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### Intersecting Challenges: Mothers and Child Protection Law in BC

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**Intersecting Challenges: Mothers and Child Protection Law in BC**

**By Judith Mosoff, Isabel Grant, Susan B. Boyd, and Ruben Lindy\***

This paper is concerned with how courts in British Columbia adjudicate applications by the state to remove children permanently from their parents, usually their mothers. Overwhelmingly, these cases are about single mothers who experience mental disability and addiction, domestic violence, and poverty. Indigenous women are overrepresented in our sample. The intergenerational effects of the child protection system also are clear as many of the mothers in our study were themselves raised in state care. The paper highlights the degree to which judges blame women for the precarious circumstances in which they live, which are often a product of austerity measures adopted by states. Courts describe these circumstances as being a function of poor “lifestyle choices”, thus obscuring the role of the state in protecting women from violence, providing safe housing and supporting mothers and children with disabilities. Particularly troubling is the finding that courts appear to be more willing to sever the relationship between mothers and their children where those children are themselves identified as having “special needs”. Judges are quick to assume that a child will be “better off” in state care even in the face of evidence that the child protection system in British Columbia has woefully failed both children and their mothers.

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## Introduction

This paper is concerned with how British Columbia courts adjudicate applications by the state to remove children from their parents, especially their mothers. It is inspired by Professor Judith Mosoff, who examined child protection decisions in British Columbia over two decades ago, finding that women with mental disabilities tended to lose their children on the basis of psychiatric opinion that appeared to apply an implicit presumption against their fitness as parents.<sup>1</sup> She identified the interplay between “scientific” psy-discourses and ideological expectations of motherhood as key factors. Professor Mosoff re-visited and broadened this field of research more recently, hoping that the world had changed over the last 20 years in ways that could affect the issue. Due to her illness and untimely death in December 2015, her co-authors made it a priority to complete and write up her research. The study examines child protection decisions in British Columbia, which overwhelmingly are about single mothers who experience mental disability,<sup>2</sup> addiction, male violence and poverty. Indigenous mothers are overrepresented, which is not surprising given the inter-generational impact of removing children from families and communities.

Several developments have occurred since the early 1990s when Professor Mosoff conducted her initial research. On a positive note, in 2010 Canada signed the UN Convention on

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<sup>1</sup> Judith Mosoff, “Motherhood, Madness, and Law” (1995) 45:2 UTLJ 107 [Mosoff, “Motherhood, Madness, and Law”]. See also Judith Mosoff, “‘A Jury Dressed in Medical White and Judicial Black’: Mothers with Mental Health Histories in Child Welfare and Custody” in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 227 [Mosoff, “A Jury”].

<sup>2</sup> We use the term mental disability broadly to include developmental disabilities, psychiatric disabilities, and other related mental health labels that may be seen as relevant to a person's ability to parent. Mental disability is the language of the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms* and in most human rights legislation. See: *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the Rights of Persons with Disabilities,<sup>3</sup> a treaty that emphasizes the inclusion of people with disabilities in all aspects of life and entitlements to the necessary accommodations that facilitate inclusion. Article 23 specifically guarantees people with disabilities the right to family life, the right to appropriate supports in raising children, and provides that no family should be separated simply because a child or a parent has a disability.<sup>4</sup> As well, the Truth and Reconciliation Commission has drawn attention to the dire consequences of the residential school system for indigenous communities, families, and children in Canada.<sup>5</sup> In May 2016, Canada officially adopted the United Nations Declaration on the Rights of Indigenous Peoples.<sup>6</sup>

At the same time as these human rights developments, an overall and arguably accelerating decline in social welfare benefits has occurred during an era of changing economic policies worldwide. These cutbacks correspond to the values of the neoliberal state, which emphasize personal or individual (rather than collective) responsibility and risk prevention.<sup>7</sup>

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<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 189 UNTS 137 [CRPD].

<sup>4</sup> For example, Article 23 on Respect for home and the family states, inter alia:

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

...

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

(CRPD, *supra* note 3).

<sup>5</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) <[http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive\\_Summary\\_English\\_Web.pdf](http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf)> accessed 3 June 2016 [Truth and Reconciliation Report].

<sup>6</sup> *UN Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, (2007); “Canada officially adopts UN declaration on rights of Indigenous Peoples”, *CBC News* (10 May 2016) online: CBC News <<http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272>>.

<sup>7</sup> This trend began in the 1970s but has accelerated with neoliberal restructuring of the welfare state since the early 1990s. See, e.g., Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto:

These values interact problematically with the ideological expectations placed upon mothers to ensure the health and well-being of their children.<sup>8</sup> Mothers are expected to be selflessly available to their children. If possible, they should take responsibility for the primary care of their children in the context of a two parent family (preferably heterosexual) that is premised on female dependence upon a breadwinner (usually male).<sup>9</sup> Many mothers find it difficult to meet this normative expectation of the selfless, full time mother and, certainly, most mothers in our study experienced challenges that made it very difficult for them to do so. A majority were single mothers with no reliable partner to assist them financially. The men that they were involved with were rarely viewed by judges as ideal father figures. As a result, the women were reliant on the ever-shrinking welfare state if they were not able to find work that also permitted them to adequately care for their children, a challenge in a country with inadequate daycare.

The retraction of state responsibility and emphasis on personal responsibility have serious ramifications for women who need state support to raise their children. The expectations of personal responsibility are particularly problematic for mothers with mental disabilities, as they are seldom able to meet the demands of autonomy and selflessness due to poverty as well as the need to meet the requirements of the mental health system.<sup>10</sup> Moreover, as we shall see, risk assessment is an important part of modern child protection in British Columbia. Yet the ideology of risk can distort and deflect attention away from the relations of race, class and gender that are

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University of Toronto Press, 2002); Janine Brodie, "The New Social "isms": Individualization and Social Policy Reform in Canada" in Cosmo Howard, ed, *Contested Individualization* (New York: Palgrave MacMillan US, 2007) 153; Shelley AM Gavigan & Dorothy E Chunn, "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-liberal Reforms" (2007) 44:4 Osgoode Hall LJ 733.

<sup>8</sup> Barbara Ehrenreich & Deirdre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (London: Pluto Press, 1979); Susan P Penfold & Gillian A Walker, *Women and the Psychiatric Paradox* (Montreal: Eden Press, 1983). On child protection, see Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's LJ 306 [Kline, "Complicating the Ideology of Motherhood"].

<sup>9</sup> See, for more detail, Susan B Boyd, "Motherhood and Law: Constructing and Challenging Normativity" in Margaret Davies & Vanessa E Munro, eds, *The Ashgate Companion to Feminist Legal Theory* (Farnham, Surrey: Ashgate, 2013) 267 at 268-270 [Boyd, "Motherhood and Law"]; Kline, "Complicating the Ideology of Motherhood", *supra* note 8 at 301-311.

<sup>10</sup> Mosoff, "A Jury", *supra* note 1 at 238.

structured into child protection processes. Poor, single mothers especially are constructed as a “risk class”, “who can legitimately be intruded upon, scrutinized indefinitely and held to account for their daily activities”.<sup>11</sup> Similarly, the experience of indigenous mothers reveals a history of colonialist and racist processes of regulation of indigenous families, yet child protection law tends to erase this history through the supposedly neutral application of the best interests of the child standard, the key legal principle in child protection law.<sup>12</sup>

Another change since Professor Mosoff’s early 1990s work is that the incidence of children labelled with “special needs” has increased, especially diagnoses in ADHD and autistic spectrum disorder. This expansion has been a source of significant controversy within the psychiatric system.<sup>13</sup> As we shall see, the coincidence of a mother with a mental disability and a child with “special needs” arises not infrequently in the case law, and identification of a child as “special needs” often makes it more difficult for the mother to retain custody.

This paper argues that despite positive developments such as the ratification of the CRPD and the greater attention to indigenous families, mothers encounter major challenges in the child

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<sup>11</sup> Karen Swift, “Risky Women: The Role of Risk in the Construction of the Single Mother” in Shelley AM Gavigan & Deirdre E Chunn, eds, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010) 143 [Karen Swift, “Risky Women”].

<sup>12</sup> Kline, “Complicating the Ideology of Motherhood”, *supra* note 8.

<sup>13</sup> One study found that the prevalence of childhood disability has grown by 15.6% between 2001 and 2011: Amy J Houtrow et al, “Changing Trends of Childhood Disability, 2001-2011”(2014) 134:3 *Pediatrics* 530. It is difficult to identify precise rates of autism because different sources present different numbers. What is clear, however, is that there has been a significant increase in the number of children with this diagnosis. Autism has been described as “skyrocketing” to an estimated rate of 1 child in 100: Benedict Carey, “New Definition of Autism Will Exclude Many” (19 January 2012), *The New York Times*, online: <[www.nytimes.com](http://www.nytimes.com)>. The CDC has found that the rate of diagnosis for autism in children has increased from 1 in 150 children in 2000 to 1 in 68 in 2012: Center for Disease Control and Prevention, “Autism Spectrum Disorder: Data and Statistics” (31 March 2016), online: <[www.cdc.gov](http://www.cdc.gov)>. See also: H  l  ne Ouellette-Kuntz et al, “The changing prevalence of autism in three regions of Canada” (2014) 44 *J Autism Dev Disord* 120 in which researchers found average annual percent increases in prevalence among children 2 to 14 years of age ranging from 9.7% to 14.6%. The CDC also reports that “Rates of ADHD diagnosis increased an average of 3% per year from 1997 to 2006 and an average of approximately 5% per year from 2003 to 2011”: Center for Disease Control and Prevention, “Attention-Deficit/Hyperactivity Disorder (ADHD): Data and Statistics” (15 March 2016), online: <[www.cdc.gov](http://www.cdc.gov)>. Another study found that the rate of ADHD diagnosis in children and teens increased by 43% between 2002 and 2011: Kathy Fackelman, “New Report Finds 43% Increase in ADHD Diagnosis for US Schoolchildren” (8 December 2015), *George Washington University Milken Institute School of Public Health*, online: <<http://publichealth.gwu.edu/content/new-report-finds-43-percent-increase-adhd-diagnosis-us-schoolchildren-0>>.

protection system, in large part as a result of cutbacks to material supports. If anything, social, political and legal changes have had a negative effect on those caught up in this system. Despite an increase in procedural safeguards for those at risk of losing their children to the state, at the stage in the process where a court must consider whether to make a final order that severs a parental relationship, the answer is still yes in a large majority of cases. Ideologically, mothers' rights are often constructed as oppositional to the rights of their children, which undermines the connection that exists between them. This oppositional construction can also result in women being defined as failing to adequately protect their children, even if a risk to the child is generated by factors largely outside the woman's control, such as poverty or a violent partner.<sup>14</sup> Both scenarios feature frequently in the cases we reviewed.

Identifying the problematic effects of the ideology of motherhood does not, of course, answer all questions posed in child protection law, although it is important to read the jurisprudence with these ideological currents in mind. Professor Mosoff emphasized in her earlier work that criticism “of how the child protection process works to disadvantage women with mental health histories is not meant to suggest that protecting children is not crucially important” nor that “any mother, regardless of her actions is entitled to remain a custodial parent with no intervention by the state or other entities.”<sup>15</sup> Inevitably in some circumstances a parent will be unable to provide a safe environment for children. The safety of children is paramount and sometimes will mean severing parental ties. These difficult cases often involve women in extremely challenging circumstances. For many, violence and substance abuse permeate their lives and extreme poverty and lack of safe housing are facts of life. Very often their children

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<sup>14</sup> Kline, “Complicating the Ideology of Motherhood”, *supra* note 8 at 301-311.

<sup>15</sup> Mosoff, “Motherhood, Madness, and Law”, *supra* note 1 at 111.



have behavioural and other challenges that keep families under constant scrutiny by child protection authorities.

Despite these harsh realities, we believe that more efforts can and must be made to keep children with their mothers. Our project is to interrogate the negative ways that structures, policies and attitudes about gender, poverty, male violence and disability infuse judicial analysis and ask whether some factors inappropriately limit the ability of mothers to retain their status as parents. The discourse in these cases suggests courts, social workers, and other helping professionals frequently fail to examine the role of socio-economic structures in constructing mental disability and the barriers to parenting it creates. Instead women are blamed for problems like their lack of housing and the violence inflicted against them by men. As Professor Mosoff observed, mothers with mental disabilities have historically been perceived by law to be like children, so it is often more difficult to see them as capable of taking caring of their own children.<sup>16</sup> In fact, with proper social and material supports, they might well be able to do so more often. The questions of how much and what kind of support should be provided looms large in this paper.

The paper proceeds as follows. We first explain the law reform history and legislative framework that form a backdrop to our case law study. We then present the findings from our case law study. Several themes that emanate from the case law are discussed, including poverty and single motherhood, the construction of disability, the intersection of a child's "special needs" with maternal disability, domestic violence and, finally, the obligations on the state to provide material resources to women to enable them to parent. The overrepresentation of Indigenous women is woven throughout our discussion. The conclusion offers the insights drawn from our study and argues that, if some of the conditions under which the mothers in our case law study

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<sup>16</sup> *Ibid* at 113.

struggle could be dealt with constructively, through material supports, fewer families would face the devastating impact of child apprehension. We also conclude that judges should be more cautious about immersing a child into the foster care system without scrutinizing the limits and dangers of that system.

## **The Statutory Framework**

In British Columbia, the child protection regime is governed by a lengthy and complex statute, the 1996 BC *Child, Family and Community Services Act (CFCSA)*.<sup>17</sup> Its enactment followed a law reform process that was intended to create a modern child protection statute that would emphasize family autonomy and limit state intervention, a philosophy that was already being followed to a considerable extent by social workers.<sup>18</sup> Ultimately this philosophy was diluted by a greater emphasis on child safety, largely due to a high profile child death at the hands of his mother,<sup>19</sup> which also put more pressure on social workers to identify and avert risky situations.

As is typical for “modern” child protection statutes, the *CFCSA* includes far more significant procedural safeguards (including limits on the duration of various orders) for parents than the previous legislation had offered. As Hall explains, however, the statute embraces two contradictory visions, a family-centred approach and a child-centred approach.<sup>20</sup> For example, the Guiding Principles state, *inter alia*, that (b) “the family is the preferred environment for the

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<sup>17</sup> *Child, Family and Community Service Act*, RSBC 1996, c 46 [*CFCSA*]. We discuss here only the provisions most salient to our inquiry.

<sup>18</sup> Margaret Hall, “A Ministry for Children: Abandoning the Interventionist Debate in British Columbia” (1998) 12:2 *Int'l JL Pol'y & Fam* 121 [Hall, “A Ministry for Children”].

<sup>19</sup> Hon Judge Thomas Gove, *Gove Inquiry into Child Protection, Final Report Vol. 1, Matthew's Story. Vol 2, Matthews Legacy* (Victoria: Queens Printer, 1995). Andrew Armitage, “Lost Vision: Children and the Ministry for Children and Families” (1998) 118 *BC Studies* 93 at 92, 102-104; Hall, “A Ministry for Children”, *supra* note 18; Hester Lessard, “The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring” (2001) 39:4 *Osgoode Hall LJ* 717. See also Isabel Grant & Judith Mosoff, “Supporting our Families, Protecting Children”, *Vancouver Sun* (8 December 1995) A19.

<sup>20</sup> Hall, “A Ministry for Children”, *supra* note 18 at 137.

care and upbringing of children and the responsibility for the protection of children rests primarily with the parents” and (c) “if, *with available support services*, a family can provide a safe and nurturing environment for a child, support services should be provided”.<sup>21</sup> These principles could be interpreted to encourage mothers to raise their children with appropriate support services (but only if “available”). However, other important Guiding Principles emphasize that “children are entitled to be protected from abuse, neglect and harm or threat of harm” and the section starts out stating that the Act “must be interpreted and administered so that the safety and well-being of children are the paramount considerations”. The section outlining factors relevant to a child’s best interests similarly emphasizes safety alongside other factors.<sup>22</sup>

Another significant law reform was an expansion of the grounds on which a child may be found in need of protection, which is the crucial first step in a child being removed either temporarily or permanently. Specifically, children can now be found in need of protection if there is a *risk* of future harm, whereas previously the harm must have already occurred. For example, a child needs protection if the child has been, *or is likely to be*, physically harmed because of neglect by the child's parent.<sup>23</sup> The risk-based inquiry increases the need for social workers (and judges) to predict future harm and mental disability, poverty and domestic violence inevitably play an important role in these risk assessments. The test to be applied for risk of future harm is lower than that used to determine past harm.<sup>24</sup> The focus on future harm has resulted in the adoption of standardized risk assessment models, a practice that has been the

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<sup>21</sup> *CFCSA*, *supra* note 17 at s 2 [emphasis added].

<sup>22</sup> *Ibid* at s 4.

<sup>23</sup> *Ibid* at s 13(1)(d) [emphasis added].

