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The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence

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THE INTERSECTION OF CHILD PROTECTION AND FAMILY LAW SYSTEMS IN CASES OF DOMESTIC VIOLENCE

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Both the child protection and the family law systems are intended to promote the best interests of children, and both can profoundly affect the relationships between children and their parents or caregivers. Over the past two decades, both systems have also accorded more weight in the assessment of best interests to how exposure to domestic violence can harm or place children at risk. However, these systems have evolved differently, are governed by different statutes, and are administered in different ways. Child protection proceedings purport to have primarily a protective function and invariably involve a public agency, while family law proceedings, under the Divorce Act *and similar provincial and territorial statutes, typically involve disputes between private litigants. In this article, I compare the impact of the two systems in cases involving allegations of domestic violence, highlighting the challenges within each, the differences between them in their identification and response to domestic violence, as well as the problematic ways in which the systems interact and generate contradictory pressures for survivors, most often*

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mothers. While I reference research findings in other jurisdictions, my inquiry is focused on Saskatchewan, a jurisdiction with relatively high rates of children in state care and the highest rate of domestic violence of all provinces. I draw on multiple sources that include extensive in-person interviews with legal professionals, government employees and service providers. I argue that the tensions and contradictions experienced by those affected by domestic violence could be mitigated by the provision of adequate and appropriate preventative and legal supports in both *systems along with information and procedural protocols, more uniform understandings of domestic violence and adequate training for all court and Ministry personnel in the dynamics of domestic violence, the impact of systemic inequalities and the specific issues arising at the intersection of both systems.*

I. INTRODUCTION

Domestic violence can give rise to disputes regarding the care of children in the Family Law system, as between individual litigants, and in the Child Protection system, as between child protection agencies and parents or caregivers of children. Interactions between the two systems arise because domestic violence can place the well-being and safety of children at risk in both. Studies have described the interactions as "difficult terrain," [1] and noted increasing complexity and confusion in high conflict family cases.[2]

While the Family Law (FL) and the Child Protection (CP) systems have evolved separately in terms

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1 British Columbia Law Institute, *Report on Modernizing the Child, Family and Community Service Act* (April 2021) at 39, online (pdf): *British Columbia Law Institute* <www.bcli.org/wp-content/uploads/2021/05/2021-04-21_BCLI-Report-on-Modernizing-CFCSA-FINAL.pdf> [BCLI].

2 Claire Houston, Nicolas Bala & Michael Saini, "Crossover Cases of High Conflict Families Involving Child Protection Services: Ontario Research Findings and Suggestions for Good Practices" (2017) 55:3 Family Court Rev 362 [Houston et al 2017] reporting on a survey of 210 Ontario cases between 2010 and 2015, involving both a parenting dispute and report to a child protection agency, along with surveys of 208 child protection workers and 64 professionals from both systems. High conflict cases often involve allegations of domestic violence. See also, the recent decision in *BJT v JD*, 2022 SCC 24 [BJT], a case under child protection (CP) legislation in Prince Edward Island, where the hearing judge described the proceedings as a "'disguised' custody battle," at para 33, and the Court questioned why the Director did not withdraw and allow the father and maternal grandmother to dispute custody under "appropriate legislation" at para 76.

of their histories and institutional cultures,[3] both purport to ultimately serve the best interests of children and both systems can determine the allocation of parental authority and parenting time. As well, policy shifts in both systems over the last two decades have attempted to give more weight to the harmful impacts of domestic violence (DV) on children's well-being. The recent amendments to the *Divorce Act*[4] (DA) and various provincial statutes such as Saskatchewan's *The Children's Law Act, 2020,*[5] (CLA) now mandate consideration of the impact of family violence (FV), broadly defined, and relevant civil or criminal proceedings, in an assessment of a child's best interests when allocating decision-making responsibility and parenting time between litigants.[6] The broad objective of the CP system, as expressed in legislation such as *The Child and Family Services Act* (CFSA), is to ensure that children are safe by offering state services, where appropriate, in ways that are least disruptive to the family unit but that can include surveillance or the actual removal of children from parental care.[7] In the early 2000s, child protection agencies (CPAs) across Canada began to include exposure to domestic violence as a ground for

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3 See Marianne Hester, "The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence" (2011) 41 Bri Jnl of Soc Work 837 [Hester 2011]; See also Joan S Meier & Vivek Sankarum, "Breaking Down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals" (2021) 28:3 Virgina Jnl of Social Policy & Law 276.

4 RSC 1985, c 3 (2nd Supp) [DA].

5 SS 2020, c 2 [CLA].

6 See DA, *supra* note 4, ss 2, 16; CLA, *ibid*, ss 2, 10.

7 SS 1989-90, c C-7.2 [CFSA], s 3.

investigating and finding a "child in need of protection" through a broader interpretation of emotional harm or explicit statutory references.[8] The number of complaints and investigations by CPAs thereafter surged dramatically although evidence from Ontario suggests that most referrals have not resulted in the removal of children from both parents.[9] More recently, the federal *An Act Respecting First Nation, Métis and Inuit children, youth and families* (FNMICYFA) also mandates consideration of direct or indirect exposure to FV and other civil or criminal proceedings relevant to the safety and well-being of Indigenous children involved in family service proceedings,[10] as does the *Miyo Pimatisowin Act* (MPA) passed by the Cowessess First Nation, the first First Nation (FN) in Canada to enter into a coordination agreement under the FNMICYFA and establish their own jurisdiction over child welfare.[11]

The primary objective of this article is to compare the FL and CP systems in the context of DV, to explore system interactions and illustrate points of tension and contradiction as between them. From the perspective of meaningful access to justice for those affected by DV, what are the failings or inadequacies of each system? How do they intersect, should they be better aligned and

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8 *Ibid*, s 11(a)(vi).

9 See Tara Black et al, "The Canadian child welfare system response to exposure to domestic violence investigations" (2008) 32:3 Child Abuse & Neglect 393 [Black et al 2008].

10 SC 2019, c 24, s 10(3)(g),(h). See also *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

11 See *Cowessess First Nation Miyo Pimatisowin Act*, ss 6.2(g), (h) (enacted March 2020) [MPA].

coordinated, and if so, how? While I reference research findings in other jurisdictions, my inquiry is focused on Saskatchewan, a jurisdiction in which these issues are more prevalent and pressing than most. This province has one of the highest rates of children in care in Canada, over 80% of whom are Indigenous,[12] and as of 2019 the highest rate of police-reported family and intimate partner violence of all provinces.[13] Recently an Indigenous author and mother, who now faces charges of child abduction and public mischief, has alleged that she fled to the United States with her son because she feared for their safety and was "failed by the Saskatchewan justice system, the family law system and child protection."[14]

Where the systems intersect or conflict, Bala and Kehoe argued in 2015 that proceedings should be maintained so far as possible in the child protection system (CPS) where there is generally better access to services, legal counsel for children, financial supports for third party care and a history of CP involvement that can assist in proving DV.[15] For parents in disputes with third parties, the

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12 "Number of children in Saskatchewan's care hit 11-year high, with 86% identified as Indigenous" (3 June 2020) online: *Global News* <globalnews.ca/news/7020525/indigenous-children-saskatchewans-care-11-year-high/>.

13 See Shana Conroy, *Family Violence in Canada: A Statistical Profile 2019* (2 March 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00001-eng.htm>.

14 Thia James, "Walker back in Canada after allegedly abducting son, fleeing to US", *Saskatoon Star Phoenix* (26 August 2022).

15 Nicholas Bala & Kate Kehoe, "Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective" (2015) at 16–

'bar to reunification' can also be lower on the CP side as they need only prove at the outset that a child is not or no longer in need of protection rather than prove that reunification is in the child's best interests or prove a material change in circumstances to vary a prior FL order.

However, while these differences would seem to privilege CP proceedings, both systems generally fail those affected by DV in Saskatchewan as a result of inadequate attention to its harms and limited preventative services. Moreover, while both systems can impinge on parental autonomy and the parent-child relationship in significant ways, lawyers for children and victimized intimate partners in our study strongly emphasized the more serious risks arising from the involvement of the CP system. In the absence of trust, adequate resources, and insight into the dynamics of DV, systemic inequalities, and intersecting systems, "protective systems" like the CPS can be experienced by survivors, who are disproportionately female, impoverished, and Indigenous and more likely to have physical or mental disabilities, as a continuing form of intimidation and control.[16] We know that the history of child welfare involvement in Indigenous families particularly has largely been one of surveillance and

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17, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child_protection.pdf>.

16 See also Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families – and How Abolition Can Build a Safer World* (New York: Basic Books, 2022) who describes the CPS as a "family policing system" that must be dismantled.. West Coast LEAF has also adopted this descriptor: See e.g. "A 360 [Degree] view on family policy" (November 2022), online (pdf): <www.westcoastleaf.org/wp-content/uploads/2022/11/family-policing-360-FINAL-with-alt-text-and-link.pdf>.

control.[17] But for most, if not all, survivors of DV, the threat of child removal by CP workers incites fear, if not terror, and inhibits disclosure of the violence they are experiencing. Where DV is disclosed, CP involvement can then critically shape how parenting arrangements in FL proceedings unfold, even without formal apprehension of the children and without FL courts fully assessing the adequacy of investigations undertaken by CP workers who may rely on limited understandings of DV. Victims also experience inconsistent expectations when both systems are potentially engaged, to protect children but also facilitate contact with abusive partners, and will lose expedited access to supports and services when CPAs withdraw. I argue that, short of a radical redesign of the CPS, these tensions could be mitigated by the provision of adequate and appropriate preventative and legal supports in *both* systems along with information and procedural protocols, more uniform understandings of DV and adequate training in DV dynamics and intersecting issues for all court and Ministry personnel.

