western Australia" (2006) 44:2 Fam Ct Rev 270 at 271.
[48] *Ibid*.

If the parties were unable to achieve settlement under the guidance of the Registrar and Counsellor, the matter was referred back to the general court system.[49] The Registrar who had presided over the conferences was disqualified from involvement in the matter once it was referred back to the general court system.[50]

After conducting an assessment of Columbus, Pike and Murphy concluded that Columbus had generally achieved success. They found that the jointly chaired conferences and individualized case management approach achieved significant benefits for many of the parents and their children.[51] For example, a number of parents were supported through very stressful, and potentially dangerous, experiences; a number of parents became aware of behavioural issues, gained an appreciation of the impact these had on their children, and took some steps to improve their attitudes; and a large number of children had an increased level of protection that might not otherwise have been available.[52]

iii. Case Assessment Conferences

The Family Court of Western Australia introduced Case Assessment Conferences (CACs) in July 2004. In developing the CAC model, the Family Court of Australia incorporated lessons learned from Columbus, specifically the importance of risk screening, assessment, and case management.[53]

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[49] Murphy & Pike, *supra* note 45 at 82.
[50] *Ibid*.
[51] Pike & Murphy, *supra* note 47 at 283.
[52] *Ibid*.
[53] Edith Cowan University, Case Assessment Conferences in the Family Court of Western Australia: A Formative Evaluation by Paul Murphy and Lisbeth Pike (2006) at 1.

The CAC is typically held after the parties' first court appearance.[54] The Family Court of Western Australia states that the purpose of the CAC is to: "allow the Court to assess the issues in [the] family situation with a view to determining how the Court might best assist; give [each party] another opportunity to negotiate with the other party; and formulate a case management plan with a view to achieving the best possible outcomes for the children."[55]

The CAC involves three phases: the screening and assessment phase, the negotiation phase and the procedural hearing.[56] During the screening and assessment phase, the parties meet individually with the counsellor. The primary purpose of this first phase is to identify the issues in the case and any risk of child abuse or domestic violence.[57] This first phase lasts for approximately 30 minutes. During the negotiation phase, the counsellor brings the parties together to discuss a resolution. The counsellor may also refer one or both parties to services outside of the Court.[58] In certain circumstances, the counsellor may continue to see the parties separately during this second phase.[59] The second phase lasts for approximately 60 minutes. The registrar joins the conference to conduct the final phase, the procedural hearing. During this phase, the registrar may make interim or final orders, including orders regarding any allegations of child abuse or domestic violence.[60] In cases where abuse is identified, the registrar may

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[54] "Case Assessment Conferences", online: Family Court of Western Australia <http://www.familycourt.wa.gov.au/_files/Case%20Assesment%20Conferences%20011210.pdf>.
[55] *Ibid.*
[56] Edith Cowan University, *supra* note 53 at 2.
[57] *Ibid.*
[58] Case Assessment Conferences, *supra* note 54.
[59] Edith Cowan University, *supra* note 53 at 3.
[60] Case Assessment Conferences, *supra* note 54.

refer the case for individualized case management and/or additional sessions with the counsellor.[61]

Murphy and Pike evaluated the CAC model and found that the introduction of CACs significantly increased the amount of time that counsellors spent with the parties. After the implementation of CACs, counsellors spent on average 3.1 hours with the parties, whereas prior to the implementation of CACs, they spent on average 1-1.5 hours with the parties.[62] Murphy and Pike also found that the introduction of CACs resulted in positive outcomes, including:

- A 20% reduction in the time that an average case was in the system;
- A 30% reduction in the number of court appearances; and
- A 50% increase in settlement at an early stage in proceedings.[63]

D. Integrated Domestic Violence Courts

Recognizing the need for an integrated approach to domestic violence cases, several jurisdictions have established an Integrated Domestic Violence Court (IDVC), which places a family's criminal and family matters before a single judge. This approach is commonly referred to as a "one judge, one family" model.[64] The parties and the children have access to a wide range of support services through the Court, which assist with the resolution of the criminal and family matters.