<sup>24</sup> *BS v British Columbia (Director of Child, Family and Community Services)*, (1998) BCJ No 1085 at paras 27-30; *British Columbia (Superintendent of Family & Child Services) v GC*, (1989) BCJ No 1577 at para 38; *British Columbia (Superintendent of Family and Child Services) v BM*, (1982) BCJ No 468 at para 27.

subject of considerable criticism from social workers and researchers.<sup>25</sup> Because mental illness or intellectual impairments are seen as risk factors for future harm, using these models is likely to have a particular impact on parents with mental disabilities.<sup>26</sup> Once identified, such parents will be viewed with stricter scrutiny. The case law also reveals an overrepresentation of children labelled as "special needs", another complicating factor to the risk calculation. Since these children may have been identified as being at higher risk by other state systems, such as education and health, there is heightened surveillance on these families.

A child is also in need of protection if the child's parent is *unable* or unwilling to care for the child and has not made adequate provision for the child's care.<sup>27</sup> According to Pivot Legal Society, this is the most commonly cited reason for removal of a child, at 47% followed by neglect at 25%.<sup>28</sup> The *CFCSA* also includes a "failure to protect" ground, so that a child will be in need of protection if they have been, or are likely to be, "physically harmed, sexually abused or sexual exploited by another person and if the child's parent is unwilling or unable to protect the child."<sup>29</sup> Even more specific is a section stating that a child is in need of protection if he or she is "emotionally harmed by living in a situation where there is domestic violence by or

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<sup>25</sup> See e.g. Ronald C Hughes & Judith S Rycusa, "Issues in Risk Assessment in Child Protective Services" (2006) 1:1 *Journal of Public Child Welfare* 85; Stan Houston & Huw Griffiths, "Reflections on Risk in Child Protection: Is it Time for a Shift in Paradigms?" (2000) 5:1 *Child & Family Social Work* 1; Sheryl Brissett-Chapman, "Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities" (1997) 76:1 *Child Welfare* 45; Karen Swift & Marilyn Callahan, *At Risk: Social Justice in Child Welfare and Other Human Services* (Toronto: University of Toronto Press, 2009) [Swift & Callahan, "*At Risk*"]. See also Pivot Legal Society, *Broken Promises: Parents Speak about B.C.'s Child Welfare System* (Vancouver: Pivot Legal Society, 2008) at 84-89, online: <[http://d3n8a8pro7vhm.cloudfront.net/pivotlegal/legacy\\_url/310/BrokenPromises.pdf?1345765642](http://d3n8a8pro7vhm.cloudfront.net/pivotlegal/legacy_url/310/BrokenPromises.pdf?1345765642) > [Pivot Legal Society, *Broken Promises*].

<sup>26</sup> British Columbia, Child Protection Consultation Services, *The Risk Assessment Model for Child Protection in British Columbia* (Victoria: Ministry for Children & Families, Child Protection Consultation Services, 1996). There appears to be no more recent copy of this document. See Karen Swift and Marilyn Callahan articles about risk assessment models from the perspective of social workers: Swift & Callahan, "*At Risk*", *supra* note 25. On single mothers and risk assessment, see Karen Swift, "Risky Women", *supra* note 11 at 143.

<sup>27</sup> *CFCSA*, *supra* note 17 at s 13(1)(h).

<sup>28</sup> Pivot Legal Society, *Broken Promises*, *supra* note 25 at 87, 89, 97.

<sup>29</sup> *CFCSA*, *supra* note 17 at s 13(1)(c).

towards a person with whom the child resides.”<sup>30</sup> A mother who is perceived to have failed to protect her child by continuing to live with an abusive man, perhaps due to poverty or lack of housing options, can find her child removed as a result, even if she is not herself abusive.

A new Ministry for Children and Families (now the Ministry of Children and Family Development) was also introduced in 1996. This Ministry has primary responsibility under the *CFCSA* to keep children safe and it merged various functions of child protection and family support that had previously been carried out by several Ministries. The rationale was to create a seamless system of assistance for those families that needed help in raising children and a watchfulness for those children who could be in peril. In line with many other public entities in the era of neoliberalism, the Ministry shifted to a model of practice where efficiency was paramount. The overall result is that family support and child protection are now officially intermingled, with an emphasis on efficient processes and formal accountability. This change does not seem to have resulted in a positive experience for mothers, in part due to the challenges that budgetary cutbacks generate for social workers themselves, due to high caseloads.<sup>31</sup>

Psychiatrists, public health nurses, homemakers, social workers, and parenting course instructors all have dual roles in the child protection system.<sup>32</sup> On the one hand, these workers provide support, services or treatment to a mother and/or her children. On the other hand, they are potential witnesses against the mother in child protection proceedings. Such professionals are often seen as better qualified than the mother herself to describe her life, her challenges, her ability to parent and the needs of her children. While judges do not qualify such persons as formal experts, they are often treated as *de facto* experts, especially in comparison with the mother. Rarely is there a case when a witness adverse to the mother’s interest did not start out as

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<sup>30</sup> *Ibid* at s 13(1)(e)(ii).

<sup>31</sup> Pivot Legal Society, *Broken Promises*, *supra* note 25 at 60-71.

<sup>32</sup> *Ibid* at 61-62.

someone providing assistance, making receipt of services, often necessary for successful parenting, a double-edged sword.<sup>33</sup> Yet, as we shall see, judges seldom interrogate the conflicted roles of the personnel working within those systems who are the providers of services, those with the authority to terminate services and those who later give evidence in applications to terminate the parental relationship.<sup>34</sup> Moreover, many of the supports that this personnel provide are “soft” supports (e.g. parenting education) rather than material supports (e.g. housing, respite care) that might make it more possible for socio-economically marginalized families to keep their children.<sup>35</sup> As a result, the modern non-interventionist child protection statutes protect familial autonomy far less than they should.<sup>36</sup>

People with mental disabilities, especially when they are poor, already have a higher level of contact with state agencies, services and health professionals than people without disabilities. The need to rely on services has implications for many aspects of an individual’s life, but particular effects arise in the child protection context. Despite the fact that a diagnosis of mental disability is probably a poor predictor of parenting capacity,<sup>37</sup> parents with mental

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<sup>33</sup> See e.g. Callie Westad & David McConnell, “Child Welfare Involvement of Mothers with Mental Health Issues” (2012) 48 Community Ment Health J 29 [Westad & McConnell, “Child Welfare Involvement”]; Leslie Doty Hollingsworth, “Child Custody Loss Among Women with Persistent Severe Mental Illness” (2004) 28:4 Social Work Research 199 [Hollingsworth, “Child Custody Loss”].

<sup>34</sup> This too was an issue in Mosoff’s earlier research: Mosoff, “Motherhood, Madness, and Law” *supra* note 1 and Mosoff, “A Jury”, *supra* note 1. For a notable exception, see *British Columbia (Director of Family and Child Services) v FC*, 2004 BCPC 531 at para 18 [*Director v FC*], where the judge was very critical of the Director for having stopped trying to provide supports for the mother once the decision was made to seek a CCO. Nonetheless the judge did go on to grant a CCO with unsupervised access to the mother.

<sup>35</sup> On the significance of housing as a material support, especially to marginalized people, see: Paula Goering et al, *National At Home/Chez Soi Final Report* (Calgary, AB: Mental Health Commission of Canada, 2014).

<sup>36</sup> Luther makes this point in the Nova Scotia context, emphasizing the difference between material and other supports: Ilana Luther, *On the “Poverty of Responsibility”: A Study of the History of Child Protection Law and Jurisprudence in Nova Scotia* (PhD Thesis, Dalhousie University, 2015) online: <dalspace.library.dal.ca/handle/10222/61015> at Chapter 5 [Luther, “Poverty of Responsibility”].

<sup>37</sup> Carol Mowbray, Daphna Oyserman, Deborah Bybee & Peter MacFarlane, “Parenting of Mothers with Serious Mental Illness: Differential Effects of Diagnosis, Clinical History, and other Mental Health Variables” (2002) 26:4 Social Work Research 225 at 237.

disabilities are more likely to be investigated by child protection authorities.<sup>38</sup> They are also more likely to lose custody of their children.<sup>39</sup>

Until 2013, under the *CFCSA*, the main way that parents could lose permanent custody of their children was through continuing custody orders (CCOs), under which the Director becomes the sole personal guardian of the child and may consent to the child's adoption.<sup>40</sup> A CCO can be made at two different stages in child protection proceedings. Section 41 allows for a CCO to be made at a protection hearing, in rare circumstances such as when the identity or location of a parent cannot be found and is not likely to be found; a parent is unable or unwilling to resume custody; or the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent.<sup>41</sup> Section 49 allows the Director to apply to a court for a CCO not sooner than 60 days before a temporary custody order (which would more commonly be ordered at a protection hearing) expires. The court *must* order continuing custody if, for instance, a parent is unable or unwilling to resume custody of the child<sup>42</sup> and it "may" order continuing custody if there is no significant likelihood that the circumstances that led to the child's removal will

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<sup>38</sup> Adrian Falkov, *Parental Psychiatric Disorder and Child Maltreatment Part I: Context and Historical Overview* (London: National Children's Bureau Highlight No 148, 1996); Adrian Falkov, *Parental Psychiatric Disorder and Child Maltreatment Part I: Context and Historical Overview* (London: National Children's Bureau Highlight No 149, 1997); Adam M Tomison, "Child Maltreatment and Mental Disorder", *National Child Protection Clearing House Discussion Paper No 3* (Commonwealth of Australia: Australian Institute of Family Studies, 1996) cited in Vanessa Lewis & Susan J Creighton, "Parental Mental Health as a Child Protection Issue: Data from the NSPCC National Child Protection Helpline" (1999) 8 *Child Abuse Review* 152 at 153.

<sup>39</sup> Hollingsworth, "Child Custody Loss", *supra* note 33 at 199.

<sup>40</sup> *CFCSA*, *supra* note 17 at 50(1)(a). Since 2013, s 54.01 allows the Director to apply to a court to permanently transfer custody of a child to someone other than the child's parent *prior* to a CCO being made. This other person must be either someone who has a relationship with the child or has a cultural or traditional responsibility toward the child *and* has been given care of the child by the child's parent, if the Director already has an agreement with this person (see s 8) or someone who has temporary custody under certain sections of the *CFCSA*. (s 54.01 en 2011-13-20, effective February 1, 2013 (BC Reg 274/2012); am 2011-2-291, effective March 28, 2013 (BC Reg 131/2012)). Section 54.1 allows for permanent transfer of custody after a CCO is made.

<sup>41</sup> *Ibid* at s 41(2). It is more common that temporary custody orders are made at a protection hearing. CCOs may also be ordered under s 42.2(4)(d) or (7).

<sup>42</sup> *Ibid* at s 50(4)(b).

improve within a reasonable time *or* that the parent will be able to meet the child's needs.<sup>43</sup> In rare circumstances, a CCO can be cancelled if the circumstances have changed significantly and cancelling the order is in the child's best interests.<sup>44</sup> Access may be granted to a parent notwithstanding a CCO, although it is often denied to facilitate adoption<sup>45</sup> and normally terminates if the child is adopted by anyone other than a family member.<sup>46</sup>

If a court does not make a CCO, section 49(7) requires it to either return custody of the child to the parent, order that the child remain in temporary custody of another person for a specified period of up to six months, or order that the child be in temporary custody of the Director for a specified period up to six months. The latter two orders are sometimes referred to colloquially as "last chance orders".

## **Our Study**

Our study examines all reported judgments in applications for continuing custody orders (CCOs) under the BC *CFCSA* from January 2002 to June 2015.<sup>47</sup> We chose these judgments as our focus for several reasons. First, as a matter of law, child protection files in BC are sealed to protect the privacy of families, making reported decisions the only easily accessible window into

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<sup>43</sup> *Ibid* at s 49(5).

<sup>44</sup> *Ibid* at s 54.

<sup>45</sup> See e.g. *British Columbia (Director of Child, Family and Community Service) v AM*, 2008 BCPC 279 [*Director v AM*].

<sup>46</sup> *Adoption Act*, RSBC 1996, c 5, s 38.

<sup>47</sup> In 2002, the Liberal government in the province, elected in 2001, began to implement major cuts to social services, which were already underfunded: Caledon Institute of Social Policy, "A New Era in British Columbia: A Profile of Budget Cuts across Social Programs" (July 2002) online: <<http://www.caledoninst.org/PDF/553820231.pdf>>. This trend began at a national level in the 1990s, when the federal government replaced the Canada Assistance Plan with the Canada Health and Social Transfer, or CHST: Shelagh Day & Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Canada: Status of Women Canada, 1998) online: <[http://www.cwp-csp.ca/wp-content/uploads/2011/07/WomenandtheEqualityDeficit\\_Shelagh-Day-Module-4.pdf](http://www.cwp-csp.ca/wp-content/uploads/2011/07/WomenandtheEqualityDeficit_Shelagh-Day-Module-4.pdf)>; Gwen Brodsky & Shelagh Day, *Women and the Canada Social Transfer: Securing the Social Union* (Canada: Status of Women Canada, 2007) online: <<http://povertyandhumanrights.org/wp-content/uploads/2011/05/Day-brodsky-di-Securing-the-Social-Transfer.pdf>>. See also Pivot Legal Society, *Broken Promises*, *supra* note 25 at 18, 90-91.



how courts apply child protection legislation to families.<sup>48</sup> Second, CCOs represent a final step in what is sometimes a long history of dealings between parents and the Ministry. Most of the children at issue in these cases have been in and out of state care for a considerable period of time. At no point in the process are the stakes higher for children and families because CCOs terminate the legal relationship between a child and parent (almost always) permanently. They have been described by one American scholar as the “death penalty of civil cases.”<sup>49</sup> The CCO hearings constitute the final opportunity for parents to challenge the state in a formal venue. Reported CCO cases thus allow us to explore the circumstances under which a court is willing to permit this profound intervention into the lives of children and parents. Finally, while not without their limitations,<sup>50</sup> studies of judicial discourse offer an important insight into how attitudes are shaped and reflected at a critical site in the child protection process.

The CCO cases themselves do not tell us how the system operates as a whole,<sup>51</sup> nor the sometimes unseen processes through which parents may eventually lose custody. For example,

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<sup>48</sup> We recommend Pivot Legal Society, *Broken Promises*, *supra* note 25 to anyone who seeks an understanding of processes leading up to a CCO hearing, based largely on the stories of mothers who have gone through such processes.

<sup>49</sup> Stephanie Gwillim, “The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals” (2009) 29 Saint Louis U Pub L Rev 341.

<sup>50</sup> Reported cases may not be representative of most cases that reach the courts. Moreover, the facts presented in reported decisions “are but one telling of the factual narrative.” Fiona Kelly, “Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts” (2011) 49:2 Osgoode Hall LJ 277 at fn 47. Judges often report facts selectively and that the judgment ultimately produced for the public is just one telling of the factual narrative. For a discussion and application of the usefulness of judicial discourse, see Isabel Grant “Intimate Partner Criminal Harassment through a Lens of Responsibilization” (2015) 52:2 Osgoode Hall LJ 557 at 572 [Grant, “Intimate Partner Criminal Harassment”]. On the selectiveness of judicial narrative, particularly in the context of male violence against women, see Elizabeth Sheehy, “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from Jane Doe to Bonnie Mooney” (2005) 17 CJWL 87.

<sup>51</sup> The decisions in our sample represent a fraction of the cases reported in the Canadian Incidence Study (CIS), a detailed epidemiological study reporting the variables around cases of substantiated child maltreatment as determined by social worker reports and interviews: Nico Trocmé et al, *Canadian Incidence Study of Reported Child Abuse and Neglect, 2008: Major Findings* (Ottawa: Public Health Agency of Canada, 2010) [Trocmé, “CIS Report, 2008”]. There is also a large discrepancy between the B.C. Ministry’s own data on open files and the number of cases in this sample: Government of British Columbia, “Open Protection Report Statistics 1998-2008” online: <<http://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-supports-for-parents-with-young->

parents may make voluntary agreements to receive support services such as counselling or respite care<sup>52</sup> or to give temporary care of the child to the Director. Although these agreements are time limited, the legislation permits renewal for various periods, so a child could be outside a parent's care under a voluntary agreement for a considerable time, even years. Once a CCO is granted, the Director becomes the sole personal guardian of the child and may consent to the child's adoption.<sup>53</sup> A parent can also consent to various orders, including a CCO,<sup>54</sup> in which case a court does not need to find that the child is in need of protection and the parent is not viewed as admitting any of the grounds alleged for removal of the child.<sup>55</sup>

While our study is not a complete representation of all CCOs during this period, the cases show us how judges balance the various factors listed in the legislation and how the best interests of the child principle is interpreted alongside other principles, such as the concern to keep children with families where possible.

## **An Analysis of BC Child Protection Jurisprudence**

### **Key Characteristics of the CCO Cases**

We do not purport to offer a quantitative analysis of the 85 reported CCO decisions that we found,<sup>56</sup> but several observations can be made about them.<sup>57</sup> First, these cases are

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[children/reporting-monitoring/04-accountability/04-2-open-protection-reports/open\\_protection\\_reports\\_nov\\_1998\\_nov\\_2010.pdf](#)>.

<sup>52</sup> *CFCSA*, *supra* note 17 at s 5.