The methodology used in this study includes a literature review, a statutory scan, and case law analysis, a review of policy manuals, protocols, and reports of Children's Advocates and Representatives, along with in-depth interviews with 17 participants who included legal professionals, government employees and service

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[17] See Caroline L Tait, Robert Henry & Rachel Loewen Walker, "Child Welfare: A Social Determinant of Health for Canadian First Nations and Métis Children" (2013) 11:1 Pimatisiwin: J Aboriginal & Indigenous Community Health 39 [Tait et al]; Patricia Monture-Angus, "A Vicious Circle: Child Welfare and the First Nations" in Patricia Monture-Angus, eds, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) 191.

providers working in the DV context. Six interviews were conducted with private legal professionals who have acted for the Ministry of Social Services (MSS) in the past or have acted for delegated agencies that deliver CFSA services on reserves or for parents or children in both the CP and FL systems. Three other lawyers worked with Legal Aid Saskatchewan and eight participants were employed by the provincial government in front line social work, program supervision, policy analysis or as legal counsel. Interviews were conducted via Zoom between December 2021 and July 2022 and transcripts reviewed to identify common and overarching themes. While there were differences between MSS personnel and other interviewees, particularly on the existing extent of service provision, almost all agreed that services were inadequate, particularly in regions outside urban centers, and agreed upon a lack of clarity surrounding the involvement of MSS in FL proceedings.

In Part II, I establish the context for comparison of these systems by highlighting differences in the impact of each on children's best interests, parental autonomy and the parent-child relationship. In Part III, I examine the most prominent issues arising from the intersections of these systems, including the processes giving rise to intersecting claims; differing definitions of FV; differences in access to family services, benefits, and legal representation, and the impact of CP involvement in FL proceedings themselves. Part IV concludes with preliminary observations from participants on the promise of FN control over child welfare.[18]

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[18] In this article, I do not review alternative dispute resolution processes in either the FL or CP system, but see Michaela Keet & Jeff Edgar,

II. DIFFERENTIAL IMPACTS ON BEST INTERESTS, PARENTAL AUTONOMY AND THE PARENT-CHILD RELATIONSHIP

The challenges to and potential constraints on parental care differ quite dramatically in the FL and CP systems. In the FLS, petitions for parenting orders are typically made after the parties have separated. Fathers are highly visible in this system and allegations arise across the socio-economic spectrum, although several participants noted the relative paucity of trials and reported decisions involving Indigenous litigants. In Saskatchewan, parents are generally presumed to share *de facto* decision-making authority, in the absence of an agreement or court order.[19] As well, although judges may dramatically alter parenting arrangements, neither parent is likely to lose contact with their children entirely given a legal culture that has encouraged maximizing parenting time with each parent.[20] Where DV is established, the blameworthiness of the perpetrator can be foregrounded in the FLS, but generally

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"Mediator Discretion in Cases Involving Intimate Partner Violence," (2023) 35:1 Can J Fam L 131 (in this issue, for a discussion of mediation in the context of the FLS).

19 CLA, *supra* note 5, ss 3(1), (2). See also *Schick v Woodrow*, 2012 SKCA 1.

20 Prior to March 2021, both the DA and the CLA 1997 included what was known as a 'maximum contact' provision. The DA now requires that courts "give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child' as one consideration among many that are relevant to a best interests assessment under the marginal note 'Parenting time consistent with best interests of child.' The CLA 2020 no longer includes such a provision but does preclude making a presumption or drawing an inference that one parent be preferred over the other, s 11.

co-parenting has been encouraged, parenting time rarely denied and courts are reluctant to impose conditions such as counselling or supervision.[21] Litigation is generally costly and since DV is difficult to prove, applicants may place their own claims at risk if the alleged DV is not substantiated and they are taken to be unfriendly or alienating parents.[22] Moreover, the court has no authority under the CLA alone to subject parental care to ongoing monitoring by a CP agency. As such, the FLS can place protective parents and children at significant risk of exposure to DV.[23]

In the CPS, parents may or may not have separated and the involvement of CPAs is triggered where a person reports having reasonable grounds to believe that children are in need of protection.[24] Under the CFSA, a child must also be at risk of serious harm to warrant removal from

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21 See *BLS v BWS,* 2019 SKQB 346 requiring a probable, and in *AMD v MRM,* 2021 SKCA 71 "a real risk of abuse or danger" to order supervision, at para 45; Susan Boyd & Ruben Lindy, "Violence Against Women and the BC Family Law Act: Early Jurisprudence" (2016) 35:2 Can Fam LQ 101, and Wendy Chan & Rebecca Lennox, "'This Isn't Justice': Abused Women Navigate Family Law in Greater Vancouver" (2023) 35:1 Can J Fam L 81 (in this issue).

22 DA, *supra* note 4, s 16(3)(c), 16(6); CLA, *supra* note 5, s 10(3)(c). See Jennifer Koshan, "Myths and Stereotypes in Domestic Violence Cases" (2023) 31:1 Can J Fam L 33 (in this issue).

23 See e.g. concerns by the dissenting judge in *KGK v LTK,* 2021 SKCA 12 that the chambers judge had not "come to grips with Ms. KGK's complaints of verbal and domestic abuse," at paras 44, 128–129; but more recently, see *Barendregt v Grebliunas,* 2022 SCC 22, emphasizing the "grave implications that any form of family violence poses for the positive development of children" at para 147.

24 CFSA, *supra* note 7, ss 11, 12.

their home in the absence of other practicable ways of ensuring the child's safety through the provision of services.[25] Court orders must align with a child's best interests and may require: returning the child with or without supervision; placing them with persons of sufficient interest (PSIs) such as extended family members; temporarily placing them with the Minister; or placing them longterm or permanently with the Minister.[26] Cases within this system are apt to involve more serious violence and where longterm or permanent orders are sought, the violence is often enmeshed within and compounded by poverty, residential insecurity, disabilities, substance abuse, and intergenerational violence.[27] Fathers have generally been far less visible in the CPS than in the FLS and critics have found that mothers, who are more often both the primary victims of DV and the primary caregivers of children, have tended to be held responsible for failing to protect them.[28] The two systems in concert can thus place contradictory pressures on survivors to both protect children from abuse but also facilitate contact between them and the abuser.[29]

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25 *Ibid*, ss 11, 14, 17.

26 *Ibid*, ss 4, 37.

27 See also Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC L Rev 435.

28 See Hester 2011, *supra* note 3. See also Beth Archer-Kuhn and Stefan de Villiers, "Gender Practices in Child Protection: Shifting Mother Accountability and Father Invisibility in Situation of Domestic Violence" (2019) 7:1 Soc Inclusion 228 (finding that the CPS in Alberta failed to engage with and hold men accountable for DV).

29 See Judy Hughes & Shirley Chau, "Children's best interests and intimate partner violence in the Canadian family law and child

Unlike the FLS, the CPS in Saskatchewan overwhelmingly involves families living in poverty and Indigenous parents and children. Parents living in poverty have less choice over their children's neighborhoods, homes, and schools, are less able to pay for supports, and may be more visible to state authorities through their residential locations or reliance on social assistance. Across Canada, colonization, residential schools, the 60s and the millennial scoop and systemic racism have also targeted Indigenous families and communities for surveillance, disruption, and destruction, generating disproportionately higher rates of Indigenous children living in poverty and government care and a profound distrust of CP services on the part of Indigenous families and nations.[30] As in several other provinces, CP services are provided by the MSS off reserve and provided on reserve by FN agencies exercising delegated powers under

protection systems" (2012) 32:4 Critical Soc Policy 677 (a qualitative study of 21 women dealing with both systems simultaneously in BC and Manitoba) [Hughes & Chau].

30 Truth and Reconciliation Commission, *Honouring the Truth, Reconciiling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 137–144, online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>. See also Missing and Murdered Indigenous Women, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a (2019) at 339–355, online (pdf): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>. See also Holly A McKenzie et al, "Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses" (2016) 7:2 Intl Indigenous Policy J.

the CFSA.[31] While the CPS is intended to keep children safe, children experience trauma when removed from their families and communities and placed in the homes of strangers, possibly multiple times. They may eventually age out of foster care without family or community connections or a healthy "sense of identity and belonging."[32] As numerous critical injury and death reports by Children's Advocates and Representatives have demonstrated, government care has often failed to guarantee physical and emotional security.[33]

As acknowledged in the recent decision of the Supreme Court of Canada in *BJT v JD*, the decisions of CP workers can have "profound, life-altering consequences for children and families."[34] CP personnel can exercise extensive powers of surveillance over both alleged perpetrators and survivors well before a protection hearing

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31 CFSA, *supra* note 7, s 61.

32 Tait et al, *supra* note 17 at 45 (finding that Indigenous children and their biological parents both experience shame and distress as a result of removal).

33 See e.g. BC Representative for Children and Youth, *Honouring Christian Lee: No Private Matter: Protecting Children Living with Domestic Violence* (2009) and *Honouring Kaitlynne, Max and Cordon: Make their Voices Heard Now*, (2012) [BC Representative].

