

Is Non-Adversarial Dispute Resolution a Better Option in High Conflict Custody Cases Where There is a Parental Personality Disorder?

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Introduction

In Canada, the principle on which parenting disputes are resolved is that of the “best interests of the child”.¹ However, it has been suggested that the area of law that resolves parenting disputes is “devoid of the attributes of consistency, reliability and predictability” and that in no other area of law do judges “possess so unfettered and broad a discretion for decision making.”² The human beings involved in this process, and their behavior, can be described in the following passage:³

Man is, in the most fundamental sense of the word, irrational, and no amount of reasoning, no matter how sophisticated, will produce a complete and consistent account of human behaviors, customs or institutions.

It is within this framework that we must examine whether non-adversarial dispute resolution is a better option in high conflict custody cases where there is a parental personality disorder. Extensive research has shown that parental conflict following separation and divorce has significant long term adverse consequences for the emotional and psychological development of children, and negatively affects many areas of their functioning.⁴ Research has also shown that this parental conflict can spill over into other family processes, including increased parent-child conflict, increased conflict in the child’s interaction with others, increased risk that the child will develop antisocial behavior and a

¹ See *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, 108 D.L.R. (4th) 287; *Young v. Young*, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117

² Jeffery Wilson, *The Law’s Treatment of Youth and Children*, (LexisNexis Canada Inc. 2011) at 72

³ Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION*, (Jossey-Bass Inc. 1994) at 348

⁴ Karen J. Kaczynski et al, *Marital Conflict, Maternal and Paternal Parenting, and Child Adjustment: A Test of Mediation and Moderation*, (2006) 20:2 *Journal of Family Psychology* 199; Kay Bradford et al, *When There is Conflict: Interparental Conflict, Parent-Child Conflict, and Youth Problem Behaviors*, (2008) 29:6 *Journal of Family Issues* 780

decrease in a parent's ability to respond to a child's emotional needs.⁵ It is also an important issue because it has been found that a high percentage of individuals who engage in "protracted adversarial processes", and take up an inordinate amount of time for family law lawyers and the judicial system, show a high percentage of personality disorders.⁶

High Conflict

High conflict, in the family law context, has been described as occurring where:⁷

- There are intractable legal disputes;
- There is ongoing disagreement over day-to-day parenting practices;
- There is expressed hostility, verbal abuse, physical threats, and intermittent violence;
- There are difficulties with communicating about the children; and/or
- There is alienation of the child by one parent.

It has also been observed that high conflict couples are often identified by their failure to make use of mediation processes that rely on rational decision making.⁸

While beyond the scope of this paper, it is important to note that there are stark differences between high conflict relationships and abusive relationships. Very simply, a high conflict relationship is indicated where there is a likelihood of a personality disorder, partners have unresolved feelings about their failed relationship, mistrust of the other parent based on a distorted and negative view of the other, cycles of reaction and counter-reaction and

⁵ *Ibid*

⁶ Rhoda Feinberg and James Tom Greene, *THE INTRACTABLE CLIENT: Guidelines for Working With Personality Disorders in Family Law*, (1997) 35:3 FAMILY AND CONCILIATION COURTS REVIEW 251 at 352

⁷ Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, (1992) 33 E.C.C.R. 415 at 420; Rachel Birnbaum and Nicholas Bala, *TOWARD THE DIFFERENTIATION OF HIGH-CONFLICT FAMILIES: AN ANALYSIS OF SOCIAL SCIENCE RESEARCH AND CANADIAN CASE LAW*, (2010) 48: 3 FAMILY COURT REVIEW 403 at 404

⁸ Janet R. Johnston, *High-Conflict Divorce*, (1994) 4:1 CHILDREN AND DIVORCE 165 at 176

pressure on the children to take sides.⁹ An abusive relationship is indicated where a partner exhibits attitudes and behaviors designed to exert inappropriate control, one partner displays symptoms of physical and/or emotional injury, the abusive partner's unresolved feelings in regard to his/her partner's desire to separate, mistrust of the abusive partner by the other, repeated instances of manipulation and control, and children being fearful of exposure to the abusive partner's dangerous, neglectful or inappropriate behavior.¹⁰

Children, who are directly exposed to parental conflict, especially if placed in the middle of that conflict, are vulnerable to short and long term emotional difficulties.¹¹ The actions of an abusive parent have been shown to have particularly significant short and long term adverse consequences for the children, and for the abused parent's capacity to parent.¹²

