

Sex workers and the best interests of their children:
Identifying issues faced by sex workers involved in custody and access legal proceedings

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Abstract

Sex worker parents often lose custody of their children. The purpose of this research was to determine what impact the status of a parent as a past or present sex worker has had on judicial decision-making in custody and access disputes.

Through doctrinal legal research, I explored judicial treatment of sex worker parents in custody and access disputes in Ontario Child Protection and Family Law case law. Parental involvement in sex work was often presented as an unfavourable aspect of the parent, or otherwise had a negative influence on their claim. Sex work was treated as a negative quality in a parent rather than an aspect of their life warranting further factual exploration. I argue that stigma against sex workers appears to carry more weight in custody and access disputes than evidence concerning the impact that a parent's engagement in sex work has on a child.

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Introduction

I run a small legal clinic where I provide free summary legal advice for sex workers in cooperation with Maggie's: Toronto Sex Workers' Action Project ("Maggie's"). Maggie's is a non-profit organization run by and for sex workers in Toronto.

At first, I expected that most of my clients would seek advice in the criminal context. Following amendments to the prostitution provisions of the *Criminal Code* in 2014, it is no longer a crime to communicate in public for the purpose of selling sexual services in Canada. Sex workers nevertheless still risk running into trouble with the law.¹ For example, the *Criminal Code* prohibits communicating for the purpose of obtaining sexual services, meaning that clients of sex workers commit an offense with each transaction.² The *Criminal Code* also prohibits all communications regarding the commodification of sexual services near schools or playgrounds; stopping or impeding pedestrian or vehicular traffic for the purpose of selling sexual services; and advertising sexual services on behalf of another person (*i.e.*, a business partner).³

I was wrong. Many of my clients are mothers who are involved in or threatened with Family Law or Child Protection proceedings and fear losing their children if they are outed as sex workers. Unfortunately, I found it challenging to provide them with legal advice because I was unable to find any resources on the challenges a sex worker might expect to face during custody and access proceedings.

The purpose of this research was to understand the impact that parental engagement in sex work has had on custody and access proceedings in Ontario. My research question is as follows:

¹ In *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], the Supreme Court of Canada struck down provisions in the *Criminal Code*, RSC, 1985, c C-46 governing the commodification of sexual services for violating s. 7 of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² *Criminal Code*, *ibid*, s 286.2.

³ *Ibid*, ss 231 (1)-(2), 286.4, 286.5 (1)-(2).

In reported decisions from Family Law and Child Protection proceedings involving claims for custody and access, what impact has the status of a parent as a past or present sex worker had on judicial decision-making?

I explored judicial consideration and treatment of parental involvement in sex work in custody and access proceedings brought under Ontario Child Protection legislation (the *Child and Family Services Act* and the *Child, Youth, and Family Services Act, 2017*) and Family Law legislation (the *Children's Law Reform Act* and the *Divorce Act*).⁴

I found that, in many cases, judges appeared to rely upon stigma and assumptions about sex work and sex workers instead of on evidence about the specific sex worker parent, their work, and any impact on the child. Parents were often labeled as prostitutes early on in decisions, followed by seemingly adverse inferences about the sex worker's parenting abilities based on that status. I thus argue that stigma against sex work and sex workers appears to carry more weight in custody and access disputes than evidence concerning the impact that a parent's engagement in sex work has on a child.

Chapter 1 begins with an overview of the history of Canada's prostitution laws, followed by a description of what I have come to learn about sex worker parents. I explain the status of the emerging field of research on the intersections between parenthood and sex work, define key terms, and provide a glimpse of the diverse professional and personal lives of sex workers.

In Chapter 2, I describe my research method. Briefly, I took a positivist approach to doctrinal legal research to determine how a parent's status as a sex worker has been treated by Family Law and Child Protection courts from January 1, 2010 to March 2020.

Chapters 3 and 4 are the heart of this work. They contain legal analyses of case law that demonstrate how a parent's status as a sex work has been considered and applied in Child Protection and Family Law proceedings where custody and access of a child is disputed. In Chapter 5 I discuss key conclusions and observations and suggest areas for future research.

⁴ *Child and Family Services Act*, RSO 1990, c C.11 [CFSA]; *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sched. 1 [CYFSA, 2017]; *Children's Law Reform Act*, RSO 1990, c C.12 [CLRA]; *Divorce Act*, RSC, 1985, c 3 (2nd Supp) [Divorce Act].

Chapter 1 – Background

In this chapter, I set out the theoretical framework for my research question. I start with an overview of Canada’s past and present models of regulating prostitution under the *Criminal Code*.⁵ While my research concerns Child Protection and Family Law, criminal prostitution laws regulate the lives and careers of sex workers. I then define sex work, sex workers, and stigma, and describe the stigma experienced by sex workers.⁶

The balance is dedicated to literature by and about sex worker parents, including anthologies, blog posts, activist pieces, and academic (sociological and sociolegal) studies. We see that sex worker parents are abundant⁷ yet understudied;⁸ encounter high rates of stigma and scrutiny;⁹ suffer disproportionately high child apprehension rates;¹⁰ and often face at least one social, economic, or health impediment that can impede parenting.¹¹ However, there is a lack of literature regarding the legal impact of parental involvement in sex work on Child Protection and Family Law custody and access proceedings.

I conclude by explaining how my legal research contributes to the field of study on sex work and parenting. As I later describe in my methodology chapter, I explored this impact by reviewing judicial analyses within Ontario case law.

⁵ *Criminal Code*, *supra* note 1.

⁶ Emily van der Meulen, Elya M Durisin, & Victoria Love, eds, *Selling Sex: Experience, advocacy, and research on sex work in Canada* (Vancouver, BC: UBC Press, 2013) at 3.

⁷ Juliana Piccillo, “We’re here. We’re whores. We’re parenting.” (February 20, 2018) online: *Red Umbrella Babies: Sex work & Parenting, an anthology* <<https://www.redumbrellababies.com/single-post/2018/02/20/Were-here-Were-whores-Were-parenting>>.

⁸ Rebecca Bromwich & Monique Marie Dejong, eds, *Mothers, mothering and sex work* (Brampton, ON: Demeter Press, 2015) at 14.

⁹ See generally, Bromwich & DeJong, *ibid*.

¹⁰ Putu Duff *et al*, “Sex Work and Motherhood: Social and Structural Barriers to Health and Social Services for Pregnant and Parenting Street and Off-Street Sex Workers” (2015) 36:9 *Health Care for Women International* 1039 at 1040 [Duff *et al* (2015)].

¹¹ Susan Dewey, Treena Orchard & Kyria Brown. “Shared Precarities and Maternal Subjectivities: Navigating Motherhood and Child Custody Loss Among North American Women in Street-Based Sex Work” (2018) 46:1 *Ethos* 27.

Prostitution laws in Canada

1892-2014: Canada's former prohibition model

Up until 2014, the *Criminal Code* prescribed a prohibition model of regulating the purchase and sale of sexual services. Prohibition models work to eliminate prostitution based on the assumption that sex work is inherently violent and harmful.¹²

The *Criminal Code* did not explicitly prohibit the sale of one's own sexual services but contained broad prohibitions against almost every behaviour that a sex worker would have to engage in in order to enter into a transaction with a client. The following actions related to sex work were prohibited under the *Criminal Code* from its enactment in 1892 to 2014:¹³

- 1) In any manner, communicating or attempting to communicate in a public place or in any place open to public view with any person for the purpose of selling or obtaining sexual services.¹⁴
- 2) Keeping, being in, or having charge or control of a common bawdy-house.¹⁵ A "common bawdy-house" was defined as a place kept, occupied, or resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.¹⁶
- 3) Living wholly or in part on the avails of prostitution of another person.¹⁷ Known as the "pimping provision", this prohibition could theoretically capture employees of or family members living with sex workers.

The *Bedford* decision

In 2010, three sex workers from Ontario sought declarations that the following provisions of the *Criminal Code* governing prostitution violated their section 7 *Charter* right to life, liberty, and security of the person:

¹² John Lowman, "Crown Expert-Witness Testimony in *Bedford v Canada*: Evidence-Based Argument of Victim-Paradigm Hyperbole?" in Chapter 15 of van der Meulen, Durisin, & Love, *supra* note 6 at 233.

¹³ *The Criminal Code, 1892*, SC 1892, c 29; *Criminal Code, ibid*.

¹⁴ *Criminal Code, ibid*, s 213(1)(b) (repealed).

¹⁵ *Ibid*, s 210(1)-(2) (repealed).

¹⁶ *Ibid*, s 197(1) (repealed).

¹⁷ *Ibid*, s 212(1)(j) (repealed).

- 1) the prohibition against keeping or being in a common bawdy-house;
- 2) the prohibition against living on the avails of prostitution; and
- 3) the prohibition against communicating in public for the purposes of prostitution.¹⁸

Their application went before the Supreme Court of Canada (“SCC”) in 2013.¹⁹ The SCC held that all of the impugned provisions were inconsistent with section 7 of the *Charter*. First, the Court held that the harm suffered by sex workers as a result of the prohibition against keeping a bawdy house—preventing sex workers from working in safer fixed indoor locations and from resorting to safe houses—was grossly disproportionate to the purpose of deterring community disruption.²⁰

Second, the SCC held that the prohibition against living off the avails of prostitution, targeted at parasitic and exploitative pimps, was overbroad in that it also captured those who could increase the safety and security of sex workers, such as drivers, managers, bodyguards, accountants, receptionists, or anyone else involved in business with sex workers.²¹

Third, the SCC held purpose of the prohibition against communicating in public for the purpose of prostitution—taking prostitution off the street in order to prevent public nuisance—was grossly disproportionate to the negative impact the law had on the safety and lives of sex workers who were thus prevented from screening potential clients for intoxication and propensity to violence.²²

The Court ordered a declaration of invalidity for the three impugned decisions, suspended for one year to allow Parliament time to prepare amending legislation.²³

¹⁸ *Canada (Attorney General) v Bedford*, 2010 ONSC 4264.

¹⁹ *Bedford*, *supra* note 1.

²⁰ *Ibid* at paras 133-136.

²¹ *Ibid* at paras 139-144.

²² *Ibid* at para 159.

²³ *Ibid* at para 169.

In 2014, Parliament amended the *Criminal Code* to implement a Nordic model of regulating sex work that is in effect today.²⁴ The commodification of sex work remains criminalized, but the laws target purchasers of sexual services (*i.e.*, the clients of sex workers) instead of sex workers. Parliament replaced the provisions struck down in *Bedford* with the following offenses:

- 1) **Purchasing offense:** it is an offense to obtain the sexual services of a person for consideration or to communicate in any place for the purpose of obtaining the sexual services of a person.²⁵ Sex workers, however, are not prohibited from communicating about the sale of their own sexual services.²⁶
- 2) **Advertising offense:** it is an offense to knowingly advertise an offer to provide sexual services for consideration,²⁷ unless the advertisement relates only to the seller's own sexual services.²⁸
- 3) **Material benefit offense:** it is an offense to receive a financial or other material benefit obtained by or derived from the commission of a purchase of sexual services. Again, sex workers are exempted if they receive a material benefit from the sale of their own sexual services.²⁹

The material benefit offense does not prevent sex workers from entering into certain family and business relationships.³⁰ Exceptions include legitimate living arrangements (*i.e.*, children, spouses, roommates); legal or moral obligations (*e.g.*, supporting a disabled parent, or giving gifts); goods and services offered

²⁴ *Bill C-36, the Protection of Communities and Exploited Persons Act*, SC 2014, c 25 (assented to November 6, 2014). Of note, on February 21, 2020, Justice McKay of the Ontario Court of Justice declared that section 286.4 (advertising ban) violates s. 2(b) of the *Charter*, *supra* note 1, and sections 286.3 (procuring), and 286.2 (material benefits provision) violate section 7 of the *Charter*, all in manners that were not justified under s. 1. See: *R v Anwar*, 2020 ONCJ 103 at para 7. It remains to be seen whether a higher court will rule that the provisions are of no force or effect.

²⁵ *Criminal code*, *supra* note 1, s 286.1.

²⁶ *Ibid*, s 286.5(2).

²⁷ *Ibid*, s 286.4.

²⁸ *Ibid*, s 286.5(2).

²⁹ *Ibid*, s 286.2.

³⁰ *Ibid*, s 286.2(4).

to the general public (e.g., accountants, landlords, pharmacists, security companies); and goods and services offered informally for fair value (e.g., babysitting or protective services).³¹

Pre- and post-*Bedford*, the *Criminal Code* prohibits stopping or impeding traffic for the purpose of offering, providing, or obtaining sexual services for consideration and communicating with any person—for the purpose of offering or providing sexual services for consideration—in a public place, or in any place open to public view, that is or is next to a school ground, playground, or daycare centre.³²

As noted, Canada’s post-*Bedford* legislative scheme is known as a “Nordic Model” for controlling sex work. Under a Nordic Model, also implemented in Sweden, Norway, and Iceland, persons who sell sexual services are not subject to criminal sanctions, but their clients are.³³ Many sex workers are unhappy with Canada’s Nordic model.³⁴ Sex worker and activist Amy Lebovitch condemns Canada’s “terrible new laws”³⁵ that were developed without input from the community that would be governed by them. Bromwich & DeJong assert that the “intended normative effect” of a Nordic model is to “continue to stigmatize and socially condemn the sex trade but to shift the social stigma from the sex workers to the consumers.”³⁶ According to the Global Network of Sex Work Projects, Nordic models “do not reduce the scale of sex work, but they do make sex workers more vulnerable.”³⁷ Many sex workers are forced to operate and negotiate contracts with clients out of public view where they are at risk of violence and exploitation.³⁸ Nordic models “prevent[s] sex workers from working openly, and from receiving the benefits of labour law and contract law.”³⁹ Elements of regular (i.e., “legal”) employment—such as consistent income, regular hours, benefits such as paid time off for medical, family, or personal emergencies—are unlikely to be available.

³¹ *Ibid*, s 286.2(4)(a)-(d); Canada Department of Justice, Prostitution Criminal Law Reform: *Bill C-36, the Protection of Communities and Exploited Persons Act* – Fact Sheet (September 14, 2018) online: Government of Canada, Department of Justice <https://www.justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi/>.

³² *Criminal Code*, *ibid*, ss 213(1), (1.1), (2).

³³ Bromwich & DeJong, *supra* note 8 at 9.

³⁴ *Ibid* at 10.

³⁵ Amy Lebovitch & Shawna Ferris, eds, *Sex Work Activism in Canada: Speaking Out, Standing Up* (Winnipeg, Manitoba: ARP Books, 2019) at 13-14.

³⁶ Bromwich & DeJong, *supra* note 8 at 9.

³⁷ *Ibid* at 12.

³⁸ *Ibid* at 9-13.

³⁹ *Ibid* at 10.

Like prohibition models, an assumption behind Nordic models is that sex work is harmful to society. Publications from Parliament regarding the post-*Bedford* amendments perpetuate a harm-based view of sex work. Material published by the Department of Justice explaining the amendments confirms that the overall objectives of the new legislative scheme are to “protect those who sell their own sexual services; protect communities, and especially children, from the harms caused by prostitution; and reduce the demand for prostitution and its incidence.”⁴⁰ The publication explains that the government seeks to denounce and prohibit “the purchase of sexual services, ... and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies that offer sexual services for sale.”⁴¹

Government denunciation of sex work in the criminal context can have extended social and legal consequences for sex workers. Bromwich & DeJong argue that the overall governance of sex work extends beyond criminality and, directly or indirectly, into other regulatory regimes.⁴² I suggest that the stigma against sex work, in part perpetuated by the Nordic model of governance provided in the *Criminal Code*, has extended into Child Protection and Family Law proceedings.

A note on alternative models

There are other options for regulating sex work that Parliament can consider aside from prohibition and Nordic models. Certain Canadian politicians are currently advocating that Canada reconsider its approach. Laurel Collins, Member of Parliament for Victoria, British Columbia, recognizes the dangers that the current Nordic Model creates for sex workers by “criminaliz[ing] the environments and the very things that would keep the workers safe” and is pushing for Parliament to consider implementing a model that would work to protect sex workers from violence.⁴³

⁴⁰ Department of Justice, *supra* note 31.

⁴¹ *Ibid.*

⁴² Bromwich & DeJong, *supra* note 8 at 12-13.

⁴³ House of Commons Debates, 43-1, No 014 (February 4, 2020) at 881, 891 (Hon Laurel Collins).

New Zealand, for example, has decriminalized sex work.⁴⁴ In June 2003, New Zealand became the first country to decriminalize sex work with the passage of the *Prostitution Reform Act, 2003*.⁴⁵ The purpose of that Act was to “enable sex workers to have and access the same protections afforded to other workers” and had the following goals:

- safeguard the human rights of sex workers;
- protect sex workers from exploitation;
- promote the welfare and occupational safety and health of sex workers;
- create an environment conducive to public health; and
- protect children from exploitation in relation to prostitution.⁴⁶

Sex workers and their clients have the right to freely contract for services. They are able to implement effective safety measures, such as performing background checks on clients, and have employment rights. Professor Putu Duff, one of Canada’s leading academics on sex work and sex workers, recommends that Canada follow New Zealand’s lead and decriminalize sex work. According to Duff, “decriminalization would foster the collectivization and empowerment of sex workers and decrease exposure to workplace and partner violence and improving peer social support networks and access to care”.⁴⁷

[Sex work and sex workers](#)

I adopt the terms sex work and sex worker for this research, words advocated for by many activists within the sex worker community.⁴⁸ Incorporation of the words “work” and “worker” acknowledge that sex work is “socially legitimate, important, and valuable work.”⁴⁹

⁴⁴ New Zealand *Prostitution Reform Act, 2003* (NZ), 2003 No 28.

⁴⁵ New Zealand Parliament, “Prostitution law reform in New Zealand” (July 2012), online <www.parliament.nz/mi/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand>.

⁴⁶ *Ibid*. Regarding the protection of children, it is noteworthy that the New Zealand Parliament was concerned with protecting children from “exploitation in relation to prostitution”. In contrast, the Canadian Department of Justice sought broadly to protect children from “harms caused by prostitution.”

⁴⁷ Putu Duff *et al*, “The ‘Stolen Generations’ of Mothers and Daughters: Child Apprehension and Enhanced HIV Vulnerabilities for Sex Workers of Aboriginal Ancestry” (2014) 9:6 PLOS ONE e99664 at 1051 [Duff *et al* (2014)].

⁴⁸ See: Bromwich & Dejong, *supra* note 8; van der Meulen, Durisin, & Love, *supra* note 6; Lebovitch & Ferris, *supra* note 35

⁴⁹ Maggie’s, “Chapter 15: Maggie’s Toronto Sex Workers Action Project” in Lebovitch & Ferris, *ibid* at 221.

Bromwich & DeJong describe sex work as “the voluntary exchange of sexual services for money”.⁵⁰ Prostitution, in contrast, is “the exchange of sexual services for money, whether voluntary or involuntary” and can include victims of sex trafficking.⁵¹ *Sex work*, then, always requires a level of choice and agency. Many sex workers are pushing to have sex work recognized as valid and socially acceptable work and believe that lumping their work into a category that includes victims of human trafficking will hinder their fight for legitimacy.⁵²

Sex work is an expansive field that includes individuals with varying skill sets and from across the socioeconomic spectrum.⁵³ Bromwich & DeJong explain that sex work “has not always been lived in similar material conditions ... [and] has not been thought about the same way in all places and times, ... [creating] muddiness around the edges of the category of what constitutes and who is a sex worker.”⁵⁴ In fact, there are debates within the sex worker community about what counts as sex work. I recently had an informal conversation with a woman who considered herself a sex worker, but had been excluded from a particular support group for sex workers because her work, which took place exclusively online, was not considered to be sex work by the organizer. Despite debates and its diversity, it appears that *most* sex work that takes place today in Canada can be classified as either indoor sex work or outdoor (street-based) sex work.

