

# PATERNAL FILICIDE AND COERCIVE CONTROL: REVIEWING THE EVIDENCE IN *COTTON V BERRY*

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## INTRODUCTION

On Christmas Day, 2017, the bodies of two small girls, Chloe and Aubrey Berry, ages 6 and 4, were found by police in a ground-floor apartment in Oak Bay, a municipality of Greater Victoria, British Columbia.<sup>1</sup> Found with them was an injured man—the girls’ father. Upon his release from hospital, the father was charged with two counts of second-degree murder.<sup>2</sup>

These deaths, and other paternal filicides, are undeniably distressing for those involved and society as a whole. Surprisingly, however, limited

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<sup>1</sup> See Bethany Lindsay, “Court Document Details Custody Battle for Sisters in Double Homicide”, CBC (28 December 2017, online: <<https://www.cbc.ca/>>. See Canadian Press, “‘Full of smiles’: Young Sisters Found Dead in B.C. Home on Christmas Day”, Ottawa Citizen (27 December 2017), online: <[ottawacitizen.com/news/national/full-of-smiles-young-sisters-found-dead-in-oak-bay-b-c-home-on-christmas-day/wcm/b788c02c-701b-4856-bf39-8e3b560a2e21](http://ottawacitizen.com/news/national/full-of-smiles-young-sisters-found-dead-in-oak-bay-b-c-home-on-christmas-day/wcm/b788c02c-701b-4856-bf39-8e3b560a2e21)>; Canadian Press, “Oak Bay, B.C. Deaths: Two Children Found Dead at Vancouver Island Home on Christmas Day”, Huffpost (26 December 2017, online: <[www.huffingtonpost.ca/2017/12/26/oak-bay-b-c-murders-two-children-killed-in-vancouver-island-on-christmas-day\\_a\\_23317439/](http://www.huffingtonpost.ca/2017/12/26/oak-bay-b-c-murders-two-children-killed-in-vancouver-island-on-christmas-day_a_23317439/)>; Katie DeRosa & Louise Dickson, “Concerns Raised about Father Week before Daughters Killed”, Times Colonist (28 December 2017), online: <[www.timescolonist.com](http://www.timescolonist.com)> [DeRosa & Dickson, “Concerns Raised”].

<sup>2</sup> See Louise Dickson & Katie DeRosa, “Oak Bay Man Charged with Second-Degree Murder in Deaths of Daughters”, Times Colonist (3 January 2018), online: <[www.timescolonist.com](http://www.timescolonist.com)> [Dickson & DeRosa, “Oak Bay Man Charged”].

research has been conducted on paternal filicide in Canada.<sup>3</sup> The public responds to such killings with disbelief. However, “these deaths are not inexplicable. Too often they occur in the context of the parents’ separation and are linked to violence against the mother.”<sup>4</sup> Ninety-five percent of those accused of murder-suicide in Canada are men.<sup>5</sup> Most often, the victim is his intimate partner; however, children are victims as well.<sup>6</sup> Evidence from the few retrospective reviews of paternal filicide suggests “[w]hile physical forms of violence are evident in many cases, it may be that controlling behavior is a particularly important feature of separation filicides.”<sup>7</sup> Paternal filicides might be preventable with better education about “coercive control”. “Coercive control” refers to the means by which some abusive

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<sup>3</sup> This is not only true in Canada. As others have noted, research is sparse throughout the western world; “there is not a body of literature and research specifically aimed at preparing and equipping professionals who may find themselves in potential filicide situations”: Kieran O’Hagan, *Filicide-Suicide: The Killing of Children in the Context of Separation, Divorce and Custody Disputes* (Basingstoke: Palgrave Macmillan, 2014) at 23.

<sup>4</sup> Debbie Kirkwood, “‘Just Say Goodbye’: Parents who Kill their Children in the Context of Separation” (2012) Domestic Violence Resource Centre Victoria Discussion Paper No 8 at 5, online <<https://www.dvrcv.org.au/sites/default/files/Just%20Say%20Goodbye'%20%28January%202013%20online%20edition%29.pdf>>.

<sup>5</sup> See Canadian Centre for Justice Statistics, “Family Violence in Canada: A Statistical Profile, 2011”, by Marie Sinha (Ottawa: Statistics Canada, 25 June 2013) at 18–19, online: <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11805-eng.pdf?st=ktFfQC0k>>.

<sup>6</sup> See *ibid.* Women also commit filicide, but in significantly lower numbers than men, and in very different circumstances. See Myrna Dawson, “Canadian Trends in Filicide by Gender of the Accused, 1961–2011” (2015) 47 *Child Abuse & Neglect* 12 at 165–74. Further, the gap between men and women as perpetrators appears to be increasing. Women more often kill children in the first year of life in the context of postpartum depression and lack of social supports (see *ibid* at 164). Retaliatory filicide appears to be an overwhelmingly male act (see *ibid* at 164), as does familicide, i.e. when all members of the family are murdered (see *ibid* at 172). See also Dominique Bourget & Pierre Gagné, “Paternal Filicide in Québec” (2005) 33 *J American Academy Psychiatry* L 354; Peter G Jaffe et al, “Children in Danger of Domestic Homicide” (2012) 36 *Child Abuse & Neglect* 71 [Jaffe et al, “Children in Danger”].

<sup>7</sup> Kirkwood, *supra* note 4 at 62.

men, often without using a great deal of daily violence, engage in “malevolent conduct . . . to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control.”<sup>8</sup>

If paternal filicides are potentially preventable, the deaths of these little girls raise serious questions about child-custody decisions in Canadian courts. How and why were these children allowed to be in the care of a man who demonstrated abusive and neglectful behaviour and who would eventually kill them? What can we learn from this case? How can future tragedies be prevented? When Ian Mulgrew dared to ask these questions in the *Vancouver Sun*, asserting that “[t]he child protection authorities once again failed miserably and so did the legal system”,<sup>9</sup> he was rebuked by the Chief Justice of the Supreme Court of British Columbia, who suggested the “tragic aftermath” of the case was “unforeseen”.<sup>10</sup> We disagree. The potential for violence in this case was foreseeable, and public criticism is not only justified, but required, to prevent such tragedies in the future. Significant evidence of coercive control—and, therefore, the risk of violence—was presented to the Court but was inadequately considered.

The discussion that follows is based on the written record of the custody hearing in *Cotton v Berry*.<sup>11</sup> We are highly critical of the Court, but this article is not intended as a personal indictment of Madam Justice Gray. She was not asked by Sarah Cotton or her counsel to cut off overnight access.<sup>12</sup> The Ministry of Children and Family Development had been involved with the family but did not seek emergency orders or to deny contact. Without

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<sup>8</sup> Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford: Oxford University Press, 2007) at 5 [Stark, *Coercive Control*].

<sup>9</sup> Ian Mulgrew, “Social Services, the Courts Fail Another B.C. Family”, *Vancouver Sun* (4 January 2018), online: <[vancouver.sun.com](http://vancouver.sun.com)>.

<sup>10</sup> Christopher E Hinkson, “Opinion: A Free Press Must Not Undermine Fair Administration of Justice”, Letter to the Editor, *Vancouver Sun* (31 January 2018), online: <[vancouver.sun.com/opinion/op-ed/opinion-a-free-press-must-not-undermine-fair-administration-of-justice](http://vancouver.sun.com/opinion/op-ed/opinion-a-free-press-must-not-undermine-fair-administration-of-justice)>.

<sup>11</sup> 2017 BCSC 907, 2017 CarswellBC 1443.

<sup>12</sup> See *ibid* at para 153.

court transcripts and the submissions of the parties, we do not know to what degree the risk was highlighted for Madam Justice Gray. Our point is that many lawyers and judges might have acted similarly. Instead of blaming individuals, we use this case to illustrate a systemic problem: lawyers, judges, and the public have a limited understanding of coercive control and risk. The underlying assumptions in *Cotton v Berry*—that controlling behaviour against women is insignificant to custody as long as children have not themselves been subjected to violence<sup>13</sup> and that contact with fathers is always in the best interests of children<sup>14</sup>—are widespread. Further, too many men, including Andrew Berry (the father of the murdered girls), use the court system as a means of asserting control over their ex-spouses.

This retrospective study contributes to the nascent literature on paternal filicide and illustrates the necessity that all participants in court proceedings regarding children understand the signs and risks associated with coercive control. As Gillian Calder and Susan Boyd asserted in a brief but insightful comment published in the *Times Colonist*, while this story may be “relatively isolated in its extreme consequence . . . it makes visible systemic concerns that exist within our family-justice system.”<sup>15</sup> To ignore such concerns is to endanger other children. We illustrate, as a great-uncle of the girls noted to the CBC, Andrew Berry “should never have been left alone

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<sup>13</sup> We note here that the term “custody” is no longer used in the new British Columbia *Family Law Act*, SBC 2011, c 25 [the “Act”], under which this case was decided. Instead, the Act avoids this term, which connotes winners and losers, and instead frames guardianship as a right and responsibility of all but the most intractable of parents (see *ibid*, s 39). Despite this fact, throughout this commentary we continue to use the term custody, not only because it is still the common term in the public, and was used in the decision itself, but also because we believe there are winners and losers in childcare, as this case makes abundantly clear.