It is important to differentiate between cases where one parent is the primary instigator for the conflict, and those where both parents are responsible.¹³ The parent who is prepared to attempt to destroy the other by false and damaging allegations made in the context of a custody dispute can foreclose any serious future collaboration.¹⁴ There is also a need to differentiate between conflict that is driven by a genuine desire by one or both parents to have a regular and significant post separation parent-child relationship and conflict that is

⁹ Clare Dalton, Judge Susan Carbon, and Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, (2003) Fall Juvenile and Family Court Journal 11 at 24

¹⁰ *Ibid*

¹¹ Lyn R. Greenberg et al, *Effective Intervention With High-Conflict Families*, (2003) JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS 49 at 50

¹² *Supra* note 8 at 17 - 20

¹³ Rachel Birnbaum and Nicholas Bala, *TOWARD THE DIFFERENTIATION OF HIGH-CONFLICT FAMILIES: AN ANALYSIS OF SOCIAL SCIENCE RESEARCH*, (2010) 48:3 FAMILY COURT REVIEW 403 at 403

¹⁴ Michael Friedman, *The So-Called High-Conflict Couple: A Closer Look*, (2004) 32 The American Journal of Family Therapy 101 at 105

characterized by physical and controlling strategies, because they can lead to very different parenting arrangements.¹⁵

The age and the range of experience of the parent add another dimension when a young parent is involved. Current studies show that brain structures and processes change throughout adolescence and continue to develop well into adulthood.¹⁶ It has been noted that:¹⁷

Behavior in adolescence, and across the lifespan, is a function of multiple interactive influences including experience, parenting, socio-economic status, individual agency and self-efficacy, nutrition, culture, psychological well-being, the physical and built environments, and social relationships and interactions. When it comes to behavior, the relationships among these variables are complex, and they change over time and with development.

It is important to note that the brain is in a process of continuous development through the lifespan, and it has been said:¹⁸

A smart society would engage young people progressively in adult processes as they demonstrate their readiness. Our society does this a little but mostly we exclude young people until a certain arbitrary age is reached and then bestow the right to participate – mostly without guidance and support. It should be no surprise that it does not work too well. We respond to this failure usually by increasing the age at which responsibility will be granted.

When negotiation and mediation are ineffective in resolving custody issues in high conflict cases, courts then often rely on the expert evidence of mental health professionals, because they are generally believed to be impartial experts.¹⁹ Although these evaluations very often form the basis of a final order or negotiated agreement, it has been observed that they often bring little long term relief for those high conflict couples who harbour great

¹⁵ *Supra* note 13 at 406; *Ibid* at 105

¹⁶ Sara B. Johnson et al, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, (2009) 45 *Journal of Adolescent Health* 216 at 217 - 218

¹⁷ *Ibid* at 219

¹⁸ Howard Sercombe and Tomas Paus, *The 'Teen Brain' Research: An Introduction and Implication for Practitioners*, (2009)103 *Youth & Policy* 25 at 35

¹⁹ *Supra* note 8 at 176

distrust and hostility and have difficulty cooperating on a daily basis.²⁰ Personality disorders, and accompanying cognitive distortions, in one or both spouses, may exacerbate conflict after separation.²¹

Personality Disorders

A personality disorder is defined as:²²

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

A personality disorder is not considered a major psychopathology or as a mental illness, but as psychologically unhealthy.²³ Major mental illness are categorized as either a thought disorder or a major affective disorder, and result in severe dysfunction in interpersonal relations, work, education, and self-care.²⁴

Individuals with a thought disorder have a severely distorted perception of reality, their thinking is disorganized, and their interpretations and inferences about other people are exaggerated and distorted.²⁵ Individuals with an affective disorder exhibit a more distorted emotion and activity level, rather than in thinking, and may be extremely depressed or manic, or may shift in a depressed and manic cycle.²⁶ Severe mental illness is often better

²⁰ *Ibid* at 176

²¹ *Supra* note 13 at 406

²² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed (Washington, DC, American Psychiatric Association, 2000) at 685

²³ Rhoda Feinberg & James Tom Greene, *THE INTRACTABLE CLIENT: Guidelines for Working With Personality Disorders in Family Law*, (1997) 35:3 FAMILY AND CONCILIATION COURTS REVIEW 351 at 352

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *Ibid* at 353

treated by a psychiatrist, who may prescribe medication to achieve emotional and behavior stabilization.²⁷

