

MANAGING HIGH CONFLICT FAMILY LAW CASES FOR THE SAKE OF THE CHILDREN

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High conflict separations are detrimental to children of these relationships. Conflict can be prevented and lessened by levelling the playing field with a presumption of joint custody. Judges and lawyers need to contain and control high conflict litigants using any number of approaches and tools, particularly those that are interdisciplinary.

Lorsque les parents ne parviennent pas à s'entendre lors de la séparation, leurs enfants en souffrent. Ces conflits peuvent être évités et apaisés en mettant les parents sur un même pied d'égalité par une présomption de garde partagée. Il appartient aux juges et aux avocats de maîtriser les parties qui sont en situation de conflit au moyen d'un bon nombre d'outils et d'approches, tout particulièrement, par le biais de méthodes interdisciplinaires.

1. Introduction

The single most detrimental factor for children whose parents have separated or are in the process of separating is a high conflict breakdown of the relationship. Conflict puts these children at risk.¹

While high conflict cases constitute 3 to 5 percent of a court's caseload in jurisdictions that have mandatory parental separation education, they take up the vast majority of the court's time.² In areas where there is no

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¹ Stephen Carter, "The Psychology of High Conflict Parents" (Paper presented at the LESA conference, High Conflict Custody and Access: Avoiding the Perfect Storm, Edmonton, Alberta, 23 January 2007) (Edmonton, Alta.: Legal Education Society of Alberta, 2007), online: The Legal Education Society of Alberta <http://www.lesa.org/comersus7f/store/comersus_viewitem.asp?id Product=34153590> [Carter, "High Conflict Parents"]; Justice Canada, *High Conflict Separation & Divorce: Options for Consideration* by Glenn A. Gilmour (Background Paper) (Ottawa: Department of Justice, 2004), online: <<http://www.justice.gc.ca/en/ps/pad/reports/2004-FCY-1/2004-FCY-1E.pdf>>; Carol Chandler and Len Stewin, "Solving the Puzzle: Restructuring High Conflict Families" (Paper presented at the Federation of Law Societies National Family Law Program, Kananaskis, Alberta, 10 – 13 July, 2006) [unpublished].

² See Nicholas Bala and Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Resolution Strategies & Legal Responses" (2004-2005) 23 Can. Fam.

mandatory parent education the number is higher. Some jurisdictions estimate it to be 10 percent.³

Surprisingly, the jurisprudence relating to these cases is not consistent across the country. Most of it relates to the issue of joint as opposed to sole custody. For the most part the appellate courts and some trial courts seem to favour sole custody to one parent. This article is based on the premise that this approach is counterproductive.

Starting with a presumption of joint custody where there is a potential for high conflict, particularly in making interim awards, helps to prevent cases from becoming high conflict. It also helps to ameliorate the environment in those cases that have already escalated to that status before going to court. Joint custody should also be awarded at trial unless there are special circumstances. To lessen conflict in custody cases, the *Divorce Act*⁴ should be amended to include a presumption of joint custody.

Judges also need to learn how to work in an interdisciplinary team approach to resolve these cases. Judges are legally trained and do not have the social science skills to deal independently with these cases. Lawyers need to recognise these cases early in proceedings and take steps to obtain early intervention both from the courts and from psychologists.

2. Case Law Relating to Custody

A survey of some of the more recent case law relating to joint custody and high conflict cases is instructive.

It would appear that the Supreme Court of Canada has not yet set down any rules on this issue. Back in the early 1990s, in *Young v. Young*,⁵

L.Q. 1 at 5-8; Ron Neff and Kat Cooper, "Parental Conflict Resolution: Six-, Twelve-, and Fifteen-Month Follow-Ups of a High Conflict Program" (2004) 42 Fam. Ct. Rev. 99 at 99; S. E. Finman *et al*, "Innovations in Family Court Dispute Resolution" (Paper presented at the Association of Family & Conciliation Courts Conference, Tampa, Florida, 31 May – 3 June, 2006) [unpublished].

³ See Rhonda Freeman, "Parenting After Divorce: Using Research to Inform Decision-Making About Children" (1998) 15:1 Can. J. Fam. L. 79; Michael E. Lamb, Kathleen J. Stenberg and Ross A. Thompson, "The Effects of Divorce and Custody Arrangements on Children's Behaviour, Development, and Adjustment" (1997) 35 F.C.C.R. 393; Brenda L. Bacon and Brad McKenzie, "Parent Education After Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes" (2004) 42 Fam. Ct. Rev. 85 at 86; Jo-Anne M. Stolz and Tara Ney, "Resistance to Visitation: Rethinking Parental and Child Alienation" (2002) 40 Fam. Ct. Rev. 220 at 220.

⁴ R.S.C. 1985, (2nd Supp.), c.3.

⁵ [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193 [*Young* cited to S.C.R.].

L'Heureux-Dubé J. made a number of *obiter* comments regarding joint custody.

She noted that:

[W]hile joint custody may remain an ideal solution in proper cases, particularly when parents are willing and able to cooperate, such premises are often based on illusion rather than reality and may, in the words of Thorson J.A., amount to “a triumph of optimism over prudence” [...]⁶

Relying on social science research, she observed:

[...] [C]ontinued contact may only be in the best interests of the child where parents are not adversarial and where interaction between the child and the access parent is not beset by conflict. Where conflict cannot be resolved or minimized, the detriment of continued contact may outweigh the benefit, as forced cooperation between hostile parents may lead to further litigation and conflict, which itself extends and increases the difficulties faced by children [...]⁷

The Alberta Court of Appeal has taken a hard line on this subject. In *Bachor v. Lehmann-Bachor*,⁸ the Court adopted the following reasoning of the British Columbia Court of Appeal decision in *Stewart v. Stewart*:⁹

[Joint custody] requires a willingness by both parents to work together to ensure the success of the arrangement. Such a willingness must be sincere and genuine; by its very nature it is not something that can be imposed by a court on two persons, one or both of whom may be unwilling or reluctant to accept it in all its implications.¹⁰

The Court in *Bachor* also referred to a trial court decision, *Hamilton v. Hamilton*,¹¹ which set out a number of indicia that must be present before a court should order joint custody:

[...] These indicia include an ability on the part of each parent to put aside personal differences to make co-operative decisions about their children. They include a

⁶ *Ibid.* at 48 citing *Kruger v. Kruger* (1979), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52 (Ont. C.A.) at 681 [*Kruger*].