<sup>14</sup> See Jonathon Cohen & Nikki Gershain, “For the Sake of the Fathers?: Child Custody Reform and the Perils of Maximum Contact” (2001) 19:1 Can Fam LQ 121; Felicity Kaganas & Shelley Day Sclater, “Contact Disputes: Narrative Constructions of ‘Good’ Parents” (2004) 12:1 Fem Leg Studies 1.

<sup>15</sup> Gillian Calder & Susan Boyd, “Comment: Connecting the Dots in Family-Violence Cases”, *Times Colonist*, (3 January 2018), online: <[www.timescolonist.com/opinion/op-ed/comment-connecting-the-dots-in-family-violence-cases-1.23134672](http://www.timescolonist.com/opinion/op-ed/comment-connecting-the-dots-in-family-violence-cases-1.23134672)>.

with those children. Never. . . . My niece worried every time they left. . . . The proof was there.”<sup>16</sup>

## COERCIVE CONTROL

Evan Stark, the author who pioneered the concept of coercive control, asserts that “[l]ike assaults, coercive control undermines a victim’s physical and psychological integrity. But the main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually.”<sup>17</sup> Judith Herman describes these behaviours as imposing “domestic captivity” on women.<sup>18</sup>

Controlling and coercive behaviours are too often minimized and misunderstood by society. It is, therefore, unsurprising they were invisible to the Court in this case. Stark argues police, child welfare officers, and courts fail to respond adequately to coercive control.<sup>19</sup> This is, in part, because violence against women is only understood as physical violence, but also because each battering or coercive incident is considered independently instead of as part of a larger pattern of controlling behaviour.<sup>20</sup> Behaviours that are intended to control women’s actions and undermine their freedom and sense of self, but which are nonviolent or rely on the threat of violence, do not receive priority response and may not even be recognized as controlling by the courts.<sup>21</sup> These interactions may seem normal on the surface, as controllers have subtle and unique ways of threatening their partners; “[t]aken in isolation, a victim’s response to a particular incident

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<sup>16</sup> Lindsay, *supra* note 1.

<sup>17</sup> Stark, *Coercive Control*, *supra* note 8 at 5.

<sup>18</sup> Judith Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (New York: Basic Books, 1992) at 74–75.

<sup>19</sup> See Stark, *Coercive Control*, *supra* note 8 at 57, 94.

<sup>20</sup> *Ibid* at 92–95.

<sup>21</sup> *Ibid* at 33.

may seem disproportionate, even fabricated”.<sup>22</sup> Further, male control of women and female subservience are normalized in our culture; “[m]asculinity in our society is identified even more closely with being ‘in control’ than it is with the use or capacity to use force.”<sup>23</sup> Despite the fact that control factors are “more predictive of intimate homicide than the severity or frequency of . . . physical violence”,<sup>24</sup> risk assessment for coercive control remains rare outside the context of domestic violence shelters.<sup>25</sup>

The failure to identify coercive control is “embedded in a dominant social discourse that is highly skeptical of women’s allegations of violence in post-separation contexts.”<sup>26</sup> In this context, a woman seeking to prevent or limit contact with an ex-partner is immediately positioned as obstructive and vindictive, rather than as seeking to ensure a child’s safety.<sup>27</sup> A woman may face grave challenges and risk in articulating coercive control for the court, particularly if she is being interrogated by her former spouse. In her study of 22 women who had sought custody against abusive men, Lesley Laing discovered the women found it particularly difficult to be heard by the justice system with regard to “controlling behaviors”.<sup>28</sup> They “experienced participating in the family law system as a process of

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<sup>22</sup> Evan Stark, “Rethinking Custody Evaluation in Cases Involving Domestic Violence” (2009) 6:3–4 J Child Custody 287 at 296 [Evan Stark, “Rethinking Custody Evaluations”].

<sup>23</sup> Stark, *Coercive Control*, *supra* note 8 at 280.

<sup>24</sup> Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) at 235.

<sup>25</sup> See Peter G Jaffe et al, “Paternal Filicide in the Context of Domestic Violence: Challenges in Risk Assessment and Risk Management for Community and Justice Professionals” (2014) 23 Child Abuse Rev 142 at 144 [Jaffe et al, “Paternal Filicide”]. Multiple tools are used to assess risk in domestic violence shelters. The most frequently used include the B-SAFER (Brief Spousal Assault Form for the Evaluation of Risk) and the SARA (Spousal Assault Risk Assessment).

<sup>26</sup> Lesley Laing, “Secondary Victimization: Domestic Violence Survivors Negotiating the Family Law System” (2017) 23:11 Violence Against Women 1314 at 1329.

<sup>27</sup> See Christine Harrison, “Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence” (2008) 14:4 Violence Against Women 381 at 382.

<sup>28</sup> Laing *supra* note 26 at 1321, 1327–28.

re-victimization that exacerbated their traumatic responses” to violence and loss of autonomy.<sup>29</sup> Many stated they were explicitly discouraged from talking about violence in custody proceedings, even by their lawyers, and were warned judges would punish them “if they were seen to be challenging the inevitability of an ongoing relationship between ex-partners and children.”<sup>30</sup> As one mother in the study noted, the women felt they had no way to adequately protect their children: “But then there’s mothers that stand up to the ‘nth degree’ and they’ve ended up going to jail. . . . All they’re trying to do is protect their children.”<sup>31</sup> Mothers in a separate study also “repeatedly said that professionals did not take seriously enough the impact of the retention of children for short periods of time, nor did they appreciate the fears associated with threats of abduction.”<sup>32</sup> Undoubtedly, Sarah Cotton would echo these findings.

When coercive control is not named or understood, child welfare agencies and child custody decisions fail to keep women and children safe. Child custody decisions embody two erroneous and interrelated assumptions: abuse of the mother is not believed to make men bad fathers, just bad partners; and contact with fathers, even abusive ones, is assumed to be in the best interests of children. Court proceedings themselves too often become yet another forum in which abusive men can control and harass their ex-partners. We must recognize—and court decisions must reflect—that coercive, controlling, and angry behaviour is not isolated, private, or simply between parents. Men who control and/or abuse their wives cannot be good parents and present a serious risk to their children.

### ERRONEOUS ASSUMPTIONS IN CHILD-CUSTODY PROCEEDINGS

Too often, courts do not consider evidence of abuse or control of the mother as relevant to custody. While courts are urged to assess the risk of

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<sup>29</sup> *Ibid* at 1320.

<sup>30</sup> *Ibid* at 1322–23.

<sup>31</sup> *Ibid* at 1322.

<sup>32</sup> Harrison, *supra* note 27 at 391.

child abuse postseparation, they lack an understanding of coercive control and, therefore, rarely consider the possible lethality for children in the midst of high-conflict separations. This is related to the limited historical understanding of the risk of abuse to children. In 1960, new data documented physical assaults of children and shocked the western world.<sup>33</sup> Tragic cases of physical abuse riveted public attention and the reporting of child abuse was made mandatory in all provinces.<sup>34</sup> However, the deaths in these cases were largely the accidental result of mistreatment and neglect.<sup>35</sup>

The harms created by witnessing violence and control are often misunderstood and minimized by child welfare authorities and courts, despite an extensive body of literature illustrating that children who grow up witnessing violence are more likely to perpetuate the cycle of violence in adulthood and have lower levels of academic engagement, social well-being, and adjustment.<sup>36</sup> The tools used in child custody assessments “consider the re-occurrence of child maltreatment but do not address the severity and

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<sup>33</sup> See C Henry Kempe et al, “The Battered-Child Syndrome” (1962) 181:1 J American Medical Assoc 17. For an insightful discussion of this literature and its impact, see Sally Mennill & Veronica Strong-Boag, “Identifying Victims: Child Abuse and Death in Canadian Families” (2008) 25:2 Canadian Bull Medical History 311 at 316–17.

<sup>34</sup> See also Sally Mennill & Veronica Strong-Boag, “Identifying Victims: Child Abuse and Death in Canadian Families” (2008) 25:2 Can Bull Medical History 311 at 316; Health and Welfare Canada, *Child Protection in Canada*, Discussion Paper, by Corinne Robertshaw (Ottawa: Health and Welfare Canada, February 1981) at 126–44. For specific details on British Columbia, see Ted Hughes, “BC Children and Youth Review: An Independent Review of BC’s Child Protection System” (7 April 2006), online: <[cwrp.ca/sites/default/files/publications/en/BC-HuguesReviewReport.pdf](http://cwrp.ca/sites/default/files/publications/en/BC-HuguesReviewReport.pdf)>. See also Mary Van Stolk, *The Battered Child in Canada* (Toronto: McClelland and Stewart, 1972) at 58–65; Benjamin Schlesinger, *Child Abuse in Canada* (Toronto: Guidance Centre, Faculty of Education, University of Toronto, 1977) at 24.

