Slaw

January 9 th 2015
Posted in: Justice Issues

We Versus Me: Normative Legislation, Individual Exceptionalism and Access to Family Justice

by John-Paul Boyd

In many of Canada's family law courts, especially our provincial courts, the majority of litigants now appear without counsel. This state of affairs should have been a foreseeable consequence of the diminution of legal aid representation in family law cases coupled with the relative absence of market forces impelling private family law lawyers to reduce their rates or embrace new service models, but it is nonetheless where we find ourselves today.

It is easy enough to point to the observable consequences of this superabundance of litigants without counsel – chief among them the increased number of ill-conceived chambers applications, the ever-expanding length of trials and the congestion presently plaguing court registries – and shudder in horror. However, it must be borne in mind that the justice system is not *our* system, a system for judges and lawyers, but *their* system, a system that belongs to the users of the system, the litigants themselves. As a result, despite the inconveniences enuring to the mutual discomfort of bench and bar, I am hard pressed to conclude that there is anything fundamentally wrong with the growing presence of unrepresented litigants; the situation is infelicitous, to be sure, but not iniquitous.

The engagement of so many litigants without counsel in court processes could be viewed as *prima facie* evidence that family justice is accessible, however as the recent work of Professor Julie Macfarlane and the Canadian Research Institute for Law and the Family demonstrates, this sort of "access" is superficial and doesn't go much further than being able to find the front door of the courthouse; there would still be lineups to get into the only hospital in town even were it staffed by a third of the necessary doctors and equipped with a third of the necessary beds, but we wouldn't call that accessible health care. The research produced by Macfarlane and the Research Institute shows that litigants have enormous difficulty understanding and navigating the rules of court, the rules of evidence, court processes and the legislation applicable to their cases, and that, unsurprisingly, they find the justice system to be impossibly intimidating, incomprehensible and inaccessible.

This raises a special set of problems for litigants involved in family law disputes. Family law is a unique species of civil law for many reasons, but primarily because of: the frequency with which disputes brought to court concern social, psychological and emotional issues rather than legal; the almost complete absence of circumstances in which a specific legal conclusion invariably and inevitably results from a particular set of facts; and, the range of other areas of the law that may be concurrently applicable, such as contracts, tax, conflicts, real property, negligence, torts and trusts. Family law, in other words, is *complex*, and the questions this note seeks to explore are the extent to which complexity is necessary or desirable, and the extent to which complexity is compatible with fairness and an accessible system of family justice.

To begin with, it must be noted that the federal and provincial legislation on domestic relations is an expression of social values and government social policy. Divorce is bad, and accordingly the 1857 UK

Divorce and Matrimonial Causes Act made it very difficult to get a divorce *a vinculo*, especially if you were a woman; adultery and abuse are bad, and accordingly the 1968 Canadian *Divorce Act* required the court to take matrimonial misconduct into account when determining issues of custody and support. Today, some of the clearest examples of social policy questions resolvable by legislation concern:

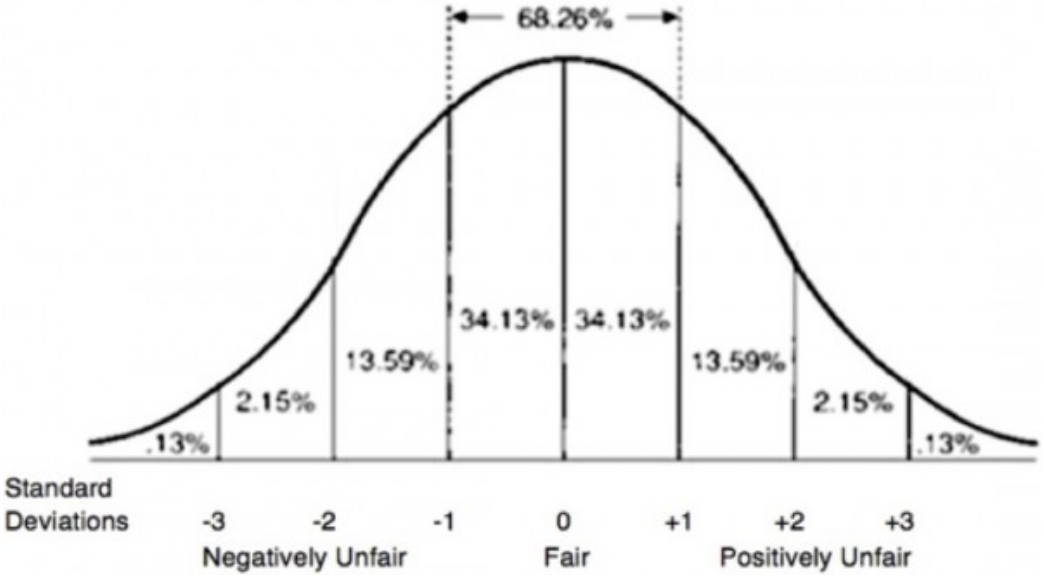
- Children – *Should both parents always be presumed to be the children's custodians? Should a default parenting schedule be prescribed by legislation?*
- Child Support – *If and when should stepparents assume a liability to pay child support? Should children be allowed as adults to sue to collect arrears accumulating during their minority?*
- Spousal Support – *Should the income of dependent spouses' new partners be considered in determining eligibility for support? Should spousal support be paid from income derived from assets that have already been divided as matrimonial property?*
- Property – *Should unmarried couples have interests equivalent to those of married couples? Should property acquired before the commencement of a relationship take priority over property acquired during the relationship, or should primacy be given to the latter rather than the former?*

Given that the moderation of conflict is a critical psychological, social, legal and economic value, it also stands to reason that *certainty* would inform the manner in which social policy is expressed through legislation, particularly in family law matters. Certainty is, by and large, a valuable and useful quality, particularly for litigants without counsel. Knowing that only X equals Y saves a great deal of time and money arguing about the possibility that Z might also equal Y; it helps to improve the predictability of litigated outcomes; it depersonalizes disputes, insofar as it's not anyone's fault that X equals Y; and, it promotes settlement by limiting the available options and thus circumscribing litigants' hopes and expectations.

Financial issues have proven to be most amenable to certainty in family law matters, as a result of which we have the tables of quantum provided by the Child Support Guidelines, the formulae set out in the Spousal Support Advisory Guidelines for the calculation of duration and quantum, and legislation establishing presumptions of varying strength with respect to the division of matrimonial property. Despite the efforts of MP Maurice Vellacott and his perpetually recurring Bill C-560, certainty as to the care and control of children after separation remains elusive, with, I suggest, good reason.

Nevertheless, certainty is the enemy of complexity in most legal matters save those relating to taxation. Certainty must yield results fulfilling government's social policy goals and those results must be objectively fair, however, because justice systems are human rather than mechanical in nature, the correct expression of this principle is that certainty must *tend* to yield results fulfilling government's social policy goals and those results must be *subjectively* fair *for most people most of the time*. It is important to observe that in adding even these modestly temporizing qualifications, abstract conceptions of objective certainty already begin to be undermined by subjective considerations, and a hint of the complexity that must necessarily fill the void begins to emerge.