Street-based sex workers solicit clients from outdoor locations such as street corners, alleys, and parks⁵⁵ and is considered to be one of the most dangerous type of sex work.⁵⁶ While most people may conjure images of street workers when thinking about sex workers, many studies suggest that only twenty percent or less of all sex work is street-based.⁵⁷

Indoor sex work can be classified as formal or informal. Formal indoor sex work occurs in formal sex work establishments, such as erotic massage parlours, strip clubs, burlesque, micro-brothels, professional

⁵⁰ Bromwich & DeJong, *supra* note 8 at 5.

⁵¹ *Ibid* at 5; Maggie’s, *supra* note 49 at 222.

⁵² Kate Sutherland, “Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade” (2004) 42:1 Osgoode Hall LJ 139.

⁵³ Bromwich & DeJong, *supra* note 8 at 5.

⁵⁴ *Ibid* at 5.

⁵⁵ Duff *et al* (2014), *supra* note 47.

⁵⁶ Rochelle L Dalla, “When the Bough Breaks ... : Examining Intergenerational Parent-Child Relational Patterns Among Street-Level Sex Workers and Their Parents and Children” (2003) 7:4 Applied Developmental Science 216 at 216.

⁵⁷ Satabdi Samtani & Elizabeth Trejos-Castillo, “Motherhood and Sex Work: A negotiation of identities” in Bromwich & DeJong, *supra* note 8 at 278; Rochelle L Dalla (2003), *ibid* at 216.

escort services, pornography studios, and other in-call locations.⁵⁸ Informal indoor sex work takes place in bars, saunas, and hotels open to the general public. Sugar babies, often young university students who are linked with adult partners (called Sugar Daddies or Sugar Mommies) who pay for tuition and other costs in exchange for dates would likely be classified as engaging in informal indoor sex work.⁵⁹ Some sex workers provide services exclusively online, such as through camming or other online chat services.⁶⁰

Many indoor sex workers, such as exotic dancers and cam girls, provide services of a sexual nature that would not likely be caught within the prostitution provisions of the *Criminal Code*.⁶¹ Such sex workers are nevertheless relevant to my research, as I am interested in the impact of stigma—including social stigma—against sex workers in Family Law and Child Protection courts. The scope of my work is not limited to impacts arising out of criminal prostitution charges or convictions.

Stigma

Almost all of the sex worker literature that I encountered discussed stigma. Feminist scholar Sara Ruddick explains that a person engages in stigmatization when they exclude someone from their designation of a standard human.⁶² Nancy Scheper-Hughes describes stigma as an “undesired difference” that “makes us turn away from another human being in fear, disgust, anger, pity, or loathing.”⁶³ She argues that stigmatizing “is the most anti-social of human acts, for it consigns the victim to a living death on the margins of human interaction.”⁶⁴

⁵⁸ Duff *et al* (2014), *supra* note 47 at 2.

⁵⁹ Bromwich & DeJong, *supra* note 8 at 6.

⁶⁰ PJ Starr *et al*, “Red Umbrella Babies: By Sex Worker Parents and Their Children” in Bromwich & DeJong, *supra* note 8 at 148-149.

⁶¹ While the *Criminal Code*, *supra* note 1, does not contain a prescribed definition of “sexual services”, it appears that the prostitution provisions are generally understood to apply to the purchase and sale of sexual intercourse, oral sex, and manual sex.

⁶² Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Boston, Massachusetts: Beacon Press, 1989) at xvi.

⁶³ *Ibid*, referring to Nancy Scheper-Hughes, *Death Without Weeping: The Violence of Everyday Life in Brazil* (Berkeley: University of California Press, 1993) at 373.

⁶⁴ *Ibid*.

Sex workers encounter high levels of stigma.⁶⁵ Author and activist Cheryl Auger argues that sex workers are constructed as “deviant, health or moral threats, or passive victims,”⁶⁶ cast aside by family members, policy makers, and authorities. Bruckert & Hannem assert that stigma-based assumptions about sex workers are “embedded in social structures and subsequently reflected in institutional policy and practice”,⁶⁷ leading sex workers to often suffer verbal abuse, public shaming, over policing, and violence.⁶⁸ The fact that crimes against sex workers—including harassment, rape, assault, and murder—go uninvestigated at a much higher rate than many other members of society is just one example of the extent to which sex workers are marginalized.⁶⁹

Lewis, Shaver, & Maticka-Tyndal argue that sex work and sex workers are cast as inherently harmful to society because they are viewed as “immoral and offensive and therefore threatening to moral order and the stability of Canadian society”.⁷⁰ This harm-based view of sex work, including the view that sex work is inherently harmful to children, is perpetuated by Parliament. One of the objectives of Bill C-36 is to “[p]rotect communities, and especially children, from the harms caused by prostitution”.⁷¹ Penalties for violating the prostitution laws may be more severe if the offense is committed in a “public place that is or is next to parks, schools, religious institutions or places where children can reasonably be expected to be present.”⁷²

Lewis, Shaver, & Maticka-Tyndal go on explain that “[under the guise of protecting the family, women, children, neighbourhoods, the good of society, and even sex workers themselves, we are told it is necessary to maintain a prohibition on sex-work-related activities.”⁷³ They argue that, rather than relying

⁶⁵ For example, see Jacqueline Lewis, Frances M Shaver, & Eleanor Maticka-Tyndale, “Going ‘round Against: The Persistence of Prostitution-Related Stigma” in Chapter 13 of van der Meulen, Durisin, & Love., *supra* note 6 at 198. Lebovitch & Ferris, *supra* note 35 at 19 and generally; Lisa Lazarus *et al*, “Occupational Stigma as a Primary Barrier to Health Care for Street-Based Sex Workers in Canada” (2012) 14:2 *Culture, Health & Sexuality* 139.

⁶⁶ Michael Goodyear & Cheryl Auger, “Regulating Women’s Sexuality: Social Movements and Internal Exclusion” in Chapter 14 of van der Meulen, Durisin, & Love, *ibid* at 213.

⁶⁷ Chris Bruckert & Stacey Hannen, “To Serve and Protect? Structural Stigma, Social Profiling, and the Abuse of Police Power in Ottawa”, in Chapter 19 of van der Meulen, Durisin, & Love, *ibid* at 297.

⁶⁸ *Ibid*.

⁶⁹ Maggie’s, in Lebovitch & Ferris, *supra* note 35 at 228-231; SWAUV Board members, “Chapter 3: ‘Pick the time and get some women together’: Organizing as the Downtown Eastside Sex Workers United Against Violence Society” in Lebovitch & Ferris, *supra* note 35 at 62-63.

⁷⁰ Lewis, Shaver, & Maticka-Tyndal, *supra* note 65 at 202.

⁷¹ Canada, Department of Justice, *supra* note 31.

⁷² *Ibid*.

⁷³ Lewis, Shaver, & Maticka-Tyndal, *supra* note 65 at 203.

on stigma and “morality-based discourse[s] of harm” to “justify and perpetuate the divisions between ‘decent folks’ and ‘prostitutes’ ... it is imperative that the government commit to basing law and policy on empirical evidence, taking a social justice stance toward the sex industry, and actively promoting the development of a more evidence-based understanding of the people who work in it.”⁷⁴

In this work, I argue that the “evidence-based understanding” of sex work advocated for by Lewis, Shaver, & Maticka-Tyndal—as opposed to a stigma-based understanding—ought to be applied to sex worker parents in Child Protection and Family Law courtrooms.⁷⁵

Sex worker parents

Stigma against sex worker parents can have unique impacts on their legal rights as parents and their relationships with their children.⁷⁶ In the balance of this chapter, I review the literature that illustrates the lives of sex worker parents and the impact of stigma on their identities and their children.

A note on gender

There is an unavoidable gendered aspect to this field. Research shows that the majority of sex workers are women and most sex worker parents are mothers.⁷⁷ However, in my research I came across cases⁷⁸ and stories⁷⁹ involving sex workers of various genders. I thus in general refer to sex worker parents and parenthood as opposed to mothers and motherhood.

⁷⁴ *Ibid* at 205.

⁷⁵ *Ibid*.

⁷⁶ PJ Starr *et al*, *supra* note 60 at 147.

⁷⁷ Bromwich & Dejong, *ibid*.

⁷⁸ For example, the sex worker parent in 2013 ONCJ 399 [HP] was a transwoman.

⁷⁹ PJ Starr *et al*, *supra* note 60 at 149; Redwood River, “Myths and Realities of Male Sex Work: A Personal Perspective” in van der Meulen, Durisim, & Love, *supra* note 6 at 45.

Sex work and parenting, particularly in North America, is a budding field of study. As recently as 2018 Dr. Susan Dewey of Wyoming commented on the lack of studies exploring the concept of parenthood among sex workers, and even fewer focusing on child loss.⁸⁰

As the field emerges, however, so do certain trends. First, many sex workers are mothers.⁸¹ Sloss *et al* estimated that 80-90% of sex workers in the United States had given birth to at least one child.⁸² Most embrace parenthood and want to be “good mothers”, or good parents, to their children.⁸³ In general, sex workers with children “continue to see themselves as mothers when authority figures, family members, and socioinstitutional systems do not.”⁸⁴

Second, sex worker parents encounter high levels of social and state scrutiny.⁸⁵ According to Susan Dewey, sex worker parents are often “sociolegally and morally position[ed] ... as fundamentally risky subjects who pose a danger to their children”.⁸⁶ Samtani & Trejos-Castillo explain that “societal disapproval of sex work as a profession overshadows a mother’s parental role, without actually giving a sex worker mom the fair chance to be evaluated on the merits of her motherhood.”⁸⁷ As such, “sex work as a profession and mothering stand juxtaposed”.⁸⁸

Indeed, many sex worker parents describe living in constant fear of Child Protection services and for good cause.⁸⁹ A third trend emerging from the research is that sex worker parents experience

⁸⁰ Dewey, *supra* note 11.

⁸¹ Bromwich & Dejong, *supra* note 8 at 14.

⁸² Christine M Sloss & Gary W Harper, “When Street Sex Workers Are Mothers” (2004) 33:4 Archives of Sexual Behavior 329 at 329.

⁸³ Jane Dodsworth, “Sex worker and mother: Managing dual and threatened identities” 2012 19:1 Child & Family Social Work 99 at 1; Ambar Basu & Mohan J Dutta, “‘We are mothers first’: Localocentric articulation of sex worker identity as a key in HIV/AIDS communication” (2011) 51:2 Women & Health 106.

⁸⁴ Dewey, *supra* note 11 at 30.

⁸⁵ PJ Starr *et al*, *supra* note 60 at 149.

⁸⁶ *Ibid* at 28.

⁸⁷ Samtani & Trejos-Castillo, *supra* note 57 at 276.

⁸⁸ *Ibid* at 278.

⁸⁹ Anonymous, “Mama Tiger Rising” in Bromwich & Dejong, *supra* note 8 at 272.

disproportionately high levels of child apprehension.⁹⁰ In one 2014 study by Duff, over one third of 350 sex worker parents interviewed reported having a child apprehended by Child Protection services.⁹¹ In a study conducted by Rochelle Dalla involving the children of thirty-eight sex worker mothers, only ten of 105 children remained with their biological mothers. Of those remaining ten children, all had been involved in multiple society-initiated cases.⁹²

Fourth, while all sex workers face increased risk of child apprehension in comparison to the general population, street-based sex workers experience higher odds—according to Duff, up to a 2.5-fold increase—of child apprehension compared to indoor sex workers.⁹³ The high rates of apprehension among street-based sex workers parents appears to correlate with “multiple and intersecting marginalizations” that can contribute to the “ongoing battle[s] to keep their children”.⁹⁴ Across North America, nearly all street-based parents experience one or more of the following social, economic, or health barriers to parenting:⁹⁵

1. Substance abuse;⁹⁶
2. Domestic violence;
3. Poverty/homelessness,⁹⁷ and/or

⁹⁰ Kathleen S Kenny, “The Role of Child Custody Loss to Child Protective Services in Shaping Health and Wellbeing among Women Who Do Sex Work in Vancouver, Canada” (Ph.D., The University of North Carolina at Chapel Hill, 2018) [unpublished]; Rochelle L Dalla (2003), *supra* note 56 at 225.

⁹¹ Duff *et al* (2014), *supra* note 47.

⁹² Rochelle Dalla, “‘I Fell Off [the Mothering] Track’: Barriers to ‘Effective Mothering’ Among Prostituted Women” (2004) 53:2 Family Relations 190 at 192.

⁹³ Duff *et al* (2014), *supra* note 47 at 3.

⁹⁴ *Ibid* at 1.

⁹⁵ Dewey *et al*, *supra* note 11.

⁹⁶ Gabrielle Tracy McClelland & Robert Newell, “A qualitative study of the experiences of mothers involved in street-based prostitution and problematic substance use” (2008) 13:5 Journal of Research in Nursing 437; Alison Granger-Brown *et al*, “The Spectrum of Motherhood” in Bromwich & DeJong *supra* note 8 at 40; Christine M Sloss, Gary W Harper, & Karen S Budd, “Street sex work and mothering” (2004) 6:2 Journal of the Motherhood Initiative for Research and Community Involvement 102 at 109; Aaron Murnan, *Using Qualitative Interviews to Understand the Treatment Needs and Barriers of Mothers Engaged in Prostitution and their Children*, The Ohio State University, 2019 [Dissertation]; Aaron Murnan *et al*, “The impact of parenting on child mental health among children of prostituting mothers” (2018) 89 Children and Youth Services Review 212; Jennifer Beard *et al*, “Children of female sex workers and drug users: a review of vulnerability, resilience and family-centred models of care” (2010) 13 Journal of the International AIDS Society S6.

⁹⁷ In Duff *et al* (2015), *supra* note 10 at 1048, 88% street-based sex workers interviewed reported being homeless at some point in their lives. Kenny, *supra* note 90, describes how street-based sex workers may have limited family supports due to increased presence of intergenerational poverty among street-based sex workers.

4. Compromised mental health.⁹⁸

I struggled with my decision to adopt the term “domestic violence” as opposed to violence against women. I am aware of the dangers of removing the gendered aspect of domestic violence, given that the majority of violence that takes place in homes involves violence against women. I also recognize that many female sex workers experience violence at the hands of male pimps, clients, and partners.⁹⁹ However, many of the cases I encountered in my research involved violence by and against persons of multiple genders. I thus believe that, for the purpose of this research, it would be inaccurate to suggest that domestic violence only included violence against women.

I refer to the above four barriers to parenting—substance abuse, domestic violence, poverty and homelessness, and compromised mental health—as “shared precarities”, a term coined by Dewey *et al.*¹⁰⁰ While social services and support are available to sex workers to assist with these shared precarities, many fear the possible repercussions of accessing those resources.¹⁰¹ Sex workers report “huge discrimination in both health and social services needs”¹⁰² and many are fearful about being open about their work with service providers due to the risk of outing themselves as a sex worker and losing custody of a child.¹⁰³

We know less about the parenting experiences of indoor sex workers. The limited resources suggest that, in general, indoor sex workers lead higher quality lives and face lower levels of victimization than outdoor workers.¹⁰⁴ While indoor workers may experience shared precarities (as might any parent), many stories,

⁹⁸ Regarding mental health, the studies that I reviewed for this research commonly referred to post-traumatic stress disorder, bipolar disorders, personality disorders, or schizophrenia. For my purposes (discussed further in Chapter 2: Methodology), I identified cases where compromised mental health was deemed to be significant enough to be relevant to the proceeding. This included sex worker parents who experienced depression, anxiety disorders, personality disorders, or, in some cases, where a court simply referred to the impact of the sex worker parent’s mental health on their parenting abilities.

⁹⁹ For example, see Rochelle L Dalla, Yan Xia, & Heather Kennedy, “Chapter 9: You Just Give Them What They Want and Pray They Don’t Kill You: Street-level sex workers’ reports of victimization, personal resources, and coping strategies” in Claire M Renzetti, Jeffrey L Edleson, & Raquel Kennedy Bergen, eds, *Companion Reader on Violence Against Women* (SAGE Publications, 2011) at 1367.

¹⁰⁰ Dewey *et al*, *supra* note 11.

¹⁰¹ Steven P Kurtz *et al*, “Barriers to Health and Social Services for Street-Based Sex Workers” (2005) 16:2 *Journal of Health Care for the Poor and Underserved* 345.

¹⁰² Samtani & Trejos-Castillo, *supra* note 57 at 278.

¹⁰³ Sloss & Harper, *supra* note 82 at 111-112

¹⁰⁴ Tamara O'Doherty, “Victimization in Off-Street Sex Industry Work” (June 2011) 17:7 *Violence Against Women* 944.

blog posts, anthologies, and publications from indoor sex workers describe lives free from such hardships.¹⁰⁵ Granger-Brown *et al* explain that indoor sex workers may come from more “traditionally accepted forms of motherhood, such as that of a girlfriend or middle-class wife.”¹⁰⁶ They are more likely to earn high incomes and live in safe neighbourhoods. Many indoor sex worker parents believe that their work provides them with the means to be good parents.¹⁰⁷ As documented by Benoit *et al*, many sex workers reported low or flexible hours, and, in comparison to white-collar women workers, reported higher levels of income, and job satisfaction, job security, and “skill discretion” (or the freedom to determine which skills to use).¹⁰⁸

Despite parenting advantages, indoor sex worker parents remain at risk of having their parenting capabilities scrutinized due to their careers.¹⁰⁹ Many describe courtroom battles where former partners use their involvement with sex work to argue—sometimes successfully—that they are unfit parents.¹¹⁰ Juliana Piccillo, a prominent sex worker activist, stated that “every sex worker I know who’s a parent and has gone through a divorce or separation has had their ex try to use [sex work] to take the kids away.”¹¹¹

¹⁰⁵ See generally Bromwich & DeJong, *supra* note 8; Red Umbrella Babies, *supra* note 7.

¹⁰⁶ Granger-Brown *et al*, *supra* note 96 at 40.

¹⁰⁷ Mysterious Witt, “I’m a Single Mom Who Makes A Living as a Sex Worker”, (October 29, 2019), online: *Medium*: <<https://medium.com/sugar-cubed/im-a-single-mom-who-makes-a-living-as-a-sex-worker-a79d45e0ef6e>>; Ella Stranger, “I’m a Sex Worker, and This is What I’ll tell my Child”, (March 18, 2016), online: *Elephant Journal*: <<https://www.elephantjournal.com/2016/03/im-a-sex-worker-and-this-is-what-ill-tell-my-child/>>; Anonymous, “How I support my family as a sex worker”, (15 February 2012), online: *Offbeat Home & Life* <<https://offbeathome.com/mom-as-sex-worker/>>.

¹⁰⁸ Cecilia Benoit *et al*, “Gender, Violence and Health: Contexts of vulnerabilities, resiliencies and care among people in the sex industry; A “working paper” prepared as background to Building on the Evidence: An International Symposium on the Sex Industry in Canada” (2014) Canadian Institute for Health Research Working Paper, online: <http://old.nswp.org/sites/nswp.org/files/Gender,%20Violence%20and%20Health%20%E2%80%93%20Contexts%20of%20vulnerability,%20resiliencies%20and%20care%20among%20people%20in%20the%20sex%20industry%20in%20Canada.pdf> at 4. See also: Duff *et al* (2015), *supra* note 10 at 1040.

¹⁰⁹ Katherine Koster, “On Mother’s Day, Remembering Sex Worker Moms” (May 8, 2016) online: *HuffPost* <https://www.huffpost.com/entry/on-mothers-day-rememberin_b_9865404>.

¹¹⁰ Melissa Petro, “How a Mom’s Sex Worker Past Can Be Used Against Her—and Her Kids”, (16 August 2016), online: *Vice* <https://www.vice.com/en_us/article/vv5553/sex-worker-mother>.

¹¹¹ Mary Emily O’Hara, “Sex workers want to talk to you about parenting” (August 14, 2015), online: *The Daily Dot* <<https://www.dailydot.com/irl/sex-worker-parenting/>>.

