

# **High-Conflict Family Cases Involving a Child Protection Agency: Report on Experience of Child Welfare and Family Justice Professionals and Suggestions for Good Practices**

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## **INTRODUCTION**

Increasingly child protection agencies (CPAs) face the challenge of being involved in a high conflict parental separation and the related custody and access proceedings. A CPA may become involved because one or both parents report allegations of abuse, neglect, alienation or estrangement by the other parent (or a new partner), or when a professional like a police officer or therapist reports concerns about children caught in the midst of parental conflict. Some of these reports are substantiated as cases where children are in need of protection, and immediate CPA intervention is needed. However, a relatively high proportion of reports in these cases, especially when made by one parent against the other, are not initially substantiated,<sup>1</sup> but the cases nevertheless raise protection concerns because of risk of emotional harm to the children due to high levels of parental conflict.

High conflict separations involving allegations may “crossover” from the family justice system to the child protection system (and often criminal justice system). They

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<sup>1</sup> See Bala, Mitnick, Trocme & Houston, “Sexual Abuse Allegations and Parental Separations: Smokescreen or Fire?” (2007), 13 *Journal of Family Studies* 26-55.

may lead to concurrent family and child protection (or criminal) proceedings. Adding to the complexity of these cases, CPA workers or police may be witnesses or resources for the family court process. These high intensity “crossover” cases are very challenging for family justice professionals, CPAs, and the courts. However, there has been limited research on high conflict family cases that involve CPAs, and therefore little information is available on good practices for the myriad professionals involved in these cases.

This paper is the second in a two-part research project on high conflict family cases that involve Ontario CPAs. The first paper reviewed the limited research on family cases that involve the child protection system, and analyzed 210 reported cases from Ontario involving custody and access disputes where a report was made to a CPA. This paper reports on information collected from interviews with 64 Ontario professionals who have experience with high conflict separations that involve CPAs. These professionals include judges, parents’ lawyers, lawyers from the Ontario Office of the Children’s Lawyer (OCL), OCL clinical investigators (CI’s), private custody assessors, mediators, as well as CPA workers, supervisors and lawyers. The paper concludes by offering some recommendations for the different professional groups who confront high conflict family cases involving child protection intervention.

## **RESEARCH ON CROSSOVER CASES**

Despite anecdotal evidence that CPAs are increasingly becoming involved in high conflict cases, there has been little empirical research investigating the phenomenon and the challenging issues that arise in these cases. A 2013 study by Saini et al. estimates that 12% of child protection investigations in Canada occur in the context of an ongoing post-

separation parental dispute.<sup>2</sup> Drawing on national data on reporting of child abuse to CPAs, the authors compared child protection files involving a parental post-separation dispute with child protection files without a parental dispute. They found that cases involving post-separation parental disputes were more likely than other cases to be opened more than three times (27% versus 19%), and that children involved in parental disputes had higher reported rates of emotional harm than children in non-parental dispute files (19% versus 13%). The authors also found that despite similar substantiation rates for both types of files, cases involving post-separation parental disputes were significantly more likely to involve allegations that CPA workers classified as “malicious unfounded allegations” (13% versus 4%).

An earlier study by Birnbaum also reported that Children’s Aid Society (CAS) involvement in custody disputing families involved with the Ontario Office of the Children’s Lawyer (OCL) is also common.<sup>3</sup> Looking at closed OCL case files from 2002-2004, Birnbaum found that in cases involving legal representation by the OCL, the CAS had been involved with the family before OCL involvement in 51% of cases. For cases involving clinical investigations, a CAS had been involved in 56% of cases before the OCL became involved.

A 2012 study by Saini et al. reported on 28 CPA workers’ perspectives of high conflict cases.<sup>4</sup> A number of themes emerged. First, the authors found that workers had

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<sup>2</sup> Saini, Black, Lwin, Marshall, Fallon & Goodman, “Child Protection Workers’ Experiences of Working with High-Conflict Separating Parents” (2012) 34 Children and Youth Services Review 1309-1316.

<sup>3</sup> Birnbaum, “Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations” (2005) 24 Canadian Family Law Quarterly 167-189.

<sup>4</sup> Saini, Black, Fallon & Marshall, “Child Custody Disputes within the Context of Child Protection Investigations: Secondary Analysis of the Canadian Incident Study of Reported Child Abuse and Neglect” (2013) 92 Child Welfare 115-137.

difficulty articulating a definition of “ high conflict.” Second, despite ambiguity of the concept, workers were able to identify three common characteristics of high conflict families: manipulation, lack of communication, and perpetual crisis. Third, workers reported that high conflict cases challenged their skills, emotional well-being, and time. Workers said it was difficult to assess the credibility of allegations made in the context of an ongoing parental dispute, and workers felt frustrated by parents whom they perceived as manipulating the child protection system to gain an advantage in custody or access proceedings. Workers also said that high conflict cases demand more time and energy than other cases, making it difficult for workers to manage their overall caseload.

Fourth, workers expressed frustration with the expectations of other professionals, who see CPAs as a “catch all” service for high conflict families, and expect CPA workers to act as case managers. Fifth, workers said they often felt pushed beyond their child protection role in high conflict cases, pressured to take a “position” in the domestic proceeding or assume the role of parenting coordinator. Some workers were resistant to child protection involvement in high conflict cases. Some felt these cases should be dealt with in the family law system. Others worried that CPA intervention would exacerbate conflict. Finally, workers identified a need for CPA standards and policies to assess and respond to high conflict families, as well as specific training on alienation, domestic violence, and emotional harm. Workers described great difficulty assessing the extent and cause of emotional harm to children in high conflict cases, and reported reluctance to substantiate risk of emotional harm in these cases. At the same time, workers reported concern about the welfare of children in high conflict families, noting that parents were often unable to see the effect of their behaviour on their children.

## **METHODOLOGY**

### **Participants**

The researchers recruited participants from the following professional groups: judges, parents' lawyers, lawyers for the Office of the Children's Lawyer (OCL), OCL clinical investigators (CI's), private custody assessors, mediators, child protection agency (CPA) workers and supervisors,<sup>5</sup> and CPA lawyers. To participate, professionals had to have at least three years experience working in their profession or within a CPA.

The researchers also attempted to recruit police officers to participate in the study. Despite repeated requests, none of the police departments contacted responded to the invitation. The lack of police perspective in the current study is unfortunate given the finding in our earlier research that police are often involved in these crossover cases.

Participants from all groups were recruited from three cities in Ontario, one large and two medium-sized. The researchers also recruited additional CPA workers and supervisors from an additional medium-sized city.

Identification of potential participants depended on the professional group. For CPAs and some courts, CPA supervisors or the chief justice, respectively, identified potential participants and the researchers then contacted the recruits to confirm their willingness to participate. For OCL participants, the OCL provided a contact list of OCL lawyers and CI's working at the research sites, and the researchers then invited individual professionals to participate. Judges from one court were recruited in the same manner.

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<sup>5</sup> Supervisors (those who supervise workers) and managers (those who supervise supervisors) were both interviewed. To ensure anonymity, we are calling both supervisors and managers "supervisors."

For the remaining groups, the researchers sent invitations to professionals identified as having some expertise or experience working with high conflict families.

The researchers recruited a total of 64 professionals. The breakdown of participants is as follows:

- Judges: 12
  - Ontario Court of Justice (OCJ): 3
  - Superior Court of Justice, Unified Family Court (UFC): 5
  - Superior Court of Justice (SCJ): 4
- Parents' lawyers: 6
- OCL lawyers: 5
- OCL CI's: 3
- Private custody assessors: 6
- Mediators: 5
- CPA workers and supervisors: 20
  - CPA workers: 10
  - CPA supervisors: 10
- CPA lawyers: 7

## **Interviews**

Participants were interviewed by telephone. The interviews ranged from twenty to ninety minutes. Participants were asked similar questions, tailored to their profession. The questions covered the following topics:

- Prevalence of crossover cases
- Challenges of crossover cases

- Role and response of CPAs
- Custody assessments
- Alternative dispute resolution/mediation
- Good practices
- Role of the Ontario AFCC

## **RESULTS**

### **Participant Demographics and Caseload**

#### Gender

Of the 64 professionals interviewed, 49 were female, 15 were male. The gender breakdown for each professional group was as follows:

- Judges: 8 female, 4 male
- Parents' lawyers: 3 female, 3 male
- OCL lawyers: 4 female, 1 male
- OCL CI's: 3 female
- Assessors: 3 female, 3 male
- Mediators: 5 female
- CPA workers: 9 female, 1 male
- CPA supervisors, 7 female, 3 male
- CPA lawyers: 7 female

#### Years in Current Position

To participate in the study, professionals had to have a minimum of three years experience in their current position or working for a child protection agency.

Judges had between 3 and 22 years on the bench, with 11.3 years as the mean. Parents' lawyers had between 6 and 27 years experience, with an average of 16.3 years. OCL lawyers had between 10 and 20 years of experience, and an average of 14.4 years. Assessors' experience ranged from 4 to 28 years, with the average being 18.7 years. Mediators reported 12 to 27 years of experience, with 20.4 being the average.

CPA workers and managers were asked to report the number of years in their current position. CPA workers had between 2 and 14 years experience, with an average of 7.3 years. CPA supervisors had between 1 and 15 years experience as supervisors, with 9.4 being the average. CPA lawyers reported between 7 and 25 years experience, with an average of 14 years.

#### Number of Custody and Access Cases

All participants, except CPA professionals,<sup>6</sup> were asked to approximate what percent of their cases involved custody or access disputes. The results are as follows:

- Judges:
  - OCJ: 33-70%
  - UFC: 30-80%
  - SCJ: 20-40%<sup>7</sup>
- Parents' lawyers: 25-75%
- OCL lawyers: 4-70%<sup>8</sup>
- OCL CI's: 4-100%

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<sup>6</sup> CPAs were asked about prevalence of high conflict cases, see below.

<sup>7</sup> One SCJ judge was not able to provide an estimate.

<sup>8</sup> OCL lawyers and CI's were asked to estimate the number of OCL files they manage that have a dispute involving custody or access. The wide numerical range reported reflects the fact that lawyers and mental health professionals may carry few or many OCL cases.



- Private custody assessors: 10-70%
- Mediators: 40-75%

### **Prevalence of Crossover Cases for Non-CPA Professionals**

Non-CPA participants were asked to estimate what percent of their custody and access cases involved one or both parents making an allegation to a CPA about the other parent. In responding to this question, many participants explained that their estimated figure would be higher had they included cases where a parent makes an allegation to a non-child protection professional, who then makes a report to a CPA. Participants frequently gave the example of parents making allegations of domestic violence or child abuse to police, for example, who then report the allegation to the CPA.

### Judges

Judges estimated that 5-50% of their custody and access cases involved an allegation by one or both parents to a CPA. Judges of the OCJ and UFC reported the highest number of these cases. Two of the three OCJ judges estimated that 50% or more of their custody and access cases involved an allegation by one or both parents to a CPA. Two of the five UFC judges also provided 50% as an estimate, though one of these judges clarified that this number included “historical” reports – cases where the CPA had closed the file. Judges of the SCJ estimated that 10-15% of their custody and access cases involved this type of allegation, a “small but significant” number, according to one judge.

While there was a difference in the number of crossover cases reported by OCJ and UFC versus SCJ judges, there was not a significant difference in the proportion of cases reported by judges in the different UFCs. For example, the two UFC judges who

estimated that 50% of their custody and access cases involve allegations came from different cities.

Judges described some of the difficulties of identifying crossover cases. A few suggested that their estimate would be greater had they included allegations made by a professional to a CPA based on disclosures by one parent. Two of the judges, for example, mentioned allegations reported by a family physician. One SCJ judge also explained that it is common for the record to indicate that a CPA had at some point opened a file but not indicate the source of the referral. Another UFC judge explained that the stage of the case determines the presence of allegations: “If they have a trial, almost all of them [involve an allegation by one or both parents to a CPA]. This judge continued, “I’m just thinking of all the trials I did and rarely a CAS allegation doesn’t come up in the course of it.” Finally, judges described cases where one or both parents make allegations of violence, abuse or neglect in their court materials that *ought* to be reported to a CPA but it is unclear whether a report has been made.

### Parents’ Lawyers

Parents’ lawyers reported that in approximately 5-25% of their custody and access cases at least one parent has made violence, neglect or abuse allegations to a CPA about the other parent. Two of the lawyers provided explanations for this range. One lawyer from a medium-sized city explained the low number of crossover cases he handles as a product of screening, saying he “prefers dealing with people who want to work things out.” A lawyer from the large city explained that his estimate of 25%, the highest reported, was due to the high number of referrals he receives from battered women’s shelters.

There was no difference in the number of crossover cases reported by lawyers by jurisdiction. There was also no difference based on the lawyers' year of call to the bar.

### OCL Lawyers

OCL lawyers reported handling a significant number of crossover cases. They estimated that between 15-95% of their OCL files involve allegations by parents to a CPA. The majority, 7 of the 10 OCL lawyers, reported that these cases represented 50% or more of their OCL cases, with 3 of the 10 saying these cases accounted for 90% of their files.

There are a few explanations for why OCL lawyers report handling more crossover cases. First, as described below, parents' lawyers and judges report requesting OCL involvement frequently in these cases. Second, due to resource restraints, the OCL is limited in the number of cases it can accept and therefore becomes involved in only the most serious. As one OCL lawyer explained, "We're seeing the really really high conflict cases come through. Those are the ones we're accepting." Finally, in OCL files, the case is already before the court; the fact that parents are litigating custody suggests a higher level of conflict than in cases that settle early (and therefore do not involve the OCL).

In terms of quantifying the number of OCL cases that involve CPA allegations, one lawyer pointed out the challenge of delineating CPA involvement, explaining that oftentimes a CPA will become involved because of a non-conflict-related protection concern but stay involved due to conflict.

OCL lawyers also noted the issue of parents making allegations to police, who may then report to a CPA, suggesting that police play a significant role in crossover cases.

There was no difference in the number of crossover cases reported by OCL lawyers by jurisdiction.

### OCL Clinical Investigators

Like OCL lawyers, OCL CI's reported handling a large number of crossover cases. CI's estimated that between 20-95% of their files involved parental allegations to a CPA, with 4 of the 6 CI's estimating that 70% of their files involved parental allegations, and 2 providing an estimate of 90%. Like OCL lawyers, CI's referenced resource constraints in explaining the high number of crossover cases they see: the OCL can only accept a limited number of cases and so focuses on the most challenging – often crossover cases. In the case of reports under s. 112 of the *Courts of Justice Act*, OCL resource constraints are compounded by a lack of private custody assessments. As discussed below, few families can afford the cost of a private assessment and there is a shortage of mental health professionals willing to do these assessments. However, many family justice professionals, including judges, find assessments particularly useful in crossover cases. As a result, the majority of high conflict cases come to the OCL rather than private assessors for assessment.

Two of the CI's interviewed said that these “custody” cases are really “on the border” and might be better classified as child protection cases due to the level of conflict. According to one CI, high conflict cases are often “child protection cases in disguise.” One CI from a medium-sized city disclosed that in two of his OCL files she called the CPA to report suspected emotional harm to the child due to parental conflict.

OCL CI's in one of the mid-sized cities reported fewer crossover cases than CI's in the other mid-sized city and large city. This discrepancy is likely not significant. Very few CI's were interviewed and there was no difference in the number of crossover cases reported by other professionals in the different cities.

### Private Custody Assessors

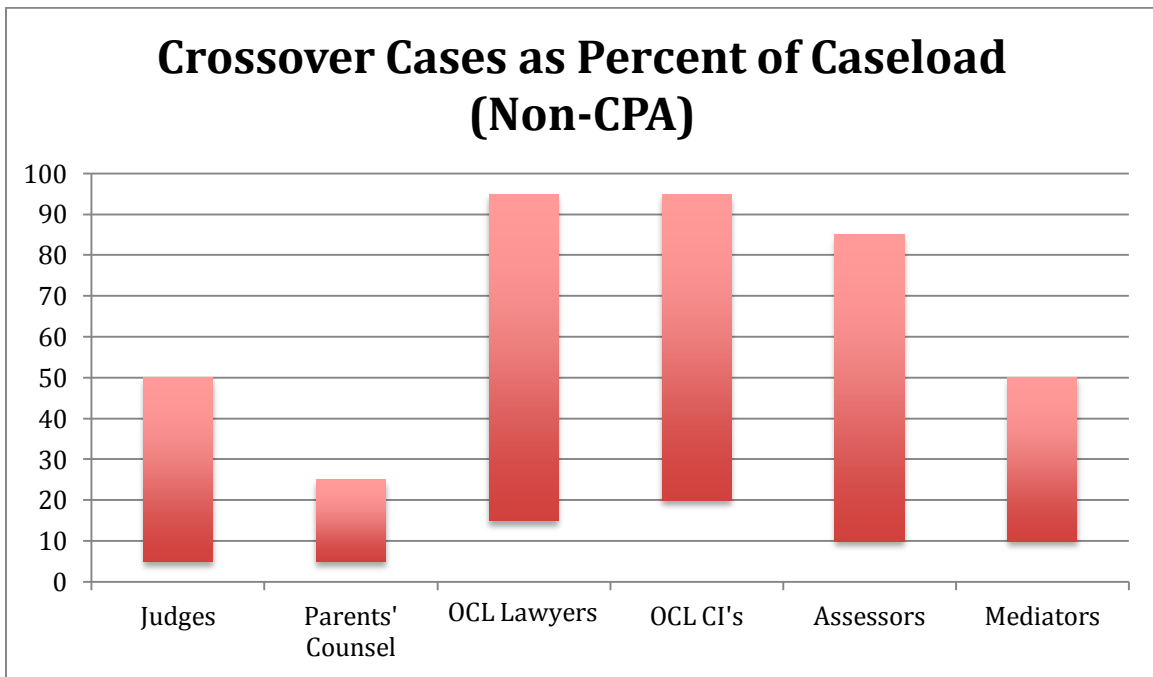
Private custody assessors appointed under the *Children's Law Reform Act* s. 30 also reported seeing a large number of crossover cases. Assessors reported that between 10-85% of their custody and access files involved a parent making an allegation to a CPA. Of the 7 assessors, 5 reported that 50% of their files involved such allegations.

Three of the assessors commented on the high number of crossover cases they see. Two explained they had expertise in working with high conflict families and therefore received and accepted more referrals for cases involving allegations to a CPA. A third assessor from a large city reported a recent rise in the number of cases involving allegations. He explained that the scope of s. 30 assessments had been narrowed: that judges were now ordering assessments only where there was a "clinical issue," and that allegations had become associated with the presence of a clinical issue. The same assessor noted that in his cases it is other professionals – rather than parents – who report allegations to the CPA. Most of his clients are represented, and he suspects that lawyers advise clients to report via a professional so that the allegations will seem more credible, making the reporting less likely to backfire on a client in a family court proceeding.

There was no difference in the number of crossover cases reported by assessors by jurisdiction.

### Mediators

Mediators saw a similar number of crossover cases to judges. Mediators reported that between 10-50% of their custody and access files involved allegations by parents to a CPA. There was no difference in the number of cases reported by mediators by location.



### Prevalence of High Conflict Cases Among CPAs

CPA workers, supervisors, and lawyers were asked to estimate the percent of their caseload that involved families engaged in high conflict custody or access proceedings.

CPA workers estimated that between 1-40% of their files involved families engaged in high conflict custody or access proceedings. Of the 10 workers interviewed, 6 reported 20% or more of their files involving high conflict families.

CPA supervisors reported that 2-25% of their workers' files involved high conflict families. Of the 9 supervisors who were able to provide an estimate, 6 guessed that at least 10% of their workers' caseloads were comprised of high conflict cases.

CPA lawyers estimated that 1-8% of their files were high conflict, with 5 of the 6 lawyers who were able to provide an estimate reporting that approximately 5% of their caseload was made up of high conflict cases. The relatively low rate of involvement of CPA lawyers in these cases suggests that while many of them raise protection concerns,

most do result in protection proceedings, but rather are resolved by domestic proceedings with some agency involvement.

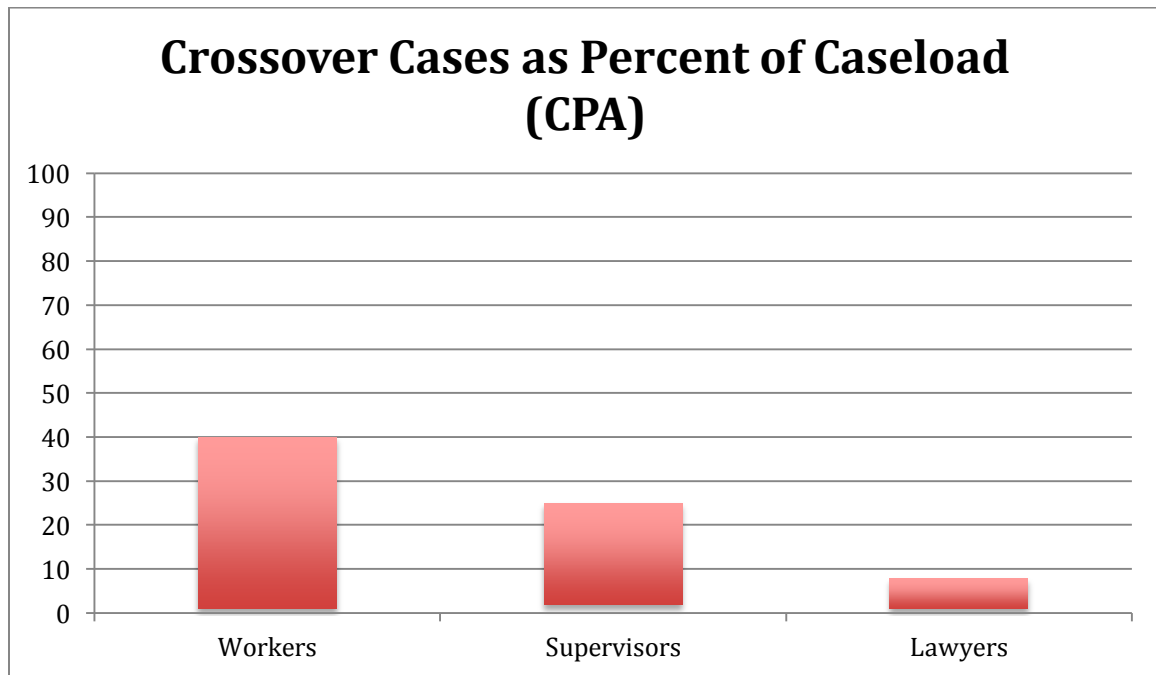
Workers and supervisors had different views about defining cases as “high conflict.” A few explained that if the definition of “high conflict” includes domestic violence, they would provide a higher estimate for the number of high conflict files they carry or supervise. One worker from a medium-sized city explained that her estimate would be higher if she included files with “some conflict.” Files with “some conflict” between separating parents were more common than “high conflict” files.

One worker from a mid-sized city explained that variability in the number of high conflict cases carried by individual workers was in part due to worker willingness to work with high conflict families. She explained, “I tend to get more [of these cases] because no one else wants them.”

Workers in one of the medium-sized cities reported carrying a slightly greater percentage of high conflict cases (30-40%) than workers in the large and other medium-sized cities (1-25%). Because of the small sample size, this finding is not statistically significant, though there may be some variation by location.