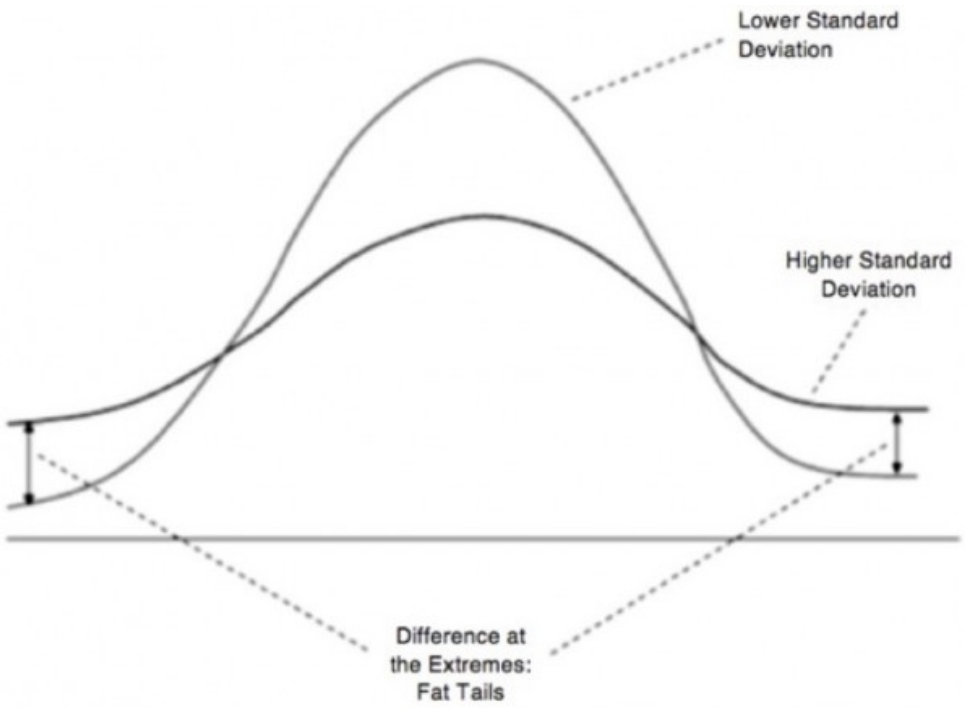
Attempts to reconcile social policy, certainty and complexity produces legislation that is ultimately, although perhaps unintentionally, utilitarian in design, inasmuch as it is generally intended to produce the greatest good for the greatest number, and therefore also normative. The classic bell curve that models the normal statistical distribution of many human qualities, from IQ scores to height, to the likelihood that the bus will arrive on time, can also be used to model the impact of family law legislation on dissolving families.



For most people, the application of the rules and principles set out in normative legislation will yield a fair, if not actually good, result. Assuming a normal statistical distribution, this should be the experience for almost 70% of the population, those grouped within the first standard deviation on either side of an average result. However, the more a family's circumstances tend to depart from those of the hypothetical everyman family for whom the legislation was written, the less satisfactory are the results produced by the application of that legislation.

It's entirely reasonable, for instance, that spousal support would be permanently payable for a couple leaving a long-term, traditional marriage of the *Leave it to Beaver* variety, in which the dependent spouse has sacrificed her career and employability to manage and nurture the family while the payor worked outside the home supporting the family and incidentally improving his earning potential. It's far less just for a couple leaving a two- or three-year relationship during which the dependent spouse became permanently unemployable as a result of a drunk driving accident or botched suicide attempt, and yet the indefinite payment of spousal support in such a case is the probable outcome, barring a hefty insurance settlement or another source of income.

Thankfully, relatively few families should find themselves in the tail areas of the bell curve; again assuming a normal statistical distribution, the outcomes obtained by less than 5% of the total population, those in the third and forth deviations, ought to be unfair or very unfair compared to an average result. In my experience as a family law lawyer, however, it has seemed to me that the bell curve modeling the impact of legislation on my clients has perhaps a higher standard of deviation than the norm, giving the bell curve a greater population at the extremes and thus fatter tails than suggested by the normal distribution; in other words, my impression is that quite a bit more than 5% of separating couples experience an unfair or very unfair result from the application of family law legislation. (This is certainly the experience of many of the unrepresented litigants discussed in Macfarlane's research and the Canadian Bar Association's recent report on access to justice.) My views may be the result of sample error, given that the families who consult counsel tend to be those whose circumstances are complex or conflicted; whether this is an error or not, it is also the experience of our judges, who deal with a still higher proportion of families in complex and conflicted circumstances.



In anticipation of just such unfairness, most if not all of the legislation on domestic relations come with built-in safety mechanisms. British Columbia's repealed *Family Relations Act*, for example, provided that spouses would each receive a one-half share of the family property, unless an equal division would be "unfair" considering a non-exhaustive list of six factors; its new *Family Law Act* prescribes an equal division unless an equal division would be "*significantly* unfair" upon consideration of an even longer non-exhaustive list of factors. The *Family Law Act* offers similar exemptions in respect of presumptions that would otherwise require parenting time and parental responsibilities to be shared equally, that all parental responsibilities after the death of one guardian be vested in those which survive, and deem a proposed relocation to be in the best interests of a child once certain conditions are met.