Moving forward

Research tells us that sex worker parents are numerous, stigmatized, scrutinized by authorities, and that they often lose legal custody of their children. For street-based sex workers, we also know that the presence of one or more shared precarities likely contributes to their challenges in battles for custody. Most of this information comes from sociological studies on sex workers and child loss, with data obtained from interviews with sex worker parents. Despite the legal nature of the subject matter, there do not appear to be any studies or analyses on the specific legal issues that sex workers face in courtroom proceedings regarding custody and access of their children, or how evidence regarding parental involvement in sex work has been applied by judges in custody and access disputes. In this work, I begin exploring the legal impact of evidence regarding parental engagement in sex work on custody and access disputes in Child Protection and Family Law proceedings Ontario.

Chapter 2: Methodology

Doctrinal legal research and analysis

I answered my research question through doctrinal legal research. Doctrine is described by Edward Rubin as an “inherently normative activity”.¹¹² I took a descriptive approach, focusing on the interpretation of the primary law and, where relevant, underlying policy.¹¹³ The purpose of this work was to provide a positivist piece that identifies the impact of a parent’s status as a sex worker on custody and access decisions.

As noted in Chapter 1, many actions related to sex work are criminalized. To begin, I thus confirmed the legal status of sex work in Canada by reviewing the following:

- *Canada (Attorney General) v. Bedford*,¹¹⁴
- Pertinent provisions of the *Criminal Code* regarding prostitution;¹¹⁵ and
- Government, academic, and lay publications on the legal status of sex work in Canada.

Second, I searched for resources and literature discussing sex workers and parenting. I used keyword searches (including sex work*, prostitut*, parent*, mother*, child*) at public library (Toronto Public Library database) and online academic databases (Google Scholar, Heinonline, York University Library, LegalTrac, Scholar’s Portal). I found little legal scholarship discussing the impact of a parent’s status as a sex worker on custody and access decisions in both in the Family Law and Child Protection fields. As such, I broadened my search to include sociological and sociolegal sources. I ultimately collected a small body of research on the intersections between sex work and parenting, some of which commented on experiences with Child Protection agencies and rates of child apprehension. Still, I did not locate any legal analyses on point.

¹¹² Edward L Rubin, “Law and’ and the Methodology of Law” (1997) Wis L Rev 521 at 546.

¹¹³ Moira McCarney *et al*, *The Comprehensive Guide to Legal Research, Writing & Analysis*, 3rd ed (Toronto, ON: Emond Montgomery Publications, 2019).

¹¹⁴ *Bedford*, *supra* note 1.

¹¹⁵ *Criminal Code*, *supra* note 1.

Third, I identified the applicable Family Law and Child Protection legislative frameworks.¹¹⁶ I reviewed treatises and textbooks on Family Law and Child Protection Law in Ontario, focusing on chapters about custody and access, the “best interests” factors, and past conduct of a parent. Family Law proceedings in Ontario are governed by the *CLRA* and the Federal *Divorce Act*.¹¹⁷ Part III of the *CLRA* and section 16 of the *Divorce Act* pertain to custody and access orders. Child Protection proceedings are currently governed by Part V of the Ontario *CYFSA, 2017*, but, prior to June 2018, were governed by Part III of the *CFSA*.¹¹⁸ I reviewed official versions of each statute to confirm currency dates.¹¹⁹ I consulted annotated versions of the above legislation to obtain a general sense of how the provisions I intend to focus on have been interpreted and applied by the Courts, making note of any case law mentioned in the annotations that appeared relevant.

Fourth, I compiled a list of all relevant Family Law and Child Protection case law decided under the four legislative schemes.¹²⁰ In order to be relevant to this research, a decision must have been decided in Ontario between January 1, 2010 to March 2020; one of the issues in dispute must relate to custody of or access to a child; and the decision must indicate that one or more parents involved in the proceeding was engaged in sex work prior to or at time of trial. Determining whether a parent engaged in sex work as defined in this work required certain assumptions. As noted in Chapter 1, sex work is “the voluntary exchange of sexual services for money”¹²¹ and does not necessarily include all acts of prostitution. However, many parents were simply described as prostitutes in the case law. For the purpose of exploring judicial treatment of sex work, I assumed that a parent described as a prostitute or a sex trade worker engaged in voluntary sex work unless it was clear from a decision that a parent was a victim of human trafficking or otherwise engaged only in the *involuntary* exchange of sexual services for money.

I started by reviewing and noting up the case law that I identified when reviewing the annotated legislation. I then noted up Part III of the *CFSA*, Part V of the *CYFSA, 2017*, section 16 of the *Divorce Act*, and the totality of the *CLRA* using three legal databases: Westlaw, Canlii, and LexisNexis. While Part III of

¹¹⁶ McCarney, *supra* note 113 at 10:5-10:12.

¹¹⁷ *CLRA*, *supra* note 4; *Divorce Act*, *supra* note 4.

¹¹⁸ *CYFSA, 2017*, *supra* note 4; *CFSA*, *supra* note 4.

¹¹⁹ E-laws currency date for *CLRA*, *supra* note 4, *CFSA*, *ibid*, and *CYFSA, 2017*, *ibid*: November 29, 2019; Justice Laws Website currency date for *Divorce Act*, *supra* note 4, November 19, 2019.

¹²⁰ McCarney, *supra* note 113 at 10:13.

¹²¹ Bromwich & DeJong, *supra* note 8 at 5.

the *CLRA* pertains to custody and access, Part I discusses parentage and definitions that I believed might lead to relevant decisions. Out of an abundance of caution, I did not limit my searches under the *CLRA* to Part III. I used advanced (Boolean) search options to filter for decisions that included at least one of following keywords:

- Sex work*, sex-work* (captures sex worker and sex-worker)
- Prostitut* (captures prostitute, prostitution, prostituting, prostituted)
- sex traffick* and sex-traffick* (captures sex trafficking and sex-trafficking)
- Sexual services
- Exotic
- exotic dance* (captures exotic dancer)
- strip* (captures stripper, stripping, strip club)
- massage, massage parlor, and massage parlour
- Escort*
- Brothel
- Bawdy-house
- In-call
- Cam girl
- Porno* (captures pornography)
- Porn, porn star
- hooker
- whore
- drag

I skimmed the facts of each decision to determine whether, on its face, the proceeding appeared to involve a sex worker parent and relate to a claim for custody and access to, or the care and control of, a child. In Child Protection cases, issues related to the custody and access or the care and control of children can arise during society investigations; apprehension; temporary care hearings; determinations that a child is in need of protection (and thus state interference with custody is warranted); and orders for crown wardship, permanent society care, society wardship, interim society care, and/or adoption (discussed in more detail in Chapter 3). I discarded decisions that did not fit these criteria. I created a short-list of twenty Family Law cases and thirty-two Child Protection cases. I organized the final list of decisions chronologically.

Finally, I performed a careful review of the short-listed decisions and sorted them into two categories: cases of actual sex work to be coded and cases involving only allegations of sex work. I coded eight Family Law cases and nineteen Child Protection cases where parental involvement in sex work was either

admitted by the sex worker parent or was otherwise accepted into evidence by the court. I created a list of—but did not code—cases where parental involvement in sex work was simply alleged by a third party, but not otherwise accepted or incorporated into the court’s analysis, or “allegation cases”. Allegation cases are evidence of the societal view that sex work is incompatible with parenting, but do not assist with my analysis of the impact of parental engagement of sex work on judicial decision-making. Twelve of the twenty Family Law cases were allegation cases and fourteen of the thirty-two Child Protection decisions were allegation cases.

For the substantive (*i.e.*, non-allegation) cases, I recorded the following information in coding tables that I created on Microsoft word:¹²²

- Citation;
- Date of hearing and date of judgment;
- Name of Judge;
- Issues and ruling. For Child Protection cases, I noted the relief sought by the moving party; the grounds for finding that a child was in need of protection; orders rendered; and any other relevant issue before the court. For Family Law cases, I noted the relief sought (custody and/or access);
- The Act that the decision was brought and decided under;
- Information regarding the parties and children. In Child Protection cases, I noted the name of the Applicant Child Protection society; the respondents’ name, gender, and sex work status (if any) as described by the court; and the name, gender, and age¹²³ of the children that were the subject of the proceeding and, where relevant, any other children discussed in the decision that were not the subject of the proceeding. For both parents and children, I included a column for “other” information that may be informative, such as race or relationship to the child if the respondent was not a parent. In Family Law cases, I noted the name, gender, and sex work status (if any) as described by the court for the parties; and the name, gender, and age of the children that were the subject of the proceeding and, where relevant, any other children discussed in the decision that were not the subject of the proceeding. I again included a column for “other” information;

¹²² See Coding tables at Appendix A.

¹²³ Interestingly, courts did not comment on the age of the child when discussing the parent’s involvement in sex work. I mention the child’s age in certain summaries of the cases in Chapter 3 and 4 for context, but do not incorporate the children’s ages into my discussion in Chapter 5.

- A brief of the decision. Briefs included colour-coding excerpts of all references to the parent's involvement in sex work; applications of sex work to an aspect of the courts' ruling; and references to shared precarities;
- My comments and observations; and
- Noting-up results.

In order to better identify trends in judicial decision making within the nineteen Child Protection decisions, I created a simple excel spreadsheet pulling out the following data regarding the sex worker parent:

- Citation;
- Past or current parental involvement in sex work;
- Short summary of the court's description of the sex work;
- Involvement of the sex worker parent in the hearing. I noted whether the parent was actively involved in the proceeding at time of hearing (*i.e.*, still a party, filed some materials at some point) and seeking custody and/or access to at least one child involved; in default; did not participate but not noted in default; or had abandoned the proceeding;
- Any racial or cultural information regarding the parent;
- The provision(s) under which the child(ren) were found to be in need of protection;
- Age(s) of the child(ren);
- References to shared precarities; and
- Custody and access outcomes (crown wardship; custody for the sex worker parent; other custody orders; no access; access).

All data was included in a single row on the spreadsheet, so I could count and view trends within the Child Protection decisions at a glance.

[Limitations and alternative methods](#)

There are limitations to my method. Many Family Law and Child Protection proceedings settle before a hearing, or if they do go to a hearing, go unreported. As such, doctrinal research only provides a limited picture of sex worker parents' experiences in the courtroom.

I considered interviews and case file reviews as alternative methods. Such methods could generate richer data about individual cases than is available through doctrinal research. Interviews could tell the stories from the perspectives of the sex workers, as opposed to the judges. Transcripts could reveal the stories as presented by the sex workers' lawyers, the sex workers themselves if they were self-represented, society lawyers, judges, and the evidence of any witnesses. Even so, it would have been significantly more time-consuming to conduct interviews and identify, locate, obtain, and review case files. Given that the Osgoode LLM program is one year in duration, I would only have been able to present data from a limited number of cases, whereas the method I adopted allowed me to explore a larger pool of data.

Chapter 3: Child Protection

Child Protection laws allow for government intervention with families in order to protect vulnerable children from harm. As described by the Ministry of the Attorney General, intervention by a Children’s Aid Society, which can range from a telephone investigation to apprehension of a child, may be warranted when “concerns are raised about a family’s ability to care for a child.”¹²⁴

The state’s duty to protect children and unilateral right to intervene can have a considerable impact on the autonomy of parents and create an imbalance of power between the parties. Similar to Criminal Law matters, parents involved in Child Protection proceedings—who are often vulnerable members of society to begin with—have little-to-no control over the process. For example, proceedings under Criminal and Child Protection laws are often triggered by a report to a state actor (*i.e.*, the police or a Child Protection agency) by a third party. A preliminary investigation led by state authorities follows. Much like a crown prosecutor who elects to proceed with an indictment, a Children’s Aid Society can then elect to commence court proceedings. Like an accused who may voluntarily agree to a plea bargain, a parent may agree to enter into a voluntary care plan.¹²⁵ The consequences of failing to take such “voluntary” steps are often the same: the matter, where one party’s *Charter*-protected right to security of the person is at stake,¹²⁶ proceeds towards trial.

In this chapter, I outline the provisions from Child Protection legislative schemes in Ontario that I noted up for this research; provide an overview of statistics arising from case law research; and analyse the impact that a parent’s status as a sex worker had at each step of the Child Protection legal process within the case law.

I conclude that sex work is generally treated as a negative quality in a parent, rather than as an aspect of a parent’s life that warrants further factual exploration. The case law suggests that courts rely more upon negative assumptions or stigma about sex work and sex workers than on evidence regarding the impact (if any) of a parent’s involvement in sex work upon their child in Child Protection hearings in Ontario.

¹²⁴ Ontario Ministry of the Attorney General, “Child Protection” (June 26, 2019), online: Child Protection <https://www.attorneygeneral.jus.gov.on.ca/english/family/divorce/child_protection/>.

¹²⁵ *CYFSA, 2017 supra* note 4, s 75(1).

¹²⁶ *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC).

Past and present Child Protection legislative schemes in Ontario: Comparison of the former *Child and Family Services Act* with the new *Child, Youth and Family Services Act, 2017*

I begin this chapter by providing and explaining the relevant legislation schemes. Child protection proceedings in Ontario are governed by Part V of the *CYFSA, 2017*.¹²⁷ The *CYFSA, 2017*, however, only came into force on April. 30, 2018. Most of the case law discussed in this chapter was decided under the now-repealed *CFSA*.

The Child Protection processes provided under the *CFSA* and *CYFSA, 2017* (“the Child Protection Acts”) are substantively and procedurally similar.¹²⁸ Both contain comparable:

- i. paramount purposes;
- ii. triggers for commencing of proceedings;
- iii. temporary care hearings during adjournments;
- iv. elements of Child Protection hearings and available orders;
- v. factors that a court must consider when making an order in the best interests of a child; and
- vi. limitations on the admissibility of evidence regarding a parent’s past conduct.

As such, I suspect that the case law regarding sex worker parents decided under the *CFSA* discussed in section c) of this chapter will remain applicable under the new legislation.

The paramount purpose of both Acts is to promote the best interests of children

The Child Protection Acts focus on the best interests of the child. The paramount purpose guiding the interpretation and application each Act is to “promote the best interests, protection and well-being of children”¹²⁹ and, discussed further below, prescribe mandatory considerations for courts when making an order in the best interests of a child.¹³⁰

¹²⁷ *CYFSA, 2017, supra* note 4.

¹²⁸ For a side-by-side comparison of the provisions of the *CFSA, supra* note 4 the *CYFSA, 2017, ibid*, discussed in this Chapter, see Appendix B.

¹²⁹ *CFSA, ibid*, s 1(1); *CYFSA, 2017 ibid*, s 1(1).

¹³⁰ *CFSA, ibid*, s 37(3); *CYFSA, 2017, ibid*, s 74(3).

Proceedings are often triggered by third-party reports, following by society investigations

Proceedings under the Child Protection Acts are often triggered by third-party reports made to a children's aid society. Subsections 72(1) of the *CFSA* and 125(1) of the *CYFSA, 2017* impose a duty to report to a children's aid society on any person who believes that a child is in need of protection.¹³¹ The person must have reasonable grounds to suspect that a child is at risk of or has actually suffered harm. "Harm" includes actual or risk of physical harm, emotional harm, sexual abuse, neglect; and/or failure to provide necessary treatment.¹³² Upon receipt of a report, a society must carry out a preliminary assessment or investigation of the family to assess and verify the report.¹³³

Temporary care hearings

Child Protection proceedings often have strict timelines that can only be extended with leave of the Court. For example, s. 88(1) of the *CYFSA, 2017* states that a Child Protection hearing must proceed within five days of apprehension.¹³⁴ Parties are often unable to meet such timelines for various reasons and so may request an adjournment before the matter can proceed to trial. If the Court grants an adjournment, the Court shall also make an order for the temporary care and custody of the child during the adjournment period.¹³⁵

The options for custody of a child during an adjournment are the same under both of the Child Protection Acts. The Court may order that the child remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention (with or without supervision and reasonable terms and conditions); be placed, on consent, in the care and custody of a person other than the person referred to above, subject to society supervision and on reasonable terms and conditions; or remain or be placed in the care of the society.¹³⁶

¹³¹ *Ibid.*

¹³² *CFSA, ibid, s 72(1); CYFSA, 2017, ibid, s 125(1).*

¹³³ *CFSA, ibid, s 72(3); CYFSA, 2017, ibid, s 126(1).*

¹³⁴ *CYFSA, 2017, ibid.*

¹³⁵ *CFSA, supra note 4, s 52(1); CYFSA, 2017, ibid, s 94(2).*

¹³⁶ *CFSA, ibid, s 51(2); CYFSA, 2017, ibid, s 94(2).*

The Child Protection Acts both provide that a child shall not be placed in the care and custody of the society or another person, unless the Court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm if returned to the person who had care and control prior to apprehension, and that the child cannot be protected adequately by an order for society supervision and on such reasonable terms and conditions that the Court considers appropriate.¹³⁷

The Child Protection hearing

Once a society has decided to intervene, the society may commence an application with the Court to determine whether a child is in need of protection.¹³⁸ At a Child Protection hearing, the society must establish that the child is in need of protection and that intervention through a court order is necessary to protect the child in the future.¹³⁹ Any order made must be in the child's best interests.

First, a society must establish that a child is in need of protection

Circumstances and conditions under which a child will be deemed to be in need of protection are provided in subsection 37(2) of the *CFSA* and subsection 74(2) of the *CYFSA, 2017*.¹⁴⁰ There are no substantive differences between the grounds for finding that a child is in need of protection between the Child Protection Acts. In summary, under both Child Protection Acts, a child is in need of protection where:

- the child has suffered, or there is a risk that the child is likely to suffer, physical harm or emotional harm, either inflicted by the parent or resulting from the parent's failure to adequately care for, provide for, supervise or protect the child, or a pattern of neglect in caring for, providing for, supervising or protecting the child;
- the child has been or is likely to be sexually abused or sexually exploited, by the parent or another person where the parent knew or ought to have known and fails to protect the child;

¹³⁷ *CFSA, ibid, s 51(3); CYFSA, 2017, ibid, s 94(4)*.

¹³⁸ *CFSA, ibid, s 40(1); CYFSA, 2017, ibid, s 81(1), 90(1)*. The matter may not necessarily result in a Child Protection hearing. As noted in s. 88(a)-(e) of the *CYFSA, 2017*, other options include returning the child to the parent or any other person with custody of the child, entering into a voluntary temporary care agreement.

¹³⁹ *CYFSA, 2017, ibid, s 101(1)*.

¹⁴⁰ *CFSA, supra note 4; CYFSA, 2017, ibid*.

- the child requires or there is a risk that the child will require treatment for physical harm or suffering, emotional harm and the parent does not provide or refuses to consent to necessary treatment;
- the child suffers from a mental, emotional, or developmental condition that, if not remedied, could seriously impair the child's development and the parent does not provide or refuses to consent to necessary treatment;
- the child has been abandoned, the child's parent has died or is unavailable to exercise custodial rights over the child and has not made adequate provision for the child's care and custody, or the parent refuses to, is unable, or unwilling to resume the child's care and custody;
- the child is younger than 12 and has killed or seriously injured another person, or caused seriously damage to another person's property, and the parent refuses to provide or consent to services or treatment necessary to prevent a recurrence;
- the child is younger than 12 and has on more than one occasion injured another person or caused property damage with the encouragement of the parent or because of a failure to supervise; and/or
- the parent is unable to care for the child and consents to court assistance.¹⁴¹

Second, the society must establish that a court order is necessary to protect the child moving forward.

If a society establishes that a child is in need of protection, they must then demonstrate that intervention by a court order is necessary to protect the child in the future.¹⁴² The terms of the Court order must address the specific category of harm that led to the finding that the child is in need of protection.