Two workers commented on trends in the number of high conflict cases they see. One worker from a medium-sized city reported that the number of files with parental conflict as the primary reason for opening had increased in the past few years (this worker was not from the city with the highest number of reported cases). Another worker from a different medium-sized city (again, not the city reporting the highest number of cases) reported that the number of high conflict files had *not* increased in recent years.

Two of the CPA lawyers reported that the number of high conflict files was increasing. Interestingly, both of these lawyers were from the medium-sized city where workers reported the highest number of high conflict cases. One expressed that these cases were “becoming more of the norm.” Another noted that more families were being identified as high conflict, and that child protection professionals were more interested in the topic. Training sessions are now being offered to CPA workers struggling with high conflict families and wanting answers on how to manage these cases. This represented a major departure from ten years ago when “high conflict” terminology did not exist.



### **Referral Sources of High Conflict Cases for CPAs**

CPA workers and supervisors were asked how their agency receives reports of families engaged in high conflict custody or access proceedings. As examples, the researchers mentioned parents, police, neighbours and courts. Police and parents were the most



common referral source, mentioned by all 20 workers and supervisors. The next most frequency cited referral source was the school (mentioned by 8 workers), followed by courts (5 workers), neighbours/community members (4 workers), and the OCL (4 workers), therapists/counselors (2 workers), Crown attorneys (2 workers), shelters (1 worker) and extended family (1 worker).

One worker from a medium-sized city reported that “if the primary reason [for calling a CPA] is conflict, [the referral] is coming from police or one of the parents.” A supervisor from the same city estimated that “almost half” of the referrals in high conflict cases are coming from the police. In Ontario police have a statutory duty under the *Child and Family Services Act* to report cases of suspected child abuse or neglect to a CPA. Where police are called to respond to domestic violence where children are present, the police are mandated to report this incident to a CPA. A number of workers explained that police referrals for high conflict often follow this pattern. One worker from a large city said that oftentimes the CPA will receive calls from police regarding an incident that did not require police involvement, where it was just “people arguing over nonsense.” Workers reported that it was common for police to call to report a problematic access exchange, where children were being transferred from one separated parent to the other. One worker from a medium-sized city noted that it was common for police to be involved in high conflict cases even if they were not the ones to make the referral to the CPA.

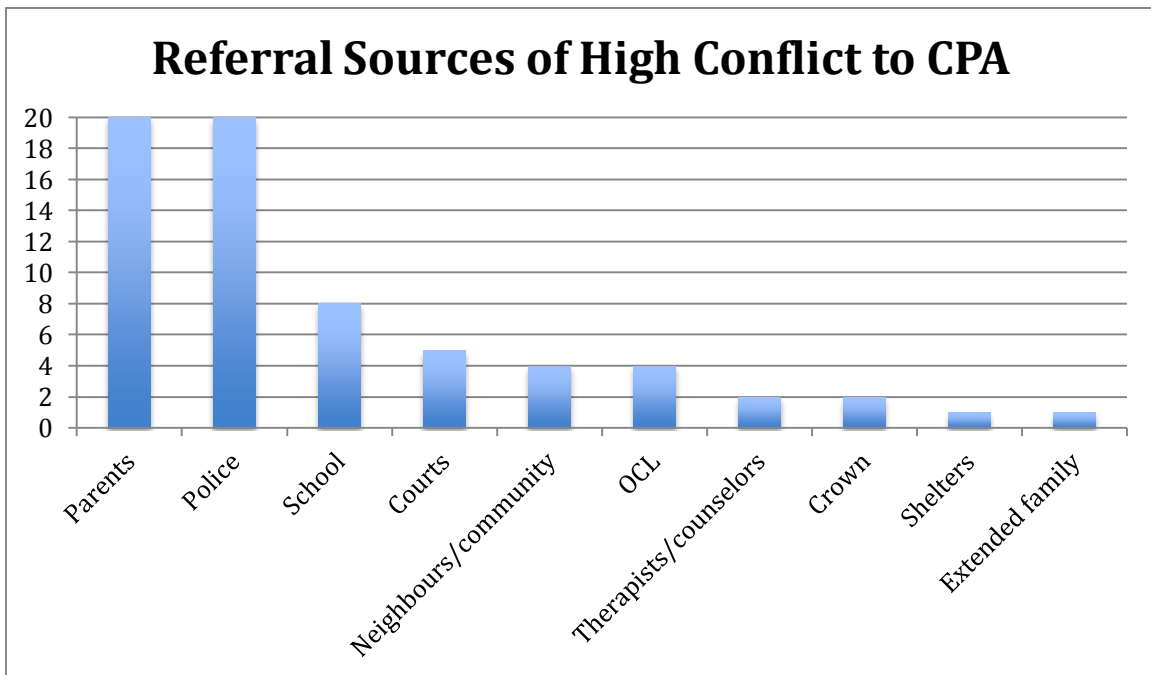
One supervisor from another medium-sized city explained that “if the case is flat-out custody and access, then [the reports to the CPA are from] parents.” A worker from the same city agreed, and suggested that these reports are more often motivated by conflict than a genuine feeling of one parent that the child is at risk with the other parent.

Another worker from that city pointed out that a report to a CPS by a parent in a high conflict case is not necessarily made for the purpose of “ratting out” the other parent. She referenced one case where the mother called the CPS for help to resolve the conflict.

In response to the researchers list of potential referral sources, a few workers and supervisors said that referrals from judges were “uncommon.” One supervisor from a medium-sized city said that she could not recall a court referral in a high conflict case. One supervisor noted that a call from a family court could be a referral, or it could be a request for more information, in which case the call would be directed to the legal branch of the CPA. This supervisor expressed that his agency was “never too keen” on becoming involved in a domestic proceeding, describing it was “wading into murky waters.”

CPA lawyers were more familiar with family court referrals. The manager of legal services in one medium-sized city reported that her department receives letters from family court judges “on a daily basis” requesting assistance in domestic, high conflict cases. Judges contact the CPA for a number of reasons, she reported. Judges may be concerned about the child, or they may want someone to help the parents. (A CPA lawyer from the same jurisdiction referenced a case where a family court judge directed the CPA to bring a protection application based on risk of emotional harm due to parental conflict). More often, the manager explained, judges call to gather information. Many high conflict parents are unrepresented, which can limit the information they place before the court. Where one of these parents mentions a history of CPA involvement, the judge may call the CPA to ensure that the judge’s order does not conflict with a CPA plan or to gather more information. According to the manager, judges are “trying to be creative and make sure they have all information before them to make the right decision.”

While police and parents were the most common referral source, workers and supervisors did report other referral sources for high conflict cases. One supervisor from a large city, for example, explained that “normally [reports come from] a variety of sources.” Another worker from a medium-sized city reported that referrals in these cases come “in all different ways, pretty much the same as [non-high conflict] cases.” This same worker also noted that it is common for high conflict cases to be reported for another protection ground, and then become categorized as high conflict at a later stage.



### Challenges of High Conflict Cases

All participants were asked to describe the challenges of cases involving allegations by one or both parents to a CPA.

### Judges

Judges observed that these are challenging cases, involving difficult litigants who monopolize court resources, possible complications from concurrent criminal proceedings, and OCL reluctance to become involved with a CPA is involved. Nine of the twelve judges identified lack of information as a challenge. These judges spoke specifically of the challenge of having to make a decision about custody or access without having enough information to know whether the allegations have merit. Judges in family cases reported lack of timely information from the CPA and the consequent delay as information is sought as a significant challenge in these cases. Many of the parents in these cases are self-represented litigants, increasing the challenges in providing adequate information to the courts and establishing the validity of allegations of abuse.

Judges reported that in cases where an allegation has been made to a CPA, there is rarely any evidence from the CPA about their involvement. Sometimes the only evidence of the CPA's response comes from the parties. Said one UFC judge, "The parents love to quote the CAS. 'They told me not to give him access.' Well, I don't have anything in writing that says that."

Getting information from the CPA is a challenge. According to one SCJ judge, "the number one frustrating factor" is that the CPA "has no obligation to the court in [custody cases]." He reported cases where he had requested the CPA to provide information about their involvement to the court (he asked the parties to provide the CPA with a copy of the endorsement in which he made this request; he explained that he could not order the CPA to provide information), only to be told by a CPA lawyer that this is not their role. "I always thought there was a kind of a disjuncture there," the judge explained, "you couldn't necessary rely on the parties to give an accurate report because

they had their own agendas and you couldn't rely on the Society to provide information because they were just doing their job and their job doesn't involve coming back to the court in civil proceedings to report on what they're doing."

Where the parents are self-represented, as they often are in high conflict cases, judges may feel they have no choice but to request information from CPA's themselves. One SCJ judge said that when parents are self-represented, "things don't come to you as concisely, neatly or clearly as you would like." "The trouble for us as judges," explained another SCJ judge, "is we rely on others to give us the information. And if we have self-reps that adds another layer because then I really need to rely on independent information, whether it's from the CAS or the police." An OCJ judge said that when parents are self-represented and making claims about what the CPA has requested them to do, she will often order a worker to be present or order the CPA to deliver records of their investigation, which she will then have to sift through, adding delay.

Judges talked about two kinds of cases involving allegations – those where the allegations have been reported to the CPA and those where the allegation are raised in court, usually on a motion, and have not yet been reported. In both types of cases, judges want to hear from CPAs. In the first type of case, judges want to know about the CPAs involvement with a family, including whether the allegations have been verified. In the second type of case, judges want the CPA to investigate and report on whether the allegations have merit.

One UFC judge explained: "It is not the court's job to investigate, it is the mandate of the CAS to identify risk and our job to accept that or reject that." Another UFC judge said that beyond the CPA's legal mandate to investigate, CPA investigations

were necessary for her to do her job: “One of the challenges I have is as a judge sitting there I have to make a decision and I need [the CPA’s] help, I can’t do a child protection assessment from the bench.” She said she wished she had a “direct line” to the CPA so that allegations raised in court could be investigated immediately.

Judges spoke generally about the challenge of assessing credibility in high conflict cases, a challenge made more difficult when the information before them is limited. Failing to take an allegation seriously may place a child (or a parent) at risk. One UFC judge says that even where a CPA does not verify the allegation, “it hangs there and worries you.” At the same time, judges were candid about the fact that high conflict litigants may exaggerate or fabricate allegations to advance their case. If a judge takes an allegation seriously and it turns out to be exaggerated or false, a child may have been deprived of contact with a parent unnecessarily. One UFC judge said she was always concerned in these cases about being “bamboozled.”

Another concern of judges is delay. Judges spoke of delay in terms of the limited resources available to high conflict families but also delay caused by allegations. Two UFC judges listed as a challenge the fact that the domestic proceeding gets put on hold if an allegation is made to a CPA.<sup>9</sup> One of these judges expressed frustration with the fact that this hold is sometimes unnecessary:

I’d say the biggest challenge is that it really puts a stop to the family law proceedings because when a child protection agency gets involved...really, they have jurisdiction, the authority, and the obligation to investigate child protection concerns, so everything comes to a stop. And in a lot of these cases, the allegations are made for this purpose really – [the parents] are trying to get evidence or they’re being malicious. Some of them are legitimate, but a lot of them unfortunately [are not]. It’s just spite that drives these allegations or

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<sup>9</sup> If the CPA initiates a protection application, s. 57.2 of the *CFSA* directs that the custody or access proceeding under the *CLRA* be stayed (except by leave of the court).

sometimes it's not necessarily spite but a parent who has mental health concerns perceives that there are problems but there aren't.

This same judge also noted the problem of delay in CPA investigations. She raised the issue of allegations being made for the first time in court – especially on emergency *ex parte* motions – and the challenge of referring these allegations to the CPA to investigate quickly so she can make an appropriate, safe and timely order.

Judges also listed as a challenge delay caused by insufficient resources. Judges mentioned delay regarding the OCL and also delay in getting parents connected to resources in the community. One OCJ judge said that programs such as counseling that could benefit high conflict parents often have waitlists of a year or more, and that the OCL's decision to accept or reject a file may take three to four months. "In the meanwhile," she said, "[the parents] are fighting every weekend."

Judges also spoke of the challenge of managing high conflict litigants. One OCJ judge described these parents as "really dug in" in terms of promoting their position, likely to have untreated mental health issues, and often self-represented, "either because they're too poor or they're crazy and think they can do this themselves." Judges also noted the problem of concurrent criminal proceedings. One SCJ judge explained that where there are concurrent child protection and criminal proceedings, the child protection proceeding might be delayed until the criminal proceeding is resolved so as not to prejudice the accused. She described this as a major problem because it prevents the family from receiving the help the child protection system is supposed to provide.

One UFC judge also raised the issue of allegations interfering with the court's ability to get the OCL involved in a case. She reported that the OCL is reluctant to become involved with a family where there is ongoing CPA involvement, and guessed

this was related to scarce OCL resources. However, she saw this as a problem since she relies “quite heavily” on the OCL to resolve high conflict cases. Finally, a few of the judges noted that high conflict litigants use a disproportionately large share of court and community resources.

### Parents’ Lawyers

Parents’ lawyers identified different challenges dealing with these cases. A few spoke of the challenges involved in having a client make allegations to a CPA. According to one lawyer from the large city, his biggest challenge is determining whether there is any basis to the allegation. If he knew whether the allegation was true or false, he would have a better sense of how to proceed. A second lawyer, from a medium-sized city, said she finds it challenging to direct clients on whether to report to the CPA. The CPA will be skeptical of parental allegations, she said, and so she tries to encourage her clients to be clear and to make sure their allegations involve real complaints, not just silly concerns. Another lawyer from the same city said he finds it difficult to get information from the CPA when his client is the one making the allegation.

Lawyers also spoke of the challenges where their client is the subject of an allegation. A few of the lawyers worried about the influence CPAs can have on their client’s case. Explained one lawyer from the large city: “We see them as being very powerful, if they want to be, they can really change the course of your client’s relationship with their child. That can assist a vulnerable parent, for sure, but it can also really interfere with another parent’s relationship with the child.” She said that, as a result, “usually the goal... is to just get the CAS uninvolved as soon as possible, unless they are really on your client’s side.” One lawyer from a medium-sized city said she always



encouraged her clients to engage with the CPA when there is an investigation since workers “have a lot of power to wield.” Another lawyer from that city said he “will push his client really hard [to do what the CPA asks] because otherwise they’re shooting themselves in the foot.” Lawyers were especially concerned about the CPA wielding its power erroneously. One lawyer from a medium-sized city explained that workers have different levels of experience working with high conflict families and not all of them will “do their homework” and test everything they have heard. A lawyer from the large city had a similar concern, “I don’t think this is a question of bias but they just might get more of one side of the story than the other. That can be a challenge.” She said that where the CPA is only hearing one side of the story, they may stay involved for longer than what is productive.

Parents’ lawyers also had concerns about the level of CPA involvement in high conflict cases. One lawyer from the large city said she finds it challenging when the CPA has been involved with a family and has given the parents some direction (i.e. to withhold access) but then refuses to take a formal position on custody or access. Another lawyer from the same city had the same complaint, saying that CPAs often direct things “behind the scenes” but are not willing to take a position in the litigation.

A final challenge for parents’ lawyers is how allegations fuel the conflict. One lawyer from the large city said he finds it hard to be productive when the other parent has made an allegation: “[My client] might get their back up if the non-residential parent calls the Society out of anger... And then the [residential parent will] say, ‘well they went off and did that so I’m not going to play fair with them. I don’t want them to have the child or unsupervised access. It really doesn’t have anything to do with the facts on the ground.’”

Another lawyer said these cases are very hard to settle, saying “either your client won’t listen to you or the other side won’t entertain in a settlement because, as I said, some of it is so pathological, it’s like they live for the fight or there is this sense of *injustice*.”

### OCL Lawyers

OCL lawyers reported a number of challenges in these cases. The most commonly cited challenge was the reluctance of CPAs to get involved in custody and access cases. Three OCL lawyers from three different cities listed this as a challenge. “I think that the challenge,” said an OCL lawyer from a medium-sized city, “is getting [the CPA] involved in the court process because they so desperately do not want to be involved in the family cases and getting them to provide disclosure in a timely matter. Those are really truly the most significant challenges that I see.” An OCL lawyer from the large city identified “inappropriate response by [child protection] agency” as one of her biggest challenges. She explained this as the CPA “relying on the family court to solve the issue,” and attributed this to workers not understanding the limitations of the domestic court. A third OCL lawyer from another medium-sized city elaborated on this point. She said that the inclination of CPAs is to not get involved in cases where the OCL is involved or where there is ongoing custody or access litigation. But, she said, where conflict is negatively impacting the children, CPA intervention is needed: The domestic court has limited ability to intervene, she explained, only able to make orders “in the moment,” whereas the CPA can provide long term services or confirm that the parents are not capable of caring for the child and then take action to protect that child.

Two of the OCL lawyers, both from the large city, also mentioned lack of communication and collaboration between agencies and professionals as a challenge in

these cases. One lawyer said that the CPA might have discussions with parents that are at direct odds with what the OCL is telling parents, or make referrals for services the OCL deems inappropriate. The other lawyer said these cases typically involve multiple professionals, and problems can arise when professionals are not talking to each other. There may also be different workers involved with the family at different times, for example a new worker may be assigned each time the CPA re-opens the file. This creates challenges because parents may receive conflicting messages from different professionals, or exploit the lack of collaboration by misrepresenting what one professional said.

Other challenges OCL lawyers mentioned included: CPA workers aligning with one parent because of a failure to test their biases or gather enough information, uncertainty about the sharing of information between a custody and access and child protection proceeding; the difficulty of having two parents with completely different perspectives of the same events; and delay. With respect to delay, one of the lawyers said that where allegations are made to a CPA and the CPA investigates, the OCL s. 112 clinical investigations are put on hold. She explained that that both agencies cannot be interviewing the children and parents at the same time, since this would lead to confusion about the agencies' respective roles and potentially interfere with the child protection investigation.

### OCL CI's

OCL clinical investigators noted some of the same challenges as OCL lawyers, specifically delay due to child protection investigations and the difficulty of cases where parents have radically different versions of events – the “he said/she said” problem. CI's provided the same explanations for the OCL's policy of putting on hold a s. 112

investigation while a child protection investigation is ongoing – avoidance of role confusion and prevention of interference with the CPA’s work. One CI also said that it is not fair to a family to subject them to multiple interviews, and that CI’s want to know the results of the CPA investigation before they provide recommendations. However, CPA investigations delay the completion of OCL reports, and where there are multiple allegations (and multiple investigations), this delay can be significant.

OCL CI’s also described the challenge of trying to make recommendations in cases where what “he said” and “she said” occurred are very different. CI’s stated that in cases involving allegations of abuse or violence, it is not their job to figure out the truth; as one CI put it, “we leave those allegations to the experts, who are the CAS.” However, there are some cases where the CPA cannot determine the truth, for example cases involving domestic violence where there is no corroborating evidence. CI’s find it challenging to make recommendations about which parent can best meet the child’s needs when a serious allegations, even if unverified, has been made.

### Assessors

Assessors identified a number of challenges in cases involving parental allegations to a CPA. The most commonly cited challenge was the “he said/she said” dynamic. For example, one assessor from a medium-sized city said her biggest challenge is “figuring out who’s lying and telling the truth and which parts of the truth are being shared.” Another assessor from a different medium-sized city said “trying to sort out whether an allegation is a real concern or part of high conflict” is her greatest challenge. She said she struggled with when to counsel parents out of making allegations versus telling them to report their concerns to the CPA. She said trying to determine if an allegation is real is

also challenging for her in terms of determining whether she has a duty to report to the CPA.

Another assessor raised the same issue of when to report a parent's allegation to the CPA. He said that he does not report unless the child spontaneously corroborates the parent's allegation. He thinks this is appropriate given the "serious consequences" that follow a report. One other assessor said she finds it difficult to explain to parents that when she reports an allegation it does not mean she is siding with one parent.

Another challenge assessors noted when parents make allegations is role confusion. Two of the assessors said that parents expect assessors to verify the allegations. One explained that managing parents' expectations is difficult in these cases. The second said that parents come to her with "a laundry list" of concerns they want her to validate. She said parents often confuse her role with that of the CPA and that even CPAs sometimes believe it is her role to investigate abuse and violence allegations. Another assessor spoke of the challenge of maintaining neutrality and objectivity in these cases. He said that high conflict parents often try to enlist him as an ally, and can become challenging to work with when he refuses.

One assessor mentioned challenges arising from CPA involvement, or lack of involvement. She said that CPAs do not take allegations made in the context of a custody dispute seriously, and when they investigate tend not to be as thorough as in other cases. She thought CPAs did not have enough training on dealing with high conflict families.

Other challenges assessors mentioned included lack of communication between involved professionals, professional complaints, and delay. One of the assessors said she had never been the subject of a complaint but knew colleagues who no longer performed

assessments because of high conflict parents complaining to professional bodies. In terms of delay, one of the assessors explained that like OCL CI's, his assessment gets put on hold whenever the CPA or the police investigate an allegation.

### Mediators

The mediators interviewed included those who mediated domestic cases, child protection cases, and both domestic and child protection cases. Domestic mediators said that one challenge they face is that when an allegation is made to a CPA, and the CPA investigates, this investigation puts a stop to the mediation. The Ministry of the Attorney General (MAG) funds most domestic mediation, while the Ministry of Children and Youth Services (MCYS) funds child protection mediation. One mediator said that MAG contracts for domestic mediation stipulate that child protection matters cannot be mediated. One mediator said that the line between what is a domestic versus a child protection case is unclear, but that where a CPA has an open file, the case is considered child protection. If a CPA opens a file on a family involved in domestic mediation, the domestic mediation is suspended. If the mediator only does domestic mediation, his or her participation in the case also ends (a mediator who does both domestic and child protection may be able to continue the mediation under a child protection contract).

Mediators also spoke about the suitability of high conflict cases for mediation. One mediator explained that mediation is voluntary, and that parents ultimately have to want to resolve the conflict. Another mediator from the large city explained that these requirements limit the number of high conflict parents seeking mediation.

Where high conflict parents do engage in mediation, mediators report that it can be difficult to get parents to agree. Explained one mediator from a mid-sized city:

The challenge is... they have such black and white thinking that they can't sort of see the bigger picture. Sometimes they might be making the allegation or complaint because of a real concern around the safety of the child but they sometimes don't see the bigger picture in terms of how are they parenting, how could I address this differently, how could we parent this together? There's limited vision. So therefore the resources you can use with these folks is also limited because they already can't see nine tenths of the rainbow, you're only working with one or two colors with these folks.

Another mediator from a different medium-sized city thought that parenting coordination was a better tool for high conflict parents since parenting coordinators can testify and can arbitrate binding arbitrations.

### CPA Workers and Supervisors

CPA workers and supervisors listed a number of challenges in managing high conflict cases. Many of these overlapped with the concerns of other professionals; some were unique to child protection agencies.

#### i. Time

One of the biggest challenges workers and supervisors reported was time spent managing high conflict files. According to one supervisor, one high conflict case can overwhelm a worker's entire caseload. Another said that high conflict cases demand so much time that workers often end up neglecting their other cases.

Workers and supervisors identified multiple allegations as one of the reasons high conflict cases are so time consuming. Multiple allegations require workers to conduct frequent allegations, and spend time trying to determine if the child is at risk. One supervisor from a medium-sized city explained:

We've always said we'd rather have ten neglect cases than two custody/access cases because these take *a lot* of time. And the reason it does it because of the frequent allegations go back and forth. And wading through that information... to find out what is legitimate, what's not. And

that smokescreen piece, it's really hard, it really is, to get through to what are child protection issues and what are not.