<sup>53</sup> *Ibid* at s 50(1)(a).

<sup>54</sup> *Ibid* at s 60.

<sup>55</sup> *Ibid* at s 60(4) and (5).

<sup>56</sup> In some of these cases a family member is also seeking custody of the child(ren) in the same proceeding. See for example *WMW v JW*, 2011 BCPC 360 [*WMW v JW*], *British Columbia (Director of Child, Family and Community Service) v GM*, 2012 BCPC 175 [*Director v GM*], *D v D*, 2013 BCPC 135 [*D v D*].

<sup>57</sup> These observations are largely consistent with a recent analysis of child protection cases conducted in Nova Scotia. See Luther, "Poverty of Responsibility", *supra* note 36. See also Pivot Legal Society, *Broken Promises*, *supra* note 25. Pivot's study was interview and affidavit based rather than based on case law.

overwhelmingly gendered. Although it is difficult to count precisely how many "single mothers" were involved,<sup>58</sup> many of the women had very fluid relationships, in the sense that men were in and out of their lives and not a stable presence in the mother's or the child's life. If we consider women who are responsible for raising their children in the absence of a stable male partner in a paternal role as being "single mothers", then a large majority of the cases involve single mothers, a fact rarely noted by judges. Often when fathers are also named in the application, they take no part in the hearing. Given that mothers generally bear the brunt of caregiving work, and that caregiving work is undervalued, these responsibilities appear to be taken for granted.<sup>59</sup> Much less, if anything, is expected of fathers.<sup>60</sup> Some of our cases involve two parents, but only rarely was the only party to the application a single father.<sup>61</sup> Instead of focusing on the challenges faced by a woman raising children alone, judges were more likely to criticize her for her poor choices,

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<sup>58</sup> Defining "single parent" is not straightforward, especially as family formations become more diverse: Andrea Doucet, "Single Fathers" in Constance L. Shehan, ed, *The Wiley Blackwell Encyclopedia of Family Studies* (John Wiley & Sons, Inc., 2016). Nancy Dowd says: "When we speak about single parents, we tend to mean an individual who is the sole or dominant caregiver and whose household is the place where their children live all or most of the time": Nancy E. Dowd, *In Defense of Single-Parent Families* (New York: New York University Press, 1997) at 6. We tend to think of single parents as uncoupled, whether due to death of a partner, divorce, separation, or planned or unplanned pregnancy. Difficult questions arise in more complex circumstances, as in many of our cases. If a mother has a casual relationship with someone who may sleep over at her home from time to time, or be "in and out of a child's life", we would define her as a single parent. Where birth fathers live with the mother, at least sometimes, she is not legally a single parent, even if he does not assist much with parenting. In some cases, nevertheless, we view her as being effectively a single mother. If a mother has a live-in relationship with someone who is not a birth parent, she remains a single parent unless the partner has assumed responsibilities as a "step-parent". Under the *Family Law Act*, SBC 2011, c 25, certain criteria must be met before a person is regarded as a step-parent, even if the person is married to the mother. Section 146 says: "stepparent" means a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life. Under s. 3, *spouse* includes, *inter alia* someone who is married to the mother, or someone who has lived with the mother in a marriage-like relationship for at least two years. According to s. 147(4), a child's stepparent does not have a duty to provide financial support for the child unless the stepparent contributed to the support of the child for at least one year.

<sup>59</sup> Hilary Stace, "Disability Care as Women's Work" (2013) 27:1 *Women's Studies Journal* 13.

<sup>60</sup> For an analysis of gendered differences in expectations in child protection see Majella Mulkeen, "Gendered Processes in Child Protection: 'Mother-blaming' and the Erosion of Men's Accountability" (2012) 12:1 *Irish Journal of Applied Social Studies* 74 [Mulkeen, "Gendered Processes in Child Protection"].

<sup>61</sup> In *British Columbia (Director of Family and Child Services) v AH*, 2002 BCPC 355 [*Director v AH*] the application was made to apprehend two children from their single father. The father had muscular dystrophy and had multiple health challenges. In *British Columbia (Director of Family and Child Services) v CD*, 2002 BCPC 462 [*Director v CD*] the father sought to have custody of two of his children returned to him and the mother supported his application. A CCO was granted for both children. CIS Data tells us that 91 percent of primary care givers in substantiated maltreatment cases are women: Trocmé, "CIS Report, 2008", *supra* note 51. Of these cases, 49% involved single parent households.

such as the men with whom she associates and her lifestyle, especially where addiction is a factor. No same sex parents appeared in the sample.

Second, poverty is pervasive in these cases, often overlapping with disability, as not only are persons with mental health issues among Canada's poorest citizens, but poverty itself is a risk factor for poor mental health.<sup>62</sup> A large majority of the cases involved a woman raising children in conditions of extreme economic disadvantage and social marginalization, consistent with other data that shows that apprehensions occur more often in poor families<sup>63</sup> headed by lone mothers.<sup>64</sup> Many women were struggling to raise several children on very low levels of support.

Third, maternal mental disability and/or addiction issues are prevalent in these cases and play a significant role in judicial decision-making. In 63 of 85 cases (74%), the primary respondent was labelled as having a mental disability<sup>65</sup> and in one case the primary respondent was a father with a physical disability. In an additional 14 cases, the primary respondent was labelled with a substance abuse issue. In 31 cases (36%), the primary respondent was labelled with both a mental disability and a substance abuse disorder. Thus in only eight cases (9%) was the primary respondent labelled with neither a substance abuse problem nor a mental disability. Addiction in these cases is not usually characterized as a disability but rather as a lifestyle choice.

Fourth, 48 cases (56%) involved at least one child who was identified as having "special needs" and courts appear to be more willing to sever these relationships on the basis that children with special needs demand not only competent, but exceptional, parenting.

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<sup>62</sup> Canadian Mental Health Association, "Poverty and Mental Illness" (November 2007) online: <[http://ontario.cmha.ca/public\\_policy/poverty-and-mental-illness/#.VxhpczYrIb0](http://ontario.cmha.ca/public_policy/poverty-and-mental-illness/#.VxhpczYrIb0)>;

<sup>63</sup> Trocmé, "CIS Report, 2008", *supra* note 51 includes poverty as a risk factor. Getting social assistance or other benefits as a "household risk" in 33 % of substantiated child maltreatment investigations.

<sup>64</sup> This is consistent with the Canadian Incidence Study on substantiated maltreatment, *ibid*, which tells us that 91 percent of primary care givers in substantiated maltreatment cases are women.

<sup>65</sup> Some of these respondents also had physical disabilities in addition to the mental disability.

Fifth, violence in various forms was very prevalent in these cases. More than half of these cases involved male violence against the mother (54%).<sup>66</sup> Male violence against children was present in 18% of cases<sup>67</sup> and mothers were violent against children in 9% of cases.<sup>68</sup> While men are only occasionally primary respondents at CCO hearings, they nonetheless loom large in the reasons issued by judges, usually as a problem for mothers seeking to retain custody. Fathers and/or boyfriends are usually not a consistent presence in the children's lives and, in fact, are just as likely to be seen as threats either because they are violent to the mother or because they are involved with selling drugs or other criminal activity. The typical response of the child protection system to cases where male violence or criminality creates a risk to the child is to displace children by removing them from the mother because they are not safe from a male threat. This threat is construed as being against the child only; little concern is demonstrated about the ongoing danger to the mother.

Sixth, Indigenous mothers are overrepresented in these CCO cases. In 23 of the 85 cases (27%), the primary respondent was identified as Indigenous, probably an underestimate as this fact may not be mentioned in every decision and our count only includes cases where an explicit

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<sup>66</sup> 54% is a low estimate because not every case involved a mother as a primary respondent. See *JAM v DCW et al*, 2004 BCPC 510 (mother deceased), *Director v AH*, *supra* note 61 (father was primary respondent), and *Director v C et al*, 2005 BCPC 331 [*Director v C et al*] (mother's application for custody was dismissed due to lack of involvement in proceedings, competing custody claims from father, aunt, and grandmother were the subject of the decision).

<sup>67</sup> The 15 cases included 11 cases of physical violence and nine cases of sexual violence but there was some overlap, which is why the total is only 15. Not all of the allegations of sexual violence were against a male partner of the mother. See *British Columbia (Director of Family and Child Services) v RB*, 2003 BCPC 563 [*Director v RB*] (perpetrator was a male cousin); *Director of CFC Services v CB*, 2006 BCPC 321 [*Director v CB*] (perpetrator was a male neighbor); *Director v BN and DW*, 2007 BCPC 75 [*Director v BN and DW*] (perpetrator was a male friend of the father); and *British Columbia (Director of Family and Child Services) v RW*, 2002 BCPC 238 [*Director v RW*] (perpetrator was not identified).

<sup>68</sup> No cases involved mothers and allegations of sexual violence. Cases involving physical violence on the part of the mother include: *Director v RW*, *supra* note 67 and *British Columbia (Director of Family and Child Services) v SK*, 2002 BCPC 291 [*Director v SK*]. In *British Columbia (Director of Child, Family and Community Service) v CLA-V & JFR*, 2005 BCPC 17 [*Director v CLA-V & JFR*] the mother had a history of inappropriately harsh punishment of the child in the past but the disciplinary role had passed to the stepfather by the time of the CCO hearing.

reference to indigeneity was made. It is estimated that up to 60% of children in care in British Columbia, including through voluntary agreements, are Indigenous.<sup>69</sup> More broadly, Canada has a long history of child apprehensions of indigenous children who, historically, were often taken from their families and their communities and placed for adoption with nonindigenous families.<sup>70</sup> In response to this history, the current statute requires courts to consider the importance of preserving a child's cultural identity in assessing the best interests of the child, although it does not mandate a particular outcome.<sup>71</sup>

Seventh, the inter-generational impact of state control over the families who are subject to CCO applications is demonstrated by the number of respondents who were themselves children in care. Roughly 30% of the mothers in this sample had been children "in care,"<sup>72</sup> challenging the notion that children who are apprehended will necessarily fare better once removed from their parent. In addition, many of these women had lost multiple children to prior child apprehension proceedings.<sup>73</sup>

Finally, and most significantly, a large majority of the mothers had their relationships to their children severed by the court. In 63 of the 85 cases (74%) CCOs were granted for at least

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<sup>69</sup> Bob Plecas, "Plecas Review, Part One: Decision Time" (4 December 2015) online: <<http://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-supports-for-parents-with-young-children/reporting-monitoring/00-public-ministry-reports/plecas-report-part-one.pdf>> at 9.

<sup>70</sup> See e.g. Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 [Kline, "Child Welfare Law"]; Patricia A Monture, "A Vicious Circle: Child Welfare Law and First Nations" (1989-90) 3 CJWL 1. This history of apprehensions can be read as a successor to the removal of aboriginal children from families under the residential school system. See Truth and Reconciliation Report, *supra* note 5 at 137-138.

<sup>71</sup> *CFCSA*, *supra* note 17 at s 4(2).

<sup>72</sup> This estimate is probably low because judges do not always mention the mother's background/childhood. In many of the cases, mothers report having been abused in foster care. For example, in *British Columbia (Director of Child, Family and Community Service) v KG*, 2005 BCPC 430 [*Director v JG and KG*], the mother was, at the time of the CCO hearing, in the midst of suing the province of Saskatchewan for the abuse she suffered while in foster care.

<sup>73</sup> See, for example, *British Columbia (Director of Family and Child Services) v CU*, 2002 BCPC 85 where the 29-year-old mother had had two children placed for adoption immediately after birth, two other children were made permanent wards, her fifth child was placed in the care of her sister and her sixth child was the subject of the proceedings. See also *British Columbia (Director of Child, Family and Community Service) v SP*, 2007 BCPC 176 [*Director v SP*]. Evidence of previous apprehensions may be used against the mother in question.

one child.<sup>74</sup> Of the 22 remaining cases, the children were returned to the mother in seven cases, left in the temporary custody of the director in six cases and left in the temporary custody of a family member in three cases. In the remaining six cases, custody was granted to another family member.<sup>75</sup> By the time the cases made it to this final stage, the result often appeared to be almost inevitable. We now turn to an examination of the judicial discourses in the cases.

## Analysis of Judicial Discourse

### (i) The Challenges of Poverty and Single Motherhood: More Than a “Lifestyle” Choice?

In many of the cases, judges rely heavily on what they refer to as poor "lifestyle" choices or "chaotic lifestyles" that are incompatible with parental responsibilities.<sup>76</sup> Lifestyle choices in

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<sup>74</sup> In two of these 64 cases, a CCO was denied for another child. See *British Columbia (Director of Child, Family and Community Service) v BG and VK*, 2006 BCPC 477 [*Director v BG and VK*] (last chance order) and *British Columbia (Director of Family and Child Services) v MB*, 2003 BCPC 429 [*Director v MB*] (one child returned to the mother under six-month supervision order). In the cases where a CCO was not granted, custody was sometimes awarded to a family member, e.g. *WMW v JW*, *supra* note 56, sometimes returned to the mother for a limited period of time, e.g. *British Columbia (Director of Child, Family and Community Service) v KLR*, 2010 BCPC 342 [*Director v KLR*], and sometimes temporary custody was given to the Director for a limited period of time, e.g. *Director v BG and VK*, *supra*.

<sup>75</sup> In 5 of these cases, an application for custody was heard along with the CCO application.

<sup>76</sup> Cases framing issues of addiction and poverty as aspects of “lifestyle” include: *PC v British Columbia (Director of Family and Child Services)*, 2002 BCPC 126 at paras 10, 24 [*Director v PC*]; *British Columbia (Director of Family and Child Services) v TM*, 2002 BCPC 158 at paras 28-29; *British Columbia (Director of Family and Child Services) v KH*, 2002 BCPC 204 at para 8 [*Director v KH*]; *British Columbia (Director of Family and Child Services) v GW*, 2002 BCPC 231 at para 3 [*Director v GW*]; *British Columbia (Director of Family and Child Services) v CDJ*, 2002 BCPC 288 at paras 12-13; *British Columbia (Director of Family and Child Services) v DW*, 2002 BCPC 616 at paras 43, 48 [*Director v DW*]; *British Columbia (Director of Family and Child Services) v CCS*, 2002 BCPC 684 at para 2 [*Director v CCS*]; *British Columbia (Director of Family and Child Services) v KW*, 2003 BCPC 94 at para 44 [*Director v KW*]; *British Columbia (Director of Family and Child Services) v JH*, 2003 BCPC 142 at paras 5, 7, 9 [*Director v JH*]; *British Columbia (Director of Family and Child Services) v TN*, 2003 BCPC 309 at paras 36, 40 [*Director v TN*]; *British Columbia (Director of Family and Child Services) v MW*, 2003 BCPC 396 at para 26 [*Director v MW*]; *British Columbia (Director of Family and Child Services) v PM*, 2004 BCPC 45 at para 1; *Director v FC*, *supra* note 34 at para 38; *British Columbia (Director of Family and Child Services) v MD(1)*, 2005 BCPC 249 at para 36 [*Director v MD(1)*]; *Director v JG and KG*, *supra* note 72 at para 25; *Director v CB*, *supra* note 67 at para 32, 106; *British Columbia (Director of Child, Family and Community Service) v SH*, 2006 BCPC 486 at 44 [*Director v SH*]; *British Columbia (Director of Child, Family and Community Service) v LW*, 2007 BCPC 120 at 42, 90 [*Director v LW and RW*]; *Director v AM*, *supra* note 45 at para 56; *British Columbia (Director of Child, Family and Community Service) v RW*, 2008 BCPC 384; *British Columbia (Director of Child, Family and Community Service) v APM*, 2011 BCPC 449 [*Director v APM and KAB*]; *British Columbia (Director of Child, Family and Community Service) v MDC*, 2012 BCPC 18 [*Director v MDC*]; *British Columbia (Director of Child, Family and Community Service) v AM*, 2013 BCPC 134.

these cases may include anything from drug addiction,<sup>77</sup> unstable or lack of housing,<sup>78</sup> civil commitment,<sup>79</sup> family violence, and even poverty.<sup>80</sup> In *SH*, for example, in granting the CCO, the court stated:

The key factor which gives rise to current protection concerns for this 11 month old infant is the mother's failure to accept that there were, and continue to be, risks to her child's safety related to her history of drug use and her lifestyle choices. Those choices have resulted in instability, family violence, financial difficulties, lack of regular or appropriate health care, and a highly nomadic existence of living in vessels, hotels, or latterly in a Winnebago trailer home.<sup>81</sup>

The court's suggestion that the violence and poverty experienced by the mother were a result of "lifestyle choices" posits a false notion of choice for many of these women and suggests a failure to appreciate the broader context of the mother's life.

If a mother's circumstances are explained in terms of choices, she is more likely to be portrayed as immature and self-involved rather than as someone dealing with very difficult life circumstances. Constructing mothers as autonomous subjects, whose life circumstances are the consequences of their own freely made choices, also helps provide a sense of justice being done in cases which otherwise often admit of no easy answers. However, where poverty, spousal abuse, and disability are key aspects of the mother's experience, casting responsibility on her for systemic issues largely beyond her control obscures the constraints that circumscribe her agency.