Other, better-known examples of such safety mechanisms are found in the Child Support Guidelines, a regulation that presumptively determines the quantum of support awards according to the payor's income and the number of children for whom support is being paid. The Guidelines provide escape valves that allow the court to depart from the tables of quantum when: a dependent child is an adult; the payor's income is more than $150,000 per year; the payor is a stepparent; each parent has the primary care of one or more siblings, known as "split custody;" the parents share the children's time equally or near-equally, known as "shared custody;" or, a parent would suffer "undue hardship" were the table amount to be paid. (These safety mechanisms are particularly important for married parents given that the *Divorce Act* prohibits the granting of divorce orders unless "reasonable arrangements," usually interpreted as payment according to the Guidelines tables, have been made for the support of the children.)

To put things another way, the drafters of our family law legislation, being aware that all families are neither cut from the same cloth nor use the same tailor, have included in their work certain presumptions, providing *objective* fairness, along with means of avoiding those presumptions, providing an element of *subjective* fairness for those families in the tails of the bell curve. Although this approach is sensible and laudable, the discretion demanded by subjective considerations undermines the certainty provided by the presumptions, resulting in the exacerbation of complexity, particularly where the exceptions themselves are couched in ambiguous language that cannot be understood without reference to the case law interpreting that language.

Returning to child support for an illustration, section 8 of the Guidelines discusses the calculation of quantum in situations of split custody and section 9 concerns situations of shared custody. Section 8 requires that the parents' table obligations be offset against one another, with the parent having the greater financial obligation paying the difference:

> Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Section 9, on the other hand, says this:

> Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

While section 8 provides a concrete and readily calculable formula, section 9 simply lists three factors that need to be considered when fixing an appropriate amount of support, and the amount payable is therefore indeterminate. As a result, parents with shared custody of their children must be able to access and understand the case law interpreting section 9 in order to have any hope of gauging the amount of support they may be obliged to pay or entitled to receive, and indeed whether they meet the 40% threshold for shared custody at all.

Two problems follow from the complexity entailed by discretion. First, complexity gives courts the opportunity to craft judgments that are precisely and often uniquely tailored to the particular circumstances of the family before them. Few litigants or lawyers would argue that this sort of bespoke justice is anything other than a highly desirable outcome, but the end result is the fraying of the tapestry of the common law with inconsistent and sometimes incoherent case law that becomes increasingly intricate as exception after exception is carved out of general, normative principles to meet the needs of individual families.

Second, it means that the law that applies to a particular legal problem becomes obfuscated and ceases to be intelligible merely upon review of the applicable legislation. The case law describing the range of circumstances invoked by open-ended lists of factors and interpreting phrases such as "undue hardship," and similar idiomatic expressions such as "unless the court otherwise orders" and "unless it would be inappropriate," must be consulted to properly understand the law, creating a significant barrier to justice for people not trained in legal research and the jurisdictional nuances of *stare decisis*. Although organizations like CanLII have done a wonderful job making newer case law accessible and searchable, it can be incredibly challenging for even highly educated laypeople to separate the wheat from the chaff and find relevant case law illuminating and elucidating the text of statute law.

Interestingly, these problems are often explicitly renounced by legislation intended to promote certainty and objective fairness, such as the rules of court. The Guidelines, for example, are introduced with this statement

of purpose at section 1:

> The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Despite their noble intent, the latter three objectives are significantly undermined by the extensive use of escape valves, often couched in frustratingly vague language, that pepper the subsequent provisions of the Guidelines and facilitate subjective fairness and single-serving justice.