Another worker from the same city added: "Because there is a lot of he said/she said, you spend your time doing a lot of investigations, really wondering like, 'where is the truth?'" According to a supervisor from a different medium-sized city, "it takes a long time to really get a good assessment in these cases."

Workers end up interacting with high conflict parents more than other clients. Explained the supervisor just quoted: "Parents are calling all the time to complain or with new concerns." Parents also connect with workers to follow up on allegations. One supervisor said: "You will have both parents on the phone with you at any given time, and take up *a lot* of time with workers trying to share their side of the story, and trying to justify the allegations. It's a constant." Finally, parents reach out to workers to gather information for their domestic case. One worker explained:

[O]ften the clients can be quite demanding of your time because if they are in family court they're working on building a case too, so if they can draw from some of the professionals that they are working with to help build their case. So you're often getting emails. I get forwarded emails that are going on between parents. They forward them to me so I can just see what they're communicating to each other. There's *a lot*.

## ii. Role Confusion

A second challenge supervisors and workers mentioned, which is related to the challenge of high conflict cases taking up a lot of time, is role confusion. Workers and supervisors reported that high conflict parents often do not understand the role of the CPA. Some parents try to enlist CPA workers as allies in the domestic proceeding. One worker from a medium-sized city talked about this challenge:



For me personally, what becomes a really big challenge is that once you develop that rapport with both parents there's a lot of 'he said/she said' and 'I need you to believe me because I'm the one that's telling you the truth and you need to do something about the other parent. So having to *constantly* remind people of what is our role and this is not about being on sides, this is about impact on the kids. And really trying to separate what our role is and what the position of the Society is to what the parents are wanting from us. They're looking for allies, both of them.

Workers and supervisors also reported that parents expect workers to intervene in non-protection issues. One supervisor from the large city said that one of his challenges is "to remind our staff of our mandate. We are not in the business of custody and access. We're also not in the business of what's best for children, we're in the business of making sure children are safe." A worker from a medium-sized city made the same point: "It's not my job to make parents perfect, or a situation perfect. I think sometimes there's some confusion there and [parents] are wanting us to step in as an authority on parenting as opposed to an authority on safety and child protection."

The supervisor just quoted said that many of his workers have a difficult time helping parents focus on child protection concerns. Workers in other cities said the same thing. However, workers and supervisors both acknowledged that it is difficult for *workers* to both identify and stay focused on child protection concerns in high conflict cases. One supervisor from a medium-sized city explained the challenge of identifying child protection concerns in high conflict cases this way:

The challenges, on a practical level, the challenges are trying to separate – as always – the parents' feelings about each other and the issues they're concerned about [with respect to] the other persons' parenting, trying to separate what's annoying them or bothering them from what is actually child protection. That's the pragmatic challenge is pulling, like trying to get the blue string out of the red ball of yarn: the blue string being the child protection issue and the red ball of yarn being everything else.

Another supervisor from a different medium-sized city spoke of the challenge for workers of seeing through all of the conflict and focusing on risk of emotional harm:

With some of these cases, we're taking on a parenting coordinating role. Sometimes you have two high conflict people and their expectations of what child welfare will do are very high: we will manage all the visits; we will manage all the conflict. Every little thing that they're dissatisfied with about the other party they report to us, even though it's not even remotely a child protection concern – the kids went to bed too late, they said something they shouldn't have, things like this – and now we have a child protection worker in the middle spending many hours a week responding to these things and negotiating and navigating them, so that makes it really challenging. *And, the other major challenge is really trying to see through all of that and to understand what is the impact on the kids... That's our business. Impact on kids... But you get so distracted* [emphasis added].

### iii. Feeling Ineffective

A third challenge workers and supervisors noted was feeling ineffective in high conflict cases. Workers and supervisors described not having “the tools” to help high conflict families. These tools included strategies for working with parents and also community resources that high conflict parents could be referred to. One supervisor from a medium-sized city explained:

I don't think as an agency we have the tools, and I don't think staff have the tools, and I don't think supervisors have the tools to effectively manage these cases or to go in with some kind of intervention that's going to make a difference... The knowledge about what would work in these families [is lacking]... If you give pretty much any worker in this agency a case where the parent's primary concern is substance abuse, they have a whole list of places they can refer people to, and they can talk about motivational interviewing and safety planning, same with mental health, same with all of those other traditional child protection concerns. But if you hand someone a case where it's high conflict custody and access I don't think they have the same tools in their toolkit to assist those families and to support them.

Workers also reported feeling ineffective at getting through to high conflict parents. They spoke of the challenge of working towards some kind of resolution where the parents are deeply entrenched in their positions. For example, one worker said:

It can be very challenging because you have two parents coming from a very different perspective of events and even when you can find some agreement, which usually I always focus on the kids, so they can find some agreement and say, 'yeah, we can see our kids are really distressed,' the reasoning for why the kids are distressed is so opposite, one just blames the other, so it's *very* challenging to get movement.

Workers said it was also challenging to work with parents who have little to no insight into how their behaviour affects their children. "There's a lot of blaming involved," explained one worker, "so [parents are] not able to take that step back and look at what are the issues here with the kids and how is your behavior impacting on that. Typically, it's, 'it's got nothing to do with me, I'm a fabulous parent, it's all because this person did this, this and this.' But never how each of them plays a role in that."

Workers and supervisors also attributed their ineffectiveness to a lack of authority. One supervisor from a medium-sized city said there was a "real hesitancy" at her agency to commence child protection proceedings in high conflict parental separation cases. She said, "they're already before the court, what's another court application going to do?" However, this left workers' "hands tied. They don't have services to offer [parents], they can't take them to court because they're already before the court, so what do we do? It kind of feels like [workers] are beating their heads against a wall sometimes." Another worker said she feels ineffective in high conflict cases because she lacks the "legal clout" to hold parents accountable – to force them to work with her in resolving the conflict. Part of the problem, she explained, is that emotional harm as a protection ground is so difficult to prove. But, she said, without a protection finding, her role becomes "babysitting warring parents."

Beyond feeling ineffective, a few of the workers and supervisors talked about feeling as if they were making things worse for children in high conflict cases. One

supervisor from a medium-sized city explained: “When should we get involved and when should we not? Are we making the situation worse or are we making it better? Because sometimes I think our actual intervention we end up being a middle person to the conflict between the parents and then they try to use our authority against each other. And then sometimes that makes the conflict even worse.” A worker from the same city had similar thoughts: “If we’re trying to help people we need to be sensitive to the possibility that in helping we might actually hurt, and find a way that we can be less likely to cause harm. If we’re trying to protect against harm it’s kind of stupid that we’d take action that could hurt people, or families.”

#### iv. Establishing Emotional Harm

Workers and supervisors talked about the challenge of establishing emotional harm or risk of emotional harm due to parental conflict in these cases. Both groups said emotional harm was harder to prove than other harms. One supervisor from a medium-sized explained:

The emotional impact on the kids is not as easy to prove as it would be physical abuse or neglect or addiction. There’s real evidence and facts that back those things up. And when we’re dealing with custody and access sometimes it’s hard to find what’s the true fact and piece of evidence that is going to say, ‘yes, this is what you’ve done, we know this was you, we know you did it on this day, and we know it had an impact on this way and we’re holding you responsible for it.’ That’s a struggle.

Echoing part of this statement, another supervisor from a different mid-sized city said it is difficult to identify the origin of emotional harm in children: “It’s really difficult to detect or pinpoint emotional harm and where it’s coming from. It’s hard to articulate that to the court to get an order or to accept that the child is harmed because of it.”

Workers and supervisors said it was especially challenging to establish emotional harm when the children were not *yet* exhibiting symptoms. “From an evidence perspective, [these cases] are challenging,” explained the supervisor just quoted, “because we have to be able prove that it’s having a significant emotional impact on the child or that it’s going to and surprisingly some of these kids are quite resilient. So they’re seemingly doing ok even though you know... they’re not going to be ok.” A worker from the same city said that children suffer emotional harm differently: “not all kids display emotional harm outwardly. It’s hard to measure in those kids.” This worker expressed frustration with what she saw as a high threshold for child protection intervention: “Why isn’t it enough when a kid is sad and wants the conflict to stop?”

v. Emotional Challenges

Workers and supervisors reported that high conflict cases are emotionally taxing. One supervisor from a mid-sized city described them as “soul-destroying.” Another, from a different mid-sized city, said she finds it difficult to find workers willing to take on these cases: “It’s hard. It’s *draining*. And after people have had a family that’s really draining and they’ve gone through that, they shy away from going through that anytime soon.”

Feeling ineffective contributes to this emotional strain. Said one worker: “It becomes a personal defeat. No matter what you do it’s not enough and it’s not going to be [enough].” One supervisor said that workers find themselves under “very intense scrutiny” by high conflict parents: “you know everything you say is going to end up in an affidavit.” She also said that testifying in domestic proceedings can be very unpleasant for workers: “you’re going to get ripped apart on the stand.”

Workers and supervisors also talked about having high conflict parents' anger directed at them. One supervisor said that when high conflict parents become involved with his agency, "their conflict then begins to become with us." He said that where workers do not support one parent's version of events, they are likely to complain – to supervisors, to the Child and Family Services Review Board, and to the College of Social Workers. "It's common to get complaints against you in these cases," said another supervisor. One worker said that even where the complaints are baseless, they take a toll. And parents are not the only ones directing their anger at CPA staff. One worker described lawyers, "screaming at [her] on the phone." All of this conflict is hard on workers. Said one supervisor: "The custody and access stuff – you feel like you're in that alone. It's you and the family and the lawyers and everyone's mad at you."

### CPA Lawyers

CPA lawyers noted many of the challenges workers and supervisors described. Lawyers talked about the amount of time workers devote to high conflict cases, the risk of workers aligning with high conflict parents, workers losing sight of protection concerns, and the difficult personalities of many high conflict parents. Lawyers also talked about the challenges for them of establishing emotional harm, and exacerbating conflict. Finally, lawyers noted additional challenges related to information sharing and concurrent child protection and domestic proceedings.

CPA lawyers spoke about the evidentiary challenges in high conflict cases involving emotional harm or risk of emotional harm. One explained that she had a hard time getting the documentation required to bring these cases to court

You have to be able to demonstrate the evidence of emotional risk or emotional harm and sometimes its difficult to have the documentation you need. In our Act,

the *Child and Family Services Act*, you have to be able to link the risk of emotional harm or emotional harm to the parents' actions. Often the evidentiary challenges make it difficult to get it before the court.

Another lawyer from the same city elaborated on this point, explaining that in emotional harm cases evidence from workers was not enough: "Our workers are qualified to make personal observations and sometimes an assessment but not any kind of expert opinion. [The *CFSA*] requires specific symptomatic behaviour to be present... things that are hard for a lay person to submit evidence to a court about, even if they are seeing it. So we have a hard time making our case out unless there's been professional assessments."

Lawyers also worried about protection applications exacerbating conflict in these cases. One lawyer from the large city worried about giving parents another venue to air their grievances:

Our instruments are very blunt when we try and intervene and I think Societies have the view that they will make the situation worse because we start a second legal proceeding. So they're already battling each other in some kind private custody/access litigation and we just add fuel to the fire by going to court with a protection application and giving them a whole other venue – the same judge or a different judge – to air their concerns and get a different ruling.

Another lawyer from a medium-sized city thought that adding court-ordered protection services sometimes provides parents with one more potential ally:

Sometimes my experience of high conflict parents is that they try to draw in as many service providers as they can to get them lined up on their side and our agency isn't any different in that. We often are there because the kids are experiencing some emotional stress or harm because of it but it's my experience in those cases, they've got services up the yin-yang... We're not clear whether one more service like our agency is actually helping the family or is it escalating the conflict somehow.

This lawyer pointed out that her agency does not tend to bring protection applications in cases where parents are already before the court on custody or access matters.

CPA lawyers raised additional challenges related to information sharing. One lawyer from the large city said she is wary of any parent who, sometimes through counsel,

“peppers” the agency with requests for letters or reports or meetings. These requests, she explained, are often designed to bolster custody and access strategies rather than meaningfully engage with the agency on resolving child protection issues. She said that because she has “no control over what happens in the custody and access forum,” she is very careful about providing information to parents because of how this information will be used – and potentially misrepresented – in the domestic proceeding.

Finally, one CPA lawyer talked about the challenges that arise where there are concurrent child protection and domestic proceedings. She said different rules of disclosure govern the two types of proceedings, and that lawyers may improperly seek to use evidence from one proceeding in the other. Another related challenge, she said, was that domestic lawyers are often not well versed in child protection law. Finally, she said that the potential for conflicting orders can be confusing for parents, especially parents who are self-represented, as many high conflict parents are.

### **Role of CPAs in High Conflict Cases**

CPA workers, supervisors, and lawyers were asked about how they and their agency manage cases involving families engaged in high conflict custody or access proceedings. Workers and supervisors were asked whether their response differs in these cases as compared to non-custody cases, about their practice of sending letters to parents in high conflict cases, the decision to file a protection application versus testifying in the domestic proceeding, and their response to risk or presence of emotional harm due to parental conflict. CPA lawyers were asked about the circumstances under which they would file a protection application for emotional harm due to parental conflict. Workers, supervisors and lawyers were also asked whether their agency had any policies respecting



high conflict cases, and whether their agency offered any educational programs or training for staff on how to manage these cases. They were also asked how their agency could better manage high conflict cases.

#### Do CPAs Respond Differently to High Conflict Cases?

CPA workers and supervisors were asked whether the response of their agency differs if one separated parent is making allegations of abuse, neglect, or violence against the other parent. Of the 20 workers and supervisors, 7 reported no differences while the remaining 13 reported some differences in the way high conflict cases are handled.

##### i. No Difference

Four workers and three supervisors (7 total) reported no difference in the way the CPA responds to high conflict cases. Each of the 4 workers was from a different city. Two of the supervisors who reported no differences were from one city, the third from another. In explaining their answers, two of the workers reported that in each case, the response of the agency depends on the risk to the child, not the source of the referral. The other two referenced their obligation to assess cases according to the *Eligibility Spectrum*. One of the supervisors provided a similar answer, saying, “No, if the case meets the threshold, even if high conflict, we will still go out and investigate.” A supervisor from the same city agreed, saying that there was no difference in terms of how the CPA responds to these cases, however she acknowledged that workers do have “skepticism in mind” when one separated parent makes allegations against the other. The remaining supervisor, from a large city, thought that the CPA’s response to high conflict cases was relatively new: “There was a time many years ago when workers would say, ‘that’s a custody issue,

that's not child protection.” Now, she explained, if one parent makes multiple calls to a CPA, workers are more likely to consider the impact of parental conflict on children.

ii. Some Differences

Six workers and seven supervisors (thirteen total) reported some difference in the way CPAs respond to high conflict cases. These differences can be divided into two types: (a) more diligence *by workers* when handling these files, and (b) less protective intervention, especially in cases where there have been repeated allegations.

(a) More Diligence

Two of the workers reported being more diligent when handling high conflict files. One worker from a medium-sized city explained:

“The basic way that we do our job is still the same but we do need to be very careful about following things up appropriately, right? Because there is a higher chance that we're going to be court involved, there is a higher change of ... one parent coming back and saying ... ‘you didn't do this right, you didn't do that right,’ so it's being very careful that we're you know dotting our i's and crossing our t's...”

Another worker from a different medium-sized city reiterated this point, explaining that some workers “may err on the side of caution because they predict or perceive that there might be a higher level of oversight... I'm going to dot my i's and cross my t's because I can just assume it's going to be in front of a judge or an OCL at some point.”

(b) Less Protective Intervention

The remaining workers and supervisors talked about how workers may play less of a protective role in high conflict cases. At one end of the spectrum are workers who apparently dismiss high conflict cases as “just custody and access” and therefore not

within the domain of child protection. None of the workers or supervisors interviewed took this position; instead, they spoke of other workers at their agency who felt this way. According to one worker from a medium-sized city, some of his fellow workers view high conflict as “a completely different animal,” and as “not worthwhile” compared to more typical child protection files. A supervisor from a different mid-sized city thought that frontline workers and supervisors were “almost dismissive” of these cases. In contrast, her team, which specializes in domestic violence, considers whether high conflict could be an extension of domestic violence and therefore a child protection issue. She thought there were two “camps” at her agency, those who saw high conflict as a possible extension of domestic violence and those who say “we don’t deal with custody [cases].”

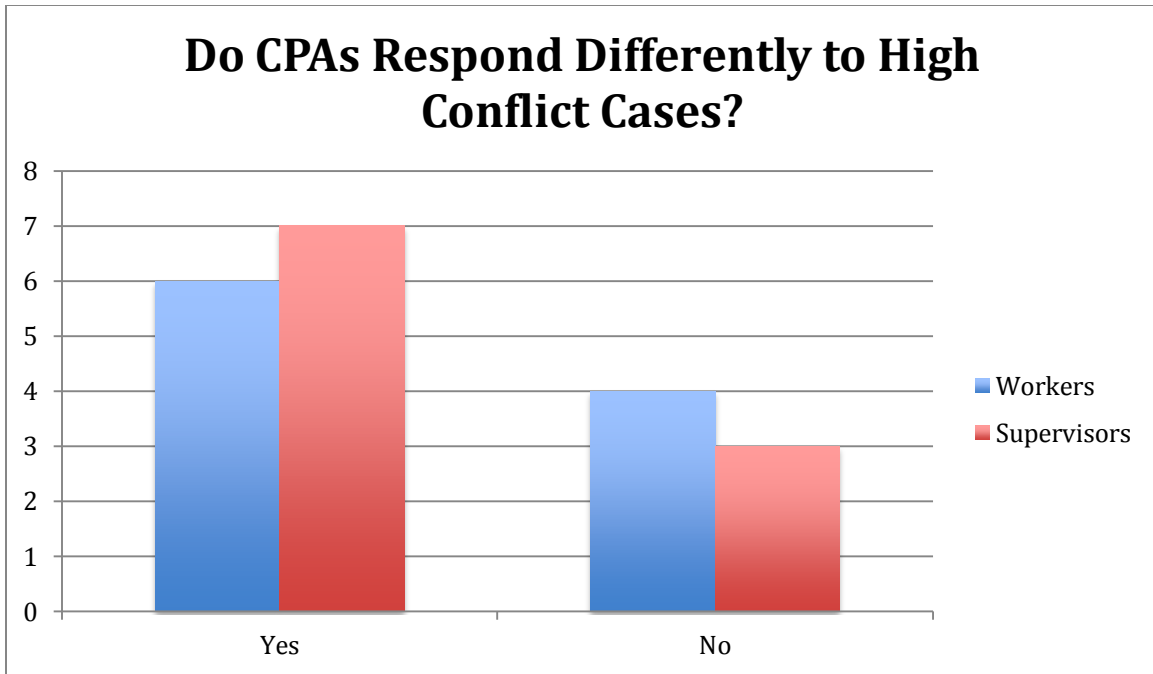
Supervisors explained that high conflict cases might be closed more quickly than other files. One supervisor from a medium-sized city justified this response in cases where workers quickly get a sense that the referral is malicious. He gave the example of one parent making an allegation after being served with divorce papers. Other supervisors worried that closing a high conflict file too quickly could place children at risk. For example, one explained that when child protection professionals approach these cases as “just custody and access,” then “it inclines you in a certain direction... like, let’s just shut this down as soon as possible or this is [a parent] who’s being a pain...” The problem with this view, he continued, is that, “we lose sight of the kids.” Similarly, another supervisor spoke of workers failing to identify child protection concerns because of the “skepticism” they sometimes bring to high conflict cases: “you can more easily miss if there’s something actually going on because people can dismiss those kind of allegations

when there's conflict; you can dismiss it to just one parent making allegations against the other because there's custody and access proceedings.”

Workers and supervisors both reported that high conflict cases might be handled differently where there are repeat unfounded allegations. Three workers explained that these cases are initially treated like any other. However, once a parent makes repeated allegations, especially unverified allegations, the worker's role may change. One worker from a medium-sized city said that she would “still follow up [on the allegation] and make sure everything was ok but might not do a full investigation.” Another said that in this situation her focus would shift to educating and supporting the *alleging* parent:

I think the approach is more to sit with that parent, try to understand what their issues are, try to explain to them the role of CAS, and if an allegation is not verified and we're unable to verify it, then making that same allegation over and over again, how we see that from our perspective... letting them know that it's kind of seen as malicious...

A number of workers and supervisors identified a tension between CPA policy and practice in these cases. CPA policy sets out guidelines for investigating allegations, regardless of referral source. However, as one supervisor noted, “human beings do child protection [work].” In practice, there is variability in how workers respond to high conflict cases. According to one worker from a medium-sized city, whether a high conflict case is handled differently than a more “typical” child protection case, “depends on who the worker is, what team they're on, who their manager is, what day of the week it is. Sadly, I think there's a lot of subjectivity to this stuff.”



#### Letter Writing in High Conflict Cases

CPA workers and supervisors were asked whether in cases in which one parent has made an allegation against the other parent their agency sends letters to one or both parents outlining its investigation, concerns and views about the case. They were also asked whether they believed these letters help reduce conflict between parents.

The majority of workers and supervisors (85%) reported sending these letters to parents in high conflict cases. Eight workers and nine supervisors reported sending letters, compared to two workers and one supervisor who reported *not* sending letters.

The most common types of letters are closing letters. These letters could come before an investigation (for “report received not investigated” cases), after an investigation (by intake workers), or after the case has been transferred for ongoing services. A worker and supervisor from one agency also reported sending letters to parents when a file is transferred from intake to ongoing services.

Workers and supervisors reported that closing letters often include a “warning” to parents: workers will outline their concerns about the impact of parental conflict on children and explain that the agency may become re-involved if the conflict continues. Workers and supervisors were divided on whether these letters reduce conflict. Six thought these letters do *not* reduce conflict; eleven thought they could reduce conflict depending on the circumstances. Those who believed letters have no impact described high conflict families as being past the point where a warning from a CPA could make a difference. Said one worker, “these people are so stuck in their need to be right, they feel so wronged and feel like the other person needs to pay... my wagging finger is not going to make a difference.” An intake supervisor from the same city who also doubted whether letters could reduce conflict explained: “Once they’re wrapped up in something like that, they’ve taken their positions and they both believe they’re right.”

Of the workers and supervisors who believed “warning” letters could reduce parental conflict, a few clarified that it would depend on the level of conflict. As one supervisor from a medium-sized city explained:

There is a range of high conflict families in terms of intensity, some people are bent on this, you can send as many letters as you like... at the extreme end of it, no letter is going to make much of a difference ... but there’s a middle range of those parents who are going to be more moderately high conflict and the letters may help for them, it does cue them to slow down and stop... and we don’t hear from them again... I believe that for those parents, the letter really does work.

Another supervisor from a different mid-sized city said that for parents “fixated on the fight,” letters from her agency have no impact in reducing conflict: “really the only thing these parents are going to recognize [is] the authority of the court.”