<sup>35</sup> See Xiaobei Chen, “Constituting ‘Dangerous Parents’ through the Spectre of Child Death: A Critique of Child Protection Restructuring in Ontario” in Deborah Brock, ed, *Making Normal: Social Regulation in Canada* (Scarborough: Nelson Thomson Learning, 2003) 209, 219.

<sup>36</sup> See e.g. Stephanie Holt, Helen Buckley & Sadhbh Whelan, “The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature” (2008) 32:8 Child Abuse & Neglect 797 at 802–03.

nature of domestic violence per se.”<sup>37</sup> More importantly, they do not consider coercive control as a risk factor for lethality.<sup>38</sup> Premeditated spousal and child murders are associated with coercive control, not the behaviours traditionally associated with child abuse. If a father has not beaten his children in the past, he will not be considered to present a risk to the well-being of his children. However, “[f]amily-related murder-suicides represent the most fatal outcome of family violence.”<sup>39</sup> The risk of such violence can exist even when children are not at risk for more obvious and common forms of abuse. Mothers often understand this fact intuitively, but their knowledge is not respected. This reflects a lack of awareness on the part of “community agencies and their employees who deal with domestic violence, relationship counselling, divorce, and separation” about homicide risk factors and a “lack of interagency cooperation.”<sup>40</sup> When coercion and violence against women are not considered to pose a risk to children, it is assumed shared custody of children is desirable.

Shared custody—the ideal that children will move between the homes of both parents and maintain all familial relationships—has become the most common outcome of contested custody cases.<sup>41</sup> Shared custody reflects

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<sup>37</sup> Jaffe et al, “Paternal Filicide”, *supra* note 25 at 145.

<sup>38</sup> See Aron Shlonsky & Colleen Friend, “Double Jeopardy: Risk Assessment in the Context of Child Maltreatment and Domestic Violence” in David W Springer & Albert R Roberts, eds, *Handbook of Forensic Mental Health with Victims and Offenders: Assessment, Treatment, and Research* (New York: Springer Publishing Company, 2007) 25 at 35.

<sup>39</sup> Shannon Brennan & Jillian Boyce, “Section 2: Family-Related Murder-Suicides”, *Statistics Canada* (25 June 2013), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-2-eng.htm>>.

<sup>40</sup> Carolyn Harris Johnson, “Famicide and Family Law: A Study of Filicide-Suicide Following Separation” (2006) 44:3 *Fam Ct Rev* 448 at 459.

<sup>41</sup> For critique of this emphasis on shared custody, see Judith G Greenberg, “Domestic Violence and the Danger of Joint Custody Presumptions” (2005) 25:3 *N Ill UL Rev* 403; Peter G Jaffe, Nancy KD Lemon & Samantha E Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Thousand Oaks: Sage Publications, 2003); Carol Smart, “Equal Shares: Rights for Fathers or Recognition for Children?” (2004) 24:4 *Critical Social Policy* 484; Helen Rhoades, “The Dangers of

both a conservative emphasis on the heteronormative family and feminist aspirational arguments that men and women should share child care more equally.<sup>42</sup> In practice, however, even in families in which abuse is not an issue, women still do the bulk of childcare,<sup>43</sup> and shared custody is based on the unproven premise men will care for their children after separation in ways they did not while their families were intact. Moreover, while some level of shared custody may be ideal in contexts in which parents are capable of co-operating postseparation, in such cases recourse to the courts is most often unnecessary. Those using the family-law system are often those for whom shared parenting arrangements are contraindicated, yet shared parenting continues to be imposed.<sup>44</sup> Too often, “the parenting capacity of

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Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform” (2008) 36:3 Federal L Rev 279.

<sup>42</sup> In British Columbia, reforms enacted in 2011 recognized same-sex parents and new reproductive technologies. See *Family Law Act*, *supra* note 13, ss 20, 23–30. The amended *Family Law Act* embedded a presumption that parenting continued for all parties postseparation (see *ibid*, s 39). The reforms also attempted to define the dangers of domestic violence and to protect children in such situations (see *ibid*, ss 37–38). However, as others have noted, no extra funds were provided for police or courts for difficult cases involving domestic violence. See Rachel Treloar & Susan B Boyd, “Family Law Reform in (Neoliberal) Context: British Columbia’s New Family Law Act” (2014) 28 Intl JL Pol’y & Fam 77 at 78.

<sup>43</sup> See Susan B Boyd, *Child Custody, Law, and Women’s Work* (Don Mills: Oxford University Press, 2003); Linda Duxbury & Christopher Higgins, “Revisiting Work-Life Issues in Canada: The 2012 National Survey on Balancing Work and Caregiving in Canada” at 3, online: <[newsroom.carleton.ca/wp-content/files/2012-National-Work-Long-Summary.pdf](http://newsroom.carleton.ca/wp-content/files/2012-National-Work-Long-Summary.pdf)>.

<sup>44</sup> See Belinda Fehlberg et al, “Legislating for Shared Time Parenting after Separation: A Research Review” (2011) 25:3 Intl JL Pol’y & Family 318 at 319. In Canada, the majority of child-custody and property disputes between separating couples are settled out of court. See Department of Justice Canada, “Resolving Disputes: Think about Your Options” (29 June 2017), online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/dr-rd/index.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/dr-rd/index.html)>. In this context—particularly in British Columbia where there is an explicit emphasis on alternative dispute resolution—this means that cases coming to court are highly conflictual and require exceptional diligence from lawyers and courts with regard to violence and coercive control. See *Family Law Act*, *supra* note 13, s 4; Treloar and Boyd, *supra* note 42 at 82–83.

violent men [is]... overestimated” and “little, or sometimes no, evidence of safe parenting [is] required by professionals for fathering to be restored”.<sup>45</sup> Abusive, coercive, and controlling fathers “continue to be given primary or shared custody in an alarming number of cases”.<sup>46</sup> At least in part, this is because the fathers’ rights movement has succeeded in convincing courts—and the court of public opinion—that men are essential in children’s lives, even men who have a history of coercion and/or violence towards their female partners. Profather discourses “construct fathers as centrally important to children’s wellbeing as sources of care and protection, blame mothers’ hostility towards fathers for father absence, and absolve fathers of any responsibility for their harmful actions”.<sup>47</sup> Fathers are constructed as “victims of judicial decisions that privilege mothers’ care time over fathers”.<sup>48</sup> These groups portray fathers as “morally compelled to press claims for justice and even to engage in heroic risk-taking in pursuit of closer relationships with their children”.<sup>49</sup> Coercive, aggressive behaviour thus becomes not only normalized, but also valorized as a sign of paternal love and devotion. Courts too often appear to endorse such beliefs.

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<sup>45</sup> Harrison, *supra* note 27 at 397.

<sup>46</sup> Stark, “Rethinking Custody Evaluations”, *supra* note 22 at 298.

<sup>47</sup> Vivienne Elizabeth, “‘I’d Just Lose It If There Was Any More Stress in My Life’: Separated Fathers, Fathers’ Rights and the News Media” (2016) 5:2 *Intl J for Crime, Justice & Social Democracy* 107 at 108. See also Richard Collier, “‘The Outlaw Fathers Fight Back’: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform—Reflections on the UK Experience” in Richard Collier & Sally Sheldon, eds, *Fathers’ Rights Activism and Law reform in Comparative Perspective* (Portland: Hart Publishing, 2006) 53; Jocelyn Elise Crowley “Taking Custody of Motherhood: Fathers’ Rights Activists and the Politics of Parenting” (2009) 37:3 & 4 *Women’s Studies Q* 223; Molly Dragiewicz, *Equality with a Vengeance: Men’s Rights Groups, Battered Women and Antifeminist Backlash* (Boston: Northeastern University Press, 2011); Michael Flood, “‘Fathers’ Rights’ and the Defense of Paternal Authority in Australia” (2010) 16:3 *Violence Against Women* 328; Michael Flood, “Separated Fathers and the ‘Fathers’ Rights’ Movement” (2012) 18:2–3 *J Family Studies* 235.

<sup>48</sup> Elizabeth, *supra* note 47 at 110.

<sup>49</sup> *Ibid.* See also Ana Jordan, “‘Every Father is a Superhero to his Children’: The Gendered Politics of the (Real) Fathers 4 Justice Campaign” (2014) 62 *Political Studies* 83.

Women feel they are “not able to put the full story of violence and abuse before the court”.<sup>50</sup> Therefore, courts often do not understand the gravity of the violence, coercion, and control faced by these women. This failure “has implications for the quality of the decision making of the courts”.<sup>51</sup> Poor-quality decisions in the child-custody context have far-reaching implications for the safety of women and their children. Shared custody or guardianship and access arrangements create “opportunities for stalking, [and] sending threats”, and mothers report having “to deal with the children’s distressed and difficult behaviors on return home from spending time with their fathers.”<sup>52</sup> Ironically, women who fail to leave abusive men can face the risk of criminal consequences.<sup>53</sup> Yet, they are “subsequently expected to promote contact with the same men, whatever the cost to them or their children”.<sup>54</sup> Critics have argued for some time that contact between parents enforced through child-custody agreements postseparation creates

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<sup>50</sup> Laing, *supra* note 26 at 1324.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at 1326.