The terminology used for protection orders is one area where the Child Protection Acts differ. Under the *CFSA*, the following protection orders were available to the Court:

¹⁴¹ *Ibid.*

¹⁴² *CFSA, ibid, s 57(1); CYFSA, 2017, ibid, s 101(1).*

1. **Supervision order:** That the child be placed in the care and custody of a parent or another person, subject to the supervision of the society, for a specified period of at least three months and not more than 12 months.
2. **Society wardship:** That the child be made a ward of the society and be placed in its care and custody for a specified period not exceeding twelve months.
3. **Crown wardship:** That the child be made a ward of the Crown, until the wardship is terminated under section 65.2 or expires under subsection 71(1) and be placed in the care of the society.
4. **Consecutive orders of society wardship and supervision:** That the child be made a ward of the society under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding an aggregate of twelve months.¹⁴³

While the orders available under the *CYFSA, 2017* are effectively the same, the legislature replaced the terms “society wardship” and “crown wardship” with “interim society care” and “extended society care”. The following protection orders, from least to most disruptive, are now available to the Court under s. 101(1) of the *CYFSA, 2017*:

1. **Supervision order:** That the child be placed in the care and custody of a parent or another person, subject to the supervision of the society, for a specified period of at least three months and not more than 12 months (including any reasonable terms and conditions that the Court deems necessary).
2. **Interim society care:** That the child be placed in interim society care and custody for a specified period not exceeding 12 months.
3. **Extended society care:** That the child be placed in extended society care until the order is terminated or expires.
4. **Consecutive orders of interim society care and supervision:** That the child be placed in interim society care and custody under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding a total of 12 months.¹⁴⁴

¹⁴³ *CFSA, ibid.*

¹⁴⁴ *CYFSA, 2017, supra* note 4.

Alternatively, the Child Protection Acts provide courts with the jurisdiction to make an order granting custody of a child to a person other than a foster parent if such an order is in the child's best interests.¹⁴⁵

Both Child Protection Acts state that a court shall not make an order removing the child from the care of the person who had charge immediately before intervention unless the Court is satisfied that any less disruptive options are inadequate to protect the child.¹⁴⁶

Courts may make orders for access

In addition to a protection order or a custody order, a judge presiding over a Child Protection proceeding may also make, vary, or terminate an access order.¹⁴⁷ The test for access to a child that has been made a Crown Ward/placed in extended society care reflects another substantive difference between the Child Protection Acts. Satisfying the test for access to a Crown Ward under the *CFSA* was described by Justice Kukurin of the ONCJ as a "formidable" or "almost impossible" task.¹⁴⁸ The *CFSA* provided that a court shall not make or vary an access order made with respect to a child who has been made a crown ward unless the Court is satisfied that:

- (a) the relationship between the person and the child is beneficial and meaningful to the child; and
- (b) the ordered access will not impair the child's future opportunities for adoption.¹⁴⁹

In contrast, under the *CYFSA, 2017*, the presumption against access for children in extended society care has been removed.¹⁵⁰ Now, a court need only find that access would be in the child's best interests.¹⁵¹ When considering whether access is in the best interests of the child, courts shall continue to consider whether the relationship between the parent and the child is beneficial and meaningful to the child and whether access will impair the child's future opportunities for adoption, but there is no longer a burden

¹⁴⁵ *CFSA, supra* note 4, s 57.1(1); *CYFSA, 2017, ibid*, s 102.

¹⁴⁶ *CFSA, ibid*, s 57(3); *CYFSA, 2017, ibid*, s 101(3).

¹⁴⁷ *CFSA, ibid*, 58(1); *CYFSA, 2017, ibid*, s 104, 105.

¹⁴⁸ *Children's Aid Society of the Districts of Sudbury and Manitoulin v CH*, 2018 ONCJ 453 at para 15.

¹⁴⁹ *CFSA, ibid*, s 59(2.1)

¹⁵⁰ *Kawartha-Haliburton Children's Aid Society v MW*, 2019 ONCA 316 [MW] at para 31.

¹⁵¹ *CYFSA, 2017, supra* note 4, s 105(5).

on the parent seeking access to establish same.¹⁵² Indeed, as the Court of Appeal recently explained in *MW*, under the new regime even a parent who puts forward no evidence may still gain access to a child placed in extended society care.¹⁵³

Any custody or access order must be in the best interests of the child

Any time that a court renders a protection, custody, or access order under one of the Child Protection Acts, the order must be made in the child's best interests. While courts are granted broad discretion to consider any circumstance of the case that the Court deems relevant, the Child Protection Acts both contain inexhaustive lists of considerations that the Courts must consider when rendering an order in the child's best interests. Under the *CFSA*, courts were required to consider:

1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
2. The child's physical, mental and emotional level of development.
3. The child's cultural background.
4. The religious faith, if any, in which the child is being raised.
5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
6. The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.
9. The child's views and wishes, if they can be reasonably ascertained.
10. The effects on the child of delay in the disposition of the case.

¹⁵² *Ibid*, s 105(6). See also: *MW*, *supra* note 150 at para 49. The shift in the approach to access for children in extended society care was recently summarized in *Children's Aid Society of Toronto v JG*, 2020 ONSC 1135 at paras 41-44.

¹⁵³ *MW*, *ibid* at para 49.

11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.
12. The degree of risk, if any, that justified the finding that the child is in need of protection.
13. Any other relevant circumstance.¹⁵⁴

Section 37(4) of the *CFSA* provides that when the Court makes “an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child’s cultural identity.”¹⁵⁵

The definition of best interests under the *CYFSA, 2017* is similar to the *CFSA*. Now, courts must consider:

- (a) the child’s views and wishes, given due weight in accordance with the child’s age and maturity;¹⁵⁶
- (b) in the case of a First Nations, Inuk or Métis child, the consider the importance of preserving the child’s cultural identity and connection to the community;¹⁵⁷ and
- (c) consider any other circumstance of the case that the person considers relevant, including:
 - (i) the child’s physical, mental, and emotional needs, and the appropriate care or treatment to meet those needs,
 - (ii) the child’s physical, mental and emotional level of development,
 - (iii) the child’s race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity, and gender expression,
 - (iv) the child’s cultural and linguistic heritage,
 - (v) the importance for the child’s development of a positive relationship with a parent and a secure place as a member of a family,

¹⁵⁴ *CFSA*, *supra* note 4, s 37(3).

¹⁵⁵ *Ibid*, s 37(4).

¹⁵⁶ *CYFSA, 2017*, *supra* note 4, s 74(3)(a).

¹⁵⁷ *Ibid*, s 74(3)(b).

- (vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,
- (vii) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,
- (viii) the merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent,
- (ix) the effects on the child of delay in the disposition of the case,
- (x) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and
- (xi) the degree of risk, if any, that justified the finding that the child is in need of protection.¹⁵⁸

For the purposes of this research, all of the relevant considerations regarding the best interests of a child under the *CFSA* that are referred to in the case law remain encoded in the *CYFSA, 2017*.

Admissibility of evidence regarding the past conduct of a parent

Both Child Protection Acts address the scope of evidence that is admissible during Child Protection hearings. Courts may consider the past conduct of a person toward any child if that person is or may care for or have access to the child that is the subject of the proceeding.¹⁵⁹ Further, certain evidence from earlier civil or criminal proceedings is admissible. Courts may consider any relevant oral or written statement or report relevant to the Child Protection proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding.¹⁶⁰

In the following section, I analyze the Child Protection case law interpreting and applying the above-noted elements of Child Protection proceedings in cases involving sex worker parents.

¹⁵⁸ *Ibid*, s 74(3).

¹⁵⁹ *CFSA*, *supra* note 4, s 50(1)(a); *CYFSA, 2017*, *ibid*, s 93(1)(a).

¹⁶⁰ *CFSA*, *ibid*, s 50(1)(b); *CYFSA, 2017*, *ibid*, s 93(1)(b).

Overview of results

I located nineteen Child Protection decisions discussing custody and access of children of nineteen past or present sex workers under the Child Protection Acts. Of the nineteen sex worker parents discussed, eleven were former sex workers and eight were involved in sex work at the time of trial. Only one regained custody of their child. The nineteen decisions arose from eighteen proceedings, as two were appeals within the same court file. Still, the cases discuss nineteen sex worker parents as one decision involved the children of two fathers who were both former sex workers.

Below, I provide some of the quantitative information from the Child Protection case law. Because the purpose of this research is to identify the role of stigma for sex worker parents, I am limited in the conclusions that I can draw from numbers alone. We cannot draw on the words used to describe sex work, the weight given to sex work, or the impact of other factors—such as the shared precarities that were present in every case—on outcomes from numbers. Still, the numbers provide a startling snapshot and serve as a starting point for this story.

Most children were found to be in need of protection due to a risk of physical harm

Seventeen of decisions contained reasons for Child Protection hearings. All of the children that were the subject of those proceedings were found to be in need of protection (*i.e.*, the court made a “finding”) under one or more of the following provisions:

- Thirteen findings that there was a risk that the child was likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person’s failure to adequately care for, provide for, supervise or protect the child; or pattern of neglect in caring for, providing for, supervising or protecting the child;¹⁶¹
- Three findings that the child’s parent was unable to care for the child and the child was brought before the Court with the parent’s consent;¹⁶²

¹⁶¹ *CFSA, ibid*, s 37(2)(b)(i)-(ii)

¹⁶² *Ibid*, 37(2)(l).

- Four findings that there was a risk that the child was likely to suffer emotional harm resulting from the actions, failure to act, or pattern of neglect on the part of the child’s parent or the person having charge of the child;¹⁶³
- One finding that the child suffered from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child’s development and the child’s parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition;¹⁶⁴
- Two findings that the child had been abandoned;¹⁶⁵ and
- Three cases where the ground for finding that the child was in need of protection was not noted.

Although not always apparent from written decisions, parties to Child Protection proceedings may agree to a finding that a child is in need of protection on consent in advance of a hearing. In the above seventeen cases, the Court explicitly noted in three decisions that the child was brought before the Court with the parent’s consent pursuant to s. 37(3)(l). The parties in the remaining fourteen decisions may have consented to the findings noted within. In any event, for the purpose of this research, the Court refers to parental involvement in sex work when discussing the finding that the child was in need of protection in only one case, discussed further below. In that case, the finding was reached on consent.

The most common protection order rendered was crown wardship, without access

Former sex worker parents were significantly more likely to be able to retain a relationship with their child than parents who were engaged in sex work current to the time of trial. Five of eleven (45.5%) former sex workers were granted custody or access. Only one of the eight (12.5%) current sex workers was granted access.

The following orders for custody and access were rendered for the eleven former sex worker parents:

- Five orders for crown wardship, without access for the purpose of adoption;

¹⁶³ *Ibid*, s 37(2)(g).

¹⁶⁴ *Ibid*, s 37(2)(h)

¹⁶⁵ *Ibid*, s 37(2)(i).

- One order for crown wardship, with access to the parent (adoption was not an option for these children);
- One order placed the children in temporary society care, without access to the parent;
- One order placing the children in temporary society care, with access to the parent;
- Two orders placing the child(ren) in the care and custody of another parent, with access to the parent; and
- One order granted custody to the parent following a temporary care hearing.

In contrast, of the eight parents engaged in sex work at the time of hearing, one hundred percent of their children were made crown wards. The following orders for custody and access were rendered for the eight parents who were engaged in sex work at the time of trial:

- Seven orders for crown wardship, without access for the purpose of adoption; and
- One order for crown wardship, with access. In this case, the society did not submit a plan for adoption and so access could not impair the child's prospects for adoption.

[Case law analysis](#)

In this section, I review and analyze case law where a parent's involvement in sex work was considered by the Courts in relation to one of the following components of a Child Protection proceeding:

- triggering a proceeding;
- temporary care hearing during an adjournment;
- finding that a child is in need of protection; and
- determining that an order of the court, which must be made in the best interests of the child, is required to protect the child in the future.

I also note instances where courts refer to parental involvement in sex work to describe the parent and/or their lifestyle, but do not connect the sex work to a particular aspect of the legal analysis.

Many Child Protection proceedings involving sex workers are triggered by third-party complaints and concerns regarding the parent's work

Many Child Protection investigations and proceedings are triggered by accusations and allegations from third parties. For sex workers, their work is often a cause for societal investigation. In eight of the Child Protection cases, courts noted that at least one of the concerns leading to society investigation involved explicit allegations of sex work by a society worker or a third party. Not all decisions outlined the reasons for initial society involvement.

Third parties may be well-intentioned individuals who believe they are complying with their duty to report a suspicion that a child is at risk.¹⁶⁶ However, many sex workers describe being reported to societies by vindictive former partners and disapproving family members.¹⁶⁷

I located an additional fourteen allegation cases where a report was made to a society that a parent was engaged in sex work and the allegation was used as grounds to investigate whether the child was at risk of harm.¹⁶⁸ For example, in *CCAS v. BLS, GJK, GJ SD*¹⁶⁹ the society became involved with the family due to concerns that the mother was “involved in prostitution.”¹⁷⁰ Later, when the child was made a society ward, the society raised concerns with the mother’s “ongoing involvement with prostitution”.¹⁷¹ Justice Pazaratz did not engage in any analysis regarding the mother’s alleged involvement in sex work, nor did he explain what gave rise to the society’s concerns in this regard.

¹⁶⁶ Section 72(1) of the *CFSA*, *ibid*, provides that any person, including a person who performs professional or official duties with respect to children, who has reasonable grounds to suspect that a child has suffered, or is likely to suffer, physical harm, or has been or is likely to be sexually molested or exploited, the person shall forthwith report the suspicion and the information on which it is based to a society.

¹⁶⁷ O’Hara, *supra* note 111.

¹⁶⁸ *Native Child and Family Services of Toronto v DC*, 2010 ONSC 1038; *Children’s Aid Society of Ottawa v RP*, 2010 ONSC 7106; *The Catholic Children’s Aid Society of Hamilton v CF*, 2011 ONSC 3335; *Children’s Aid Society of Ottawa v CN*, 2013 ONSC 402; *Children’s Aid Society of Ottawa v C-D*, 2014 ONSC 6954; *Children’s Aid Society of Toronto v KS*, 2015 ONCJ 63; *Children’s Aid Society v NJ-L*, 2016 ONSC 5889; *CAS of London and Middlesex v TY*, 2017 ONSC 3460; *Children’s Aid Society of Ottawa v CN*, 2018 ONSC 3988; *Catholic Children’s Aid Society of Toronto v TTL*, 2018 ONCJ 403; *Catholic Children’s Aid Society of Toronto v TTL and SS*, 2019 ONCJ 530; *Children’s Aid Society of (Ottawa) v JR*, 2019 ONSC 3012; *CAS v TS and MOU and CS*, 2020 ONSC 879.

¹⁶⁹ 2014 ONSC 5513 [BLS].

¹⁷⁰ *Ibid* at para 10.

¹⁷¹ *Ibid* at para 12.

Overcoming sex work supported one mother's motion for custody at a hearing for temporary care and custody of the child during an adjournment

In many Child Protection cases a proceeding will be adjourned before the matter can proceed to a hearing for final disposition. If so, the Court will make a temporary order for care and custody of the child during the adjournment period.¹⁷²

The only Child Protection case where a sex worker parent received custody of a child was decided following a temporary care hearing. In *Children's Aid Society of Algoma v RS*, the mother was a former stripper and escort.¹⁷³ She successfully opposed a society motion to enter her child into society care at a temporary care hearing. It appears that her success can be partially attributed to the fact that she no longer engaged in sex work. Justice Kukurin began the decision by describing the mother's life as "anything but stable".¹⁷⁴ He noted the mother's past involvement in sex work while listing a number of unfavourable factors:

[The mother] has used both marijuana and cocaine in the past. She has been involved in domestic violence, as a perpetrator in the case of [a former partner] of whom she was convicted of assault. She has been employed as a stripper and as an escort.¹⁷⁵

Justice Kukurin then described how the "pejorative introduction [of the mother] must, in fairness, be juxtaposed to information ... that is more current." In reviewing the mother's positive qualities, he praised her for having "given up her job as a 'dancer' and ... attending school to upgrade herself to a high school diploma."¹⁷⁶ Justice Kukurin did not connect the mother's sex work to an impact on the child.

¹⁷² *CFSA*, *supra* note 4, s 52(1).

¹⁷³ 2013 ONCJ 688 [RS].

¹⁷⁴ *Ibid* at paras 3-4.

¹⁷⁵ *Ibid* at para 4.

¹⁷⁶ *Ibid* at para 9.

Courts often find that the children of sex workers were in need of protection due to a risk of physical harm arising out neglect and/or failure to supervise.

In the majority of the cases where a court made a finding that a child was in need of protection, the Court found that the child was at risk of physical and/or emotional harm as a result of parental neglect and/or failure to supervise.

Sex work was only directly referred to by a court when justifying a finding that a child was in need of protection in one case. In *Children's Aid Society of the Regional Municipality of Waterloo v CT*, the mother's involvement in sex work was included in a list of factors, including shared precarities, provided in the opening paragraphs of the decision to show that the child was at risk of physical harm.¹⁷⁷ First, Justice Benotto noted that the father claimed that the mother was prostituting herself after describing the mother's history with substance abuse:

[5] In 2006 the [Children's Aid Society] received a referral from a public health nurse who learned that the mother was pregnant again. Shortly after the child's birth, the mother tested positive for marijuana. A nurse observed the mother's speech to be slurred. Although the child remained in her mother's care, there were incidents of police involvement as a result of domestic violence reports. There were also ongoing reports to the Society about the mother's alleged use of drugs in the presence of the child. A series of hair screens completed on the child in 2010 and 2011 showed positive results for cocaine and marijuana. In January 2012 the father told the Society that the mother was "prostituting herself."¹⁷⁸

Second, Justice Benotto noted that the mother's sex work was included in a Statement of Agreed Facts that the parties signed when agreeing that the child was in need of protection:

[6] In May 2012 the parents and the Society agreed that the child should be found in need of protection. The parents signed a Statement of Agreed Facts. The Statement outlined and summarized the background including the following:

- i. From 2002 to 2012 there were ongoing issues regarding the parents' drug usage;
- ii. The mother was involved in the sex trade industry;
- iii. There were incidents of domestic violence between the parents;

¹⁷⁷ 2017 ONCA 931 [CT].

¹⁷⁸ *Ibid.*

- iv. The mother had mental health issues including bipolar disorder and personality disorder;
- v. The father was diagnosed with chronic pain, dysrhythmias, and panic disorder;
- vi. Since February 2012, the father has had only supervised visits with the child and further access would be at the discretion of the Society; and
- vii. The child is not an Indian or native person.¹⁷⁹

These passages highlight the fact that the society took the position that the mother's sex work, as a stand-alone factor, placed the child at risk of physical harm. However, Justice Benotto did not explain how the society came to the conclusion that the mother's involvement in sex work affected the child.

Courts have referred to parental engagement in sex work when considering what order is in the best interests of the child

For seven of the sex worker parents discussed in the Child Protection case law, the Court referred to past or present involvement in sex work when explaining what protection order was in the best interests of the child:

- In four cases, the Court suggested that involvement in sex work affected the parent's ability to provide stability, permanency, and/or structure for the child;¹⁸⁰
- In one case, the Court considered the importance of continuity in the care of the child with the non-sex worker parent; and
- In two cases, the Court found that the child would be at risk of physical harm if returned to the sex worker parent.

I argue that in six of these seven cases, courts appeared to treat involvement in sex work as an adverse factor when considering what is in the best interests of the child *without* considering the particular evidence regarding the sex worker parent and any impact of same on the child. I argue that in those six

¹⁷⁹ *Ibid.*

¹⁸⁰ The enumerated list of factors under the *CFSA*, *supra* note 4, does not include stability, permanence, or structure. As will be described in Chapter 4: Family Law, these two factors are contained in s 24(2)(f) of the *CLRA*, *supra* note 4 and are open to the Court to consider pursuant to s. 37(3) 13 of the *CFSA* ("any other relevant circumstance".) The ability to provide permanence, stability, and structure could also reasonably fall within factor 37(3) 1.: the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.

cases, the Court's conclusions about the parent insofar as they related to sex work were informed by stigma, not fact.

In the seventh case, the Court directly connected the particular facts regarding the parent's engagement in sex work to an adverse impact on the child. The child was sexually abused by a client that the parent had brought into the home.

To be clear, for the purpose of identifying stigma against sex workers in custody and access making, I refer only to excerpts of the decisions that shed light on how decisions regarding the best interests of a child appear to be influenced by a parent's involvement in sex work. Courts often considered multiple factors affecting the child's best interests—at least one shared precarity was noted in each case—and the weight afforded to all factors of any given case is not reflected in my descriptions. Child protection proceedings are by nature factually rich and critiquing each decision on its merits based on judicial consideration of the full factual matrix of each case is beyond the scope of this research.

