

# Matrimonial Affairs

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**In this Issue:**

Family Court - Simcoe County  
Experience

Editorial

Letters to the Editor

Comments from the Chair

Family Law Section  
Submissions on Pension Reform

The Family Law Rules - Perils and  
Pitfalls

Meditation - Arbitration:  
Perspectives

Robert Mnookin on  
Collaborative Law

What Role, if any, Should Children  
Have in Collaborative Law?

Acting for Cassandra -  
Asperger's Syndrome in  
Separation & Divorce

Counselor's Corner:  
Introducing a New Metaphor for  
Divorce and Remarriage

Movie Review

Book Review

## Family Court - Simcoe County Experience

*Thomas C. Dart\**

In this article, the Simcoe County Family Law Lawyers' Association hopes to outline for you how Family Court once operated in our County and then recount its gradual decline. In so doing, we admit our bias in favour of a "specialized" family law system of dispute resolution, designed to resolve family law disputes in the least damaging manner.

As we all know, the Unified Family Court began in 1977 as an experiment in Hamilton. Its success led to the quick realization among all who practice in the area of family law that there were significant benefits to be achieved in a specialized court. Naturally, family law lawyers clamored for its expansion.

It ought to be noted first and foremost that family law is not for everyone. Those of us who practice (or dispense) family law exclusively tend to lose sight of this simple premise. There are many lawyers and judges who would rather do anything other than handle and try family law cases. We ought to do all in our power to respect their right to avoid family law matters and handle only those types of cases over which they have special skill and aptitude.

In Simcoe County, in 1994, lawyers in our County formed the Simcoe County Family Law Lawyers' Association and, through its auspices, actively lobbied the Provincial Government to be among the first areas of the Province designated for expansion outside Hamilton. We were very proud to be successful and, in 1995, our County was among one

of the four areas in the Province which gained the "Family Court". We knew that we had Family Court when we realized that special courtrooms in a special area of the courthouse were set up to hear only family law cases; special Judges were appointed just to hear family law cases and an atmosphere of understanding, compassion, and a strong desire to resolve cases without litigation was actively promoted among the bar, the judiciary and court's administration. An active component was the addition of "on site" mediation services funded largely by the Provincial Government.

From 1995 until 1999, we also had what is now known as "case management" in the true sense of the word. One family law Judge handled a family law case from its first filing until resolution by settlement. If no settlement could be achieved, the case went to a different family law Judge for trial. The case management system employed at that time was simple. Lawyers could manage the file without the assistance of a Judge for a brief period of time on their own. However, lawyers were required to report to the case management Judge on the success of their efforts to resolve the case. The Judge intervened as the Judge felt necessary. Until the case was resolved, it could only be adjourned to a fixed date. Litigants and lawyers had to re attend and explain their progress on the file at specific times without exception until the case was eventually resolved. The case management Judge acted primarily as a focal point to gain the attention

*continued on page 17...*



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# Editorial

The legalization of same-sex marriage in all provinces appears imminent. Gay and lesbian couples have already achieved equality in almost all other areas of family law. But what about their children? We know that many gay and lesbian couples are raising children through adoption or through the use of assisted reproductive technologies. These children are not being afforded the same protections as those of heterosexual families. The *Vital Statistics Act* does not contemplate same sex parents. Birth certificates only provide for one “mother” and one “father.” While Ontario has permitted a same-sex parent to adopt her partner’s children since 1995 as a result of a Charter challenge, the other “mother” is still listed as a “father” on the birth registration even after the adoption. More problematic, heterosexual couples, who use donor insemination to have children, do not have to do a step-parent adoption. These couples simply list the husband as “father” on the birth certificate. Not surprisingly, this

arbitrary and discriminatory system has been challenged successfully in two provinces. Our Attorney General has indicated a willingness to review the law respecting parentage to ensure the inclusion of same-sex families. Given the evolution of the case law on this topic, it is time for the government to make this legislation consistent with the Charter.

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## Letter to the Editor

### Response - Where have all the Flowers Gone?

Let me respond to your editorial comment in the October 2004 edition of *Matrimonial Affairs*:

The article in the *Report on Business* September 24, 2004 was a journalistic failure in every sense of the word. The article was poorly written, factually inaccurate, one sided and written by a reporter with preconceived ideas. It had everything to do with a denouncement of family lawyers and the current system of dispute resolution in matrimonial matters and absolute nothing to do with gender or gender discrimination. I can’t imagine how any family lawyer would want to be quoted or profiled in that article. I happen to know as a fact that some of our esteemed colleagues refused to be quoted after being interviewed by the reporter.