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<sup>77</sup> *Director v SH*, *supra* note 76. In one case the mother used marijuana to control her seizures from epilepsy. This, and the fact that she smoked cigarettes in front of the children, were part of the justification for the CCO. See also *Director v GM*, *supra* note 56.

<sup>78</sup> *Director v MDC*, *supra* note 76. See also *Director v CB*, *supra* note 67 at para 32 where the lifestyle issues included a housing crisis and a shortage of food in the home. In *Director v GM*, *supra* note 56 at para 107, the judge stated that both parents were homeless at the conclusion of the hearing and that no child could be returned to homeless parents, even though the judge found that social workers had failed to take steps to ensure that the children could remain with the family and one child had been grievously injured in foster care.

<sup>79</sup> *Director v SH*, *supra* note 76 at para 33; *British Columbia (Director of Family and Child Services) v SL*, 2004 BCPC 525 at para 2 [*Director v SL*]; *British Columbia (Director of Child, Family and Community Service) v JM*, 2012 BCPC 333 at para 22.

<sup>80</sup> *Director v SH*, *supra* note 76.

<sup>81</sup> *Ibid* at para 44.



It places blame on the mother as an individual while failing to sufficiently scrutinize the role of government and society in constructing the barriers these mothers face and in failing to provide adequate assistance to surmount them. The problem with framing systemic problems in the language of “lifestyle” choices was described succinctly by Marlee Kline:

Altogether, the characterization of battering and alcohol and drug dependency as personal problems reinforces the placing of blame for child neglect on the deficiencies of individual mothers, and obscures the roots of the difficulties First Nation mothers face in more systemic oppressive relations including historical and continuing colonialist and racist practices.<sup>82</sup>

Judges are not always insensitive to the systemic nature of the issues facing the parents appearing before them. Nevertheless, even women’s significant efforts to improve their circumstances and so-called “lifestyle” choices may not prove to be enough to retain custody of their children. In *ST*,<sup>83</sup> for example, the mother had successfully completed a year-long parenting course and witnesses from that course testified to the significant improvements she had made as well as her recent willingness to seek out support from social services and from her own mother. Despite this testimony supporting the mother’s position, a CCO was ordered based on a number of factors such as her need for stable housing, her ongoing use of marijuana and cigarettes in the child’s presence, and a lack of cleanliness in the home. The judge said to the mother after granting the CCO:

I have now spent the better part of seven court days dealing with the life of a 19-month-old child and her 28-year-old mother. I have heard from the mother what her life has been like. I want her to know that I admire all that she is done to better equip her to be a good mother. I have concluded that she is sincere in her wish to be a good mother. She has suffered so many disadvantages in her life that I have concluded that she does not now have the ability to safely and effectively care for her daughter. Other people, who also care about her daughter will be given that responsibility so that she can grow up healthy and secure. I hope that [the mother] will be reassured and even be somewhat comforted by the

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<sup>82</sup> Kline, “Complicating the Ideology of Motherhood”, *supra* note 8 at 322.

<sup>83</sup> *British Columbia (Director of Family and Child Services)*, 2003 BCPC 35 [*Director v ST*].

fact her daughter has been and will be well cared for and will likely have opportunities in her life that [the mother] was never given.<sup>84</sup>

Not only is this woman told that her extraordinary efforts to improve her “lifestyle” fall short, she is also expected to be grateful to the Ministry for finding a better home for her daughter. This mother is expected to be so “selfless” that she can be comforted by her child being taken from her care.

## **(ii) The Construction of Mental Disability**

As we have noted, mental disability is an important intersecting factor in many of the cases we studied. Despite increasing societal acceptance of the rights and ability of people with mental disabilities to be parents, the medical model of disability<sup>85</sup> continues to serve as the dominant paradigm through which mothers with mental disabilities are understood in child protection decisions.<sup>86</sup> While mental disability is not, in and of itself, a reason for terminating a parent’s relationship with her child, it continues to be treated as a risk factor at crucial stages of the child protection process.<sup>87</sup> It is consistently portrayed in negative terms, as an individual affliction, frequently obscuring the role of society in constructing the barriers mothers with disabilities face and failing to assist mothers in confronting the challenges of parenting, for

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<sup>84</sup> *Ibid* at para 55.

<sup>85</sup> The medical model of disability understands disability as an intrinsic facet of the individual and therefore considers medical intervention as the appropriate societal response to the disadvantage that disability engenders. By contrast, social models of disability understand the disadvantage experienced by people with disabilities as flowing not from the impairment itself, but rather from society’s response to those impairments, in particular the construction of barriers to full participation in society based on the application of normative standards. See e.g.: Bill Hughes & Kevin Paterson, “The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment” (1997) 12 *Disability and Society* 325; Liz Crow, “Including all of our Lives: Renewing the Social Model of Disability” in Jenny Morris, ed, *Encounters with Strangers: Feminism and Disability* (London: Women’s Press, 1996) 206. See also H. Archibald Kaiser's “Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State” (2009) 17 *Health Law Journal* 139.

<sup>86</sup> See, for example, Lisa Miller, “Who Knows Best”, *New York Magazine* (24 January 2016), online: <nymag.com>.

<sup>87</sup> As we discussed earlier, at the stage of initial investigation, Ministry social workers are required to conduct a Risk Assessment. While the *CFCSA*, *supra* note 17 is silent on the issue, parental disability remains a key risk factor in the Risk Assessment Model. See Swift & Callahan, “*At Risk*”, *supra* note 25.

example by alleviating poverty and providing services. Perhaps contradictory to the medical model, however, women are also blamed for their mental disability, as if it were a matter of personal choice, rather than a function of other indices of social disadvantage such as poverty and addiction, and their own experience in the child protection system as children.

Many women in these cases have been given multiple diagnoses throughout their contact with the child protection and mental health systems. These labels often trigger high levels of state surveillance and some women have never been given the opportunity to interact with their children except in the presence of social workers.<sup>88</sup> Personality disorders, such as borderline personality disorder<sup>89</sup> or dependent personality disorder,<sup>90</sup> are frequently included in the list of diagnoses given to these women.<sup>91</sup> These labels are disproportionately attached to women and suggest that these women have struggled to cope with their social circumstances, or to escape abusive and controlling relationships. Feminist scholars have argued that the DSM definitions of these disorders are gendered both in their criteria and in their application.<sup>92</sup> Dependent personality disorder, for example, has been referred to as little more than a “caricature of the traditional female role.”<sup>93</sup> These disorders are supposedly lifelong conditions and do not lead to

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<sup>88</sup> See, for example, *Director v MDC*, *supra* note 76

<sup>89</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (5<sup>th</sup> Ed.)* (Washington, DC: American Psychiatric Association, 2013) [American Psychiatric Association, *DSM-V*]. See for example *Director v DW*, *supra* note 76 and see *Director v SL*, *supra* note 79 at para 59 where this condition is described as including “difficulties with impulse control, chronic pari-suicidal thoughts (of harming oneself where the intent is not necessarily death), eating disorders and substance abuse.”

<sup>90</sup> American Psychiatric Association, *DSM-V*, *supra* note 89.

<sup>91</sup> The fact that psychiatric experts often disagree on the labels attached to these women speaks to their validity. In *Director v JH*, *supra* note 76 at para 17, for example, one expert suggested that the mother “might have an Impulse Control Disorder, a Passive Aggressive Personality Disorder, and an Antisocial Personality Disorder” but a year later another expert did not agree that the mother had these disorders and diagnosed her with bipolar disorder. A third expert decided that the correct diagnosis was Borderline Personality Disorder (para 36).

<sup>92</sup> Paula Kaplan, “A Woman’s View of DSM-III” (1983) 38:7 *American Psychologist* 786 [Paula Kaplan, “A Woman’s View”].

<sup>93</sup> Krystle L Disney, “Dependent Personality Disorder: A Critical Review” (2013) 33:8 *Clinical Psychology Review* 1184. Disney is describing the seminal work by Paula Kaplan in “A Woman’s View, *ibid.* There is some disagreement as to whether the criteria themselves reflect gender bias or whether the diagnosis is applied differentially based on gender (at 1188). Disney also describes how the research on the applicability of these labels to racialized groups is a “grossly neglected area of research needing further exploration” (at 1189). Research does

any type of treatment, but rather act as descriptors of what is construed as women's inadequacy in coping and, in the context of child protection, their inadequacy to parent.

Many of these women were themselves children in care, apprehended from their own mothers, and left to struggle through the foster care system.<sup>94</sup> The impact of this kind of childhood not surprisingly leads to diagnoses that label the woman as having poor impulse control or an excessive need for nurturance. Others have had their children taken from their care at birth, which can affect both the woman's ability to present herself as a competent mother and also her mental health status. For the Indigenous mothers, in particular, state involvement in their families and communities may extend back generations. Furthermore, because personality disorders are seen as lifelong, even where a woman has taken steps to improve her functioning, judges may doubt her ability to maintain those gains. In *RD*,<sup>95</sup> for example, where a mother had left a violent relationship, the judge noted that the personality traits which led her to the unhealthy relationship had not changed and therefore that the child was at risk in the future.<sup>96</sup> In another case, the hearing featured conflicting testimony about whether the mother suffered from schizotypal personality disorder.<sup>97</sup> If that diagnosis were substantiated, the judge indicated that it would be determinative of her future ability to parent: "[i]f the mother does suffer from that disorder, then it is highly unlikely that she would ever be able to significantly improve her

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show that those living in more collectivist cultures are more likely to score high on tests for this disorder, raising the question of whether Indigenous women are more likely to be given this label.

<sup>94</sup> See for example *Director v ST*, *supra* note 83 where the mother had herself been in the care of the Director since she was eight years old when her own mother had abandoned her. The expert witness described her as having a "preoccupied attachment with her mother and this disorder also likely causes the mother to form the sequential, unhealthy relationships with men" (para 24). She was described as having "a great need to be cared for and does not like to be alone," (para 25) which is not surprising for someone who was bounced from one foster home to another.

<sup>95</sup> *British Columbia (Director of Family and Child Services) v RD*, 2002 BCPC 60.

<sup>96</sup> *Ibid* at para 25

<sup>97</sup> *Director v RW*, *supra* note 67.

parenting abilities.”<sup>98</sup> If the diagnosis of depression were correct, by contrast, then there was hope that the mother could learn to parent.<sup>99</sup> Such labels are far from neutral.

The intersection between disability and idealized constructions of motherhood can be seen in various different ways throughout the case law. Women with disabilities are infantilized and construed as insufficiently self-sacrificing. These traits, in turn, make them unfit mothers. Critical disability and legal scholars have convincingly demonstrated that across a range of discourses, women with mental disabilities are often constructed as needy, dependent, childlike and asexual.<sup>100</sup> Representatives of the Director, psychologists and judges continue to label mothers with mental disabilities with descriptors such as naïve, dependent, immature or childlike. Such descriptors stand as markers for the absence of qualities expected of mothers, such as the ability to assume independent and autonomous responsibility for a child. By existing in opposition to normative understandings of what makes a fit mother, the “child stereotype” accorded to these women naturalizes the eventual termination of their legal rights to be parents.<sup>101</sup> Children cannot parent children and thus, by implication, nor can those who are “childlike”.

It is not uncommon to see women described with multiple child-like characteristics, such as “friendly but self-absorbed”, “alarmingly” and “amazingly” naïve, and “psychologically much

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<sup>98</sup> *Ibid* at para 49.

<sup>99</sup> A CCO was ultimately not ordered. Rather a temporary order of custody was given to the Director for six months in part because the child was 11 years old and not likely to be adopted but rather kept in long-term foster care.

<sup>100</sup> Catherine Frazee, Joan Gilmour, & Roxanne Mykitiuk, “Now You See Her Now You Don’t” in Diane Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 223 at 227; Fiona Sampson, “Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equal Rights Law” in Diane Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 267 at 280-82. Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief” (2007) 52 *McGill Law Journal* 243 at para 34 [Benedet & Grant, “Consent, Capacity and Mistaken Belief”]; Janine Benedet & Isabel Grant, “More than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth” (2013) 25 *CJWL* 31 at 35; 50 [Benedet & Grant “More than an Empty Gesture”].

<sup>101</sup> See our discussion of the ideology of motherhood, above; e.g. Kline, “Complicating the Ideology of Motherhood”, *supra* note 8; Mosoff, “Motherhood, Madness, and Law”, *supra* note 1.

younger than her years.”<sup>102</sup> Mothers are described as being “prone to emotional role reversals with [their] children” and as confusing their “own emotional needs with the needs of [their] children”.<sup>103</sup> *RM*<sup>104</sup> involved a mother who had grown up in a polygamist community and experienced incest, sexual assault, forced marriage and other ongoing abuse as a child. She had been labelled with a number of personality disorders, many of which focused on her obsessive-compulsive behaviour in parenting. The mother was described as overly-dependent on the support of others and analogized to a child. The judge noted that “throughout this trial that she often had her head resting upon a support person, or even her lawyer, much the way that a child would rest her head upon a parent.”<sup>105</sup> The mother was involved in a class-action lawsuit against the Bountiful community and the judge was concerned that she may “fall back into her own world with poor mental health and poor parenting” worrying that this lawsuit could lead to “the possible waxing and waning of the mother’s mental health.”<sup>106</sup>

This tendency to infantilize mothers with disabilities is particularly acute for women with intellectual disabilities. Not uncommonly, they are described as having the mental age of a child, thus raising the spectre of a child raising a child, even though they are grown women with life experiences that no child could possibly have.<sup>107</sup> In one case where the children were removed in part because of the mother’s “low intellectual functioning”,<sup>108</sup> the court equated the candidness of her testimony, presumably a good thing, with her being “quite childlike”.<sup>109</sup> In *TN*, the mother who had “significant cognitive and intellectual difficulties” was described variously as

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<sup>102</sup> *British Columbia (Director of Child, Family and Community Service) v HP*, 2010 BCPC 326 at para 40 [*Director v HP*].

<sup>103</sup> *Ibid.*

<sup>104</sup> *British Columbia (Director of Family and Child Services) v RM*, 2003 BCPC 338 [*Director v RM*].

<sup>105</sup> *Ibid* at para 22.

<sup>106</sup> *Ibid* at para 42. The judge ultimately ordered a last chance order to determine whether the mother could be given increasing access to her child while being monitored by the Director.

<sup>107</sup> See Benedet & Grant, “More than an Empty Gesture”, *supra* note 100 at 50-51.

<sup>108</sup> *Re JRDP*, 2003 BCPC 298 at para 3 [*Re JRDP*].

<sup>109</sup> *Ibid* at para 26.

“emotionally immature” by the Ministry social worker, and presenting as “emotionally and cognitively younger than her stated age” by the author of the parenting capacity assessment.<sup>110</sup>

Related to the childlike and dependent stereotype is the construction of the mother as self-involved and incapable of placing her children’s needs before her own.<sup>111</sup> The self-involved mother can be contrasted with the ideal of the selfless mother who is expected to disregard her own needs to meet those of her children, even at great cost to herself. Courts frequently describe mothers with mental disabilities as being unable to place their children’s needs before their own.<sup>112</sup> For instance, in *RM*, where the mother had been raised and abused in a polygamist community, the court stated:

All the children have obviously suffered significant neglect and emotional abuse as a result of their mother being unable in the past to put her children's needs ahead of her own personal needs.<sup>113</sup>

The inability to overcome addiction, to separate from an abusive partner, or to comply with the plans made by mental health professionals are seen as a function of a mother being selfish. Troubling assumptions about personal agency and choice are often at the heart of these descriptors.

The cases reveal that mental disability is seen as permanent and often immutable. Yet research indicates that parents with developmental disabilities can become skilled parents so long

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<sup>110</sup> *Director v TN*, *supra* note 76 at para 15.

<sup>111</sup> See Mosoff, “Motherhood, Madness, and Law” *supra* note 1; Mosoff, “A Jury”, *supra* note 1.

<sup>112</sup> For cases where the mother is unable to put her children's needs above her own, see *Director v HP*, *supra* note 102 at paras 80,88; *Director v RM*, *supra* note 104 at para 34; *British Columbia (Director of Child Protection) v PS*, 2004 BCPC 488 at para 179 [*Director v PS*]; *AJF (Re)*, 2002 BCPC 287 at para 31 [*Re AJF*]; *Director v TN*, *supra* note 76 at para 32; *Director v AM*, *supra* note 45 at para 31, 41; *Director v GW*, *supra* note 76 at para 5; *British Columbia (Director of Family and Child Services) v PB*, 2002 BCPC 519 at para 107 [*Director v PB*]; *Director v JG and KG*, *supra* note 72 at para 34; *British Columbia (Director of Child, Family and Community Service) v MRL*, 2009 BCPC 65 at para 33.