Two supervisors thought that letters were more likely to reduce conflict if the parent making the allegations is represented. According to one supervisor from a

medium-sized city, “the letters have more of an impact when there’s lawyers involved and we ‘cc’ the lawyers. I’ve seen an impact on that because then I feel like the lawyers then say, like, “whoops, CAS is saying this so you need to stop doing this....” This supervisor also believed that letters have more of an impact where the parents are court-involved or will be court-involved; she said parents are less likely to “dismiss” letters in those cases. Another supervisor from a large city reiterated the point that letters from a CPA can encourage parents’ lawyers to direct their clients to reduce conflict: “when they have lawyers I think what happens is... the person making the allegations brings their letter to their lawyer and it says that the society does not believe their concerns are validated [multiple times]... their lawyer is probably telling them, ‘knock it off with the phone calls, you’re going to look awful in front of the judge [hearing the domestic case].”

Workers reported that letters might reduce parental reports to a CPA, even if they do not reduce parental conflict. “My personal experience, I’ve never seen it that [a letter] reduced conflict... I think sometimes what it has done is it will reduce the reporting of conflict,” said a worker from a medium-sized city. Reduced reporting was seen as both positive (see preceding paragraph) and potentially negative. Explained one worker from a different mid-sized city, “I’m also a little bit worried about... the message that [a warning letter] sometimes sends is ‘don’t report’... It could also be perceived as ‘shhhh’.”

Workers and supervisors recognized that there was value in sending letters to parents in high conflict cases, even if those letters did not reduce conflict. One worker from a medium-sized city thought that letters were useful for the agency to have as evidence in case they brought a protection application. Another worker from a different mid-sized city thought that warning letters in particular were useful for judges in the

domestic proceedings to see that parents had been cautioned about their level of conflict. A supervisor from the remaining mid-sized city expressed that she was “not sure that [a letter] necessarily helps parents to reduce conflict but it does help other people involved.” The letters her team sends describe the reported protection concerns, the investigation, and a basic summary of whether and why the concerns were or were not verified. The letters are written for parents, parents’ counsel, and the courts – a challenge because it requires finding the right balance of disclosing and withholding information:

It’s that balance of you need to give [parents] enough that they feel satisfied that an adequate job was done in investigating the concerns and also enough that we know lots of times those letters are going before the court, right? So we want to put enough in there that parents’ counsel or a judge if it’s put before the court has a clear understanding of what, of our outcome and why we did what we did without needing anything further from us. But at the same time, we don’t put *everything* in there because sometimes when you give [parents] more it just gives them more fuel (for lack of a better word). But we do absolutely sort of list the outcome and the reason for the outcome in enough detail that someone else, a third party, would be able to read it and understand how we got there.

According to this supervisor, sending detailed letters also helps the agency, as it guards against them being called upon in the future to provide further information about the case.

Only two workers and one supervisor reported that it was not their practice to send letters to parents in high conflict cases. All three worked at the same agency in a large city. One of the workers explained that she did not write letters because her supervisor did not allow it but that other supervisors at the agency did. Another worker said that she personally was “very cautious” about sending letters in high conflict cases because of the danger of being “pulled in” to the conflict. The one supervisor who reported not sending letters specified that she did not send “warning” letters to parents, describing this as “relatively older practice.” In her view, sending these letters “defeats the whole purpose of trying to partner with a family and help them.”



### Testifying in High Conflict Cases

Workers and supervisors reported that it was “very rare” for them to testify in custody or access proceedings. For example, one worker from a large city, who had nine years experience, said she had never testified and did not know any workers that had. Only two supervisors, each from a different medium-sized city, mentioned that they had testified. According to a supervisor from another mid-sized city, it was more common for CPA files to be subpoenaed or a motion for disclosure of CPA files to be brought.

A few workers and supervisors mentioned the “stress” of testifying in domestic proceedings, with one supervisor saying it is “never comfortable.” Another supervisor explained that it is hard to feel as if your credibility is being challenged. She also noted the time commitment required to testify, saying that this added stress to workers trying to manage other files. A couple of workers questioned the utility of testifying in a domestic proceeding. One worker described a case where a colleague had testified on behalf of one parent only to have the other parent dismiss everything the worker said as a lie. Another worker wondered if it was worth the expense to a parent, who may or may not benefit from the worker’s testimony. She noted that worker testimony is often limited to information about the investigation; it typically does not include a position on custody or access. However, others thought that even if worker testimony did not advance the position of either parent, it could be helpful to judges. According to one supervisor from a medium-sized city, evidence from the CPA is usually regarded as “objective, professional, and credible” and, he continued, “sometimes the court appreciates this.”

Other workers and supervisors also mentioned not taking a position in custody or access proceedings, even where parents are pressuring them to take a side. According to

one worker from a medium-sized city, they try to remain “neutral,” speaking only to the safety of the children and leaving the custody or access decision to the judge. Another supervisor from a different medium-sized city said that judges resent workers offering a position on custody as part of their testimony, telling the agency, “if you feel so strongly that these kids should live with mom and mom only than you should be going to court as a child protection agency and putting that in place.” By contrast, two supervisors from a large city said they preferred testifying in a high conflict domestic proceeding to filing a protection application. Both supervisors worried about making a bad situation worse.

I have never had to initiate a protection application in a high conflict case... Because often what happens is that they're usually in front of the family court and the reality is we know we're going to get called, we *always* do, by one or both parents to go and give evidence at court in terms of are there are any protection concerns, you know, what's your assessment... The reality is, [judges are] going to hear what our you know concerns are, what the protection concerns are, and they will generally draft, we've been quite successful in terms of getting orders that generally assist in protecting and ensuring safety for the kids so it's actually worked out well. I find when you initiate protection applications in high conflict cases you make a bigger mess. I'm not saying I'd sacrifice a kid's safety but I'm saying when you put undue pressure and stress on a situation that's already a hot bed you're not helping the family at all.

Since workers were likely to be called to testify in the domestic proceeding, this supervisor preferred taking a position in that venue to bringing a protection application which would introduce another proceeding and the potential for conflicting orders.

### Emotional Harm

Workers and supervisors were asked to detail the circumstances under which their agency would become involved with a family due to emotional harm or risk of emotional harm to children caused by parental conflict, and how they respond to these cases.

#### i. CPA Involvement in High Conflict Cases

Workers and supervisors identified a number of factors that, if present, would likely lead them to “open a file” and have on-going involvement based on emotional harm or risk of emotional harm due to parental conflict. These included: a negative change in the child’s behavior, especially where an outside professional is able to verify this change and link it to the conflict; parents who downplay or justify the conflict; a child being exposed to conflict; presence of concurrent protection concerns (i.e. alcoholism); a pattern of repeated calls to the CPA or police; and withholding access or breach of a family court order.

Section 37(2)(f) of the *Child and Family Services Act* defines a child in need of protection based on emotional harm or risk of emotional harm:

A child is in need of protection where,

...

(f) the child has suffered emotional harm, demonstrated by serious,

(i) anxiety,

(ii) depression,

(iii) withdrawal,

(iv) self-destructive or aggressive behavior, or

(v) delayed development,

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;

...

(g) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (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

The Ontario Child Welfare *Eligibility Spectrum* sets out guidelines to assist CPA staff in determining whether a family should receive child protective services. Section 3 of the *Eligibility Spectrum* relies on s. 37(2)(f) and (g) to provide workers with direction on when to intervene in a family based on emotional harm or risk of emotional harm.

The most common reason cited for opening a file based on parental conflict was “impact on the child” or “a child’s behavior.” Eight workers and nine supervisors listed this reason. One supervisor mentioned following s. 37(2)(f) and (g), and one worker said she referred to the *Eligibility Spectrum* when making a decision to open a file. Another worker and three supervisors said they would consider opening a file in a high conflict case if they believed the conflict was *likely* to have a negative impact on the child’s behavior.

Supervisors and especially workers were more likely to open a file based on emotional harm than risk of emotional harm. According to one worker from a medium-sized city, her threshold for opening a file due to parental conflict was “actual recognizable impact on the children.” Another from a different medium-sized city said he needed “clear emotional harm.” A supervisor, also from that city, said, “we try not to touch as much the risk [of emotional harm] but maybe we’re getting better at that.” She said they might verify risk, send a letter to parents setting out this concern and some recommendations for reducing conflict, and “then we close our file and don’t necessarily always work through this because we don’t want to get in the mucky of all that’s going on.” However, a different supervisor from the same agency thought they were “a fairly liberal agency in interpreting the *Eligibility Spectrum*,” and explained that “sometimes nobody’s telling us that the child is struggling but based on the information we’re getting we say hmm you know the child may not be showing any signs right now but it’s very likely that they will be soon if this doesn’t change somehow.”

Three supervisors (each from one of the medium-sized cities) and one worker (from a medium-sized city) mentioned the possibility of opening a file based on risk of

emotional harm due to parental conflict. One supervisor said that, in her experience, it was more common for a file to be opened based on risk of harm than actual harm:

The *Spectrum* is pretty specific in terms of the symptoms that need to be exhibited and lots of times we don't have that... if we don't have the specific things that I think [the *Spectrum*] talks about... it would be more about we're starting to get a pattern of calls and worrying about the impact of that on children because it seems that they're repeatedly being exposed to the same thing. Certainly if we are getting calls from schools or professionals that the kids are acting out and they're connecting it to high conflict custody and access but I don't think that that happens very often. My experience is typically when the file gets opened it's because when we looked back we've had multiple multiple calls... I think we open it under emotional harm with a suspicion that that's what's happening or that the risk is there but we may not have the symptoms that are specifically outlined in the *Spectrum*.

A second supervisor agreed, saying that “presumed harm” might be enough for them to step in. According to the worker, a file might be opened where “the parent’s behaviour is getting to a point where *this is going to have an impact* on the child [emphasis added].”

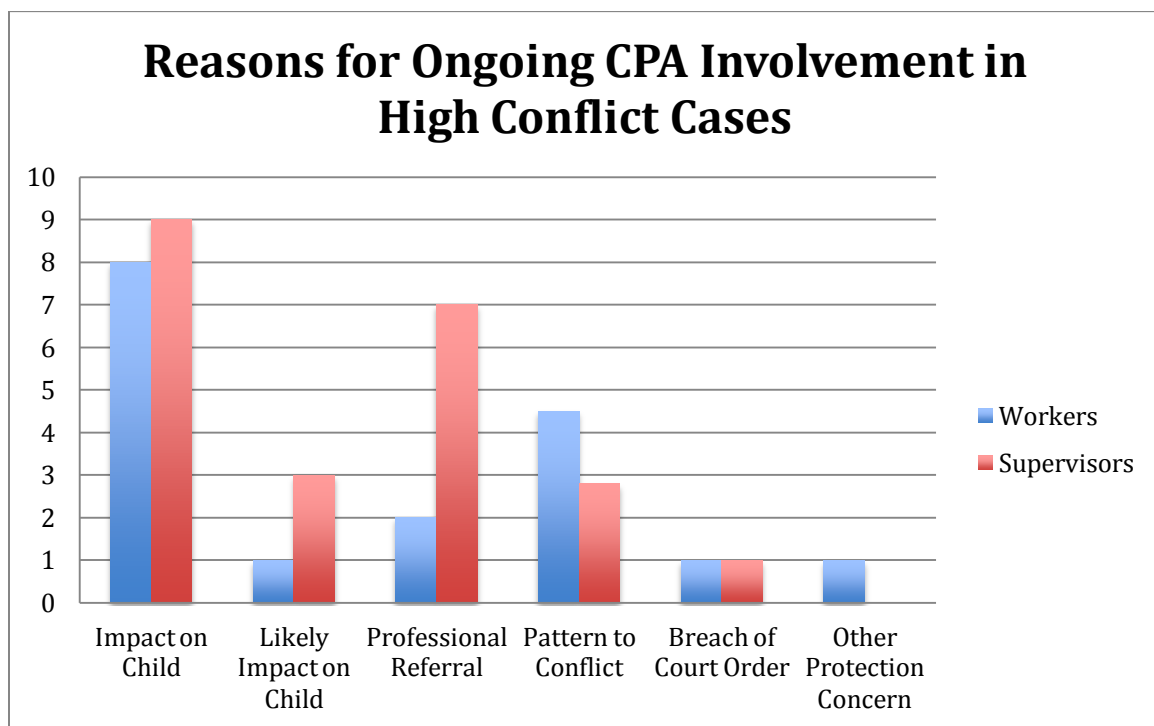
She specifically mentioned knowledge and exposure to the conflict as red flags.

A number of respondents (two workers and seven supervisors) said they would be more likely to open a file in a high conflict case where a professional had made the referral. This included referrals from schools. Workers and supervisors also mentioned the significance of a child disclosing conflict – either to the CPA or another professional. Three workers and four supervisors mentioned a child’s disclosure as a reason to open a file. According to one supervisor from a large city: “What really helps is when you’re able to get really clear disclosures from kids.”

Another factor was whether there was a “pattern” to the conflict. Two workers and three supervisors mentioned this factor. These respondents emphasized that they were less likely to remain involved with a family after one report or after a report of an isolated incident. According to one worker, the conflict would have to be “significant and ongoing” for the agency to stay involved. Intake would likely transfer the file “if it was

not an isolated incident [of conflict].” Another supervisor echoed this point, saying the decision to stay involved was “more about a pattern than a specific incident.”

Other factors workers and supervisors mentioned as likely to result in ongoing involvement with a high conflict family included concurrent protection concerns (cited by one worker), and withholding access or breach of a court order (cited by one worker and one supervisor).



ii. CPA Response to Emotional Harm or Risk of Emotional Harm Due to Conflict

Workers and supervisors were asked how their agency responds to cases that have been indicated for emotional harm or risk of emotional harm due to parental conflict. Many of the workers and supervisors reported that there was little to no difference in terms of how they handle these cases versus other cases. As one worker from a medium-sized city explained, “There is no standardized approach to working with emotional harm.”

However, even those workers and supervisors who said there was no formal difference in the way cases involving emotional harm due to conflict are handled acknowledged some differences in practice. Two supervisors, each from a different medium-sized city, reported that these cases often involve more direct service because there are little to no community services that high conflict families can be referred to. One of these supervisors said direct service often involves educating parents about the effects of conflict on children. Other workers and managers also noted their role as educators in these cases. “Educating the parents... is a huge part of helping them move forward,” explained one worker from the large city, “Sometimes I think even just educating the parents about [emotional harm] can nip the problem in the bud really quick.”

Two supervisors from the same medium-sized city reported that workers also end up doing more mediation and problem solving in high conflict cases. One supervisor said that younger workers in particular tend to take on this role. She said parents often want workers to mediate non-protection issues, such as appropriate bedtimes, *et cetera*, and that younger workers have a harder time telling parents to resolve these issues themselves. The other supervisor commented that what many of these parents need are parenting coordinators (PCs), but that PCs are too expensive for most of these families.

Other workers and supervisors mentioned the importance of not getting “dragged into” the conflict. One worker said that his agency promotes “ultra-transparency” in high conflict cases, such as always writing the same letter to both parents, as a way to keep the agency “neutral.” The objective, he explained, was to avoid getting caught up in the “he said/she said.” One supervisor from the same medium-sized city, noting the possibility

that CPA involvement could inflame already high levels of parental conflict, joked that his agency handled these cases like a “bomb squad.”

A few respondents talked about working with children who had suffered emotional harm or were at risk of emotional harm due to parental conflict. One supervisor from a medium-sized explained that once a high conflict file is transferred to ongoing services, the focus becomes “connecting with those kids... getting them to feel comfortable talking to someone about all this.”

This supervisor believed that transferring a high conflict file to ongoing services, and the corresponding focusing in on the children, could reduce parental conflict: “In some ways that starts to help because the parents know there’s somebody in there and those kids are visible and people are aware of it now. That sometimes can be enough to stop one parent’s behaviour.” She thought that increasing the level of child protection involvement to providing ongoing service could be especially useful where the parents are before the domestic court: “If it is in court [the parents] also don’t want to be identified as the one that’s [inflaming the conflict].”

#### Filing a Protection Application in High Conflict Cases

CPA workers, supervisors, and lawyers were asked about the decision to begin a protection application in cases involving emotional harm or risk of emotional harm due to parental conflict.

##### i. Workers and Supervisors



CPA workers and supervisors reported it was rare for their agency to bring a protection application based on emotional harm or risk of emotional harm due to conflict. Two workers from the large city said they had never seen an application in one of these cases.

Workers and supervisors explained their agencies' hesitation to bring protection applications in high conflict cases. One worker and one supervisor, both from the same mid-sized city, talked of getting "stuck" in these cases. Once a protection application is filed, the supervisor explained, the agency may be required to remain involved until the custody and access proceeding is resolved, which could take years, even where the protection concerns have been addressed. Explained the worker, "once we're in, we're in."

One supervisor from the large city explained his reluctance to file protection applications in these cases on the basis of the potential harm to children:

[W]e think about from a clinical perspective, what is the impact going to be on this child if we start a court process? So, sometimes what we decide is even though the situation's not great, we're not going to help the situation if we launch a protection application because all it does is the parents see in black and white all the dirty laundry and this child may be under further scrutiny.

The supervisor worried specifically about parents reacting to the views of children expressed in protection application materials. He was also concerned that reports of what one parent said about the other in CPA application materials could inflame the conflict. This could increase the child's level of stress. He worried that it could also place parents who are victims of domestic violence in greater danger.

Two supervisors from different medium-sized cities reported not filing protection applications in these cases because of judges' reluctance to find a child in need of protection on the basis of emotional harm due to conflict. According to one, "there have been cases where we've gotten our hand slapped before for getting involved in cases that I guess we felt there were child protection issues and the courts disagreed and thought

that we were prejudging matters that were custody and access and not necessarily child protection.” The other supervisor reported that while some judges admonish his agency for filing protection applications in high conflict cases, others admonish them for *not* filing protection applications in these cases. He said there had been cases where a judge directed his agency to remove children on the basis of emotional harm or risk of emotional harm due to parental conflict. Another supervisor from the same agency confirmed that judges had “ordered” CPA involvement in high conflict cases.

Workers and supervisors said they consider the utility of protection orders in high conflict cases. One supervisor from a medium-sized city said she will only consider a protection order if the current family (domestic) court order is not enough to keep the child safe. Others questioned the utility of protection orders in general. The most common disposition in these cases, according to the workers and supervisors, is an order for CPA supervision. A couple of respondents doubted whether supervision orders could reduce parental conflict. According to one worker from a medium-sized city: “Supervision orders are rarely effective.” Another supervisor from a different medium-sized city explained the limitations of CPA supervision in high conflict cases:

We haven’t had a lot of success with it. It’s a way to try to force people to do what you want them to do but I guess it’s like lots of social work interventions, if people don’t think they have a problem they might do it half-heartedly but they don’t really buy into the process. So it may kind of help out for a little while but in our experience it doesn’t actually resolve the issue.

When pressed on whether having the authority of the court behind the CPA had any impact, the supervisor continued: “I think it helps in terms of it gives us a bit more control and authority to step in but in terms of overall long term outcomes for kids, I can court order someone to go to a program but I can’t necessarily court order them to change their thinking.”

However, another worker from the third medium-sized city thought that supervision orders provided important authority to force parents to engage with the agency, thereby allowing workers to educate parents about the impact of conflict on children: “Supervision orders are helpful in that light sometimes because if the court sees the child’s in need of protection and then within a supervision order there would be certain conditions and often those conditions are, you know, even just to maintain contact with the worker[.]” A supervision order also helps the agency gather more information: “[I]t allows us to get a more thorough assessment of what’s happening with the family.”

While many respondents spoke of CPA reluctance to file protection applications in high conflict cases, supervisors from one medium-sized city said their agency had recently changed its policy in a way that could increase the number of protection applications filed. These supervisors explained that the agency would now file an application in any case where it was “directing” custody or access. As one supervisor explained: “If we’re acting as a custody and access judge, then our lawyers say we should be bringing it to court. Cause it’s not our role but if we’re doing that firmly because of protection issues, then it should be being brought to court.” The other supervisor explained why the new policy was better for parents:

Our old practice, maybe five or even ten years ago, was to stay to a parent, ‘look if you don’t want to send the kids, don’t send the kids and we think that’s a really good idea that you don’t send them (wink wink, nudge nudge),’ and then you get these poor moms – cause unfortunately it’s usually moms – saying CAS kind of suggested I shouldn’t send the kids for the weekend and now dad’s got the police at my door. We’ve changed our practice to say, you know, if we’re telling somebody flat out that the kids shouldn’t be seeing somebody we need to go get the legal authority to make that decision... Are we making the decisions? If so, then we need to go to court.”

According to the first supervisor, the new policy acted as a “check” on agency power.

While protection applications are reportedly rare in high conflict cases, workers and supervisors provided a list of factors that would make them more likely to consider an application in one of these cases. These factors include: concurrent protection concerns, failure to engage voluntarily with the CPA, failure to reduce conflict despite agency involvement, and clear “evidence” of emotional harm to the child. Many of the factors workers and supervisors consider in making the decision to file a protection application are the same as those considered in deciding whether to transfer a high conflict file for ongoing services.

Workers and supervisors both reported that it was rare to see a case involving suspected emotional harm or risk of emotional harm due to conflict where no other protection concerns were raised. The presence of other protection concerns was also listed as a factor that could lead to a protection application being filed in a high conflict case. Parents’ failure to engage voluntarily with the CPA around the issue of high conflict was a second factor. Third, workers and supervisors reported that even where parents had accepted services, a protection application was more likely where the parents were “stuck.” This included situations where, despite agency intervention, one or both parents could not or would not recognize the harm to their child due to conflict, as well as cases where the conflict continued to escalate despite the agency’s involvement.

Workers and supervisors also listed clear evidence of emotional harm to the child as a prerequisite to filing a protection application in a high conflict case. One worker from the large city provided an example of a case where a child attempted suicide because of conflict. Another supervisor from a mid-sized city described a case where the child was self-injuring. Workers and supervisors reported being more likely to bring a

protection application where evidence of harm was provided by an outside professional. One supervisor from a medium-sized city recognized the tragedy of seeking professional evidence of harm, admittedly a high standard, to intervene: “We’ve got psychologists or therapists calling us saying, ‘we’ve tried, this child cannot function this way.’ And so cases like that, those are almost helpful in a sad way because you’ve got evidence.”

ii. Lawyers

CPA lawyers provided similar responses to workers and supervisors about the decision to file a protection application based on emotional harm or risk of emotional harm due to parental conflict. Like workers and supervisors, lawyers reported that such applications are rare. According to one lawyer from a medium-sized city, the case would have to be “very very extreme” before the agency would consider filing an application. Another lawyer from a different medium-sized city reported that applications based on emotional harm are rarely required since these cases are often resolved on the basis of a different protection finding, supporting workers and supervisors’ reports that high conflict cases often involve concurrent protection concerns.

The primary reason offered by CPA lawyers for the low number of protection applications was the high threshold for proving emotional harm under the *CFSA*. Six of the seven lawyers spoke of the need for evidence of emotional harm to support a protection application in a high conflict case. According to one lawyer from the large city, “[If] there’s no physical manifestation of issues, it becomes sometimes quite challenging to make an argument for emotional harm or risk of emotional harm.” She said that her agency has had “pushback from the courts” in cases where they have tried to establish risk of emotional harm to the child based on evidence of parental conflict alone.