As counsel for the husband in the profiled case I can tell you that:

- a) my co-counsel on this very complex matter was my extremely bright and capable FEMALE partner D. Smith;
- b) D and I were assisted through out the trial by my extremely bright and capable FEMALE partner Susan Jack;

- c) my learned friends Gerald Sadvari and Stephen (not Peter as noted in the article) Grant were very well assisted by their FEMALE associate Julia Barrs;
- d) the FEMALE reporter from the Globe spent days in court speaking with Mr. Sadvari and Mr. Grant and never once approached me, Ms. Smith or Ms. Jack for comment or opinion;
- e) the trial lasting almost 6 weeks was presided over by the very able FEMALE Justice Nancy Backhouse.

Women played an active role in our trial as they do in the specialized family law bar. The omission of reference to women in the article can be attributed to nothing more than journalistic incompetence.

By the way, I do agree with your comment in the editorial about being reactionary and whiny, you were being both!

Gary S. Joseph, LL.M.  
MacDonald & Partners

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# Letter to the Editor

February 3, 2005

## SENT BY E-MAIL

To the Editors  
Matrimonial Affairs

Mesdames:

This is in response to the column by the Learned Chair, Grant Gold, in your October edition, wherein Mr. Gold pleads for the appointment of judges who have family law backgrounds. I only quarrel where he says that this view is unanimously held by the family law bar.

I have always thought that cross-pollination is useful and that some of our best family law judges (and their judgments) have been men and women who had not practised in that area.

Without any effort, I come up with the names of Galligan (who gave us the first major decision under the FLRA in *Silverstein*: a lucid and a guiding light for many many years) Zuber, Peter Wright, Henry (who gave us *Bregman*), Robins and Morden.

I refrain from using current members of the Bench as examples although I normally do not balk at currying favour.

To lend strength to my argument I can recite a list of good family law lawyers who, upon ascending to the Bench, did not impress. I will not name names unless you buy me a drink at the next Family Law Dinner.

And we should all toast the family law judges who were/are good before and after ascension.

Yours very truly,

DORAN & MILLS

*“Burke Doran”*

A. Burke Doran

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# Comments from the Chair

*Grant W. Gold\**

Whenever I begin my preparation for this column, I typically look at previous issues to make sure that I am not repeating what I have said before. (I don't want to appear like an old family law lawyer telling the same stories far before my time.) In reviewing my comments from last January, however, I determined that my words from a year ago were worthy of repetition today.

“Let's all agree that -35 as a temperature, with or without wind chill, is just too cold.” It certainly doesn't make for a pleasant walk to any courthouse.

In an attempt to heat things up, politically at least, our Section's Executive has taken on a pretty hot issue: The specialization of Judges. Below is a copy of my letter to Chief Justice Heather Smith dated December 30, 2004, a copy of which went to Chief Justice Roy McMurtry, Associate Chief Justice Douglas Cunningham, and the Attorney General, Michael Bryant.

December 30, 2004

The Honourable Heather Forster Smith  
Chief Justice of the Superior Court of Justice of Ontario  
393 University Avenue  
10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

Dear Chief Justice Smith:

I am writing to you in my capacity as Chair of the Family Law Section of the Ontario Bar Association.

The purpose of this letter is to alert you to an initiative being undertaken by our Family Law Executive, which initiative stems from what many family law lawyers across this Province see as the erosion of the Family Court throughout Ontario.

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At our Executive meeting on December 8, 2004, we scheduled a special meeting which meeting will take place on January 18, 2005, the purpose of which will be to devise a strategy to do all we can to ensure the restoration of the Family Court in the Province.

The *Courts of Justice Act* provides for, as you know, the establishment of the Family Court as a special branch of the Superior Court of Justice. I know that many members of the Judiciary are extremely proud of the post-1995 expansion of the Hamilton model of this Court to many regions in Ontario.

As you are aware, in many judicial regions throughout Ontario, the Family Court is currently being managed, out of necessity, by non-family Judges. In practice, there is simply no such thing as a Family Court. In the Central East Region, for example, family and civil motions are being routinely scheduled for the same day in front of the same Judge, who very often is not a Judge with either experience or interest in family law. I have been contacted by lawyers throughout the Province who have advised me that this practice is becoming alarmingly wide spread throughout a large number of Judicial Regions.