<sup>113</sup> *British Columbia (Director of Family and Child Services) v RM*, *supra* note 104 at para 34.

as support services are appropriately geared toward their needs.<sup>114</sup> Judges rarely connect the labels of mental disability with the devastating social circumstances in which many of these women find themselves. In *AM*,<sup>115</sup> the mother was a young woman with an intellectual disability. Her child had been identified as having special needs such that “a highly competent caregiver with considerable intellectual and emotional resources”<sup>116</sup> would be required. One expert described the results of the mother’s psychological testing as follows:

She displays herself as someone who is probably chronically unhappy, pessimistic and resentful. The testing indicates someone who feels alienated from the world, and has difficulty in meeting responsibilities. She is likely to be insecure, but self-centred, demanding of attention, but at the same time complaining about others not meeting her needs, being at fault for her difficulties.<sup>117</sup>

The mother was described as functioning at a grade 3 level and much was made of her difficulty with reading. There was no acknowledgement that she had almost certainly encountered significant social barriers given her disability and that alienation and resentment are not surprising for a woman in her circumstances. There was no evidence of any drug use, violence or physical harm to the child. Despite the “many positive things” about her parenting, including her patience with her child, she was simultaneously described as emotionally needy, immature and narcissistic.<sup>118</sup> The experts appeared to agree that this mother could learn additional parenting skills but that the challenge would lie in generalizing those skills to new situations. An

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<sup>114</sup> See e.g. Dave Shade, “Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act,” (1998) 16 *Law and Inequality* 153 at 160-161 and Paul Preston, “Parents with Disabilities,” in JH Stone & M Blouin, eds, *International Encyclopedia of Rehabilitation*, (2011), <http://cirrie.buffalo.edu/encyclopedia/en/article/36/>, cited in National Council on Disability, “Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children” (Washington, DC: National Council on Disability, 2012), online: National Council on Disability <[https://www.ncd.gov/rawmedia\\_repository/89591c1f\\_384e\\_4003\\_a7ee\\_0a14ed3e11aa.pdf](https://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf)> at 230.

<sup>115</sup> *Director v AM*, *supra* note 45.

<sup>116</sup> *Ibid* at para 21. Taken from expert testimony.

<sup>117</sup> *Ibid* at para 31.

<sup>118</sup> *Ibid* at para 40-41.



assisted parenting arrangement was considered not viable in this case. Instead a CCO was granted and the mother was denied access because it might have made adoption more difficult.

Once a label gets attached to a woman it is very difficult for her to portray herself as a competent mother. Where she struggles to overcome the challenges that led to the labels initially, she may be construed as selfish and unwilling to put her child's needs before her own. Difficult circumstances such as being raised in an abusive, dysfunctional family or being raped as a teenager may be dismissed as everyday "stressors" of life.<sup>119</sup> There is little scrutiny on the part of judges when a woman is presented as having multiple, sometimes contradictory, labels by different experts. The social challenges these women face as a result in part of living with these psychiatric labels are used as evidence to prove that the labels themselves are legitimate. As we will see in the next section, these barriers are multiplied when the child is identified as having "special needs".

### **(iii) Children with Special Needs**

The prevalence of children with "special needs" in Canada's child protection systems has been well documented.<sup>120</sup> For example, the most recent Canadian Incidence Study on Child Abuse and Neglect (2008) found that in 46 per cent of substantiated child maltreatment cases "at least one child functioning issue was indicated."<sup>121</sup> As we noted earlier, a significant proportion of CCO cases we reviewed (48 of the 85 cases (56%)) involved one or more of the children being identified as having "special needs" of some kind. Numerous examples appear of the

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<sup>119</sup> *Director v HP*, *supra* note 102 at para 4.

<sup>120</sup> We use the term "special needs" in this section, rather than disability, in part because that is how judges often describe children who face particular challenges but also because the precise nature of the child's challenges is sometimes not specified or described in terms that do not easily lend themselves to a particular diagnosis.

<sup>121</sup> Trocmé, "CIS Report, 2008," *supra* note 51 at 5. Note that the report suggests that this number may be an underestimate because these findings are based only on case-worker reports. See also Westad & McConnell, "Child Welfare Involvement", *supra* note 33.

Director arguing that the special needs of the child warrant a CCO.<sup>122</sup> Of course, considering the specific needs of a child and the parent's capacity to parent is not itself problematic. In assessing a child's best interests, courts are required to consider "the child's physical and emotional needs and level of development".<sup>123</sup> However, the frequency with which the combination of the mother's mental disability and the child's "special needs" is cited as a key reason for permanently terminating their relationship underscores that despite the *CFCSA*'s disability-neutral language, the child protection system continues to operate as a significant barrier to women with mental disabilities, especially where their children are identified as having "special needs".

The past 20 years have seen a dramatic increase in children diagnosed with "special needs" in Canada, especially those related to learning disabilities, attention deficit hyperactivity disorder and/ or autism.<sup>124</sup> While some applaud the trend towards the naming of new disorders, more accurate and early diagnosis, development of new drugs, and innovative therapeutic interventions in education and rehabilitation,<sup>125</sup> others are more critical of the rising numbers.<sup>126</sup>

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<sup>122</sup> For examples of cases where courts addressed the exceptional level of parenting required for children with disabilities see *Director v GM*, *supra* note 56 at paras 96, 98, 109; *British Columbia (Director of Child, Family and Community Service) v JY*, 2010 BCPC 170 at para 5 [*Director v JY*]; *British Columbia (Director of Child, Family and Community Service) v TR*, 2009 BCPC 52 at para 37 [*Director v TR*]; *Director v LW and RW*, *supra* note 76 at paras 100-101; *British Columbia (Director of Child, Family and Community Service) v CS and JK*, 2007 BCPC 19 at para 108-110 [*Director v CS and JK*]; *Director v BG and VK*, *supra* note 74 at para 10; *British Columbia (Director of Child, Family and Community Service) v SG and CP*, 2006 BCPC 116 at paras 43-44, 84 [*Director v SG and CP*]; *British Columbia (Director of Child, Family and Community Services) v RW*, 2003 BCPC 55 at para 85; *Director v MD(1)*, *supra* note 76 at paras 8, 14; *Director v SL*, *supra* note 79 at paras 146-47; *Director v FC*, *supra* note 34 at para 81; *Director v MB*, *supra* note 74 at paras 20-29, 46-47; *Director v. PS*, *supra* note 112 at para 177; *Director v RM*, *supra* note 104 at para 41; *Director v TN*, *supra* note 76 at para 25; *Director v RB*, *supra* note 67 at para 53, 60, 86-87; *Director v JH*, *supra* note 76 at para 69; *Director v KW*, *supra* note 76 at para 44; *British Columbia (Director of Family and Child Services) v AJ*, 2002 BCPC 539 at para 5 [*Director v AJ*]; *Re AJF*, *supra* note 112 at paras 28, 38; *Director v SK*, *supra* note 68 at para 36; *Director v SP*, *supra* note 73 at paras 4, 42-44, 56-63; *Director v KH*, *supra* note 76 at paras 1, 27-28, 37-38; *Director v PC*, *supra* note 76 at para 27; *British Columbia (Director of Family and Child Services) v LS*, 2002 BCPC 16 at paras 120-22, 145, 171-72, 179, 195-97, 202; *Director v AM*, *supra* note 45 at para 61.

<sup>123</sup> *CFCSA*, *supra* note 17 at s 4.

<sup>124</sup> See the studies cited at note 13.

<sup>125</sup> See, for example, Eric Fombonne, "Epidemiology of Pervasive Developmental Disorders" (2009) 65 *Pediatric Research* 591; Marissa King & Peter Bearman "Diagnostic Change and the Increased Prevalence of Autism" 38

How a child's particular challenges factor into decisions about severing of the parental relationship is revealing both in terms of what it says about motherhood and about disability. While many scholars have shown the ubiquitous nature of mother blaming in relation to family problems,<sup>127</sup> there is a particular significance to blaming mothers in relation to child disability. Importantly, the decisions link the child's challenges to the mother, in a way that holds her responsible. Sometimes a particular diagnosis is intrinsically linked to what the mother has or has not done prenatally or after birth. Labels given to children such as reactive attachment disorder,<sup>128</sup> abstinence syndrome,<sup>129</sup> and fetal alcohol spectrum disorder<sup>130</sup> implicate mothers directly. Mental health labels that are linked to affection, discipline or nurturing are inevitably the mother's fault. Yet it is not surprising that children are labelled as having attachment disorders when many of them have been separated from their mothers from early infancy and have interacted with their mothers only in supervised settings.<sup>131</sup> Others have been in and out of state care multiple times over their short lives. Yet none of their symptoms are attributed to the actions of the state, only to those of the mother. Mothers are expected to be loving, selfless, and totally concerned with their children both before and after birth so that any risks taken during

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1224; Ashley Wazana, Michaeline Bresnahan, & Jennie Kline, "The Autism Epidemic: Fact or Artefact?" (2007) 46 *Journal of the American Academy of Child & Adolescent Psychiatry* 721.

<sup>126</sup> See, for example, Jennifer S Silk, Sanjay R Nath, Lori R Siegel & Philip C Kendall, "Conceptualizing mental disorders in children: Where have we been and where are we going" (2000) 12 *Development and Psychopathology* 713 at 729 where the authors question whether the "diagnostic pendulum" has swung too far and become overzealous in diagnosing and labeling children, classifying too many childhood abnormalities as dysfunctional.

<sup>127</sup> See Paula Kaplan, "A Woman's View", *supra* note 92. For an analysis of mother blaming in the context of abuse, criminal proceedings and child protection, see Mulkeen, "Gendered Processes in Child Protection", *supra* note 60. For mother blaming related to children's health outcomes, see Debra Jackson & Judy Mannix, "Giving Voice to the Burden of Blame: A Feminist Study of Mothers' Experiences of Mother Blaming" (2004) 10 *International Journal of Nursing Practice* 150.

<sup>128</sup> See e.g. *Director v HP*, *supra* note 102; *Director v AM*, *supra* note 45; *Director v LW and RW*, *supra* note 76.

<sup>129</sup> See e.g. *Director v PB*, *supra* note 112.

<sup>130</sup> See e.g. *Director v. GM*, *supra* note 56; *Director v RB*, *supra* note 67; *Director v CD*, *supra* note 61.

<sup>131</sup> See for example *Director v AM*, *supra* note 45, where a four year old child who was the subject of a CCO had been separated from his mother at the age of 13 months. The mother's access during this time varied between two full days per week, unsupervised, and two hours twice per week, supervised.

pregnancy challenge the idea that she could be a good mother.<sup>132</sup> Where problems are traced to the prenatal environment, the mother is always held responsible, regardless of what part the father played in the culture of alcohol and drugs.

The lens of judicial discourse allows us to see not just that “special needs” children are overrepresented, but also *how* the presence of the child’s “special needs” informs the arguments made in favour of CCOs. In particular, the constructions of disability in the mother and child intersect, often leading to the conclusion that mothers with mental disabilities are especially unsuited to meet the needs of their children with “special needs”. We focus on two aspects of the cases in which courts conclude that mothers lack the above-average level of skill required to parent such children.

First, in some cases, the mother is told that, but for her child’s “special needs”, the child would have been left in the mother’s care. In other words, the mother is not labelled as inherently unfit to parent a child but only unfit to parent a child with “special needs”. In *TR*,<sup>133</sup> for instance, the mother was described as having “obvious deficits” and, while never tested, the court speculated that she might share the same genetic condition as two of her children. The Director acknowledged that she had “significantly improved” since the apprehensions of three other children, but stated that she still did not “have a complete understanding of how the world works” because she took her child on a “not at all well thought out” bus trip to the United States.<sup>134</sup> Significantly, the court expressly stated it would have given the mother another chance but for the child’s special needs:

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<sup>132</sup> Susan C Boyd & Kent Roach, *Mothers and Illicit Drugs: Transcending the Myths* (Toronto: University of Toronto Press, 1999); Roxanne Mykitiuk & Dayna Nadine Scott, “Risky Pregnancy: Liability, Blame and Insurance in the Governance of Prenatal Harm” (2011) 43 UBC L Rev 311.

<sup>133</sup> *Director v TR*, *supra* note 122.

<sup>134</sup> *Ibid* at paras 34-37.

This child is no longer a baby. If this child were of average or better intelligence, it seems likely, for several reasons, that the Court would have given her mother another chance to raise her daughter. First, this mother is not and has not been violent or abusive to this child. The strongest case that the Director could make in regard to abuse was that the mother was overly strict in enforcing overly strict rules with this child. However, the Court finds no sufficient evidence that the mother's actions towards this child have, at any time in the last many years, been sufficient to amount to grounds for permanent removal of this child on the basis of actual abuse or neglect. Second, the mother can follow directions. So long as she receives any help from our society whatsoever, she would be able to make reasonable plans for ordering her daughter's days and would be able to follow through with them. Third, a child of average or better intelligence would not need the extra support that a special or high needs child would.

There are many more reasons why, at this point in time, at this point in this mother's life and development and at this point in the child's life, that the Court would be much more disposed to return the child to the mother's care were it not for the fact that this child is a high needs/special needs person.<sup>135</sup>

Not only did the court speculate that, had the child not had "special or high needs" the mother could have retained custody, it also indicated that, if the existing foster parents were not able to adopt the child, then the child should be returned to the mother's care:

Notwithstanding anything else set out in these reasons for judgment, this Court would return the child to the mother's care if the Court understood that the Director's plan was to place the child for a stranger adoption; and adoption out to yet another new set of parents in yet another home, probably in yet another school.<sup>136</sup>

The judge realized that leaving the child with the mother would be a better option than a stranger adoption, thus acknowledging that the mother *was* capable of parenting this child. Only because there was a better offer on the table – dedicated foster parents willing to adopt – was the relationship severed. The child's disability gave the court permission to weigh competing homes for the child to determine which one would be better. Further support surely should have been

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<sup>135</sup> *Ibid* at paras 37-38.

<sup>136</sup> *Ibid* at para 22.

explored to see if the child's exceptional needs could have been met with exceptional support. Instead, a CCO was determined to be in the child's best interest.<sup>137</sup>

Second, and often overlapping with the first concern, some decisions separate the child with special needs, allowing the mother to retain custody of the "typical" children but not of the child with "special needs", thus isolating that child from his or her family connections. This approach again suggests that the mother is a capable parent, but not an extraordinary parent who can provide the additional care to meet the "special needs" of her child.

For example, in *BG and VK*,<sup>138</sup> the Director sought a CCO for two toddlers. The Director had "longstanding" concerns with the mother's low intellectual functioning and the father's aggression and hostility.<sup>139</sup> The older child is described as a "healthy two-year-old girl with little in the way of special requirements" while the younger child "at 16 months is four to five months globally delayed, with constipation problems and hypotonia".<sup>140</sup> With respect to the older child, the court found that there was insufficient evidence that the parents would not be able to meet his needs in a reasonable time. It concluded, however, that the parents would not be able to meet the younger child's special needs within the foreseeable future:

Before he was fed pureed food through some sort of a sucking apparatus. Now his foster mother chops everything to the size of one-third of a grain of rice so that he will not choke. It is obvious that D.K. will require continuous medical care, as well as occupational therapy, physiotherapy and likely speech therapy. The extraordinary effort taken by the foster parents just for feeding make it clear that D.K. requires specialized care, a quality of care which is simply beyond the capacity of his parents now and for the foreseeable future. In this regard, I have considered the plan of care and the child's best interests, and have no alternative but to make a continuing custody order for D.K.<sup>141</sup>

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<sup>137</sup> *Ibid* at para 39.

<sup>138</sup> *Director v BG and VK*, *supra* note 74.

<sup>139</sup> *Ibid* at para 2.

<sup>140</sup> *Ibid* at para 9.

<sup>141</sup> *Ibid* at para 9.

As a result, a CCO was granted for this child, whereas only a temporary custody order was granted with respect to the child without “special needs”. While efforts are often made to keep siblings together, this goal was clearly not a priority in the decision.

*MB* highlights the dilemmas courts face when asked to separate siblings with “special needs”.<sup>142</sup> In this case, a CCO was sought for eldest two children with “special needs” to remove them from their Indigenous mother but not for the youngest child, an infant, who did not have “special needs”. The court describes the mother as having a dysfunctional and abusive upbringing, during which she spent time in foster care and had her first child at 14. She had struggled with substance abuse and abusive relationships and was described as having borderline intellectual functioning. The Director relied on an expert report emphasizing that the mother’s “special needs” children required above-average parenting abilities that the mother lacked.

I think M.B. would not be capable of successfully dealing with the challenges and stresses of raising three normal children. M.B. is almost certainly not capable of parenting an infant as well as two children whose special needs require greater than average parenting abilities. If M.B. were to parent her three children, it is unlikely that she would be able to obtain enough support on an ongoing basis over many years to prevent her from relapsing into destructive modes of coping.<sup>143</sup>

However, the expert report indicated that she could adequately parent the infant child without special needs, noting that she “has shown diligent efforts to improve herself, avoid substance abuse, develop her parenting skills, and reach out for support.”<sup>144</sup>

At the time of the trial, the infant daughter continued to reside with the mother while the older two daughters lived together in a foster placement with a non-Indigenous family that was eager to adopt. The court described this placement in a way that highlighted the economic advantage of the foster parents, with whom the children were “now very attached”:

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<sup>142</sup> *Director v MB*, *supra* note 74. The special needs of the older children are described at paras 23-25.

