HIGH-CONFLICT CUSTODY CASES IN CANADA

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Are we really doing an adequate job of addressing the needs of children caught in high-conflict custody cases? This paper examines some of the newer initiatives associated with an increasing number of Canadian courts handling family law cases, including high-conflict cases. As well, it provides a brief overview of the transition in Canadian case law from a "rights-based" parent-focused approach to a more "needs-based" child-focused approach, and questions whether this change in terminology is actually making a difference for children in high-conflict cases.

FAMILY-FOCUSED INITIATIVES:

Case-managed Court Systems

Increasing numbers of family law courts across Canada now operate under a "case-managed" system. A case-managed system can allow individual judges to retain control of high-conflict cases and steer them through and out of the system. Although still not universal in Canada, a number of provinces, including Ontario, have also started unifying some of their provincial and federal courts to provide family law litigants with "one stop shopping". Unified Family Courts (or "UFC's") are generally supported by family law lawyers. The Family Law Section of the Ontario Bar Association lobbied for some time to have these courts introduced in Ontario. UFC's allow a case management system to be coupled with a dedicated bench of experienced judges as well as essential support services that separating families require, such as mediators, counsellors, and family information programs.

Most experienced family lawyers do everything possible to resolve a non-emergency case outside court and only recommend court as a last resort. Generally, when lawyers have a case with difficult children's issues and clients can afford it, they also encourage clients to agree to custody assessments, without going to court. If a case ends up in court it is usually because it needs a judge's firm direction.

Family law lawyers, however, are expressing concern with the focus of some case-managed court systems. Due to the initial good press, the prevailing view in some Ontario courts is that judges must try to settle every case and should not be making orders. But case management judges cannot expect to settle every file and higher-conflict cases in particular often need the judge to make an order to get parents to listen. Judges handing family law cases are trained in the law, but not always trained to facilitate settlement discussions with the

many emotional issues that parents bring to the table. Rather than dispensing justice, judges can find themselves brokering deals between embittered and often disillusioned parents. As well, judges may be rotated in and out of a particular court every few months to hear non-family cases and therefore cannot always see a higher conflict case through from beginning to end. Lawyers who have done their best to settle before going to court are often frustrated by having to go through the motions of canvassing settlement again at court before they are able to schedule a date to have a judge make an interim order. These court settlement meetings or "Case Conferences" are often held in the more informal atmosphere of a judge's chambers. Sometimes parents are included in the case conference discussions, but often only briefly after lengthy discussions between the lawyers and the judge. Parents in higher conflict custody/access cases who are pressed to settle matters without an order can soon discover that the agreements reached are impossible to enforce.

Assessors and Experts

Although there have been a few decisions over the past 10 years discouraging the routine ordering of assessments, in fact assessments are now ordered almost routinely if requested by either parent, particularly if there are issues that are likely to intensify conflict between the parents. In a 1999 Manitoba case an assessment was actually ordered because the request for the assessment *itself* was found to have taken a low conflict case and made it high conflict. (*Jarjour* v. *Brooks*). In Canada, assessments are almost always joint and the costs are normally shared. The parties either agree on one assessor or, failing agreement, the court will appoint an assessor. In either case, the assessor has a duty to submit a report to the court on the needs of the children. Mental health professionals such as psychiatrists, psychologists and social workers bring a non-legal, yet essential perspective to the needs of children in high-conflict cases.

Unfortunately, as much as we have come to rely on the opinions of these experts, they generally make their opinions known through their written reports and are not available in person to assist judges at court. Even if these experts were to make themselves available, they would not be affordable for many parties. So, judges who not normally trained to identify potential high-conflict custody cases or to understand the implications of family violence on parents and children are still left to make decisions about children. Without hands-on guidance from experts, judges may be left to rely on their own subjective views of what is or is not in a child's best interests. While judges may truly believe that they are focusing on the needs and best interests of the children, in reality they may relate more to the needs of parents and be responding to their competing rights.

Children's Lawyers

We are fortunate in provinces such as Ontario, to have our own government-run Children's Lawyer's Office. In those provinces and territories where there is no formal government agency to represent the interests of children, there remains

an avenue open for a court to appoint a legal representative for children. Courts in Canada have the inherent power to appoint counsel pursuant to their *parens patriae* jurisdiction. While the views and preferences of children in high conflict cases are important, Canadian courts do not have to follow them. Counsel appointed for the children are generally mindful of their clients' best interests and do not simply parrot their opinions. In some high-conflict cases where the parties cannot afford an assessor, a lawyer may be appointed for the child and may involve a mental health professional to assess the needs of the child.