34 *BJT*, *supra* note 2, at para 64. See also *New Brunswick v G(J)* [1999] 3 SCR 46; *Winnipeg Child and Family Services v KLW*, 2000 SCC 48 at para 79 (but this decision also held that child removal without a warrant or prior judicial authorization in non-emergency situations did not violate section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (UK) 1982 c 11).

that can assess the concerns is held.[35] Two participants expressly likened that involvement to coercive control or abuse that can trigger their clients.[36] Anyone who believes that a child is in need of protection can report to an agency and CPAs must assess or investigate every such report, including those advanced by abusive ex-partners who often allege that mothers have serious mental health issues and are unable to care for their children. Several participants described typical front-line CP workers as recent graduates, middle class, inexperienced and inadequately trained in DV dynamics. While services must be offered before removing children and structured risk assessment tools are to be followed, workers exercise considerable discretion in making intake and safety assessments. Faced with the threat of child removal, parents can be subjected to warnings, *de facto* mandates, and unannounced home visits.[37] Upon apprehension, clients are given a list of conditions that must be met to regain care of their children and that usually require separation from an alleged perpetrator. While the CPS is supposed to be more rehabilitative than punitive, according to one participant, parents are typically on the defensive in CP proceedings

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35 Note that the CFSA requires that a child protection hearing be held within 30 days but in practice this is taken to be satisfied by the first court date, s 22. A file may then be adjourned several times, to allow for disclosure, service on all parties, or legal representation, before a summary hearing on requests for supervision or temporary orders or before a trial for long term or permanent orders (Participants 6, 14, 15). The legitimacy of apprehensions was rarely contested by our participants before a summary hearing, but if contested, it can still take 3–4 weeks for such a hearing.

36 Participants 6, 7.

37 CFSA, *supra* note 7, s 17(1).

and their counsel were often referred to as defence counsel.[38]

CPA involvement can also shape the pathway towards more intrusive and longer term interventions. A lack of cooperation with the requests and expectations of workers or a failure to comply with conditions can be grounds for extended supervision or state care. Placement with third parties, with parents from whom the child has not been removed (non-removal parents), or with foster caregivers can also establish stability for a child that can be difficult for the parent from whom the child was removed to challenge.[39] Longer term monitoring through supervision orders or the placement of children in the temporary or permanent care of the Ministry can pave the way for adoption and the termination of parental rights.[40]

A recent Saskatchewan decision illustrates the potential for such consequences. In *Re ET*, the Ministry's involvement arose from a police report regarding a break-in by a former partner who had been violent towards the mother.[41] The MSS apprehended and placed the child with

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38 Participant 6.

39 See e.g. *Re SC*, 2018 SKCA 19 and *Re H-LM*, 2021 SKQB 145, where foster caregivers were identified as PSIs under the CFSA even before a protection hearing.

40 See CFSA, ss 37(2), 37(3) and *Re SS*, 2022 SKQB 189 (where the Yorkton Tribal Council sought to challenge the inability to place conditions for access on permanent orders on constitutional grounds, but the application was rendered moot when Richmond J decided to place the child with the foster caregiver as a person of sufficient interest).

41 *Re ET* 2021 SKQB (unreported decision on file with author).

third parties, and then with the paternal grandmother, while arranging for the mother's residence in an in-house program. The mother was subsequently evicted from the residence for failing to follow the rules (she "did things like smoke in her room, store alcohol in her room on one occasion, and have a male in her room for longer than was authorized").[42] Finding no further exposure to violence on the facts, and no evidence that the mother's drug or alcohol use placed the child at risk, Megaw J noted that the mother's "report of the violence led directly to her child being apprehended" and that "a failure to follow rules in a residence program does not necessarily equate to placing a child at risk." Rather, "there ought to have been a concerted effort to ensure she and the child were safe and protected. There ought to have been a recognition she was blameless in what had happened."[43]

In *Re ET*, the mother had only had supervised time with the child since the apprehension but had completed some programming. However, in another similar situation, a participant recounted how "as soon as [the apprehension] happened, all of the triggers for her, all of the confidence-building stuff that happened … in terms of trusting your medical provider, trusting the social worker, trusting all of this—that broke down. And so she fought, and …Six months into fighting, she relapsed. So now we're in the cycle of, you know."[44] Whether the initial apprehension

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42 *Ibid* at para 5.

43 *Ibid* at paras 15, 21.

44 Participant 6. According to Participant 7: "In identifying DV as an issue, I've seen victims get retraumatized telling their story to MSS workers, who at times do not believe them or seem not to care about them as the victim because their focus is on the children and not

was lawful can become irrelevant in the CPS if mothers (who may be self-medicating from exposure to DV) relapse and are unable to resume care at the time of the protection hearing, or if they return to abusive partners when the children are gone.[45] Another participant expressed "hope that doesn't happen often; [you] can't just say, oh you got beat up by your husband, so we're taking your kid."[46] However, the real potential for such outcomes helps explain why women, particularly Black, Indigenous, racialized, newcomers, impoverished or women with disabilities or mental health issues, are reluctant to report violence, seek help from CPAs or disclose violence in FL proceedings.[47] As a result, the harm and "the legal issues

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necessarily on preserving the family." This participant also complained that the MSS was slow or had failed to investigate reports by parents of sexual abuse of children while they are in care.

45 See CFSA, *supra* note 7, s 37(1). Under s 17(1), the apprehension may be unlawful if the child is not on reasonable grounds in need of protection, is not at risk of serious harm, and if family services or other arrangements to ensure the child's safety are not practicable. See also s 79 for immunity for acts performed in good faith under the *Act*.

46 Participant 13.

47 See Ramona Alaggia et al, "In Whose Best Interest? A Canadian Case Study of the Impact of Chld Welfare Policies in Cases of Domestic Violence" (2007) 7:4 Brief Treatment and Intervention 275. See also Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's LJ 306; Ilana Dodi Luther, On the "Poverty of Responsibility": A Study of the History of Child Protection Law and Jurisprudence in Nova Scoia, PhD Thesis, Dalhousie University, 2015 online (pdf): <dalspace.library.dal.ca/xmlui/bitstream/handle/10222/61015/Luther-Ilana-PhD-Law-August-2015.pdf?sequence=1&isAllowed=y>.

continue to snowball unabated and without therapeutic intervention."[48]

In addition to the CPS, parents can be caught up in an extensive, complex "web of surveillance" that includes the criminal justice, immigration, social assistance, education and social housing systems.[49] Indeed, women in these systems are likely to be more visible to CPAs, even if there is minimal collaboration between systems once they are engaged. While Ministry participants were adamant that children are not apprehended due to poverty or an inability to provide food or housing, most children are apprehended for neglect, which is highly correlated with poverty.[50] Survivors in persistent poverty may also be subject to invasive questioning by income support workers and required to pursue child and spousal maintenance unless the individual worker believes "potential abuse by the absent spouse or parent poses a serious threat to the

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48 Participant 1.

49 Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:2 Windsor Yearbook of Access to Justice 149 at 175 [Mosher, "Grounding Access"]. See also Krys Maki, *Ineligible: Single Mothers under Welfare Surveillance* (Winnipeg: Fernwood, 2021) at 93 [Maki]. See also Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Fam L 297 (in this issue) [Mosher, "Domestic Violence"].

50 Anne Blumenthal, *Child Neglect I: Scope, Consequences, and Risk and Protective Factors*, 2015, CWRP Information Sheet #141.E. Montreal QC: Centre for Research on Children and Families at 4, 6; On rates of child poverty, see Miguel Sanchez, "Saskatchewan Child and Family Poverty Report, 2021", online (pdf): *Campaign 2000* <campaign2000.ca/wp-content/uploads/2021/11/Saskatchewan-Report-Card-English-CPR-2021.pdf>.

individual and/or dependents."[51] Under Saskatchewan's Income Support program, maintenance is counted as income and offset against benefits that are far below the official poverty line.[52] The experience of recipients on welfare has also been likened to living with an abusive partner.[53]

According to one participant, "I know people, like I say, find it intrusive, …but it really is meant to be a support."[54] Despite workers having the best of intentions, how survivors experience a "protective" system can depend upon both the overall quality of the relationships between actors and the provision of meaningful material aid, if needed.[55] In situations of DV, all such systems can be experienced as further intimidating and disempowering if system actors are not accountable[56] or are not trusted and

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51 Saskatchewan Income Support Program Policy Manual, February 2023 at 21, online: <publications.saskatchewan.ca/#/products/101659> [SISP]. See Maki, *supra* note 49 at 112. Note that legal aid lawyers may nevertheless refuse to pursue child support on behalf of their clients if there are safety concerns (Participant 5).

52 See *ibid* at 19. See also, *The Saskatchewan Assured Income for Disability Regulations, 2021*, c S-8 Reg 11 (when determining the monthly income and eligibility for assistance for applicants with a disability, maintenance received for children over 18 is excluded but for children under 18, only s 7 expenses and amounts in excess of table amounts for child support are excluded).

53 See Maki, *supra* note 49 at 105.

54 Participant 13.

55 See eg. Felicity Gray, "Protection as connection: feminist relational theory and protecting civilians from violence in South Sudan" (2022) 18:1 Journal of Global Ethics 152–170.

56 See e.g. West Coast LEAF, *Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare*, September 2019 [WC

power is not exercised with insight into the complex dynamics of DV and underlying systemic conditions.

Resource constraints within the MSS can not only limit the provision of material aid to survivors but can also shape the way power under the CPS is generally exercised, in ways that tend towards more reactive, crisis-driven interventions. Almost all participants referenced the high caseloads that CP workers carry and the high levels of staff turnover and burnout due to both budgetary constraints and/or the onerous nature or location of their work. Such circumstances make it hard to fill positions, hard to get adequate training and hard to build trust and plan longterm, with the result that many clients return to the system or feel that they have not been heard.[57] The containment of costs and excessive workloads in the CPS may also be conducive to a number of other measures, explored in Part III, that ultimately prejudice claims by survivors in FL proceedings. Agreements may be entered into without adequate legal advice, children may be placed with non-removal parents or third parties in the absence of a fulsome investigation into their best interests, and services to survivors may be terminated prematurely. Workers may also encourage, resort to, and resist further CP involvement

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LEAF] at 5, online (pdf): West Coast Leaf <www.westcoastleaf.org/wp-content/uploads/2021/03/West-Coast-LEAF-Pathways-in-a-Forest-web-Sept-17-2019-002-Online-Version-2021-compressed4.pdf>.