Like workers and supervisors, lawyers spoke of the importance of professional referrals in the decision to file a protection application. According to one lawyer from the large city, “the most common [reason to file] would be when we get referrals from doctors or psychologists who are seeing these symptoms and are prepared to write letters or reports that we can use that are good evidence from experts about the presence of emotional harm.” She also mentioned the importance of reports from schools. Worker reports were another basis on which applications could be filed, but these were less persuasive. One lawyer from a medium-sized city said she would need multiple affidavits from workers testifying to “long-term accumulation of symptoms” in the child. One of the lawyers from the large city said the situation would have to be “pretty severe” before she could file an application based on worker testimony. She provided examples of a child attempting suicide, being hospitalized, or being “unable to function.”

Some of the CPA lawyers expressed the same reluctance as workers and supervisors about bringing protection applications in high conflict cases. Lawyers noted the same fear of exacerbating conflict, thus placing children at greater risk of emotional harm. Explained one CPA lawyer from a large city:

I think Societies’ have the fear that they will make the situation worse because we start a second legal proceeding. So they’re already battling each other in some kind of private custody and access litigation and then we just add fuel to the fire by going to court with a protection application and then giving them a whole other venue, the same judge or a different judge, to air their concerns again and get a different ruling.

She thought that parents often *want* the agency to file a protection application to continue the custody battle, and reported that parents’ lawyers will call asking the agency to file an application – something that does not happen in other cases.

One lawyer from a medium-sized city explained her reluctance to file protection applications in high conflict cases according to fear of “losing control” of the process. She said that judges in her city often do not understand the issues in high conflict cases, and try to force her agency into a role the agency is not mandated to perform. She worried about being forced to expend limited agency resources in these cases

### **CPA Policies, Education and Training on High Conflict Cases**

#### CPA Policies on High Conflict Cases

CPA workers, supervisors, and lawyers were asked if their agency has any policies for managing high conflict cases. None of the respondents reported that their agency has any such policies. One supervisor from a medium-sized city said their agency had a 1999 policy on custody and access cases, but nothing about high conflict parental separations specifically.

While none of the agencies had policies for managing high conflict cases, two of the agencies provided workers with the opportunity to consult with more experienced workers and supervisors and outside experts in high conflict cases.

#### CPA Education and Training on High Conflict Cases

CPA workers, supervisors and lawyers were asked if their agency offers any educational programs or training on high conflict cases. All of the workers and supervisors reported having access to some education or training on how to manage high conflict cases. However, supervisors in each of the cities confirmed that most of the training on high conflict cases was offered outside the agency.

A few supervisors acknowledged that the high conflict training offered to workers and supervisors was limited. According to one supervisor from a medium-sized city: “There is training out there but not everyone has training or has access to it.” He said such training is infrequent, which is a problem because of worker turnover. He also noted that it is not mandatory and that only a few spaces are open to CPA workers, which means that the same people with interest in the topic end up attending each time. One supervisor from a different mid-sized city thought that workers would identify lack of training on high conflict cases as a problem. Another supervisor from that city said that while outside training is available, many workers find it difficult to attend. She also thought that interdisciplinary educational programs on high conflict parental separations were often “uncomfortable” for CPA workers since they generally involved “a lot of CAS bashing.” Finally, one worker from the large city said that high conflict training was only offered to limited, designated staff. A supervisor from that agency explained that the expectation was that a few employees would go to the training, bring the materials back to the agency, and teach others what they learned, though it is not clear how much this sharing of knowledge is occurring. They are a large agency, explained another supervisor, so it is not possible for every worker and supervisor to attend outside training on how to manage high conflict cases.

CPA lawyers also reported opportunities for training and education on high conflict cases. Again, many of these opportunities were offered through outside agencies. One lawyer specifically mentioned attending an AFCC conference dealing with high conflict. CPA lawyers also felt that training and educational opportunities could be improved. Two lawyers from different cities reported that most education and training is



targeted to social workers; programs tend to focus on clinical aspects of high conflict. One lawyer said she would like to hear more about strategies for CPA lawyers managing these cases. Another said that training and education disproportionately focused on identifying high conflict cases, but were “lacking in what to do now.” She also said she would like more information about outside resources for high conflict families: “Who can we send these people to?”

### **How Other Professionals View the Role of CPAs in High Conflict Cases**

Non-CPA professionals were asked about the role of CPAs in high conflict cases. Judges were asked to describe CPA involvement in high conflict cases, and to comment on how useful they found CPA involvement. Other professionals were asked how they thought CPAs responded to allegations made by parents involved in custody and access cases.

#### Judges

Judges described CPAs as performing two roles in high conflict custody cases: child protection and information sharing. The two roles were related. If a CPA had been involved with a high conflict family, judges wanted to know if the agency had identified any protection concerns. In some cases, judges would ask the CPA to become involved with a family to investigate allegations made by the parents of child abuse or neglect. In a few cases, judges reported forcing CPA involvement by ordering the child into care.

Where a CPA has been involved with a high conflict family, judges reported relying on agency files, letters, and testimony to gather information. Specifically, judges said they relied on the CPA to tell them whether any abuse or neglect to the child had been verified. Five of the twelve judges reported getting this information from CPAs in

the form of letters. Two judges – one OCJ judge and one Unified Family Court (UFC) judge – said they have asked CPAs for these letters. Three of the judges reported ordering CPAs to produce their files. One of these judges, from the OCJ, explained that letters are preferable to file disclosure – judges do not always have time to read the entire file. She said short letters with some kind of recommendation (as to custody or access) are the best.

Judges reported that worker testimony is rare in custody cases. One OCJ judge said worker testimony is not very helpful if the judge already has the CPA file. Four judges said they had requested a representative of the CPA to appear in a high conflict custody case to provide information to the court. A fifth said he had never ordered an agency representative to attend “but wouldn’t hesitate to do so.” One judge from the Superior Court of Justice reported asking workers to attend case conferences. He said that where the CPA is actively involved with a family, the CPA and court have a “symbiotic relationship.” If the CPA attends the case conference, they can have input into a consent order, which allows both the court and agency to achieve their goals. By having input into the final order, the CPA is saved from having to file a separate protection application.

Judges also reported initiating child protection involvement in high conflict custody cases. One judge said that in cases involving allegations of child abuse or neglect by one or both parents, she orders parents to give the CPA a copy of the pleadings or sends a copy herself. She said it is not her role as a judge to investigate whether these allegations have merit; it is the role of the CPA. Two other judges reported that they had forced CPA involvement in cases where children were being emotionally harmed by parental conflict by ordering the child into agency care.

Judges reported that it was rare for a CPA to file a protection application involving parents in a high conflict custody case. One judge of the Ontario Court of Justice (OCJ) said this happens in about “0.1% of cases.”

Most of the judges found CPA involvement useful in high conflict custody cases, with two describing it as “extremely useful”. Judges spoke mostly of the utility of CPAs in terms of providing information judges needed to make decisions that would not place children at risk. For example, one OCJ judge said she relied on the CPA to determine the veracity of maltreatment allegations, a job the CPA was uniquely positioned to do:

[CPAs can] tell you whether the allegations can be substantiated or not, and they’re the only ones who can tell you that short of a place like a children’s hospital that has an abuse team... but they’re the experts in telling you ‘can we substantiate this allegation or not?’ I need that. I can’t tell from the allegations, I mean I might think I can tell, but I shouldn’t, that’s their job and I let them tell.

An SCJ judge said she was more comfortable making an order respecting custody or access if information from the CPA about its investigation was before the court:

I find it extremely useful when you’ve got a serious situation and you know you have to do something but you don’t have enough information and so knowing how to define your order – how far reaching should the order be – and you have nobody other than the Children’s Aid Society as being part of the puzzle. They are extremely helpful. Usually their file, on its own, is enough to give me the comfort that I need to know whether I’m doing the right thing.

However, a UFC judge also spoke of the need to have a representative from the CPA attend where the agency is so involved as to be “calling the shots in the background.” In these cases, she explained, it was almost impossible to move forward without CPS input:

I’ve sometimes, but I don’t like doing this because they hate it, I might say ‘a representative from the Children’s Aid Society with knowledge on this is asked to attend.’ That’s where when we can’t get anywhere without hearing from them or their help. And the lawyer might say to me, if there’s a lawyer on a file, ‘you know the CAS’s are up to their necks in this. They’re telling my client this, and they’re telling the other client that. They’re saying he should only have

supervised access’ or whatever, and I’ll say, ‘yeah, we have to have them here in court, how can we have a settlement conference without them?’

In addition to stressing the importance of information sharing, one UFC judge also spoke of the value of CPA involvement in high conflict cases in terms of helping families and protecting children:

They have the resources, I think, to quite often not only figure out the problem, so if a party needs to go for anger management, they can recommend that... And they also, if they’re involved, they also have the capacity to safeguard the child, which is the most important thing, with supervised access or make arrangements for a family supervisor or even the child being placed with family. So as far as protecting a child goes and looking at the child’s best interests, in high conflict cases, the CAS is really helpful in the worst cases.

Only one of the twelve judges expressed some ambivalence about CPA involvement in high conflict cases. This UFC judge explained that it is only useful to hear from the CPA in certain cases:

If they have recent experience or have a long-time working relationship with the parent and they can give you some third party information about how the parent has done that can only be helpful to us really. Where it’s unhelpful is where its vague and its sort of just hanging there and they’re not really working with the family anymore.

In other words, the more involved with the family, the more useful the information the CPA can provide to the court.

### Other Professionals

Other professionals were asked for their views on how CPAs respond to allegations made by parents in ongoing custody and access cases.

#### i. Parents’ Lawyers

Parents’ lawyers described the CPA response to high conflict custody cases in terms of the initial investigation and ongoing response. All but one of the parents’ lawyers reported that when one parent makes an allegation against the other parent to a CPA, the

CPA investigates the allegations. However, many of the lawyers believed that CPAs are skeptical of allegations made in the context of a custody dispute. According to one lawyer from a medium-sized city: “If there’s a custody and access battle going on, [CPAs] feel like they’re being used as a weapon.”

Parents’ lawyers were divided on whether a CPAs ongoing involvement with a family changed where there was a custody dispute. One lawyer from a medium-sized city said that CPAs approach allegations made by separating parents differently: “I think they look at it through a lens where they are first acknowledging or recognizing that it’s custody and access.” However, he went on to say that this “lens” did not affect the CPA’s involvement: “They [respond] as thoroughly as in child protection cases.” By contrast, another lawyer from the large city thought that CPAs were less involved in custody cases than non-custody cases: “The CAS kind of does their normal check, they come and take a look, and most of the time, in my experience, they close the file. Like they just say, ‘you’re dealing with this through the domestic court so we’re not going to get involved.’”

One lawyer from the large city saw CPA involvement in cases involving allegations by one or both separating parents as either too much or too little: “I would say... generally it’s a woeful under-response or a dreadful over-response. That’s what I usually find.” He was the only parents’ lawyer to suggest that the CPA might not investigate allegations made in the context of a custody dispute. He explained what he meant by CPA under- and over-responses in these cases:

Usually [an under-response] involves an allegation being made and absolutely nothing happening or saying, ‘sure we’re happy to come out and have a look, and if we’re lucky we’ll get out there sometime in the next two or three weeks.’ And the over-response is usually... ‘we will come out immediately and we will perhaps empower the other parent to suggest that there should be no access whatsoever or even if we don’t do that on purpose we will not do anything to make it clear that we are still in the investigation stage and don’t have any

opinion as of yet.’ In my experience they do not tend to make things better, even when there’s a legitimate concern, they do not tend to make things better.

Another lawyer, also from the large city, suggested that in some cases the CPA might both over- *and* under-respond. He described situations where the CPA refuses to take a formal position on custody or access while dictating to the parents what the custody or access regime should be – for example, telling one parent to refuse access. He called this, “directing the scene from behind the scene.” He said that in these situations, the CPA needed to “get off the pot.”

ii. OCL Lawyers

OCL lawyers described variability in the way CPAs respond to allegations by separating parents but thought that generally CPAs avoid getting involved in high conflict cases.

One OCL lawyer from the large city said there was “tremendous variation from agency to agency and worker to worker.” She provided an example of one CPA that was looking for funding for parenting coordination for high conflict parents and contrasted it with agencies that refuse to investigate allegations made by separating parents, saying, “this is just custody and access.” Another OCL lawyer from the same city thought that despite recent training for CPA staff on the risk of high conflict for children, there continued to be pushback from agencies, in particular those who say: “that’s a custody and access issue, not a child protection issue.” She believed that one of the barriers to CPA involvement in these cases was their failure to look beyond individual allegations of harm to see a larger pattern of conflict that could affect the child. For example, in a case involving multiple allegations of sexual abuse, the abuse may not be verified but the fact that the allegations are being made repeatedly points to a risk of emotional harm. Both of these lawyers wanted CPAs to play a greater role in high conflict cases. Said one of the

lawyers: “For many families, either because of geographic or socioeconomic resources, CAS is the only game in town.”

OCL lawyers from the medium-sized cities reported a similar reluctance on the part of CPAs to get involved with high conflict families. One lawyer explained that in most cases the CPA investigates allegations, sends a letter noting conflict, and refers families to domestic court to resolve their custody and access dispute. Another lawyer from the same city agreed that CPAs would investigate allegations but were less likely to become involved in an ongoing custody case. He explained this reluctance in terms of skepticism regarding the allegations, combined with resource constraints:

They probably respond like they would in almost any case. But they walk in with a degree of skepticism. They also don't want to be pulled into custody cases. They don't want to be in there. They're probably more than happy to not get involved where they can avoid it. They have enough cases, they have enough, that they seem to be more than happy to stay out of things when they can. Are they going to shirk the duty? Not really, they're not going to ignore a significant protection concern but they're probably less likely to jump in if they can avoid it.

He attributed CPA skepticism to the fact that many high conflict parents make allegations against the other to the CPA – “this is a fixture in high conflict cases” – which probably leads the CPA to take these allegations less seriously.

Another OCL lawyer, from a different medium-sized city, described CPAs as being “very reticent to become involved” in custody cases. While she did not speak specifically to CPAs’ response to allegations, she did report that CPAs are reluctant to take a formal position. She said this created tension between judges, who wanted the CPA involved to provide information to the court, and CPAs, who see high conflict cases as custody matters and therefore not within the domain of child protection.

### iii. OCL Clinical Investigators

OCL CI's had a similar view to OCL lawyers regarding CPAs' response to allegations: CI's generally report that the CPA response is variable, but that for the most part agencies avoided getting involved in high conflict custody cases.

One CI from a medium-sized city thought the CPA response depended on what was being alleged:

I've seen where they take [allegations] seriously and do a full on investigation. I find with sexual abuse allegations especially they seem to be pretty vigilant about it. I've also seen where they discount the referral just because of custody/access. So it's a bit of a mixed bag. I've not seen where there's been a sexual abuse allegation that they ignore. Lots of other types of allegations they'll ignore, or they'll minimize or not open. It's my experience in child welfare that often as soon as they hear 'custody/access' or as soon as they know it's custody/access, the attitude is 'oh, we don't do custody/access.' That's not an uncommon thing.

This CI explained that CPAs "get tired" of high conflict parents making allegations "back and forth" against each other.

Another CI, from the large city, described the CPA response to high conflict cases as "a sad story." She said that some CPAs respond by saying, "this is a custody/access case, we're not going to do anything about this." She said some CPAs have a view that if a family is before the domestic court, the court is taking care of it, and so why does the CPA have to become involved? She said the CPA may also "take a step back" if they see that the OCL is involved with a family. As a result, there is little collaboration between CPAs and the OCL on high conflict custody cases.

Another CI, also from the large city, worried that CPAs were overlooking risk of emotional harm to children involved in high conflict separations. Like one of the OCL lawyers, she felt that CPAs often failed to see past individual allegations to the larger pattern of conflict. She thought the CPA was more likely to become involved where an outside professional was calling to report risk of emotional harm due to conflict.



iv. Assessors

Private custody assessors also reported variability in the CPA response to allegations made by separating parents, and all believed that CPAs were reluctant to get involved in high conflict cases. Like other professionals, assessors reported that there were some workers and agencies that took these allegations seriously, while there were others that dismissed them as “just custody and access” disputes. One assessor, from the large city, who described the CPA response as “very mixed and inconsistent” thought the variation was mostly by agency: “I think if the agency position is clear, workers will do it.”

Two assessors described different “thresholds” for CPA intervention in cases where separating parents are making allegations against the other. One assessor, from a large city, thought that CPAs use a higher standard for verifying parental allegations of child abuse in high conflict cases:

It’s very clear that it’s kind of a two-tiered system. Whenever there is high conflict divorce, specifically custody and access issues, the threshold employed by child protection agencies seems to be a bit different. They tend to approach these matters with higher levels of trepidation; they recognize that people are not averse to trying to use the system to gain an advantage in litigation. It’s not uncommon that they would validate risk to the child by virtue of their exposure to parental conflict, so risk of emotional abuse, but I think their threshold for validating allegations of child abuse or neglect is a little different.

As this assessor pointed out, the higher standard for substantiating parental allegations of abuse did not prevent CPAs from verifying risk of emotional harm to children. He was also clear that this “two-tiered system” was not due to negligence: “I do believe [CPAs] do their due diligence and they undertake their procedures in the same way, it’s just different criteria, that’s my belief.” This assessor thought the two-tiered approach was justified, explaining that it is in the interests of children to recognize that sometimes parents make false allegations to advance their litigation position. He thought that

approaching parental allegations with some skepticism was justified: “The consequences of intervention by a child protection agency can be huge to a family.”

Another assessor who described a different threshold for CPA involvement in custody cases was more critical. This assessor, from a medium-sized city, described CPAs as “generally unresponsive” to allegations made by separating parents:

I find that the threshold seems to be higher, like there seems to be some reluctance to get involved and there’s this kind of phrase that’s used like, ‘well, that’s a custody and access dispute’ as if there can’t – there’s certainly conflict in the period while parents or families are trying to reorganize, that certainly poses a level of emotional harm to kids regardless – but that somehow that if there’s a custody dispute and if there’s that period it’s almost like, ‘well there can’t be some other things going on there that are separate and apart from the custody issues’

This assessor also said that she found CPAs “particularly unresponsive” to reports she has made of emotional harm due to conflict.

Another assessor from the same city expressed similar concerns about the CPA response in custody cases, saying that CPAs have difficulty identifying protection concerns in the midst of parental conflict:

Unless there is blood on the floor, they are very hesitant to intervene because they see the custody umbrella as defining everything that is happening rather than teasing out how much of this is related to custody conflict and how much is related to genuine safety issues.

While all of the assessors noted CPA reluctance to get involved in high conflict cases, a few – including the assessor quoted above – thought that reluctance was justified.

Another assessor from a medium-sized city thought it was a problem that CPAs in her area investigated every allegation made by a parent in a custody case: “I think that can sometimes feed one parent, it causes a lot of stress and anxiety in the other parent and I think it puts the kids through unnecessary constant interviewing.” She said that by

treating every allegation as if it were a new allegation, the CPA makes the situation “much much worse.”

v. Mediators

Mediators’ views of CPA involvement in high conflict cases were mixed. For example, one mediator, from a medium-sized city reported no concerns about how CPAs responded to allegations by separating parents: “I haven’t seen a concern about how they’re responding. Are they too lenient, too harsh? I wouldn’t say they’re too anything.” Another mediator from a different medium-sized city viewed the CPA response to parental allegations positively: “I think they take it very seriously... I think they would respond probably more, they would take it more seriously in custody/access.” A third mediator from a medium-sized city thought the CPA was opening more files involving high conflict families than in the past, a development she viewed as positive.

By contrast, another mediator from the large city described the CPA response to allegations by separating parents as “by and large unsatisfactory.” She noted that there were exceptions and she was optimistic that the CPA response to high conflict was improving; however, she said that agencies continued to be “very hands off.” She saw limited CPA involvement in high conflict cases as a problem: “It’s a problem for families. It’s an access to justice issue. It’s a public health issue.”

### **Assessments in High Conflict Cases**

Respondents were asked about the use and utility of assessments in high conflict cases, including parenting capacity assessments under s. 54 of the Ontario *Child and Family Services Act (CFSA)*, private custody assessments under s. 30 of the *Children’s Law*

*Reform Act (CLRA)*, and OCL investigations under s. 112 of the *Courts of Justice Act (CJA)*.

### Judges

Judges were asked under what circumstances they would order an assessment under s. 30 of the *CLRA* or s. 54 of the *CFSA* or an OCL investigation under s. 112 of the *CJA* to help resolve a custody case involving parental allegations to a CPA. Superior Court judges in the locations studied do not have jurisdiction to order a parenting capacity assessments under the *CFSA*, so could not comment on the decision to order these assessments. Judges were also asked how useful assessments are in these cases.

#### i. Private Custody Assessments Under s. 30 of the *CLRA*

Most of the judges said they rarely order assessments under s. 30 of the *CLRA*. Where s. 30 assessments are ordered, it is usually with the consent of the parties. At the Superior Court, judges reported that the practice is to ask parties to agree to a s. 30 assessment. One SCJ judge said he has made “a lot” of these requests.

Superior Court judges reported seeing more s. 30 assessments than judges of the OCL and UFC. One SCJ judge said she sees s. 30 assessments “frequently.” By contrast, OCJ judges, reported seeing “almost no” s. 30 assessments, or seeing them “hardly ever.” This difference likely reflects the fact that litigants in the OCJ generally have lower incomes.

Judges reported the key barriers to s. 30 assessments as cost, delay, and availability of assessor. One UFC judge explained: “[S]ection 30 assessments are limited to people who have money.” Another reported that hardly any parents were willing to pay

for s. 30 assessments, with the majority requesting OCL involvement “because it’s free.” Along this same line, another UFC judge said she might see a s. 30 assessment where the OCL has declined to become involved or where there is a discrete issue to be resolved, such as where the child should attend school. Judges also reported delay and lack of assessor availability as problems, and the two were connected. One UFC judge said that many mental health professionals had given up conducting assessments because they were “being sued [by high conflict parents] all the time.” Another said that if she “had ten people with unlimited resources, [she] wouldn’t be able to find ten assessors.” An OCJ judge said that this assessor shortage means parents are placed on waitlists for assessments. One SCJ judge said that it could take “several weeks” before parents meet with an assessor and then months to complete the assessment process. He said assessors often hold a disclosure meeting before writing their report, which is “great” if the parents can settle, but if the parents can’t settle, there is further delay in requesting the report and waiting for the assessor to write it.

Some judges said that even without these barriers they were not prepared to order s. 30 assessments in all custody cases involving high conflict. One UFC judge said there would have to be some type of clinical issue for her to order a s. 30 assessment. Another, from a different city, said she would consider the potential impact on the child when ordering a s. 30 assessment. This judge said that if there were already a number of professionals involved, she would balance the potential harm that talking to another professional might have on the child versus the potential benefits of the assessment.

Despite the relative rarity of s. 30 assessments, especially in the OCJ and UFC courts, judges reported finding them helpful in resolving high conflict custody cases,

sometimes more helpful than OCL investigations. One SCJ judge described why she found s. 30 assessments more useful than OCL investigations:

I think it's fair to say that I can rely more confidently on a s. 30 assessment because you've got highly paid professionals – I'm not saying the OCL is not a professional body, don't get me wrong – but the quality of the work that's done under s. 30 is just generally better because these are people who run businesses and that's all they do and they get paid for their time whereas at the OCL – I'm obviously always really grateful when they agree to take on a file – but they are generally overburdened – it's a government-funded organization – and I don't find they have the time to really do anything other than a report that [says] 'the parents, he said this, she said that.' Sometimes their recommendations are helpful and I've had reports where I've totally disagreed with what they've done. So I just don't find them quite as helpful.