Parenting Education Programs

Parental education for separating spouses is being offered more widely and in particular through UFC courts, however, many of these programs are still being offered on a trial basis. There is little consensus yet on whether such programs should be voluntary or mandatory, their ideal length, and whether they should be available for all separating parents or only those starting a case in court. For example, the one-evening mandatory information session for litigants in Toronto cannot hope to address the needs of high-conflict families. High-conflict families often need long-term counselling.

The above are, in theory, positive initiatives, however as the Canadian experience has shown, court-based initiatives require a variety of long-term support services, for both judges and parents, before they can hope to improve the lives of children caught up in high conflict cases.

THE COMPETING "RIGHTS" OF PARENTS AND CHILDREN:

Over the past 20 years Canadian custody and access laws and particularly the cases decided under them have moved from the language of a "rights-based" parent-focused approach to a "needs-based" child-focused approach. In the 21st Century we are moving toward a "parental responsibility" approach. Unfortunately, "needs-based" presumptions and language have, to a great extent, made little difference for children. These presumptions have often served to simply redistribute parental rights at the expense of the rights of children

By the 1980's Canadian courts began to distance themselves from the earlier presumption that a mother, as primary caregiver during the marriage, should be awarded custody. This presumption in favour of the rights of the primary caregiver gave way to a focus on the child's best interests, with a presumption that a child needed maximum contact with both parents, *irrespective of the roles each parent may or may not have assumed during the marriage*. Although our current Divorce Act does not define "best interests" of children, it does assume that maximum contact is in the best interests of most children – *without reference to the degree of conflict between their parents*. Our current federal Divorce Act provides that children should have as much contact with each parent as is consistent with their best interests and that courts should consider the willingness of the individual seeking custody to facilitate such contact.

This "maximum contact" presumption, supposedly based on the best interests and needs of children, has greatly expanded the rights of access parents (generally fathers). At the same time, it has reduced the rights of custodial parents (generally mothers). The majority of the Supreme Court of Canada has held that a custodial parent has no right to limit access unless such contact poses a risk of harm to the child (*Young* v. *Young*). The onus is on the parent opposing access to establish that it would not be in the best interests of the child. As a result of the maximum contact presumption, a parent is not normally deprived of access unless they have been proven to have abused or neglected their child.

This "maximum contact" presumption has also been used by fathers to claim increased "rights" to custody or joint custody. The motives for such claims can sometimes be viewed as suspect, since our Child Support Guideline legislation provides that a parent who has a child with him (or her) 40% or more of the time may have the "right" to reduce their obligations to pay child support for this child to the other parent. Mothers, fearing the loss of needed child support, often counter that they have a "right" to full custody and to make major decisions for their children. In many relationships mothers still perform the major child-rearing role and they feel threatened when their right to continue to take responsibility for their children is challenged on separation by what they perceive to be "born-again" dads.

These "rights-based" positions, with fathers' rights groups taking the lead, were argued out during hearings across Canada in the late 1990's by the Federal Government's Special Joint Committee on Child Custody and Access. Perhaps it is not surprising that the Special Joint Committee's 1998 Report, *For the Sake of the Children*, recommended that any changes to the Divorce Act *strengthen* the maximum contact presumption. This has the potential to fan the flames in high-conflict cases.

A federal Divorce Act Bill, which has yet to be re-introduced in the House of Commons, proposes changes to terminology in the Divorce Act due to the negative connotations of the terms "custody and access". While fathers' rights groups are still pushing for a presumption of "shared parenting" the term "parental responsibilities" seems to be the preferred option.

Focusing on a division of parental responsibility for children, rather than who is the best parent to have custody, will prevent the winner and loser mentality and therefore reduce the potential for on-going conflict between parents - or so the argument goes. Changes in terminology, however, must be addressed very carefully in high-conflict custody cases. If one parent has mental or emotional problems, imposing any sort of shared parenting analysis or forcing parents to negotiate over their responsibilities might prove disastrous for the children.

Canada is at a crossroad in our child custody laws. While we are struggling with the dissatisfaction of parents caught up in our family law system, we know that change will take its toll on children too. It seems fairly likely that within the next year or so we will see legislation re-introduced to remove the labels of "custody" and "access", and move toward parenting plans and a listing and division of parental responsibilities. Many have already expressed fear this will not reduce but actually add to the conflict between parents, as there will be more to argue about. As well, with change comes uncertainly and with uncertainly the possibility of increased litigation – none of which bodes well for the needs of children. The real question is, can we *legislate* changes in attitudes toward children - not only the attitudes of parents, but also the attitudes of government and the legal system? This remains to be seen.

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