57 Participant 6.

in private family proceedings, limiting not only service provision but the information available to the FL court.[58]

III. THE INTERSECTION OF THE CPS AND FLS

A. CP AND FL PROCESSES

The FLS can intersect with the CPS in a number of ways before, during or after CP involvement in cases of DV. As indicated, the mere threat of CP involvement may inhibit disclosures of DV in both systems. Alternatively, reports of DV (as between parents or subsequent partners) or of mental health or substance abuse concerns that may be linked to long term DV can be made to the MSS before or during FL proceedings. According to participants, police or Mobile Crisis workers most often reported DV but reports by community members or by one parent against another were not uncommon. However, police do not always call the MSS, as was tragically illustrated in the recent killing of thirteen-month old Tanner Brass by his father after his mother alleged abuse and warned police in the city of Prince Albert of lethal risks.[59]

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58 See also Richard Sullivan, Margo Nelson & Amanda Oliver, "Kinship Care in an Era of Cost Containment" (2015) 72/73 Can Rev Social Policy 95.

59 See Yasmine Ghania and Jason Warick, "New details emerge in homicide of Sask. 13-month old Tanner Brass" (12 June 2022), online: *CBC* <www.cbc.ca/news/canada/saskatoon/baby-tanner-new-details-emerge-1.6484733>: The Indigenous mother had escaped the house and police, believing her to be intoxicated, arrested her. The Saskatchewan Public Complaints Commission is conducting an investigation.

The MSS may either not open a file or close it without apprehending or requesting a protection hearing if the child is seen to be safe in the care of a 'protective parent'; for example, if the parents had lived together but have separated, there are no prior or further known incidents, the violence is not severe, and the victim is supported by services or abiding by a safety plan.[60] In such circumstances, either the survivor or the abusive parent, who in the absence of an agreement or court order is still considered a joint legal decision-maker under the CLA, may apply for a parenting order in the FLS. Violence may also be experienced in relationships parents subsequently have and result in removal and placement with a "person who has a right to custody" that may be a non-removal parent or a third party, both of which can give rise to claims for parenting or contact orders in the FLS.[61] One participant complained that the MSS may place a child with a non-removal parent and close their file, even where that parent resides in another jurisdiction and has had minimal involvement with the child and without vetting closely whether that relationship was also violent.[62] Where files are closed or proceedings withdrawn, the Ministry is not then accountable for the apprehension, if it was

60 Participant 11. See also CFSA, *supra* note 7, s 14(4).

61 CFSA, *supra* note 7, ss 7(3), 17(3) .

62 Participant 15. See *Re NVRD*, 2019 SKQB 302 [*Re NRDV*]; see also *AH v Ministry of Social Services*, 2019 SKCA 70 (appeal dismissed as moot, where the Ministry had placed the child with the father in Alberta and the lower court found it had an unfettered right to withdraw proceedings); but see *LP v ZM* 2021 SKCA 134 (where status quo with the mother was restored under the CLA after her addiction issues were resolved and the MSS had removed and placed the child with the father who had had no involvement in the child's life for the first 7 years).

contentious. Moreover, the placement itself can expose survivors, including children, to trauma and subsequently prejudice their FL claims by establishing a new status quo or a settled parenting situation, the preservation of which can then be seen to be in the child's best interests.

Instead of having a child apprehended, parents may also privately arrange with third parties for the care of children after a safety check on them is completed. These arrangements are seen to facilitate cultural norms of extended parenting in Indigenous families[63] and can be formalized by way of a transfer of guardianship, with the assistance of Legal Aid if the parties are eligible. However, if the transfer is not completed, the third party may be left without formal legal status and may seek standing to apply for an order as a PSI under the CLA or in more limited circumstances, under the DA.[64] In assessing a child's best interests, there is no presumption favouring biological parents and the Supreme Court's recent decision in *BJT v JD* suggests that a biological tie may carry minimal weight.[65] Third parties in the FLS are not subject to

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63 Participant 14.

64 Participant 7. See *DLC v GES*, 2006 SKCA 79 for the threshold test for status as a PSI under the CLA. In *Schindel v Stone*, 2008 SKQB 399, a former foster parent's application to be designated a PSI was denied but the court refused to make a general rule prohibiting such applications, which have been advanced successfully against prospective kin caregivers. See also Wanda Wiegers, "Child Placement and the Legal Claims of Foster Caregivers" (2019) 52:2 UBC L Rev 631 at 679–682.

65 BJT, *supra* note 2 at para 109. The CLA, like the CP legislation in PEI, does not include mention of a biological tie in its mandatory best interest factors but does limit the definition of parent to parentage by birth, adoption or by way of assisted reproduction under the Act.

monthly or annual reviews or other forms of surveillance by social workers but neither are they entitled to state compensation or family services.

If a child is apprehended and not returned to a parent or a person entitled to custody within 48 hours, workers must serve a notice to apprehend and, in the absence of a voluntary surrender of care (a s 9 agreement), apply for a protection hearing.[66] The MSS may place a child in a place of safety, with a foster caregiver or family member, even a member of the abuser's family if they are deemed safe. Such placements can shift the dynamics for reunification substantially and also result in claims in the FLS.[67] Under a s 9 agreement, parents remain the legal guardians though the MSS technically has care, leaving family caregivers with financial support and some assistance in dealing with schools and health authorities, but without legal status.[68] Section 9 agreements are intended to be short-term, but if problems subsequently develop between the family member and parent, the former could seek status as a PSI and challenge the survivor's rights under the CLA.

Reports relying on Ontario Incidence Studies suggest that about 12% of CP investigations in 2013 involved a custody dispute post-separation.[69] In such cases,

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66 CFSA, *supra* note 7, ss 9, 17(1).

67 See Wiegers, *supra* note 64; *TLP v SSMT* 2021 SKQB 146 (where the CP matter was adjourned pending the outcome of the CLA proceeding, as between the mother and the paternal and maternal grandparents).

68 Participant 11.

69 Tara Black et al, "The intersection of child welfare, intimate partner violence and child custody disputes: secondary data analysis of the

parents more often reported to CPAs and reports were more likely to involve previous investigations and emotional harm to children than in cases not involving a custody dispute. Half of all investigations involving child custody disputes were substantiated, 41% were unfounded and "a small fraction" (10%) were made deliberately or maliciously, compared to 4% of investigations not involving a custody dispute. Exposure to DV was the primary concern, cited in 42% of all investigations involving a custody dispute.

Whether a FL proceeding is underway is not a relevant risk factor in safety assessments[70] but legal professionals outside the MSS did believe that workers were more suspicious or skeptical of claims that a child was in need of protection in such circumstances. They were either concerned that the complaint raised a custody, rather than a protection, issue or that CP involvement was being used to secure a tactical advantage in the FL dispute. These observations are consistent with findings of studies in Ontario where workers feared "losing focus on protection issues" in high conflict cases[71] and where the existence of a child custody dispute significantly predicted the closure of files and services.[72] Since the vast majority of reports were found to have been made in good faith and DV is known to be under-reported by survivors, these outcomes raised concerns that allegations of DV are more likely to be

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Ontario incidence study of reported child abuse and neglect" (2020) 15:4 J Public Child Welfare Issue [Black et al 2020].

70 Participant 11.

71 Houston et al 2017, *supra* note 2 at 367.

72 See Black et al 2020, *supra* note 69.

dismissed, files are more likely to be closed prematurely and parties less likely to receive ongoing child welfare services where custody proceedings are underway.[73]

Several participants also suggested workers needed more specific and extensive training on screening for DV, an issue linked to understandings of FV.

B. Definitions and Understandings of Family Violence in Each System

While case outcomes ultimately depend on how judges weigh the risks of DV against the perceived benefits of parental contact in both systems, conceptual understandings of FV can matter. Family violence is now broadly defined in the FLS to include conduct that is violent, threatening, that "constitutes a pattern of coercive and controlling behavior," or that causes fear for one's safety and "in the case of a child, includes direct and indirect exposure to such conduct."[74] In the CPS, by contrast, domestic or family violence tends to be defined more narrowly. Under the CFSA, a child is in need of protection if "exposed to interpersonal violence or severe domestic disharmony that is likely to result in physical or emotional harm"[75] or where an inability to meet the child's

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73 See Hughest & Chau, *supra* note 29 at 691 and other studies cited by Black et al 2020, *ibid* at 10. See also Koshan, *supra* note 22.

74 DA, *supra* note 4, s 2; CLA, *supra* note 5, s 2.

75 See CFSA, *supra* note 7, s 11(a)(vi); MPA, *supra* note 11 (defines emotional injury under s 8.1(f) to include exposure to family violence under s 8.3(a)(ii)D and includes family violence and its impact on the child as a factor relevant to a child's best interests including direct or indirect exposure and physical, emotional and psychological harm or

needs has caused or is likely to cause physical or emotional harm.[76] Such a finding will warrant the provision of services and removal if there is a risk of serious harm and no practicable alternatives.

However, none of these terms are defined in the CFSA and under *The Victims of Interpersonal Violence Act*, interpersonal violence does not include controlling behavior or emotional abuse.[77] The Structured Decision-making Manual (SDM) used to guide risk assessments by workers does define DV to include "a pattern of abusive behaviours" that can encompass "emotional abuse, controlling or domineering behavior, intimidation, stalking, passive/covert abuse (e.g. neglect) and economic deprivation."[78] However, participants generally agreed that DV is most commonly interpreted in practice as exposure to threats or actual incidents of physical violence. DV is "not articulated as a pattern" but rather is incident-based with past incidents taken into account;[79] the language of coercive control is not used nor are different kinds of DV acknowledged. Coercive behavior can also be more

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risk of harm to the child, s 6.2(g)). For similar language, see FNMICYFA, *supra* note 10, s 10(3)(g).