<sup>53</sup> See Karen J Swift, *Manufacturing ‘Bad Mothers’: A Critical Perspective on Child Neglect* (Toronto: University of Toronto Press, 1995) at 121. See also Anne McGillivray, “Child Physical Assault: Law, Equality and Intervention” (2003–2004) 30:2 *Man LJ* 133; Kendra Nixon, “Intimate Partner Woman Abuse in Alberta’s Child Protection Policy and the Impact on Abused Mothers and their Children” (2009) 8:1 *Currents* 1; Nico Trocmé et al, “Nature and Severity of Physical Harm Caused by Child Abuse and Neglect: Results from the Canadian Incidence Study” (2003) 169:9 *CMAJ* 911.

<sup>54</sup> Harrison, *supra* note 27 at 401. See also Vivienne Elizabeth, Nicola Gavey & Julia Tolmie, “. . . He’s Just Swapped His Fists for the System’: The Governance of Gender Through Custody Law” (2012) 26:2 *Gender & Society* 239 at 248; Liz Trinder, Alan Firth & Christopher Jenks, “‘So Presumably Things Have Moved On Since Then?’ The Management of Risk Allegations in Child Contact Dispute Resolution” (2010) 24:1 *Intl JL Pol’y & Fam* 29. The fact that mothers are held accountable for child welfare even when fathers are the problem is evident in the recent policy decision of the Ontario Children’s Aid Societies to open files in the name of the mother. See Ontario Association of Children’s Aid Societies, *CPIN—Business Harmonization Work Group HARMONIZED PROCESS—FINAL—Identifying and Changing Primary Client*, 30 October 2017.

safety risks for mothers.<sup>55</sup> Shared-custody decisions ignore the fact that contact also creates risk for children.

### ABUSE OF COURT PROCEEDINGS IN THE CONTEXT OF COERCIVE CONTROL

As Heather Douglas notes, “[t]he loss of opportunities for abuse that existed prior to separation and the engagement in litigation that co-occur around the point of separation creates a kind of perfect storm.”<sup>56</sup> The court system itself can become a form of abuse, with coercive fathers “filing frivolous lawsuits, making false reports of child abuse, and taking other legal actions as a means of exerting power, forcing contact, and financially burdening their ex-partners.”<sup>57</sup> Court procedures are thus used as another means of controlling women.<sup>58</sup> As Miller and Smolter have argued, “practitioners and criminal justice system officials should recognize this behavior as yet another kind of abuse from which victims need protection.”<sup>59</sup> However, they do not, despite evidence suggesting “it is often coercive fathers who pursue custody and/or contact provisions aggressively and tenaciously through family courts as part of their ongoing harassment of their former partners.”<sup>60</sup> Self-representation may be a particularly egregious form of such abuse, as it provides men with the opportunity to personally question and intimidate their former partners in a public forum in which

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<sup>55</sup> See Janet R Johnston & Nancy Ver Steegh, “Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices” (2013) 51:1 Fam Ct Rev 63 at 68.

<sup>56</sup> Heather Douglas, “Legal Systems Abuse and Coercive Control” (2018) 18:1 Criminology & Criminal Justice 84 at 85.

<sup>57</sup> Susan L Miller & Nicole L Smolter, “‘Paper Abuse’: When All Else Fails, Batterers Use Procedural Stalking” (2011) 17:5 Violence Against Women 637 at 637–38.

<sup>58</sup> See *ibid.* See also Brittany E Hayes, “Abusive Men’s Indirect Control of their Partner During the Process of Separation” (2012) 27:4 J Family Violence 333.

<sup>59</sup> *Ibid* at 640.

<sup>60</sup> Elizabeth, *supra* note 47 at 117.

such aggression is sanctioned.<sup>61</sup> Fighting tenaciously for children may be a contraindication to shared custody because coercive control “is often signaled by efforts to win custody by a father who has had little previous involvement in parenting”.<sup>62</sup> Moreover, it is based on an assertion of patriarchal rights over children rather than concern for their well-being. Refusal to pay child support and other payments ordered by the courts is also inherently abusive. Coercive controllers are particularly likely to have imposed economic inequality on their partners.<sup>63</sup> Because of this, “[b]eing unable to afford a lawyer or no longer qualifying for free legal aid is common for women who find themselves in and out of court due to these claims.”<sup>64</sup> Family law is “framed in a paradigm of conflict between equals”.<sup>65</sup> However, in reality, women are rarely equally empowered and/or resourced in these proceedings, and in abusive relationships this power differential can be extreme.<sup>66</sup> Finally, any perceived loss in court may leave the father “seething with rage and a desire for revenge or retaliation.”<sup>67</sup> In this context, the courts have an obligation to be aware of power dynamics and to protect women and their children. In *Cotton v Berry*, the Court failed to fulfill this obligation and missed clear signs of coercive control and the risk of escalating violence.

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<sup>61</sup> See Vivienne Elizabeth, Nicola Gavey & Julia Tolmie, “The Gendered Dynamics of Power in Disputes over the Postseparation Care of Children” (2012) 18:4 Violence Against Women 459 at 474.

<sup>62</sup> Stark, “Rethinking Custody Evaluations”, *supra* note 22 at 295.

<sup>63</sup> See Adrienne E Adams et al, “Development of the Scale of Economic Abuse” (2008) 14:5 Violence Against Women 563, which argues economic abuse is difficult to measure. See also Anna Aizer, “The Gender Wage Gap and Domestic Violence” (2010) 100:4 American Economic Rev 1847, which argues pay equity is essential to solving the problem of intimate partner violence.

<sup>64</sup> Miller & Smolter, *supra* note 57 at 643.

<sup>65</sup> Laing, *supra* note 26 at 1330–31.

<sup>66</sup> For a more fulsome discussion of this problem, see also Treloar and Boyd, *supra* note 42.

<sup>67</sup> O’Hagan, *supra* note 3 at 168.

## COERCIVE CONTROL & VIOLENCE AGAINST CHILDREN

The Department of Justice Canada, in its handbook on “Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce”, acknowledges that “the risk of lethal violence is particularly high following parental separation”.<sup>68</sup> It lists the following risk factors for lethality: “[a]busers with history of intimate terrorism (or coercive controlling violence);<sup>69</sup> exposure of children to violence and controlling behavior;<sup>70</sup> “belittling the mother’s parenting skills and/or getting the children involved with the criticism”;<sup>71</sup> “[u]sing the child as a weapon . . . to continue to intimidate, harass, or exert control over their ex-spouse” (by using such methods as failing to respect custody agreements, threatening loss of custody, undermining the mother’s authority, and trying to alienate the child from the mother);<sup>72</sup> and a history of abducting the child(ren). They conclude: “fear expressed by the child should be taken seriously.”<sup>73</sup> Fear expressed by the mother with regard to the safety of her children must also be taken seriously, but this fact it is not stated by the Department of Justice.<sup>74</sup> Other authors assert changing circumstances should also be carefully monitored, noting the postseparation coercive controller “may

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<sup>68</sup> Department of Justice Canada, “Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce” by Peter Jaffe et al (Ottawa: DOJ, February 2014) at 14, online: <[www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rfcsfv-freevf/rfcsfv-freevf.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rfcsfv-freevf/rfcsfv-freevf.pdf)> [DOJ, “Risk Factors”].

<sup>69</sup> *Ibid* at 17 [citations omitted].

<sup>70</sup> See *ibid* at 17–18.

<sup>71</sup> *Ibid* at 18.

<sup>72</sup> *Ibid* at 19.

<sup>73</sup> *Ibid* at 20.

<sup>74</sup> We know that women, if anything, underestimate risk and understate their fear. See Arlene N Weisz, Richard M Tolman & Daniel G Saunders, “Assessing the Risk of Severe Domestic Violence: The Importance of Survivors’ Predictions” (2000) 15:1 J Interpersonal Violence 75 at 76–77. Women are alert to the subtle signs of danger particular in their own abuser in ways that elude those evaluating the relationships from the outside. Therefore, when women are vocal about fear, for themselves or their children, it is extremely important to listen and to provide safety planning and protection.

obsess over his loss, deprive himself of food or other basic necessities, 'slip' in his personal hygiene, and experience many of the same health and behavioral symptoms due to the loss of control over his partner that we observe in women who are being abused."<sup>75</sup> Erratic behaviour and/or psychiatric deterioration are indications of enhanced danger, creating a need for "particular vigilance."<sup>76</sup> Many of the warning signs noted above were apparent in *Cotton v Berry*. The twin assumptions that bad behaviour towards the mother does not reflect an inability to parent and that extensive contact with the father is essential to children's well-being precluded the protection of Chloe and Aubrey Berry. Courts should always look for "'red flags' for the possibility of an extreme outcome or 'worst case scenario';"<sup>77</sup> but the Court failed to do so in this case.