An adjustment reaction is a temporary, distorted, and exaggerated psychological response to severe stress, as may occur with a separation, and generally resolves itself as the court case proceeds.²⁸ Individuals with a personality disorder usually “dig in” and maintain their rigid attitudes and perceptions throughout the legal process.²⁹

In assessing whether non-adversarial dispute resolution is a better option in high conflict custody cases, where there is a parental personality disorder, it is important to know some of the features of each, be able to recognize the major types of personality disorders and know how, when and if possible, to work with them (see Appendix A for an edited and condensed description of relevant personality disorders).³⁰

Personality disorders are grouped into three clusters, which are based on descriptive similarities, and those individuals within each cluster can be generally described as either conflict avoiders or conflict engagers.³¹ Cluster A includes the paranoid, schizoid, and schizotypal personality disorders, and these individuals, who often appear odd or eccentric, avoid conflict.³² Cluster B includes the antisocial, borderline, histrionic and narcissistic personality disorders, and these individuals, who often appear dramatic, emotional, or erratic, engage in conflict.³³ Cluster C includes the avoidant, dependent and

²⁷ *Ibid*

²⁸ *Ibid* at 354

²⁹ *Ibid* at 355

³⁰ *Ibid* at 356 - 364; See also *Supra* note 21 at 685 - 729 and *Infra* note 31

³¹ William Eddy, *High Conflict People in Legal Disputes*, (HCI Press, 2006) at 29-31

³² *Ibid*

³³ *Ibid*

obsessive-compulsive personality disorders, and these individuals, who often appear anxious or fearful, also avoid conflict.³⁴

While not the subject of this paper, it is important to note that research has indicated that there is a correlation between certain parental personality disorders (histrionic, antisocial, borderline, paranoid tied with avoidant) and child behavioral problems, and that early intervention may be a way of dealing with this problem.³⁵ High conflict custody disputes often occur where one or both parents exhibit a significant personality disorder, and this is particularly so in parents with a chronic and severe borderline, narcissistic, or antisocial personality disorder.³⁶ For example, the stress of separation exacerbates the features of a borderline personality disorder and they are unable to distinguish their feelings and needs as being separate from those of their children.³⁷ Those with a borderline psychopathology tend to either idealize or scorn and condemn others.³⁸ It has been said that the former partners of those with a narcissistic psychopathology can do little to avoid a conflict, other than agree, and that they have a difficult time working out a cooperative arrangement.³⁹ Further, “the narcissistically disturbed parent is capable of essentially unilaterally creating and maintaining post-divorce conflict.”⁴⁰

Enablers

It has been observed that individuals with high-conflict personalities don't get very far unless they can persuade others to adopt their cognitive distortions and assist in their

³⁴ *Ibid*

³⁵ *Supra* note 9 at 272, 279

³⁶ Joan B. Kelly, *Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes*, (2003) 9:1 *Journal of Family Studies* 37 at 43

³⁷ *Ibid* at 43 - 44

³⁸ *Supra* note 14 at 110

³⁹ *Ibid* at 114

⁴⁰ *Ibid*

interpersonal battles, because most, on their own, lack credibility.⁴¹ Enablers (referred to by Bill Eddy as “negative advocates”), often inadvertently advocate for the cognitive distortions and negative behavior of high conflict personalities.⁴² Enablers, who can be family members, friends, mental health professionals and legal professionals, try to help, but “get it backwards” because they adopt or agree with the high-conflict person’s backward thinking.⁴³ Bill Eddy says that when an enabler supports the cognitive distortion of a high-conflict person, the enabled person “becomes more confident and aggressive, which increases the likelihood of becoming involved in the legal system.”⁴⁴

Unlike most parents going through the divorce process, who are careful to protect children from adult disputes, the high-conflict personality often seeks to recruit the children into the dispute (also described as a “special indicator” of a high conflict personality).⁴⁵ Lawyers can escalate the conflict by zealously advocating a client’s cognitive distortions when they conduct no critical examination of the truth of what their client has said.⁴⁶ When the court gets it “backward” by adopting the high-conflict person’s cognitive distortion, the victory encourages that person to have confidence in his\her now-validated (but distorted) thinking, and the aggressive energy increases.⁴⁷

The court’s often heard admonition to overly aggressive parties, to “stop fighting”, often misses the point that the underlying problem is of a high-conflict personality attacking an innocent target.⁴⁸ Eddy concludes his discussion of enablers with the following point:⁴⁹

⁴¹ *Supra* note 31 at 149

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid* at 153

⁴⁵ *Ibid* at 155

⁴⁶ *Ibid* at 159-160

⁴⁷ *Ibid* at 161

⁴⁸ *Ibid*

⁴⁹ *Ibid* at 166

Since the [high- conflict personality's] impaired behavior and perceptions may be obvious to others, they seek negative advocates to replace the ordinary doubts of others with the negative advocate's higher credibility. Negative advocates excuse the [high-conflict personality's] negative behaviors and advocate for (enable) their minor, absurd or non-existent claims in court. As one negative advocate persuades another, the conflict escalates. This encourages the negative thinking and negative behavior of the [high-conflict personality], and often inspires the target to become much more active in the case.