76 *Ibid*, s 11(b).

77 SS 1994, c V-6.02, s 2(e.1).

78 Children's Research Centre, "The Structured Decision-Making System for Child Protective Services, Saskatchewan" (2011, updated May 2020) at 8, online: <pubsaskdev.blob.core.windows.net/pubsask-prod/72929/SDM-PP-manual-May2020.pdf> [SDM].

79 Participant 8.

difficult to prove and identify[80] and is apt to be seen as "historical", rather than current.[81]

Moreover, central to screening is the impact on the child, specifically whether the child: has seen or is aware of the DV and is likely to be physically harmed; has been diagnosed with or is exhibiting severe mental health symptoms as a result of exposure; or will likely experience such effects and is aware of physical violence occurring between adults more than once or only once if weapons were used or an adult was injured.[82] In assessing risk, workers will interview parents and at least three collaterals but they rely heavily on disclosures by children, who may generally be unable to identify or understand controlling dynamics. Mutual and resistant violence are not "really [separated] out. It's more about "what is the child exposed to?" in assessing risk.[83]

One participant opposed the expansion of a DV definition in the CPS given the lack of checks and balances on the authority to apprehend that can take "two to three months to fix, if it can be fixed" at all.[84] However, notwithstanding the risks of increased surveillance and control, most interviewees favoured a more uniform

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80 According to Participant 9, "getting locked out of the house or getting relegated to live in the basement" was not seen as abusive and MSS was "inconsistent on financial abuse and control."

81 Participant 14.

82 SDM, *supra* note 78, at 18–19.

83 Participant 11. According to Participant 7, "For Indigenous people, both parents were often viewed as being involved in the violence, not just the perpetrator, but the victim also."

84 Participant 15.

definition of FV across both systems that would include coercive control. In theory, a broader definition could make visible more of the harmful impact of FV and assist in educating victims, providing services and stemming harm at an earlier point. Risks might also be minimized by provisions that, as in the federal FNMICYFA and the Cowessess MPA, superweight ongoing family relationships and community and cultural connections, greatly prioritize preventative supports over apprehensions and require proof that such efforts have been made and less disruptive measures attempted prior to removal.[85] A provision acknowledging that children should generally not be apprehended solely "as a result of socio-economic conditions" as in the FNMICYFA, could also reduce concerns with the inclusion of financial abuse as a form of family violence.[86] Use of the same screening and risk assessment tools for DV in each system could also be explored.[87]

Overcoming the risks, however, crucially depends both on the actual availability of safe housing, adequate income support and other preventative supports, as discussed below, and on workers attuned to the dynamics and impacts of DV. Training could alert workers to the danger of placing children with violent, controlling parents where control has truly incapacitated a victim[88] and be

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85 FNMICYFA, *supr*a note 10; MPA, *supra* note 11, see similar recommendations by WC LEAF, *supra* note 56 at 92–97.

86 *Ibid*, s 15. See also BCLI, *supra* note 1, rejecting financial abuse on this basis, at 47–51.

87 Heather Douglas, *Women, Intimate Partner Violence, and the Law* (New York: Oxford University Press, 2021) at 255.

88 Participant 14.

particularly important in distinguishing resistant from mutual violence where a primary aggressor engages in a pattern of abuse. It would also assist young, inexperienced workers in standing up to clients who attempt to control or intimidate them.[89]

More extensive training might further enable workers, who may often make separation from a partner a condition of continued care by a mother, to appreciate its complexities. Both the FL and CP systems tend to assume that children will always be better protected upon separation but this assumption can obscure the protective strategies mothers adopt pre-separation, the "hidden, secret things"[90] mothers may do to buffer, compensate for, deflect risk or otherwise minimize children's exposure.[91] Separation is also often "a process," rather than a "single event,"[92] a process hindered by economic and emotional barriers and a real risk of heightened violence towards intimate partners and children. As well, abusers may be accorded parenting or contact rights in the FLS post-separation that can expose children to violence more directly or inhibit their healing.[93]

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89 Participant 13.

90 Participant 13.

91 See Leslie M Tutty & Kendra Nixon, "Mothers abused by intimate partners: Comparisons of those with children placed by child protective services and those without" (2020) 115 Children and Youth Services Rev; Linda Neilson, *Responding to Domestic Violence*, Can LII, ch 17 [Neilson].

92 *Ibid* at 3.

93 Several participants complained of perpetrators refusing to consent to counselling for their children.

Participants complained that courts in both systems fail to "see [DV] from [a] safety lens."[94] According to two participants, coercive control was often a relevant dynamic where DV was the foremost issue in the CPS, but even though it increased the harm and reduced the protective parent's capacity in multiple ways, courts tended only to see physical abuse.[95] Some courts also ordered parenting time with children who had suffered trauma without adequate therapy or preparation.[96] This speaks to the need for judges and lawyers in both systems to be educated in the dynamics and impacts of DV.

C. Provision of Counselling and Parenting Services, Benefits and Safe Housing

In the FLS in Saskatchewan, few if any services are provided to litigants without cost. Even where counselling, mediation or parenting coordination services are mandatory, litigants must themselves bear most costs. By contrast, the CFSA explicitly mandates the provision of services and can allow for expedited access to services at less or no cost.[97]

All participants stressed that preventative supports were essential to reducing the harms of DV for survivors and their children.[98] If, however, the MSS determines that

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94 Participant 13.

95 Participants 13, 14.

96 Participants 8, 11.

97 Participants 9, 15.

98 Preventative supports most often identified by participants included culturally appropriate DV counselling, parenting education, mental health and addictions services, accessible and reliable childcare and

safety factors are no longer relevant and closes its file, leaving custodial arrangements to be decided in the FLS, services through the MSS will also be withdrawn, making it harder for victims to get "connected with those resources in order to improve their circumstances."[99] The Ministry generally has the right to close their file or withdraw CP proceedings and all related services without court consent and without proceeding to a hearing or finding on the protection issue.[100] Two participants noted that their clients had entered into agreements with MSS or consented to Supervision Orders in order to expedite or preserve access to such supports.[101]

However, within the CPS itself, community supports were still generally seen as inadequate, often subject to wait lists or not at all available in some areas such as northern or rural communities.[102] Non-Ministry

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respite care. However, I use 'preventative supports' in the broader sense to include access to safe housing and adequate financial assistance.

99 Participant 14.

100 CFSA, *supra* note 7, s 25(b). See also *Re NRVD, supra* note 62, finding that the Ministry could withdraw without consent of the court where a child was either returned or placed with a party entitled to custody. The Court did not find a legislative gap that would enable the exercise of *parens patriae* jurisdiction nor a violation of the mother's s 7 *Charter* rights through the withdrawal. The mother was left to pursue her rights through the CLA.

101 Participants 9, 15.

102 See e.g. Black et al 2008, *supra* note 9 at 402, finding that substantiated investigations of children exposed to DV in Ontario had the lowest rate of ongoing service provision compared to other types of investigations i.e. 64% of such cases; see also Black et al. 2020, *supra* note 69 at 9, where the presence of a child custody dispute significantly predicted

participants also complained of a lack of coordination and support for clients in navigating services provided by community-based agencies having different mandates, criteria, waiting times, and length and geographical range of service. More specifically, many also complained of a lack of timely, DV specific, trauma-informed, and culturally appropriate mental health services for intimate partners and their children. Survivors are often subject to a "revolving door of personal counsellors" that do a bit of grief counselling, a bit of DV, "just a mishmash," with "stuff all over."[103] Survivors can end up being re-victimized by these processes and receiving short-term, inconsistent, and unsafe therapy, particularly if such counselling is made a condition of their children's return. Several complained of a lack of counselling that could provide insight into the "cycle of violence" or the lack of a harm reduction approach to DV that would meet survivors where they are at and assist them incrementally.[104] Further, while programming for children exposed to violence is available in some communities, the Children's Advocate recently catalogued the deficiencies in mental health services for children and youth, noting that approximately

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closure and lack of ongoing child welfare services; see also Hughes & Chau, *supra* note 29 at 690 (citing sources establishing that "family situations" needed to be medium or high risk before receiving services). Note that increased funding for First Nations is forthcoming under the Final Settlement Agreement related to the ruling of the Canadian Human Rights Tribunal that found the federal government had discriminated against First Nations children in funding arrangements that were systemically biased in favour of apprehension, see *First Nation Child and Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2.

103 Participant 1.

104 Participants 11, 13, 6.

800 children and youth were on waitlists for psychiatry services in Saskatoon alone.[105]

Perpetrators may be referred to anger management therapy or courses on parenting or healthy relationships, but such courses are not likely to address what one participant described as a notable lack of self-awareness and a resistance to accepting responsibility in cases of DV.[106] The most comprehensive counselling on coercive and controlling dynamics is offered through criminal DV courts, but most DV cases are not reported to police. Moreover, such programs are only available to offenders sentenced in Regina, Saskatoon, and North Battleford; do not meet the need for continuous programming (in the event the parties reconcile);[107] and the 5–8 month course can be overly demanding for those who are working poor or low income and their families.[108] Victims may also qualify for counselling services in these courts but Victim Services is inadequately staffed,[109] and victims tend to be "just players in getting things [the criminal process] moving along."[110]

All participants emphasized the critical importance of meeting survivors' material needs, such as having an

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105 See e.g. Saskatchewan Advocate for Children and Youth, *Desperately Waiting* (Special Report) (Saskatchewan: Advocate for Children and Youth, 29 March 2022) at 124.