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[61] Edith Cowan University, *supra* note 53 at 3.
[62] Edith Cowan University, *supra* note 53 at 4,
[63] *Ibid*.
[64] "Integrated Domestic Violence Courts: Key Principles", online: Center for Court Innovation <http://www.courtinnovation.org/sites/default/files/documents/IDV_FACT_SHEET.pdf> .

Matters come before IDVCs in one of two ways, depending on the particular IDVC. In some jurisdictions, IDVCs have separate intake units, whereas in others matters are transferred to the IDVC from criminal or family courts. Once a family's matters are before the IDVC, they are typically heard separately on the same day.[65]

There are strong arguments to support the establishment of IDVCs. It has been argued that having one judge deal with both family and criminal proceedings in one court allows for:

- **Enhanced access to justice:** Typically, families with criminal and family matters will have to appear in multiple courthouses before several judges. In contrast, families with matters before the IDVC have coordinated court appearances in one location with one judge and typically are required to attend fewer court appearances.[66]
- **Compliance monitoring:** Increased collaboration between community agencies and the courts can increase accountability for offenders and compliance with court orders.[67] For example, in the New York IDVCs, the resource coordinator not only refers the accused to various community programs and services, including substance abuse treatment, but they also receive regular reports from the programs and services on the accused's attendance and progress. The resource coordinator then forwards this information to the judge prior to each court

[65] Koshan, *supra* note 2 at 1010.
[66] *Ibid* at 1011.
[67] Rachel Birnbaum, Nicholas Bala & Peter Jaffe, "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned" 29 Can J Fam L 117 at 14.

appearance, which enables the judge to question the accused regarding their non-compliance and make decisions accordingly.[68]

- **Advocacy for domestic violence victims:** Many IDVCs employ a victim advocate who works alongside the Court's resource coordinator to provide domestic violence victims and their children with counselling, safety planning and access to services.[69] The advocate may also be available to accompany victims to meetings and court appearances.[70] The Center for Court Innovation notes that having "a dedicated victim advocate enables the court to provide a crucial link to safety and ensures that important services are being delivered."[71]
- **Improved judicial decision-making:** By handling all the cases relating to one family, the IDVC judge gains a better understanding of the relevant issues. The judge can then make decisions and orders that are consistent and adequately address the issues in both the criminal and family cases.[72] The reduction of inconsistent court orders in turn reduces confusion, reduces the number of court appearances and protects the safety of victims and their children.[73]
- **Better access to and coordination of support services for victims and children:** Most IDVCs employee a resource coordinator, who acts as a liaison between the court and community agencies. The coordinator assists the court in referring family members to appropriate programs and/or services.[74]

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[68] Integrated Domestic Violence Courts, *supra* note 64.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] Koshan, *supra* note 2 at 1031-1032.
[74] Integrated Domestic Violence Courts, *supra* note 64.

While IDVCs are often suggested as a way to improve court-based approaches to the problems associated with concurrent criminal and family proceedings, some have questioned whether the "one judge, one family" model compromises the rights of alleged abusers.[75]

While the judge hears both the criminal and family cases relating to a family, these cases are not consolidated. To protect the rights of both parties in IDVCs judges consider each case separately.[76] Judges apply to each case the appropriate rules of evidence and standard of proof and decides each only on the evidence presented in that case.[77] While it may seem difficult for judges to ignore evidence that is presented in another proceeding, Aldrich and Kluger remark that "judges are asked to do this every day."[78] Judges often have to exclude from consideration evidence that is presented and later deemed inadmissible. The IDVCs, in Aldrich and Kluger's opinion, "is no different."[79]

i. Integrated Domestic Violence Courts in Practice

The first IDVC was established in Dade County, Miami in 1992. Since then, several others have been established throughout the United States of America and the rest of the world.[80] Ontario launched Canada's first IDVC in 2011.