It is my intent to forward a more detailed letter to you after our Executive meeting on January 18, 2005, but in the interim I thought that it would be useful to alert you to our concerns. I would appreciate any assistance that you can provide.

I wish you all the best in the New Year.

Yours truly,

Grant W. Gold  
Chair – Family Law Section  
Ontario Bar Association

Since writing the letter, the Executive has met again and is in the process of fleshing out a more formal Position Statement advocating for specialization and the rotating into Family Court of non-specialist Judges who wish to sit in family law. You should see that Statement shortly.

We have received widespread support for our position from many lawyers and a number of Judges. Some of the County Law Associations have taken their own initiative to push for a specialized court, with the Simcoe County Family Law Lawyers Association being the most active and vocal. Those of you who have had family law motions in Simcoe County, I expect share their frustration.

I know that there are some of you with contrary views and I would appreciate hearing from you by e-mail at [ggold@goodmancarr.com](mailto:ggold@goodmancarr.com).

By the time that this goes to print, the Annual Institute and Family Law Dinner will have come and gone. Congratulations to this year's recipient of the Kroll Lindquist Avey Award for Excellence in Family Law, Justice Mary Lou Benotto. Justice Benotto has worked tirelessly as both a lawyer and a Judge to further the interests of Family Law in the Province of Ontario and are indebted to her for that.

To conclude on a very exciting note, subsequent to a meeting between representatives of the Ontario Bar Association and the Attorney General's Office, the Attorney General has formed a working group comprised of his staff, Ministry Officials and two representatives from each of the OBA, Advocates' Society and County and District Law Presidents' Association. The purpose of the working group is to begin working on a Family Law reform package. Wendy Napier and I will attend our first meeting on February 15, 2005. Hot times ahead for Family Law ... stay tuned.

*\* Grant W. Gold, Goodman and Carr LLP.*

# Family Law Section Submissions on Pension Reform

As a result of the Policy Forum held on November 25, 2004 with representatives from the OBA and the Attorney General's office, the Attorney General has invited the presidents of the OBA, Advocates Society and CDLPA to nominate 2 members each to participate in a group to work on a family law reform package.

It is expected that the working group will soon be established and that reform of the treatment of pensions in property division will figure prominently in the discussions. The Family Law Section also presented a number of other reform concerns which were outlined in the submissions made on November 25, 2004. The text of those proposals was as follows:

## A. INTRODUCTION

Since the enactment of the *Family Law Act* in 1986, judges and lawyers, and the public they serve, have repeatedly identified areas in need of reform. Regrettably, family law reform has not been given the political and legislative attention it deserves, so we continue to operate within a legislative scheme that is both outdated and gives rise to unfair results. Any clarification of the law or any extensions of the law to comport with the *Charter* have been achieved through costly litigation, at the expense of individual litigants and the justice system as a whole.

The Ontario Bar Association ("OBA") and, in particular, the Family Law Section is hopeful this government will give family law the prominent place it deserves amongst its law reform initiatives. We believe the *Family Law Act* is in immediate need of amendment in some key areas and we urge the government to enter into a dialogue with the family law bar, with the ultimate goal of introducing draft legislation that would perhaps be tabled for discussion at public hearings. We propose the immediate establishment of a family law reform working group, which would be comprised of AG personnel and members of the OBA Family Law and Pensions and Benefits Sections.

The OBA comprises more than 15,000 members and our Family Law Section of the OBA has a membership of some 403 strong. We are aware that the Advocates' Society has also made a request for family law reform and we share many of their concerns and positions.

## B. SUMMARY OF ISSUES

We have identified a number of issues as commanding consideration for reform. They are as follows:

- a. the treatment of pensions;
- b. the treatment of the matrimonial home;
- c. entitlement to support for the adult child;
- d. an expanded definition of parentage;
- e. new regulatory disclosure provisions for child support;
- f. retroactivity of child support;
- g. provisions for out of court variations;
- h. the right to access after adoption; and
- i. a reconsideration of maintaining different property regimes for married, unmarried and same sex spouses.

Issues b-i are dealt with here in summary fashion only as the focus of this preliminary brief is the pension issue. While all agree that pension reform is a pressing priority, we urge the government to consider other legislative reform initiatives.

