The Arbitration Act and Family Law

by Fathers Are Capable Too: Parenting Association

Fathers Are Capable Too: Parenting Association is an equality-seeking support and advocacy group to assist people dealing with divorce and to promote positive child, and family, outcomes when relationships start to fall apart. We have some 1,300 members plus we run weekly meetings, annual events, and email support groups. We have worked with over 8,500 parents involved in separation issues over the last 10 years. We promote the involvement of both parents in their children's lives at all times, and believe in non-adversarial forms of dealing with difficult issues in order to achieve lasting and positive outcomes.

Any time of significant change in family structure, such as divorce and separation, is a time of discontinuity and stress to the parties and the children involved. Of particular destructive import is the effect of the stress of an adversarial system on the children and their families. The rules governing divorce must be such that they minimise the stresses on the children, and on their parents — the stakeholders in the divorce process. All are damaged significantly by such occurrences, as seen in the huge increases rates of male and child suicide rates, the increase in "intimate partner violence" and the almost certain psychological and sociologic damage done to children deposited with depressed, non-working parents.

Courts and lawyers do not provide non-adversarial venues – they generate stress and adversity[1]. Statistics Canada has identified that judges are making custody and access decisions in about 50% of cases of separation and divorce[2]. Those cases have gone before the courts, because of a system that encourages or requires courts, are dealt with overwhelmingly in motion courts. In motions court, decisions are imposed on the children after hearing a few minutes of non-expert and non-parental argument by a judge who will turn the decision around in less than 20 minutes — that these decisions will hold for decades. These family courts have become an abusive

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[1] Braver, SL, Cookston, JT, Cohen, Bruce R. Experiences of Family Law Attorneys with Current Issues in Divorce Practice. *Family Relations*, v. 51, 325-334.

[2] National Longitudinal Survey of Children and Youth: Changes in the family environment. *The Daily.* Satstics Canada. June 2, 1999. p. 3.

environment for children and parents[3]. Motion courts do not and, often cannot, consider individual circumstances or individual children's needs in the vast majority of cases[4]. Poor legislation, regulation, rules and bad previous judgements are stop effective solutions from being found in a courtroom.

The court process have changed these men, women and children of separation into a vulnerable class preyed upon by those effectively promoting adversity and imposing foreign and damaging principles on these families. Families do need protection, and they do need to be included in any process involving family law. Families are the *true* stakeholders. Unfortunately it is the lawyers, judges, bureaucratic departments and "experts" who seek to impose their own cultural norms on the diverse selection of families in Canada. In a free and democratic society, a tolerant and diversified society, and a multicultural country this type of regimentation is simply unacceptable.

To this end, it is clear that alternate forms of dispute resolution that do not involve the courts are very important and need to be recognised as not as victimising of children or parents. Dispute resolution mechanisms that provide a healing element of community care and support become even more important to children and parents to minimise the damage caused simply by the divorce. Getting to a life plan quickly to establish parenting routines is important to children of all ages. The emotional, social and financial problems caused by the seemingly unending family court stress is not in the best interests of the real and involved parties of a divorce.

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[3] Kelly, JB, Emery, RE. Children's Adjustment Following Divorce: Risk and Resilience Perspectives. *Family Relations*, v. 52, 352-362.

[4] Clarke-Stewart, KA, Vandell, DL, McCartney, K, Owen, MT, Booth, C. Effects of Parental Separation and Divorce on Very Young Children. *Journal of Family Psychology*, v. 15, n. 2 (2000), 304-326.

John Kromkamp, the Registrar of the Court of Appeal for Ontario, stated one of the fundamental problem that had embedded in the destructive nature of the family court in a letter of June 13, 2001 in the National Post:

> *There is no bedrock legal principle of finality in family law. In family law, agreements have never been considered as necessarily being final.*

It is difficult to imagine a statement about the courts that is supportive of any family, and yet that is the position of the Court and its officers.

Negotiation and mediation, in terms of mutual agreement, is clearly a good solution. Voluntary arbitration offers a supportive and low-conflict method of dealing with those "sticky" issues that may well be small issues in the eyes of a judge but that are important to the parties. Both alternatives offer a lower-cost, personalised, and much quicker set of solutions that can be offered in the context of the family's cultural environment and within the society in which the couple exists. While clearly the most humanistic of solution, the ponderous and expensive overrides by the legal system, and the bureaucratic entities, destroy the flexibility of families to solve their diverse needs to their mutual satisfaction with minimum conflict and reasonable expense.

Religious organisations provide such community support and timely solutions. As long as both parents believe in the same basic principles, exist in the same basic community, and will continue to live in that community it is that community's culture that is important in their lives. Religious beliefs provide a moral and ethical framework to help their members reach a more positive solution. Dispute resolution mechanisms that come from these sources are important in providing stability to families. These communities are important in supporting the diversity and multi-cultural nature of our society. The ability of parents to find a supportive and less adversarial mechanism for resolving issues is important. That these mechanisms have a level of legal recognition becomes important in a country where the state has imposed a homogenised level of legal strictures that is not permitted to show individual discretion irrespective of the

needs of the family. Whether it be with respect to child support, access, or education, we need to guarantee the ability for parents and children to come to their own best solution. Imposing an impersonal, cookie-cutter decision on them will victimises the entire family and the entire multi-cultural community.