## OBLIGATIONS OF THE COURT

The 2011 revisions to the British Columbia *Family Law Act* were intended to reflect modern family arrangements—the existence of same-sex families and the increased involvement of fathers in parenting—and to protect women and children from domestic violence.<sup>78</sup> Section 1 of the *Act* explicitly defines domestic violence and section 37 states it is relevant to guardianship decisions.<sup>79</sup> The definition, however, emphasizes physical violence over control in its more subtle forms. Moreover, the *Act* begins with the assumption guardianship continues postseparation for all parents.<sup>80</sup> As Treloar and Boyd noted in 2014, by assuming "ongoing guardianship when parents separate, regardless of the past history of parenting", the *Act* "places a burden on a parent who resists shared guardianship, especially given the normative climate in favour of shared parenting."<sup>81</sup> Therefore, the *Act* "may

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<sup>75</sup> Stark, "Rethinking Custody Evaluations", *supra* note 22 at 311.

<sup>76</sup> Johnson, *supra* note 40 at 459.

<sup>77</sup> Jaffe et al, "Paternal Filicide", *supra* note 25 at 150.

<sup>78</sup> Treloar and Boyd, *supra* note 42 at 77.

<sup>79</sup> *Supra* note 13, ss 1, 37(2)(g).

<sup>80</sup> *Ibid*, s 39(1).

<sup>81</sup> Treloar and Boyd, *supra* note 42 at 88.

generate serious problems for a mother caregiver who is dealing with a manipulative or abusive spouse”.<sup>82</sup> The existence of such “serious problems” is evident in *Cotton v Berry*. The Court underestimated the potential for violence, minimized evidence of coercion and risk, and put Chloe and Aubrey Berry at risk by awarding extended unsupervised parenting time to their father. Further, there was evidence of inadequate, even harmful, parenting by the father, while the mother’s parenting was beyond reproach.

### EVIDENCE FROM *COTTON V BERRY*

*Cotton v Berry* was heard in the British Columbia Supreme Court, 1–4 November and 14 November 2016 by Madam Justice Gray (who has since retired from the bench).<sup>83</sup> At the hearing, Ms. B.E. Bate represented Sarah Cotton while Andrew Berry represented himself. Although he claimed he had to do so because his money had all been spent on legal fees,<sup>84</sup> at the time of the hearing he was employed by B.C. Ferries,<sup>85</sup> in arrears for almost two years’ worth of his child-support payments,<sup>86</sup> and had won \$100,000 in a lottery.<sup>87</sup> Andrew Berry could have afforded a lawyer. The Court was asked to consider the mother’s “many concerns about the Father’s parenting” when determining how and when the father would spend time with his children.<sup>88</sup> The Court should have been wary that his self-representation was a tactic of control and intimidation, but it was not.

Sarah Cotton and Andrew Berry met while they were both working at B.C. Ferries<sup>89</sup> and they lived together in a common-law relationship from 1

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<sup>82</sup> *Ibid* at 89.

<sup>83</sup> *Supra* note 11.

<sup>84</sup> See *ibid* at para 89.

<sup>85</sup> See *ibid* at para 2.

<sup>86</sup> See *ibid* at para 145.

<sup>87</sup> See *ibid* at para 89.

<sup>88</sup> *Ibid* at paras 3, 153.

<sup>89</sup> See David Carrigg, “Neighbours in Oak Bay Apartment Mourn Slain Girls”, *Vancouver Sun* (27 December 2017), online: <<https://vancouver.sun.com>>.

January 2010 until 13 September 2013.<sup>90</sup> They had two children, referred to in the case as C.B. and A.B., born in June 2011 and January 2013, respectively.<sup>91</sup> Ms. Cotton was a stay-at-home mother for the majority of the time during which the couple cohabited after the birth of the children.<sup>92</sup>

Ms. Cotton testified the troubles between her and Mr. Berry began after the death of her father.<sup>93</sup> Mr. Berry “became increasingly critical of her and called her foul names in the presence of the children.”<sup>94</sup> Mr. Berry also failed to protect the safety of the children, taking “2-year-old CB boating without a life jacket,”<sup>95</sup> leaving 6-month-old A.B. unsupervised in a stroller,<sup>96</sup> and, when angry, driving erratically, speeding, and failing to use turn signals, “even with the children in the car.”<sup>97</sup> In the summer of 2013, Ms. Cotton mentioned possible separation to Mr. Berry.<sup>98</sup> On 6 September 2013, Mr. Berry “threw clothing at her, hitting her with a belt buckle.”<sup>99</sup> On 11 September 2013, they argued about how Ms. Cotton had spent their universal childcare benefits and “before he left for work, [Mr. Berry] threw a drink in anger and intimidated her.”<sup>100</sup> He sent emails asking for details about C.B.’s childcare expenses and when he came home for lunch “said that he would ‘blow up the house’ if he did not get a breakdown of what happened to the funds, and . . . looked angry and crazed.”<sup>101</sup> After lunch, Ms. Cotton sent Mr. Berry an email with the details of what she had done with

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<sup>90</sup> See *Cotton v Berry*, *supra* note 11 at paras 1, 7.

<sup>91</sup> See *ibid* at para 1.

<sup>92</sup> See *ibid* at para 19.

<sup>93</sup> See *ibid* at para 21.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* at para 22.

<sup>96</sup> See *ibid* at para 23.

<sup>97</sup> *Ibid* at para 24.

<sup>98</sup> See *ibid* at para 25.

<sup>99</sup> *Ibid* at para 26.

<sup>100</sup> *Ibid* at para 27.

<sup>101</sup> *Ibid* at paras 28–29.

the money.<sup>102</sup> She then sent another email, stating “I need to know that you’ll have calmed down by the time you get home from work today. If you don’t, I’ll need to take action. I won’t live like this anymore.”<sup>103</sup> On the night of 13 September, Ms. Cotton was in bed when Mr. Berry “pulled the covers off her, and then jumped on her and pinned her on the bed.”<sup>104</sup> When she stated she was ready to call the police, he drove away. Mr. Berry did not testify about either incident and Madam Justice Gray accepted Ms. Cotton’s “uncontradicted evidence.”<sup>105</sup> Ms. Cotton responded in precisely the way recommended by all protection agencies: she declared the relationship over and sought police protection.<sup>106</sup> Mr. Berry’s attack was the kind of intimidating violence indicative of coercive control;<sup>107</sup> Ms. Cotton’s statement that she was unwilling “live like this *anymore*”<sup>108</sup> suggests coercion and control were not new; Andrew Berry may have had a history of “intimate terrorism.”<sup>109</sup>

Mr. Berry’s threat to blow up the house constituted a direct threat to his children. He was arrested<sup>110</sup> and Ms. Cotton received a restraining order.<sup>111</sup> In November, Mr. Berry entered into a peace bond, which was amended to allow him to see the children.<sup>112</sup> Ms. Cotton and Mr. Berry entered into an interim agreement titled “Minutes of Settlement.”<sup>113</sup> Subsequently, under new Minutes of Settlement from January, Mr. Berry was given parenting time on Tuesdays and Thursdays from 3:30 p.m. to 6:00 p.m., from 8:45

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<sup>102</sup> See *ibid* at para 30.

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

<sup>104</sup> *Ibid* at para 32.

<sup>105</sup> *Ibid* at paras 29, 32.

<sup>106</sup> See *ibid* at paras 30–35.

<sup>107</sup> See DOJ, “Risk Factors”, *supra* note 68 at 17.

<sup>108</sup> *Cotton v Berry*, *supra* note 11 at para 30 [emphasis added].

<sup>109</sup> DOJ, “Risk Factors”, *supra* note 68 at 17.

<sup>110</sup> See *Cotton v Berry*, *supra* note 11 at para 33.

<sup>111</sup> See *ibid* at para 35.

<sup>112</sup> See *ibid* at para 38.

<sup>113</sup> *Ibid* at para 40.

a.m. to 1:00 p.m. on Saturdays for the younger child and until 5:30 p.m. for the elder, and from 7:45 a.m. until 1:00 p.m. and 5:30 p.m., respectively, on Sundays.<sup>114</sup> At this time, neither child was in school so the remainder of time was with spent with their mother.<sup>115</sup> Once he was granted access to the children, Andrew Berry continued with tactics of intimidation and control. He failed to respect agreements or pay child support,<sup>116</sup> attempted to alienate the children from their mother,<sup>117</sup> and abducted them for short periods of time to enforce his wishes.<sup>118</sup> He stonewalled Ms. Cotton's plans and desires for the children by refusing to respond to her emails and requests<sup>119</sup>. He intervened and asserted his authority whenever possible but did not live up to his financial responsibilities.

Mr. Berry's actions are illustrative of the risk factors for children in situations of family violence described by the Department of Justice Canada. He repeatedly "belittle[ed] the mother's parenting skills and . . . involved [the children] with the criticism"<sup>120</sup>. He "use[d] the child(ren) to continue to intimidate, harass, or exert control over [his] ex-spouse".<sup>121</sup> He engaged in behaviours that put the children themselves at direct risk. This pattern of behaviour was not fully recognized or understood by the Court. This may have been, in part, because these behaviours—and Ms. Cotton's fear—were underemphasized by her counsel; we do not have access to the transcripts and submissions to make that determination. The following examples of coercion, control, and manipulation are provided in chronological order to illustrate the growing sense of frustration and fear that Ms. Cotton likely experienced.