To boil all of this down somewhat, in my view our legislation on domestic relations does in fact tend to yield generally fair results for most people most of the time, arguments over the correctness of social policy aside. There are, however, families for whom the legislation yields results that are unfair or very unfair, and there are more of these outliers in family law disputes than one would expect from utilitarian legislation yielding a normal distribution of fair and unfair outcomes. Our legislation anticipates, and is drafted so as to accommodate, these outliers, however in so doing: the plain meaning of the legislation becomes obscured; a critical body of uncodified case law necessarily accumulates that is external to the legislation yet must be accessed to understand it; certainty of result is diminished as complexity increases and expectations are less bounded; opportunities to pursue subjective fairness multiply, and along with them conflict and the likelihood that litigation will be required to resolve any given dispute; and, ultimately, the accessibility of family justice is significantly impaired.

In the end, the dilemma posed by the conflicting principles of objective certainty and subjective justice resolves into a question of values and priorities to which there is no easy answer.

We could adopt relatively inflexible legislation of the X equals Y variety, which offers very little room for judicial discretion but results in a correspondingly higher degree of certainty. A separating couple would be able to read the legislation and determine the range of likely outcomes, without needing to read the case authorities except to seek explanations. A limited range of potential outcomes would reduce opportunities for conflict and the likelihood that unreasonable positions will be adopted. Separating couples would be more able to resolve legal disputes without the need for costly court proceedings. Pressure on the system would ease and more judicial time could be given to non-adversarial processes. Frankly, it's not hard to imagine simplified versions of the Guidelines and Advisory Guidelines that admit of fewer opportunities to escape their presumptions, mathematical approaches to the division of matrimonial property that are more determinate, or even automated dispute resolution systems that at least provide a starting point for settlement discussions where disputes aren't resolved completely.

Unfortunately, the rigidity inherent in such an approach will damn those individuals stuck in the fat tails of family law to their unfair or very unfair results, with little opportunity for redemption. The approach is poorly

compatible with the principle that decisions about the post-separation care of children must be based on their best interests as well. It may stifle innovation and the evolution of the law. It also conflicts with the shrill yet compelling demand for custom-fit outcomes. Justice will be accessible, although it may not be just.

On the other hand, we could have a system much like that we already have, which generously accommodates individuals stuck in the tails and their pleas for subjective fairness. However, excessive deference to demands for custom-fit outcomes raises critical barriers to justice. Such an approach demands complexity, often becoming involute to an extraordinary degree, resulting in systemic inefficiencies and unintelligible legal principles; it exacerbates conflict in the highly emotional circumstances of family breakdown, depleting family resources and risking serious long-term harm to children; and, it diminishes the likelihood that someone without counsel will achieve a fair result even at trial, a concern raised by Justice Victoria Gray in her paper on litigants without counsel and the judicial system.

Although there may be a hybrid approach which lies somewhere in the middle of these two options, it is clear that the present system is inordinately complex, requires enormous funding to maintain, and is largely inaccessible to litigants without counsel at a time when such litigants are flooding the courts. I fear that efforts toward reform which are conducted without a radical reexamination of our fundamental assumptions about the expression of social policy and the nature of family justice will produce results no better than what we have at present.

The tension in the justice system between the law that is good for the group and the law that is good for the individual reaches a critical mass in family law disputes as the call for bespoke justice is so clear in such cases. However, the emphasis on subjective fairness and individual exceptionalism in family law matters comes at a very high price and it is not at all clear that the benefits to the individual outweigh the psychological, social, legal and economic cost of complexity. As we deliberate on the barriers to justice and explore avenues of improvement in the age of the litigant without counsel, it seems to me that we need some degree of resolution to the debate on the extent to which complexity in family law matters is necessary or desirable, and the extent to which complexity is compatible with an accessible system of family justice. Should we accept some impairment of the needs of the few on the condition that such vitiation redounds to the benefit of the many, or should the needs of the few prevail at the risk of access to justice for all? Should family justice be designed for we or just me?

John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family. The Institute is a federally-incorporated charity established in 1987 and is affiliated with the University of Calgary.

Comments

Craig McLeod
January 9th, 2015 at 2:07 pm

An excellent and concise article JP. Really it appears initially to be a question of justice that is accessible but not necessarily just, and justice that is just but not readily accessible. Some sort of automated (computerized) or facilitated system (such as having financial and property issues referred to a third-party assessor as happens in some civil law jurisdictions) is, in my view, inevitable, for at least two reasons. First, people are now used to relying on computerization for everything (which, in the legal area, can include research and online dispute resolution, as well as mathematical calculations of probable outcomes given a set of variables).

