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Custody Disputes - Evaluation and Intervention

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Reviews

Custody Disputes — Evaluation and Intervention. By Ruth S. Parry, Elsa A. Broder, Elizabeth A. G. Schmitt, Elizabeth B. Saunders, and Eric Hood. Toronto: Lexington Books, 1986. Pp. xiii, 194.

Mediation of custody disputes has become a “buzz” word of late. The duty of lawyers to discuss with clients the possibility of mediation is referred to in the new *Divorce Act*. However, little research is available and this book is therefore a valuable contribution to the Canadian literature on dealing with custody disputes.

This book is based on the experience and research findings of the Custody Project undertaken within the Department of Psychiatry of the University of Toronto. The editors are all members of that Department, though James McDonald was brought in as a guest contributor to provide a lawyer’s view of the history of custody and access disputes.

The book attempts to develop a process which the contributors have found helpful in dealing with amelioration of distress to families involved in contested custody disputes and the provision of expert assistance to the courts in such cases.

After McDonald’s explanation of the changes in judicial attitudes to access and custody cases since *R. v. DeManeville* in 1804, Kreindler explains the role of mental health professions in such cases and identifies at p. 27 four points which emerge from those dealing with such cases on a day to day basis:—

1. Extensive litigation in family disputes is financially and emotionally costly.
2. Children have a major stake in their own future following parental separation and have a right to be heard.
3. The parents’ marital relationship may end, but for their children they remain parents always. The only question is whether they will be an involved parent or an absent but fantasied parent.
4. The plan that all family members can devise themselves for custody and access arrangements has a greater chance of success than one that is imposed, whether by a clinician’s opinion or through judicial order.

Kreindler then identifies some of the fears of clinicians involved in the litigation process — that confidential information or information potentially destructive of the clinical ongoing therapeutic relationship with the family may be elicited — and attempts to provide solutions to these problems or at least to warn of the pitfalls such as positive or negative counter transference.

Thereafter the chapters deal with various aspects of the Custody Project Model, the family characteristics and other data involved, the

process of clinical intervention, the techniques of therapeutic intervention, and the clinical issues involved in custody and access disputes.

This project started in 1971 with child psychiatrists accepting referrals from presiding Supreme Court judges on a fairly informal basis. By 1976 the sharp increase in members necessitated a more systematic administration of the program and the Family Court Clinic of the Clarke Institute of Psychiatry took over this responsibility. The clinicians participating in the study were mainly pediatric psychiatrists, although some psychologists and social workers were also involved. This raises the question of the extent to which social phenomena like divorce and its side effects are best regarded as a form of mental illness requiring the intervention of psychiatrists. The referrals initially came from judges but by 1979-80 referrals from lawyers had increased to nearly 90% of all referrals.

The project clinicians accepted that the impartiality of the clinician was crucial. However, this is a much more subtle problem than it seems. If the court is expecting the clinician to make confident or even tentative recommendations it may be important to understand the basis of their beliefs. The appearance of impartiality to both parents can be crucial. The fact that a clinician has particular views on access or custody may lead to the appearance that they are predisposed to view a case in a particular way. An adherent of Goldstein, Solnit and Freud may have a different view to the access rights of a non-custodial parent than an adherent of Dr. Judith Grief's view, and experts' views on co-parenting differ widely. The role of the clinician in the study clearly went beyond that of a mediator who was attempting to enable the parties to reach their own decision although even here it may be relevant to inquire into the mediators' beliefs and value system.

Assuming the problem of impartiality was overcome, the parties to the dispute were required (in addition to completing a questionnaire) to agree to certain preconditions, namely:—

1. All parties to the dispute and counsel agree to the assessment in writing, including the acknowledgment that they are in agreement for the clinician to interview or obtain information from any person perceived as significant in the situation. Such information is sought only on the basis of the parents' written consent.
2. A nominal administrative fee is required, forwarded by one or both lawyers as determined by them in consultation with their clients.
3. The lawyer and parent questionnaires must be completed in order to provide basic demographic information about the family members, the history of previous litigation, if any, the current legal status, and a statement by each parent as to his or her position with regard to custody, access, or both.

4. Each lawyer is requested to provide a written undertaking for the payment of professional fees, the sharing of these by the parties to the dispute to be arranged between them and their lawyers.