<sup>143</sup> *Ibid* at para 20.

<sup>144</sup> *Ibid* at para 21.

The foster home is wonderful-the kind of home any child would love to live in, with a huge swimming pool and a back yard playground that would rival the playground of many schools. The foster mother aggressively advocates for the special needs of the children. The foster parents have gone so far as to pay out of their own pocket for the oldest child to attend a private school to better address her special needs. Both foster parents are actively involved in the parenting of the children.<sup>145</sup>

The mother in this case had a strong network of support from her local aboriginal community, which was concerned that she had not been given a fair opportunity to regain her two children at least in part because she was Indigenous. The community believed that social workers had already made their minds up to have the girls adopted by the foster family and thus did not take unsupervised access seriously even though the mother had met their conditions for obtaining such access. The judge was explicitly critical of the Ministry and recognized that the Ministry's behaviour was what led to a lack of cooperation on the part of the mother who felt that nothing she did would be good enough to satisfy the Ministry.<sup>146</sup>

In the midst of the hearing, the court granted unsupervised access. Apparently during the course of her testimony, the mother appeared to become more trusting. In stark contrast to the suggestion that she had "limited cognitive abilities,"<sup>147</sup> it became clear that "she could be very articulate when she felt comfortable in her surroundings."<sup>148</sup> The court noted the "metamorphosis" the mother had undergone and described her as an excellent parent for her youngest child. Nonetheless a CCO was granted with respect to the eldest child, who had expressed a desire to remain with the foster family. The court found that the relationship between the daughter and the mother was so damaged that it would be like "being thrown back into the

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<sup>145</sup> *Ibid* at para 27.

<sup>146</sup> *Ibid* at paras 28-29.

<sup>147</sup> *Ibid* at para 31.

<sup>148</sup> *Ibid* at para 31.



vortex of a tornado”<sup>149</sup> to return her to the mother. This tornado had been caused at least in part by the child protection system.

There were a number of positive aspects to this judgment. The court recognized the enormous progress the mother had made, criticized the Ministry for failing to live up to its side of the agreement, and refused to grant a CCO for the middle child. The judge also acknowledged that judges should be cautious about using poverty as a basis for ordering a CSO:

Poverty brings with it a certain level of potential risk to children. Unquestionably the mother needed to be taught that there were more proper interim measures that could be taken to heat the trailer, such as getting a temporary electric heater from the band. But this is all in the context of a mother who was raised as a child in a tent in the bush where the only source of heat was an open fire. The court must be careful not to overemphasise protection concerns that are primarily rooted in poverty, otherwise a significant portion of our population would be deemed to be in need of protection.<sup>150</sup>

Ultimately, however, the middle class benefits provided by the foster home loomed large in the decision to terminate the mother’s relationship with her oldest daughter with special needs.

Foster families, especially those seeking to adopt, can create a conflict for a court. The issue should not be whether a mother is the best option for a child but rather whether the maternal relationship can, with support, be maintained for the child. Yet where the children have been in foster care for some time, the deck may be stacked against the mother even if she has made significant progress in putting her life together.<sup>151</sup> The “best interests of a child” principle should not provide a licence to look for the “best home” for a child.

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<sup>149</sup> *Ibid* at para 44.

<sup>150</sup> *Ibid* at para 39.

<sup>151</sup> See also *Director v SK*, *supra* note 68, granting a CCO for a “mentally challenged” 15 year old whose mother was described as having “the academic capacity of an eight-year-old” (paras 1-2). The Director did not remove the child’s brother, who did not have “special needs”. The court, in making a CCO for the daughter, described the mother’s parenting ability as “[falling] far short of being able to properly care for this special needs child” (para 36).

These cases are particularly striking in light of the fact that, as judges acknowledge, children with extensive “special needs”, particularly older children, are difficult to place for adoption and more likely to remain in foster care indefinitely.<sup>152</sup> As a result of their “special needs” these children do not just lose their mothers, but also potentially their siblings, their grandparents and other extended family members. As we discuss later, these cases highlight the critical role played by material supports. If a mother is fit to raise her “typical” children, it seems likely that extensive support would allow her to care for a child with “special needs”. As we suggest in our conclusion, judges should be given more power to require the state to provide necessary supports. What makes it more difficult to parent a child with a disability is that more resources, of all kinds, may be required. Families with significant economic resources are able to purchase necessary services that support the particular needs of the child and provide assistance to the parents. They are also likely to be more effective advocates for themselves and their children and are not subjected to the sort of surveillance that poor families will be if they receive publicly funded services. As a result, some parents are more likely to be able to maintain their parent-child relationship than others, based largely on class.

In general, the additional “burdens” that come with parenting a “special needs” child in a society not equipped to support that mother are expected to be borne by that mother alone. The mother is held responsible for any limitations in her caregiving and only so much support is available before a child will be removed. It is rarely acknowledged that the foster parent system involves significant costs as well as significant risks.

#### **(iv) Male violence against women**

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<sup>152</sup> See, for example, *Director v PS*, *supra* note 112 at para 183 where the judge acknowledges that an older child and another with a significant disability “are not likely to be placed for adoption.”.

Violence was prevalent in the lives of the women in our sample. As mentioned above, over half of our cases involve male violence against women (46 of 85 or 54%).<sup>153</sup> In 15 cases (17%), men were either physically or sexually violent (or both) against children. Perhaps surprisingly, there was not a great deal of overlap between male violence against women and that against children, with only five cases involving both.<sup>154</sup> All but one of these 15 cases (93%) led to a CCO.<sup>155</sup> There were allegations of violence committed by the mother in eight cases (9%), all but one of which resulted in a CCO.<sup>156</sup> Many of the mothers had also been victims of various forms of violence as children. In this section, we focus on male violence against women because of its prevalence in our study and because of the problematic aspects of removing children because their mother is a victim of violence.<sup>157</sup>

Section 13(1)(c) of the *CFCSA* deals with what is sometimes called “failing to protect.” It provides that a child is in need of protection if they have been, or are likely to be, “physically harmed, sexually abused or sexually exploited by another person and if the child's parent is

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<sup>153</sup> This percentage is low given that not all cases involved a mother as a respondent. Some cases only involved a father or a grandparent. Furthermore, in some cases, spousal abuse may not have been raised before the court or it may not have been deemed relevant, particularly if the abuser was no longer in the picture or if the basis for the application was something specific, like failure to seek adequate medical treatment for a child. Also this number only refers to spousal abuse, not cases in which the mother may have been abused by non-spouses, such as other family members. Numerous parents in this sample reported being abused emotionally, physically or sexually as children or youths.

<sup>154</sup> As noted above, there were 10 cases involving sexual violence and 10 cases involving physical violence against children but with both physical and sexual violence in 5 cases, the total was 15 cases. There were only six cases where violence was alleged to have been perpetrated against both the mother and the child. See *Director v PS*, *supra* note 112; *Director v BN and DW*, *supra* note 67; *Director v JH*, *supra* note 76; *Director v J*, 2013 BCPC 68 [*Director v J*]; *Director v CS and JK*, *supra* note 122; *Director v CB*, *supra* note 67.

<sup>155</sup> See *Director v J*, *supra* note 154.

<sup>156</sup> See *Director v RW*, *supra* note 67; *Director v SK*, *supra* note 68; *Director v JH*, *supra* note 76; *British Columbia (Director of Family and Child Services) v HTHV*, 2003 BCPC 376 [*Director v HTHV*]; *The Director v CLA-V & JFR*, *supra* note 68; *British Columbia (Director of Family and Child Services) v UW*, 2005 BCPC 244; *Director v MD(1)*, *supra* note 76; *Director v JY*, *supra* note 122. In *Director v HTHV*, *supra* at para 27 for example, the mother had been convicted of assaulting her daughters with a coat hanger although she continued to deny the allegations. It was the denial, not the actual violence, that led the judge to conclude that she did not understand her duty to protect her daughters and therefore to order a CCO.

<sup>157</sup> See Catherine Richardson & Allan Wade, “Creating Islands of Safety: Contesting “Failure to Protect and Mother-blaming in Child Protection Cases of Paternal Violence against Children and Mothers” in Susan Strega, et al, eds, *Failure to protect: Moving Beyond Gendered Responses to Violence* (Winnipeg, MB: Fernwood Pub, 2013) 188.

unwilling or unable to protect the child.”<sup>158</sup> The provision that deals most directly with children witnessing spousal abuse provides that a child is in need of protection if he or she is “emotionally harmed by living in a situation where there is domestic violence by or towards a person with whom the child resides.”<sup>159</sup> Our sample contains numerous cases of the Ministry seeking a CCO at least partly on the basis of a woman “failing to protect” her children from being exposed to the violence perpetrated against the mother by her male partner, but never did the Ministry seek a CCO on the basis of a man failing to protect his children from violence (either male or female).<sup>160</sup>

In many cases, the presence of male violence in the home was one of the primary grounds on which the Director sought a CCO. The Director may also argue that a mother’s past history of “choosing” abusive partners is indicative of a future risk of harm to the child, as if choosing violent partners is something a woman does deliberately.<sup>161</sup>

Cases involving domestic violence are particularly challenging because in some of these situations, the child may be at serious risk of harm and thus may need to be removed from the home,<sup>162</sup> at least temporarily, while supports are provided to the mother. The high number of CCO’s in these cases demonstrate how seriously violence is taken by judges in the context of child protection. We acknowledge that witnessing the abuse of their mothers is harmful for

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<sup>158</sup> See also section 13(1.2) which provides that for the purpose of s. 13(1)(c) the “the likelihood of physical harm to a child increases when the child is living in a situation where there is domestic violence by or towards a person with whom the child resides, *CFCSA*, *supra* note 17.”

<sup>159</sup> *CFCSA*, *supra* note 17 at s 13(1)(e)(ii).

<sup>160</sup> In one case, the Director did assert that the father had failed to protect the child from a mother with a serious mental illness, but there were no allegations of violence: *British Columbia (Director of Family and Child Services) v JW*, 2003 BCPC 155. The child was returned to the father under the Director’s supervision for six months. One condition of the order was that the child never be left alone with the mother.

<sup>161</sup> This suggestion perpetuates the myth that battered women are masochistic and deliberately choose abusive men.

<sup>162</sup> See, for example, *Director v DW*, *supra* note 76, where both the mother and her boyfriend were heavily involved with the use and distribution of cocaine and where the mother had repeatedly been subjected to very significant violence sometimes in the presence of her child. On one occasion the police responded after the mother had been forcefully kidnapped by her boyfriend. While she testified she had given up cocaine, drug tests were repeatedly positive for cocaine use. In *DW*, the child witnessed his mother being beaten and even shot at by her violent boyfriend.

children, although we question whether permanent removal of the child is the only solution. Two concerns arise from these cases. First, women are blamed for the violence against them as if it is an immutable personality flaw that is determinative of their fitness to parent.<sup>163</sup> Scholars have written about the tendency to hold women responsible for failing to prevent violence perpetrated against them in the context of domestic violence,<sup>164</sup> sexual assault,<sup>165</sup> and criminal harassment<sup>166</sup> and some cases reflect this view in the child protection context. Second, inadequate attention is given to the connection between poverty and lack of housing, on the one hand, and the inability to escape domestic violence on the other. A lack of housing options puts women facing male violence in a particularly difficult dilemma. They are expected to leave their violent partners to protect their children and yet may have no safe housing option.<sup>167</sup> Removing the child from the mother is seen as an easier solution than protecting the mother from violence. Little concern is shown for the mother's safety even though, in the majority of cases, she is the sole target of the abuse. Nor is there a recognition that protecting the mother from violence also protects the child from being exposed to it.

Removing children to protect them from witnessing abuse raises complex questions about how responsibility for preventing violence against women should be allocated between the state, society, and the individual. Other authors have demonstrated the ways in which the current climate of neoliberal policy-making, particularly those policies concerned with “downloading”

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<sup>163</sup> For a nuanced discussion of mother blaming in relation to both exposure to family violence and child sexual abuse by a woman's male partner, see Dorothy E Roberts, “Mothers Who Fail to Protect Their Children: Accounting for Private and Public Responsibility” in Julia E Hanigsberg & Sara Ruddick, eds, *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Boston: Beacon Press, 1999) 31.

<sup>164</sup> Martin Silverstein & Roberta Spark, “Social Bridges Falling Down: Reconstructing a 'Troublesome Population' of Battered Women through Individual Responsibilization Strategies” (2007) 15:4 *Crit Criminol* 327.

<sup>165</sup> Melanie Randall, “Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming” (2010) 22:2 *CJWL* 397; Lise Gotell, “Third-Wave Anti-rape Activism on Neoliberal Terrain: The Garneau Sisterhood” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 243.; Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22 *CJWL* 435.

<sup>166</sup> Isabel Grant, “Intimate Partner Criminal Harassment”, *supra* note 50.

<sup>167</sup> *Director v APM and KAB*, *supra* note 76.

responsibilities from state to individual, disproportionately impact already marginalized individuals and communities.<sup>168</sup> In the child protection context, the burden of removing children on the basis of witnessing domestic abuse falls heavily on women living in poverty, those who are living with disability, and those who are Indigenous.

In a number of cases, the Director made return of children contingent upon a mother leaving an abusive spouse and/or courts cited a mother's failure to leave an abusive partner as a ground for granting a CCO. For example, in *BN and DW*,<sup>169</sup> the mother's partner beat her in front of her child and Ministry staff insisted that she leave the abuser to prevent the child from being exposed to violence. The partner also violently spanked the child, leading to criminal charges. In granting a CCO, the judge criticized the mother for maintaining contact with her partner even after the child had been removed and for her "lack of attention to services available to reduce risk to her and her children".<sup>170</sup> Yet the mother indicated that she stayed with the abuser because she had "nowhere else to go."<sup>171</sup> In *APM and KAB*,<sup>172</sup> the Director cited "domestic violence" as a key concern and pointed to the mother's failure to follow through on attending a course "in order to deal with the continuing violent relationships in which she has been engaged".<sup>173</sup> The Director's concerns also included the mother's "housing instability" as she had no fixed address and was essentially homeless and living in shelters. However, the decision contains no

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<sup>168</sup> See David Garland, "Governmentality and the Problem of Crime" (1997) 1 *Theoretical Criminology* 173; Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865; Isabel Grant, "Intimate Partner Criminal Harassment", *supra* note 50. See also Susan Boyd & Rachel Treloar, "Family Law Reform in (Neoliberal) Context: British Columbia's New Family Law Act" (2014) 21:1 *Int J Law Policy Family* 77.

<sup>169</sup> *Director v BN and DW*, *supra* note 67 at para 84.

<sup>170</sup> *Ibid* at para 25.

<sup>171</sup> *Ibid* at para 113. See also *Director v APM and KAB*, *supra* note 76 [discussed above in relation to poverty]

<sup>172</sup> *Director v APM and KAB*, *supra* note 76.

<sup>173</sup> *Ibid*, para 51.

suggestion that poverty or lack of housing might also explain the mother's difficulty in leaving her violent boyfriend.<sup>174</sup>

Women are at greatest risk of being assaulted and even killed by violent male partners when they leave or attempt to leave a relationship.<sup>175</sup> Thus, when the state requires a woman to leave her relationship in order to maintain custody of her children, it is particularly important that the state ensure her safety in doing so. In fact, police and other social support systems too often fail to protect women and to provide necessary resources to make leaving a realistic option.<sup>176</sup> Providing safe housing to a woman who is trying to escape violence should be an absolute requirement on the part of the state before removing a child.<sup>177</sup>

The child protection system can create a Catch-22 for a woman who is deciding whether to report violence against her. A mother who fears that her child may be removed from her care is less likely to report the violence. This fear is not unfounded. A number of the child protection investigations and removals in this study began with a report of domestic violence.<sup>178</sup>

Mental disability adds another dimension to the gendered dynamics of domestic violence in child protection cases. Women with disabilities experience intimate partner violence at

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<sup>174</sup> *Ibid*, para 32.

<sup>175</sup> Isabel Grant, "Intimate Partner Criminal Harassment", *supra* note 50 at 558.

<sup>176</sup> *Director v AJ*, *supra* note 122; *Director v PS*, *supra* note 112; *Director v CD*, *supra* note 61; *Director v LW and RW*, *supra* note 76; *Director v BN and DW*, *supra* note 67. There are also a number of cases in which the Director argued spousal violence but in which the court declined to make a CCO at that time (e.g. they may make a supervision order or a "last chance" order instead): *British Columbia (Director of Child, Family and Community Service) v SS*, 2014 BCPC 398 [*Director v SS*]; *British Columbia (Director of Family and Child Services) v NH*, 2004 BCPC 302 [*Director v NH*]; *Director v MW*, *supra* note 76; *British Columbia (Director of Family and Child Services) v MASL*, 2003 BCPC 310 [*Director v MASL*]; *Director v KH*, *supra* note 76; *Director v CCS*, *supra* note 76; *Director v J*, *supra* note 154; *Director v APM and KAB*, *supra* note 76.