⁷ *Young*, *supra* note 5 at 82.

⁸ 2001 ABCA 53, 242 W.A.C. 269, 14 R.F.L. (5th) 238 [*Bachor*].

⁹ (1994), 41 B.C.A.C. 213, 2 R.F.L. (4th) 53 (B.C.C.A.) [*Stewart*].

¹⁰ *Bachor*, *supra* note 8 at para. 24 citing *Stewart*, *ibid.* at para. 9 which cites *Kruger*, *supra* note 5 at 678.

¹¹ (1992), 43 R.F.L. (3d) 13 (Alta.Q.B.) [*Hamilton*].

demonstrated ability to co-operate and communicate openly and freely about the children's needs and situation. [...] ¹²

More recently in 2005 in *Richter v. Richter*¹³ the Court stated:

First, as a general proposition, joint custody and shared parenting arrangements ought not to be ordered where the parents are in substantial conflict with each other, and certainly not before trial especially when there is also significant disagreement on the evidence. The best interests of a child are not well served by imposing régimes which invite continued court applications on all matters, big and small. [...] ¹⁴

Second, as this Court has previous[ly] indicated, de facto child custody arrangements should not be lightly disturbed pending trial: *Roebuck v. Roebuck* (1983), 45 A.R. 180 at para. 19 (C.A.). A primary consideration is to ensure that there is some stability and certainty in a child's life. [...] ¹⁵

The idea of joint custody in high conflict situations has not fared much better in Ontario. The Court of Appeal in *Kaplanis v. Kaplanis*¹⁶ reversed an order for parallel parenting with increasing access to the father.

The Court explained:

As in any custody case, the sole issue before the trial judge was the best interests of the child. The fact that both parents acknowledged the other to be "fit" did not mean that it was in the best interests of the child for a joint custody order to be made. [...]

The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important. In this case there was no evidence of effective communication. The evidence was to the contrary.¹⁷

¹² *Ibid.* at para. 21.

¹³ 2005 ABCA 165, 20 R.F.L. (6th) 396 [*Richter*].

¹⁴ *Ibid.* at para. 11.

¹⁵ *Ibid.* at para. 12.

¹⁶ (2005), 249 D.L.R. (4th) 620, 10 R.F.L. (6th) 373 (Ont. C.A.) [*Kaplanis* cited to D.L.R.].

¹⁷ *Ibid.* at para. 10-11.

In 2006, in *Lawson v. Lawson*, the Ontario Court of Appeal reiterated its position that joint custody was not appropriate if the parents are unable to cooperate or communicate effectively.¹⁸

The British Columbia Court of Appeal took the same approach in *Stewart*¹⁹ and in *Ness v. Ness*.²⁰

The Manitoba Court of Appeal appears to take a different position, although it has not specifically provided guidance in any reported cases on the issue of joint custody. As far back as 1986 the Court indicated in *Abbott v. Taylor*²¹ that the mere unwillingness of one parent to share custody does not preclude an order of joint custody.

In 2005 in *Sawatsky v. Sherris*²² the Court stated:

In situations of very high conflict, courts have sometimes ordered joint custody using the “parallel parenting” model, which includes a provision for consultation with respect to major decisions, occasionally allowing either party to apply to the court on matters upon which they disagree. [...]²³

In Saskatchewan, there is an instructive case at the Court of Queen’s Bench level. In *Howard v. Howard*,²⁴ Wright J. noted:

By implication, joint custody requires parents to cooperate in making important decisions regarding their children, and an expectation that each will afford each other, and their opinions, mutual respect. For this reason, it is not common for such orders to be made where the parents are highly conflicted, do not communicate well, or refuse to cooperate. An alternative, and that suggested by the petitioner, is to impose along with a joint custody order a detailed parenting plan that clearly delineates the parties’ respective responsibilities and obligations. Parallel parenting embraces the concept, as pointed out by Wimmer J. in *Sagh v. Lambe*, 2005 SKQB 16, [2005] S.J. No. 27 at para. 26, “that where parents are equally to provide proper care, children should be able to have the love and attention of both on a regular and continuous basis. ...”

In certain other jurisdictions, parallel parenting regimes have met with a degree of disapproval. That has not been the case in this province where there are, as of yet, no

¹⁸ (2006), 81 O.R. (3d) 321, 29 R.F.L. (6th) 8 (Ont. C.A.) [*Lawson* cited to O.R.].

¹⁹ *Supra* note 9.

²⁰ 1999 BCCA 51, 43 R.F.L. (4th) 363.

²¹ (1986), 28 D.L.R. (4th) 125, 41 Man. R. (2d) 173, 2 R.F.L. (3d) 163 (Man. C.A.); see also *V.L. v. D.L.* 2001 ABCA 241, 206 D.L.R. (4th) 325 at para 69.

²² 2002 MBCA 143, 170 Man. R. (2d) 51, 32 R.F.L. (5th) 450 [*Sawatsky* cited to Man. R.].

²³ *Ibid.* at para. 6.