The child's need for stability, permanence, and structure

Stigma against sex work contributed to a finding that the parent could not provide the child with stability, permanency, and/or structure for the child in four cases.

When ruling that the mother could not provide a permanent and nurturing environment in *CCAS v LM*, Justice Maddalena appeared to rely upon the mother's involvement in prostitution noted in an expert report as evidence that the children would be at a serious risk of maltreatment if returned to their mother.¹⁸¹ A portion of a report from expert witness Dr. Harris stated that “[p]erhaps the most concerning problem area has been LM's pervasive problems with self-regulation over the years. She has engaged in numerous maladaptive methods for emotion regulation and self-soothing including drug and alcohol use, self-harm (suicide attempts), and high risk behaviour (prostitution)”.¹⁸²

¹⁸¹ 2012 ONSC 1778 [*LM*].

¹⁸² *Ibid* at para 126.

Justice Maddalena appeared to accept Dr. Harris' opinion that prostitution constitutes high risk behaviour in the absence of any evidence regarding the nature of the mother's sex work, which I argue is further coloured by being included in same sentence as substance abuse and suicide attempts. She relied on Dr. Harris' report to conclude that "it could take decades for LM to resolve the issues or indeed they may never actually resolve. This is concerning for the Court since it leads to the inevitable conclusion that children placed in her care would remain again at serious risk of maltreatment."¹⁸³ Crown wardship would provide "permanency and a nurturing parent environment" that the children required and the mother could not provide.¹⁸⁴

Justice Curtis referred to a sex worker mother's prior involvement in prostitution to determine that she was unable to provide stability in *Catholic Children's Aid Society of Toronto v JB*.¹⁸⁵ In the opening paragraphs, Justice Curtis summarized the mother's pre-*Bedford* "history of criminal behaviour, prostitution and drug use, prior to her pregnancy."¹⁸⁶ She noted that the mother "worked as a prostitute and used drugs from the age of 15" and had a "substantial criminal record, with convictions for prostitution, the sale of drugs, assault, vehicle theft and fraud. ... She had 45 charges regarding prostitution, and 15 convictions, including jail time for these convictions."¹⁸⁷

Justice Curtis accepted expert evidence that the mother has "good insight into her past difficulties" and has "overcome a lot in her life", yet still relied upon the mother's past convictions as evidence of *ongoing* poor judgment that rendered her unable to provide a stable home environment.¹⁸⁸ The mother was deemed not able to "provide the child with ... stability and consistency" and, if returned to her care, the child would not have the "certainty, finality, and [the ability to] grow up in a safe and stable family, where he is valued and protected from harm."¹⁸⁹ Justice Curtis ordered crown wardship without access.

¹⁸³ *Ibid* at para 128.

¹⁸⁴ *Ibid* at para 176.

¹⁸⁵ 2013 ONCJ 583 [*JB*].

¹⁸⁶ *Ibid* at para 7.

¹⁸⁷ *Ibid* at paras 25, 26

¹⁸⁸ *Ibid* at paras 33, 59, 76.

¹⁸⁹ *Ibid* at paras 79, 81.

I do not suggest that Justice Curtis was wrong to consider the mother's criminal history. Under s. 50 (1) (b) the former *CFSA*, evidence of a parent's past criminal history was admissible.¹⁹⁰ I argue that the stigma against sex workers perpetuated by the pre-*Bedford* criminal scheme contributed to the uphill battle that the mother in *JB* faced during her proceedings. Perhaps the mother's criminality in *JB* would have been considered in a different light if a large portion of her record was the result of unconstitutional laws.

In *Children's Aid Society of Hamilton v CH*,¹⁹¹ the applicant society brought a motion for crown wardship on summary judgment after learning that the mother would not be attending trial. The evidence of the society included multiple references to the mother's sex work:

[21] The mother has serious lifestyle problems including significant involvement with prostitution:

- a. She has a history of working as a prostitute since age 13.
- b. In early 2012 the Society discovered advertisements the mother had placed through on-line escort services. The mother admitted she placed the ads on the website, but claimed she had never followed through with the service.
- c. The mother recently advised a society worker that she had a better life when she was involved in prostitution.¹⁹²

Neither the society nor Justice Pazaratz, the presiding judge, explained how the mother's history of sex work, advertisement of sex work, or her assertion that sex work provided a better life impacted the best interests of the child. Nevertheless, Justice Pazaratz relied on the society's "thorough and unchallenged" evidence to conclude that the mother "lacks the skills, motivation and stability to be an appropriate caregiver for this young child"¹⁹³ and ordered crown wardship without access.¹⁹⁴

For the fourth case where a court implied that sex work impacted the child's need for permanency, Justice Duchesneau-McLachlan connected the location of the mother's sex work and to her ability to provide

¹⁹⁰ *CFSA*, *supra* note 4 at s. 50(1)(b) provides as follows: "Despite anything in the *Evidence Act* [RSO 1990, c E.23], in any proceeding under this Part ... any oral or written statement or report that the Court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence."

¹⁹¹ 2014 ONSC 3731 [*CH*].

¹⁹² *Ibid* at para 21.

¹⁹³ *Ibid* at para 24.

¹⁹⁴ *Ibid* at para 34.

permanency for the child.¹⁹⁵ The mother in *B(J)* was an exotic dancer with a history of substance abuse, which Justice Duchesneau-McLachlan discussed in detail throughout her decision. She did not refer to the mother’s exotic dancing until the concluding paragraphs, when she noted that the mother was “vulnerable to drug abuse and finds herself in a work environment where the temptations *might* be too great” (emphasis added).¹⁹⁶ She stated that the mother was “courting disaster”¹⁹⁷ by continuing to work as an exotic dancer at a location “well known” for drug use. Justice Duchesneau-McLachlan concluded that the child needed structured caregivers who can avoid drug use, and “cannot wait any longer for his parents to straighten out. His best interests dictate that he get a chance for a permanent home and committed parents”¹⁹⁸ and ordered crown wardship without access.

I agree that courts should be concerned about a parent who is an addict working in an area where drugs are readily available, as substance abuse by a parent can certainly lead to adverse impacts on a child.¹⁹⁹ I suggest, however, that Justice Duchesneau-McLachlan ought to have incorporated in further fact-finding when ruling that the mother’s drug use prevented her from providing permanency and stability. Instead, she relied upon a presumption that the temptations “might” be too great. Further, she does not explain what evidence he relied upon to find that the mother’s place of work is “well known” for drug use.

Continuity of the child’s care

Continuity of the child’s care with the non-sex worker parent was given preference in one case. *Children’s Aid Society of Toronto v SAP et al* involved an appeal of a final order granting custody of the children to the father by a former sex worker mother.²⁰⁰ The child had been in the care of the father while the mother took a number of what appeared to be society-required steps to overcome society concerns, including ceasing her involvement in sex work. During that time, the child developed a stable home with the father. Justice Shore acknowledged that the mother had made “significant progress since her first involvement with society, ... overcome[ing] her involvement with drugs, escorting, and abusive partners”,²⁰¹ yet held

¹⁹⁵ *Children’s Aid Society of Nipissing and Parry Sound v. B(J)*, 2010 ONCJ 34 [B(J)].

¹⁹⁶ *Ibid* at paras 89.

¹⁹⁷ *Ibid* at para 91.

¹⁹⁸ *Ibid* at paras 84, 92.

¹⁹⁹ Murnan (2018), *supra* note 96.

²⁰⁰ 2019 ONSC 3482 [SAP].

²⁰¹ SAP, *supra* note 200 at para 34.

that it was in the best interests of the child to remain with the father. It is not apparent from either decision what, if any, tangible impact the mother’s engagement in sex work had on the children.

The decision suggests that the society required that mother refrain from drug use, escorting, and associating with abusive partners, and that she complied. The time it took for the mother to comply with the terms—including exiting sex work—was the primary reason that the children were not returned to her care. Despite praising the mother’s progress, Justice Pawagi ordered (and Justice Shore upheld) that the most “significant factor” regarding the children’s best interests was “continuity of care.”²⁰² The father was granted custody of the children because “during the time that [the mother’s progress] has taken, the children settled into their placement with their father. It would be in their best interests have that [*sic*] placement be permitted.”²⁰³

Ongoing risk of physical harm

For two cases, parental engagement in sex work contributed to a determination that the child was at ongoing risk of physical harm. First, in *CCAS v. JF-G and NS*, the sex worker mother sought custody and access but could not attend trial as she was incarcerated.²⁰⁴ The father also sought custody. When reviewing the evidence against the mother, Justice Mazza noted that the society worker who apprehended the children had learned that, prior to apprehension, the mother “had been smoking crack and prostituting herself.”²⁰⁵ The father gave evidence that he separated from the mother after learning that she was “involved in prostitution and was consuming crack cocaine”.²⁰⁶ In his conclusion, Justice Mazza noted that the mother’s life “was one that included prostitution, alcoholism, drug addiction, a criminal record, alarming tendency to violence and that she is currently facing a charge of procuring young children for the purposes of prostitution. ... [T]o return the children to her care would clearly place them risk of both physical and emotional harm”.²⁰⁷

²⁰² *Ibid* at para 30, reference to para 29 of the reasons of Justice Pawagi

²⁰³ *Ibid* at para 34, reference to para 31 of the reasons of Justice Pawagi.

²⁰⁴ 2013 ONSC 6434 [*JF-G*].

²⁰⁵ *Ibid* at para 11.

²⁰⁶ *Ibid* at para 77.

²⁰⁷ *Ibid* at paras 120-121.

I query why Justice Mazza only mentioned, without any details or analysis, the procurement charges once at end of the +140-paragraph decision. Procurement of children is a serious offence and, if convicted, would be compelling evidence that the children would be at risk of harm if returned to the mother. However, we are not provided with any details regarding the mother's procurement charge. Further, for the purpose of this research, it is relevant that Justice Mazza listed the mother's involvement in "prostitution" separately from the procurement charge, implying that engagement in prostitution is as a negative factor in and of itself.

The mother's involvement in sex work also had a negative impact on the father's claim for custody in *JF-G*. During submissions, counsel for the society argued that the father demonstrated poor judgment by choosing to become involved with the mother. The society submitted that the father's choice of a partner who was "involve[d] with prostitution, drug consumption and ... [was] prone to violence" did "not speak to the success of the future family's constellation."²⁰⁸ The society further submitted that the father was untrustworthy, in part due to "having not advised the society of [the mother's] inappropriate behaviour, her tendency to violence, her involvement with prostitution, and her addiction to drugs. He was forthcoming on none of these very concerning circumstances."²⁰⁹ Justice Mazza accepted the society's submission that the father's failure to report the mother's "involvement in prostitution and her consumption of illicit drugs and alcohol while the children were in her care" demonstrated that he "clearly ... did not appreciate the importance of protecting [the children] in such a precarious environment."²¹⁰ The three children were made crown wards without access to either parent.

Courts referred to an ongoing risk of physical harm in two appeal decisions from the *DD v Children's Aid Society of Toronto* proceeding.²¹¹ These decisions contain one of the few fact patterns where the parent's involvement in sex work appears to have had an explicit adverse impact on the child.

In both *DD* decisions, the mother is introduced as a sex trade worker. Justice Horkins and Justice Pardu both noted that the mother arrived in Canada from Romania in 1995 and "worked in the adult

²⁰⁸ *Ibid* at para 101.

²⁰⁹ *Ibid* at para 102.

²¹⁰ *Ibid* at para 128.

²¹¹ 2015 ONSC 4197 [*DD* ONSC] and 2015 ONCA 903 [*DD* ONCA].

entertainment business and as a sex trade worker.”²¹² The father was a client and had no further contact with the mother or the child.²¹³

The mother’s sex work is later raised by Justice Pardu when she upheld a decision of the trial judge (which does not appear to have been reported) to admit and rely upon disturbing hearsay evidence from the child. The child described being sexually abused by one of the mother’s clients in the home.²¹⁴ Justice Pardu did not comment on the weight given to or impact of the child’s evidence at trial, or otherwise substantively consider the evidence in upholding the trial judge’s order for crown wardship without access. She only noted that the mother could not point to any trial unfairness arising from the admission of the hearsay evidence.²¹⁵

As noted, *DD ONCA* is one of the few decisions where an element of the parent’s particular manner of practicing sex work (bringing a client into the home while the child is present) is clearly connected to the harm experienced by the child (the client sexually abused the child). Unfortunately, neither Justice Horkins or Justice Pardu considered or unpacked the connection between the child’s hearsay evidence and the orders rendered—for example, by considering whether an order that the mother refrain from bringing clients home could adequately protect the child in the future—in their written reasons.

Sex work as part of a negative description of a parent

For nine of the nineteen sex worker parents, the presiding judges did not appear to apply sex work to any particular element of the legal analyses before them. Instead, judges referred to sex work as part of a negative description of the parent and/or their lifestyle. For cases involving former sex workers, judges referred to the parent’s past sex work without considering the limitations on adducing evidence regarding a parent’s past conduct provided in both Child Protection Acts.²¹⁶

²¹² *DD ONSC, ibid* at para 2; *DD ONCA ibid* at para 3.

²¹³ *Ibid.*

²¹⁴ *DD ONCA, ibid* at para 21.

²¹⁵ *Ibid* at para 40.

²¹⁶ *CFSA, supra* note 4, s 50(1)(a); *CYFSA, 2017, supra* note 4, s 93(1)(a).

Prior involvement in sex work appeared in a list of negative qualities of the father in *Catholic Children's Aid Society of Toronto v. LDE*.²¹⁷ The father had been noted in default, and so the Court did not consider whether the father should be granted custody or access. The father's involvement in sex work appeared in an excerpt from a parenting capacity assessment. The assessment listed the father's past behavioural issues, including "... sexualized behaviours, prostituting himself, drug usage, theft from his parents, staying out late, refusing to take his medication for his social disorders and acts of violence (emphasis in original)."²¹⁸

Similarly, in *Children's Aid Society of Toronto v. DB-S*, Justice Murray referred to the mother's sex work when describing her past issues with substance abuse:

D.B.-S.'s cocaine use continued, on and off, for over 25 years. Her cocaine use was accompanied by binge drinking of hard liquor. She sold drugs periodically, and eventually sold herself, working as a prostitute.²¹⁹

While the Court made no further references to sex work, Justice Murray later applauded the mother for her efforts to overcome her addictions and maintain a positive relationship with the child. Justice Murray refused the society's request for crown wardship without access and placed the child in the custody of the father—who resided with the mother—with access to the mother.

Judges condemned a parent's choice of choosing a sex worker as a romantic partner in two cases. First, in *The Ottawa Children's Aid Society v. CS* the mother had three children with two different fathers, RP and PS.²²⁰ Both fathers were former sex workers. Justice McKinnon referred to the fathers' involvement with sex work when describing their "tragic" and "hard" lives.²²¹

Regarding RP, Justice McKinnon noted at the onset of the decision that he was "seriously mentally ill and has had what can only be described as a tragic life as a result of his illness. He has been seriously addicted to both alcohol and drugs from a very early age and in the past engaged in male prostitution in order to

²¹⁷ 2012 ONCJ 530 [LDE].

²¹⁸ *Ibid* at para 7.

²¹⁹ *Children's Aid Society of Toronto v DB-S*, 2013 ONCJ 405 [DB-S] at para 28.

²²⁰ 2016 ONSC 3828 [CS].

²²¹ *Ibid* at paras 4, 135.

feed his addiction”.²²² RP’s children were made crown wards, partly due to the mother’s refusal to end her relationship with RP and parent the children on her own.

Justice McKinnon described PS as a former prostitute and pimp. PS “engaged in prostitution in order to get drugs and trafficked in drugs for a period of time.”²²³ In response to accusations from a former girlfriend that he was a pimp, PS “stated he did not feel he was a pimp but realized that he was benefitting from her prostitution and would encourage her to do it.”²²⁴ Justice McKinnon ordered crown wardship for PS’ daughter, explaining that that “PS’s lifestyle choices and highly unstable background make him incapable of providing a secure, predictable and stable environment for [his daughter], to ensure her healthy upbringing.”²²⁵

The second case involving criticism of a non-sex worker parent for their choice of a sex worker partner is in *Children’s Aid Society of Toronto v. RB-H*.²²⁶ Justice Zisman questioned the father’s judgment and insight partly due to the father’s “belief that the mother was a good parent to the children”,²²⁷ despite her demonstrated inability to meet the children’s needs and her involvement with “prostitution” and “the sex trade”.²²⁸ Justice Zisman also relied upon adverse evidence from a society witness regarding the mother, including how the mother “admitted to ... working in the sex trade”²²⁹ during an interview with the society. I suggest that the use of term “admitted” suggests that evidence of sex work is viewed as harmful to the sex worker’s case. Justice Zisman ordered crown wardship without access.

The mother in *Children’s Aid Society of Hamilton v. AS et al* was an escort and did not attend trial.²³⁰ The main issue before the Court was with respect to a parenting plan presented by the paternal grandmother of one of the children. When summarizing the evidence, Justice Pazaratz referred to the society’s concerns with escorting by the mother:

²²² *Ibid* at para 4.

²²³ *Ibid* at para 135.

²²⁴ *Ibid* at para 135.

²²⁵ *Ibid* at paras 179, 186.

²²⁶ 2015 ONCJ 389 [RB-H].

²²⁷ *Ibid* at para 184.

²²⁸ *Ibid* at paras 50, 59.

²²⁹ *Ibid* at para 80.

²³⁰ 2017 ONSC 2226 [AS]

[26] g. ... in July 2016 the Society received information the mother was working as an escort. Although the mother initially denied this, she eventually admitted to escorting. She said the partner she had been living with had introduced her to this. She later admitted to the Society that her work as an escort is one of the reasons she hasn't been able to attend for access regularly.²³¹

The impact to the child appears to arise from the mother's failure to attend access, not a specific aspect of sex work. I question whether the society's response would have been if the mother had missed access for a socially acceptable line of work.

When discussing harm to the children, Justice Pazaratz referred to the mother's decision to engage in escorting in the same paragraph as severe domestic violence:

[26] j. [The mother] has shown no insight into the impact of exposing her children to domestic violence. She has failed to protect them from real and foreseeable dangers which resulted in A.S-P. not only witnessing but also suffering horrible abuse. ... She continues to pursue a dangerous and unstable lifestyle, unaware or unconcerned about the danger her decision to escort presents to her own safety and any child placed in her care.²³²

Justice Pazaratz did not explain what evidence he relied upon to conclude that the mother's work as an escort endangered her children, particularly when the domestic violence referred to at the beginning of the paragraph was inflicted upon the mother by intimate partners, not by clients.²³³

I located two cases where sex work was relied upon to describe a parent's problematic history and the fact that a parent was no longer involved in sex work received favourable treatment by the Court. First, in *Catholic Children's Aid Society of Toronto v. CM*, Justice Murray noted the mother's involvement in sex work when describing her "difficult life".²³⁴ At a young age, the mother had been "steered her into prostitution."²³⁵ Prior to the birth of the child, she "was convicted of a number of criminal offences, most of which involved possession of cocaine, prostitution and failure to attend court or to comply with probation orders."²³⁶ When providing an updated description of the mother, Justice Murray referred to

²³¹ *Ibid* at para 26 g.

²³² *Ibid* at para 26 j.

²³³ *Ibid* at paras 25-26.

²³⁴ 2011 ONCJ 648 [CM] at para 14.

²³⁵ *Ibid* at para 15.

²³⁶ *Ibid* at para 16.

prostitution and drug use as two “major obstacles to being an adequate parent” that the mother had successfully dealt with.²³⁷ Both children were made temporary society wards with supervised access, with one child to be returned to the mother in two months subject to a supervision order.