<sup>177</sup> Also, where a mother has successfully exited a violent relationship a court may decline to order a CCO. See, for example, *Director v SS*, *supra* note 176; *Director v NH*, *supra* note 176; *Director v MW*, *supra* note 76; *Director v MASL*, *supra* note 176.

<sup>178</sup> See for example *Re JRDP*, *supra* note 108. In that case, a call to police regarding a "domestic disturbance" led to her three-week old child's removal. See also *Director v NH*, *supra* note 176 (Child initially removed after father assaulted mother); *Director v APM and KAB*, *supra* note 76 at para 8 (Director first became involved after "domestic violence incident" for which father was arrested and incarcerated); *Director v CD*, *supra* note 61 at para 18 (Children removed after "domestic dispute" in which both parents were arrested); *Director v PS*, *supra* note 112 (Children initially removed over domestic violence concerns).

significantly higher rates than women without disabilities.<sup>179</sup> Of the 39 cases involving mothers identified in our sample as being victims of intimate partner violence, 36 of the mothers were also identified as having either a history of addiction, a mental disability or both.<sup>180</sup> Moreover, not only do women with disabilities experience intimate partner violence at higher rates,<sup>181</sup> but they may experience intimate partner violence differently than women who do not have disabilities,<sup>182</sup> in part due to the unique barriers women with disabilities face in accessing support and community resources when dealing with intimate partner violence.<sup>183</sup> Women with disabilities may have difficulty in making contact with shelters or other services. They are more likely to be financially dependent on their abusers and leaving a violent partner might involve losing financial security and housing.<sup>184</sup> They may also feel that they are more likely to be disbelieved by the police and judges should they complain about the violence against them and are unlikely to have a high level of trust that they will be protected from harm. Ironically, women with mental disabilities are less likely to be believed in criminal courts as victims of male

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<sup>179</sup> See Benedet & Grant, “Consent, Capacity and Mistaken Belief”, *supra* note 100.

<sup>180</sup> The remaining cases with domestic violence are: *Director v MRC*, *supra* note 66; *British Columbia (Director of Family and Child Services) v EF*, 2003 BCPC 406; *D v D*, *supra* note 56. In *D v D* at para 29 the court suggested that “there are concerns respecting [the mother’s] parenting capacity and abilities” but did not elaborate.

<sup>181</sup> See for example: Benedet & Grant, “Consent, Capacity and Mistaken Belief”, *supra* note 100 at 255, noting that Canadian studies on the prevalence of sexual assault unanimously find that women with disabilities, particularly mental disabilities, are at a two to ten times greater risk of physical and sexual violence than women without a disability. See also: Douglas A Brownridge, “Partner Violence Against Women with Disabilities: Prevalence, Risk, and Explanations” (2006) 12:9 *Violence Against Women* 805 at 817; Diane L Smith, “Disability, Gender and Intimate Partner Violence: Relationships from the Behavioral Risk Factor Surveillance System” (2008) 26 *Sex Disabil* 15 at 22.

<sup>182</sup> See e.g.: DAWN Canada, “Factsheet: Women with Disabilities and Violence” (2014), online: DAWN Canada <<http://www.dawncanada.net/issues/issues/fact-sheets-2/violence/>> [DAWN Canada, “Women with Disabilities and Violence”]; Sara-Beth Plummer & Patricia A Findley, “Women With Disabilities’ Experience With Physical and Sexual Abuse: Review of the Literature and Implications for the Field” (2012) 13:1 *Trauma, Violence, & Abuse* 15 at 26 [Plummer & Findley, “Women with Disabilities”].

<sup>183</sup> See e.g.: DAWN Canada, “Women with Disabilities and Violence”, *supra* note 182 which identifies barriers such as difficulty making contact with shelters or intervention services, lack of access to information about available services, difficulty accessing transportation, fear of losing financial security, housing or welfare benefits, and fear of being institutionalized; Plummer & Findley, “Women With Disabilities’” *supra* note 182 at 23.

<sup>184</sup> DAWN Canada, “Women with Disabilities and Violence”, *supra* note 182; Plummer & Findley, “Women With Disabilities” *supra* note 182 at 23-24. See also: Betty Jo Barrett & Melissa St Pierre, “Variations in Women’s Help Seeking in Response to Intimate Partner Violence: Findings From a Canadian Population-Based Study” (2011) 17:1 *Violence Against Women* 47 at 64.



violence, yet those same claims of violence are often the basis for removing their children in the child protection context.<sup>185</sup>

The prevalence of domestic violence in these cases is alarming and speaks powerfully to the intersection of poverty, disability and gender. The failure of the criminal justice system to respond adequately to male violence against women only aggravates the impact on women in the child protection system who are seeking to retain custody of their children.<sup>186</sup> So long as we blame domestic violence on its victims, and fail to provide material supports like safe housing for these women, it is likely that they will continue to lose their children. It is to this question of support that we now turn.

#### **(v) Failures of State Support**

A central question about support services looms large in so many of these cases: to what degree is the state responsible for providing the necessary supports that would enable mothers to parent their children. We focus on two issues. First, what is the extent of the state obligation to support mothers who are struggling to raise their children and second, what is the appropriate response of the courts where women are not cooperative in accepting and following through with Ministry supports? This latter question arises most often in the context of “soft supports” such as parenting or other programs the Ministry believes could improve the mother’s parenting or change her “lifestyle”.

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<sup>185</sup> See: Benedet & Grant, “Consent, Capacity and Mistaken Belief”, *supra* note 100; Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52 McGill LJ 515.

<sup>186</sup> See The Honourable Donna Martinson QC & Dr Margaret Jackson, “Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts – FINAL Research Report” (14 January 2016), online: FREDA centre <<http://www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>>.

The *CFCSA* states as a Guiding Principle that “(c) if, with *available support services*, a family can provide a safe and nurturing environment for a child, support services should be provided”.<sup>187</sup> As it stands, available support services presumably vary widely depending on location in the province. While courts are clear that the state obligation to provide supports is not unlimited, the extent of the state obligation remains unclear.

Judges often refer to the lack of support uncritically as if it is a fact of the mother’s life and not a more systemic failure. In *RM*,<sup>188</sup> the young Indigenous mother had an intellectual disability. The judge described her situation as follows:

She is in a particularly difficult situation because she is of such limited intellectual or social abilities, not meaning to be harsh to her, that employment is a real difficulty for her. I cannot imagine, in a time when [sic] British Columbia where unemployment rates are often in the ten percent range and where they are in the sixty or seventy percent on most aboriginal reserves, that RM would ever be able to obtain a job. Because she cannot meet the requirements for social assistance, having not been away from her parents for two years, her financial life is unimaginable. How R has managed to avoid the world of the homeless or the drug addicted or life on East Hastings is a bit of a miracle. As I say, I cannot imagine anyone employing her. If she survives the two years to social assistance, she can only do it either by selling the virtues of a young woman or being involved in serial relationships with others who can provide some of her basic needs for at least shelter and food. The latter appears to be the case.<sup>189</sup>

Here the judge speculates that this young Indigenous mother with a disability may have to turn to prostitution to support her child rather than demanding *anything* of the state in the way of resources. Her relationships are described merely as a means of obtaining her basic needs for

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<sup>187</sup> *CFCSA*, *supra* note 17 at s 2 [emphasis added]. See e.g.: *Director v RM*, *supra* note 104 at para 38 where the court notes that “the support services available to help the mother are not endless. The support services cannot provide the primary care and protection for the child and the mother needs to be capable of meeting the needs of her child.” See also *British Columbia (Director of Child, Family and Community Services) v DM*, 2004 BCPC 476 at paras 69-71 where the court notes that the Director’s secondary function, on top of ensuring the safety and well being of the child, is “to provide family support and assist the family in being able to properly protect the child...[but] the Director chose not to put any resources on their secondary mandate. That is always a judgment call.” See also the leading case in Nova Scotia, *Nova Scotia (Minister of Community Services) v LLP et al*, 2003 NSCA 1 at para 7 where the court outlines a variety of remedial and supportive services.

<sup>188</sup> *British Columbia (Director of Family and Child Services) v RM*, 2004 BCPC 242 [*Director v RM* (2)].

<sup>189</sup> *Ibid* at para 5.

shelter and food. Aside from the obvious disrespect towards this mother in this passage, the state's responsibility for this woman's dreadful circumstances is not acknowledged.

As we have described above, women are often blamed for unstable or lack of appropriate housing or other resources, which are constructed as lifestyle choices rather than as a failure on the part of the state.<sup>190</sup> For example, in *SG* where stable housing was an issue, finding a home for a family of five was acknowledged as a significant challenge:

As to the Director's concern that these parents lack stable housing, this is of some significance. From early on, the Director and the various social workers involved in this case stressed the need on the part of his parents to establish a stable residence appropriate for a family of five. ... The parents achievement of this goal of stable housing has been negatively affected by a number of factors, including talk of living separate and apart, lack of income, perhaps the father's criminal background, probably a lack of supply of housing within their budget, and I think based on all the evidence I have heard and reviewed, feeling on the part of both parents of being overwhelmed by the demands of the whole process of seeking reunification with their children.<sup>191</sup>

The case law suggests that there are limits on how much support can be provided to facilitate a mother's ability to care for her children. The decision in *AJ*, for example, cites an earlier case indicating limits to state obligations to support women in their role as mothers:

Cases dealing with the mental capacity of a parent to properly look after his/her child must be looked at individually. There are cases where, with proper support, such a parent can adequately care for a child. Such support resources are not infinite, but where reasonably possible they should be applied. If the level of support resources required to properly meet the protection concerns of a child becomes too high, then it cannot be said that the parent has the capacity to meet the child's needs. The support services should not become the primary caregiver for the child.<sup>192</sup>

At some point, then, the level of support needed will be seen as so significant that it undermines the mother's status as primary caregiver. The difficult question is how to determine what

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<sup>190</sup> *Supra* notes 76, 78, and 84.

<sup>191</sup> *Director v SG and CP*, *supra* note 122 at para 36.

<sup>192</sup> *Director v AJ*, *supra* note 122 at para 9. This passage cites approvingly from *Director of Family and Child Services v SD* [1999] BCJ No 2914 at para 20.

constitutes a “reasonable” level of support and at what point the needs of the mother for support become so great that removing the child is seen as preferable to providing more support? The notion that a certain level of support may render a parent no longer the “primary caregiver” has concerning implications for persons with disabilities to be parents, particularly if they are poor. What it means to be a parent is understood strictly in relation to a norm that does not include disability, but rather one in which autonomy and independence from state support are understood as hallmarks of “good” parenthood. For example, the fact that a woman who is quadriplegic may need support with virtually all physical aspects of parenting does not, and should not, undermine her role as mother and as primary caretaker. The question of how much is too much arises most starkly in cases where a woman requires significant one-on-one support over a long period of time in order to parent her child. When the support needs reach this level, judges are more likely to order a CCO.

The individualistic focus on primary care could easily be extended to preclude the appointment of a person to assist the parent, even when it may enable the parent to remain in the child's life.<sup>193</sup> Yet in the context of post-separation parenting, shared parenting of some sort is generally preferred with the goal of keeping each parent involved with the child, even when one parent has been less than fully committed to the child's care in the past.<sup>194</sup> In the child protection context, in contrast, even where there are potential shared parenting relationships within the mother's own family, they may be rejected by courts. For example, in *MDC*, both the paternal grandparents and the maternal aunt were parties to the application seeking custody of the two

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<sup>193</sup> See, for example, the case of “Christie”, a mother with schizophrenia, who was able to develop a shared parenting arrangement with her own parents, in Claudia Malacrida, “Negotiating the Dependency/Nurturance Tightrope: Dilemmas of Motherhood and Disability” (2007) 44:4 *Canadian Review of Sociology* 469 at 488 [Malacrida, “Negotiating the Dependency/Nurturance Tightrope”].

<sup>194</sup> See Nicholas Bala, “Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law” (2015) 40:2 *Queens LJ* 425 at 435-436; Susan B Boyd, “Joint Custody and Guardianship in the British Columbia Courts: Not a Cautious Approach” (2010) 29:3 *Canadian Family Law Quarterly* 223.

children involved, although the grandparents only sought custody of the one child who was their granddaughter. The expert witness was “satisfied that both parents are genuinely interested in assuming responsibility” and noted that the parents would benefit from home care and regular respite.<sup>195</sup> However significant support would be required for the mother to raise her children:

Dr. Lea was very pointed and direct in his opinion that the mother was not capable of parenting children on her own. He said that she would require the assistance of an individual who would be dedicated to giving the next fourteen to sixteen years to help the mother and to be prepared to do the heavy lifting in parenting.<sup>196</sup>

In fact, the mother was already receiving help from friends and family with a number of tasks and clearly her family was motivated to support her in parenting. However, in their testimony the family members downplayed the amount of support the mother required, perhaps because they believed that this would help her to retain custody. Although the aunt was willing to assist her sister, the judge concluded that she did not have enough insight into her sister’s “shortcomings and failures” as a parent<sup>197</sup> and criticized her for wanting the mother to be the primary caregiver.<sup>198</sup> The judge was not willing to separate the girls and thus ruled out the application by the grandparents even though there could be no guarantee that the children would be kept together after a CCO. No consideration was given to the possibility of combining resources amongst these various parties. Instead the Director’s plan to find adoptive parents for the two children was accepted without scrutiny. In ordering that her relationship with her children be permanently severed, the judge made the following comments:

I cannot help but have a level of sympathy for the mother. I recognize that in her own mind the mother genuinely believes she can provide a good home for these two young children. The mother needs to be commended for maintaining her contact with Ms. McAllister and taking some steps to bring some stability to

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<sup>195</sup> *Director v MDC*, *supra* note 76 at para 40.

<sup>196</sup> *Ibid* at para 43.

<sup>197</sup> *Ibid* at para 92.

<sup>198</sup> *Ibid* at para 102.

her life. I am also mindful that the visits with the children have generally been positive and that Ms. M. clearly loves her children. However, there is clearly a significant difference between caring for children during 1 to 2 hour a week supervised access visits and parenting children on a full-time basis.<sup>199</sup>

The fact that the children were removed from her care at birth meant that the mother had never had an opportunity to bond with the children nor to demonstrate whether she could, with support, parent them. It was not her choice to only see her children on supervised access visits.

In several other cases, the idea of a full-time support worker was rejected out of hand. For example, in *BG and VK*,<sup>200</sup> the court referred to a psychologist's report stating that the mother would need a "responsible adult to ride shotgun over her parenting almost continuously".<sup>201</sup> The judge clearly believed that this requirement meant that a CCO was inevitably the appropriate outcome. Similarly, in *CDS*,<sup>202</sup> the court observed:

It is clear that she has periods where she functions better than at other times, but even when she is functioning at what would appear to be her highest level, in my view she is not functioning to a level which would permit her to parent even with supports in place. She would effectively need a 24-hour-a-day co-parent in order to raise a child.<sup>203</sup>

Some cases stress that the child requires "constant monitoring" and that the mother is not up to that task. In *LW and RW*,<sup>204</sup> for example, the court cited a foster parent's evidence of what it would take to adequately parent the special needs child:

In his evidence, J.B. outlined the factors which in his opinion would make easier the return of the child with special needs. Those include a two-parent family with one parent available at home; consistent supervision over the next 7 to 8 years; stability in the home; consistency; a nurturing environment to address needs for instant gratification and the ability to provide consistent care 24 hours a day, 7 days a week and not simply day care.<sup>205</sup>

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<sup>199</sup> *Ibid* at para 123.

<sup>200</sup> *Director v BG and VK*, *supra* note 74.

<sup>201</sup> *Ibid* at para 3.

<sup>202</sup> *British Columbia (Director of Child, Family and Community Service) v CDS*, 2011 BCPC 467.

<sup>203</sup> *Ibid* at para 11.

<sup>204</sup> *Director v LW and RW*, *supra* note 76.

<sup>205</sup> *Ibid* at para 100.

It is clear from this analysis that no single mother on her own could meet this child's needs nor could any parents without significant financial resources. This approach essentially suggests that a stay-at-home mother family configuration was the only way this mother could maintain her parental relationship.

Beyond the question of how much support is needed, the cases reveal considerable concern on the part of judges with respect to the mother's willingness to cooperate with those providing support.<sup>206</sup> The refusal to participate in multiple parenting programs was a consistent theme and one that contributed significantly to decisions to remove children from their mothers. In addition to courses in parenting, women were advised to attend courses for drug and alcohol dependency, anger management, self-esteem workshops, or counseling for their choices of friends or partners. If they did not comply with the advice, they were criticized regardless of the actual connection to the parenting question. In *KLR*,<sup>207</sup> for example, much of the Director's case in favour of the CCO was based on the mother's failure to comply with the Director's conditions. The judge described the mother's argument that this focus was inappropriate:

Counsel for the Respondent stresses that it is the child's interest that needs to be considered first, not meeting the dictates of a powerful state agency. He notes that much of the case for the Director focused on how the Respondent did not comply with the demands made on her by the Director, and that is not what the CFCSA asks the court to consider in making a decision of this nature. He is critical of the Director's position of "three strikes, you're out" and of how the Director has ceased any measure that would assist in reuniting the children with the Respondent. He argues that the present reality is that the Respondent is ready, willing and able to parent these children despite her past and despite the

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<sup>206</sup> Distrust can also be a two-way street with the Ministry ceasing to be supportive in helping a mother improve her situation. See, for example, *Director v CB*, *supra* note 67 at para 110 where the trial judge denied a last chance order in part because "the climate of mistrust which exists between the Director and [the mother] makes it unlikely that little, if anything, will change in the next six months". One judge describes a situation where "in some cases, the Director withdraws from the parent once the application for a continuing custody order has been made." See *Director v AM*, *supra* note 45 at para 78. In *Director v GM*, *supra* note 56 at para 101, the judge found that social workers had disregarded court orders for access and had failed to take steps to facilitate the children remaining in the family.