Once the case was assigned to a clinician the administrative responsibility of the project ceased. The next stage of the process involved the clinician and counsel discussing the clinician's hourly rate and estimating the number of hours likely to be involved in the process (described as mediation¹/assessment). Counsel was to be advised as the process continued if any revision of the hours involved was necessary. Counsel might also be required to clarify issues prior to initiation of the clinical interviews. Moreover, since the issue of custody was often inter-related with the issue of the occupation of the matrimonial home and other issues, and protection of the client's rights remained an issue throughout the process, feedback to counsel is essential particularly since the assessment stage may result in the clinician reporting to the court.

Chapter 5 described the complex research methodology in investigating custody arrangements but concludes that, despite criticisms of the smallness of samples in some of the research and that the samples may be skewed that families involved in custody or access disputes cannot await well designed replicated findings. The chapter goes on to discuss some of the variables such as the length of time for which the families had been separated;²

- (ii) the parents involved and whether there was any evidence of change in social attitude to divorce (there seemed little evidence of the parties putting an immediate need for qualification ahead of a sense of lasting commitment; the spouse's experience of separation in their own parents marriage,³ as well as the spouses' age at marriage, length of courtship, whether premarital pregnancy was a factor and the psychiatric history;
- (iii) the profile of the spouses and of the children involved.⁴

Perhaps of most interest to lawyers was the fact that the recommendations made by the clinicians to the court did not seem to correspond to the statistics of orders made by the courts in other cases. The clinicians seemed less interested in the so-called tender years presumption/rule in favour of mothers. Fathers were recommended to be the custodial parent in 51% of cases as opposed to only 14% of cases dealt with outside the project.⁴ It will perhaps come as little surprise that psychological bonding,

1. This may be a misnomer since it is doubtful if therapeutic interventions are best described as mediation.

2. The period substantially exceeded the Canadian average and might therefore be presumed to involve the more difficult or intractable cases.

3. There was such evidence.

4. 58% of the children involved in the custody disputes investigated by the Project were boys and 42% were girls. (p.63)

the child's wishes and continuity of care turned out to be the critical factors. On the topic of access, the project asked clinicians to recommend access as (i) frequent, (ii) structured (i.e., prearranged as to time and duration), (iii) supervised. Solving access disputes, again to no surprise to lawyers, was found by the researchers to be more complex than custody disputes. The authors suggest at p. 134 from guidelines:

1. An access plan needs to allow predictable and frequent access by the child to the noncustodial parent.
2. A preschooler needs a more stable environment than older children. Thus frequent brief visits are preferable to day-long or overnight visits.
3. For the school age and the older child, increasing control by the child of the frequency and the duration of the visits is to be preferred. While adhering to the principle of continuous and frequent access, the child in latency or adolescent years is more mobile and thus can often undertake more responsibility in negotiating visits with the absent parent.
4. Issues relating to the care and control of the child, such as routines, health care, education, leisure-time activities, and religion, are best agreed upon jointly by the parents and supported by both of them if the child is not to be faced with conflicting expectations. Agreement on these areas by both parents and a commitment to support one another lessens the potential for the child to play one parent off against the other.

For those for whom these general guidelines are too flexible or unhelpful, supplementary guidelines are offered:

1. The child resides in one home, and that is the home of the custodial parent. This is the place where the child spends most time, keeping his belongings, and from where most activities originate. The custody arrangements should clearly support the child in feeling he or she lives in that home and visits with the noncustodial parent.
2. The custodial parent carries the primary responsibility for the child's rearing. Daily routines, education, religion, health care, and leisure-time activities where possible should be discussed with the noncustodial parent but are to be decided by the custodial parent. Support of these plans during access visits is expected of the noncustodial parent.
3. The age of the child is a primary factor in planning the duration of visits, location, and frequency. The needs of the preschool child are different from those of the older child.
4. Changes in visiting arrangements arising out of changes in the child's activities or illness in either the child or one of the parents are to be expected and planned for. Visiting should disrupt the child's normal routines as little as possible. In other words, the visiting parent should adapt, insofar as possible, to the child's schedule, and not vice-versa. Mechanisms for making an unexpected change in visiting plans can be established, requiring minimal negotiations between the parents.