²⁴ 2006 SKQB 352, [2006] S.J. No. 493 (QL) [*Howard*].

appellate decisions providing guidance. In *C.G.H. v. D.M.H.*, supra, Ryan-Froslic J. endorsed the concept saying at para. 40:

[40] As Justice Aston pointed out in *T.J.M. v. P.G.M.*, [2002] O.T.C. Uned. 78; [2002] O.J. No. 398 (S.C.), joint custody can be an appropriate disposition even in cases where parents are openly hostile and uncooperative. The key is to set up a joint custody arrangement that involves “parallel parenting” versus “cooperative parenting.” Under such an arrangement both parents have equal status but exercise their rights and responsibilities associated with custody independently from one another.²⁵

There was a slight shift in 2006 in the Ontario Court Appeal position in *Ursic v. Ursic*.²⁶ In that case, there was a great deal of conflict and lack of communication between the parties but the child was not exposed to it. The Court of Appeal approved the lower court decision where the trial judge recognized the value of awarding joint custody under a parallel parenting plan in a situation where the parents have difficulty communicating or agreeing. The Court noted that when parallel parenting is ordered one parent would typically be given the final say if a conflict arises.

In *Lawson* the Court recognized that one parent cannot create problems with the other parent and then claim custody on the basis of a lack of cooperation.²⁷

The view that joint custody is not appropriate where there is conflict is misguided. There is a significant difference between joint custody and joint parenting. Joint parenting does require cooperation. Where there is conflict and a lack of cooperation, the proper approach is to use parallel parenting, rather than joint parenting, within a joint custody order.

Parallel parenting orders require the courts to make extremely detailed orders that fully set out the roles of the parties. There are, however, model orders that can be followed.²⁸

²⁵ *Ibid.* at para. 46-47.

²⁶ (2006), 32 R.F.L. (6th) 23 (Ont. C.A.).

²⁷ *Lawson*, supra note 18 at para. 15.

²⁸ Terry Pezzot-Pearce et al, *Critical Issues for Consideration when Developing Practical Parenting Plans For Families in Conflict: A Working Guide* (2007), online: Alberta Justice Family Law Information Centre <<http://www.albertacourts.ca/cs/familyjustice/parentingplanissuesguide.pdf>>.

Parallel parenting is a parenting model that affords a degree of safety for children.²⁹ The parenting plan helps to remove the children from the battle zone. Parenting is shared in a clearly defined and structured manner and responsibilities are clearly delineated. In parallel parenting, the language promotes change rather than conflict and allows the parents to parent independently without interference from the other parent. Some basics of a parallel parenting order are:

- The terms “primary residence” and “access” are avoided wherever possible in favour of the neutral term “parenting time.”
- Each parent assumes total responsibility for the children during the time they are in his or her care.
- There can be no expectation of flexibility or negotiation.
- The parent who does not have parenting time has no say or influence over the actions of the other parent while the children are in that parent’s care.
- Neither parent may plan activities for the children during the other parent’s time.
- Contact should be avoided or minimized; for example, a safe and neutral place should be chosen for exchange or a third party could facilitate the exchange.
- Children are not to deliver messages or written notes.
- A system of communication such as a parenting book, e-mail exchange or a specially designed parenting communication program must be used.
- The parenting arrangements must be extremely detailed including exchange time and mode, vacations, schooling, medical practitioners, and so on.³⁰

Research from the United States suggests that in high conflict relationships, parents who start out parenting in parallel are more likely to come to a more cooperative arrangement over time.

²⁹ See E. Mavis Hetherington and John Kelly, *For Better or Worse: Divorce Reconsidered* (New York: W.W. Norton & Company, 2002) at 139; see also Hanna McDonough and Christina Bartha, *Putting Children First: A Guide for Parents Breaking Up* (Toronto: University of Toronto Press, 1999) at 74.

³⁰ Carol Chandler, “Parallel Parenting Plans, Conducting the Business of Parenting in High Conflict Families” (Paper presented to the Collaborative Divorce Professionals Advanced Educational Conference, Winnipeg, Manitoba, 5 November, 2005) [unpublished].

The earlier cases suggesting that joint custody will not work without cooperation and is not in the best interests of a child are based on social science research which is out of date. Recent research shows that children do better after separation if they have a good relationship with both parents. This need for a relationship has to be balanced against the harm to children that comes from conflict between the parents. The opposite of having a meaningful relationship with a parent is having no or little true relationship. The opposite of conflict is no conflict. It is therefore in the best interest of children that everything possible be done to contain and reduce the conflict between the parents to allow meaningful parenting by both parents.³¹

Joint custody will often level the playing field and negate the impression that one of the parents is a winner and the other a loser. The parent who does not have custody is perceived to be a loser and will continue the conflict in order to become a winner. Joint custody is a state of neutrality where each party has something to lose - custody - if that party engages in bad behaviour.³² It helps to prevent conflict.

There are, admittedly, some cases where in the long run joint custody will not work. Joint custody should, however, be the norm presumed at the interim order stage and at trial.

There are times when a parent will behave inappropriately which will require the court on an interim or permanent basis to make a change to sole custody. Some examples are child abduction, defiance of court orders and serious alienation. Other examples are child abuse, significant ongoing spousal abuse and misogynist attitudes.

In addition if conflict continues and it appears, on proper evidence being put before the court, that the conflict is impacting a child, then sole custody may be appropriate³³ and terminating contact between a child and a parent may even be necessary. These cases, however, amount to less than .5 percent of cases and the cessation of contact should only be used in the very worst cases. In many of these cases one or both of the parents will have a personality disorder.

³¹ Joan B. Kelly and Michael E. Lamb, "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children" (2000) 38 F.C.C.R. 297; Edward Kruk, "Shared Parental Responsibility: A Harm Reduction-Based Approach to Divorce Law Reform" (2005) 43 Journal of Divorce and Remarriage 119, online: <<http://www.haworthpress.com/web/JDR>>.