106 Participant 8.

107 Participant 14.

108 Participant 1.

109 Participant 14.

110 Participant 1.

adequate income and access to safe housing. Survivors may seek to remain in their homes with their children, but applications by the MSS for "protective intervention orders" under the CFSA that could restrain contact are rarely sought, relying instead on no-contact orders where charges are laid or on supervision orders.[111] If children are placed in foster or third party care for more than 30 days, parents will lose the Canada Child Benefit (CCB) that many, if not most, need to pay their rent. Where clients must relocate, the MSS will try to refer clients to emergency shelters or longer-term residential programs for survivors and their children. However, shelters have waitlists and provide access only to women, and residential care homes, which can provide both longer term shelter and wrap-around services within one facility, along with second stage housing in some communities, are in high demand and have variable and restrictive criteria.[112] Small programs in some communities may assist in finding housing for survivors but several participants complained that their clients are generally themselves responsible for

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111 CFSA, *supra* note 7, s 16.

112 Participants 1, 2. The Saskatchewan government has not provided operational funding for second stage housing in the past but has declared an intention to do so in the 2023 budget: See Jeremy Simes, "Sask. to provide second stage shelters with operational funding" (8 March 2023), online: *Regina Leader Post* <leaderpost.com/news/local-news/sask-politics/sask-to-provide-second-stage-shelters-with-operational-funding>. See also Krys Maki, "Breaking the Cycle of Abuse and Closing the Housing Gap: Second Stage Shelters in Canada" (2020) at 40, online (pdf): *Women's Shelter Canada* <endvaw.wpenginepowered.com/wp-content/uploads/2020/09/Second-Stage-Shelters-Full-Report.pdf>

finding safe, stable housing.[113] A lack of housing or social assistance (if recipients end up without an address) can delay if not preclude reunification of parents and children. While the Saskatchewan Income Support program provides some emergency and relocation benefits,[114] changes introduced in 2020 to promote client 'independence' have exacerbated the issues faced by survivors, as clients must now access income assistance online or by phone and are no longer assigned a specific worker.[115]

Notably, several participants regarded services provided through FN agencies having delegated authority as more holistic, more centralized, and readily accessible. Workers were also seen to be more prepared to provide practical, material assistance (like diapers and furniture in setting up a home out of prevention funding from Indigenous Services Canada). They were seen to be more trustful of care by extended family members, more patient with relapses, and more willing to work harder and longer

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113 See e.g. *Re DW*, 2022 SKQB 154, finding that the mother had to come up with a safety plan and find shelter herself, with no assistance from the MSS, at para 23. The MSS had not shown that no other arrangements were practicable before the apprehension and the child was returned to the mother's care.

114 See e.g. SISP, *supra* note 51 at 40, 45: The Saskatchewan Income Support program will maintain the existing shelter benefit for 3 months after apprehension subject to one further 3 month extension and pay an amount equal to the CCB in the month in which a child is returned. However, the shelter benefit rarely covers the full rental costs, and it takes at least 90 days after primary care is resumed to reinstate the Child Benefit.

115 Participant 14. According to Participant 7, accessing basic services during COVID-19 also generally required an internet connection.

at keeping children within their families. "They really lead with their heart, and they know their kids. …they are seen in the way, in the Indigenous way that an aunt would be."[116] Some agencies also have more family-oriented approaches that enable whole families to be placed in wellness centres or family healing cabins for extended periods of time and provide group homes in their communities that more readily allow for visits by family members and at less cost.

However, services provided by delegated FN agencies may also not be provided if the matter is seen as or becomes a custody dispute, and several participants spoke of the "normalization" of DV on some reserves.[117] According to one participant, DV was "typically treated as a result of those other issues" [i.e. intergenerational trauma, FAS, addictions, gang violence].[118] In such circumstances, "it takes [Indigenous women] a very long time to, number one, acknowledge that there is domestic violence, to identify that she's not wrong, she doesn't have to be kind or enable this, and that it actually is in the children's best interests."[119] In particular, coercive control was not widely acknowledged, sexual violence could be downplayed, and psychological harm or trauma go unaddressed in some communities. "The resources aren't there, and the knowledge on how to deal with [DV] isn't there."[120] Moreover, a shortage of housing on reserves, rules surrounding eligibility for Band housing, and distrust of the

116 Participant 3.

117 Participants 2, 3, 8. See Koshan, *supra* note 22.

118 Participant 2.

119 Participant 3.

120 Participant 3.

RCMP have inhibited disclosures of DV and effective case planning.[121]

The lack of an effective poverty-reduction strategy along with services that can adequately address housing and mental health issues presents problems for both systems; however, the loss of services provided by the CPS in the course of a FLS proceeding can itself have important implications for recovery from abuse.

D. Impact of CPA Involvement in FL Proceedings

1. Presumptions as to Stay of Proceedings

Case law in Saskatchewan suggests that CP and FL statutes are to be read together, harmoniously if possible, as part of a comprehensive scheme that promotes child welfare.[122] The DA does not address concurrent proceedings though consolidation is possible in accordance with Rules of Court. The CLA differentiates between FL applications made before or after CP proceedings. If before, a CP proceeding can continue presumably because protective concerns should supercede prior parenting arrangements to ensure that children are safe.[123] Where an application under the CLA is subsequently made, however, the MSS must be served with notice and the CP proceeding will be stayed,

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121 Participants 3, 5, 7, 11.

122 See *D(MB) v Saskatchewan (Minister of Social Services)*, 2002 SKQB 308.

123 See e.g. *Fortowsky v Roman Catholic Children's Aid Society for County of Essex*, 1960 CanLII 380 (ON CA), 23 DLR (2d) 569. See also *Re Catholic Children's Aid Society of Metropolitan Toronto*, 1972 CanLII 528 (ON SC), 26 DLR (3d) 266.

unless the court orders otherwise or the MSS applies to be a party, in which case a superior court may consolidate the proceedings and make an order under the CFSA.[124] Notably, this process varies from that in place in Ontario, where the CP legislation is viewed as a comprehensive code and a prior or subsequent proceeding under provincial family legislation is stayed subject to leave until the CP matter is decided.[125]

Some sort of statutory direction may be beneficial here, as multiple proceedings can increase stress, financial cost, retraumatization and risk exposure to abuse along with conflicting orders or outcomes.[126] In terms of children's interests, Saskatchewan's position appears to assume that FL proceedings will accurately address

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[124] See CLA, *supra* note 5, ss 21(1)–21(2). Where the CP proceeding has been commenced in Provincial Court, the parenting application will be decided first and then referred back for a disposition under the CFSA.

[125] See *G(C) v Catholic Children's Aid Society of Hamilton-Wentworth*, 1998 CanLII 3391 (ON CA), 40 OR (3d) 334; *Child, Youth and Family Services Act, 2017*, SO 2017 c 14, ss 102, 103. The matter is more complicated in the context of the DA; see e.g. *D.D. v H.D.*, 2015 ONCA 409, where the Court assumed, without deciding, that it had jurisdiction to determine custody under the DA where CP proceedings had been launched.

[126] Some cases suggest that a parent from whom a child is apprehended cannot initiate claims under the CLA to avoid or defeat prior CP proceedings: See *H(S) v Saskatchewan (Minister of Social Services)*, 1995 CanLII 5777 (SK QB), 138 Sask R 184 at para 7; *DMM v HRM*, 2009 SKQB 304 at para 104 [*DMM*]; *GL and CL v SK (MSS)*, 2017 SKQB 48 [*GL v MSS*]. But see also *LP v ZM*, supra note 62, where the mother, from whom the child had been removed by MSS on account of addiction issues that she had since addressed, obtained interim primary residence under the CLA as against the father with whom MSS had placed the child.

protective concerns, rendering CP issues moot.[127] However, this confidence in the FLS can be misplaced in cases of DV, particularly where the FL court lacks information regarding Ministry involvement over DV and services cannot be easily accessed. A FL proceeding can also shift the legal terrain in disputes with third parties who are found to be PSIs, as it precludes an inquiry into whether the child is in need of protection and parents may instead have to directly deal with a "state-imposed status quo" in determining best interests.[128] On the other hand, the CPS may also underestimate the harm of DV or impose conditions that are overly burdensome and unsupportive of victims.[129]

Here too, where a FL proceeding is launched, the MSS has significant procedural powers. It may withdraw the CP proceedings, rendering a choice of forums moot, or decide not to join the parenting dispute as a party, which will preclude consolidation.[130] Our participants were generally unable to identify the criteria for Ministry involvement as a party in FL proceedings. Several noted that MSS counsel typically prefer to deal with the CP matter first but will usually oppose consolidation, or if consolidated, may not file material, withdraw or take no position.

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127 Participant 6.

128 Participant 15.

129 See e.g. *MSS v OMM*, 2017 SKQB 361 (where the MSS ignored the risks posed by an abusive father).

130 See *LP v ZMB*, 2020 SKQB 295 at para 33.

Participants were also unable to identify the criteria judges relied on in deciding which matter should proceed, where MSS does not withdraw, or in deciding whether the proceedings should be consolidated, where MSS applies to be a party to the parenting dispute. In applications by PSIs under the CLA that have not involved DV, courts have lifted the stay on CP proceedings where claims could be advanced under the CFSA itself, where home studies had been completed and siblings placed under that Act and where the Court would be provided with more information as to the children's history of care.[131] The Court may also wish to ensure that the MSS can continue to "assist the family by rehabilitating and providing services which will remedy the protection concerns"[132] or supervise the care of the child by a parent.[133] However, all participants described the situation as unpredictable, with outcomes dependent largely on what judge you have. The need to systematize or structure discretion in more predictable ways is particularly important in cases involving DV given challenges in identifying, proving and giving DV sufficient weight in a best interests assessment.