5. Making access visits into special occasions is to be avoided. Rather it is preferable for the parent and the child to undertake normal activities. To maintain visits as special occasions places a strain on the noncustodial parent, limits the opportunity for the development of an easy parent-child relationship, and may risk alienation of the custodial parent. The custodial parent may perceive himself or herself as carrying out the basic child-rearing responsibilities, whereas the visiting parent reaps the benefits.

These comments, although not directed specifically at joint custody, do nevertheless give a representative view of the author's cautious attitude to it in the light of the limited empirical data on it. This contrasts with Irving, Benjamin and Trocme's findings on shared parenting.⁵ Lawyers hoping to persuade courts to exercise their powers to order co-parenting under ss. 16(4) and (10) of the new Divorce Act will find the academic research camps divided on this issue. All in all this is a worthwhile piece of research which lawyers can read with advantage even if the results are not always as clear cut as they might have hoped.

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5. p. 65.

6. *Shared Parenting: An Empirical Analysis Using a Large Data Base*, (1984), 23 Family Proc.: 23, 561-69.

The Trials of Israel Lipski. By Martin L. Friedland. London: MacMillan Limited, 1984. Pp. 219.

On June 28th 1887 in the East End of London a particularly dreadful murder took place. A woman was struck on the head and nitric acid poured down her throat as she lay in bed. Israel Lipski was found under the women's bed with some traces of nitric acid around his mouth but to no great ill effect. Both the victim and Lipski were in a room that had been locked from the inside. The room's two windows were impossible to open. Was Lipski guilty of murdering this woman?

Professor Friedland's very thorough investigation of the case and its surrounding political, economic and social circumstances has all the tense elements of a Victorian cause célèbre. To begin with, as the author admits in his Preface, his interest in the case arose out of his interest in the judge that tried the case — Mr. Justice James Fitzjames Stephen. Additionally, the author's interest in Jewish immigration to England from Eastern Europe and the attitudes of the recipient country would be addressed. Here was a situation where both victim and accused were Jewish immigrants living in a predominantly Jewish immigrant area of London. Professor Friedland also asks whether this, in fact, was the first "trial by journalism" and in this context paints a vivid picture of the activities of W.T. Stead, The Editor of the *Pall Mall Gazette* at the time.

This book not only provides the reader with an insight into the qualities of Mr. Justice Stephen through the course of a controversial criminal trial, it shows us counsel of the day at work. There are substantial excerpts from the trial transcript. Defence counsel is criticized for his conduct of the case. The case for the defence was originally to be conducted by Gerald Geoghegan (Marshall Hall's principal) but he became indisposed at the last minute. This indisposition, the author conjectures, was due to heavy drinking. His replacement, A. J. McIntyre, Q.C. was predominantly a civil lawyer as, the author tries to show, was demonstrated by his cross-examination. However, Geoghegan sat in with McIntyre at the trial. But, when illustrating counsel's daily habits during the trial, the author, perhaps, makes an unfair gratuitous comment about Geoghegan at lunch:

Counsel probably remained in the small barristers robing room. Poland (Crown Counsel), no doubt, had his usual small brown loaf, large pat of butter and jug of milk, which one contemporary says was all, in his forty years' knowledge of Poland, he ever saw him take for lunch. And, no doubt, Geoghegan had one or more drinks. (p. 46)

It was not until 1898 that an accused could in all cases be called to give evidence as a witness on his own behalf. In 1887 an accused could make

an unsworn statement to the court. No such statement was made by Lipski and McIntyre called no evidence. Was the defence, asks the author, properly conducted and was the judge's charge to the jury unfair? Again, there was no Appeal from conviction in 1887. A reprieve might be granted by the Queen on the advice of the Home Secretary after the latter had consulted with the trial judge. Should a reprieve have been granted in this case, having regard to the post trial soul searching that Mr. Justice Stephen went through? At the same time, the author weaves into the mix the role played by the press, notably the *Pall Mall Gazette*, the political figures of the time and the reactions of and possible effects on the Jewish community.

The reader will have to judge how convincing a case is made by Professor Friedland in this book. Regardless of that, the reader is bound to be pleased with the way the book holds the attention from start to finish with a fascinating cast of characters.

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