³² Chandler, *supra* note 30.

³³ *Hildinger v. Carroll* (2004), 2 R.F.L. (6th) 331 (Ont. C.A.).

3. Divorce Act

The case law is purportedly based on the provisions of the *Divorce Act* relating to custody and access. The relevant provisions are as follows:

s.16(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child....

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other considerations of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.³⁴

These provisions of the *Divorce Act* have not been revised in some time. Even so, they clearly allow for joint custody and maximum contact with each parent. The “best interests of the child” provision has been used by the courts in high conflict cases to deny joint custody as an easy solution rather than dealing with the behaviour of the parties.

Several years ago, a bill was introduced in the Canadian Parliament to change the approach to parenting after separation. This bill died on the order paper and has not been reintroduced.³⁵

The Province of Alberta, however, enacted almost identical provisions to the proposed revisions to the *Divorce Act* in the revision of family law statutes which resulted in the *Family Law Act*.³⁶ The *Family Law Act* was deliberately drafted to track the proposed changes to the *Divorce Act* so the

³⁴ *Divorce Act*, *supra* note 4, s.16.

³⁵ Bill C-22, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence*, 2d Sess., 37th Parl., 2003.

³⁶ S.A. 2003, c. F-4.5.

law in Alberta would be consistent for the children of both married and unmarried parents.

This legislation provides details for assessing the best interests of a child:

18(1) In all proceedings under this Part, the court shall take into consideration only the best interests of the child.

(2) In determining what is in the best interests of a child, the court shall

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on

(A) the safety of the child and other family and household members,

(B) the child's general well-being,

(C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

(D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

- (A) to care for and meet the needs of the child, and
- (B) to communicate and co-operate on issues affecting the child,

- (ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,
- (x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and
- (xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.³⁷

The Act does away with the concepts of “custody” and “access,” using instead the terms “guardianship” and “parenting time.” It would have been better to retain the concept of “custody” and introduce a presumption of joint custody, because “joint custody” is a neutral term that connotes no winner or loser. Especially in high conflict cases, where one parent has more parenting time than the other, whatever the reason, it connotes a status that seems to be important to high conflict couples.

Eliminating the use of the word “custody” also causes some awkwardness in crafting orders. There are instances where one parent should not be making any decisions but may have some parenting time. The parents remain joint guardians by virtue of the legislation but in order to protect the children from unilateral removal, or to allow the parent with whom the child lives to give permission for medical treatment or counselling or to apply for a passport for the child, the phrase “sole parenting” has to be used to denote an intermediate status between guardianship and parenting time.

The use of the neutral term “parenting time” to describe the time a parent spends with a child, rather than “access” and the less commonly-used term “residential care,” is of great benefit in high conflict cases. Using the same terms for each parent's time with the child leaves the impression that there is no second class of parent who only gets access but does not parent.

While the detail in the Alberta Act giving guidance to determine “best interests” is welcome, it does cause a problem with high conflict parents. It gives them a ready-made list of areas over which to wage war. It also gives the impression that after weighing all the factors there will be a winner and a loser. Parents whose behaviour is normal usually figure out what is best for their children and themselves, and do not need a detailed list.

³⁷ *Ibid.* s. 18.

It would have been preferable if the Act had established a rebuttable presumption of joint custody and had adopted s.16(10) of the *Divorce Act* setting out the principle of maximum contact with each parent. The loss of the maximum contact principle is a retrograde step.

4. *How to Identify High Conflict Cases*

It is relatively easy to identify high conflict cases.³⁸ They have high rates of litigation. There is anger and distrust between the parties.

High conflict case litigants are very manipulative and do not comply with court orders. The affidavits that they file are frequently voluminous, scandalous, outrageous and vexatious. Each party tells a contrary story, and it is impossible in many instances to get at the truth even when they give *viva voce* evidence.

In some instances, parents are unable to let go of the spousal relationship and use parental issues to try to hold on to it. Sometimes one parent may use the parenting arrangement as a way of maintaining or exerting control or of exacting revenge. Frequent court applications and lengthy affidavits requiring responses may be used to punish and exhaust the other parent emotionally and financially. One or both of the parties may still be very emotionally engaged.

The children tend to be exposed to the conflict in terms of verbal statements made by the parents or legal documents which may be read to the children or provided for their review. Children may be asked to write letters to the court.

Extended family and friends are brought into the fray and expected to take sides.

If the conflict has continued for a period of time, it is not unusual to see children beginning to resist contact with one parent or refuse visitation entirely.³⁹ Allegations of abusive behaviour may be cited by one parent (verbal, emotional, physical and occasionally sexual); alienation may be alleged by the other parent. These allegations may or may not be true.

³⁸ Robin Deutsch, "High Conflict Couples: Who Are They and What do We Do About Them" (Paper presented at the National Judicial Institute, Kananaskis, Alberta, July 2006) [unpublished]; Carter, "High Conflict Parents," *supra* note 1.

³⁹ See Janet R. Johnston and Joan B. Kelly, "Rejoinder to Gardner's 'Commentary on Kelly & Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'''" (2004) 42 Fam. Ct. Rev. 622; Neff and Cooper, *supra* note 2 at 100; Stolz and Ney, *supra* note 3.

In the state of Florida, work has been done on a screening test for litigants to identify those parties that have the potential to involve high conflict.⁴⁰ It would be useful to adapt the test for computer so that all litigants could be screened at the commencement of proceedings and potential high conflict cases segregated. Early intensive intervention could be initiated.

At present it is difficult to identify these cases in advance. Often the conflict has become seriously escalated before the court becomes involved. Then it may take several court appearances before a file gets labelled “high conflict.” In some instances, legal counsel for the parties, or mental health professionals, become implicated in the conflict and make matters worse.