Pathways to Resolution

Some time ago it was recognized that:⁵⁰

The most benign and least expensive interventions are divorce education programs, which should be mandated for parents with child-related conflicts, and provided early in the process, as a first step before adversarial processes are initiated. Research-based divorce education programs are most likely to be effective. Particularly successful are those that communicate those factors or parental behaviors that increase children's risk of adjustment problems, describe protective factors that promote resiliency following divorce, and focus on skill-building in competent parenting, neutral communication, and negotiation techniques.

Research has shown that mandatory parent education, which clearly describes appropriate behavior for separated individuals, is a very effective tool for the prevention of high conflict cases.⁵¹ However, once identified as a high conflict family law case, an interdisciplinary team is required to effectively manage it, and the expertise of an experienced psychologist is invaluable.⁵² The main objective of the team becomes having the parents become child-centred in their approach, rather than adversarial.⁵³

It has been observed that "conflict is natural, inevitable, necessary, and normal, and the problem is not the existence of conflict but how we handle it."⁵⁴ Not all disputes result in conflict. It is said that a dispute emerges and is transformed into something more serious

⁵⁰ *Supra* note 36 at 39

⁵¹ Marguerite Trussler, *MANAGING HIGH CONFLICT FAMILY LAW CASES FOR THE SAKE OF THE CHILDREN*, (2007) 86 THE CANADIAN BAR REVIEW 516 at 527

⁵² *Ibid* at 533

⁵³ *Ibid*

⁵⁴ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*, (Jossey-Bass, 2000) at 3

through successive steps of naming, blaming and claiming.⁵⁵ There are five basic approaches which individuals engaged in conflict use to meet their needs, namely, power-based, rights-based, interest-based, principle-based and/or manipulative-based.⁵⁶ People handle conflict in different ways – some rigid and others flexible.⁵⁷ A person's approach to conflict can be assessed within a continuum of different stylistic variables, namely, cognitive (analytical versus intuitive, linear versus holistic, integrative versus distributive, outcome focused versus process focused, proactive versus reactive), emotional (enthusiastic versus reluctant, emotional versus rational, volatile versus unprovocable) and behavioral (direct versus indirect, submissive versus dominant, threatening versus conciliatory).⁵⁸

What are the options for the resolution of high conflict custody cases where there is a parental personality disorder, and the merits of each?

Negotiation

In assessing whether negotiation is a viable option for the high conflict couple, we must briefly review the characteristics of those individuals in high conflict custody cases and the process of effective negotiation.

The characteristics of parents in high conflict disputes have been described in the following passage:⁵⁹

... aside from high conflict and intense anger, include pervasive distrust, poor or nonexistent communication, disregard, contempt for the other, or both, extreme polarization in views, imperviousness to rational positions or arguments, unsubstantiated allegations of abuse or poor parenting, loss of

⁵⁵ William L. F. Felstiner et al, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, (1981) 15 Law and Society Review 631

⁵⁶ *Supra* note 54 at 36 - 39

⁵⁷ *Ibid* at 41

⁵⁸ *Ibid* at 41 - 46

⁵⁹ *Supra* note 36 at 38

child focus, and frequent use of the child to express rage toward the ex-partner. In some cases, physical, emotional abuse, or both, of the other parent plays a continuing, significant role.

... it is important to recognize that some entrenched child disputes are primarily the result of one parent's actions.

Some of the identified factors contributing to entrenched and enduring disputes are:⁶⁰

... (a) marital or partner behaviours that engender anger and mistrust; (b) the manner in which the separation occurs; (c) personality factors, including personality disorders and mental illness; and (d) highly adversarial legal proceedings.