Second, in *Children’s Aid Society of Oxford County v. CL*,²³⁸ Justice Paull summarized the “traumatic personal history” of the mother—a former sex worker—at the onset of the decision. He described the mother as a victim, noting that she suffered from “a diagnosis of PTSD related to being a victim of human trafficking, violence, and prostitution”.²³⁹ Justice Paull recognized that the mother had overcome difficult facets of her life and was generally a good parent. He placed the child in temporary society care but noted that he would have placed the child in the care and custody of the mother had she agreed to live apart from the abusive father.²⁴⁰

And finally, perhaps the most disturbing language to describe a sex worker appeared in *Children’s Aid Society of Algoma v. LP*.²⁴¹ Justice Kukurin referred to the mother’s involvement in sex work only at the beginning of the decision when explaining why he would not consider placing the children with her. He described the mother as an “attractive prostitute” with chronic substance abuse problems and as a “tragic waste of life”.²⁴²

Conclusion

In the above cases, sex work was treated as a negative quality in a parent rather than as an aspect of a parent’s life that warranted further factual exploration. Overall, courts appeared to rely more upon negative assumptions or stigma about sex work and sex workers than on evidence regarding the actual impact (if any) of a particular parent’s involvement in sex work upon their child in Child Protection hearings in Ontario.

²³⁷ *Ibid* at para 71.

²³⁸ 2019 ONCJ 923 [CL].

²³⁹ *Ibid* at para 6.

²⁴⁰ *Ibid* at paras 4, 79.

²⁴¹ 2011 ONCJ 712 [LP].

²⁴² *Ibid* at para 6.

In one hundred percent of the Child Protection cases, a parent's past or present involvement in sex work had a negative impact on the parent's claim for custody or access at some point during the proceeding, ranging from an unfavourable description of the parent to a contributing factor for an order that crown wardship without access is in the best interests of the child. I argue that stigma against sex work and sex workers is a primary driver of those negative impacts.

In seventeen of the nineteen Child Protection cases, courts appeared to accept that sex work was incompatible with parenting yet did not explain how sex work effects the child. In contrast, the Courts only connected a parent's involvement in sex work with a negative impact on a child in two of the nineteen cases.²⁴³

²⁴³ In *B(J)*, *supra* note 195; *DD ONCA*, *supra* note 211.

Chapter 4: Family law

In contrast to the imbalance of power that is inherent in Child Protection proceedings, custody and access disputes in Family Law custody are usually between two parents who are presumed to be of equivalent footing. Barring certain circumstances, a child's parents are equally entitled to custody²⁴⁴ and a child should have as much contact with each parent as is consistent with their best interests.²⁴⁵

Chapter 4 follows a similar format to Chapter 3. First, I outline the Family Law legislative schemes applicable in Ontario: the provincial *CLRA* and the federal *Divorce Act* ("the Family Law Acts").²⁴⁶ Second, I provide an overview of statistical data arising from the Family Law case law. Third, I analyse the apparent impact of parental engagement with sex work on claims for custody and access in Family Law decisions.

My conclusion in this Chapter is similar to Chapter 3: for sex workers involved in custody and access disputes, stigma can carry more weight at trial than evidence (or a lack thereof).

Family Law legislation: The Ontario Children's Law Reform Act and the Federal Divorce Act

The Family Law Acts govern private custody and access disputes in Ontario. Section 16 of the *Divorce Act* applies exclusively to married parents obtaining a divorce and Part III of the *CLRA* applies to all parents, including those in common law spousal relationships.²⁴⁷

As with the Child Protection proceedings, custody and access proceedings brought under the Family Law Acts contain parallel substantive and procedural elements. Both contain similar:

- i. paramount purposes;
- ii. application processes for commencing proceedings;
- iii. available orders;

²⁴⁴ *CLRA*, *supra* note 4, ss 20(1), (7).

²⁴⁵ *Divorce Act*, *supra* note 4, s 16(1).

²⁴⁶ For a side-by-side comparison of the relevant provisions of the *CLRA*, *supra* note 4 and the *Divorce Act*, *ibid*, please see Appendix C.

²⁴⁷ *CLRA*, *ibid*; *Divorce Act*, *ibid*.

- iv. factors that a court must consider when making an order in the best interests of a child; and
- v. limitations on what evidence regarding a parent's past conduct is admissible during a hearing.

Paramount purpose

Like Child Protection laws, the Family Law Acts work to ensure that applications for custody and access are determined on the basis of the best interests of the child.²⁴⁸

Family Law proceedings are commenced by application to the Court

Custody and access proceedings under the *CLRA* are commenced when a parent, or any other person, seeking a custody and access order makes an application to the court.²⁴⁹ Applications must be accompanied by an affidavit that includes information regarding the applicant's involvement in any Child Protection or criminal proceedings, and any other information relevant to the child's best interest. While the *CLRA* does not refer to a respondent's obligations, Rule 35.1(2) of the *Family Law Rules* confirms that if an answer to an application includes a claim for custody of or access to a child, the answering party shall also serve and file an affidavit in support of the claim.²⁵⁰ Under the *Divorce Act*, a parent seeking an order for custody of and/or access to a child of the marriage can commence a proceeding by way of application.²⁵¹ A person other than a married spouse requires leave of the Court to make an application.²⁵²

Available orders

When making an order for custody and access under the *CLRA*, a court may do any of the following:

- (a) grant the custody of or access to the child to one or more persons;
- (b) determine any aspect of the incidents of the right to custody or access; and
- (c) make any additional orders the Court deems necessary.²⁵³

²⁴⁸ *CLRA, ibid, s 19(a); Divorce Act, ibid, s 16(8).*

²⁴⁹ *CLRA, ibid, ss 21(1), (2).*

²⁵⁰ O Reg 114/99: *Family Law Rules under Courts of Justice Act, RSO 1990, c C.43.*

²⁵¹ *Divorce Act, supra note 4, ss 16(1)-(3).*

²⁵² *Ibid, s 16(3).*

²⁵³ *CLRA, supra note 4, s 28(1).*

Custody orders under the *CLRA* may be for joint (*i.e.*, shared) or sole custody of a child, and can pertain to physical custody, where a child lives with the parent, and/or the right to be involved in significant decision-making. Once an order for custody or access has been made, a court may only vary the order if there has been a material change in circumstances that affects or is likely to affect the best interests of the child.²⁵⁴

The *Divorce Act* grants broad discretion to courts to make orders regarding custody and access—including interim or joint custody or access—of a child of the marriage on any such terms, conditions, or restrictions as it thinks fit.²⁵⁵

Any custody or access order must be in the best interests of the child

Custody and access disputes under both Family Law Acts must be determined only on the basis of what is in the best interests of the child.²⁵⁶

The *CLRA* provides an inexhaustive list of considerations affecting the child’s best interests.²⁵⁷ When rendering an order for custody and access, courts shall consider “all the child’s needs and circumstances”, including:

- (a) the love, affection and emotional ties between the child and
 - (i) each person, including a parent or grandparent, entitled to or claiming custody of or access to the child;
 - (ii) other members of the child’s family who reside with the child, and
 - (iii) persons involved in the child’s care and upbringing;
- (b) the child’s views and preferences, if they can reasonably be ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;

²⁵⁴ *Ibid*, s 29.

²⁵⁵ *Divorce Act*, *supra* note 4, ss 16(4)-(6)

²⁵⁶ *CLRA*, *supra* note 4, s 24(1); *Divorce Act*, *ibid*, s 16(8).

²⁵⁷ *Ibid*, s 24(2).

- (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live;
- (g) the ability of each person applying for custody of or access to the child to act as a parent; and
- (h) any familial relationship between the child and each person who is a party to the application.²⁵⁸

The *Divorce Act* does not contain a list of considerations. Instead, section 16 simply provides that the Court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.²⁵⁹

Past conduct of a parent

Under the *CLRA*, evidence regarding a person's past conduct is only admissible if it relates to their ability to act as a parent.²⁶⁰ When assessing a person's ability to act as a parent, the Court shall consider whether the person has at any time committed violence or abuse against a spouse, a parent of the subject child, a member of the person's household, or any child.²⁶¹ Anything done in self-defence, or to protect another person is not to be considered violence or abuse.²⁶² In divorce proceedings, a court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.²⁶³

A note on Bill C-78: Amendments to the *Divorce Act*

On June 21, 2019, Bill C-78, which proposed substantial amendments to Canada's federal Family Law regime regarding divorce, separation, and parenting, received Royal Assent.²⁶⁴ The amendments will come into effect on March 1, 2021.

²⁵⁸ *Ibid*, s 24(2).

²⁵⁹ *Divorce Act*, *supra* note 4, s 16(8).

²⁶⁰ *CLRA*, *supra* note 4, s 24(3)(a), (b).

²⁶¹ *CLRA*, *ibid*, s 24(4)(a)-(d).

²⁶² *CLRA*, *ibid*, s 24(5).

²⁶³ *Divorce Act*, *supra* note 4, s 16(9).

²⁶⁴ *Bill C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2019 (as passed on June 21, 2019) [*Bill C-78*].

The terms “custody” and “access” do not appear in the new *Divorce Act*. Instead, courts will make parenting and contact orders.²⁶⁵ A parenting order may contain terms and conditions regarding the allocation of parenting time and decision-making responsibilities; means of communication between parents, children, and other persons with parenting time or decision-making responsibilities; and any other relevant matter.²⁶⁶ Contact orders contain terms regarding contact, such as visits and communications, between a parent and a child.²⁶⁷ According to parliamentary debates, the change in terminology is meant to alleviate the adversarial nature of divorce proceedings by reducing the semblance of a winning litigant who is granted custody, and a losing litigant who is granted access.

Perhaps most significantly, the *Divorce Act* will be amended to prescribe a list of best interests factors that courts must consider when making parenting and contact orders.²⁶⁸

- (a) the child’s needs, given the child’s age and stage of development, such as the child’s need for stability;
- (b) the nature and strength of the child’s relationship with each spouse, each of the child’s siblings and grandparents and any other person who plays an important role in the child’s life;
- (c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child’s views and preferences, giving due weight to the child’s age and maturity, unless they cannot be ascertained;
- (f) the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child’s care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

²⁶⁵ *Ibid*, ss 16.1(4), 16.5(4).

²⁶⁶ *Ibid*, s 16.1(4).

²⁶⁷ *Ibid*, s 16.5(4).

²⁶⁸ *Bill C-78, supra* note 264, ss 16(1), 16.1(1).

- (j) any family violence and its impact on, among other things
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security, and well-being of the child.

Overview of results

Procedurally, Family Law disputes are simpler than Child Protection proceedings. Parents must only demonstrate that the custody or access order they seek is in the best interests of the child. I have thus organized my analysis of the Family Law cases by the parent's status as a sex worker (past or present) and outcome.

I located eight relevant Family Law cases and twelve allegation cases.²⁶⁹ Four cases involved parents who were engaged in sex work at the time of trial:

- One mother sought sole custody. She was awarded joint custody of the child, with primary care to the father.
- One mother sought and was denied custody.
- One father sought access, which was denied.
- One mother requested increased access to her child as a result of parental alienation by the father, which was granted. It is not clear from the decision why the sex worker mother did not originally have custody of the child.

²⁶⁹Allegation cases: *Porter v Hamilton*, 2011 ONSC 5792; *Sangha v Meighan*, 2012 ONSC 2362; *Avakian v Natiotis*, 2012 ONCJ 584; *Aza v Zagroudnijski*, 2014 ONCJ 293; *JBH v TLG*, 2014 ONSC 3569; *GTB v ZBB*, 2014 ONCJ 382; *Facchini v Bourre*, 2015 ONSC 763; *VB v MM*, 2016 ONCJ 98; *TEH v GJR*, 2016 ONCJ 156; *Daher v Khanafer*, 2016 ONSC 5969; *DE v CS*, 2017 ONCJ 668; *Hackett v Sever*, 2017 ONCJ 193.

Four cases involved parents who formerly engaged in sex work:

- Three mothers were awarded custody of the child. Courts appeared to treat the fact that the parent no longer engaged in sex work favourably.
- One mother sought, but was not, awarded custody. The mother had previously abandoned her child to pursue sex work in another province. The Court appeared to approve of the mother's subsequent decision to leave sex work but felt that placement with a person who had cared for the child during the mother's absence was in the child's best interests.

Like the Child Protection cases, the Family Law cases are factually rich. None of the Family Law decisions were rendered solely—or even primarily—based on the parent's sex work. Again, all of the sex worker parents experienced at least one shared precarity at some point in their lives. Even so, judicial treatment of sex work throughout the Family Law cases further demonstrates the impact of stigma on sex workers in custody and access disputes.

Law & analysis

Parents involved in sex work at the time of hearing

I located four cases that illustrate how stigma against sex work can adversely impact the claims of a parent involved in sex work at the time of a proceeding.

The mother in *Fias v. Souto* was a stripper and a masseuse.²⁷⁰ Evidence of her involvement in sex work weakened the positive evidence that a clinical investigator from the Office of the Children's Lawyer provided on behalf of the mother. After testifying to the strength of the mother's parenting skills, the investigator acknowledged on cross-examination by counsel for the father that she was unaware that Ms. Fias had been working as a 'stripper' or in a 'body rub parlour'. The witness admitted that she would need to understand the situation better to know how this would affect mother's lifestyle.²⁷¹

²⁷⁰2015 ONSC 880 [*Fias*].

²⁷¹*Ibid* at para 41.

The father in *Fias* raised the mother's sex work during his evidence in chief when expressed concerns about the mother's parenting abilities. He gave evidence that he "question[ed] [the mother's] choice of employment and denie[d] that he knew of [the mother's] previous employment (until she was three months' pregnant) as an exotic dancer."²⁷² The mother's direct evidence was that she worked as a server at that time, but later "admitted" to exotic dancing on cross-examination.²⁷³

When assessing the credibility of the mother, Justice Stevenson noted that the mother had been "less than forthright with respect to providing details regarding her current employment I accept [the mother's] evidence that her current employment as a masseuse is not employment that she is comfortable with; however, this information should have been provided to allow [the clinical investigator to have full information before her while she completed her investigation."²⁷⁴

Justice Stevenson nevertheless held that the mother was a good parent with a loving relationship with her child and ordered joint custody, with primary care for the father. Unfortunately, part of the mother's success appears to have come from her apologetic attitude towards sex work. Justice Stevenson accepted the mother's evidence that she was not comfortable with her employment, noting that she "often feels sick about" her work as an exotic masseuse.²⁷⁵ The mother's counsel submitted that she was taking steps to find "meaningful employment" and only worked as a masseuse to "survive".²⁷⁶

Overall, it is unclear from the decision how the Court, the parties, and the witnesses in *Fias* believed the mother's sex work actually affected the children.

The mother and father in *Rivest-Marier v. Emond* both sought sole custody of a six-year-old boy. The opening paragraphs of Justice Shelston's decision contain a refreshing example of judicial neutrality towards sex work.²⁷⁷ When reviewing the backgrounds of the parents, Justice Shelston noted that the parents met when the father managed a strip club where the mother worked as a dancer, and that the

²⁷² *Ibid* at para 55.

²⁷³ *Ibid* at paras 80, 84, 97.

²⁷⁴ *Ibid* at para 49.

²⁷⁵ *Ibid* at para 88.

²⁷⁶ *Ibid* at para 190.

²⁷⁷ 2017 ONSC 4197 [*Rivest-Marier*].

mother worked as a dancer up until she became pregnant. Justice Shelston did not explicitly rely on the mother's past sex work when ruling that sole custody to the father was in the best interests of the child.

Still, the mother's sex work had at least two adverse impacts on the mother during the course of the dispute between the parents. First, the Court noted that relatives encouraged the father to commence custody proceedings because they were concerned about the mother's depression and involvement in prostitution, and the impact of same on her parenting abilities.²⁷⁸ Second, at trial, the testimony of an aunt who provided evidence on behalf of the mother was weakened on cross-examination because the aunt "had never heard that the mother worked in a Swedish massage parlor", a fact that mother eventually "admitted".²⁷⁹ Again, the *Rivest-Marier* decision does not clarify *how* the mother's work allegedly affected the children.

A parent with a long history in sex work brought a motion to restart access to her children in *HP v. PLC*.²⁸⁰ The parent acknowledged a violent history—including sexual offenses against the mother—but submitted that there had been a material change in circumstances affecting the best interests of the children because she was ready to be present in her children's lives and had dealt with her charges. Her motion was deemed to have no merit and was dismissed.

There is no question that domestic violence, which appears to have been significant in *HP*, can harm a child. Domestic violence as a stand-alone factor could have been sufficient to warrant an order for no access in *HP*. For the purpose of this research, however, it is noteworthy that Justice Hardman stated at the onset of her decision that her concern regarding the past sexual abuse of the mother had been "noted", however there were a "number of other problems" regarding the parent's sexual history. Justice Hardman then proceeded to consider the parent's involvement in sex work separately from the parent's violent history.

Justice Hardman summarized the evidence regarding the parent's sex work in *HP* as follows:

[35] Despite [the parent's] attempt in her materials to suggest that her participation in prostitution was historical, it is clear that it has continued throughout these

²⁷⁸ *Ibid* at para 10.

²⁷⁹ *Ibid* at paras 33, 38.

²⁸⁰ *HP*, *supra* note 78.

proceedings. The advertisements filed invite paying customers to contact her by the cell phone number used by [the parent.] Further there is the offer of “incall” times at her home and “outcall” times elsewhere in the community. It appears that [the parent] even offers her services weekends.

[36] While [the parent] has denied that she entertains clients in her home, the phrasing of the advertisements is of concern. One advertisement on the internet sets out where she is prepared to engage in sex: “my place, his place, outdoors, restroom, bathhouse, theatre, truck stop or gym”.²⁸¹

The parent’s sex work had negative implications for the parent at five points during the decision. First, Justice Hardman reviewed a counsellor’s report confirming the parent demonstrated an “‘appropriate understanding of normative sexual behaviour’ ... and ‘was able to identify ‘pre-offense factors’ and develop a list of warning signs to avoid.”²⁸² Despite the conclusions in the report that the parent was able to deal with inappropriate sexual urges, the Court commented that “[s]urely the participation of [the parent] as an escort-prostitute is exactly the impersonal sex risk factor that [she] planned to avoid.”²⁸³ In deciding to give little weight to the report, the Court concluded that “Given [the parent’s] current lifestyle both for money and leisure, it would seem that any conclusions about risk from the report must be considered unreliable. [The parent] herself states on some of the advertisements that she is “drug and disease free”, identifying risks that are part of her lifestyle.”²⁸⁴

Second, Justice Hardman appeared to reject supportive evidence of the sex worker’s parenting skills provided by her partner’s parents. The sex worker had a child from another relationship, and the witnesses had seen the sex worker exhibit positive parenting skills. Nevertheless, Justice Hardman appeared to discredit the evidence from the in-laws because “whether [the witnesses are] aware of the background of [the parent] or the life style [sic] chosen by her...] is unknown.”²⁸⁵

Third, Justice Hardman concluded that the parent’s online advertisements and involvement in sex work demonstrates that she “clearly has not thought of the potential consequences of such revealing exposure of herself and lifestyle to her own children and family. What [the parent] does on the net, for work and recreation, is all about her and her focus on her own needs and not about any care taken about potential

²⁸¹ *Ibid.*

²⁸² *Ibid* at para 34.

²⁸³ *Ibid* at para 34.

²⁸⁴ *Ibid* at para 41.

²⁸⁵ *Ibid* at para 53.

repercussions on her children.”²⁸⁶ Justice Hardman did provide some factual context regarding the parent’s sex work (*i.e.*, in calls and out calls, working weekends) but did not explain what the “potential repercussions” the mother’s sex work might have on the children.

Fourth, Justice Hardman appeared to accept the mother’s submissions that the parent’s engagement in sex work was a sufficient reason to deny the parent’s request for access. Justice Hardman explained that the mother “has told the Court that she decided that it was not in the best interests of her children [to have access to the sex worker parent] based on all the information she had, and that the confirmation that [the sex worker parent] continued to prostitute made her realize that it had been the right decision.”²⁸⁷ Justice Hardman agreed with the mother, concluding that the sex worker parent’s “untreated historical issues, her recreational pursuits, her risky employment and her without-boundary behaviour on the internet would raise alarms about the suitability of any person to parent.”²⁸⁸ Justice Hardman accepted that “the mother does not want the choices that [the parent] has made to be part of her children’s lives given their differences in values. In the circumstances, her concerns are not unreasonable.”²⁸⁹

Fifth, Justice Hardman concluded that the parent had a lack of focus on the children, in part because “she could have chosen a life style [*sic*] that would allow her to contribute to both the emotional and financial stability of these children.”²⁹⁰ In the end, despite strong condemnation for the parent’s work and lifestyle choices, it does not appear that Justice Hardman made any connection with the sex worker parent’s lifestyle to her request for *access*. She concluded that:

Perhaps the most important consideration is the fact that the children are happy, stable and secure in the home where they are. The mother and her husband work diligently to ensure that the girls have everything that they need. In considering best interests, the Court must consider that family unit and ensure that no decision will adversely affect the stability of that home.²⁹¹

²⁸⁶ *Ibid* at para 43.