2. Information Deficits

Litigants to a FL proceeding must identify whether there have been CP or criminal proceedings and the MSS must be served with notice if there is an outstanding CP

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131 See *GL v MSS*, *supra* note 126 at para 65; *CS (Re*), 2011 SKQB 124 at para 134.

132 *DAWC v MWH* 2013 SKQB 313 at para 48.

133 See e.g. *DMM*, *supra* note 126, where the FL action was commenced prior to CP involvement and the parties agreed to consolidation.

matter.[134] If both proceedings are then consolidated, information from the CP proceeding up to that point will become available to the FL court. Information deficits arise where proceedings are not consolidated and requests are made by counsel for parties in the FLS through the court, to the CPA itself, or through freedom of information applications.

A duty of confidentiality applies to all employees, persons or organizations under contract with MSS, but disclosures are allowed to guardians or parents where "required to carry out the intent" of the Act or as provided for in the regulations and where, in the opinion of the Minister, the benefits outweigh any potential invasion of privacy.[135] Where CP proceedings are discontinued or have never been launched, our interviewees provided mixed accounts as to whether MSS will readily provide information as to their involvement to a party in a FL proceeding. While some suggested an openness to doing so, others complained that disclosure was not consistently

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134 See *The Queen's Bench Rules*, Forms 15-16, 15-19A; DA, *supra* note 4, ss 7.8(1), (2) (positive duty on court to consider whether civil protection, child protection or criminal proceedings are pending or in effect in order to avoid conflicting orders and coordinate proceedings), 16(3)(k); CLA, *supra* note 5, ss 10(3)(k), 21(1)(b). See also "Saskatchewan Child Abuse Protocol" (2019), online (pdf): <yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf> at 5–6 (defines child abuse to include exposure to interpersonal violence and includes information sharing between the police and child protection systems, among others, but not the FLS).

135 CFSA, *supra* note 7, ss 74(1)(b), 74(5.1) (except for disclosure of the identity of a person making a report where they have requested non-disclosure), 74(4). See also *The Child and Family Services Regulations*, c C-7.2 Reg 1, ss 17.1, 17.2.

available. Without such disclosure, survivors who have reported concerns to the MSS may appear less credible in the FLS and be more readily assumed to be attempting to gain an advantage in that proceeding. Where the parties are parenting separately, reports of abuse or neglect in one parent's home may also not be disclosed by MSS to the other parent making it impossible for them to assess whether the children are safe during the former's parenting time. Since DV is generally difficult to prove and parenting orders in the FLS are typically not supervised or monitored, the involvement of MSS in a FL dispute either as a party or through the filing of affidavits where there are relevant protection concerns can be important in ensuring children's safety.[136]

Parties can also "end up having to argue all sorts of inferences" in the FLS based on non-disclosure or ambiguous or vague information provided by MSS.[137] MSS will usually provide information if requested by a judge, but if no information is otherwise filed, a court may

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136 See e.g. *TB v LB* 2020 SKCA 46, where the child was safe in the mother's care and the MSS filed an affidavit in the DA proceeding. In *GLK v CLK* 2021 ONSC 5843 at para 141, the Court ordered production of the CP file (as well as the mother's counselling records) under Court Rules, finding the information to be relevant and necessary to ensure trial fairness.

137 Participant 2. In CP proceedings, affidavits of disclosure by MSS may contain speculation, opinion and hearsay evidence (if credible and trustworthy and it is not in the child's best interests to testify), see CFSA, *supra* note 7, s 28(3) and Court of Queen's Bench Rules, 15-127. In the FLS, affidavit evidence must not contain opinion or speculation and hearsay evidence only in more limited circumstances, *ibid,* 15–46. See e.g. *KD v CK*, 2021 SKQB 92, describing notes from the Social Services file as "cryptic, often [containing] unidentified hearsay and of little assistance" at para 12.

infer that there are no issues. Unless MSS applies for party status, workers and employees of agencies working with the Ministry are also not compellable to give evidence.[138] Under the Child Protection Manual, whether an official should agree to testify depends on a balancing of privacy concerns with protection of the child in light of numerous factors.[139] These assessments are discretionary and outcomes highly unpredictable. How precisely privacy and risk can be balanced raises complex issues beyond the scope of this article. However, participants generally favoured guidelines that structured discretion more systematically and clearer protocols that require disclosure in the FLS where the safety of survivors and children may be at risk. As Meier and Sankarum argue, MSS should not falsely assume that the FL court will properly identify risks in the absence of their involvement.[140]

Neilson argues, as do most scholars, that improved information flows and protocols for collaboration are

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138 CFSA, *supra* note 7, s 73. In *ST v MM*, 2021 SKQB 282, McCreary J did not allow MSS to file material without applying for leave to be a party or to intervene as a friend of the court. In the latter case, MSS must be shown to be neutral and have no interest in any related proceedings.

139 Ministry of Social Services, "Child Protection Manual", at 262–264, online (pdf): *Publications Saskatchewan* <publications.saskatchewan.ca/#/products/78412 >.

140 Meier & Sankarum, *supra* note 3. See also Hughes & Chau, *supra* note 29 at 688, 690 (who found that the "FLS did little to recognize the history of their relationships with their partners, and while CPS did recognize the history, it did little to intervene or assist in challenging unsafe custody arrangements").

needed to improve responses across systems.[141] Virtually all our participants believed that information relevant to DV should be shared to expedite proof of DV and the resolution of conflict, as well as to reduce the risk of conflicting orders and of harm for victims, including children. Some cautioned, however, that information flows can be a "double-edged sword" for survivors if workers lack a deep, nuanced understanding of DV dynamics and have unfairly framed their conduct as non-protective. As Mosher argues, rather than reducing harm, information sharing runs the risk of deepening state control of marginalized women.[142]

3. Impact of CPS Involvement on Outcomes in the FLS

Most participants agreed that allegations of DV are subject to widespread skepticism and an "aura of disbelief"[143] in the FLS. One "can see victims reasserting some power in identifying DV in FL cases but getting to that stage is rare."[144] While emotional and financial abuse may be established through digital and financial records respectively, coercive control is often hard to establish in both systems. It is "not a tangible thing to work through,"[145] unlike substance abuse that can be tested

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141 Neilson, *supra* note 91. See also BC Representative, *supra* note 33, finding a lack of collaboration across multiple systems; Houston et al 2017, *supra* note 2, reported similar concerns from non-CPS professionals about the lack of communication from CPS in high conflict FL cases, at 367.

142 Mosher, "Grounding Access", *supra* note 49.

143 Participant 12.

144 Participant 1.

145 Participant 12.

through toxin screens or physical abuse that may leave bruises. In Hughes and Chau's study of litigants involved in both systems in Manitoba and British Columbia, women also complained of being discounted as result of cultural difference, race, and newcomer status. They found that affluent or middle-class women were less likely to be investigated themselves by CPS than racialized or low income women, but their accounts of violence were also less likely to be believed in the FLS.[146]

Proof of physical violence typically requires photos or police reports, but most victims do not report to the police, and judges appear to look for convictions rather than charges that can be a long way off.[147] Moreover, both complaints to police and CPAs can also be discounted as alienating or manipulative strategies to advance a FL claim.[148]

Given these difficulties, the testimony or affidavits of workers can be important in proving DV in the FL context. All participants agreed that DV is more likely to be established where the MSS is known to have substantiated a complaint, particularly at the interim stage. Indeed, there are FL cases in which courts appear to defer

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146 Hughes & Chau, *supra* note 29 at 689. See also Myrna McCallum & Haley Hrymak, "Decolonizing Family Law Through Trauma-Informed Practices" (January 2022), online (pdf): *RISE Women's Legal Centre* <womenslegalcentre.ca/wp-content/uploads/2022/01/Decolonizing-Family-Law-RiseWomensLegal-Jan-2022-WEB.pdf> (identifying a need to decolonize the FLS by way of education in Indigenous history, customs and law, cultural humility and more compassionate and trauma-informed legal practices).

147 Participants 12, 15.

148 See Koshan, *supra* note 22.

to the outcome of the Ministry's investigation without identifying what the investigation entailed and what definition of DV was relied upon in the investigation.[149] Where the MSS has not substantiated the allegation, DV may then too often be simply assumed not to have happened.[150] As well, where the MSS does not intervene because the survivor can mitigate the risks of DV, the FLS should not assume an absence of risk when she applies for primary decision-making responsibility and asks that the perpetrator's parenting time be supervised. Here the FLS may problematically assume that the CPS has accurately sorted it out or has eliminated all risks.[151]

However, even where a concern has been substantiated by MSS, some participants complained that some judges in both systems failed to take the findings seriously. Even recent findings by MSS were seen to have little impact in the face of controverted evidence by the parties.[152] In that respect, one participant was concerned about the weight accorded privately funded psychological assessments that were one-sided and purportedly written from a traditional Christian or traditional Indigenous point

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149 See e.g. *KBA v JGB*, 2015 SKQB 328 at paras 50, 56; *Hamblin v Svendsen*, 2015 SKQB 274 at para 134. Houston et al 2017, *supra* note 2, recommend continuing involvement of MSS where there is parental conflict even if specific allegations are not substantiated, better training and policies that mandate written summaries of CP involvement for use in FL disputes (including the allegations, the results of investigations if any, information on ongoing involvement or concerns), and that can be updated upon request by a court at 369–370.

150 Participants 4, 6.

151 Meier & Sankarum, *supra* note 3.

152 Participant 14.

of view.[153] In her opinion, these assessments could completely ignore the realities of the family's current circumstances and fail to identify DV, particularly subtle patterns that "can be easily overlooked by someone who doesn't want to see them."

4. Legal Representation and Court Support Services

The above complexities suggest that meaningful access to justice will depend in part on access to counsel who are aware of both DV dynamics and the challenges arising from intersecting systems.