Few would argue that negotiation is a basic life skill that is used every day, and that it includes cooperation and competition. The “negotiator’s dilemma” occurs when they must balance the protection of their own interests with that of developing a cooperative relationship, and such includes a tension between value creators and value claimers.⁶¹

Negotiation can also be examined on a distributive (how do I get the most of what is available) and integrative (how can we maximize the benefits available for distribution among us) dimension.⁶²

Some key characteristics of distributive negotiation are:⁶³

- Issues tend to be framed in terms of how to compromise among conflicting needs or how to choose among mutually exclusive alternatives;
- Power is applied to wrest concessions out of other parties;
- Alternatives are used as leverage to convince others to compromise or to give up potential benefits;
- Information is a key item in the negotiation;
- Agreement is reached when the parties accept a proposal they believe to be better than their realistic alternatives.

⁶⁰ *Ibid* at 40

⁶¹ D. Lax & J. Sebenius, *The Negotiator’s Dilemma: Creating and Claiming Value in The Manager as Negotiator: Bargaining for Cooperative and Competitive Gain*, (New York Free Press, 1986) at 102 – 108; *Supra* note 54 at 148 - 146

⁶² *Supra* note 54 at 148 -155

⁶³ *Ibid* 148 - 150

Some key characteristics of integrative negotiation are:⁶⁴

- It is about successful relationship building;
- It is about communication;
- It is about education;
- It is about problem solving;
- It is a principled process;
- It is an interest-based process;
- It makes creativity the heart of problem solving;
- It involves a genuine partnership among the participants.

If you accept the accuracy of the following comparison of high conflict parents with functional coparents, the conclusion must be that negotiation is not a viable process in many high conflict custody cases involving a parental personality disorder:⁶⁵

Their lack of negotiation skills, give and take or problem-solving mechanisms to resolve issues, lead to the depletion of emotional and financial resources that come from repeated exposure to dispute resolution processes in the legal-adversarial system.

Functional coparents work directly with each other in a collaborative manner, avoiding the legal-adversarial system and its multiple costs. They approach differences and issues with a child-focused, problem-solving approach, avoiding blame and engaging in a give and take process that builds trust and confidence in their coparent.

Mediation

Mediation is “a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.”⁶⁶ It has the advantage of preserving relationships, allowing creative solutions and promoting self-determination and autonomy.⁶⁷

⁶⁴ *Ibid* at 151 - 154

⁶⁵ Matthew J. Sullivan, *Coparenting and the Parenting Coordination Process*, (2008) 5:1\2 *Journal of Child Custody* 4 at 13

⁶⁶ Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, (1994) 1 *JOURNAL OF DISPUTE RESOLUTION* 1 at 2-3

⁶⁷ *Ibid* at 3

Over time mediation has evolved, and currently three practical models make up the “cultures of dispute resolution”, namely, the pragmatic approach (classical problem solving model), the transformative approach (focuses on process, empowerment and recognition, rather than on problem solving), and the narrative approach (the storytelling, constructivist model).⁶⁸

When non-adversarial dispute resolution is appropriate, which model is best? It has been observed that:⁶⁹

- The pragmatic model appears to fit business conflicts and solution oriented problems;
- The transformative model is better for disputes involving relationships that involve deep interdependence and emotional intensity; and
- The narrative model is best for conflicts between intellectuals or “where a clear progressive new regime is prevailing in the public sphere”.

Proponents of the transformative model view conflict as a “rift” in the relationship, and the ideal way to resolve it is through a process that includes empowerment, recognition, and moral growth.⁷⁰ Simply put, the mediator’s role within this process is to help the parties transform.⁷¹ A process, sometimes referred to as “therapeutic mediation”, attempts to gain an understanding of why parents are locked into chronic disputes and attempts to help them focus on the needs of their children, rather than their own.⁷² The mediator’s role in the pragmatic model is to manage the encounter, to overcome the biases of the parties, and achieve an integrative win-win solution.⁷³

⁶⁸ Michael Alberstein, *Forums of Mediation and Law: Cultures of Dispute Resolution*, (2006-2007) 22 Ohio State Journal on Dispute Resolution 321 at 322-327

⁶⁹ *Ibid* at 374

⁷⁰ *Ibid* at 334

⁷¹ *Ibid* at 337

⁷² *Supra* note 8 at 177

⁷³ *Supra* note 68 at 336-337

Mediators must be aware of the challenges and consequences of power imbalances.⁷⁴ In this regard, the ethical standard of fairness requires a mediator to ensure that decisions are voluntary and non-coerced, and the transformative model facilitates such through empowerment.⁷⁵ It is now generally accepted by most mediators that their pre-mediation screening should include screening for intimate partner violence and/or abuse.⁷⁶