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[75] Elizabeth MacDowell, "When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism" (2011) 20:2 Tex J Women & L 95.
[76] Liberty Aldrich & Judge Judy Harris Kluger, "New York's One Judge-One Family Response to Family Violence" (2010) 61:4 Juvenile and Family Court Journal 77 at 83.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] Birnbaum, Bala & Jaffe, *supra* note 67.

ii. The Toronto Integrated Domestic Violence Court

In 2010, the Toronto IDVC Community Advisory Committee and the Planning Committee Working Group were formed to advise on the establishment of an IDVC in Toronto.[81] The committees were composed of members of the Ontario Court of Justice judiciary, provincial government policy staff in family, domestic violence and criminal agencies, and community advocacy groups and community agencies working with victims of domestic violence and abusers.[82]

The Toronto IDVC was launched in June 2011 as a two-year pilot project and was modeled after IDVCs in New York State.[83] The court is located at the Ontario Court of Justice at 311 Jarvis Street and sits every other Friday. The court is presided over by one of two judges. A Crown Attorney, a criminal legal aid duty counsel and a family legal aid duty counsel are available to assist the court.[84]

The court also employs two support workers: a victim witness services court worker and a family support worker. [85] The court employed a Community Resource Coordinator for the first three years of its operation. The Coordinator was responsible for "connecting parties to community resources; coordinating the transfer of clients to the IDVC; advising the parties of upcoming IDVC attendances; providing the judge with information and updates regarding the availability of community programs; and reporting

[81] *Ibid* at 29.
[82] *Ibid* at 28-29.
[83] Koshan, *supra* note 2 at 1030-1031.
[84] Birnbaum, Bala & Jaffe, *supra* note 67 at 30.
[85] *Ibid* at 30-31.

back to the IDVC on the status of the parties' court-ordered treatment."[86] However, the Coordinator position was eliminated due to funding restrictions.[87]

Involvement in the Toronto IDVC was initially voluntary.[88] Over time, it became clear that requiring each party's consent was acting as an access barrier.[89] As of March 2012, cases that meet the eligibility criteria are automatically transferred to the IDVC.[90]

A family will automatically be referred to the Toronto IDVC where there is a summary conviction domestic violence charge scheduled for appearance in one of the two designated Toronto criminal courts[91] and a corresponding family court case involving custody, access, child support, spousal support or restraining orders in one of the two provincial family courts in Toronto.[92] As the Toronto IDVC operates at the provincial court level, it does not have jurisdiction over divorce, matrimonial property, or child protection matters.[93]

The criminal and family proceedings are heard by the judge sequentially. The judge will proceed through the process to plea and sentence in the criminal case and through the case management process to resolution in the family case. If either proceeding is not resolved, a trial will be heard by a different judge.[94]

By September 2014, 41 cases had come before the Toronto IDVC. Of those 41 cases, 34 criminal cases and 19 family cases were resolved. The majority of those cases

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[86] Making the Links, *supra* note 1 at 97.
[87] Birnbaum, Bala & Jaffe, *supra* note 67 at 31.
[88] Birnbaum, Bala & Jaffe, *supra* note 67 at 29.
[89] *Ibid* at 30.
[90] *Ibid*.
[91] Old City Hall or College Park.
[92] 311 Jarvis Street and 47 Sheppard Avenue East.
[93] Koshan, *supra* note 2 at 1031.
[94] Bala, Birnbaum & Martinson, *supra* note 26 at footnote 13.

were resolved without a trial.[95] It is expected that more cases will come before the IDVC now that appropriate cases are automatically referred to the court.

iii. Evaluation of the Toronto Integrated Domestic Violence Court

During the planning process, a Research Advisory Committee was established to assess whether the objectives of the IDVC were being met. The Committee is in the process of conducting a full evaluation of the Toronto IDVC. The Committee has identified five basic questions that they hope to answer:

1. Is there a reduction in conflicting or inconsistent court orders as a result of the IDVC?
2. Is there a reduction in court appearances as a result of the IDVC?
3. Is there greater information sharing between the Crown and family court as a result of the IDVC?
4. Is there enhanced consistency and coordination for victims/offenders as a result of the IDVC?
5. Is there more safety for the victim and more accountability for the offender as a result of the IDVC?[96]

In 2014, Birnbaum, Bala and Jaffe released a paper analyzing the issues related to the establishment of the Toronto IDVC, as well as some preliminary results from Committee's research, including a summary of qualitative interviews with professional stakeholders involved with the court, and victims and offenders who have appeared

[95] Birnbaum, Bala & Jaffe, *supra* note 67 at 32.
[96] Birnbaum, Bala & Jaffe, *supra* note 67.

before the court.[97] As the authors note, "[t]his is the first study that explores the process for establishment of an [IDVC] in Canada and provides the views and experiences of the key stakeholders involved."[98]

Birnbaum, Bala and Jaffe report that "the majority of stakeholder professionals who were interviewed were on the whole positive about the potential of the IDVC and their experiences to date."[99] However, the stakeholders expressed concerns about the length of time needed to hear both cases, and the related increased cost for litigants who may need to hire two lawyers to attend court for longer sessions. The authors also note that many stakeholders recognized a need for dedicated administrative support.[100] For example, when asked about the challenges and benefits of having community supports attached to the court, concerns were expressed about the lack of coordination in the provision of services.[101] Challenges regarding coordination were likely exacerbated with the elimination of the Community Resource Coordinator.

Birnbaum, Bala and Jaffe identify two major issues for the pilot project. The first issue relates to the provision of services. They state that for the IDVC to be successful, "it will require more specialized support services to support the victims and offenders as well as administrative support to the court."[102] However, they acknowledge that accomplishing this will be challenging, due to budget restrictions. The second issue relates to the small catchment area of the IDVC. By September 2014, only 41 cases had come before the IDVC and the authors argue that this lack of cases puts the viability of

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[97] *Ibid* at 8.
[98] *Ibid* at 16.
[99] *Ibid* at 50.
[100] *Ibid* at 51.
[101] *Ibid* at 42.
[102] *Ibid* at 52.

the project at risk.[103] The authors "support including, for referral to the IDVC, domestic violence cases from other court sites in the City of Toronto and that a dedicated administrator be made available for identification and referral of cases to the IDVC."[104]

The latter issue raised by Birnbaum, Bala and Jaffe presents a larger problem, which is the division in Canadian provinces between superior and provincial courts. The IDVC is part of the Ontario Court of Justice, which only has jurisdiction over summary conviction criminal proceedings and family proceedings that involve custody, access, child support, spousal support or restraining orders. The Superior Court has exclusive jurisdiction over indictable conviction criminal proceedings and family proceedings relating to matrimonial property and divorce. This divide effectively precludes the full integration of criminal and family matters.

In the New York IDVCs, which the Toronto IDVC was modeled after, all criminal, civil and family matters are integrated at the superior court level.[105] Jennifer Koshan, after evaluating the New York IDVCs, advised that Canadian jurisdictions with, or willing to implement, unified courts may be able establish IDVCs that follow the New York model. However, before the IDVCs could be established, the jurisdiction of the unified courts would need to be expanded to include criminal matters.[106] Additionally, legislative amendments to the *Criminal Code* may be necessary to give the IDVCs jurisdiction over all domestic violence criminal offences.[107]

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[103] *Ibid*.
[104] *Ibid*.
[105] Koshan, *supra* note 2 at 1028.
[106] *Ibid*.
[107] *Ibid* at footnote 230.

iv. Expansion of the Toronto Integrated Domestic Violence Court

A spokesperson for the Ministry of the Attorney General recently told the Toronto Star that the pilot project is still being evaluated and that the government would only consider expanding the project once it has identified whether improvements are needed.[108]

In the event the Research Advisory Committee determines that the Toronto IDVC has been successful in achieving its objectives, consideration should be given to expanding the IDVC. This should include expansion to other geographic regions, as well as expansion to include cases over which the superior courts have exclusive jurisdiction.