According to our participants, court delays and legal fees that are "out of control" in the FLS are a huge impediment to justice for those affected by DV.[154] Perpetrators here tend to have more economic resources than survivors and can prolong litigation to perpetuate abuse and escalate costs.[155] Without counsel to counteract litigation abuse, victims who have been traumatized can easily become overwhelmed and simply "give up", settling for a co-parenting arrangement that is not in their children's best interests.[156] Litigants who cannot afford counsel may have access to information online or through family law information clinics, but still experience difficulties in navigating the FL system.[157] They may be

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153 Participant 13.

154 Participant 12.

155 See also Mosher, "Domestic Violence", *supra* note 49; Chan & Lennox, *supra* note 21.

156 Participant 12.

157 Participant 7.

unable to fully understand the law or unable to apply the information to their own fact situations, let alone know how to identify hearsay, present relevant, admissable evidence[158] or cross-examine witnesses. Early dispute resolution, which is now mandatory in family courts in Saskatchewan following the close of pleadings, may also proceed without legal advice or require a court application for an exemption in cases of violence.[159]

Participants also differ in their input and legal needs. Children generally have input in FL proceedings only through Voices of the Child reports, if they are 12 years-old or over, and receive pro bono counsel only if appointed by the court.[160] Newcomers experience the additional complexities of immigration law including fear of deportation or abduction of their children, language barriers, and isolation or pressure from other family members.[161] According to our participants, Indigenous parties, most often represented by Legal Aid, rarely pursue litigation beyond the interim stage and few FL proceedings originate from reserves, especially in the north, where "there's no understanding of where to turn for [custody] issues."[162] One participant also complained that "most private lawyers are mainstream players and lack an understanding of Indigenous people and its colonial history

158 See e.g. *SWBM v CSM*, 2021 SKCA 64.

159 *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 44.01 [QBA].

160 See generally Donna J Martinson & Caterina E Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation" (2018) 31:1 Can J Fam L 151.

161 Participants 7, 8. See Mosher, "Domestic Violence", *supra* note 49.

162 Participant 2.

and how this has negatively impacted our family systems."[163]

While parents in a child protection proceeding may have a constitutional right to counsel,[164] they are eligible for Legal Aid in either system only if their income is below a very low threshold. Parents with incomes above that threshold, such as the working poor, will either have to self-represent or apply for court-appointed counsel. This process is difficult and cumbersome, less likely to succeed when a short term order is sought in a CP proceeding and not likely to succeed at all on the FL side. Those who self-represent obtain disclosure from MSS in a less timely way and usually only under direct supervision of their worker without being able to retain copies.[165] Transfers and 'voluntary' surrenders of custody under s 9 (that can set clients up for longer term orders) are also generally made without legal advice, and at points when victims of DV may be traumatized, afraid of not seeing their children or otherwise facing protracted litigation. Children who have been taken into care in CP or consolidated proceedings will have counsel appointed under certain conditions, but not if the matter proceeds in the FLS alone.[166]

Salaried lawyers at Legal Aid service the most marginalized, impoverished clients who generally present

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163 Participant 7.

164 *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46.

165 Participants 6, 15.

166 *QBA, supra* note 159, s 33.1; *The Provincial Court Act, 1998,* SS 1998, c P-30.11, s 64.1.

with multiple interconnected issues. Clients may have difficulties meeting eligibility requirements for Legal Aid and maintaining contact if they have not filed income tax returns or lack proper ID or a stable residence.[167] Additionally, our participants indicated that no formal screening tools or policies on DV are used across all clinics and staff (along with counsel on the Ministry side) are not provided with training in DV or trauma. Duty counsel on CP matters, that can expedite processes, have been recently provided but only in Regina. Victims in criminal proceedings do not qualify for legal representation and in the CPS, clients must reapply for Legal Aid after any court order, even a short-term one, which can result in different counsel over time in CP matters.[168] Importantly, for present purposes, legal representation is limited to criminal and FL/CP matters and lawyers are specialized in each in most clinics, making it more difficult to get advice, coordinate strategy, and ensure that conditions are consistent across all legal fields. Clients can also be assigned different lawyers on FL and CP matters depending on the allocation of workloads in individual offices. As with the MSS, Legal Aid in Saskatchewan is underfunded compared to Crown and comparable government agencies, resulting in high caseloads and highly reactive services that focus on individual casework rather than educative and advocacy work. While the system is more responsive to CP issues, clients in the FLS may have to wait up to 3 months for representation.[169] The result is representation that struggles

167 Participant 3.

168 Participants 6, 15.

169 Participant 15.

to but cannot work effectively across systems to keep children out of state care and families free from violence.

IV. CONCLUSION

The above analysis suggests that people affected by DV in Saskatchewan are not able to access just and safe outcomes for themselves and their children in a meaningful way. Both systems are inadequate in different ways and neither should be presumed to identify and respond effectively to DV.

While the CPS can provide a historical record, access to funding and services, as well as counsel for children, it relies on narrow definitions of DV dynamics and expertise, is more likely to hold women responsible for failing to protect their children, and can trigger extensive state surveillance. CP intervention can increase the risk of child removal and related trauma and the risk of claims by non-removal parents and third parties, including foster caregivers. It can also fail to deliver adequate support and preventative services, not only because of inadequate resources, but also because of deeply entrenched mistrust of the system on the part of Indigenous parents, families, and communities.

In the FLS, a survivor may have more control over proceedings, face less ongoing surveillance and onerous outcomes, and may rely on more expansive definitions of FV. However, they may also carry a heavier evidentiary burden given information gaps, have even less access to supports, and to date FL courts have rarely fully recognized the harm to children through exposure to DV. Neither system may thus meet children's needs effectively, neither

may get it right in identifying DV, and both do little to prevent it. Rather than predicate more support on control and surveillance through the CPS, supports should be more available across both systems.

Indigenous jurisdiction over child welfare may well facilitate a paradigm shift towards a more caring model that could yield better outcomes for families and communities.[170] Almost all participants in this study believed that FN control was an exciting and positive development that could provide more holistic, wraparound programming, more culturally appropriate and flexible services, and a "collaborative, community, restorative, rehabilitative approach" that is what children and their families need.[171] Of critical importance was the likelihood of more trusting relationships with workers. According to one participant, personnel from within the communities themselves would be less likely to fall back on racist assumptions and more likely to appreciate the systemic conditions affecting families.[172] They would also generally have more information and be better positioned to find

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170 In a constitutional challenge to the FNMICYFA, *supra* note 10, the Quebec Court of Appeal has held that the provision and regulation of child welfare services falls within an inherent Aboriginal right of self-government that is protected under s 35 of the *Constitution Act, 1982*, subject to the federal or provincial governments justifying an infringement as developed in *R v Sparrow* [1990] 1 SCR 1075 and subsequent cases, *see Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185, finding all but sections 21 and 22(3) of the FNMICYFA constitutional and now awaiting a decision from the Supreme Court of Canada.

171 Participants 9, 13.

172 Participant 7.

family resources and "move things forward more quickly, and in a good way."[173] Where permanent placements were appropriate, they would be more likely to incorporate cultural plans and ensure continuing contact with family and community members. One participant noted that planning was more likely to be community-led and community-specific than is currently the case, as many communities are represented by umbrella delegated agencies. Most also predicted a substantial decline in the number of apprehensions and court applications.[174]

In terms of the impact of Indigenous jurisdiction over child and family services on the FLS, much may depend on the kind of adjudicative system each nation adopts and the extent to which such systems will have to collaborate with mainstream systems. Some of the foreseeable changes could reduce the incidence of parenting disputes in the FLS that arise from or are related to child removal by the Ministry, especially disputes involving foster caregivers.[175] Broader definitions of DV could increase the number of cases that are dealt with by the FN and might encourage an expansion of Indigenous jurisdiction into FL matters more generally.[176] Such

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173 Participant 13.

174 No children on the Cowessess First Nation have been taken into care since the passage of their legislation, Eva Coles, Executive Director, Chief Red Bear Children's Lodge, email September 9, 2022.

175 Participants 14, 15.

176 See e.g. Siksika Justice Department, "Aiipohtsiniimsta" (March 2021), online (pdf): *Siksika Nation* <siksikanation.com/wp-content/uploads/2021/03/AISK-Brochure-October-2020.pdf> (setting up a mediation-arbitration model for the resolution of family disputes, among others).

changes could render FL litigation involving Indigenous parties even more rare than is presently the case.

However, there are also challenges that must be confronted. Other commentators have noted the need for a binding, non-discriminatory structure that can ensure adequate long-term funding by the federal government.[177] Beyond this, one participant questioned whether each FN would have the infrastructure in place to deal with the spectrum of underlying issues experienced by families. Others foresaw potential staffing issues, such as burnout, jurisdictional conflicts if parents are members of different First Nations or reside in different locations, and conflict of interest situations in small communities that would have to be worked out. One participant noted that the negotiation of coordination agreements carried risks for agencies that have highly developed systems and well-established processes that have long kept the political process at arms-length.[178]

In whatever system DV is dealt with, it will be of utmost importance to acknowledge fully its manifold harms,[179] particularly for children, and to appreciate its

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177 See e.g. Naiomi Walqwan Metallic, Hadley Friedland & Sarah Morales, "The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families" (4 July 2019), online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf>.

178 Participant 2.

179 See Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018) (who argues that such harms must become 'speakable').

complex dynamics and the impacts of intersecting systemic inequalities. As canvassed in this article, other significant challenges include securing safe, affordable housing, adequate financial aid and other preventative supports across all legal systems; providing legal counsel when needed, and structuring the interaction of different legal processes and outcomes with a view to empowering and improving outcomes for those who experience DV.