Religions are not uniform in nature. Even within same church, school, sect or branch of a religion local, non-religious cultural norms often are integrated into the belief system providing a wide diversity of interpretations. The differences of beliefs and practices of the Roman Catholic Church and the Hutterites is a Christian example of the diversity of religion. The fundamentally consistent beliefs of Buddhism appear significantly different in implementation from region to region. Within the "secular" religion, the implementation of the creed is vastly different from land to land. Islam is no different than any other belief system in its variety of interpretation and implementation of its religious law. Yet in all these religions, it is the community interpretation that provides the support to the members of that religion. In a multi-cultural society, like Canada, we respect those cultures within the context of a free and democratic society. The State should not even consider removing the fundamental freedom of religion from people whether we are proponents of that religion or belief system or not.

The formalised sanctity of marriage is a fundamental part of many religions, such as Islam and Judaism. In other religions, such as Christianity, it has become implemented as over the centuries as a key piece of the religion. Where marriage is religious, or even just cultural, there are provisions for divorce and separation. In societies that have survived for centuries and thrived on its internal population growth, we know that these provisions would be equitable and in the interests of children.

If the religious and cultural system did not produce a healthy community, the population growth would drop to levels that would not sustain the population, and that society would die out. The marriage structures of the older surviving major religions have passed Darwin's test of survival of the fittest by still existing. Clearly, they have provided a cultural structure of growth and nurturing to members of its community that works.

It is clear from the research[5] that low-adversity, low-cost, community supported, dispute resolution mechanisms are vastly superior to what comes out of the slow, ponderous, arbitrary adversarial court system that most Canadians find themselves embroiled with now. The Australians, after many years of the same poor outcomes as we find in Ontario, are moving towards a system that provides just this type of a supportive mediation/arbitration based environment that will provide better lives for children and divorced parents. Even the family law lawyers[6], in recognition of the failure of the family court system, has been looking into alternative solutions such as arbitration collaborative law and the use of parenting co-ordinators (effectively a form of day-to-day binding arbitration). Ontario should be looking for *better* solutions than family law courts and stifling legislation — and expanded use of culturally sensitive and supportive mediation *and* arbitration are certainly important options.

It should also be considered totally unacceptable, when the parties find a mutually agreeable settlement to look at the State moving in and imposing a structure that is not acceptable to the parents. Even worse is a system that cherry-picking pieces of the mutually agreement, thereby upsetting the balances that made the agreement fair to the participants. Unfortunately, Section 56 of the *Family Law Act* does exactly this type of selective disassembly.

This review of the Arbitration Act was triggered by the thought of Shari'ah law being used as a basis for arbitration. An example of the problems of Section 56 can be drawn from these rules, although the problem exists in many other situations.

Under Shari'ah law a woman's property is strictly hers and no-one can demand any settlement from her. This is from the Koran so for believers of Islam this is a fundamental rule. Depending upon the community practices, the woman may receive entitlement to significant property by

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[5] Purett, MK, Williams, TY, Insabella, G, Little, TD. Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children. *Journal of Family Psychology*, v. 17, n. 2 (2003), 169-180.

[6] Kessler, JF, Koritzinsky, AR, Schlissel, SW. Why Arbitrate Family Law Matters. *Journal of the American Academy of Matrimonial Lawyers.* v. 15 (1997), 333-351.

inheritance or, in those communities that traditionally have a very high bridal-dowry (mahr) given to the bride under a form of pre-nuptial arrangement, or even by employment (e.g. pensions). The investment grown on these assets also belong to the woman irrefutably.

At separation, the woman may have significant assets, in the form of a house, a business, or even cash equivalents. When it comes to an asset splitting the woman have well have accumulated greater assets than her husband. She may be unwilling to sell a house or a business to meet an equalisation requirement under Canadian courts. On the other hand, if she retains residency of the children, she may be entitled to a degree of spousal or child support. In order to retain her property, she may well trade future income streams from her spouse in order to retain current assets. This certainly would be meeting the conditions under the Koran and not generate an arbitration award that is not enforceable under Shari'ah law.

Section 56 of the *Family Law Act* allows the courts to come in and alter the income portions of the arbitration agreement, as well as adjusting custody, residency and access. Section 56 does not allow the recomputation of the division of property as agreed upon under the arbitration in compliance with Shari'ah law. An unbalanced rejection of the terms of arbitration causes injustice, an encouragement for opportunism and really makes it impossible to deal in a non-adversarial environment — with the resulting disastrous impact on children and parents.

Clearly the interaction between the two acts much be aligned properly. The end result is that either family law matters should be removed from the Arbitration Act, thereby closing another reasonable choice for superior results for children and families, and forcing every family through the bilious quagmire called the family court system at great financial expense and social damage. Alternatively a positive acceptance of arbitration should be accepted, and made not easily overturned, to provide children and parents with the community-based solutions that are provide much better outcomes.

It is clear that across the western world — in significant parts of the US, Australia and New Zealand — that the family law courts are recognised as poor and destructive venues. There are

non-adversarial systems that are the only way to protect the interests of the children, parents, grandparents and extended families. Ontario should be looking at expanding the availability of there services in a culturally sensitive way rather than imposing a the cultural of a minority on people who don't want it.

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