The UFC judge who noted that most litigants request OCL involvement also thought that in some cases s. 30 assessments could be better than s. 112 reports. She explained that lawyers can hire an assessor and start the assessment process immediately (versus having to wait to see if the OCL accepts the file); a private assessor might not be put off by CPA involvement (whereas the OCL might decline to become involved if the CPA has an open file); the parties can hire someone other than a social worker to give an expert opinion; and an assessment is guaranteed (versus in the case of an OCL referral, the office may assign a lawyer instead of a clinical investigator).

ii. Assessments Under s. 54 of the *CFSA*

Assessment under s. 54 of the *Child and Family Services Act* can be ordered in a high conflict parental separation if the CPA has commenced a child protection proceeding under the *CFSA*.

Judges of the OCJ and UFC reported ordering s. 54 assessments in high conflict cases. One OCJ judge reported that *CFSA* s. 54 assessments are more common than s. 30 assessments under the *CLRA*, but are not ordered as much as they used to be. He blamed

this on cost and “delay, delay, delay”. CPAs are responsible for the cost of s. 54 assessments and so they sometimes oppose ordering an assessment in a high conflict parental separation due to budgetary concerns. In some jurisdictions, s. 54 assessments are provided through Family Court Clinics (FCCs). One UFC judge, however, reported a problem getting the FCC to conduct a s. 54 assessment in one high conflict case because the FCC characterized the case as custody rather than child protection, and therefore not eligible for CFSA assessment funding.

A few of the judges reported ordering s. 54 assessments in high conflict cases to identify clinical issues and match parents with appropriate resources. Explained one UFC judge: “The circumstances where I’m most likely to order a s. 54 assessment – the case is actually before the court, child protection case – is if there are concerns of a psychological nature, cognitive, mental health issues, if there are concerns about alienation or emotional abuse – the more difficult issues.” One OCJ judge said she does not look to s. 54 assessments to establish facts, such as whether a child is at risk – she looks to the CPA for this – but instead if there are “other issues,” like “a persistent need, drive, whatever, of one parent to destabilize the relationship with the other parent or just to accept that a child doesn’t want to be with that parent.”

Another OCJ judge agreed that a s. 54 assessment should not be used to verify facts (such as the presence of domestic violence) or establish harm to the children (such as whether they are suffering emotional harm from exposure to conflict) but to “assist [the court] to understand the parents better and how to assist the parents better.” He said that having an assessment, especially early in the case, guarded against “stumbling around saying ‘do this,’ without knowing if [the parents] can.” A third OCJ judge echoed

this point, “if you can get it soon enough in the case, it’ll tell you whether the parents can benefit from resources.”

Judges did note downsides to s. 54 assessments. In addition to cost and delay, assessments were described as “very intrusive.” One OCJ judge pointed out that not all parents’ counsel agree to assessments.

iii. OCL Investigations Under s. 112 of the *CJA*

For the most part, judges found s. 112 reports useful for resolving high conflict cases. One OCJ judge said that he “want[s] frequent OCL involvement” in these cases, describing the OCL as “incredibly valuable as a third party resource.” He found OCL investigations particularly useful in cases where there are a lot of material facts in dispute, where the children are young and therefore cannot express views and preferences, and where the parents are self-represented. The OCL can get occurrence reports, speak to collaterals, and speak to children, gathering independent evidence that he as a judge cannot go out and get himself. Another OCJ judge agreed that s. 112 reports are useful to “give [her] a perspective on what other people involved with the children are seeing.” This judge mentioned cases where clinical investigators (CI) have continued to work with a family after the assessment to help phase in a new custody or access regime, a role this judge strongly supported. This judge said that a particularly skilled CI could also help parents mediate a resolution. Another UFC judge thought s. 112 reports were a good settlement tool, and said she follows the OCL’s recommendations “most of the time.”

Judges saw high conflict cases as appropriate cases to refer to the OCL. However, one UFC judge mentioned that in cases where the CPA has taken a position, the OCL typically refuses to accept the case. She said that unless the CPA has closed their file, she



would not refer a case to the OCL unless the child was older and there was no evidence of the child's views and preferences.

While s. 112 investigations were generally seen as helpful, a few judges commented on the challenges associated with these investigations. Judges mentioned that like s. 30 assessments, s. 112 investigations cause delay. One OCJ judge said it takes approximately 3-4 months to hear whether the OCL will take the file, and at least a year before the report is written. One judge explained this delay as a problem of the OCL being "overburdened and overworked."

A few judges commented on the OCL's discretion to accept custody cases and determine the kind of services to offer (i.e. counsel for the child, s. 112 investigation, counsel with clinical assist). One SCJ judge thought this should change: "The problem is we can't make [the OCL accept a file for investigation]. If I had a complaint about the system and a way of improving it I would say it's in that area." Other judges agreed it was a problem to not be able to order OCL involvement. One SCJ judge said OCL discretion to refuse cases was partly a matter of limited OCL resources.

One judge from the OCJ who described OCL investigations as "really useful," said that sometimes CI's advocate for unrealistic parenting arrangements.

#### iv. Utility of Assessments Generally

All of the judges interviewed found assessments useful in resolving high conflict cases. Judges reported that assessments are useful for providing information, giving recommendations, focusing the issues, and encouraging settlement. One SCJ judge explained that in high conflict cases, she "would like as much help as [she] can get."

Judges reported that assessments offer information that can help resolve high conflict cases. One UFC judge said that an assessment “at least gives you sort of a background, and a framework and observations of the parent with the child, which we don’t get.” An OCJ judge valued the mental health perspective that assessments add: “Any mental health intersection or clinical intersection on these domestic cases is going to be helpful. Anything. We will latch on to anything.” Another UFC judge said that assessors often have a better understanding of the case than she does: “I’m hearing the case for the first time, whereas this person has spent a lot of time talking to the parents, they’ve spoken to the children usually... they’ve lived the case and I haven’t.”

Two SCJ judges mentioned the value of custody recommendations provided by assessments. One judge said assessments are useful where they “make recommendations which don’t avoid making the hard call.” Another judge said he did not rely on assessments to establish facts but instead found them “more useful in terms of an independent third party with expertise making recommendations about what should happen going forward.”

One SCJ judge said that she found assessments useful as a way of focusing the issues, including focusing on what is best for the child: “[Assessments are useful for] sucking some of the hyperbole, sucking some of the highly-charged emotional junk, out of it and focusing on what matters. It’s really doing it’s best if it’s a good assessment, a good assessor, to neutralize some of the stuff that doesn’t really matter and obviously just focus on the wellbeing of the child.”

Finally, judges mentioned the value of assessments in helping parties settle cases. One judge explained that assessments could even encourage settlement in cases where

one of the parties does not agree with the assessor's recommendation. An assessment puts this party on notice that they will face an even higher hurdle at trial since they will now have to "neutralize" the assessment in order to prove that their position is stronger.

### Parents' Lawyers

Parents' lawyers were asked under what circumstances they would seek a privately paid custody assessment under s. 30 of the *CLRA* or request OCL involvement to resolve high conflict cases in which allegations had been made to a CPA.

#### i. Decision to Move for an Assessment or Request OCL Involvement

Most of the parents' lawyers reported not seeking *CLRA* s. 30 assessments. Cost was the biggest barrier. According to one lawyer from a medium-sized city, he had only had one case involving a s. 30 assessment in twenty years of practice. Another lawyer from the large city said that the majority of her clients are on Legal Aid certificates and that she has never seen Legal Aid of Ontario pay for a *CLRA* s. 30 assessment.

Parents' lawyers said they would consider s. 30 assessments in cases involving serious allegations of domestic violence, mental health issues, or "persistent bad behaviour in the other parent." One lawyer from the large city said there were both practical and strategic considerations in the decision to move for a s. 30 assessment. Practical considerations were cost and delay. Strategic considerations included, "how is my client going to do?" She explained that assessments carried a lot of weight in her jurisdiction, and so even where she believed her client was going to "do well," she would approach the decision to secure an assessment "carefully," since "it can go either way."

Two of the lawyers, both from the large city, noted that one benefit of s. 30 assessments was the ability to choose an assessor. Lawyers felt this gave them more control over the assessment process. One lawyer said the ability to choose an assessor gives him greater faith in the process, regardless of the outcome: “If it’s somebody you trust, and there’s a couple of people I trust, I don’t care whether the assessment comes out in favour of my client or against my client because I trust what’s in the assessment.”

ii. Utility of Assessments

Most parents’ lawyers found assessments valuable in high conflict cases. One lawyer from the large city explained which cases she thought benefitted from assessments: “They are fairly useful where parties are entrenched in their positions and you want someone to weigh in on where the kids are coming from or where the children’s best interests lie in advance of a trial.” She also said that assessments were valuable as evidence in the event of a trial. Another lawyer from a medium-sized city discussed assessments as a valuable settlement tool: “The OCL is crucial. That’s what settles files in this jurisdiction. That is the thing that settles files. There will be such disappointment if there is no OCL appointed because that’s sometimes the only prospect for settlement, like that is the only voice of reason that you’re going to see.” Another lawyer from the large city found the OCL especially helpful in settling cases where a CI provides interim recommendations to implement before the assessment process is complete.

One lawyer was more skeptical of the value of assessments. She commented specifically on OCL investigations because most of her clients cannot afford CLRA s. 30 assessments. While this lawyer saw the value of having a trained professional provide an independent view, she thought “some of the recommendations are, like it is not really

necessarily something that a good judge couldn't do, like it's not rocket science, right? I mean, the benefit is that they have the ability to meet both parties and the child, which I guess the judge doesn't have, but a judge could probably make a good enough order if they had all the information in front of them." She agreed that the OCL can play a mediative role but said this role "isn't that special," given the number of ADR resources available. She also worried about the potential for OCL reports inflaming conflict: "I've had CI reports that were kind of like, 'now we're really going to trial!' She said that for this reason, involving the OCL is "really crapshoot."

### CPA Lawyers

CPA lawyers were asked under what circumstances they would seek an assessment under s. 54 of the *CFSA* to help resolve cases involving high levels of parental conflict. They were also asked how useful these assessments and other custody assessments (including *CLRA* s. 30 assessments and OCL investigations) are in these cases.

#### i. Decision to Seek *CFSA* s. 54 Assessment

CPA lawyers said *CFSA* s. 54 assessments in high conflict cases are rare. Five of the seven CPA lawyers said they had never seen a s. 54 assessment in a high conflict case. According to one lawyer, "it's certainly not in the forefront of anyone's thinking in child protection." The two CPA lawyers who had seen a s. 54 assessment in a high conflict case were from the same medium-sized city. These lawyers described seeking assessments in cases where one or both parents had underlying mental health issues and the agency needed information about what kind of services to provide. One lawyer gave this example: "[T]he Society is at the end of its rope and is not sure where to turn so

you're looking for somebody to give you some insight into what might be effective in dealing with [the parents].”

All of the CPA lawyers thought s. 54 assessments could be useful in these cases. One lawyer from the large city noted that there are often many professionals involved with a high conflict family and having one professional there to pull all the information together would be useful. Another lawyer from the same city thought that assessments could “take some of the adversarial nature out of the case.” However, she thought that workers were not making referrals for s. 54 assessments as often as they could, in large part because they were unfamiliar with the process.

Despite their utility in high conflict cases, s. 54 assessments are costly for the agency. Most CFSA s. 54 assessments are done when a child is in CPA care under the CFSA. In high conflict cases, children are usually living with one parent.

## ii. Utility of Custody Assessments

CPA lawyers were asked to comment on the utility of custody assessments, including OCL reports and *CLRA* s. 30 assessments. Most CPA lawyers had not come across a *CLRA* s. 30 assessment or OCL report. A few explained that the reason for this could be s. 57.2 of the *CFSA*, which directs that a *CLRA* proceeding be stayed (except by leave of the court) whenever a *CFSA* proceeding is commenced. CPA lawyers explained that an assessment may be underway in the domestic proceeding, but it generally gets put on hold when the CPA files an application, meaning they do not see the assessment report.<sup>10</sup> Others acknowledged that there could be completed assessments that they do not see.

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<sup>10</sup> OCL CI's also reported that OCL policy requires them to put their assessment on hold whenever the CPA becomes involved in a case, even if just to investigate (see below).

One CPA lawyer from the large city thought completed s. 30 assessment reports and OCL reports could be useful but explained that, “we’re not in a position to ask for them.”

Two CPA lawyers reported that they had seen custody assessments in CFSA cases. One lawyer from a medium-sized city said she did not think the assessment was that useful, explaining that, “the dynamic of the file mattered more.” Another lawyer from the same city, however, described OCL reports as being “helpful” to the CPA:

[U]sually when you’ve had a social worker who’s already gone out, who’s already interviewed the parents, who’s already done a lot of the legwork essentially that the Society itself would be doing, and they’ve come to a conclusion ... if there were allegations being made they would essentially have investigated those, they’ve spoken to the children and gotten a sense... of where they’re at in the proceedings.

#### OCL Lawyers

The remaining professionals were asked how useful custody assessments are in custody cases where a parent makes allegations to a CPA about the other parent. All OCL lawyers described assessments as useful. They said assessments can identify the underlying cause of conflict, which allows appropriate resources to be directed to the family, and can flag clinical issues, and help bring the parties to settlement. Explained one OCL lawyer from a medium-sized city, “We have general legal insight, personal insight, but [s. 112 investigations] put the evidence behind it, and they can flag clinical issues, and they allow you to step back and see what resources you can bring to bear for the kids you’re representing.” While one lawyer said that s. 30 assessments are “incredibly helpful,” many OCL lawyers said it was rare for them to see these assessments.

#### OCL CI’s

All three CI's described assessments as useful in custody cases involving allegations to a CPA. First, CI's thought that assessments were valuable in helping cases to settle. One CI from a medium-sized city explained,

I think because the judges typically take them pretty seriously, or the lawyers do, and so I think once the OCL report goes in for example the lawyers, very few of the lawyers – they may dispute it, but they very rarely enter a dispute – and I think they encourage their clients to settle because ultimately a judge more than likely is going to err on the side of caution based on the OCL report.

However, while this CI thought s. 112 reports encouraged settlement, she did not think OCL investigations necessarily reduced conflict between the parents.

One CI from the large city thought that assessments were more useful where the assessor was able to speak to the parents and explain the reasons for their custody recommendation at a disclosure meeting: “that’s where the professional part works because they’re able to – it’s one thing to get a report and read it, if they can read it – it’s another thing to have someone explain to them, here’s the reason why.”

Second, CI's thought assessments were valuable in terms of providing a comprehensive picture of a family. One CI from the large city described s. 112 reports as being useful for CPAs and courts: “These assessments are really the only place where you get all the information in one place, in one report, the whole history, all the collaterals, the observation visits. So I think they can be very valuable for the CAS and the court for these kinds of very complex families.”

### Assessors

While all of the assessors in private practice saw the value of assessments in general, some acknowledged the limitations of assessments in cases involving parental allegations to a CPA.



Assessors noted many of the same benefits as other professionals. For example, one assessor from a medium-sized city said the following about assessments as a settlement tool: “The assessment process always has a component of offering mediation to help parents settle.” Another assessor from the same city noted that assessments can also identify the “right services [to put] in place.” Other assessors mentioned the importance of providing courts and CPAs with a more complete picture of a family. One assessor from the large city added that assessments provide information over time: “the custody assessment allows you to get multiple sources of information from a variety of people and gives you a chance to see how the parents respond over a period of time.” Another assessor from the large city spoke specifically of the benefits to CPAs: “it does provide useful information for a child protection agency, I can think of any number of cases where the findings of the assessment helped to guide the Children’s Aid’s plan and the intervention that they may or may not contemplate undertaking.”

One assessor from a medium-sized city thought that assessments could also be useful in providing information to a CPA that could encourage their involvement in a custody case: “they can put information out there and certainly raise concerns and raise flags for the court when there may be a role for the Society where [the Society] may have determined that they weren’t going to investigate.”

One assessor from a medium-sized city said that while assessments were valuable and sometimes necessary in high conflict cases, he worried about their effect on children. In his view, the assessment “inherently ramps up the conflict which the children are exposed to.” He said that depending on the child and the level of conflict, custody assessments can sometimes be “worse than the cure.” Another assessor from the same

city also worried about assessments increasing parental conflict, especially where one parent agrees with the assessment and the other does not. A third assessor from a different medium-sized city said that assessments are not useful in the small subset of high conflict cases where one or both parents have significant mental health issues. In these cases, recommendations or a court order following the recommendations will not reduce conflict. She also said she avoids doing s. 30 assessments where one or both parents are unrepresented, calling this type of case “a minefield.” Finally, another assessor from the same city reported that, in her experience, assessments are less likely to lead to settlement in high conflict cases versus other custody cases.

### Mediators

Mediators generally found assessments useful in high conflict cases. One mediator from the large city said that assessments provide her with context when meeting with parents. Another from a medium-sized city thought that assessments were useful for “drawing a line for people to follow”; they placed some limits on parents’ behaviour. This mediator also saw the value of assessments in providing children with “a voice,” and she believed that parents were more likely to follow assessment recommendations where children’s views and preferences had been taken into consideration. A third mediator from a different medium-sized city said she rarely sees assessments in her work.

Two of the mediators spoke about the challenges and potential pitfalls of assessments. Both of these professionals had long careers working in different positions in the family justice system. One spoke about the shortage of assessors. In the past, assessments were common and psychologists were trained in conducting assessments. Now, assessments are reserved for the most complex cases, and few psychologists

receive assessment training. Psychologists may avoid assessments because of the complexity of high conflict cases, which often involve allegations of abuse or alienation, and often result in complaints to the psychologists' professional college. As a result, assessments have become more expensive, causing even fewer to be performed. While she saw the value of OCL investigations, she said that the quality varies. She advocated for more psychologists (as opposed to social workers) on the OCL panel, so that the type of professional conducting the investigation could be tailored to the needs of the case.

The final mediator discussed the pitfalls of assessments. She said that in many high conflict cases, the parents are equally capable of providing adequate care to the children. She did not think assessments were particularly valuable in such cases. Instead, she thought that parenting coordination was the best resource. She believed that assessments should be limited to cases where there are mental health or capacity issues. Otherwise, assessments provide parents with one more avenue for conflict. She gave an example where each parent prepared a critique of the assessment report totaling more than one hundred pages.

#### CPA Workers and Supervisors

Of the 10 CPA workers, 4 had never seen an assessment in a high conflict case. The remaining 6 had seen OCL s. 112 reports but never a *CLRA* s. 30 assessment. None of the workers had seen a *CFSA* s. 54 assessment in a high conflict case. Of the 6 workers who had seen a s. 112 report, 4 said that they found them useful or very useful. (The remaining 2 said they rarely saw s. 112 reports and therefore could not comment on their utility.) One worker, from the large city, said that an OCL investigation reduces her workload. OCL reports gather the same information she would typically gather on a

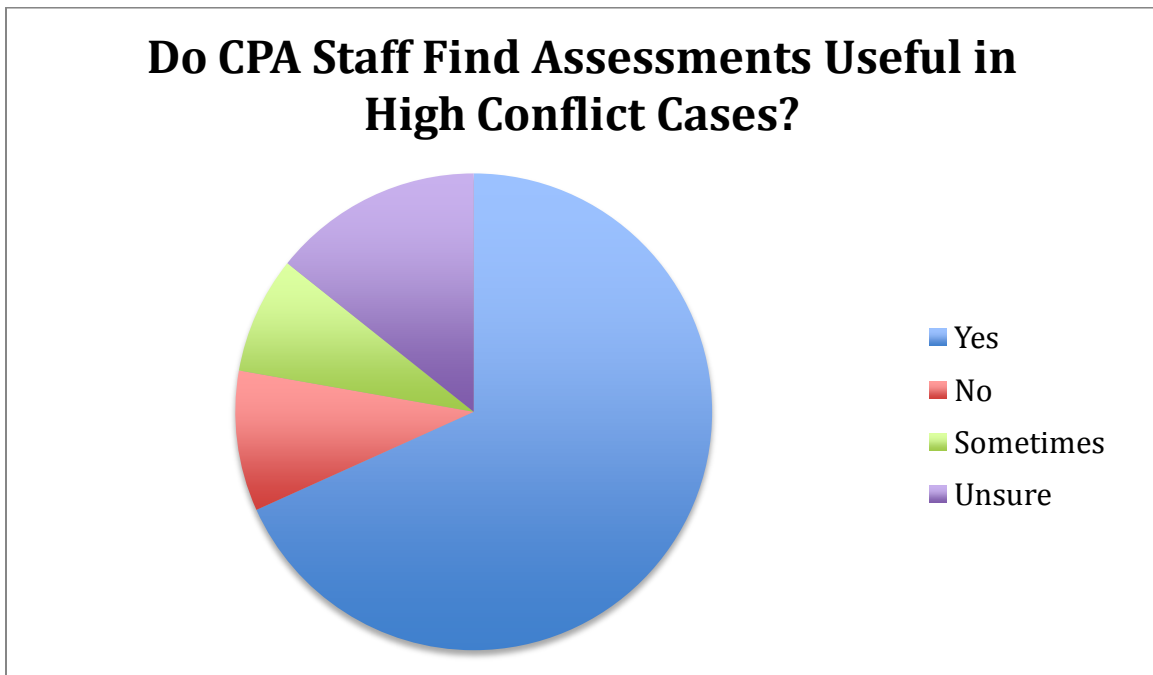
family, and often do it faster. She thought parents were more likely to cooperate with the OCL than with a CPA. Two workers, from different medium-sized cities, said the recommendations in s. 112 reports are particularly helpful. Explained one worker, “If it boils down to custody and access... then it’s clearer for us to say this report guides what the family should do, [we say to the parents] read it, follow it, we don’t have a pony in this race. Or if there’s one parent following it and one parent not following it, it guides us in knowing how to support the non-offending parent.” The last worker, from the large city, thought s. 112 reports were useful in providing children in these cases with a voice.

Nine of the ten supervisors had seen a custody assessment in a high conflict case, usually a s. 112 report. Of these nine supervisors, only one thought OCL reports were not useful. This worker, from the large city, said that OCL reports were “not particularly helpful in terms of doing [his] job,” since he is “in the business of looking at safety and risk and those assessments are about who is a better parent.”

Eight of the supervisors found assessments useful in high conflict cases. The majority said that OCL reports in particular added to the CPA’s assessment of a family. One supervisor, from a medium-sized city, explained that he always “takes [the OCL] on as a collateral” because “parents are saying things to them they might not say to us [the CPA].” Another said that OCL reports give a “good picture of the family and what they’ve been told.” If parents have received recommendations, and these recommendations have not been followed, the CPA can then focus on why.

Three of the supervisors said they rarely see OCL reports, despite their utility. One supervisor from a medium-sized city who also works as a clinical investigator for the OCL explained: “I think sometimes it’s the right arm and left arm not always talking to

each other or the timing is off. So we're involved prior to the assessment or the assessment has already been done." She said she directs her workers to ask whether an assessment has been done because having multiple perspectives is important and it can also prevent workers from "reinventing the wheel." However, the OCL is not always willing to provide copies of the assessment; she has had requests for reports turned down. Another supervisor from a different medium-sized city, who also works as a clinical investigator, thought that CPA assessments were useful to the OCL but that CPAs rarely receive OCL reports and therefore do not benefit from these reports.