5. Approaches to High Conflict Cases

There a number of ways to deal with high conflict cases. They range from large group education to intensive “one-on-one” therapy.

a) Mandatory Education

The best solution for high conflict cases is to prevent them from developing in the first place. One of the most effective tools for prevention is parent education. Mandatory parent education clearly sets out appropriate behaviour for people who will no longer be spousal partners but will remain parenting partners. Research into parent education courses has shown that they are a very effective prevention tool.⁴¹ In high conflict files it is also necessary to require new significant others and grandparents to attend.

⁴⁰ See Alicia M. Homrich, Michelle Muezenmeyer Glover and Hon. Alice Blackwell White, “Program Profile: The Court Care Center for Divorcing Families” (2004) 42 Fam. Ct. Rev. 141 at 147.

⁴¹ See Jackie D. Sieppert *et al*, *An Evaluation of Alberta’s Parenting After Separation Seminars* (Edmonton, AB: Alberta Children’s Services, 1999); John H. Grych, “Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs” (2005) 43 Fam. Ct. Rev. 97 at 103; Jack Arbuthnot and Donald A. Gordon, “Does Mandatory Divorce Education for Parents Work? A Six-Month Outcome Evaluation” (1996) 34 F.C.C.R. 60; Kevin M. Kramer *et al*, “Effects of Skill-based Versus Information-based Divorce Education Programs on Domestic Violence and Parental Communication” (1998) 36 F.C.C.R. 9 at 9-10; Jack Arbuthnot, Kevin M. Kramer and Donald A. Gordon, “Patterns of Relitigation Following Divorce Education” (1997) 35 F.C.C.R. 269; Jeffrey T. Cookson *et al*, “Prospects for Expanded Parent Education Services for Divorcing Families with Children” (2002) 40 Fam. Ct. Rev. 190 at 191; Bacon and McKenzie, *supra* note 3 at 87; Laurie Kramer and Christine A. Washo, “Evaluation of a Court-Mandated Prevention Program for Divorcing Parents: The Children First Program” (1993) 42 Family Relations 179; Nancy

For around 5 to 10 percent of cases, further skills-based courses for those who did not get the message in parent education seminars are often effective.⁴² Many jurisdictions in the United States and Canada offer such courses.⁴³ There is still, however, a small group of litigants who are unable or unwilling to absorb and act upon the information imparted in education sessions. These people require a more intensive, integrated intervention.

b) Early Intervention

The sooner high conflict cases are identified, the better. They need to be segregated and treated differently from normal cases. The behaviour of the parties is abnormal and it needs to be openly characterized as such. Members of the legal profession have a responsibility to give special attention to these cases, to seek the help of experienced psychologists to try to modify their clients' behaviour and also to alert the court that the file is a high conflict one. Lawyers have a special responsibility to the children in these cases and should not blindly follow their clients' instructions.

c) Joint Custody as a Tool

Custody can be used as a tool to modify parents' behaviour. If the court starts with joint custody and one parent continues to behave badly, then the taking away of joint custody until that parent modifies his or her behaviour can be effective. Critics who say that custody should be based on the best interests of the child and should not be used for behaviour modification need to remember that reducing conflict is always in the best interests of a child.

Courts of appeal should be loath to interfere with interim orders of a judge in these cases. Allowing appeals at the interim stage often plays into

Thoennes and Jessica Pearson, "Parent Education in the Domestic Relations Court: A Multi-site Assessment" (1999) 37 F.C.C.R. 195; Pei Feng and Mark A. Fine, "Evaluation of a Research-Based Parenting Education Program for Divorcing Parents: The Focus on Kids Program" (2000) 34 Journal of Divorce and Remarriage 1; Glenn Stone, Katherine Clark and Patrick C. McKenry, "Qualitative Evaluation of a Parent Education Program for Divorcing Parents" (2000) 34 Journal of Divorce and Remarriage 25; Michelle L. Toews and Patrick C. McKenry, "Court-Related Predictors of Parental Cooperation and Conflict After Divorce" (2001) 35 Journal of Divorce and Remarriage 57; Joan Hunt and Ceridwen Roberts, "Intervening in Litigated Contact: Ideas From Other Jurisdictions" Family Policy Briefing 4 (2005), online: Department of Social Policy and Social Work University of Oxford <<http://www.apsoc.ox.ac.uk/Docs/fpb4-ref6.pdf>>.

⁴² See Grych, *ibid* at 105, noting that one or two sessions are likely to be inadequate for 10 - 15% of couples, who exhibit continuously high levels of conflict.

⁴³ Manitoba, Saskatchewan and Alberta offer courses in Canada.

the hands of a parent who is most at fault in the conflict and takes away a valuable tool from a chambers judge.

d) Interdisciplinary Collaboration

The current best practice in high conflict family law cases is an interdisciplinary or team approach.⁴⁴ This method goes counter to the traditional adversarial system where professionals are called as witnesses for one side or the other. The psychologist is not the witness of either party but has a role assisting the judge. The psychologist sees the parties outside of the courtroom setting and has the skills to administer psychological tests and undertake counselling which a judge cannot do. Because the psychologist sees the parties outside of the court room where often they are on their best behaviour, psychologists see them acting closer to their normal behaviour and it often becomes apparent what the problems are and which parent is causing the most problems. In high conflict cases the psychologist has been a missing member of the team.