## C. THE PENSION ISSUES

### 1. Overview

On two occasions in the past decade the Supreme Court of Canada has had to grapple with pension issues in cases arising from Ontario. In both instances the Court remarked on its limited capacity to remedy the problem at hand, commenting that legislative reform in this area was long overdue. The principal problem with the treatment of pensions in the family law context is that they are treated as assets, subject to valuation and equalization upon marriage breakdown, even though the pension member has no access to the asset until retirement, at which time it is received as income. This current inability to defer the division of the pension until it is in receipt by the pension member often creates considerable hardship for the pension member, who may end up leaving the relationship with no other assets.

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# The Family Law Rules - Perils and Pitfalls

*Susan Harris\**

On Monday, October 18, 2004, a crowd of hopefuls attended the OBA Family Section meeting at 20 Toronto Street to receive the latest update on the Family Law Rules. Given that the Rules were well underway, it was high time to hear how things were going, from not only the Bar, but the Bench and the administration at the Court as well. And, we all silently hoped that some precious nugget of information would be passed to us so we could create our Case Conference Memorandum and Form 14s in such a way that they would shine out above the masses.

Presiding as Chair was Jacqueline Mills and on the panel we heard from Justice MacDonald, Roselyn Zisman, Stephanie Sroka, Brahm Siegel and a very valuable last-minute addition, Mary Dion.

For those who crave the executive summary, here are the top 12 (too much information to squeeze into 10) things we learned at the dinner:

1. Read the Rules
2. If you're concerned about having something rejected at the Court, attach a photocopy of the Rule to your process server's memo, after you've read the Rule
3. Please include "grounds" in your notice of motion (although not required by the Rules, the Judges find it very helpful)
4. When you're starting a fresh case, you still have to file a Part 2, even though it's empty!
5. Read the formal requirements of the continuing record <http://www.ontariocourts.on.ca/family-court/notices/formal.htm>
6. When counting days for service, read the Rules
7. Read the Rules before calling the Court to ask a question
8. At your first Case Conference ask the Judge to endorse the record "Case Conference completed. Parties free to bring motions."
9. When at a Case Conference or motion, get the Endorsement before you leave
10. In your 14C do not tell the Judge to "read all material" be specific
11. Yes to Factums. Short, concise, illuminating, Factums
12. Read the Rules

Okay, now that you have the short answer, here's a little more. The Rules have changed everything, most notably by making all the waits longer. Longer wait to speak with Stephanie, longer wait to a Case Conference date, longer wait at the counter. Everybody is frustrated; some are even "driven crazy". Everybody is doing their best. It's the steep part of the curve, just think back to your first year of practice, like that.

Use your Case Conference to your best advantage. Let the Judge know **exactly** what you would like them to read. Seek direction from the Judge. Set a timetable for delivery of disclosure. Set the next date. Seek direction regarding bringing a non-family matter under the Family Law Rules. For example, an Order for Partition and Sale or an oppression remedy under the OBCA. You may not know that you can book a Case Conference in front of a DRO if both parties consent. Now you do.

If you want to start a case in a jurisdiction other than one allowed by the Rules, you need the permission of the Court. Here is what Mary Dion suggested. Start your case in the correct jurisdiction. Bring a motion (on consent) to change jurisdiction. That's a 14 B, signed by both parties and include copies of your draft Orders. Not everyone was happy with that suggestion because that's not in the Rules. What **is** in the Rules is that you need the Court's permission in the municipality chosen by the parties, 5(1)(c). But that's not what Mary said... Clear? Good.

As for serving and filing ... no late briefs. If you were not served with something on time, but counsel on the other side was able to file it anyway [pesky other side] take it up with the Judge. It is not the job of the counter staff to make sure the documents they are accepting have been properly served. Really? Don't serve by fax after 4pm on a day Court is open (Rule 6(8)). [But if you read that Rule with Rule 6(7)... It does not really make sense.] Don't serve a Factum by fax (this may only apply to appeal Factums as no other Factums are referred to in the Rules). Don't serve tomes of great weight (over 16 pages) by fax...but this is all in the Rules (Rule 6). Read the Rules.

What if you serve an Order for approval as to form and content and hear nothing for 10 days? Send it to the Court and it will be issued. Rule 25(8). Practical advice

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to all those who take extended summer vacations, leave instruction with your staff to deal with these issues if they come up.

Roselyn Zisman has a handy Appeal route chart. If you ask her nicely, she may fax it to you.

Finally, for those interested, Salmon Wellington.

It was my pleasure to prepare this article, although I understand I was only asked because Epstein, Cole has been hogging the presses lately. Oh well, any chance for notoriety.