²⁸⁷ *Ibid* at para 67.

²⁸⁸ *Ibid* at para 95.

²⁸⁹ *Ibid* at para 105.

²⁹⁰ *Ibid* at para 98.

²⁹¹ *Ibid* at para 106.

While the parent “proposed to have the children come visit her and become part of her life”,²⁹² she did not propose a change of residence for the children or that would otherwise appear to affect the stability of the home. Further, the Court did not consider a form of access that would not require contact between the sex worker parent and the mother, or that the children attend the sex worker parent’s home, such as supervised access at an access centre.

I located one case that illustrates that stigma against sex workers contributes to their risk of being alienated from their children. Volikis & Jakubowska explain that alienation occurs when one parent tells the child that the other parent is not a good parent, is a bad person, or otherwise attempts to “poison ... a child’s mind against the other parent.”²⁹³

In *Lopez v. Dotzko*, the mother, an exotic dancer, moved for increased access to because the father continuously refused to allow the mother to see the child.²⁹⁴ The father’s pleadings and evidence at trial contained numerous disparaging references to the mother’s work as an exotic dancer. He claimed that the mother’s profession “compromised her ability to parent [the child]”²⁹⁵ and was “incompatible with ‘healthy family environment’”.²⁹⁶ The father also claimed that she had “inappropriate relationships” with clients, including accepting gifts.²⁹⁷

Justice Price found that the father’s remarks about the mother in *Lopez* were evidence of alienation. He noted that parental alienation arises “from a combination of programming indoctrinations by one parent adding to and/or colouring a child’s own feelings toward the other parent causing a negative emotional atmosphere between the child and the parent victim.”²⁹⁸ Justice Price held that the father’s negative attitude towards the mother created such a negative emotional atmosphere, and significantly increased the mother’s access rights.

²⁹² *Ibid* at para 99.

²⁹³ Anita Volikis & AJ Jakubowska, *The 2018 Annotated Ontario Children’s Law Reform Act*, (Toronto, ON: Thompson Reuters Canada Limited, 2018) at 647.

²⁹⁴ 2011 ONSC 6778 [*Lopez*].

²⁹⁵ *Ibid* at para 42.

²⁹⁶ *Ibid* at para 43.

²⁹⁷ *Ibid* at para 43.

²⁹⁸ *Ibid* at para 109.

Treatment of past involvement in sex work

I located four Family Law cases involving former sex workers. In each of these cases, the fact that the parent left sex work was treated favourably by the presiding judge.

Griffiths v. Leonard involved a motion by a former stripper for access to a 9-year-old child. Justice Blishen provided the following overview of the mother's history:

[27] There is no question that Elizabeth manipulated and deceived her parents while in a relationship with Nicolas Leonard. Her lifestyle, unbeknownst to her parents, involved drugs, alcohol and partying. She was subjected to ongoing abuse by Nicolas Leonard, most of which she hid from her parents who considered her to be an ideal daughter. In addition, she worked briefly at a Gatineau strip club, which she also hid from her parents.²⁹⁹

Justice Blishen found that the mother had overcome her difficult past, and was able to provide a stable, loving home environment for the child:

Nevertheless, despite these difficulties as a teenager, I find based on all the evidence that Elizabeth Griffiths has turned her life around. Once she terminated her relationship with Nicolas Leonard, she obtained full-time employment, met David, got married, and now is happily raising both Isabelle and baby Melissa with the assistance of her husband and her parents. She has a close supportive extended family and both children appear to be thriving in their mother's care.³⁰⁰

Angus v. Angus chronicles how a mother, a former "masseur in the adult entertainment industry",³⁰¹ expressed shame of and hid her work, left the industry, and improved her life. She was ultimately awarded custody. The mother gave evidence that "she felt that she did not have many options without a formal education. She did not want to return to massage following the birth of her child but felt that the family needed the money." The mother testified that the father supported her work because of the financial benefit. Justice Howard accepted that the father did not object to the mother's return to work and was "certainly complicit in the decision."³⁰²

²⁹⁹ 2010 ONSC 4824 [*Griffiths*] at para 27.

³⁰⁰ *Ibid* at para 27.

³⁰¹ 2017 ONSC 4911 [*Angus*] at para 17.

³⁰² *Ibid* at para 24.

Justice Howard described how the mother experienced shame as a result of her work, noting that “[the] job was not something that Ms. Angus was proud of, and she did not want people to know what she did for a living. Ms. Angus strived to keep her employment in the adult entertainment industry separate and apart from her day-to-day life.”³⁰³ He was careful to note that the mother “did not engage in prostitution.” She would “remove her clothes while she performed the massage, but there was no sexual intercourse.”³⁰⁴ The mother “stopped working in the adult entertainment industry” two years before trial and was in the process of furthering her education. The Court agreed that the mother was a “devoted, committed mother ... [and a] caring parent who is able to safely and appropriately parent [the child]”.³⁰⁵

When describing the background of the parties’ relationship in *Melanie Gillett v. James Gratton*, Justice Charbonneau explained that “when [the parties] met, the [mother] was a sex trade worker. She was 16 years old and a heavy drug user. She had been brought into this unfortunate and dangerous lifestyle by her much older sister, Christine, who was herself a sex worker and a heavy drug user. The [father] was 42 years old and a client of Christine.”³⁰⁶ The Court noted that Ms. Gillett “terminated her sex trade involvement” when she moved in with the father. After being subjected to domestic abuse, the mother left the father and commenced an application for custody.

Justice Charbonneau granted full custody to the mother, noting that the child had been well cared for. Further, the Court granted the mother’s request to allow her to relocate to Germany with the child. In coming to this decision, the Court noted that the mother “has had a very difficult and problematic period when she was only 15 years old. She has however taken important steps to improve her situation” and would be in a better position to continue to improve herself in Germany.³⁰⁷

The final Family Law case, *Hernandez v. Nikas*, is the only one of the four cases involving a former sex worker where the Court connects the evidence related to the mother’s sex work and the child’s best interests to hold that the mother should not have custody of the child.³⁰⁸ *Hernandez* involved a dispute between a mother who worked as an exotic dancer and Ms. Stewart, a long-time caregiver of the child. In

³⁰³ *Ibid* at para 19.

³⁰⁴ *Ibid* at para 19.

³⁰⁵ *Ibid* at para 75.

³⁰⁶ 2018 ONSC 362 [*Gillett*].

³⁰⁷ *Ibid* at para 55.

³⁰⁸ 2017 ONSC 162 [*Hernandez*].

this case, the mother effectively abandoned her child by moving from Ontario to Alberta to dance. She left the child in Ms. Stewart's care for several years.³⁰⁹

When ruling that it was in the child's best interests for Ms. Stewart to have custody, the Court primarily relied upon the mother's absence in the child's life and Ms. Stewart's demonstrated ability to provide the child with structure, and a permanent and stable home.³¹⁰ There was a tangible connection between the mother's choice to engage in sex work in a location far away from her son and his best interests. Even so, aside from the fact that dancing was the reason for the mother's absence, it is unclear how the act of exotic dancing had negative impact on the child.

The evidence regarding the mother's sex work in *Hernandez* was prominently used to negatively describe the mother and her lifestyle. When summarizing the background evidence of the relationship between the parties, Justice Henderson explained that the mother originally told Ms. Stewart that she worked as a hairstylist in Toronto, but eventually "confessed" that she was an exotic dancer and providing escort services.³¹¹ I again suggest that the use of terms "confessed", like "admitted", suggests a view that exotic dancing and escorting are shameful activities. Justice Henderson later notes that after moving to Alberta, the mother was "caught up in the lifestyle of an exotic dancer".³¹² Again, I suggest that Justice Henderson's language reflects a negative view of exotic dancing.

When assessing the mother's credibility, Justice Henderson noted that the mother "apologized so often about the poor decisions she has made that she lacked sincerity." The Court found that the mother did not have the capabilities to properly parent the child, living a life in "turmoil ... without stability, replete with conflict, drug addictions, and a self-indulgent lifestyle. [Although] she has made some strides towards self-improvement ... I am skeptical to believe that she can sustain it."³¹³

³⁰⁹ *Ibid* at para 12.

³¹⁰ *Ibid* at paras 105-106.

³¹¹ *Ibid* at para 11.

³¹² *Ibid* at para 22.

³¹³ *Ibid* at para 94.

Conclusion

The Family Law cases further illustrate the negative impact of stigma against sex work in custody and access disputes. Like the Child Protection decisions, in one hundred percent of the Family Law cases, a parent's past or present involvement in sex work had a negative impact on the parent's claim for custody or access at some point during the proceeding. Such negative impacts again ranged from a descriptive aspect of a parent's difficult past (*Griffiths*)³¹⁴ or as a contributing factor for severing the parent-child relationship (*HP*).³¹⁵ Overall, seven of the eight decisions contain no indication of how sex work actually, or even allegedly, affected the child (the exception being *Hernandez*).³¹⁶

I noted an increase in the level of description devoted to the type of sex work that the parent engaged in among the Family Law cases. Only one decision simply referred to the sex worker as a "sex trade worker" (*Gillett*)³¹⁷ and, unlike several of the Child Protection cases, none of the Family Law cases referred to the parent as a "prostitute".

³¹⁴ *Supra* note 299.

³¹⁵ *Supra* note 78.

³¹⁶ *Supra* note 308.

³¹⁷ *Supra* note 306.

Chapter 5: Discussion

This chapter contains a discussion of my results. I begin by noting that my research confirms two trends from the literature noted in Chapter 2. I then explain the apparent impact of stigma in custody and access disputes arising from my results. I conclude with suggestions for further research.

The case law confirms key findings of the sociological and sociolegal research

My research supports two common findings regarding sex worker parents from the sociological and sociolegal literature discussed in Chapter 2.

First, my research suggests that the findings of Susan Dewey, Putu Duff, Kathleen S. Kenny, and others that sex worker parents involved in Child Protection proceedings frequently lose custody of their children hold true in Ontario.³¹⁸ My results further suggest that sex worker parents involved in private Family Law disputes in Ontario experience low levels of success at trial. For parents involved in sex work at the time of trial, eight out of eight parents noted in the Child Protection case law and three out of four parents noted in the Family Law case law were not granted custody of the child that was the subject of the proceeding. Further, in all cases where a former sex worker was granted custody of a child, evidence that the parent was no longer involved in sex work appeared to bolster their claim.

Second, my results are consistent with earlier findings that sex worker parents frequently experience at least one shared precarity.³¹⁹ One hundred percent of the sex worker parents (past and present) noted in the case law experienced substance abuse, domestic violence, poverty/homeless, or compromised mental health. Given the factually-rich nature of all custody and access disputes, I did not analyse or compare the weight given to evidence regarding the shared precarities and sex work by judges, nor did I critique the outcomes of the decisions. Such analyses would have been beyond the scope of this initial, exploratory research.

³¹⁸ Dewey *et al*, *supra* note 11; Duff *et al* (2014), *supra* note 47; Kenny, *supra* note 90;

³¹⁹ Dewey *et al*, *ibid*.

No apparent impact on case law from *Bedford*

I did not note any substantive changes to courts' treatment of sex work within the case law following *Bedford* and the 2014 amendments to the *Criminal Code*.³²⁰ In fact, I did not locate any decisions that acknowledged the changes to Canada's prostitution laws.

Case law suggests that, in custody and access disputes, courts may rely more upon stigma against sex work and sex workers than on evidence

We know that sex workers lead diverse lives and that custody and access disputes are supposed to be decided on the specific facts of each case. Even so, the case law demonstrates that evidence regarding parental involvement in sex work—a broad profession that encompasses parents from across the socioeconomic spectrum—is generally treated as an adverse factor in custody and access cases without full consideration of the evidence of the case. Often, judges simply noted that the parent was involved in prostitution or the sex trade. We were not told whether the parent was involved in street-based or indoor sex work, even though such sex workers may have very different lifestyles.³²¹ In other cases, judges offered slightly more information by describing the particular type of sex work, such as an escort, dancer, or masseuse. However, those judges still did not discuss other aspects of employment that would commonly be relevant in custody and access disputes, such as hours worked and remuneration, even though such factors can influence the parent's ability to meet the child's needs.³²²

For one hundred percent of the sex worker parents described in the case law, sex work appeared to have an adverse impact on the parent's claim. In all twenty-seven cases, the manner in which sex work was presented in evidence by a party to the proceeding and/or considered by the court appeared to have a negative impact on the views and assessment of the sex worker's parenting capacity. However, courts only referred to evidence about the specific nature of the parent's involvement in sex work in six of the twenty-seven cases (two Child Protection and four Family Law). Within those six cases, courts only drew

³²⁰ *Bedford*, *supra* note 1; *Criminal Code*, *supra* note 1.

³²¹ Van der Meulen, Durisin, & Love, *supra* note 6; Duff *et al* (2014), *supra* note 47.

³²² Granger-Brown *et al*, *supra* note 106; Witt, *supra* note 107; Stranger, *supra* note 3.

connections between that evidence and an impact on the child in three cases (one Child Protection and two of the Family Law).

The case law reveals a judicial tendency to rely upon negative stigma and assumptions about sex work and sex workers as opposed to requiring evidence about the nature of the parent's sex work and an impact on their child. Many judges appeared to draw adverse inferences about a sex worker's parenting abilities based on labels. As such, I conclude that stigma and assumptions about sex work and sex workers appear to play bigger roles in custody and access disputes than evidence about the impact, if any, that a parent's engagement in sex work has on a child. The twenty-six allegation cases suggest that sex work is assumed to be incompatible with parenting by the community at large, further highlighting societal stigma against sex worker parents.

I submit that stigma has no place in the courtroom. As a legal community, we must ensure that stigma stays out of legal decisions. Reducing stigma is particularly important in proceedings involving such marginalized populations as sex workers, and high-stakes outcomes as custody and access to one's own children.

I do not argue that sex work will never be relevant to custody and access disputes. The presence of sex work likely *is* relevant in many cases. The sociological studies and the case law support a reasonable concern that parental involvement in sex work may increase the risk of harm to a child, in part due to the high correlation between street-based sex work and shared precarities. Further, there are aspects of sex work—such as bringing clients into the home, as occurred in *DD*—that could directly expose a child to a risk of harm. I agree that society workers and courts can and should exercise caution and make inquiries into the specific facts of the case. However, the case law suggests that such inquiries are not always made.

Legal findings must be based on admissible evidence, not assumptions. Courts should not draw negative conclusions about a parent based on a label. I suggest that so long as sex work remains publicly denounced—by all members of society, from individuals to Parliament—sex worker parents will be vulnerable to the negative stigma and stereotypes about sex work when authorities cast judgment on what is in the best interests of their children.

I am confident that reducing stigma against sex workers in the courtroom is not a pipe dream. As noted, the case law provides some examples of judges who did not appear to jump to default conclusions that sex work is inherently harmful, particularly Justice Shelston’s neutral description of the mother as a dancer in the opening paragraphs of *Rivest-Marier*.³²³ Further, courts have successfully moved away from stigma-based assumptions about a parent in other contexts. As previously discussed, with respect to substance abuse, courts recognize that their analyses must consider whether the parent’s drug use actually causes harm to the child.³²⁴ Drug use alone is understood to be insufficient: courts must find a corresponding negative impact on the child.³²⁵

Historically, children of LGBTQA+ parents were assumed to be at risk of harm simply due to their parent’s sexual orientation or gender identity.³²⁶ For example, a father in *Children’s Aid Society of Brant v. M(S)* was described as having “severe social maladjustment and acting-out behaviour over a period of years during his childhood, including ... gender identity issues.”³²⁷ The Court noted that the father “had not learned how to be an adequate father”, in part because the father “has issues regarding gender identity and cross-dressing and is in denial with respect to them.”³²⁸

In *Bezaire v. Bezaire*, His Honor Judge McMahon ordered that the mother, a lesbian, must refrain from living with any other person without the approval of the court as a condition for custody of the children.³²⁹ He reasoned that he was “attempting to improve the situation and that includes navigating any open, declared and avowed lesbian or homosexual relationship.”³³⁰ The mother subsequently moved in with a lesbian partner. The father successfully applied for a change order, with Judge McMahon ruling that the mother’s “changing of relationships, even the changing of lesbian partners, indicate to this court a very

³²³ *Rivest-Marier*, *supra* note 277.

³²⁴ *DB-S*, *supra* note 219 at para 200.

³²⁵ In *DB-S*, *ibid* at para 200, the Court notes that “Use of marijuana, in and of itself, does not indicate incompetent parenting, absent some evidence that the drug use negatively affects the parent’s abilities”.

³²⁶ For example, see Nancy Polikoff, “Invisible and Ignored: LGBT Parents in the Child Welfare System” (March 21, 2018), online: *LGBTQ Poverty Initiative* <<https://www.lgbtqpoverty.info/poverty-initiative-blog/2018/invisible-and-ignored>>; Janette Norrington, “Does Parental Sexual Behavior Influence ‘Parental Fitness’ and Child Custody Determinations?” (2011) 3 *The University of Maryland McNair Scholars Undergraduate Research Journal* 161.

³²⁷ [2003] OJ No 4584, 127 ACWS (3d) 473 (ONCJ) [*MS*] at para 25.

³²⁸ *Ibid* at para 28.

³²⁹ *Bezaire v Bezaire* (1980), 20 RFL (2d) 358, 1980 CanLII 3623 (ONCA) (reports for trial and change order decisions unavailable) [*Bezaire*].

³³⁰ *Ibid* at 361.

deep-rooted instability in Mrs. Bezaire.”³³¹ While the mother’s appeal of Judge McMahon’s change order was dismissed, Justice Arnup of the Court of Appeal stated the following in response to Judge McMahon’s comments on the mother’s sexual orientation:

In my view, homosexuality, either as a tendency, a proclivity or a practised way of life, is not in itself alone a ground for refusing custody to the parent with respect to whom such evidence is given. The question is and must always be what effect upon the welfare of the children that aspect of the parent's make-up and life-style has, and it will therefore be a question of evidence in that very case as to whether what has been shown to exist has or may tend to have effects adverse to the welfare of the children.³³²

Writing in dissent, Justice Wilson added that, in her view, “homosexuality is a neutral and not a negative factor as far as parenting skills are concerned.”³³³

Further progress is seen in *Whyte v. Whyte*.³³⁴ In *Whyte*, the father underwent scrutiny because the mother alleged that he was homosexual and a pedophile. The two allegations were coupled together throughout the decision. Justice Grant of the Supreme Court of Nova Scotia concluded that there was “no finding that he has sexually abused the child or that his sexual orientation is alleged. ... From the objective evidence, the father has not been shown to be a pedophile nor to be homosexual.”³³⁵ Justice Grant’s decision provides an example of judicial movement away from relying upon stigma and requiring actual evidence of harm, ruling that “[a]s to the sexual orientation I am not satisfied that, standing alone, such would disentitle a parent to custody. Such cases are decided on the individual facts of each case.”³³⁶

Sex worker parents are largely denied the benefit of inquiry into causation. However, with awareness, education, and effort, legal actors can work to promote the same shift towards an “evidence-based understanding”³³⁷ for sex workers that we have already seen for LGBTQA+ parents and parents with substance abuse issues.

³³¹ *Ibid* at 363.

³³² *Ibid* at 365.

³³³ *Ibid* at 367.

³³⁴ *Whyte v Whyte* (1991), 101 NSR (2d) 249, 1991 CanLII 4480 (NSSC) [*Whyte*].

³³⁵ *Ibid*.

³³⁶ *Ibid*.

³³⁷ Lewis, Shaver, & Maticka-Tyndal, *supra* note 65 at 205.