There are a number of ways of approaching a high conflict case in an interdisciplinary way:

i) Screening

If a lawyer or judge has no idea what is going on except for the fact there seems to be significant conflict between the parties, a psychologist or social worker can be asked to have a look at a case in order to identify the problem and recommend what therapeutically might be the best way to approach the case. Recommendations can run from urging that the matter proceed expeditiously to trial, to suggesting counselling, to indicating that a bilateral custody assessment is necessary. It is a diagnostic tool.⁴⁵

ii) Brief or short-term intervention

The second approach takes the form of a short-term intervention. It is extremely helpful for single-issue problems. The best use of it is for children who are resistant to access. The psychologist can ascertain the

⁴⁴ See Rachel Birnbaum and Dena Moyal, "How Social Workers and Lawyers Collaborate to Promote Resolution in the Interests of Children: The Interface between Law in Theory and Law in Action" (2003) 21 Can. Fam. L.Q. 379 at 391; Chandler, *supra* note 21; Stephen Carter, Bonnie Haave and Shirley Vandersteen, "Family Restructuring Therapy for High Conflict Families & Estranged Children" (Paper presented at the Association of Family & Conciliation Courts Conference, Tampa, Florida, May 31-June 3, 2006) [unpublished]; Chandler and Stewin, *supra* note 1.

⁴⁵ Programs are in place in Florida, Connecticut and Australia that involve an initial screening and then referral to the appropriate service.

nature of the problem between the child and the shunned parent, and determine if alienation is occurring. It can also be used to ascertain a child's true preference with respect to where the child wishes to live.

If the psychologist is not able to resolve the matter so that it comes back to court as a consent order, a letter is sent to the judge indicating the facts as ascertained by the psychologist and what the problem is. Typically no recommendation is made because a thorough assessment was not carried out but the sorting out of the facts and a better understanding of the issue substantially aids the judge in making a decision.

iii) Longer-term intervention or post-separation intervention

This process is more complex and takes more time. It is used where there are multiple issues and the parties are seriously conflicted. It involves the restructuring of the relationship between the parties.⁴⁶ The parties attend pursuant to a court order. They are not allowed to return to court until the psychologist indicates that the process has broken down or there are issues the judge needs to decide. From time to time progress reports are made available to the judge.

This type of intervention is not an assessment but a restructuring of how people interact with each other. It is non-adversarial and therapeutic. It teaches people the harm they are doing to their children and how to put their children's needs before their differences with the other parent.

Not all psychologists are trained or experienced enough to do this type of work. Often it takes two or more psychologists working as a team, and is extremely intensive.⁴⁷

Another way of dealing with these cases is a method not much used in Canada but which has some similarities with restructuring. It involves using a parenting coordinator to guide the parents through step by step decision making. The coordinator is easily accessible and helps the parents avoid continual court appearances. In some jurisdictions in the United States this figure also has some minimal decision-making authority.⁴⁸

⁴⁶ Chandler and Stewin, *supra* note 1; Carter *et al*, *supra* note 44.

⁴⁷ Deutsch, *supra* note 38; Janet Johnston (Paper presented at the 4th World Congress on Family Law and Children's Rights, Capetown, South Africa, March 2005) [unpublished]; Carter *et al*, *supra* note 44.

⁴⁸ Joanne Paetsch *et al*, *High Conflict Intervention Programs in Alberta: A Review and Recommendations* (Calgary: Canadian Research Institute for Law and the Family, 2007) at 30.

Slightly different approaches are needed depending on whether the file is pre- or post-trial. With pre-trial files, a decision needs to be made whether to send the parties to screening, to counselling with a qualified psychologist or to an assessment, or instead to push the matter quickly to trial. If the parties are amenable to resolution the decision is easy. If the parties are deeply entrenched in their battle it is better to arrange a quick trial date. On occasion, a trial will settle a file down. If counsel are unsure of what to do, sending the parties to a psychologist or social worker to determine whether there is any hope of therapy resolving the matter is a good option. It is important for the lawyers or a judge to state clearly to the psychologist that advice as to the problem between the parties and a recommendation on potential of therapy is needed.

Post-trial the only feasible option is therapy. If the parenting relationship does not settle down after a trial, then the file can be considered to be chronic. There is not much a judge can do except to hear numerous applications for enforcement or for changes to the trial order. These people need intensive therapy. They also need to get out of the court system.

iv) Assessments

The fourth example is a court-ordered assessment. Assessment is a generic term that covers a considerable range of services offered by mental health professionals. An assessment can be limited to assessing a child's needs or just the child's school needs. It can be limited to a parent's parenting ability. It can cover a mental health assessment of one of the parties. The type of assessment most often used is that referred to as a bilateral custody assessment.⁴⁹

Judges often order bilateral custody assessments when faced with a problematic case. Unless the government has available a program that pays for assessments, they tend to be very expensive for the parties.⁵⁰ Assessments can also be very adversarial. Each party tries to look his or her best which frequently involves making negative comments about the other party's parenting skills. At the end of the process, the problem is

⁴⁹ Carol Chandler, "Examination of High Conflict Divorce Custody Assessments" (Paper presented at the National Judicial Institute, Kananaskis, Alberta, July 2006) [unpublished].

⁵⁰ See Nicholas Bala, "Assessments for Postseparation Parenting Disputes in Canada" (2004) 42 Fam. Ct. Rev. 485 at 504 [Bala, "Assessments for Postseparation Parenting"]; Nicholas Bala, "Assessments and the Law of Expert Evidence in Custody, Access & Child Welfare Cases" (Paper presented at the LESA Children's Lawyers Training Program, Edmonton, Alberta, 2005) [unpublished].

identified in the report and usually there is a recommendation. At that point, a considerable amount of money and resources have been expended without any true resolution being achieved.

Once ordered, bilateral custody assessments often do not get done in a timely fashion if the parties have to pay for them, as one or both of the parties may have trouble finding the money to pay the assessor. As they take a long time to complete, some parties use them to delay the process and ingrain a *status quo*.⁵¹ If one party does not like the recommendations emerging from the assessment, that party frequently asks to have a second assessment.

