

## **THE ADVERSARIAL SYSTEM**

### **Side effects for Children**

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The adversarial court system is dangerous to the health of children. Despite warnings in social science literature that conflict is contrary to a child's best interests, our court system fuels conflict. Sooner or later, despite their best intentions, lawyers and parents find themselves defaulting to standards of behaviour designed to wound rather than heal. Here are some examples of the challenges parents and children face in an adversarial court system:

- Law school training for lawyers (including lawyers who become judges) does not traditionally include courses on the emotional dynamics of family break-down or parent-child relationships or child development.
- The adversarial system is based on confidentiality and zealous advocacy. There is no obligation for parents to share everything that may be relevant in making custody/access orders, and therefore no guarantee a judge will have enough facts to decide what is really in a child's best interests.
- The adversarial system is essentially "win-lose" – not the best way to decide the fate of children. Parents, both of who may be adequate in their own right, are encouraged to demean each other by focusing on the negative rather than the positive conduct of the other.
- Parents are often not functioning well or not communicating by the time they separate. Since the court system is intimidating, lawyers tend to do most of the talking and decide what is or is not important for their client's case. The court system does not help parents communicate or co-operate with each other, but they are still expected to work together after court to implement custody/access orders.
- The adversarial system encourages polarized positions. This feeds negative emotions such as frustration and anger, increases stress, and drains a family's finances that could be better spent on addressing their children's *needs* rather than prolonging their *suffering*.
- Parents without legal representation, the "walking wounded", are left to navigate their way through a complicated court system where decisions affecting their future relationship with their children will be made.

- Parents' expectations that they will be heard, validated, and vindicated are seldom met in the adversarial court system. While a judge can make an order, it may have little impact on family conflict. The order is about legal issues, while often emotional issues are driving the case. The legal system does not find emotions very relevant.
- A child expert brought in by one parent can be seen as a "hired gun" for that parent – some are co-opted as a result and other professionals refuse to become involved at all, which means the family may lose a valuable resource.
- Assessments of the needs of children are one expert's prediction at one point in time, usually when a family is in trauma, following separation. The assessment is short-term, but may be used by a judge to determine the dynamics of a family for years to come. And no one can really know how much the assessor's own personal experiences and biases may be influencing their report.
- Because parents as parties in the litigation are assumed to represent the interests of their children, judges often do not hear from the children themselves. Instead of feeling protected, children can feel left out of the process and worthless, as their opinion does not seem important.
- In essence, the focus in adversarial proceedings, despite "best interests" terminology, concentrates on the rights of parents, not on their responsibilities or the rights or needs of their children.
- The adversarial system is intended to make decisions for parents when they are incapable of making these decisions for themselves. But judges cannot "micro-manage" families or take over their day-to-day decision-making.
- Families need courts to be time-sensitive and provide early assistance, but with limited information from parties and limited support services allocated to most family courts in Canada, judges often do not have enough information about the children to make decisions early on in the proceedings.
- Stability is important for children following separation. Since courts are reluctant to change custody/access arrangements once established, the first custody/access order made in a case can be the most crucial. It often determines the "status quo" of where children will live. But the first order is often made with the fewest resources available. An order that changes one factor in a family dynamic may have a significant impact on the future outcome for children. If an order is inappropriate its damaging effects can be magnified over time, but over time it is also less likely to be changed.

- Even if enough information is available to make a short-term order, without on-going educational and support resources for the family, there is no gurantee the order will really solve problems or end conflict between parents. The first court skirmish may end, but the emotional battle can continue out-of-court, with no protection for the children whose best interests were supposed to be the subject of the order.

It is time for some “preventative medicine” to protect children from the harmful effects of the adversarial system. If families must enter the court system they should be supported, educated, and encouraged to maintain their roles as decision-makers for their children. Resources should be available at all family courts, including teams providing meaningful education and parenting programs and family and individual assessments and counselling. Most importantly, parents should not be required to start court proceedings to get these services. Funds invested by government at the time families separate are fewer and better spent than those currently expended due to court battles and the fall-out from families in a constant state of conflict.

*C Judith L. Huddart*