In 2003 Dr. Joan Kelly, an experienced researcher, custody evaluator, mediator, and Special Master, suggested that one-third of entrenched parental disputes that continued several years after the separation or divorce were due to one high conflict parent, and therefore it was necessary to assess blame.⁷⁷ With respect to persons with a borderline personality disorder, she observed:⁷⁸

[T]hey do not function particularly well in mediation, unless the experienced mediator understands how to align himself or herself constructively, and provides the necessary structure, focus, clarity, and written agreements, while also maintaining a working relationship with the other parent. ... These adults generally need more specialized interventions in order to restabilise, both in coparenting focused groups and individual sessions in which the impact of their character difficulties is well understood.

With respect to persons with an antisocial personality disorder, she observed:⁷⁹

...the adversarial divorce process accommodates the antisocial personality quite well. Each lie, each allegation, is treated as truth, and entangled webs of false and confusing information are woven and repeated in court pleadings. The deceptions of these parents are hard to nail down, without enormous amounts of effort and money, and they are generally one step ahead of the other partner and his or her attorney.

With respect to persons with a narcissistic personality disorder, Dr. Friedman says:⁸⁰

⁷⁴ *Ibid* at 342

⁷⁵ *Ibid* at 342-349; See also: ADR Institute of Canada, Inc., *Model Code of Conduct for Mediators*, June 13, 2005

⁷⁶ Amy Holtzworth-Munroe, *THE MEDIATOR'S ASSESSMENT OF SAFETY ISSUES AND CONCERNS (MASIC): A SCREENING INTERVIEW FOR INTIMATE PARTNER VIOLENCE AND ABUSE AVAILABLE IN THE PUBLIC DOMAIN*, (2010) 48:4 FAMILY COURT REVIEW 646; Joan B. Kelly & Michael P. Johnson, *DIFFERENTIATION AMONG TYPES OF INTIMATE PARTNER VIOLENCE: RESEARCH UPDATE AND IMPLICATIONS FOR INTERVENTIONS*, (2008) 46:3 FAMILY COURT REVIEW 476

⁷⁷ *Supra* note 36 at 38

⁷⁸ *Ibid* at 44

⁷⁹ *Ibid* at 46-47

There seems to be general agreement that the ex-spouses of narcissistically disturbed individuals can do little to avoid a conflictual relationship short of acceding to their wishes. Johnston and Campbell write that because “moderately [narcissistically] disturbed persons’ disputes with their ex-mates are often primarily intrapsychically motivated, their spouses can do little to offset their need for conflict.” Baris and colleagues, for whom narcissistic disturbance is the hallmark of what they call “high conflict personalities,” state that the spouses of these disturbed individuals “have a terrible time working out a cooperative divorce arrangement. They remind one of a gored bull, standing in confusion in a noisy stadium with little clue as to what hit them or what to do about it.” In other words, the narcissistically disturbed parent is capable of essentially unilaterally creating and maintaining post-divorce conflict.

Is there any benefit to including children in the mediation process? Research has shown that both child focused mediation and child-inclusive mediation resulted in a continuing reduction in conflict levels for the majority of families.⁸¹ One year later, for men and children, the child-inclusive mediation continued to show recovery of relationships between father and child, and in father’s recovery of confidence in the co-parental relationship.⁸² The authors concluded that their research supported the further development and application of the child-inclusive model of therapeutically oriented mediation.⁸³ They said that it:⁸⁴

...offered children a safe, specialist avenue for their views and needs to be considered and indeed to impact significantly upon the way in which their parents were able to resolve their parenting disputes. Beyond meeting of the child rights, their inclusion in this form of divorce mediation was associated with a significant level of repair to the parental relationship and to improved emotional availability of parents to children and produced developmentally sensitive agreements with which parents and children remained more content over a 1-year period postmediation.

⁸⁰ *Supra* note 14 at 114 (footnotes omitted)

⁸¹ Jennifer E. McIntosh et al, *CHILD-FOCUSED AND CHILD-INCLUSIVE DIVORCE MEDIATION: COMPARATIVE OUTCOMES FROM A PROSPECTIVE STUDY OF POSTSEPARATION ADJUSTMENT*, (2008) 46:1 FAMILY COURT REVIEW 105 at 120

⁸² *Ibid*

⁸³ *Ibid* at 122

⁸⁴ *ibid*

The possible role of a parenting coordinator, which includes an element of mediation, will be discussed under the heading of mediation\arbitration.