For these reasons, full bilateral custody assessments are rarely desirable and should be ordered sparingly for only the very worst of cases.

If it is necessary to order an assessment, the psychologist or social worker should be able to directly approach the judge who ordered the assessment if there are any difficulties in completing the report. When the report is finished, it should be forwarded to the judge. Counsel should receive a copy of the report, but they should not be allowed to make a copy of it for their clients. Clients should generally be allowed to read the report only in the lawyer's office, or at the court house, in the case of self-represented litigants. High conflict families are prone to bring their children into the battle. One of the most common strategies is to leave the assessment report in places where children can see it; this can be prevented if parties do not have a copy they can take home.

v) Special programs pertaining to allegations of sexual abuse

The fifth example involves cases where there are allegations of sexual abuse of the children by one of the parents or a new partner. Several jurisdictions have effective programs. The most extensive one is found in Australia.⁵² This type of program can be modified to fit the needs of individual jurisdictions. The one in Edmonton has a senior social worker employed by Alberta Children's Services who must be informed before a party raises such an allegation in family-related court proceedings. A thorough investigation is conducted by the social worker and the police. Any interviewing of the child is conducted by a trained interviewer and is videotaped. The file is immediately put under case management and a report is sent to the case management judge within four to six weeks. The

⁵¹ Bala, "Assessments for Postseparation Parenting," *ibid*.

⁵² See Thea Brown, "Magellan's Discoveries: An Evaluation of a Program for Managing Family Court Parenting Disputes Involving Child Abuse Allegations" (2002) 40 *Fam. Ct. Rev.* 320.

social worker is not the witness of either party, but is there as a friend of the court and is part of a team approach. The social worker may require the parties to enter into support agreements with child welfare and can arrange for counselling. The procedure is highly effective in that it allows for early intervention and resolution of a case.

vi) Cost effectiveness of an interdisciplinary approach

It is frequently suggested that the parties cannot afford an interdisciplinary type of intervention. In comparison to the cost of court proceedings, however, it is inexpensive and, with the exception of bilateral custody assessments, much more productive than other approaches. It is also important to direct people away from the court or there is a serious risk that parties involved in high conflict cases will become litigation junkies, or they will become letter writers to all and sundry including chief justices, the media, elected representatives and ministers of justice.

6. Management of High Conflict Cases

It takes an interdisciplinary team to manage a high conflict custody case effectively. The expertise of an experienced psychologist is invaluable. The psychologist works with the parties to try to modify behaviour and give the parties insight into their behaviours. The main objective is to have the parties become child-centered in their approach rather than taking an adversarial position. The lawyers need to assist their clients positively in making a change in their approaches and not automatically side with every action of their clients. The message must be consistent with the psychologist's message. The judge needs to take a firm directive role. Psychologists who engage in this therapy feel that it is essential for judges to back up the psychologist and not allow the parties to constantly run back to court while therapy is taking place.⁵³ If a party thinks that a judge is weak then that party controls the case, not the court.

It is absolutely essential that high conflict files be case-managed by one judge. Once a case is identified as a high conflict case, a judge should be assigned to hear all applications and to direct the case until it is ready for trial.⁵⁴ All applications should be brought before the assigned judge.

If one judge hears all the applications in an action, then there is some chance that judge will be able to figure out what is happening; otherwise, the parties use the change of judges to wreak havoc. The affidavits

⁵³ Stephen Carter, Carol Chandler and Bonnie Haave have all expressed this opinion.

⁵⁴ See Lamb *et al*, *supra* note 3 at 41-42.

presented are often diametrically opposed, but having one judge means there is continuity and some chance for enforcement of orders. Frequently, parties will modify their behaviour somewhat just because one judge is in charge.

High conflict litigants need structured, detailed orders,⁵⁵ or they will use the lack of detail to flout the intention of the court and to continue the battle. The family system needs containing and the only way it can be achieved is by the judge engaging in micro-management. Many judges say it is not their job to micro-manage, but if they do not, the parties will continue to plague the judge with enforcement applications. It becomes a game to thwart the judge's order.

Some judges throw up their hands and take the easy way out by cutting one parent out of the children's lives. In fact, in some jurisdictions, if there is conflict, the courts cut off contact to the non-residential parent to protect the children from the conflict.⁵⁶ This approach is very short-sighted. It denies the children the love of both parents and often rewards bad behaviour by the residential parent. It also spawns fathers' and parents' rights groups.

There must be immediate sanctions for bad behaviour and it must happen the first time there is a breach of the order, or high conflict litigants will believe that they have a licence to thwart the order.⁵⁷

In cases where it has been necessary to conduct a custody assessment and a detailed parenting plan has been imposed, it is important that the sanctions for non-compliance be identified in the plan, or the risk of non-compliance is high.

It is also necessary to avoid all contact between the parties except when they are at counselling. Any communication should be through an access book or by e-mail so a record is available.⁵⁸ There are several computer programs available in the United States that allow the parties to communicate like regular e-mail but a case management judge or a non-

⁵⁵ See Matthew J. Sullivan and Joan B. Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001) 39 Fam. Ct. Rev. 299 at 301; see Lamb, *ibid.*

⁵⁶ This approach appears to be the prevailing one in the United Kingdom. It is not so much the case in Canada, but see comments of L'Heureux-Dubé, J. in *Young, supra*, note 5 at para. 107.

⁵⁷ See Lamb *et al, supra* note 3 at 27-29

⁵⁸ Chandler and Stewin, *supra* note 1; Carter *et al, supra* note 44.

judicial family manager such as a psychologist can also access the communication.⁵⁹

Exchanges of the children should be done by a third party and, where that is not possible, at a neutral place. Some jurisdictions have access exchange centres for this purpose.⁶⁰

A regime of parallel parenting should be set up.⁶¹ Each party should have their own parenting time. In fact, an order for joint custody with each party taking responsibility for some aspect of the children's life, such as health or education, has a tendency to relieve conflict. Initially the parties should not expect there will be any flexibility in the order.