<sup>207</sup> *Director v KLR*, *supra* note 74.

fact that she has not done things according to how the Director would have liked.<sup>208</sup>

The children were returned to the mother because she had overcome her addiction, was gainfully employed and in a stable relationship.<sup>209</sup>

Where mothers *have* complied with treatment programs, but make mistakes subsequently, a conclusion is drawn that they have not tried hard enough or failed to adequately retain enough information. It is important to consider in assessing a mother's refusal to participate in programs, whether they are appropriate for her particular circumstances. In *RM*,<sup>210</sup> for example, a case involving a young Indigenous mother with an intellectual disability, the judge described the inevitable failure of the mother in a particular program:

She goes into Second Stage, a housing project for young mothers who are having trouble parenting, and it is a loving and supporting environment. It is strict. It has rules and particularly for a young, possibly an FAE/FAS aboriginal, it must have been a fairly complex structure for her to cope with. She herself describes her upbringing as pretty chaotic so the mere transition to Second Stage, even though well-intentioned, I think probably was doomed to failure. There, at Second Stage, within a period of a couple of weeks, RM simply horrified everybody who came into contact with her. Her parenting skills were very, very minimal.<sup>211</sup>

This statement surely begs the question of why this mother was put into a program where failure was apparently inevitable. The young mother in this case was also bounced from one social worker to another. In the words of the judge "every time [she goes] to see the Director, it is a different face."<sup>212</sup> The judge stressed that the mother was not hurting her child nor exposing her child to violence but rather was someone who needed significant supports to parent. The judge acknowledged that the concept of assisted or shared parenting might have been plausible for her:

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<sup>208</sup> *Ibid* at para 40.

<sup>209</sup> *Ibid* at para 50. In reaching this conclusion the judge stated, "Surely however, the Respondent's past cannot serve as a permanent bar to the return of her children in a case such as this one where the Respondent has made very significant deposits in the bank of positive lifestyle change" (para 51).

<sup>210</sup> *Director v RM (2)*, *supra* note 188.

<sup>211</sup> *Ibid* at para 8.

<sup>212</sup> *Ibid* at para 10.



In an ideal world, it is a shame that R. and her child could not be placed together in the home of, say, a fifty-year-old Nisga grandmother of strong character and who, with the power of a matrilineal society, would be able to simultaneously raise them together so that R. would be able to have those bonds of ties and affection with her child, yet her special needs could be met while the child could be raised in safety and security<sup>213</sup>

This privatization of the responsibility to provide adequate supports meant that because no family member was available, a CCO was granted to the Director. No expectation was made that the Director should support or help develop a shared parenting agreement.

In *TN*, a case involving a 21-year-old Indigenous mother,<sup>214</sup> the Director sought a CCO for a two-year old child, citing “the mother's limited intellect, her chaotic lifestyle, her lack of family support and her inability to absorb and benefit from the numerous programs and help that have been made available to her”.<sup>215</sup> Much of the evaluation of the mother was based on her lack of enthusiasm for, and irregular attendance at, parenting programs. She was repeatedly criticized for spending time focusing on her own daily crises as opposed to the goals of the parenting program.

The mother in this case may well have struggled to be the sole caretaker of the child in question but no other options were explored. She had a significant intellectual disability and was sent to multiple parenting programs, shuffled among multiple social workers, and criticized for paying attention to the (not insignificant) problems in her own life. Despite the extensive involvement of social services in her life, there is little evidence that material supports were provided, such as help within the home, stable housing and so on. One of the parental capacity assessments concluded that the mother was able to parent and nurture her son and focused on the progress that she had made in overcoming an abusive childhood and in remaining clean and

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<sup>213</sup> *Ibid* at para 16.

<sup>214</sup> *Director v TN, supra* note 76.

<sup>215</sup> *Ibid* at para 40.

sober. As the court describes, this assessor was critical of how the Ministry had interacted with the mother:

The ministry's approach to Ms. T.N. failed to appreciate her limiting deficits and an inherent aboriginal distrust of the child protection authorities. Dr. Howes felt that there are too many social workers and that too much information was given to Ms. T.N. She said that expectations were unrealistic. She was of the view that existing aboriginal agencies would assist T.N. and that these agencies would be the best source of ongoing support for her.<sup>216</sup>

The judge also noted that the mother had connected to her aboriginal culture and that the aboriginal community agencies were available to help her parent. Nonetheless, another maternal capacity report was accepted over this more encouraging one and the judge concluded that the mother was unable to care for her child. While some of the parenting programs were apparently culturally appropriate, no mention was made of whether they were appropriate for a mother with a significant intellectual disability. Instead, the mother was held solely responsible for her failure to comprehend and retain what was being taught.<sup>217</sup>

Nor are judges rigorous about requiring evidence that such programs have a high "success" rate in terms of helping people escape violence, drug addiction and poverty. Rather, it is assumed that these programs work and that parents who fail to cooperate are correspondingly unfit to parent.<sup>218</sup> In the context of domestic violence, it is assumed that male violence can be dealt with simply by teaching women not to choose abusive men. In *BP*,<sup>219</sup> a CCO was granted on the basis that the mother had made bad "choices" about men, and she used marijuana. It was important to the judge that she would not go to counselling to deal with her problem in choosing inappropriate partners:

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<sup>216</sup> *Ibid* at para 38.

<sup>217</sup> *Ibid* at para 21.

<sup>218</sup> See for example *Director v APM and KAB*, *supra* note 76 at para 51.

<sup>219</sup> *Director v PB*, *supra* note 112

Although she is without a partner at present and says she won't let someone else control her life that way again, she has done nothing to change what was in her to pick out such a partner and to stick with him. This refers, of course, to the lack of long term counselling.<sup>220</sup>

The cases reveal little evidence of judges questioning the validity of a program or treatment generally or the reasons to expect it to be successful in the particular case. Nor do judges interrogate whether a particular program was well-suited for the woman in question given either her level of intellectual functioning or other disability and her culture.

Women who do not accept help from treatment programs thus fare poorly in the child protection system. As we have seen, distrust by many of the women in our sample of soft supports, such as parenting courses or counselling, often results in mothers rejecting offers by the state of this type of assistance. This distrust and lack of participation in turn can result in women being labelled uncooperative, which may lead to negative inferences being drawn about their capacity to parent. The final trigger for the CCO application may be something that is not inherently harmful to the child but rather something that demonstrates the mother's lack of cooperation with the Ministry, such as leaving the jurisdiction with the child.<sup>221</sup>

Implicit in these decisions is the suggestion that any conscientious parent would agree to participate in whatever programs the Ministry recommends. Yet these refusals must be seen in the context of the lives of women who have been subject to high levels of state surveillance and intervention, and repeated judgments about their various inadequacies, especially as mothers. Requests for support may in fact be what triggered past child apprehensions. Many mothers understandably see the Ministry and related "helping professionals" with skepticism and distrust. Given that the Ministry may have removed a woman's children multiple times and, in many

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<sup>220</sup> *Ibid* at para 128.

cases, removed the woman herself from her own mother, it is not surprising that social workers may be seen not as a source of support but rather as a potential threat. This suspicion may be particularly apt for Indigenous women given the long history of state intervention and dislocation of Indigenous children at the hands of child protection authorities.<sup>222</sup>

## Conclusions

Several trends in the case law are particularly troubling. First, child protection law is not supposed to be interpreted in a way that compares a child's actual family situation to that of another family that may be superior due, for instance, to more economic resources.<sup>223</sup> If this approach prevailed, children with disabilities could often be removed from the care of poor, single women and given to families with greater economic resources. As one judge noted, "if it were a competition between the foster mother, and the biological mother... rarely would we return the children [to their mother]."<sup>224</sup> Instead, a child is only supposed to be removed because of a parent's absence or harm (or risk of harm) to a child or inability or unwillingness to care for the child.<sup>225</sup> In practice, however, comparisons seem to occur, for example, to what a foster parent can offer. In cases involving children who have been identified as "special needs", in particular, comparison to more affluent parents and their capacity for "extraordinary" parenting may be explicit. A child should be placed with his or her parent if that is a safe option even though there may be a family better equipped to care for the particular child. For instance, the

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<sup>222</sup> See Pivot Legal Society, *Broken Promises*, *supra* note 25 at 25-29.

<sup>223</sup> See e.g.: *Children's Aid Society, Hamilton-Wentworth v M(M)*, [1992] OJ No 1704, 35 ACWS (3d) 74 at para 58 where the Judge notes that the mother was unfairly judged "by middle class standards of behaviour that may not have been appropriate standards for a person living in poverty." See also: *Director v MB*, *supra* note 74 at para 54 where the Judge notes that "if the family can provide a safe and nurturing environment for the child, then it will be in the best interests of the child to be in the family home, even if the foster home could provide an even more safe and nurturing environment... The child protection hearing is not a contest between foster parents and natural parents."

<sup>224</sup> *British Columbia (Director of Child, Family and Community Service) v AW*, 2007 BCPC 150.

<sup>225</sup> *CFCSA*, *supra* note 17 s 13.

court in *TR* was willing to concede that care by the mother was better than a stranger adoption: “If our society is not prepared to maintain the current very high level foster placement, then this Court is convinced that the mother should be given one last chance” and willing to acknowledge the tremendous gains the mother had made in pulling her life together.<sup>226</sup> Yet because an existing foster family was prepared to adopt, the child was not returned to the mother.

Second, there appears to be an unspoken assumption that children who are apprehended by the state will end up in “better” circumstances than those from which they were removed. The overwhelming majority of these cases do not mention the risks of children in care being shuttled from one foster home to another, living alone in hotels or children dealing with the trauma of losing a parent and possibly their extended family. Nor is the potential for abuse, sexual violence and neglect in state care mentioned. The idea that children will necessarily thrive if taken from their mothers is simply false.<sup>227</sup> The fact that almost 1/3 of the mothers in our study had themselves been in state care as children demonstrates the intergenerational impact of the child protection system on families. Third, and related to the second, judges do not require a high degree of specificity about the plan for the child’s future after the CCO is ordered. The cases contain vague statements like the Director “hopes” to keep multiple children together in the adoption process, but rarely is there any certainty that the children will be placed in a permanent

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<sup>226</sup> *Director v TR*, *supra* note 122 at para 39

<sup>227</sup> British Columbia's Child Advocate, Mary Ellen Turpel-Lafond, provided the following statistics about children in the care of the Ministry in a recent interview: "More than 2,000 children were critically injured between July 2007 and September 2015 and 814 kids have died." See "B.C. children's watchdog slams report on Children's Ministry", *The Globe and Mail* (29 April 2016), online: < <http://www.theglobeandmail.com/news/british-columbia/bc-childrens-watchdog-slams-report-on-childrens-ministry/article29803350/>>. In one of the cases in our study, for example, a child was taken from his mother and suffered a devastating, "life-shortening", "non-accidental" injury while in foster care which included permanent brain damage and permanent visual impairment requiring around-the-clock care. Very few details were given other than to say criminal proceedings were underway. *Director v GM*, *supra* note 56. The judge ordered that the child not be placed for adoption so that the mother could have ongoing access to the child in foster care.

home or that siblings will be kept together.<sup>228</sup> Particularly given the high number of children with “special needs”, and the difficulty in placing such children for adoption, many will remain in the foster care system until they age out.

Finally, perhaps the most dominant theme in these cases is that women are blamed and found responsible for the desperate social circumstances in which they find themselves, often related to poverty, mental disability/addiction, homelessness, male violence, the intergenerational impact of the child protection system and the tragic legacy of residential schools and the removal of Indigenous children from their families.<sup>229</sup> A pervasive and long-standing ideology that blames mothers for anything that is seen as wrong with their children influences judicial decision-making in various legal fields.<sup>230</sup> Marlee Kline also argued that this individualized approach to responsibility means that child protection workers are trained to find solutions for a mother’s problematic activity rather than to “develop responses to problems of poverty, racism, and violence, and the way these affect women’s lives.”<sup>231</sup> Mothers in the CCO decisions that we studied are expected to always put their children’s interests above their own, while at the same time they are expected to work hard to improve their own, often dismal, circumstances. This standard is particularly difficult to meet for women who are struggling with poverty, mental disability/addiction, and male violence, as so many mothers in our study were. By the time mothers arrive at this final stage of the child protection process, their parental status has already been seriously undermined through previous apprehensions, court orders, and reports

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<sup>228</sup> See for example *British Columbia (Director of Child Family and Community Service) v KBW*, 2015 BCPC 14 at para 122 where the Ministry was “hopeful that at present there may be a family willing and able to take all three Children together”. For an exceptional case where the judge was concerned about the lack of specificity of the Director's plan see *Director v SS*, *supra* note 176, where the judge, in refusing to grant a CCO, noted that removing the child from her ongoing foster home to carry out the Director's plan for permanent adoption at the same time as severing her relationship to her mother would be emotionally harmful to the young girl

<sup>229</sup> Kline, “Child Welfare Law”, *supra* note 70; Truth and Reconciliation Commission Report, *supra* note 5.

<sup>230</sup> See Boyd, “Motherhood and Law”, *supra* note 9.

<sup>231</sup> Kline, “Complicating the Ideology of Motherhood”, *supra* note 8 at 320.

that criticize their parenting. They may be blamed for not bonding with their children despite the fact that they may have rarely, and sometimes never, had custody of those children or have only spent time with them under strict supervision in very limited settings. They are also blamed for failure to cooperate with the very Ministry that is attempting to remove their children.

In her 1995 article, Professor Mosoff recommended, quite modestly, “simply that judges act as they do on other matters and scrutinize the evidence of experts in child welfare cases with the same rigour as they would in other proceedings.”<sup>232</sup> We would also suggest that more attention needs to be paid to the possibility of support systems that might allow more mothers to be parents to their children.<sup>233</sup> A mother’s relationship to her child should only be severed when remaining with her is an utterly unacceptable option; not where remaining with the mother is simply not the best option. Safe and affordable housing may allow women to escape from violent relationships. Child care and adequate respite for single mothers can be key, as well as advocacy in facilitating access to various social support systems. Where possible, some form of shared parenting between a mother and a relative or foster parent can also be a positive strategy.<sup>234</sup>

Leaving a child with his or her parent may sometimes involve a certain amount of risk in the sense that one cannot be certain that a parent will be able to rise to the occasion. We believe that, in calculating that risk, and in assessing whether it is too great to warrant leaving the child with the mother, the risks that are involved in removing children from their parents must also be weighed in the balance. Instead of a one-sided calculation, where only one type of risk is examined by the courts, judges need to demand more evidence that the risks of apprehension will not harm the child. As one judge astutely noted, “the best of foster care is not always better than

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<sup>232</sup> Mosoff, “Motherhood, Madness, and the Law”, *supra* note 1 at 111-112.

<sup>233</sup> E.g. Westad & McConnell, “Child Welfare Investment”, *supra* note 33; Hollingsworth, “Child Custody Loss”, *supra* note 33.

<sup>234</sup> See example of Christie co-parenting with her parents in Malacrida, “Negotiating the Dependency/Nurturance Tightrope”, *supra* note 193 at 488. See also Pivot Legal Society, *Broken Promises*, *supra* note 25 at 43.

a sub-par home with a natural parent.”<sup>235</sup> Acknowledging the risks to children that can accompany CCOs, and the devastating intergenerational effects of the child protection system on families, might lead policy makers to be more willing to go further with respect to material and other supports to keep families together. By examining risks, we do not mean comparing the advantages of another family over that of the mother, but rather avoiding the assumption that the child will end up in a safe environment if removed from the mother.

Overall, our findings support the recommendations of others<sup>236</sup> that better child protection practices and outcomes cannot be accomplished simply through legislative changes, but also require the resolution of social problems that have been named many times: addressing women’s and children’s poverty; providing necessary services for survivors of abuse and people with disabilities; dealing with Aboriginal claims for self-determination. We also urge that courts be given more power under the *CFCSA* to order that additional services be provided to support parents. A judge should not be permitted to order a CCO until he or she is confident that all support options have been exhausted. Recognizing the difficult decisions that must often be made in these cases, we would urge that judges do whatever remains in their power to ensure that, where possible, children remain in the care of their mothers.

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<sup>235</sup> *Director v KH*, *supra* note 76.

<sup>236</sup> Luther, “Poverty of Responsibility”, *supra* note 36; Pivot Legal Society, *Broken Promises*, *supra* note 25.