\* *Susan Harris, Bastedo, Stewart, Smith.*

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## Mediation-Arbitration: Perspectives

*Anne Marie Horne\**

Issues at the forefront of mediation-arbitration were discussed at the OBA Family Law Section dinner of November 16, 2004.

Mediation-arbitration, colloquially known as “med-arb”, is the alternative dispute resolution (ADR) process whereby the parties attempt to resolve issues in dispute first through mediation and then, if the mediation fails, through arbitration with the mediator changing hats to that of an arbitrator. The use of med-arb has become mainstream in many areas of practice, including family law. Despite its apparent popularity, the med-arb process is not without controversy.

Philip Epstein, Q.C., of Epstein Cole LLP, was chair of a panel which included Terry Caskie, of Christie Saccuccie Mathews and Co., Julie Hannaford, of Borden Ladner Gervais LLP and Hilary Linton, of Riverdale Mediation.

Each of the panellists conveyed his/her views on the utility of the med-arb model. All three were generally supporters of med-arbs albeit maybe for different reasons.

There was a discussion as to the various roles that each of them assumes when they were doing mediation i.e.

whether it be a neutral evaluator or facilitator. A lot depends on the personality of the mediator as well as the parties’ needs. Mr. Epstein clarified that mediation is very different from the collaborative family law process which is another viable settlement option for clients.

All three were in agreement that the use of med-arb is preferable over simple mediation because of the “teeth” that the arbitration element provides. As Ms. Linton stated “for some people having the arbitration piece is critical to getting them to settle.” Ms. Hannaford at times prefers the use of the litigation process over the med-arb process for some clients as it provides the threat and impetus which results in movement when the parties have taken hard line positions. Also, litigation provides jurisprudence.

Ms. Hannaford presented the view that family law should be less emotionally burdened and that mediation can at times feed the emotional side of family law. Nonetheless, Ms. Hannaford agreed that mediation-arbitration may very well have the effect of speeding up the process of overcoming the parties’ feelings of grief and anger by providing them with a forum to express those feelings, and thereby allowing a principled result to be arrived at sooner.

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The most controversial issue is the notion of neutrality. Mr. Epstein, Ms. Linton and Mr. Caskie, who all act as mediator-arbitrators, discussed how the mediator-arbitrator, while in the role of mediator, stays neutral without prejudging the case before it goes to arbitration before him or her. Mr. Caskie admitted that while med-arb is not a perfect system it can be done. Mr. Caskie indicated that while it is ideal to have a separate mediator and arbitrator for neutrality assurances, having the two roles filled by different people would frustrate the process and be more costly for the parties. The reason why certain senior family lawyers and/or professional mediators are selected by the disputing parties to act as the neutral third party throughout the dispute resolution process, both as mediator and arbitrator, is because the parties and their lawyers trust the skill, knowledge, and judgement of that person and want the entire process to be steered by him or her.

Further, Mr. Caskie, Ms. Linton and Mr. Epstein all agreed that med-arbs hardly ever proceed to arbitration. The arbitration element, in their experience, acts as a tool in getting parties to come to a satisfactory resolution. Given this, there is no real issue of neutrality in any practical sense.

Another topic of discussion was whether it is ever appropriate for the mediator to caucus and/or remove the lawyers from the mediation process. Mr. Epstein removes lawyers only on their consent and does so when lawyers have gotten too positional which prevents clients from talking to each other. Ms. Hannaford prefers that the lawyers are not asked to leave during the mediation while Ms. Linton routinely does mediation without lawyers present. If and when caucusing is done, there should be confidentiality of what was discussed in the caucus. This goes a long way to helping people save face and make concessions that they might not otherwise make.

Two of the basic ground rules that kept recurring in the discussion were that it is important to do a screening for clients in advance i.e. usually not taking cases where there has been domestic abuse and doing med-arb only where both clients are represented.

Also discussed was the issue of reserving a right to appeal and/or the right to judicial review in the mediation-arbitration agreement. Ms. Hannaford stated she thought it was important to reserve the right to appeal as it allows the parties some solace in handing the process over to a mediator-arbitrator whom they don't know. It was suggested that in deciding whether to reserve a right to appeal, or, a right to judicial review, the fact that appeals can only be made on questions of law and the fact that judicial review protects procedural rights and natural

justice should be taken into consideration. Mr. Caskie also recommended that there should be a transcript of the arbitration if there is right of appeal and that the parties should pay for that transcript.