IV. Best Practices When Ordering Contact

A. Conditions of Release in Criminal Court Proceedings

A parent charged with a family violence offence may be subject to conditions of release prohibiting contact with the other parent and child.[109] Due to the constitutional doctrine of paramountcy, any conditions imposed on the accused in criminal proceedings will override any conflicting orders for custody or access made in family proceedings.[110] Conflicting orders can present challenges to parents, as they are unlikely to understand which conditions take precedence and which conditions they are to comply with.

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[108] Olivia Carville, "Failure of criminal, family courts to share information puts lives at risk", *The Toronto Star* (01 February 2015) online: <http://www.thestar.com/news/gta/2015/02/01/failure-of-criminal-family-courts-to-share-information-puts-lives-at-risk.html>.
[109] Concurrent Legal Proceedings, *supra* note 4 at 51.
[110] *Ibid*.

Before releasing the accused or attaching conditions to the release, the criminal court judge should have the following information:

- Does the accused have children?
- How will the conditions affect his or her access to the children?
- Is the accused involved in any child protection or family proceedings?
- What is the status of the child protection or family proceedings?
- Are there any pre-existing child protection or family court orders regarding custody and access or exclusive possession of the matrimonial home? If so, what are the terms of the order?
- Do the circumstances of the allegation make the previous order(s) inappropriate?
- Is the issue of access better left to the child protection or family court judge?[111]

i. Deference to Family Court Proceedings

Bala and Kehoe argue that "the family or child protection court will usually be better placed [than the criminal court] to make orders that appropriately balance concerns about protection of alleged victims and children with concerns about allowing a child whose parent is involved in the criminal process to maintain an appropriate, safe relationship with the parent."[112] Conditions relating to contact between the accused and any children should provide for access to be "as per family or child protection court order made following the date of this order, provided that judge has awareness of this criminal court order."[113]

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[111] Best Practices, *supra* note 12.
[112] Concurrent Legal Proceedings, *supra* note 4 at 54.
[113] Concurrent Legal Proceedings, *supra* note 4 at 68.

ii. Conditions Prohibiting Contact

Conditions prohibiting contact with the other parent and child typically exclude the accused from the family home and prevent him spending time with his children, as he is not able to contact his partner to make arrangements to see the children. Limitations on contact may establish a status quo that is detrimental to the accused in family law proceedings.[114]

iii. Conditions Requiring Supervision by a Child Protection Agency

Di Luca et. al advise against imposing conditions of release on the accused requiring contact to be supervised by a child protection agency, as child protection agencies have limited resources to supervise parental access visit.[115] Further, child protection agencies may object to enforcing conditions of release.[116] While Di Luca et. al advise against imposing conditions requiring contact to be supervised by a child protection agency, they recommend that a criminal court judge imposing such a condition specify the minimum amount of contact to ensure consistent access. For example, a term providing "contact with children to be exercised under the supervision of the child protection agency and not to occur less than once per week."[117]

iv. Conditions of Release Affecting Attendance in Court

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[114] Making the Links, *supra* note 1 at 58.
[115] Best Practices, *supra* note 12 at 17.
[116] *Ibid*.
[117] Best Practices, *supra* note 12 at 18.