### **Alternative Dispute Resolution in High Conflict Cases**

Respondents were asked about the use and success of alternative dispute resolution (ADR) or mediation in custody cases involving parental reports to a CPA.

#### Judges

Eleven of the twelve judges reported that ADR or mediation was used in high conflict cases. One judge said she had never ordered or diverted a high conflict case to mediation, so she could not be sure whether ADR or mediation was used in these cases.

Most of the judges were skeptical that ADR or mediation could be effective in high conflict cases. Only one judge – from a Unified Family Court – reported “great results.” Two of the judges said they did not know whether ADR or mediation was successful in these cases.

Most of the judges said high conflict cases are not likely to be resolved through ADR or mediation. According to one UFC judge, in high conflict cases, “the gloves are off, they’re going to trial.” Another UFC judge explained why mediation was unlikely to occur: “[G]enerally speaking, these high conflict cases, [the parents] can’t get along well enough to go to a mediator. Probably the mediator throws up their hands because these people just are so mistrustful of the other side or so convinced that they are right, there’s no middle ground.” Another OCJ judge said that, “these are not the types of families that are going to be amendable to ADR.” She referenced power imbalances between parties, allegations of historical violence, and mental health issues as barriers to settlement. Another OCJ judge agreed, saying mediation “won’t work” in cases involving an obvious power imbalance or severe personality disorder.

Two of these judges pointed out that the success of ADR or mediation depended on how these terms were defined. The UFC judge who said that a mediator would “throw up their hands” at the prospect of mediating a high conflict case thought that OCL reports often helped the parties come to a resolution. The second OCJ judge said that if mediation includes a lawyer negotiating with his or her client then this is always helpful

in high conflict cases. Other judges acknowledged that the success of ADR or mediation depends on the level of conflict involved.

Two judges expressed concern about mediated settlements in high conflict cases involving serious allegations of violence. They spoke of their discomfort in cases where one parent makes an allegation of violence against the other only to later agree to a resolution at odds with the allegation, for example joint custody. In these cases, it is difficult for judges to know whether the victim may have been pressured to settle (versus whether the allegation might have been exaggerated or fabricated). The judges were concerned about approving settlements that place women or children at risk. One judge recommended that both parties to mediation have independent legal counsel. The other thought mediation should be avoided in cases involving power imbalances.

#### Parents' Lawyers

Parents' lawyers were split on the use of ADR or mediation in high conflict cases: 3 reported using ADR or mediation, 3 reported not using ADR or mediation. Again, the definition of ADR mattered: one lawyer who said she would be reluctant to refer high conflict parents to mediation said she did negotiate settlement agreements with opposing counsel in high conflict cases.

Two of the parents' lawyers said that their clients' experiences of abuse or power imbalances prevented them from using ADR or mediation in these cases. The third lawyer referenced mental health issues, saying that mediation was too difficult in high conflict cases where "something pathological is going on."

Two of the lawyers who reported using ADR or mediation used it sparingly. Both of these lawyers were from the large city. One explained that mediation is "difficult" in

high conflict cases, and “very difficult” in cases involving “true intimate partner violence.” However, he thought that with a skilled mediator and a good lawyer on the other side, mediation could work. The other lawyer agreed, crediting the success of mediation in two high conflict cases with the quality of the mediator and opposing counsel. The third lawyer who reported using ADR or mediation spoke about the increasing trend in her jurisdiction towards parenting coordination in high conflict cases. She thought parenting coordination could be “really helpful” in these cases. She said that parenting coordination forces parents to face both the emotional and financial costs of litigation: they must confront each other face-to-face, and they must pay for the arbitration session as soon as it ends. She thinks these up-front costs force parents to reconsider engaging in conflict.

#### OCL Lawyers

Four of the five OCL lawyers reported using mediation or ADR in high conflict cases. The one lawyer who had not used ADR or mediation, who was from a medium-sized city, explained that, “these cases are not often amenable to that.” Another – from the large city – said that she rarely used ADR or mediation, saying it was “risky” in these cases. She thought mediation could be counterproductive in cases involving serious domestic violence or significant mental health issues – including parental alienation. She said that in alienation cases, “traditional remedies are not going to work.” Attempting mediation in alienation cases would be “losing time”, and “you don’t want to lose time in these cases.” A third lawyer, from another medium-sized city, described OCL disclosure meetings as ADR, and thus considered ADR a core component of her OCL work. She reported that most of her high conflict cases settle after the disclosure meeting.



OCL lawyers described the circumstances in which mediation or ADR are successful in high conflict cases. One lawyer, from the large city, had been involved in a number of child protection cases where high conflict was an issue, and where mediation or ADR was being used. She thought Family Group Counseling (FCG) was a particularly successful model for high conflict families because it left parents accountable to extended family members. Another lawyer, from a medium-sized city, said it was common in her jurisdiction for high conflict cases to be mediated through a Legal Aid of Ontario settlement conference, as long as one parent was on a Legal Aid certificate. She thought these settlement conferences usually resulted in a settlement, even in high conflict cases. She reported that in her city, CPAs were not willing to fund FGC in high conflict cases.

#### OCL CI's

All three OCL CI's said that mediation or ADR is used in high conflict cases. One described the disclosure meeting as a form of mediation. The other two described more formal methods of ADR, but neither reported success. For example, one CI from the large city said when she receives a file the parents have already attempted mediation and it has failed or the case is not appropriate for mediation because of domestic violence. The other CI, from a medium-sized city, said it was "not unusual" for high conflict cases to be referred for mediation but that in her experience mediation "doesn't work" – either because it does not lead to settlement or because one parent refuses to participate. She said that while CPAs are required by the *CFSA* to consider ADR, only some do.

#### Custody Assessors

All of the custody assessors reported that mediation or ADR was used in cases involving parental reports to a CPA. However, one assessor – from the large city – said mediation was unusual in these cases. He explained that by the time the case gets to assessment, both parents are usually so entrenched in their views and there is such an extensive history of conflict that the parents cannot engage in cooperative problem solving. Two of the assessors described assessments as a form of ADR. One – from a medium-sized city – emphasized the educational component of assessments, where parents are told of the effects of high conflict on their children and encouraged to end formal litigation. The other, from a different medium-sized city, said she conducts a disclosure meeting at the end of her assessment process in which parents are encouraged to settle.

Most of the assessors were skeptical that ADR or mediation could be successful in high conflict cases. One assessor from a medium-sized city explained that in cases where parents are making allegations about each other to a CPA, the level of communication is so low and the mistrust so high that mediation or ADR will not work. Another assessor, from the same city, said parents may not want to settle: “[high conflict cases] are less likely to settle, in part because the issues might be more severe, their relationships are more brittle and there isn’t the will. Often these people have come to my office after a long, protracted struggle and they’re not in a place where they’d consider agreeing with their former partner.” Two other assessors, from a different medium-sized city and the large city, said they had not seen successful mediation or ADR in these cases.

However, two of the assessors reported success in high conflict cases where mediation or ADR was attempted. One, from a medium-sized city, said that with a skilled mediator, mediation could have “very positive results.” Another, who stressed the

educational value of assessments, said that most professionals do not believe ADR can work in these cases but that he believed the inverse: that the higher the conflict, the more important ADR strategies become. With ADR, parents can be educated about the effects of conflict on children, something that does not happen in court, he said.

### CPA Workers and Supervisors

All of the CPA workers and supervisors reported that ADR or mediation is being used in high conflict cases. However, only half the workers and supervisors had experience using ADR or mediation in these cases. A few of these were intake workers and supervisors, who were not in a position to use ADR or mediation. One intake supervisor said she might recommend mediation in a high conflict case transferred for ongoing services.

Two of the workers, both from the large city, who reported using mediation or ADR in high conflict cases said that referrals for mediation or ADR had always come from the domestic side – they had never referred a case for mediation or ADR. One explained that mediation or FGC offered through the CPA was used for cases involving conflict between the agency and the parents, not between parents. Another supervisor, from a medium-sized city, said that her agency should not be providing mediation in cases where high conflict is the only issue. She also said she was more willing to recommend ADR or mediation in the domestic system than facilitate ADR or mediation through the CPA in cases involving high conflict.

Four of the workers and seven of the supervisors commented on the results of mediation or ADR in these cases. All four workers – each from a different city – reported negative results. One of these workers, when asked about the use of mediation or ADR in these cases said, “We try. We try. *We try.*” But said that parents are usually the ones to

resist, often refusing to sit in the same room together. The others said that high conflict parents are too entrenched in their positions for ADR or mediation to work. Explained one worker: “each parent’s ‘bottom line’ is nowhere close to the others’.” Another said that parents come to the table saying, “I want what I want.” She thought mediation and ADR were helpful in terms of putting issues on the table but not in reaching a resolution.

Three of the supervisors reported negative results when using ADR or mediation in these cases. One of the supervisors, from a medium-sized city, said that ADR or mediation was “not useful yet” in high conflict cases, despite a “real push” at her agency to use ADR or mediation in all child protection cases. She explained that, in her experience, parents’ lawyers do not agree to child protection mediation or ADR. She said she has also had an ADR referral refused because the case was considered “custody” and not child protection. A second supervisor, from the same city, said that while she had made referrals for ADR in high conflict cases, none had been accepted. The third explained that mediation and ADR were difficult to use for parents who have lawyers and are already deeply involved in the legal process and before the court.

Four supervisors reported mixed results with mediation or ADR. One supervisor reported results when mediating access but not custody. Another said ADR was more likely to be effective where the parents were older and had extended family who could “calm [the parents] down.” He thought FGC was a good option in high conflict cases. A third thought the success of mediation depended on the degree of conflict. Finally, the fourth supervisor said that while he had had success “hammering out an agreement,” mediation’s success in reducing conflict over the long term was “mixed.” He explained

that mediation does not deal with the issues underlying the conflict. That said, he was a “strong proponent” of mediation because litigation never leaves people happy.

### CPA Lawyers

Four of the seven CPA lawyers, from two of the medium-sized cities, reported using mediation or ADR in high conflict cases. Three lawyers reported not using ADR or mediation in these cases, and all three were from the large city. One of these lawyers said that mediation had been discussed in the two high conflict cases she had worked on but was ultimately not utilized because the parents could not agree on how to proceed. She thought mediation would have been helpful in these cases because a trained person could have “knock[ed] some sense into [the parents.]” Another of these lawyers said she had not used ADR or mediation in a high conflict case and that other lawyers at her agency probably used it “rarely.” She said her agency does not get involved in enough high conflict cases and that of the high conflict cases they do take on, very few are referred to mediation or ADR. The final lawyer said that she had never used ADR or mediation in a high conflict case and that these cases would generally not lend themselves to resolution: “by definition, [the parents] are not going to agree.” She said that in general her agency is not using ADR as often as they are directed to.

None of the CPA lawyers who had used mediation or ADR reported success in terms of case settlement. However, two lawyers pointed out other positive results. One said that mediation eliminates some of the issues that allow conflict to grow and continue, for example by forcing parents to share information they otherwise refuse to share. Another said mediation could reduce conflict where the mediator explains to parents the harmful effects of conflict on children or by simply allowing the parents to feel heard.

## **Suggestions of Interviewees**

Participants were asked what they and other professionals could do to better manage high conflict parental separations where a CPA is also involved.

### Judges

#### i. Improved Information Sharing

The most cited recommendation by judges was for improved information sharing. Eleven of the twelve judges said information must be shared between professionals and with the court. According to one SCJ judge: “Information sharing subject to privacy concerns has got to be priority number one. Judges need as much information as they can get.”

One OCJ judge suggested that early in the case all professionals who may have material information about a family be identified and an order for global releases of information be made. She said getting parents to sign individual consents to release information from the “myriad” professionals whom they have seen takes time. A global release up front would reduce delay, and also allow professionals to begin speaking to each other. This is important so that “pivotal” information about the child is not overlooked.

Judges said they needed better access to information from CPAs. One SCJ judge thought there should be automatic file production in cases where a CPA has been involved. He did not think parties should have to bring a motion for a CPA file. An OCJ judge thought a case summary would be more useful than CPA file production:

If I’m dealing with allegations of abuse and neglect... If there could be an easier way for the results of [the CPA’s] investigation to get before the court in cases where they haven’t commenced a protection application that would be great.... It takes a long time for me to get records when I order it and then I have to take the time to go through it and distill it. If there was some sort of a summary that [the

CPA] could do – either in every case or where the judge orders it – that would be good.

This judge thought a summary would be sufficient and could therefore save the CPA the trouble of sending a worker to court: “I don’t always need to see the worker in court.”

Judges also mentioned the need for better access to police records and criminal record checks. Said one SCJ judge: “If the police know that there is something going on, they need to share it.” One OCJ judge said getting criminal record checks quickly is important since they will be needed in almost every case. Another UFC judge said access to criminal records was especially important in cases involving allegations of violence:

I would love it if we could just have access to criminal records. I don’t see why a judge dealing with family law matters shouldn’t as a matter of right be able to go to their chambers and get a copy of someone’s criminal record. We’re dealing with children’s lives here. With allegations of violence, should I not be able to go and have direct access to that? Why should I have to wait for someone to bring a motion for a criminal record?

Another OCJ judge said she would like to see an easier way of getting access to police occurrence reports.

Judges also brought up the importance of information sharing and collaboration among different professionals. A number of the judges said there should be an informal way for all professionals involved with a high conflict family to work together. One UFC judge referenced child protection Family Group Conferencing as a possible model. She said the goals should be more communication between professionals, consolidation of resources, and the development of a plan for each high conflict family. Judges supported this “team approach” to high conflict families. One OCJ judge said judges often felt like: “We’re on our own here.” He advocated onsite family court clinics where parents and children could immediately be referred for services. He thought a therapeutic approach

was necessary right at the outset in high conflict cases, but that it needed to be combined with a legal approach because “these people need boundaries and rules.”

ii. Improved Management of High Conflict Cases

Judges also talked about the need for better management of high conflict cases. This included early intervention as well as ongoing case management. Judges recognized that high conflict families use a disproportionate amount of court and community resources. However, they also believed that intensive services were appropriate for families upon entering the justice system. One OCJ judge proposed limiting court services to litigants after six months: “Maybe you say to people, ‘you know what, we’re here for you for the first six months, we’ll give you info, ADR, mediation, all these things, but you know? If you haven’t figured this out in six months, we’re moving to a different stream.’ If we don’t try to come up with some way to control it – it’s a huge drain on the system.” This judge also talked about the importance of case management to coordinate resources provided to high conflict families: “We need to appoint one person/professional to be the case manager because there could be a number of agencies involved.” She did not think this role should fall to CPA workers, since they do crisis work and are often not in the office. She wondered if the professional doing case management could be based in the courthouse, since court appearances bring the different parties together.

Only one of the judges discussed judicial case management in high conflict cases. This judge, from the SCJ, supported the idea of “one judge, one family,” but said it was not likely in high conflict cases where there are often multiple legal issues: “Depending on whether you have property, whether you have divorce, whether there’s child protection, or whether you have a criminal case, you’re not going to get that.” He said



that proposals for judicial case management in high conflict cases also incorrectly assume that judges can manage these cases alone, when in reality it needs to be a collaborative effort: “People think [judges] have a whole lot of authority, but we only have as much authority as we get the cooperation and willingness of the other agencies.”

### iii. More Resources

Judges spoke about the need for more publicly funded resources for high conflict cases. A few judges said that more funding needed to be directed to Legal Aid Ontario to provide parents with lawyers in domestic family proceedings. One OCJ judge said that failing to provide high conflict parents with lawyers resulted in greater costs to the system overall:

They have really cut back on domestic legal aid. But the truth is it just means we're spending more money on my side of the system because they're coming back more often, they're not getting organized, they're not getting a coordinated approach. So, I think it's one of those things where you might save money here but I've had six more appearances over here. Really, if you've had the lawyers, the Legal Aid Certificate, for that twenty hours, we might have had a solution here. So, I appreciate everyone's trying to save money but there's no point in saving it on the back of the system next door.

Other judges thought more funding needed to be directed to the OCL. Said one of the SCJ judges: “[What is] obvious is that the Office of the Children’s Lawyer should be better funded and able to help us more frequently. That’s one of the biggest holes in the system.”

Judges also recommended that high conflict families receive improved services. One OCJ judge suggested “more resources at an earlier stage.” He said families need access to professionals with experience in high conflict, and that services for high conflict families have to be more affordable. Another OCJ judge advocated wrap-around services

for high conflict families, saying that issues often persist after a court decision. She recommended follow-up with OCL CI's to help resolve parenting issues over time.

### Parents' Lawyers

Most of the recommendations of parents' lawyers were directed at CPAs. One lawyer from the large city said that CPAs need to "act quickly and efficiently, and as impartially as possible" in high conflict cases. Another lawyer from a medium-sized city said that CPAs need to be accountable for their intervention in high conflict cases – they can no longer direct the family "behind the scenes." If a CPA has directed one parent to withhold access, for example, they need to put this in writing and communicate with parents' lawyers their concerns.

A lawyer from the large city said she was hesitant to recommend more CPA involvement in high conflict cases, saying it could be really intrusive, but thought that where the CPA is involved, they should have a specialized team for working with high conflict families. Finally, another lawyer from the large city said that CPAs need "far more training," both in high conflict and in interviewing children who are the subject of allegations made by one or both of their high conflict parents.

A second recommendation by parents' lawyers was to reduce delay in addressing issues in high conflict cases. One lawyer from the large city said that criminal issues need to be resolved more quickly in cases involving separating parents. Another said that assessments need to be performed more quickly – both private assessments and OCL investigations. A third lawyer from the large city said the OCL case assignment process should be faster. He explained that, "in family law, time is of the essence."

One lawyer from a medium-sized city advocated for better communication and collaboration among professionals working with high conflict families: “The greater the community integration, the better... Are we going to have the healthiest families if everyone is working in silos? No.”

Finally, one lawyer from the large city recommended judicial case management, saying that the same judge should be hearing a high conflict case from the beginning to the end. Having one judge who knows the history of the case places controls on high conflict parents – they cannot manipulate the lack of knowledge of other judges to try to re-litigate issues in order to get a different outcome. “Can you imagine an accountant having to audit a different company every year from scratch? It makes no sense at all,” the lawyer explained, “or having to go to a different doctor every time and the doctor has to learn the history of you? It really makes no sense.”

### OCL Lawyers

Most of the OCL lawyers spoke about the need for better coordination in high conflict cases. Three of the lawyers talked about the importance of case management. One OCL lawyer from a medium-sized city suggested early case management by a professional organization or single professional. She thought that within one week of a parent making an allegation to a CPA or a report to the police, the case manager could bring the parties and the various professionals and agencies together to talk about how to proceed.

Two lawyers proposed increased judicial case management. One OCL lawyer from a mid-sized city said there ought to be someone the parties meet *before* seeing the judge, someone who can ensure the case is moving forward with the right materials. She said this type of administrative case management would be useful in high conflict cases

where many litigants are self-represented. Another lawyer from a different medium-sized city agreed: “Case management would be nice. When I think about these high conflict cases you really need someone to grab it by the throat and make sure it goes forward.”

One of the OCL lawyers recommended better coordination and communication between the different professionals involved in high conflict cases: “It’s very hard to navigate these cases unless you have the big picture. And so if you have a whole bunch of people with little pictures, it can often do more harm than good... These cases are not helped by compartmentalizing issues, you really need a broader sense of what’s going on.”

A couple of the lawyers offered recommendations for specific professional groups. One OCL lawyer said that the CPAs response to high conflict needed to be more consistent; that the response should not vary by worker. Two of the OCL lawyers thought parents’ lawyers needed to be careful not to inflame the conflict. One suggested that parents’ lawyers abide by the maxim of “know thy client and their limitations.” She said that “definitely these cases spin out of control even faster” when parents’ lawyers fiercely advocate their clients’ position without considering whether the position is reasonable. The other OCL lawyer said that high conflict cases cannot be resolved where parents’ lawyers simply act as “mouth-pieces” of their clients. Parents’ lawyers need to provide advise to clients about the effect of their conduct on their children.

### OCL CI’s

Each of the three OCL CI’s offered different suggestions for good practices in high conflict cases. One suggested that there be more publicly funded lawyers for parents: “Self-reps just make it that much more difficult.” Another recommended a coordinated approach involving “everyone around the table for this family, including the family.”

This CI thought the Family Group Conference mediative approach used in child protection proceedings was a good model.

The third CI spoke about the importance of neutrality, for child protection workers and parents' lawyers in particular. She warned against CPA workers taking sides in high conflict cases and expressed concerns about parents' lawyers advocating the unreasonable positions of clients.

### Private Custody Assessors

Assessors expressed many of the same concerns as other professionals, and made similar suggestions for good practices.

Two of the assessors expressed concerns about some professionals forming their opinions about a case too quickly and failing to remain open to reconsideration of their positions as more information becomes available. One assessor from a medium-sized city said that assessors need to have an "openness to receiving new information"; that they cannot simply parrot the concerns of their clients. Another assessor, from a different mid-sized city, said CPA workers also need to be careful about accepting information at face value, that "in the context of custody and access, you always have to test data that is being provided to you."

Two of the assessors spoke about the importance of collaboration among professionals working with a high conflict family. "The trick to serving these families better," said one assessor from a mid-sized city, "is better communication and streamlining of services that are coming to them versus this kind of silo approach that we have right now... [H]aving a mechanism in place for these services to come together to plan for these families or to service these families in a more integrated fashion would be a

real help.” She thought some kind of “group conference” that would get families and various service providers “around the table” would be ideal. The other assessor, from the large city, agreed that different professionals needed to work together in high conflict cases: “No one sector can service [high conflict] parents on their own.” He thought it would be useful to also offer cross-professional training on high conflict cases.

One assessor from a mid-sized city echoed other professionals by noting the problem of self-represented litigants. She recommended more duty counsel. She also suggested employing mental health professionals at the court to help high conflict litigants who may be too emotional to effectively advocate on their own. She said that where parents are not provided with effective representation, children lose.

The final assessor talked about the importance of delineating the roles and responsibilities of the various professionals involved in high conflict cases. He said professionals need to be educated about the roles that each perform, and be careful not to perform the work of others. For example, he talked about how it would be inappropriate for assessors to conduct child protection investigations concerning abuse allegations.

### Mediators

Most of the mediators said that more professional collaboration was needed in high conflict cases. “It doesn’t matter how good you are at your respective role,” said one mediator from a medium-sized city, “[high conflict] families need multiple services. We need to figure out how to work together in a collaborative way.”

In terms of recommendations for specific professional groups, two of the mediators said that parents’ lawyers needed to be careful not to exacerbate conflict in these cases. One mediator suggested more education for lawyers and law students on

collaborative law. Another mediator said that lawyers needed to encourage high conflict parents to resolve their disputes outside the courtroom.

### CPA Workers and Supervisors

Better communication among different professionals involved in high conflict cases was the recommendation offered most frequently by CPA workers and supervisors. Four of the supervisors and four of the workers offered this recommendation. Two – one worker and one supervisor, both from the large city – thought that cross-disciplinary training on high conflict cases would be useful. The worker said she would like to “hear other people’s sides, where they’re coming from, what their mandate is.” The supervisor said this training should involve everyone working with high conflict cases, including judges. Other workers and supervisors advocated communication as a way to work together to help high conflict families. A supervisor from one of the mid-sized cities said there was less “cross communication” among professionals in custody and access files than in other files, like domestic violence. She said that, as a result, “I think we’re all probably stepping on each others’ toes without knowing it and trying to do the same work and if we could just sit down and somehow come together with a plan that we may have a better idea of what each other is doing and maybe better outcomes.” She said that better communication could also help professionals understand each other’s roles.