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<sup>114</sup> See *ibid* at para 44. Unfortunately, the Minutes of Settlement are not available to the public.

<sup>115</sup> See *ibid* at para 46.

<sup>116</sup> See *ibid* at paras 78–79, 123, 145.

<sup>117</sup> See *ibid* at paras 101–02, 140.

<sup>118</sup> See *ibid* at para 78. See also DOJ, "Risk Factors", *supra* note 68 at 18–19.

<sup>119</sup> See *Cotton v Berry*, *supra* note 11 at paras 62, 67, 70, 109, 111, 116, 129, 139.

<sup>120</sup> DOJ, "Risk Factors", *supra* note 68 at 18.

<sup>121</sup> *Ibid* at 19.

Mr. Berry refused to sign passports for the girls when Ms. Cotton wanted to take them to a cousin's wedding in Greece.<sup>122</sup> Mr. Berry attempted use money as a weapon of control; however, he was unsuccessful, as Ms. Cotton, unlike many women, had adequate resources to support the children on her own. Ms. Cotton selected a Montessori school for their elder daughter and "the Father attended the parent meetings. The Father testified that he thought he had made it clear to the Mother that he could not afford the cost of the Montessori preschool".<sup>123</sup> Ms. Cotton also hired a nanny, whom she paid. Mr. Berry did not contribute towards the cost; "[a]t trial, he did not dispute that he owed the Mother something as his contribution to Ms. Morin's wages, but he argued that the Mother did not supply him with sufficient detail . . . . He appeared to seek something in the nature of timesheets."<sup>124</sup>

Under circumstances not disclosed in the decision, the older daughter, C.B., started to spend some overnights with her father.<sup>125</sup> In April of 2015, Ms. Cotton tried to arrange a birthday party for C.B. and asked Mr. Berry to pay child support and other expenses.<sup>126</sup> He "did not respond. His position at trial was that because he could not obtain access to his equity in the Cranmore Home [the former family home], he would not pay child support."<sup>127</sup> He could not receive equity because the house required remediation, and he was simultaneously refusing to participate in this process, despite the Minutes of Settlement obliging him to do so.<sup>128</sup> On the date of the birthday party, "the Father demanded that the parties meet at the police station. . . . The Father testified that it was a sensitive time and he wanted to meet at the police station as a 'precaution'."<sup>129</sup> The Court should

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<sup>122</sup> See *Cotton v Berry*, *supra* note 11 at para 48.

<sup>123</sup> *Ibid* at para 54.

<sup>124</sup> *Ibid* at para 55.

<sup>125</sup> See *ibid* at para 56.

<sup>126</sup> See *ibid* at para 66.

<sup>127</sup> *Ibid* at para 67.

<sup>128</sup> See *ibid* at paras 40, 59–62.

<sup>129</sup> *Ibid* at para 69.

have noted this as a clear tactic of intimidation, as Ms. Cotton had not in any way behaved in a manner that created a threat to Mr. Berry. At the end of June 2015, he stopped contributing to expenses for the house, which meant that the mortgage was not paid by the required date that month.<sup>130</sup> Ms. Cotton thereafter took over the full mortgage payments.<sup>131</sup>

In August 2015, the younger child, A.B., started spending nights at Mr. Berry's home;<sup>132</sup>

[t]he background to this was that one day, in the presence of the girls, the Father refused to let the girls return to the Mother unless the Mother agreed that AB could spend overnight time with him. Although unhappy with the Father's tactic in raising the issue in the presence of the girls, the Mother agreed to start with AB staying overnight once a week with the Father, and to consider further nights after six or eight weeks.<sup>133</sup>

This was not simply a matter of "raising the issue in the presence of the girls," as it was described in the judgement of the Court; Mr. Berry violated the custody agreement. Subsequently, "[a]round October 2015, the Father insisted on having AB for two nights per week. The Mother was unhappy that the Father did not discuss this with the Mother and instead, simply decided unilaterally that things would change. The Mother did not have her current legal counsel and did not know what to do about the Father's insistence, so the change was made."<sup>134</sup>

Shortly thereafter, "AB developed a urinary tract infection" and "said things to the Mother which raised a concern that the Father may have been touching AB inappropriately."<sup>135</sup> The nanny, Ms. Morin, also testified the little girl had told her "the Father had hurt her vagina."<sup>136</sup> When Ms. Morin asked the older sister about the issue, she "simply would not respond. Ms.

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<sup>130</sup> See *ibid* at para 74.

<sup>131</sup> See *ibid*.

<sup>132</sup> See *ibid* at para 78.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid* at para 79.

<sup>135</sup> *Ibid* at para 80.

<sup>136</sup> *Ibid* at para 81.

Morin found this troubling, because CB [was] usually talkative.”<sup>137</sup> The Ministry of Children and Family Development and the police investigated, and the father’s access was supervised for around two weeks.<sup>138</sup> It was found he had acted inappropriately but without criminal intent.<sup>139</sup> He did not take the parenting courses recommended by the Ministry of Children and Family Development.<sup>140</sup> This refusal should have been noted by the Court as a contraindication to parenting time, particularly overnight time.

In January of 2016, Ms. Cotton noticed “a large soft spot” on A.B.’s head.<sup>141</sup> Ms. Cotton took her for a checkup and was advised to go to the emergency ward. She noted “AB had been restless, tired, and crying for a few days before” this point.<sup>142</sup> Ms. Cotton asked Mr. Berry what had happened, but he denied responsibility.<sup>143</sup> She was contacted by a Ministry of Children and Family Development worker and “the Father’s visits were supervised again for a short period of probably less than a week.”<sup>144</sup> The parents signed a Safety Plan, which required them to record details about their days with the children in a “Communication Book” and to inform one another in advance if either parent planned to leave the Victoria area with the children.<sup>145</sup>

Mr. Berry repeatedly denigrated Ms. Cotton in front of the girls and thwarted her efforts to ensure they were engaged in appropriate activities. The nanny testified the older daughter told her “she knew what the word ‘selfish’ means, that it means you care only about yourself, and that the

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<sup>137</sup> *Ibid* at para 82.

<sup>138</sup> See *ibid* at paras 83–84.

<sup>139</sup> See *ibid* at para 86.

<sup>140</sup> See *ibid* at para 87.

<sup>141</sup> *Ibid* at paras 93–96.

<sup>142</sup> *Ibid* at para 96.

<sup>143</sup> See *ibid* at para 94.

<sup>144</sup> *Ibid* at paras 98–99.

<sup>145</sup> *Ibid* at para 100. The injustice of the mutuality of the Safety Plan should be noted here. Ms. Cotton was not suspected of poor parenting and should not have been subjected to the same conditions as Mr. Berry.

Father says that the Mother is really selfish.”<sup>146</sup> Ms. Cotton repeatedly sought Mr. Berry’s agreement to enroll the girls in recreational activities, such as T-ball, summer camp, and swimming lessons, but he failed to respond.<sup>147</sup> He also failed to respond meaningfully when she requested some extra parenting time on Mother’s Day.<sup>148</sup> He returned the girls at 4:00 p.m. instead of the usual 5:30 p.m., against the wishes of the older daughter who “was upset that she did not get to spend Mother’s Day with the Mother.”<sup>149</sup> Mr. Berry violated the limitation on travel, repeatedly taking the daughters out of the Victoria area without telling Ms. Cotton.<sup>150</sup> At trial, Mr. Berry admitted to this, but “his explanation [was] that the trips have been short daytrips, such as a trip to waterslides in the Vancouver area . . . [and] he has not planned these sufficiently in advance to include in the Communication Book. He says that he has sometimes reported them in the Communication Book after they occurred.”<sup>151</sup> In fact, however, these were abductions, and his ongoing failure to abide by agreements should have been a red flag for the Court.

In July of 2016, Ms. Cotton obtained a court order relieving her “of the requirement for personal service on the Father, and [she] was permitted to serve documents alternatively”.<sup>152</sup> This suggests that Mr. Berry had either been evading service or harassing her, or both. Her counsel also sent him a letter proposing a change in the childcare schedule because the older child was starting school.<sup>153</sup> He did not respond. Based on his failure to respond, Ms. Cotton “changed the parenting schedule as set out in . . . [the] letter. The changed schedule provided for the Father to have parenting time

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<sup>146</sup> *Ibid* at para 101.

<sup>147</sup> See *ibid* at paras 105, 109, 111.

<sup>148</sup> See *ibid* at para 107.

<sup>149</sup> *Ibid* at para 108.

<sup>150</sup> See *ibid* at para 114.

<sup>151</sup> *Ibid* at para 115.

<sup>152</sup> *Ibid* at para 112. Again, the transcripts of these court proceedings are not available to the public.

<sup>153</sup> See *ibid* at para 116.