Areas for future research

My research was exploratory. The results suggest that sex worker parents are stigmatized in custody and access disputes due to their careers. Further research is required to understand the true impact of sex work on trial outcomes. Research comparing case law involving sex worker parents with non-sex worker parents facing similar shared precarities is necessary to see the real impact of sex worker status at trial. Cases involving sex worker parents who did not experience shared precarities would also be illuminative. As noted, I did not locate any such cases. Perhaps examples would arise through case file reviews, or interviews. Follow-up research could also be undertaken as more cases are brought and decided under the *CYFSA, 2017*.³³⁸

My results are further limited by the fact that many Child Protection and Family Law cases resolve before trial.³³⁹ According to the results of a Survey on the Practice of Family Law in Canada from the Department of Justice, practitioners reported that 53.8% of divorces involving custody issues and 34.2% of cases involving access issues likely require a trial and judicial decision in order to be resolved. Qualitative research could be done to learn about the experiences of sex worker parents involved in custody and access disputes, and the impact of their careers throughout the legal proceedings.

Finally, the Black Lives Matter and Missing and Murdered Indigenous Women movements remind us that there is much work to be done regarding the impact of systemic racism on Indigenous, Black, and People of Colour (IBPOC) including during interactions with authorities.³⁴⁰ Black and Indigenous children are overrepresented in the Ontario Child Welfare system.³⁴¹ Beneficial research could focus on the intersections between race and racism, sex work, and society and legal players involved in custody and

³³⁸ *Supra* note 4.

³³⁹ Canada Department of Justice, The Child-centered Family Justice Strategy Baseline Information from Family Law Practitioners: 2.0 Survey on the Practice of Family Law in Canada (Date Modified: 2015-01-07), online: Canada Department of Justice <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/biflp-dbpdf/p2.html>>.

³⁴⁰ Black Lives Matter Toronto: Demands (2016), online: BLM-TO <<https://blacklivesmatter.ca/demands/>>; Black Lives Matter, “BLM’s #whatmatters2020” (2020), online: Black Lives Matter <<https://blacklivesmatter.com/what-matters-2020/>>; Marion Buller, Chief Commissioner *et al*, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (June 3, 2019), online: National Inquiry into Missing and Murdered Indigenous Women and Girls <<https://www.mmiwg-ffada.ca/final-report/>>.

³⁴¹ Ontario Human Rights Commission, “Report: Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare” (February 2018), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/interrupted-childhoods>>.

access proceedings to determine if IBPOC sex workers experience additional negativity to the situations of sex workers described in this research.

For Indigenous families that receive Child Protection services, Parliament recently passed new Child Protection legislation: *An Act respecting First Nations, Inuit and Métis children, youth and families*.³⁴² This Act contains a new list of factors that courts must consider when rendering orders in the best interests of Indigenous children³⁴³ and addresses many of the shared precarities faced by sex workers. Section 15 states that indigenous children “must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.”³⁴⁴ Work could be done to explore the impact of this Act on Indigenous sex worker parents involved in Child Protection proceedings and their children.

³⁴² *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

³⁴³ *Ibid*, s 10(1)-(3).

³⁴⁴ *Ibid*, s 15.

Conclusion

No parent should fear being separated from their child due to a label. However, in every reported custody and access decision involving a sex worker parent, the parent's involvement in sex work was presented as an unfavourable aspect of the parent and their lifestyle, or otherwise appeared to have a negative influence on the parent's claim. I conclude that in reported case law in Ontario from the last decade, sex work was more often treated as a negative quality in a parent rather than as an aspect of a parent's life that warranted further factual exploration.

Of the Child Protection cases, sex work, or simply allegations of same, contributed to society decisions to investigate, conclude that a child is in need of protection, apprehend, and/or commence proceedings. At trial, courts have relied upon the presence of sex work to rule that it would not be in the child's best interests to be returned for the parent. Courts implied that sex work prevented the parents' abilities to provide stability, permanency, or structure for the child moving forward, or rendered the child at increased risk of physical harm.

For Family Law cases, we saw that parental involvement in sex work was twice raised on cross-examination to discredit evidence of good parenting, contributed to another parent's decision to bring claims for custody, and led to alienation. In nearly every decision, courts did not refer to any evidence regarding the specific nature of the sex worker parent's work or make any direct connection between the sex work and an impact on parenting or the child.

This research may be built upon by comparing my results with cases involving parents who have never engaged in sex work and experience shared precarities. As cases are brought and decided under the *CYFSA, 2017* and *An Act respecting First Nations, Inuit and Métis children, youth and families*, we may begin to see cases involving sex worker parents who did not experience shared precarities.³⁴⁵ As an alternative to doctrinal legal research, richer data on the true impact of sex work throughout a proceeding may be available through case file reviews and interviews.

³⁴⁵ *An Act respecting First Nations, Inuit and Métis children, youth and families*, supra note 342; *CYFSA, 2017*, supra note 4.

Regardless of format, ample work must be done on the impact of stigma and systemic racism on IBPOC sex workers during interactions with legal authorities, including those that impact their children.

Custody and access orders should only be based on evidence. Assumptions about sex work and sex workers contribute to the uphill battle that many already face in Child Protection and Family Law courts. The case law supports the unfortunate conclusions from earlier studies that many sex workers, particularly street-based, experience multiple and intersecting social and economic barriers that can complicate parenting. We must not allow stigma to be added to the list.

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Appendix A: Coding tables

Child Protection

Full citation						
Dates	Hearing:					
	Judgment:					
Judge(s)						
Issue(s) and ruling(s)	Relief sought			Held		
	Finding					
	Orders					
	Other					
Parties and child(ren)	Applicant					
	Respondent(s)	Name	Gender	Sex worker status	Other (incl. race)	
	Child(ren)	Name	Gender	Age	Other (incl. race)	
Other						
Context, incl:	Overview					
	Facts					
	Analysis (BI)					
	Conclusion					
	Other					
Julie's comments						
Noted up (w/ date)						

Family law

Full citation					
Date	Hearing:				
Judge(s)					
Issue(s) and ruling(s)	Relief sought			<i>CLRA or Divorce Act/section</i>	Held
	Custody:				
	Access:				
	Other:				
Parties and child(ren)		Name	Gender	Sex status	worker Other (incl. race)
	Applicant(s)				
	Respondent(s)				
	Child(ren)	Name	Gender	Age	Other (incl. race)
	Other				
Context, incl: <ul style="list-style-type: none"> • Sex trade • Best interests • Poverty • Drug use • Violence • Mental Health • community 	Overview				
	Facts				
	Analysis (BI)				
	Conclusion				
	Other				
Julie's comments					
Noted up (w/ date)					

Appendix B: Chart comparing relevant Child Protection legislative provisions

	<i>Child and Family Services Act</i>	<i>Child, Youth and Family Services Act, 2017</i>
Paramount purpose	1 (1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.	1 (1) The paramount purpose of this Act is to promote the best interests, protection and well-being of children.
Duty to report	<p>72 (1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:</p> <ol style="list-style-type: none"> 1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's, <ol style="list-style-type: none"> i. failure to adequately care for, provide for, supervise or protect the child, or ii. pattern of neglect in caring for, providing for, supervising or protecting the child. 2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's, <ol style="list-style-type: none"> i. failure to adequately care for, provide for, supervise or protect the child, or ii. pattern of neglect in caring for, providing for, supervising or protecting the child. 3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child. 4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3. 5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, 	<p>125 (1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall immediately report the suspicion and the information on which it is based to a society:</p> <ol style="list-style-type: none"> 1. The child has suffered physical harm inflicted by the person having charge of the child or caused by or resulting from that person's, <ol style="list-style-type: none"> i. failure to adequately care for, provide for, supervise or protect the child, or ii. pattern of neglect in caring for, providing for, supervising or protecting the child. 2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's, <ol style="list-style-type: none"> i. failure to adequately care for, provide for, supervise or protect the child, or ii. pattern of neglect in caring for, providing for, supervising or protecting the child. 3. The child has been sexually abused or sexually exploited by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual abuse or sexual exploitation and fails to protect the child. 4. There is a risk that the child is likely to be sexually abused or sexually exploited as described in paragraph 3. 5. The child requires treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide the treatment or access to the treatment, or, where the child is incapable of consenting to the treatment under the Health Care Consent Act, 1996, refuses or is unavailable

	<p>or refuses or is unavailable or unable to consent to, the treatment.</p> <p>6. The child has suffered emotional harm, demonstrated by serious,</p> <ul style="list-style-type: none"> i. anxiety, ii. depression, iii. withdrawal, iv. self-destructive or aggressive behaviour, or v. delayed development, <p>and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.</p> <p>7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.</p> <p>8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.</p> <p>9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.</p> <p>10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.</p>	<p>or unable to consent to, the treatment on the child's behalf.</p> <p>6. The child has suffered emotional harm, demonstrated by serious,</p> <ul style="list-style-type: none"> i. anxiety, ii. depression, iii. withdrawal, iv. self-destructive or aggressive behaviour, or v. delayed development, <p>and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.</p> <p>7. The child has suffered emotional harm of the kind described in subparagraph 6 i, ii, iii, iv or v and the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the harm.</p> <p>8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph 6 i, ii, iii, iv or v resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.</p> <p>9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph 6 i, ii, iii, iv or v and the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to, treatment to prevent the harm.</p> <p>10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide the treatment or access to the treatment, or where the child is</p>
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	<p>11. The child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.</p> <p>12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment.</p> <p>13. The child is less than 12 years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.</p>	<p>incapable of consenting to the treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.</p> <p>11. The child's parent has died or is unavailable to exercise custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.</p> <p>12. The child is younger than 12 and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to treatment.</p> <p>13. The child is younger than 12 and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.</p>
Society may initiate proceedings	40 (1) A society may apply to the court to determine whether a child is in need of protection	81 (1) A society may apply to the court to determine whether a child is in need of protection.
Temporary order for care and custody	<p>51(2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,</p> <p>(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;</p> <p>(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;</p> <p>(c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other person, subject to the society's supervision</p>	<p>94 (2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,</p> <p>(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;</p> <p>(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;</p> <p>(c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other person, subject to the society's supervision and on such reasonable</p>

	<p>and on such reasonable terms and conditions as the court considers appropriate; or (d) remain or be placed in the care and custody of the society, but not be placed in, (i) a place of secure custody as defined in Part IV (Youth Justice), or (ii) a place of open temporary detention as defined in that Part that has not been designated as a place of safety.</p> <p>Criteria (3) The court shall not make an order under clause (2) (c) or (d) unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2) (a) or (b).</p>	<p>terms and conditions as the court considers appropriate; or (d) remain or be placed in the care and custody of the society, but not be placed in a place of temporary detention, of open or of secure custody.</p> <p>(4) The court shall not make an order under clause (2) (c) or (d) unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2) (a) or (b).</p>
<p>Finding that a child is in need of protection</p>	<p>37(2) A child is in need of protection where, (a) the child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's, (i) failure to adequately care for, provide for, supervise or protect the child, or (ii) pattern of neglect in caring for, providing for, supervising or protecting the child; (b) there is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's, (i) failure to adequately care for, provide for, supervise or protect the child, or (ii) pattern of neglect in caring for, providing for, supervising or protecting the child; (c) the child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child;</p>	<p>74 (2) A child is in need of protection where, (a) the child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's, (i) failure to adequately care for, provide for, supervise or protect the child, or (ii) pattern of neglect in caring for, providing for, supervising or protecting the child; (b) there is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's, (i) failure to adequately care for, provide for, supervise or protect the child, or (ii) pattern of neglect in caring for, providing for, supervising or protecting the child; (c) the child has been sexually abused or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual abuse or sexual exploitation and fails to protect the child; (d) there is a risk that the child is likely to be sexually abused or sexually exploited as described in clause (c);</p>

<p>(d) there is a risk that the child is likely to be sexually molested or sexually exploited as described in clause (c);</p> <p>(e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment;</p> <p>(f) the child has suffered emotional harm, demonstrated by serious,</p> <ul style="list-style-type: none"> (i) anxiety, (ii) depression, (iii) withdrawal, (iv) self-destructive or aggressive behaviour, or (v) delayed development, <p>and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;</p> <p>(f.1) the child has suffered emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;</p> <p>(g) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;</p> <p>(g.1) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm;</p> <p>(h) the child suffers from a mental, emotional or developmental condition that, if not</p>	<p>(e) the child requires treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide the treatment or access to the treatment, or, where the child is incapable of consenting to the treatment under the Health Care Consent Act, 1996 and the parent is a substitute decision-maker for the child, the parent refuses or is unavailable or unable to consent to the treatment on the child's behalf;</p> <p>(f) the child has suffered emotional harm, demonstrated by serious,</p> <ul style="list-style-type: none"> (i) anxiety, (ii) depression, (iii) withdrawal, (iv) self-destructive or aggressive behaviour, or (v) delayed development, <p>and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;</p> <p>(g) the child has suffered emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to the treatment to remedy or alleviate the harm;</p> <p>(h) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;</p> <p>(i) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and that the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses</p>
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	<p>remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition;</p> <p>(i) the child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody;</p> <p>(j) the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment;</p> <p>(k) the child is less than twelve years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately;</p> <p>(l) the child's parent is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is twelve years of age or older, with the child's consent, to be dealt with under this Part; or</p> <p>(m) the child is 16 or 17 years of age and a prescribed circumstance or condition exists.</p>	<p>or is unavailable or unable to consent to treatment to prevent the harm;</p> <p>(j) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide treatment or access to treatment, or where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to the treatment to remedy or alleviate the condition;</p> <p>(k) the child's parent has died or is unavailable to exercise custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody;</p> <p>(l) the child is younger than 12 and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide services or treatment or access to services or treatment, or, where the child is incapable of consenting to treatment under the Health Care Consent Act, 1996, refuses or is unavailable or unable to consent to treatment;</p> <p>(m) the child is younger than 12 and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately;</p> <p>(n) the child's parent is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is 12 or older, with the child's consent, for the matter to be dealt with under this Part; or</p> <p>(o) the child is 16 or 17 and a prescribed circumstance or condition exists.</p>
Protection orders	57 (1) Where the court finds that a child is in need of protection and is satisfied that intervention through a court order is	

	<p>necessary to protect the child in the future, the court shall make one of the following orders or an order under section 57.1, in the child's best interests:</p> <p>Supervision order</p> <p>1. That the child be placed in the care and custody of a parent or another person, subject to the supervision of the society, for a specified period of at least three months and not more than 12 months.</p> <p>Society wardship</p> <p>2. That the child be made a ward of the society and be placed in its care and custody for a specified period not exceeding twelve months.</p> <p>Crown wardship</p> <p>3. That the child be made a ward of the Crown, until the wardship is terminated under section 65.2 or expires under subsection 71 (1), and be placed in the care of the society.</p> <p>Consecutive orders of society wardship and supervision</p> <p>4. That the child be made a ward of the society under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding an aggregate of twelve months.</p>	
<p>Best interests</p>	<p>37 (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:</p> <ol style="list-style-type: none"> 1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs. 2. The child's physical, mental and emotional level of development. 3. The child's cultural background. 4. The religious faith, if any, in which the child is being raised. 5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family. 	<p>74 (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,</p> <ol style="list-style-type: none"> (a) consider the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained; (b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and (c) consider any other circumstance of the case that the person considers relevant, including,

	<p>6. The child’s relationships and emotional ties to a parent, sibling, relative, other member of the child’s extended family or member of the child’s community.</p> <p>7. The importance of continuity in the child’s care and the possible effect on the child of disruption of that continuity.</p> <p>8. The merits of a plan for the child’s care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.</p> <p>9. The child’s views and wishes, if they can be reasonably ascertained.</p> <p>10. The effects on the child of delay in the disposition of the case.</p> <p>11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.</p> <p>12. The degree of risk, if any, that justified the finding that the child is in need of protection.</p> <p>13. Any other relevant circumstance.</p> <p>(4) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child’s cultural identity.</p>	<p>(i) the child’s physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,</p> <p>(ii) the child’s physical, mental and emotional level of development,</p> <p>(iii) the child’s race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,</p> <p>(iv) the child’s cultural and linguistic heritage,</p> <p>(v) the importance for the child’s development of a positive relationship with a parent and a secure place as a member of a family,</p> <p>(vi) the child’s relationships and emotional ties to a parent, sibling, relative, other member of the child’s extended family or member of the child’s community,</p> <p>(vii) the importance of continuity in the child’s care and the possible effect on the child of disruption of that continuity,</p> <p>(viii) the merits of a plan for the child’s care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent,</p> <p>(ix) the effects on the child of delay in the disposition of the case,</p> <p>(x) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and</p> <p>(xi) the degree of risk, if any, that justified the finding that the child is in need of protection.</p>
<p>Past conduct</p>	<p>50 (1) Despite anything in the <i>Evidence Act</i>, in any proceeding under this Part,</p> <p>(a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and</p> <p>(b) any oral or written statement or report that the court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence.</p>	<p>93 (1) Despite anything in the <i>Evidence Act</i>, in any proceeding under this Part,</p> <p>(a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and</p> <p>(b) any oral or written statement or report that the court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence.</p>

Appendix C: Chart comparing relevant Family Law legislative provisions

	<i>Children’s Law Reform Act</i>	<i>Divorce Act</i>
Purpose	19 The purposes of this Part are, (a) to ensure that applications to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children	n/a
Commencing proceedings	Application for custody or access 21 (1) A parent of a child or any other person, including a grandparent, may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.	16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage. (3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.
Orders available	28 (1) The court to which an application is made under section 21, (a) by order may grant the custody of or access to the child to one or more persons; (b) by order may determine any aspect of the incidents of the right to custody or access; and (c) may make such additional order as the court considers necessary and proper in the circumstances, including an order, (i) limiting the duration, frequency, manner or location of contact or communication between any of the parties, or between a party and the child, (ii) prohibiting a party or other person from engaging in specified conduct in the presence of the child or at any time when the person is responsible for the care of the child, (iii) prohibiting a party from changing the child’s residence, school or day care facility without the consent of another party or an order of the court, (iv) prohibiting a party from removing the child from Ontario without the consent of another party or an order of the court, (v) requiring the delivery, to the court or to a person or body specified by the court, of the child’s passport, the child’s health card within the meaning of the Health	16 (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

	<p>Insurance Act or any other document relating to the child that the court may specify,</p> <p>(vi) requiring a party to give information or to consent to the release of information respecting the health, education and welfare of the child to another party or other person specified by the court, or</p> <p>(vii) requiring a party to facilitate communication by the child with another party or other person specified by the court in a manner that is appropriate for the child.</p>	
<p>Best interests</p>	<p>Best interests of child</p> <p>(2) The court shall consider all the child's needs and circumstances, including,</p> <p>(a) the love, affection and emotional ties between the child and,</p> <p style="padding-left: 20px;">(i) each person, including a parent or grandparent, entitled to or claiming custody of or access to the child,</p> <p style="padding-left: 20px;">(ii) other members of the child's family who reside with the child, and</p> <p style="padding-left: 20px;">(iii) persons involved in the child's care and upbringing;</p> <p>(b) the child's views and preferences, if they can reasonably be ascertained;</p> <p>(c) the length of time the child has lived in a stable home environment;</p> <p>(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;</p> <p>(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;</p> <p>(f) the permanence and stability of the family unit with which it is proposed that the child will live;</p> <p>(g) the ability of each person applying for custody of or access to the child to act as a parent; and</p> <p>(h) any familial relationship between the child and each person who is a party to the application.</p>	<p>16 (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.</p>

<p>Past conduct</p>	<p>Past conduct</p> <p>24 (3) A person's past conduct shall be considered only,</p> <p>(a) in accordance with subsection (4); or</p> <p>(b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent. 2006, c. 1, s. 3 (1); 2016, c. 23, s. 7 (2).</p> <p>Violence and abuse</p> <p>(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,</p> <p>(a) his or her spouse;</p> <p>(b) a parent of the child to whom the application relates;</p> <p>(c) a member of the person's household; or</p> <p>(d) any child.</p>	<p>16 (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.</p>
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