The words "primary residence" and "access" should be avoided. Instead, the use of the term "parenting time" for both parents, even if their time is not equal, has a calming effect.⁶²

It is often a good idea to let an order work for a while. Going to court sometimes becomes part of the life of one parent. These people need to be slowly weaned from making court applications for every minor thing. It helps to forbid those who abuse the system from bringing applications for long periods of time except for serious enforcement applications. This withdrawal process can be assisted by setting up yearly reviews.

7. Tools for Enforcement

The courts have many tools to enforce orders. The first time that an order is not obeyed and needs enforcing it is important for there to be immediate sanctions. An admonition with high conflict parties is not sufficient. The offending party often feels vindicated if nothing happens and thereafter feels he or she can do as he or she pleases. The non-offending party views the court as not being effective and starts to feel that there is no reason to obey orders.

⁵⁹ One example of this type of program is on the Website <<http://www.ourfamilywizard.com>>.

⁶⁰ Australia has exceptionally good access exchange centres that meet a national standard.

⁶¹ See Hon. Evelyn Frazee, "Sensitizing Parent Education Programs to Domestic Violence Concerns: The Perspective of the New York State Parent Education Advisory Board" (2005) 43 Fam. Ct. Rev. 124 at 131.

⁶² See Brenda Cossman and Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 Can. J. Fam. L. 13.

a) Reducing or Increasing Parenting Time

This method is quite effective. If a party disobeying the order sees that every time the order is disobeyed the other party gets more regular time with the children, the offending parent soon realizes the judge is serious and most will modify their behaviour for fear of completely losing the children. It is a good idea to ask the offending parent to deliver the children to the other parent unless it is necessary to have the parties meet at a neutral place.

b) Making up Time for Lost Access

It is essential to make up lost access time when the loss of time is the result of behaviour of the other parent. Make-up time should be more than the time lost, with one or two days added for each day lost.

c) Changing Primary Residential Care

Change of primary residential care is more draconian. It requires that the parent asking for the change have enough parenting skills to look after the children on a day-to-day basis and have a plan for childcare. However, it is very effective even if only done for a short period of time. It can also be done in conjunction with taking custody away from an offending parent.

d) Ordering Costs and Security for Costs

A request should always be made for costs against an offending parent. Where a party is constantly bringing applications that are harassing or unwarranted, a request should be made to have the party post security for costs before bringing another application. It is also possible to require that unpaid costs be paid before another application is brought.

Costs can be used as a creative enforcement tool. For example, they can be awarded against an offending party, but the payment stayed as long as that party complies with the court order.

e) Jail

Having the power to jail a person is a very useful and powerful tool of the court, but it has to be used sparingly in the most glaring of cases usually involving blatant alienation where there are flagrant breaches of court orders. It can do more harm than good as the children may become even more alienated. It is essential that the children receive counselling if one of

the parties is jailed. However, judges should not be reluctant to jail a person who is in contempt in the worst of cases if nothing else is effective.

f) Child Welfare Intervention

In extremely high conflict cases, sometimes the only appropriate thing to do, as a last resort, is to remove the children from both parents. In these cases, the parents should try to agree on a neutral third party with whom the children can live. In some cases, child welfare or children's services may need to be approached to apprehend the children.⁶³

g) Appointing Counsel for the Children

It is important to consider having counsel for the children. This may be helpful in improving the environment if counsel are experienced and have the ability to avoid taking sides. Counsel may also assist the court by revealing how the situation appears to the children.

If the parties cannot afford counsel, legal aid systems will in some instances appoint counsel for the children. In some jurisdictions such as Ontario there is a child counsel program. It is a fairly expensive program to operate, so all jurisdictions cannot afford to provide one notwithstanding how important it is to have children represented. The most extensive child counsel program is found in New Zealand.

The Alberta Court of Appeal has discussed the criteria for appointing counsel and the manner in which it should or should not be done.⁶⁴ There is significant jurisprudence on the appointment of counsel for children from the High Court of Australia.⁶⁵

8. Conclusion

In summary, new integrated approaches need to be taken in high conflict cases. Family law legislation across the country should be amended to include a presumption of joint custody. The use of the phrase "parenting time" should be adopted rather than "residential care" and "access."

Courts need to change their attitudes and level the playing field in high conflict cases by awarding joint custody initially and at trial. Only if

⁶³ *B. (S.L.) v. A. (G.)*, 2004 ABCA 366, 9 R.F.L. (6th) 35 (Alta. C.A.).

⁶⁴ *Puszczak v. Puszczak* 2005 ABCA 426, 262 D.L.R. (4th) 303, 56 Alta. L.R. (4th) 225, 22 R.F.L. (6th) 147.

⁶⁵ *In the Marriage of K and B* (1994) 118 F.L.R. 414 (Fam Ct. of Aust. F.C.); *B. v. R* (1995) 127 F.L.R. 438 (Fam Ct. of Aust. F.C.).

matters do not improve after a trial and some form of intervention, and if the children are at risk, should sole custody be considered. Courts of appeal should allow case management judges to manage cases without interference. Interference at the pre-trial stage increases the intensity of the conflict.

The courts need to engage the assistance of other specialized professionals to work with conflicted parents. Mental health professionals have the proper skills to assist these people. Courts only see these people a snapshot at a time and often cannot ascertain the pathology of the conflict. Judges also need education about the dynamics of high conflict cases.

Family law lawyers need education in this area as well and should put the needs of the children who are subject to the conflict above their client's adversarial tendencies.

It is only by using a multi-disciplinary approach with all of the professionals working together that the best interests of children can be protected.