Wednesdays from after school until 6:30 p.m., and on alternating weekends from Fridays at 5:00 p.m. to Sundays at 5:30 p.m.”<sup>154</sup> But, on the first day of the change, he arrived at the younger daughter’s preschool and A.B. asked if they were having a sleepover.<sup>155</sup> He said yes, although the weeknight overnights were supposed to stop under the letter. Mr. Berry asserted “since the Mother had changed the schedule, he could too. The Father blocked the Mother from kissing AB goodbye. The Mother threatened to call the police and dialed the number, but while the number was ringing, the Father agreed to return the girls to the Mother by 6:30 p.m.”<sup>156</sup> The Court should have recognized such tactics of intimidation as signs of coercive control.

Mr. Berry refused to speak to Ms. Cotton or to provide any information about the children during drop off and pick up.<sup>157</sup> In September 2016, he stopped using the Communication Book mandated by the Ministry of Children and Family Development.<sup>158</sup> At trial, he claimed “the children started ripping pages in the Communication Book and colouring them” and “he did not want the Communication Book on days when he was only seeing the girls for a few hours, because it would take him too long to read the Mother’s entries.”<sup>159</sup> In reality, however, this was a direct violation of the Safety Plan.

Around October 2016, the younger daughter returned from time with her father with a burn on her foot that had not been properly treated.<sup>160</sup> Ms. Cotton testified the children were often “exhausted, hungry, emotional, and in need of a bath. . . . following their parenting time with the Father and, as a result, she [was] hesitant to make any plans for Sunday evenings.”<sup>161</sup> This

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<sup>154</sup> *Ibid* at para 117.

<sup>155</sup> See *ibid* at paras 119–20.

<sup>156</sup> *Ibid* at para 120.

<sup>157</sup> See *ibid* at para 123.

<sup>158</sup> See *ibid* at para 125.

<sup>159</sup> *Ibid* at para 126.

<sup>160</sup> See *ibid* at para 137.

<sup>161</sup> *Ibid* at para 138.

evidence was supported by the nanny.<sup>162</sup> The older daughter “told the Mother that the Father says that the schedule is silly, the Mother is selfish, the Father is poor and the Mother is rich, and the Father is going to steal all of the Mother’s money.”<sup>163</sup> It was noted that, when the girls were with their father, “the Father sleeps sometimes in a bed with one of the girls, and sometimes on a pullout sofa.”<sup>164</sup> The nanny felt that, “over the previous six months to a year, AB had become more aggressive, and CB had become a little more reserved”.<sup>165</sup>

Ms. Cotton arranged for counselling for the girls and attended multiple counselling sessions with them.<sup>166</sup> At the time of the trial in November 2016, Mr. Berry was still working for B.C. Ferries and Ms. Cotton was working for herself, managing the rental properties she had inherited from her father.<sup>167</sup> Mr. Berry “had not paid child support for almost two years”.<sup>168</sup> He testified “he was waiting for the trial to conclude. The Father testified he had not taken the parenting courses recommended by [the Ministry of Children and Family Development] because ‘a lot ha[d] been going on.’”<sup>169</sup>

### THE DECISION IN *COTTON V BERRY*

The decision in *Cotton v Berry* was issued on 31 May 2017, just under seven months before the girls would be killed. In her decision, Madam Justice Gray acknowledged that, under *Family Law Act* paragraph 37(2)(g), she had to consider “the impact of any family violence on the child’s safety, security or well-being, whether the family violence is directed toward the child or another family member;”<sup>170</sup> and under paragraph 37(2)(i), she was

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<sup>162</sup> See *ibid* at para 139.

<sup>163</sup> *Ibid* at para 140.

<sup>164</sup> *Ibid* at para 143.

<sup>165</sup> *Ibid* at para 144.

<sup>166</sup> See *ibid* at paras 106, 113.

<sup>167</sup> See *ibid* at paras 141–42.

<sup>168</sup> *Ibid* at para 145.

<sup>169</sup> *Ibid* at para 146.

<sup>170</sup> *Ibid* at para 161; *Family Law Act*, *supra* note 13, s 37(2)(g).

similarly bound to consider “the appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members”,<sup>171</sup>

While offering careful reasons for her decision, Madam Justice Gray nonetheless misunderstood the risk to the children and minimized the evidence of coercive control and negative parenting by Mr. Berry. She dismissed his “aggressive behavior around the time of separation and during some exchanges of the children” as “transient and relatively minor.”<sup>172</sup> She noted that the aggressive behaviour had “not been directed at the children”,<sup>173</sup> which reflects the assumption that harm to the mother is unimportant to parenting time as long as the father has not physically harmed the children themselves. While she admitted the behaviour “may have affected their well-being because they have sometimes been present”, she argued “[t]his is not a case where family violence is a significant factor for determining parenting arrangements.”<sup>174</sup>

Madam Justice Gray found that Mr. Berry “displayed poor judgment in dealing with the children That has included saying negative things to the girls about the Mother, the touching which led to the [Ministry of Children and Family Development] investigation, and his present arrangement of sometimes sleeping together with one or the other of the girls.”<sup>175</sup> Despite this, she stated “[i]t can be hoped that, on reflection, the Father will recognize that it is a poor idea for him to say negative things about the Mother to the girls and to sleep with the girls.”<sup>176</sup> She also noted “[i]t is concerning that the girls are often over-tired when the Father returns them to the Mother. This may be due, at least in part, to the Father’s view that he

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<sup>171</sup> *Family Law Act*, *supra* note 13, s 37(2)(i).

<sup>172</sup> *Cotton v Berry*, *supra* note 11 at para 168.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid* at para 169.

<sup>176</sup> *Ibid.*

has insufficient time with the girls, leading him to overdo activities when the girls are with him.”<sup>177</sup> She observed that:

[t]he Father has displayed poor judgment in dealing with the Mother. That bad judgment has included failing to honour the Safety Plan about advance notice to the Mother of trips out of Victoria and about using the Communication Book, and making exchanges of the children cold and uncomfortable. It also includes the Father’s failure to honour court orders and written agreements, including failing to pay child support.<sup>178</sup>

However, she did not consider the wider implications of these actions, whether they constituted evidence of coercive control or indicated any potential danger to Ms. Cotton or the children. Instead, though Ms. Cotton was loving and deeply engaged with her children and had done the bulk of the childcare, the children were forced to split their time between their parents, based on speculation that Mr. Berry could, in the future, become a better father. Madam Justice Gray asserted “[i]t can be hoped that, in time, the Father can act in the best interests of the children by showing the maturity to honour court orders and his agreements, and by ensuring the children are not exposed to his disputes with the Mother.”<sup>179</sup> She found Mr. Berry to be “a loving Father who has much to offer his daughters. It is in the best interests of the girls to have significant parenting time with the Father.”<sup>180</sup> She asserted that, “[o]n balance, I am not persuaded that the Father’s displays of poor judgment regarding the children have reached the level that the children should be deprived of significant parenting time with their Father.”<sup>181</sup> This reflects the assumption

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<sup>177</sup> *Ibid* at para 170.

<sup>178</sup> *Ibid* at para 171.

<sup>179</sup> *Ibid* at para 172.

<sup>180</sup> *Ibid* at para 178.

<sup>181</sup> *Ibid* at para 179. In fact, while she awarded greater parenting time to Ms. Cotton, the vast majority of this time was during the week (see *ibid* at paras 181–85). Mr. Berry was granted three out of four weekend days each two-week period, while Ms. Cotton would care for the children during the week, while he worked and children were in school. This presumably made it difficult for her to have any relaxed time with her children. However, Madam Justice Gray did not see this as unfair, asserting “[t]he Mother will

that fathers are essential to children's well-being, even fathers who are coercive, violent, or simply irresponsible and lacking in "maturity". While he was denied the alternating weeks he had requested, Mr. Berry's parenting time was substantially increased.<sup>182</sup> For instance, holidays were to be split between the parties;<sup>183</sup> this is why the children were with their father on Christmas Day 2017. Mr. Berry had previously achieved increases in his parenting time by refusing to honour agreements and threatening to abduct the children. These coercive, controlling, and dangerous behaviours were ultimately rewarded by the Court.

Ms. Cotton sought parental decision-making power;<sup>184</sup> however, Mr. Berry "argued that he [was] willing to work to improve not only the volume but also the quality of his communications with the Mother. . . . [He] argued that he would like the parties to communicate almost daily by telephone. He suggested that the parties begin with two phone calls a week of 5 or 10 minutes each, progressing to calls daily."<sup>185</sup> Of course, such contact would be in the interest of a coercive and controlling man. In a clear understatement, counsel for Ms. Cotton asserted "she was not sure it was realistic to hope that the parents could have daily phone calls."<sup>186</sup>

Madam Justice Gray found "[t]he Father ha[d] been strangely unresponsive to the Mother concerning parenting matters. The evidence included many emails and texts between the parties. The Mother's requests for responses from the Father were consistently polite, brief, and informative. There was nothing provocative or insulting in the Mother's

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have substantially more parenting time because of her ability to limit work to when the children are occupied. While the Mother will have parenting time only one weekend day out of four, she will be able to attend the girls' activities while they are with their Father, and will have significant time with them during weekdays" (see *ibid* at para 184). Of course, to attend such activities, she would have had to be in public spaces also occupied by Mr. Berry.