Conditions of release prohibiting contact between the accused and the other parent and/or children may prevent the accused parent from attending family or child protection proceedings.[118] Conditions of release should therefore specify how the accused may be involved in concurrent family or child protection proceedings. This should include provision for court preparation and attendance.[119] For example, conditions prohibiting contact with the other parent or child should be "subject to such contact with the other parent as may be necessary for participation in child protection or family proceedings, which includes safety concerns but other factors as well."[120]

v. Conditions Regarding the Family Home

Conditions of release that restrict the accused's access to the family home can result in the accused's partner having *de facto* exclusive possession of the family home. In *Shaw v. Shaw*, Justice Pugsley of the Ontario Court of Justice criticized routine bail provisions that result in the exclusion of a parent from the home:

> "Routine orders excluding a party from the common home of the parties until the end of the criminal matter without thought to the consequences thereof, and without a remedy short of a bail review, place one party in a position of immediate superiority over the other party for as long as it takes (perhaps a year) for defended criminal charges to be resolved."[121]

Conditions of release should therefore permit the accused to return to the family home to collect personal items (in the company of police, if necessary).[122]

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[118] Concurrent Legal Proceedings, *supra* note 4 at 50.
[119] *Ibid* at 51.
[120] *Ibid*.
[121] *Shaw v Shaw*, 2008 ONCJ 130, OJ No 1111 at para 5.
[122] Best Practices, *supra* note 12 at 19.

B. Parenting Arrangements in Family Court Proceedings

In custody and access proceedings, the family court judge is to consider the best interests of the child. It has long been recognized that a finding of child abuse is relevant to the determination of custody and access.[123] Jaffe et. al argue that a finding of spousal violence is also a relevant factor in determining the appropriate parenting arrangement, for the following reasons:

- Spousal abuse often does not necessarily end with separation of the parties;
- Perpetrators of family violence are more likely to be deficient if not abusive as parents;
- Individuals who have a pattern of abuse of their partners and those who commonly resolve conflicts using physical force are poor role models for children;
- Abusive ex-partners are likely to undermine the victim's parenting role;
- In extreme cases spousal violence following separation is lethal; and
- Spousal violence may negatively affect the victim's parenting capacity.[124]

Before making an order for custody and access, the family court judge should have the following information:

- Is this a case where there may be family violence?

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[123] Department of Justice Canada, Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices by Peter G Jaffe, Claire V Crooks and Nick Bala (2006) at 15 [Making Appropriate Parenting Arrangements].

[124] Peter Jaffe et al, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans" (2008) 46:3 Fam Ct Rev 500 at 501-504.

- Are there criminal charges?
- Are there any bail or probation conditions relating to access to the child or the other parent?
- How will this court keep apprised of the criminal proceedings?
- Is this a case where it might be useful to hear from police or the Crown?[125]

i. Identifying Family Violence

"The untrained eye and ear do not reliably detect the abusive dynamics in relationships where violence is hidden, or where most of the abuse is not physical in nature."[126] Red flags that should prompt further inquiry into the presence or absence of family violence include:

- A documented history or allegations of mental illness, substance abuse, or child abuse by either party;
- Indications that the children are exhibiting symptoms consistent with abuse, such as sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression, or other behavioural problems, depression or anxiety;
- The presence of one or more prior court orders restricting a parent's access to any of his or her children;
- A history of court or social services involvement with the family;
- Allegations of alienating behaviour by a parent; and

[125] Concurrent Legal Proceedings, *supra* note 4 at 71.
[126] National Council of Juvenile and Family Court Judges, Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide by Clare Dalton, Leslie M Drozd & The Honourable Frances QF Wong at 8.

- Indications that one or both parents are inattentive to the children's needs.[127]

ii. Dimensions of Violence Relevant to Parenting Arrangements

Once family violence is identified, the judge needs to make a distinction between minor, isolated acts of violence and acts that occur as part of a pattern of abuse.[128] The capacities of the perpetrator and the victim to effectively parent will vary depending on the nature of the violence.[129] When determining the appropriate parenting arrangement in a family violence case, Jaffe et. al propose that three basic factors be taken into consideration: the potency, pattern and primary perpetrator of the violence.[130]

- **Potency:** The level of potency is, according to Jaffe et. al, "the foremost dimension that needs to be assessed and monitored so that protective orders can be issued and other immediate safety measures taken and maintained."[131]
- **Pattern:** The extent to which the violence is part of a patter of coercive behaviour, as opposed to an isolated incident, is an important indicator of the extent of the family's trauma and of what measures to take.[132]
- **Primary Perpetrator:** Once the family court judge has determined which parent was the primary aggressor, they will know which parent's access should be restricted and which parent can provide the child with a safe home.[133]

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[127] *Ibid* at 12.
[128] Peter G Jaffe, Claire V Crooks & Nicholas Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009) 6 J of Child Custody 169 at 184-185.
[129] Jaffe et al., *supra* note 124 at 504.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.

