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Amicably ever after

When it comes to divorce, we live in a time awash in contradictions, Canadian divorce expert Deborah Moscovitch says. Lurid tabloid headlines blare the news about celebrity breakups. Yet, despite the fascination with celebrity cases, when it comes to reality, divorce is viewed as just part of modern life and, too often, people get the message “just get over it already”, Ms Moscovitch says.

Deborah Moscovitch, author of *The Smart Divorce*

‘A divorce is like an amputation:
you survive it, but there’s less of you.’
– Margaret Atwood

But like Canadian author Margaret Atwood’s quote reflects, the end of a union is a painful transition with a lasting impact for those involved, she says.

“Both men and women have to recognize that they are grieving a major loss when they go through divorce,” says Ms Moscovitch, author of *The Smart Divorce*, (Chicago Review Press, \$18.95), which has gone into its second printing in Canada. “A big part of having a smart divorce is recognizing how to keep your emotional equilibrium and knowing how to take care of your emotional needs so you can keep them out of the legal issues.”



Statistics Canada reports almost 38 per cent of Canadian marriages are expected to end in divorce by their 30th year. And, it cites, second marriages fare worse, as do common-law unions. Divorce is so stressful, it ranks second to the death of a spouse on Thomas Holmes & Richard Rahe’s Social Readjustment Rating Scale, a measure designed to gauge the impact of common life stressors.

So, the emotional havoc is not surprising. John, a 49-year-old York Region man, has been embroiled in an on-again, off-again family court battle that has lasted more than 12 years. The medical professional, with a thriving practice, has seen six court-ordered settlements fall apart. Each time, he has returned before a judge, lawyer in tow, praying that what he calls “the worst nightmare imaginable” will finally end. Eventually, charges of child abduction were laid against his ex-partner, who had cut off all contact and concealed the whereabouts of their two children. Meanwhile, with no resolution in sight, his ongoing litigation costs have escalated to six figures.

Yet, during the same time period, Kate, a trim self-employed businesswoman in her 40s, and Bo, a finance management specialist in his 50s, also went through an angry breakup. But in their case, the Toronto couple, who have one son, sought “divorce counselling” and met once with a mediator to learn of their rights and responsibilities.

The family took a six week divorce/ counselling course. Even their young son took part in group sessions with other children his age from families also going through divorce. In the end, they worked out an agreement together and brought it to their lawyers. It cost around \$5,000 and the deal has lasted.

These cases show, according to Mary Anne Shaw, a family lawyer for more than 20 years, how “no two divorce experiences are ever the same and it is surprising how some of the most seemingly calm and well-adjusted people can change once they confront the reality of a breakup.”

“Sadly, with divorce, lawyers have heard and seen it all,” says Ms Shaw, who also specializes in wills and estate law.

Ms Moskovitch, a Thornhill resident, agrees and says even the most well-intentioned couples can get thrown off course when their emotions clash with the legal system. But lawyers and divorce consultants say recently there has been a sea change with much of the “divorce industry” working to make the transition more bearable.

For years, legal experts have believed the stress of divorce, plus the inherent adversarial nature of the legal system, made it inappropriate as the primary venue for resolving the majority of family law disputes.

By the 1990s, many factors converged, sparking new programs that emphasize resolving divorce cases and avoiding protracted court battles. One of the motivating factors is the financial cost, which has become staggering. Litigated divorces can routinely set you back at least \$100,000, sources say.

Currently, couples have a menu of divorce choices. And, most are geared toward avoiding a full-blown trial. At more traditional negotiations, each party brings their lawyer and try to hammer out a deal, looking for areas of compromise and middle ground. The purpose is to reach a settlement or settle as many areas as possible before escalating into litigation. But it can be costly.

However, even if litigation begins, there are many other mechanisms built into the family court system to reach settlements.

They include case management systems where court officials keep track of cases to see if they are getting bogged down to try and streamline the proceedings and reduce undue delays, Ms Shaw says.

Parties are set up with case, settlement and trial conferences in a bid to avoid going to court. In the end, more cases settle before trial. “In my view, sometimes timing is everything,” Ms Shaw says. “Sometimes, people just want to fight to a certain extent and then they just get to an emotional readiness point. Then people behave.”

Mediation has evolved over the last 20 years and works well for many people, Ms Moskovitch says. Couples find a trained, certified mediator, who acts as a neutral third party to make them aware of their rights and responsibilities.

They work together to work the best deal for their family. Their lawyers give it their final approval. The cost is estimated to range from as low as \$3,000 to \$5,000 and up depending on the complications of the case.

Ms Moskovitch says mediation is an excellent cost-saving solution as long as both parties have “equal bargaining power ... and some element of trust” as there must be full disclosure. Often, mediation results

in creative solutions tailored for individual family's needs. Couples have the option of bringing in the expert opinions of child psychologists and financial experts and sharing the costs. Its big flaw is, if it does not work, it is not binding, so if one party is unhappy, they can withdraw and start over with the normal court process and its inherent costs, she says.

But what is seen as the newest trend in family law, which has spurred the interest of lawyers and "the helping professions", is called collaborative family law. It is seen as combining the best of many options, according to Victoria Smith, a lawyer who was a pioneer of the practice in Toronto. "It is quite revolutionary and it works," Ms Smith says. "The fall-off rate is about 5 per cent and it is, for the most part, successful."

She and Judith Huddart, who also runs a different collaborative practice, say the idea was pioneered by an American lawyer Stuart Webb, after he lost a longtime friend due to a particularly acrimonious divorce case during which they had been on opposite sides.

In a collaborative practice, the two parties commence, in writing, to work with specially trained lawyers to reach a customized agreement that is good for them and their children. From the get-go, the clients and lawyers know if they can't reach an agreement, they will have to start all over with new lawyers and new costs.

But Ms Huddart and Ms Smith say, for the lawyers, the philosophy goes beyond costs and retaining cases. They view family breakup as a holistic process.

Collaborative lawyers can talk to each other more openly and try to make their clients' needs known. They try to respect their clients' emotional levels as they go through the divorce process. They can bring in outside experts such as parenting coaches to help deal with parenting plans and to hear the children's needs. They try to ensure all levels of the family's progress and "readiness" are taken into account during the negotiations.

It is a sane way of seeing family breakdown that accounts for the facts and emotional states, the social states and legal and financial states of mind, they say. Most lawyers who participate in it do it because they want "hopeful, healthy, creative solutions", Ms Huddart says.

And it can cost about one-third of a contested divorce, although the money is not the point. "The point is for everyone to come out as whole and healthy and heard as possible," she says.

Susan (in her 50s, not her real name) sums up the three meetings that made her collaborative separation agreement after 22 years of marriage this way: "I liked the fact that our respective, collaborative-practice lawyers would have had to withdraw if we decided to go to court. It meant that they weren't exacerbating things to earn more money. I can never understand why some couples would prefer to give their assets to lawyers rather than try to work things out collaboratively."

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