Arbitration

Arbitration has been defined as:⁸⁵

[T]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.

Advantages (accessibility, adaptability, cost, predictability, privacy, result, and speed) and disadvantages (cost, jurisprudence, and process) are associated with arbitration.⁸⁶

However, when dealing with high conflict custody cases associated with personality disorders, arbitration lacks the advantages of the mediation\arbitration process and the benefits sometimes associated with litigation, as discussed in the next two sections.

Mediation\Arbitration

The process of mediation followed by arbitration ("med\arb") has been described as follows:⁸⁷

[I]n its pure form, and as a distinct process of dispute resolution, med-arb is conducted by a single individual whom the parties have agreed will first attempt to mediate their dispute and then will arbitrate if mediation fails. There can be variations in this form, affected by whether the process is invoked by contract or on an *ad hoc* basis, by who decides when the transition from mediation to the arbitration stage takes place, and by whether there will be private caucuses.

While med\arb is described as offering some significant benefits to individuals (accessible, cost effective, private, efficient, and customizable), concern has been expressed by some

⁸⁵ Henry Campbell Black, *BLACK'S LAW DICTIONARY*, 5TH ed (West Publishing Co., 1979)

⁸⁶ Lorne H. Wolfson, *Family Arbitration in Canada*, (2010) Federation of Law Societies; Stephen Grant, *Alternate Dispute Resolution in Family Law: What's Not to Like?*, (2010) 27 CFLQ 235

⁸⁷ Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, (1991) 27 Willamette L. Rev. 661 at 663

that mediation and arbitration by the same person are inherently incompatible.⁸⁸ However, the Ontario Court of Appeal held that med\arb:⁸⁹

... is a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing an agreement, then proceeds to conduct an arbitration.

For high conflict custody cases, parenting coordination is a form of med\arb that is often used.⁹⁰ The functions of parenting coordinators include assessment, education, coaching, intensive case management, mediation and monitoring.⁹¹ They will:⁹²

...attempt to help parents to communicate more effectively, [but] in many cases this will not be possible. The goal in these higher conflict cases should be to disengage the parents, thereby assisting them to parent in a parallel fashion.

When agreements cannot be reached, the parenting coordinator (PC) makes binding decisions (arbitrates) within a defined and typically limited scope. Typically, high conflict parents are prone to argue about day to day parenting issues and more so than the “major” child-related decisions ...

Parenting coordinators require specialized skill and knowledge, and have been described as follows:⁹³

...usually are mental health professionals experienced in working with high-conflict families going through separation and divorce. In addition, they have particular expertise in the following areas: a range of conflict resolution techniques such as mediation and arbitration, an understanding of child development, family systems theory, case management, characteristics of high conflict families, how to assess the impasse, personality characteristics, how to develop effective strategies for helping these parents. Finally, they must have knowledge of the relevant legislation.

In Canada, judges cannot make an order delegating their power to a third party, and accordingly parenting coordinators can only have mediation and arbitration powers if the

⁸⁸ *Supra* note 86 at 13

⁸⁹ *Marchese v. Marchese*, [2007] O.J. No. 91 (Ont. C.A.)

⁹⁰ Barbara Jo Fidler & Philip Epstein, *Parenting Coordination in Canada: An Overview of Legal and Practice Issues*, (2008) 5:1\2 Journal of Child Custody 53 at 54

⁹¹ *Ibid*

⁹² *Ibid*

⁹³ Linda Chodos, *Parenting Coordination: The Cutting Edge of Conflict Management with Separated/Divorced Families*, (Paper presented at the Special Lectures 2006:Family Law, Toronto, Ontario, April 3, 2006) at 14-4

parties consent.⁹⁴ In high conflict custody cases a parenting coordinator could be used to implement an existing court ordered parenting plan or use his\her agreed upon mediation\arbitration authority to develop a comprehensive parenting plan.⁹⁵

Parenting coordinators who deal with high conflict families require considerable skill and experience.⁹⁶ While family court intervention is intended to assist conflicted coparents, it often results in keeping the level of engagement high, and therefore parenting coordinators that work to disengage conflicted coparents have a greater chance of success.⁹⁷ One of the benefits of having a parenting coordinator is the speedy resolution of coparenting issues with high conflict parents.⁹⁸ It has also been noted, because of its easy accessibility, that proper structure and boundaries must be in place so that parenting coordination cannot become a forum to maintain a high level of engagement and conflict.⁹⁹

Litigation\Judicial Intervention

It has been said that “[T]here is a growing recognition in Canada that the courts are not a suitable place to resolve most custody and access disputes.”¹⁰⁰ A study from the United Kingdom, that highlighted the importance of efforts to build parenting capacity and parental alliance, noted that:¹⁰¹

At present, however, the court process is typically restricted to determining a timetable for contact, rather than directly seeking to influence the quality of parent-parent and parent-child relationships.