Second, such a trend will be driven not by the members of the legal system (lawyers and judges, for example) but by the lay participants in the system. They are the consumers and the system seems to be more consumer-driven than ever.

I also want to comment on your statement, "Although organizations like CanLII have done a wonderful job making newer case law accessible and searchable, it can be incredibly challenging for even highly educated laypeople to separate the wheat from the chaff and find relevant case law illuminating and elucidating the text of statute law." This is not just a challenge for educated laypeople. It is also a challenge for trained and experienced lawyers. With more relevant caselaw sometimes being reported in a day than was once reported in a month in the memory of many senior lawyers, it has become increasingly difficult to remain current with even a smaller area of the law. If lawyers are challenged then laypeople must be overwhelmed.

Nate Russell
January 9th, 2015 at 3:05 pm

Having read this post from beginning to end, I feel rather cruelly treated that you offer no definitive answer! Much of this post contemplates the subjective nature of s. 9 of the Child Support Guidelines, versus the simple rule in s. 8. In split custody arrangements, impairment on the "needs of the few" for whom s. 8 works an unjust result is accepted. The legislation mandates that the higher earner pays the difference between what each spouse would otherwise pay. In the Leave it to Beaver scenario, were the Cleavers to cleave and Ward to leave, Ward could take Wally, and unto June the Beav. Because June honestly discloses that she earns $4,000 each month mining BitCoin out of the laundry room, while Ward earns a robust and era-appropriate, but comparatively meager, $10,000 annually at his 1950s company job, June tops him up substantially.
As you note, it's really quite different were the boys to shuttle back and forth.
Under s. 9, Ward and June are fighting to establish their case favourably, each vying to elevate or diminish certain s. 9 factors against others and competing to sway the totality of evidence per Contino. The discretion of the court will be exercised with a view to the best interests of the children, as presented and contorted by counsels' able argument. The Court will discipline itself not to use "common sense" reasoning, but rather strict factor-specific assessments. Could June end up getting Ward's new live in girlfriend's income considered under s. 9(c)? Would Walt owe June money where June has primary care?
What strikes me as hard to reconcile is why one rigid (s. 8) and one highly plastic (s. 9) regime sit side by side one another.

John-Paul Boyd
January 10th, 2015 at 5:33 pm

Thanks for your comments, Craig and Nate.

Craig, something along the lines of a semi-automated system is actually what I had in mind as the start of a hybrid system that balances subjective fairness with restricted discretion. I can imagine a hybrid system working something like this, assuming an absence of urgency and possibility of violence.

1. Couple separately attend neutral court-attached lawyer. Lawyer explains the law and the range of likely outcomes. (Not the range of all possible outcomes, just those that are probable.) Lawyer provides binding direction on minimum documents parties must exchange with each other and date by which disclosure must be complete. Specific consequences of non-disclosure, such as inferences about income, are set out in

direction.

2. Parties separately attend court-attached psychologist to address parenting arrangements for children. Psychologist separately interviews children aged six and older. Psychologist may require testing or production of records of children's schools, therapists and physicians.

3. Parties meet psychologist together. Psychologist summarizes recommended parenting arrangements and attempts to find consensus between parties. Failing consensus, psychologist's recommendations form part of court record in the event a hearing is required.

4. Following disclosure date and completion of process with psychologist, parties attend lawyer together. Parties provide oath or affirmation as to the truthfulness of their statements, and lawyer collects essential information including: parties' ages, employment status, incomes and health status; name and age of children, school status, and parenting arrangements; nature of present and future special expenses; dates of cohabitation, marriage and separation; and, value of assets and debts, and date and manner of acquisition. Lawyer enters information into web-based program provided through courts. In the event of non-disclosure, lawyer enters information according to consequences for non-disclosure stated in direction.