<sup>182</sup> See *ibid* at paras 157, 181.

<sup>183</sup> See *ibid* at para 186.

<sup>184</sup> See *ibid* at para 187.

<sup>185</sup> *Ibid* at paras 188–89.

<sup>186</sup> *Ibid* at para 190.

communications.”<sup>187</sup> Madam Justice Gray rightly noted that “[t]he Father’s failure to focus on what is in the children’s best interests . . . is troubling and demonstrates poor judgment. It also demonstrates an inability to work cooperatively in parenting the girls.”<sup>188</sup> However, she failed to recognize this strange unresponsiveness reflected the fact that Mr. Berry was interested in the children primarily, and perhaps only, as a means of controlling his ex-spouse. The polite, cooperative mother was forced to increase her accommodation of a difficult, coercive, and angry father. Madam Justice Gray held that Ms. Cotton would have decision-making power “if the parties are unable to agree or if the Father simply chooses not to respond within a reasonable time, which will usually be 48 hours.”<sup>189</sup> She further held that Mr. Berry would “have the right to apply to court to set aside any decision the Mother has made,”<sup>190</sup> thereby providing him with means to continue to harass his ex-spouse through ongoing court proceedings. Madam Justice Gray did refuse Mr. Berry’s request for telephone communication, instead ordering that “they [would] communicate with each other by email except in cases of emergency.”<sup>191</sup>

Andrew Berry was ordered to pay “Basic Table Child Support”<sup>192</sup> and “Extraordinary Expenses” relating to the preschool and the nanny.<sup>193</sup> Madam Justice Gray ordered Mr. Berry to make arrangements to have his share of the house transferred to Ms. Cotton on receipt of her buyout.<sup>194</sup> Madam Justice Gray awarded costs to Ms. Cotton because

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<sup>187</sup> *Ibid* at para 192.

<sup>188</sup> *Ibid* at para 194.

<sup>189</sup> *Ibid* at para 195.

<sup>190</sup> *Ibid* at para 195.

<sup>191</sup> *Ibid* at para 202.

<sup>192</sup> *Ibid* at para 208.

<sup>193</sup> *Ibid* at paras 223–39.

<sup>194</sup> See *ibid* at paras 246–49. Her buyout reflected a deduction of arrears on child support and extraordinary expenses so that she owed him a minimal amount and would then own their home outright.

[t]he order substantially reflects the relief sought by the Mother. The Father failed in respect of who should make parenting decisions, whether there should be alternate week parenting time, whether nanny and preschool costs would be considered to be Extraordinary Expenses, and regarding the value of the Cranmore home.

As a result, the Mother was substantially successful at trial and is entitled to her costs.<sup>195</sup>

In fact, however, Ms. Cotton had lost on the most important issue: her controlling ex-partner was given increased parenting time with his children despite her fears for the children's safety and her legitimate and well-documented concerns about his inadequate parenting.

## CONCLUSIONS

In hindsight, it is clear that Madam Justice Gray did not fully understand what was going on in the relationship between Sarah Cotton and Andrew Berry. Without the parties' submissions and the court transcripts, we do not know to what degree violence, coercion, and fear were emphasized for the Court. Nevertheless, even the minimal descriptions of the relationship contained in the written record make it clear that evidence of coercive control—and of danger to the children—was minimized in this decision. The assertion that Mr. Berry's "aggressive behavior . . . has been transient and relatively minor",<sup>196</sup> denies the overwhelming evidence that Andrew Berry repeatedly defied court orders and agreements, and failed to consider the well-being of his children or take steps to improve his parenting. It ignores that fact that he insulted and denigrated his ex-partner and exerted control over her through their children. Given that only high-conflict cases require recourse to the courts, courts are under a heightened obligation to understand coercive control and the accompanying risk of lethality. The lesson from this trial is not that Andrew Berry's lethal violence was "unforeseen" or inevitably unforeseeable,<sup>197</sup> but that we must talk about

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<sup>195</sup> *Ibid* at paras 260–61.

<sup>196</sup> *Ibid* at 168.

<sup>197</sup> Hinkson, *supra* note 10.

coercive control and provide better education for lawyers, judges, and the public in order to keep future children (and their mothers) safe. The children's deaths suggest a disconnect between the courts and other social services, particularly the Ministry of Children and Family Development. This disconnect resulted in what Ian Mulgrew referred to as a miserable failure to protect child welfare in a context of known—or what should have been known—risk.<sup>198</sup>

It is also important to note Andrew Berry showed signs of psychological deterioration after the time of the trial. However, Madam Justice Gray did not have the opportunity to consider evidence of his declining mental health. In the summer of 2017, Mr. Berry left or lost his job at B.C. Ferries.<sup>199</sup> In August 2017 his bank “sued to recover \$12,000 in outstanding credit-card debt.”<sup>200</sup> He was served an eviction notice for nonpayment of rent but refused to leave.<sup>201</sup> A neighbour described his apartment as having “things strewn all over the floor . . . ‘Chaos is an understatement’”<sup>202</sup> A neighbour stated Mr. Berry’s hydro was turned off in early December.<sup>203</sup> The week before Christmas, immediately before the murders, he was reported to the Ministry of Children and Family Development, but nothing appears to have been done.<sup>204</sup> Further, he seems to have had an escalating gambling problem “which caused a serious financial strain.”<sup>205</sup> No one limited Mr. Berry’s access to his children or seemed to be paying attention to his deterioration (except, no doubt, Ms. Cotton). Ms. Cotton and Mr. Berry were involved in further family court proceedings as recently as 23

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<sup>198</sup> See Mulgrew, *supra* note 9.

<sup>199</sup> See Katie DeRosa & Louise Dickson, “Neighbour Recalls Inviting Girls and Father to Dinner”, *Times Colonist* (27 December 2017), online: <[www.timescolonist.com](http://www.timescolonist.com)> [DeRosa & Dickson, “Neighbour Recalls”].

<sup>200</sup> DeRosa & Dickson, “Concerns Raised”, *supra* note 1.

<sup>201</sup> See DeRosa & Dickson, “Neighbour Recalls”, *supra* note 199.

<sup>202</sup> *Ibid.*

<sup>203</sup> See DeRosa & Dickson, “Concerns Raised”, *supra* note 1.

<sup>204</sup> See *ibid.*; DeRosa & Dickson, “Oak Bay Man Charged”, *supra* note 2.

<sup>205</sup> DeRosa & Dickson, “Concerns Raised”, *supra* note 1.

November 2017<sup>206</sup> this suggests his noncompliance in the payment of child support and division of assets had continued. Yet, this time the Court did not provide Sarah Cotton with an opportunity to challenge the parenting arrangements. Nor were mental health supports triggered by Andrew Berry's increasingly erratic behaviour and emotional downward spiral. This case represents a full system failure, not simply a failure of the Court. Nevertheless, courts must develop better skills in screening cases so men like Andrew Berry do not have opportunity to harm their children.

Desperate, angry, and controlling, Andrew Berry imposed the most agonizing punishment possible on the ex-spouse who had refused to be dominated: he killed her children during the parenting time allotted to him by the Court. Sarah Cotton, as Madam Justice Gray noted, had been cooperative and polite throughout the legal proceedings and in all dealings with her ex-spouse. She complied with all orders of the Court and facilitated Mr. Berry's access, despite her deep and well-founded concerns about his parenting. Had she refused to comply, she would have been constructed as an uncooperative and alienating parent, and might have had her own parenting time reduced. She was powerless to prevent this tragedy. The Court, however, did have the power to order conditions that might have protected the children; for example, the Court could have prohibited overnight access, followed through with requiring Mr. Berry to take a parenting course, imposed penalties for violations of the parenting agreement, or required his time with the children to be supervised. Instead, Andrew Berry's time with his children was increased and he was not required to take any concrete steps towards improve his parenting or his own mental health.

This case provides clear evidence "[b]asic reforms are required in assessment, adjudication, and accountability . . . if the family court is to retain its legitimacy as an arbiter of family matters".<sup>207</sup> Child welfare workers, lawyers working in divorce and custody proceedings, and the courts need to understand power dynamics and be able to recognize signs

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<sup>206</sup> See Lindsay, *supra* note 1. Unfortunately, the transcript of the hearing on 23 November 2017 is not available to the public.

<sup>207</sup> Stark, "Rethinking Custody Evaluations", *supra* note 22 at 287.

and symptoms of coercive control. Chloe and Aubrey Berry will not be the last children in Canada to die at the hands of angry, domineering fathers. Until we overturn the prevailing assumptions that coercive behaviour targeting mothers does not make men bad fathers and that even negligent fathers are essential to their children's well-being, paternal filicide will continue. We must provide protection and support for women and children trapped in relationships with abusive men and increase the education of lawyers, courts, and the public with regard to coercive control. Deaths such as those of the Berry children "are not inexplicable"<sup>208</sup> or inevitable. It is unconscionable, not simply heartbreaking, to allow them to continue.

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<sup>208</sup> Kirkwood, *supra* note 4 at 5.