⁹⁴ *Supra* note 90 at 56

⁹⁵ *Ibid*

⁹⁶ *Ibid* at 61

⁹⁷ *Supra* note 65 at 11

⁹⁸ *Ibid* at 19

⁹⁹ *Ibid* at 22

¹⁰⁰ *Supra* note 90 at 56

¹⁰¹ Liz Trinder, et al, *The Relationship Between Contact and Child Adjustment in High Conflict Cases after Divorce or Separation*, (2008) 13:4 *Child and Adolescent Mental Health* 181 at 186 (footnotes omitted)

An American psychologist has written:¹⁰²

Custody orders (parenting plans) that come from the court tend to be woefully inadequate for high conflict coparents to effectively implement. Essential areas or “gaps” are often not addressed or court orders leave “gray areas” where interpretation issues flourish and conflict breeds. The lack of detail in the parenting plan about the implementation of the regular schedule, holidays, transitions, protocols for required information exchange, right of first refusal, etc. can necessitate ongoing engagement that these high conflict coparents cannot, nor should be expected to manage.

Recall that “high-conflict divorcing families have often been identified by their failure to make effective use of mediation methods that rely upon a rational decision-making process.”¹⁰³ In some cases, such as when one party will attempt to thwart the process or not give an arbitrator necessary respect, litigation, rather than arbitration, is a better method of resolving family law disputes.¹⁰⁴ In 2003 Dr. Joan Kelly wrote:¹⁰⁵

Mandatory settlement conferences with judges immediately following failed mediations give those angry parents who want their day in court the opportunity to be heard, without all the preparation for a more formal hearing or trial. While unstudied, this promising judicial intervention provides urgently needed reality-testing to irrational, angry parents early in the process.

Dr. Kelly has written that individuals with a borderline personality disorder “often function at their best within the litigation model.”¹⁰⁶ With respect to individuals with an antisocial personality disorder, she stated:¹⁰⁷

...the adversarial divorce process accommodates the antisocial personality quite well. Each lie, each allegation, is treated as truth, and entangled webs of false and confusing information are woven and repeated in court pleadings. The deceptions of these parents are hard to nail down, without enormous amounts of effort and money, and they are generally one step ahead of the other partner and his or her attorney.

¹⁰² *Supra* note 65 at 15

¹⁰³ *Supra* note 8 at 176

¹⁰⁴ Thomas Galbraith Bastedo, *Six Reasons to Litigate Rather than Arbitrate Family Law Disputes*, (2007) Law Society of Upper Canada

¹⁰⁵ *Supra* note 36 at 40

¹⁰⁶ *Ibid* at 44

¹⁰⁷ *Ibid* at 46

With respect to litigation involving people with personality disorders, Bill Eddy has said:¹⁰⁸

- The threat of going to court is sufficient in many cases to get someone's attention and motivates them to change – or refrain from – certain behaviors;
- It helps to threaten [high conflict persons] with exposure of their arrears of vulnerability;
- Without the threat of exposure and possible court consequences, [high conflict people] escalate their stories with confidence that they won't be found out;
- In some cases, sanctions stop the escalation of the case;
- Court orders regarding possible [high conflict persons] must be written very specifically, and they must have very specific consequences.

Conclusion

Unfortunately, there is no simple solution or answer when it comes to resolving high conflict custody cases involving a parental personality disorder. A more sophisticated understanding of the problem and how to deal with it is necessary for all involved. Few will disagree that the adversarial system often escalates the conflict. On the other hand, an effective non-adversarial dispute resolution process requires considerable skill of those involved, and access to supportive resources, including those of a child psychologist.

These enduring cases consume an inordinate amount of resources. It may be that when dealing with high conflict custody cases involving a parental personality disorder that meaningful and effective resolution can often only be achieved through a combination of education, “therapeutic” alternative dispute resolution and judicial intervention, with all participants in the process sensitive to the complexities involved. We will all benefit when society is better equipped to deal with this issue.

(June 30, 2012)

¹⁰⁸ *Supra* note 31 at 233-238