5. Program generates results for quantum of child support, sharing of children's special expenses, quantum and duration of spousal support, and division of property. Lawyer verifies that results accord with likely range of results, endorses results and attempts to find consensus between parties. Failing consensus, program results form part of court record in the event a hearing is required.

6A. If consensus is reached on parenting and financial arrangements, lawyer attends court in presence of parties and speaks to consent order. If judge is satisfied that the proposed order is reasonable, consent order is made. Court prepares order and attends to judge's endorsement and distribution to parties. File is closed.

6B. If consensus is not reached, parties attend judicial dispute resolution process with disclosure previously provided, psychologist's recommendations as to parenting arrangements and the endorsed program results. Judge attempts to find consensus and will make recommendations as to result in the event consensus cannot be reached. Parties may agree that judge's recommendations will be binding; whether judge's recommendations are binding or not, recommendations form part of court record.

7A. If consensus is reached at judicial dispute resolution process, judge reads consent order into record in presence of parties. Court prepares order and attends to judge's endorsement and distribution to parties. File is closed.

7B. If consensus is not reached, matter proceeds to resolution through trial process. Parties may pursue further disclosure, compel examinations for discovery and retain experts, and burden of proof lies on party seeking results different than those previously recommended. Subject to appeal, file is closed.

What I have in mind here is a process in which opinions are provided early on in the process that have some heft to them are presented as a likely result, but parties are still free to disagree and pursue a litigated result… with those opinions following them to trial and being taken into consideration by the judge hearing the trial.

This is just something that's been rattling around in my mind for awhile; I'm sure it's highly problematic and that there are critical issues I have failed to address.

Craig McLeod
January 11th, 2015 at 2:16 pm

Perhaps, with some limitations or rights to apply to set aside, the recommendations proposed in part 6B could be deemed to be binding if a party does not move to set the matter down for trial within a month or two of the judicial dispute resolution process. Many people just want the right to be heard in some sort of comprehensible forum, and such recommendations may look and feel better after a few days than in the heat of the moment. Unfortunately, there are some people for whom no system is going to be sufficient to discourage their extended, and often repetitive, litigation, and I suspect my suggestion to make the recommendations binding would be challenged on the grounds it is inconsistent with a person's right of access to the courts.

John-Paul Boyd
January 11th, 2015 at 10:52 pm

Craig, your thought about making the recommendations binding if the parties don't set their case for trial would certainly encourage them to get their act together! Not necessarily a bad idea at all.

And you're certainly right about people's need to "be heard". I think that's a huge factor in family law matters among litigants without counsel; so much of the time it seems that what's being brought to court is emotional or psychological in nature rather than legal.

John Koziar
January 12th, 2015 at 10:54 am

An insightful post and an attractive procedure suggested by Mr. Boyd. It strikes me that a step or two could be saved if the neutral court-attached lawyer in the first place were also the judge at the end. That is, if family files were handled by an administrative tribunal.

My understanding of the history is that before the legislative changes in the second half of the 1900-s family law was not a thing regular people had access to, certainly not on a regular basis. (Recall the remains of Old Stephen Blackpool's marriage in Dickens' "Hard Times".) We've "democratised" family law by opening it up to a mass market, so that now we can all hope for a fair distribution of entitlements following the ends of our relationships. But lawyers have not kept pace — they have not democratised in the same was as the law. We are wrapped up in our classist history perhaps — we want to be the well-heeled retainers of well-heeled clients, but if lawyers are going to help with the access to justice crisis we will have to be the middle-class (even lower middle-class) agents of middle-class clients.

Employment law and tenancy law are two prominent examples of other fields which underwent a similar democratisation in the twentieth century. They have their boards, so why not family law too? An administrative tribunal could allow the flexibility of Mr. Boyd's suggested system, with a lawyer making the binding order at the end of the process.

Lastly I should add that the reflexive reaction against the family law board suggestion has at times been coloured by a certain bias — family law needs to be done in court because it is >important<. It is important because it involves property — sometimes big piles of it. Not incidental little things like one's home or one's livelihood that are the truck of the LTB and the LRB or, worse still, the completely insignificant amounts

dealt with over at the Social Benefits Tribunal.