Two of the workers wanted to see better communication between CPAs and parents’ lawyers. One worker from the large city said that parents’ lawyers ought to keep workers “in the loop” as to what is happening in the domestic proceeding. Another worker from one of the mid-sized cities said she would like to see “more partnership” between parents’ lawyers and CPA workers. She said she would like to hear parents’

lawyers' thoughts and concerns and would like to share her views with parents' lawyers. Finally, one supervisor from another medium-sized city said he would like to be connected to service providers who specialize in high conflict cases. He said that in his city there is "nothing therapeutic to send [high conflict] people to."

The second most frequently cited recommendation by CPA workers and supervisors concerned parents' lawyers. Two workers and six supervisors said parents' lawyers need to stop inflaming conflict in high conflict cases. Two supervisors – each from a different city – said that some parents' lawyers encourage clients to make allegations to the CPA to advance their position in the domestic case. One supervisor described this as "shortcutting" the domestic proceeding. Other workers and supervisors expressed concern about lawyers who refused CPA efforts at mediation. Describing those parents' lawyers who work well with the CPA, one supervisor said, "I always like lawyers who can fight if they need to but don't always start it when they don't have to."

One worker and one supervisor, each from different mid-sized cities, said that high conflict cases needed to be resolved more quickly. Both said that the longer the court process, the greater the number of allegations made to a CPA. "If you're making a family go through adjournment after adjournment and the trial date is going to be December and it's April, it's just a recipe for disaster," said the supervisor, "they're going to be building a case for that whole [eight] months against each other and unfortunately the way a lot of people do that is through their kids."

### CPA Lawyers

CPA lawyers had similar suggestions for best practices as other professionals. Four of the seven CPA lawyers said that different professionals involved in these cases needed to be



talking to one another more. One CPA lawyer from a medium-sized city said that all professionals involved in a high conflict case should be brought “to the table and understand each other’s roles and work together instead of against each other.” Another CPA lawyer from the large city thought better coordination of lawyers was key in cases involving concurrent proceedings. She said that criminal lawyers, family lawyers, and child protection lawyers have different and sometimes competing objectives, which makes it challenging to work with a family to resolve the child protection issues.

Three of the CPA lawyers suggested cross-professional training. “I think everybody needs better training,” said a CPA lawyer from the large city, “Maybe if we had cross-position training it would go a long way – we could hear each other’s perspectives and have the same information disseminated to everybody.” Another CPA lawyer, from a medium-sized city, thought that cross-professional training could help with role confusion: “It would almost be good if there could be – and protocol is probably too strong a word – but something along that line: everybody getting together and understanding what each others’ roles are or what they could be.” Another CPA lawyer raised the possibility of cross-professional training for CPA workers and parents’ lawyers. She thought that parents’ lawyers had the power to exacerbate conflict and wished they could be as well educated on the effects of high conflict on children as CPA workers.

Two other CPA lawyers also suggested that parents’ lawyers be careful to not inflame conflict in high conflict cases. “With high conflict families, there’s no doubt about it that sometimes, depending on who the counsel is on the file, [legal representation,] sometimes it helps, sometimes it doesn’t,” said one CPA lawyer from a medium-sized city, “If you’ve got an aggressive counsel on one of these files, it does not

help at all. I think you have to have someone who recognizes if you've got a client who's taking an unreasonable position and how to deal with that."

A final suggestion, offered by one CPA lawyer from a mid-sized city, was for other service providers to share the burden of high conflict cases: "I think that a lot of the times the Society becomes sort of the last stomping ground once people have had the door shut in their face, they end up at the Society and we sort of can't turn them away. So we'd like to see other service providers do a little more, so that everything wasn't sort of left at our door, I think we feel that way a little bit."

### **Role of the AFCC-O**

All participants except judges were asked what role the Ontario chapter of the Association of Family and Conciliation Courts (AFCC-O) could play in developing model policies or providing training for dealing with crossover cases. A number of CPA workers and a few supervisors and lawyers were not familiar with the AFCC-O. These professionals were asked if it would be useful to have an outside organization provide training or model policies.

All of the participants support a role for the AFCC-O (or another outside organization) in helping professionals manage crossover cases. ("Anything would be helpful at this point," said one CPA worker from a mid-sized city.) Many of the participants thought the interdisciplinary makeup of the AFCC-O would allow it to facilitate cross-professional communication and collaboration.

That said, a few participants thought the AFCC-O needed to be more interdisciplinary. A common concern was that the AFCC-O does not include many child protection professions. Said one assessor from the large city: "The only shortcoming I

would say is that the AFCC does not have the same reach to the child protection community that it could or should have.” A CPA worker from one of the medium-sized cities said he wished the AFCC-O could reach more CPA workers.

Participants stressed the need for trainings and model policy development to be truly interdisciplinary. One OCL CI from the large city suggested that the AFCC-O approach professionals from a number of sectors, including child protection agencies, the police, counseling agencies, children’s mental health agencies, and domestic violence service providers to engage in issues related to high conflict cases with CPA involvement. A CPA supervisor from one of the medium-sized city said that any training must be tailored to CPA professionals:

It has to be from people who understand what it’s like to actually do the work. That’s not been the case... We know the theory. We know the impact on kids. But it can’t all be ‘what Children’s Aid needs to do, Children’s Aid needs to do.’ You have to understand the limitations of our authority and what we actually can do.

This supervisor said that even better than training and model policies would be the establishment of therapeutic programs for high conflict families.

A few professionals suggested that the AFCC-O partner with other organizations in developing training or guidelines. One of the OCL lawyers and one assessor, both from the large city, suggested that the AFCC-O partner with the Ontario Association of Children’s Aid Societies (OACAS). The OCL lawyer said that child protection workers play a very particular role in high conflict cases and so the AFCC-O should draw on the expertise of the OACAS. The assessor thought that partnering with the AFCC-O could help the OACAS improve training for high conflict cases that it has already developed. He said that working with the OACAS would help the AFCC-O “infiltrate the child protection sector.”

One of the mediators suggested that the AFCC-O consider partnering with the Ontario College of Physicians and Surgeons and the Ontario Psychological Association (OPA), noting that the Ontario Bar Association and OPA have started to collaborate in some education and policy work.

Only a few professionals questioned whether the AFCC-O was the proper organization to provide training or model policies for crossover cases. One CPA worker from a medium-sized city questioned whether an outside organization could develop policies that were appropriate for CPAs: “Education and support and training and things like that would be useful. External policies being placed on us might not be as useful because if you don’t do the work you may not know whether those are going to work as much.” Another CPA supervisor from the large city expressed a similar sentiment, saying, “I’m not sure what training [the AFCC-O] could offer. We’re the ones working with these families.” Finally, one mediator from a medium-sized city said the AFCC-O should not provide high conflict training, that there was enough training available. “I think the AFCC’s role,” she explained, “is how to take an interdisciplinary approach and how do we strengthen that? How do we work better as a team?”

In terms of specific recommendations for policy development, a few of the professionals suggested that the AFCC-O focus on developing guidelines for CPA workers on how to manage high conflict cases. One CPA supervisor wanted to see articulation of “best practices” on how to investigate allegations so as to not exacerbate conflict, as well as guidelines on when the CPA should be bringing cases involving emotional harm due to conflict to court. He said he receives conflicting messages from courts: some judges get angry when the CPA does not act to protect children from

parental conflict, while other judges get upset when the CPA brings a protection application on the basis of emotional harm due to conflict, saying the agency is being too interventionist.

Two of the professionals – one parents’ lawyer and one OCL CI, both from the large city – thought that the AFCC-O should take a more active role in lobbying for funding for the family justice system.

## **DISCUSSION AND RECOMMENDATIONS**

Participants identified a number of issues and areas for improvement in the handling of high conflict parental cases that involve reports to a CPA, and offered suggestions for good practices. In this section, the authors of this report respond to participants’ concerns and draws from their suggestions to provide our own recommendations for improving responses to these very challenging cases.

### **Communication and Coordination**

One of the biggest challenges in working with high conflict separating parents is lack of communication and coordination among the different professionals and agencies that may be involved. Participants spoke of specific challenges around role confusion, conflicting efforts, and lack of information sharing. Suggestions on how to address these challenges included cross-professional training and dialogue, and case management.

#### **Recommendation 1: Cross-Professional Dialogue & Education**

Improved dialogue between professional groups and better education about the roles of the various professionals involved in these cases is necessary. Those working with high conflict families need opportunities to share their experiences and learn from other

professionals and agencies in their communities; cross-professional education should include opportunities for different professionals to meaningfully interact.

The AFCC-O, because of its interdisciplinary makeup, is well positioned to play a significant role in cross-professional education, both in terms of preparation of materials and sponsoring of educational programs. However, because the AFCC-O has limited reach to child protection professionals, the AFCC-O should consider partnering with the Ontario Association of Children's Aid Societies (OACAS) or local CPAs to provide education to both family dispute resolution professionals and child protection professionals.

A number of non-lawyer participants identified challenges in working with parents' lawyers, and in some cases may not fully appreciate the role and responsibilities of lawyers, so cross-professional education should include lawyers' groups such as the Ontario Bar Association or local law associations, in order to reach as many family lawyers as possible.

*Recommendation 2: Coordination of Publicly Funded Services and Case Management*

High conflict parents and their children are often involved with a number of publicly funded service providers. There should be better co-ordination of the involvement of the Office of the Children's Lawyer, child protection agencies and other publicly funded service providers like court connected mediation and police. It is important that service providers share information to the extent permissible by rules of confidentiality and as permitted by clients, and for public agencies, to the greatest extent permitted by their

mandates, to develop a common, coordinated plan for how to help the children by reducing parental conflict.<sup>11</sup>

Bringing service providers and professionals “to the table” can facilitate information sharing and development of a coordinated service plan that avoids duplication or even inconsistent service provision. A shared service plan can also hold parents accountable to all agencies involved.

Many professionals who were interviewed for this research suggested that one service provider or professional should act as “case manager,” arranging meetings of professionals and parents, helping to develop a service plan, and monitoring any service plan that is developed. In cases in which it is involved, the child protection agency may be in the best position to play this role. As part of its investigative work, the CPA identifies the various professionals involved with a family and information obtains from them. Since the CPA is already in contact with the various professionals and has a child-focused mandate, it will often be appropriate for the CPA to coordinate meetings with professionals and parents, and to follow up with the other professionals as the case proceeds.

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<sup>11</sup> The sharing of information respecting a child or family involved in child protection proceedings is subject to s. 45(8) of the *CFSA*, which provides: “No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child’s parent or foster parent or a member of the child’s family.” R.S.O. 1990, c. C.11.

In our view, custody assessors or CI’s who include information obtained from a CPA or that relate to protection proceedings in a report prepared for the family court are not violating s. 45(8). However, to protect the interests of children and their parents, as well as to protect the professionals involved, those who prepare these reports might want to include on the cover a statement that:

This report is prepared pursuant a court order for the parties and the court. It is not to be shared beyond those involved in the proceedings, and the contents should not be discussed with children. Those who receive this report are reminded that s. 45(8) of the *Child and Family Services Act* prohibits against the making public of information that has the effect of identifying a child who is the subject of a child protection proceeding, or a child’s parent, a foster parent, or a member of a child’s family.

In cases where it is not appropriate for the CPA to play a case manager role, the OCL, if involved, should help to facilitate communication and coordination by bringing together professionals and, where appropriate, parents to share information and determine how to move the case forward. The OCL also contacts collateral professionals in the course of its investigation or representation and is therefore well positioned to facilitate ongoing communication and collaboration between these professionals.

Beyond case management and the facilitation of cross-professional meetings, professionals and courts should always be considering how to address issues of communication and coordination of services.

*Recommendation 3: Provincial Policies to be Re-Considered*

Participants in this study identified the need for reconsideration of some existing provincial policies, particularly of the agencies of Ministry of the Attorney General, that may limit flexibility for providing the most cost efficient and effective response to high conflict cases. Notably, if a report of suspected abuse or neglect is made to a CPA, any clinical investigation that has been commenced by the OCL and court-connected mediation must cease. While there are clearly cases where this is appropriate, there should be flexibility, in particular to allow a continuation of service provision in cases where it has been commenced and appears to be effective. Having case management, for example by the CPA or a judge, would facilitate individualized, appropriate decision-making about use of these publicly funded resources.

**Child Protection Agency Involvement in High Conflict Cases**



Participants in this research project, including CPA staff, identified reluctance on the part of CPAs to become involved in high conflict cases as a major concern. It was noted that some CPA professionals appear to focus only on immediate allegations of physical or sexual abuse, and fail to appreciate “the big picture” of emotional harm that may arise from a high conflict separation. CPA professionals also expressed frustration and described challenges for their agencies in dealing with these cases.

We offer recommendations to more effectively engage Ontario CPAs in these cases.

*Recommendation 4: Child Protection Agency Role and Policies for High Conflict Cases*

The information provided by participants in this study does not suggest that CPAs are failing to investigate reports of abuse or neglect in the context of parental separation. However, some workers may be unduly skeptical of allegations made by a separating parent, or may lack the training to identify issues of emotional harm that arise in these cases.

While many abuse or neglect allegations made in the context of a high conflict separation are not substantiated, it is important that workers continue to investigate allegations made in this context. Further, even if the immediate allegations are unfounded, there may still be risk of emotional harm to children due to high levels of parental conflict that needs to be addressed. CPAs are legally mandated to protect children from emotional harm or risk of emotional harm, even if this harm is due to conflict arising from parental separation. Therefore, CPAs must not avoid verifying harm or risk of harm from parental conflict or providing services to high conflict families.

The absence of local and provincial child welfare policies that address high conflict parental separations is concerning. While child protection needs of communities differ, it is important that the child protection response to high conflict cases be more consistent both within and between agencies. Clear CPA policies are needed for how to investigate cases involving allegations by separating parents; how to identify emotional harm and risk of emotional harm due to parental conflict; and when to commence a protection application in a high conflict case.

While the Ministry of Children and Youth Services, the OACAS, and local CPAs should have a central role in development of these policies, family justice professionals, including the judiciary, and professional organizations, like the AFCC-O, should have a role in policy development.

*Recommendation 5: Increased Support and Training for CPA Staff*

High conflict cases are very challenging for CPA workers and supervisors. Many feel they do not have the tools to help high conflict families. CPAs lack resources for providing direct service to high conflict parents, and there are limited community resources they can refer parents to. High conflict cases often demand more time and energy than other cases for CPA staff. High conflict parents can be difficult to work with, leaving workers feeling manipulated or frustrated.

Efforts must be devoted to providing workers with the education, skills and support they need to work with high conflict families. Ideally, programs for high conflict families should be developed within agencies or by organizations in the community. Supervisors need training on how to support workers managing high conflict files. Where

possible, workers managing high conflict cases may also need to have their caseload reduced to account for the additional time and energy demands these cases involve.

Since many workers and supervisors already have experience working with high conflict families, agencies may want to consider developing specialized teams for handling these cases. The establishment of specialized teams, however, should not preclude other workers and supervisors from receiving more training on high conflict.

CPA workers and supervisors identified gaps in education and training on high conflict cases. Given the frequency with which separating parents make allegations to CPAs, it is important that workers and supervisors be educated about high conflict, the nature of allegations by parents involved in high conflict separation, and especially emotional harm to children caused by high levels of parental conflict. In addition, workers and supervisors need to be trained on how to identify emotional harm or risk of emotional harm to children due to parental conflict, and how to help families where emotional harm or risk of emotional harm due to conflict is verified. Training on high conflict cases should be available to more workers and supervisors. Any education or training on high conflict cases for CPA workers and supervisors should be tailored to their child protection role while also including information on how high conflict cases are handled in the family justice system. Preferably professional education about high conflict cases should be cross-disciplinary and involve family justice professionals.

### **The Role of CPAs in Family Proceedings**

While CPAs often bring protection applications in a relatively small proportion of high conflict cases that they investigate and these agencies are not parties to custody or access proceedings, they are often involved in the domestic proceedings in less formal ways.

Judges may order production of CPA files; a CPA worker may be subpoenaed by one of the parents to testify; a judge may request a letter from the CPA or request that a representative of the CPA appear to summarize their involvement or offer a position, or a CPA may on its own initiative write a letter to one or both parties summarizing their involvement or setting out a position.

Judges find it very challenging to make decisions in cases where an allegation has been made to the CPA but there is no direct evidence before the court about whether the CPA has investigated the allegation, whether the allegation has been substantiated, or any ongoing involvement of the CPA with the family. Judges and lawyers described frustration in cases where a CPA was directing the case “behind the scenes,” for example telling one parent to withhold access without initiating a protection application or without taking a position in the domestic proceeding.

*Recommendation 6: CPAs Summaries for Domestic Cases*

Many of the CPA workers and supervisors interviewed for this study indicated that it is their practice to send reporting letters to parents involved in custody and access proceedings about their involvement in the case; these letters often are introduced in any family proceedings, and judges in this study reported that they generally place significant value on these documents. However, preparation of these reports by CPA’s is far from a uniform practice. Given the value of these reports to the family court system (and potential reduction in the cost and duration of family proceedings if this information is available), provincial policy should require that CPAs provide written summaries of their involvement in high conflict parental separation cases for use by the family courts.

These reports should summarize the history of CPA involvement, including information on any reports made to the CPA involving allegations of abuse against either a parent or a parents' new partner, whether an investigation occurred, a summary of the investigation, whether any allegations were substantiated, and any information about ongoing CPA involvement with the family. These reports should not normally be expected to provide a recommendation about custody and access arrangements, but may do so if there are protection concerns. The written summary should be provided to both parents, the expectation being that one or both parents will provide this report to their lawyers (if represented) and that it will be made available to the family court. The report should also be made available to the Office of the Children's Lawyer if it is involved or considering a referral. Written summaries should be provided to parents at the closing of the file or when a decision is made to provide ongoing services. CPAs should also provide updated summaries where requested in an endorsement of the court.

Expecting the CPA to write a summary report in every high conflict case will place a greater demand on CPA resources. However, having these reports may save resources that would have to be expended on sending a CPA representative to court or having a CPA lawyer – who is less familiar with the case – prepare a summary at the court's request. It may also save workers from having to testify in the domestic proceedings. Further, having these reports will reduce the length and cost of some family proceedings. CPAs should have a template for summaries and train workers on how to properly prepare these summaries.

*Recommendation 7: CPAs to Commence Protection Proceedings If Safety Concerns*

CPA professionals from one of the agencies involved in this study described a recently introduced policy of the agency that requires the staff to bring a protection application if it is felt that a child is unsafe and should not “direct from behind the scenes.” This should be the policy of all child protection agencies. If a child is unsafe or exposed to significant risk of emotional or physical harm, it is the role of the CPA to protect that child. This should be done formally, through a court order obtained by the agency or by written agreement, not by expecting a vulnerable parent to take protective measures in family proceedings.

### **The Role of Judges in Crossover Cases**

CPA professionals reported judicial reluctance to grant protection applications in cases involving emotional harm or risk of emotional harm due to parental conflict. Other professionals talked about the challenge of multiple judges hearing a high conflict case.

#### *Recommendation 8: Judicial Education on Emotional Harm Due to Parental Conflict*

While many judges deal regularly with high conflict cases and have very sophisticated understanding of their dynamics, more judicial education is required about the effects of high levels of parental conflict for children.

#### *Recommendation 9: Judicial Case Management of High Conflict Cases*

Judicial case management of high conflict separations by a single judge allows the court to gain understanding of the dynamics of a case. Further, appearing in front of the same judge for all conferences and pre-trial motions allows the judge to exert greater influence on parental behaviour. While judicial case management of high conflict parental separations is common in some courts in the province, it is far from universal. Single

judge case management can reduce attempts by high conflict parents to reargue issues before different judges, none knowing the family well. Judicial case management can also facilitate expeditious resolution of a case, and allow the court to play an effective role in assisting with coordination of efficient service provision.

In cases involving concurrent family law and child protection proceedings, wherever possible there should be a single judge case managing both proceedings. However, this will only be possible in jurisdictions with a Unified Family Court, or where both proceedings are in the Ontario Court of Justice.

*Recommendation 10: Ethical Responsibilities of Lawyers for Parents*

Lawyers for parents can have a critical role in advising their clients of the unintended harm that their conflict may cause their children. The *Rules of Professional Conduct* require that counsel for a parent has an obligation to advise a parent about the effect of their conduct on their children:

In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

While lawyers need to take effective legal action to protect the rights of parents, and ultimately must act on the instructions of their clients, concerns were expressed by many participants in this study that lawyers for parents may sometimes needlessly exacerbate conflict.

Parents in high conflict cases may reject sound child-focused advice from their lawyers, or even fire a good family lawyer to represent themselves or retain a lawyer who will “do what they say.” However, education programs for parents’ lawyers should

include discussion of the lawyers' responsibilities to their clients' children and to the long term interests of their adult clients in having emotionally healthy children.

### **Lack of Resources**

Many participants in this study described a lack of community services for high conflict families. They explained how high conflict families turn to the CPA when there are no other service providers they can access. CPA workers and supervisors also talked of being pushed beyond their traditional child protection role in high conflict cases. All professionals described the high number of self-represented litigants involved in high conflict separations, and the challenges of working with unrepresented, highly conflictual parents.

### **Recommendation 11: More Resources for Children of High Conflict Families**

Resources need to be directed to developing community programs for high conflict families and their children. Community professionals with expertise working with high conflict families as well as CPAs need to be part of this effort.

Resources also need to be directed to providing high conflict parents with legal representation. Effective legal representation for parents improves the likelihood of resolution of high conflict cases without the emotional toll on children of a trial. In Hamilton, Legal Aid of Ontario is sponsoring a pilot program to provide low-income high conflict litigants with representation by an experienced lawyer with trial and litigation experience but who is also resolution-focused. The program developers recognized that high conflict cases are more likely to resolve where parents have lawyers, and where these lawyers favour dispute resolution. However, many high conflict litigants



do not qualify for legal aid. Efforts need to be made to ensure that a greater number of high conflict parents have access to lawyers.

Mediation is currently available to high conflict parents through the family justice and child protection systems. However, participants reported little success with mediation in high conflict cases. Some suggested that a better ADR model for high conflict cases might be parenting coordination. Unfortunately, parenting coordination is expensive and not available in every jurisdiction. How to provide high conflict parents with greater access to parenting coordination should be explored.

*Recommendation 12: More Research on Crossover Cases*

While this report increases understanding of the challenges of high conflict parental separation where a CPA is involved, more research is necessary to further develop best practices for professionals working with these cases.

A major shortcoming of the current research is that the perspectives of criminal justice professionals – especially police – who confront high conflict cases could not be included. Further research should also consider the challenges of high conflict cases for professionals working in smaller communities, and suggestions for best practices that may follow from these unique challenges. Longitudinal research is clearly needed to gain an understanding of the effect of different interventions and legal responses on children whose parents have a high conflict separation.

Finally, most of the participants in this study were not randomly selected but were invited to participate based on either their knowledge or experience with high conflict cases or affiliation with the AFCC-O. It would be useful for future research to involve a wider range of professionals.