Jaffe et. al advise that judges can undertake this kind of preliminary assessment "provided they have access to relevant facts and appropriate training, even at an interim stage in the proceedings."[134] However, this kind of preliminary assessment can only provide a working hypothesis as to the nature and effects of domestic violence in a case.[135]

iii. Differential Parenting Arrangements

In custody and access proceedings, judges have a range of options to consider:

- **Co-Parenting:** A co-parenting arrangement is one in which both parents "are actively involved in the lives of their children, share information and problem-solve the normal challenges of parenting as they arise."[136] Co-parenting is often viewed as the best arrangement for children, as it helps them maintain a strong relationship with both parents.[137] However, it is not considered appropriate in high conflict cases where there are family violence concerns.[138]
- **Parallel Parenting:** A parallel parenting arrangement is one in which both parents are involved in the children's lives, but contact between the parents is minimized. Such an arrangement may be appropriate in high-conflict cases where both parents are competent parents. However, parallel parenting is not appropriate where there is a finding that one parent poses a physical, sexual or emotional

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[134] *Ibid* at 506.
[135] *Ibid*.
[136] Making Appropriate Parenting Arrangements, *supra* note 123 at 33.
[137] *Ibid*.
[138] *Ibid*.

threat to the child, or where there are ongoing concerns of spousal violence.[139] Bala, Crooks and Jaffe provide that a comprehensive assessment is required to determine whether a parallel parenting arrangement is appropriate in family violence cases. Relevant factors include "whether or not the perpetrator of the violence has taken responsibility and successfully completed an intervention; whether or not the children have received any indicated services and are experiencing ongoing symptoms of trauma or distress; and, the developmental stage of the children."[140]

- **Supervised Exchange:** Supervised exchanges may be appropriate in high-conflict cases, where there is a need for supervision during transitions. The victim, who may feel anxiety and distress when coming into contact with the abusive parent, may feel more comfortable when a third party is present during transitions. Supervised exchanges, however, do not minimize the risk of violence where there are ongoing concerns about the safety of the spouse or child.[141]
- **Supervised Access:** Supervised access may be appropriate in cases where a parent is deemed to be a risk to the child, or where the child is afraid of a parent.[142] Bala, Crooks and Jaffe provide that "[s]upervised access should only be undertaken if it is believed that a child stands to gain some benefit from a parent maintaining an ongoing role in the child's life but there remain concerns about the parent's risk of physical or emotional abuse to that child."[143]

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[139] *Ibid* at 35.
[140] *Ibid.*
[141] *Ibid* at 36.
[142] *Ibid* at 37.
[143] *Ibid* at 37.

- **No Contact:** While it is generally assumed that continued contact between the non-custodial parent and the child is usually in the child's best interests, there are extreme cases were no parent-child relationship is possible. [144] Bala, Crooks and Jaffe explain that "when a parent has engaged in a pattern of abusive behaviour and has indicated no remorse or real willingness to change, termination of the parental relationship may be indicated."[145]

V. Conclusion

The lack of coordination between the criminal and family law court present a number of obstacles for Canadian families navigating multiple proceedings. While none of the "best practices" discussed within this paper provide a perfect solution, they can help guide Canadian courts moving forward toward reform.

[144] Concurrent Legal Proceedings, *supra* note 4 at 26.
[145] Making Appropriate Parenting Arrangements, *supra* note 123 at 39.