James
January 12th, 2015 at 1:37 pm

Interesting proposal. One could envision a less expensive approach where the lawyer was removed and replaced with a set of questions and per-written general warnings and guidelines. While not ideal, it would save significant costs for the parties and system (each party is of course free to retain their own counsel for further advise if they wish).

Instead of meeting physically both parties could fill out the web based form, which would guide them through what needed to be filled out, and where to attach/send documents. Once completed a clerk could review the form to see if everything had been correctly entered, and if the file needed to be flagged for an appointment with a court appointed lawyer to guide one or both parties on the data entry, or for a show cause hearing if a party is in default of their obligation to complete the form or to do so accurately. Result of show cause can be order regarding imputed income, etc.

Once the data is deemed to be entered, formula applied, result issued, judge endorses, and now you have your order (can put a delay in to allow for amendment for non-time sensitive aspects). As outlined above, order is binding unless set aside. Onus on party moving to set it aside could be set relatively highly, making it likely that the default position remains the case, but providing an escape valve for extreme situations.

John-Paul Boyd
January 12th, 2015 at 3:11 pm

That's an interesting idea as well, James. I threw in the lawyer as a means of setting the parties' expectations from the get go and a check to ensure the (relative) fairness of the results generated by the support and asset division program, but I suppose that reasonable people with a very "normal" relationship and separation could do it all on line.

As for John's comment, I'd certainly be willing to try a tribunal approach. Especially if it took a less adversarial, perhaps inquisitorial?, approach to the resolution of family disputes. I think you're right that in general the impulse against adopting a tribunal is expressed in an uncritical manner. It's an idea we should examine more closely.

Brenda Muliner
January 14th, 2015 at 6:02 pm

Having been a lawyer for 22 years, my take on this is that one of the reasons we have complexity in family law is that we live in a real world with often complex situations, which require unique solutions to every case as the best outcome. Trying to legislate less complexity into family law is not a realistic solution, it just sounds nice and makes legislators think they are doing a good job at revamping the system when in fact the real outcome is making things worse. As an example, some of the changes to family law in BC, such as changes to how property is dealt with under the Family Law Act have created significant uncertainty for lawyers, Judges, and lay litigants. In addition, cuts to legal aid by the BC government have left many women in poverty in dire situations, rampant confusion for lay litigants, and creating enormous backlogs in the court

system. In short there has been no benefit to any one in cutting access to justice by cutting legal aid, not to confused self-reps, the Courts, or to the taxpayer. I have heard that court costs about $2000/hr when all the costs are added up; when trials take an extra day of trial time because they are bogged down by struggling lay litigants, no doubt i would have cost less to the taxpayer to provide a legal aid lawyer in the first place.

John-Paul Boyd
January 17th, 2015 at 11:18 am

I think that's fair comment, Brenda. Your point about the new Family Law Act is also well taken.

The uncertainty caused by the new legislation was, in my view, inflicted more upon the bench and bar than it was on families. It was the judges and lawyers who had to throw out three decades of established case law and start over again; it seemed to me that my clients had very little knowledge of the old Family Relations Act and therefore had nothing to relearn when separating.

That said, in my work on the Family Law Act I have been consistently amazed by the extent to which government has left the fine details to the bench to work out. Take "significantly unfair," for example. We had case law out the wazoo on "unfair" in the context of reapportionment under the Family Relations Act, but nothing on "significantly unfair." In fact, the only other law in the province to use the phrase is the Strata Property Act, which uses the phrase in an entirely different and incommensurable context. Without specifying exactly what "significantly unfair" means, the government has created a huge amount of uncertainty while we wait until some clear appellate authority is established.

One of the questions I meant to raise in my article concerns the extent to which ambiguity, like the phrase "significantly unfair," creates conflict by expanding the range of potential outcomes and providing the bench with the opportunity to provide justice tailored to the individual, and whether it might be less conflictual, and more efficient for the system overall, to constrain ambiguity and the range of outcomes at the cost of subjective justice. As I've said, I don't know the answer, but I am not sold on the idea that complexity, and its corollaries conflict and uncertainty, is a necessary element of family justice.