Mr. Epstein expressed that one of the benefits to mediation-arbitration is that it allows for creative solutions. Mr. Epstein stated that as a mediator he looks for solutions to the problems and not necessarily legal outcomes. In mediations he always tries to provide some starting suggestions while conveying to the parties that the suggestions will not be part of an arbitrated outcome.

All members of the panel agreed that litigation as a method of dispute resolution is costly and tends to pit the spouses against each other. Therefore, other options of dispute resolution need to be considered in getting to a cost effective and satisfactory result for clients.

It was clear there are a number of dispute resolution options and alternatives for parties to choose from. The discussion as a whole seemed to solidify med-arb as a valid and ever growing option while at the same time recognizing that different family law cases and different client needs call for different methods for dispute resolution.

*\* Anne Marie Horne, Epstein Cole LLP.*

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# Robert Mnookin on Collaborative Law

Sandra Demson\*

Professor Robert Mnookin of the Harvard Law School addressed a meeting of over 500 collaborative professionals in Boston in October 2004, on the topic: “Managing the Tensions of Negotiations: The Role of Collaborative Professionals.” Mnookin is the Director of the Harvard Negotiation Research Project and author of *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. He is currently involved in a project to create dialogue between the settlers and the peacemakers in Israel!

Mnookin began by making the statement that what is true in practice is also possible in theory, and that while the collaborative movement was being developed in practice he was at the same time working on his core intuition about what cooperative lawyers can achieve for their clients: if both spouses go to lawyers who know and trust each other, they will be better off. Lawyers who will pledge their reputation to behave in a particular way can do a lot for their clients.

Mnookin cautioned us that we can better serve our clients and society by understanding the challenges of legal negotiation, to be able to facilitate negotiations in circumstances where clients cannot do it themselves. There is no silver bullet. Negotiations require the management of three tensions that do not go away, namely:

- 1. The tension between creating value and distributing value.** When working to create value, caution is necessary not to be taken advantage of by the other negotiator who does not reciprocate. A naïve disclosure of your position when the lawyer on the other side wants to exploit the situation can backfire, which is why lawyers have typically guarded information. Collaborative practice is premised on full disclosure of the clients’ information and interests. Be aware of this dilemma.
- 2. The tension between assertion and empathy.** The advocate asserts their client’s needs. Empathy is the ability to express your understanding of the other person’s needs and views, while being prepared to be corrected by them if you get it wrong. Empathy is not sympathy. Tension exists because some of us are good at asserting but not good at listening. Others are able to empathize and understand another perspective, but lose their own perspective in the process, and instead fall into an accommodation mode. Faced with conflict lawyers and clients are challenged and may not always be able to manage this tension.

- 3. The tension between principals and agents.** As professionals we are agents for our clients but we still have interests of our own – our reputation, self-image – that may not always align with our client’s interests. Sometimes lawyers have been known to advance their own interests through the litigation process under the guise of helping the client. Clients also have been known to exploit their agent. The reality is that our interests are not identical with our client’s interest.

There are a lot of impediments to successful negotiations. When clients sign the participation agreement in a collaborative process, they don’t always understand the deal or even completely agree with it. Any one of the four relationships (lawyers with each other, clients with each other, lawyer with own client and lawyer with other client) can be dysfunctional, making problem solving difficult. Our culture leads clients to expect divorce lawyers to be adversarial, and this expectation may not always be congruent with what the lawyer intends. Cultural assumptions need to be made explicit and challenged where they contradict successful management of these three tensions within legal negotiations. At the least we need to recognize the assumptions clients have, for example that lawyers are hired guns, or “the less she gets, the more I get”. Mnookin sees collaborative practice as having the potential to change the dynamics of negotiation and align incentives in ways he supports. In managing the tensions, lawyers are not assuming the neutral role of mediator, their role is to:

1. facilitate the disclosure and underlying interests, help the competitive client to listen, the accommodating client to understand they have a legitimate interest that deserves respect, the avoiding client to articulate their issues.
2. maintain a problem-solving orientation.
3. have an up front relationship with the client, advise the client of the lawyer’s values and explain candidly the advantages and disadvantages of collaborative practice so the client can make an informed decision.
4. develop a strong relationship with the other professionals.

5. work to help the client better manage the tensions, by acknowledging where there are distributive issues, by using the problem-solving orientation to produce a process that creates values, and by promoting efficient communication between the lawyers and the clients.

Other professionals, including financial analysts and mental health professionals, usually but not always play a neutral role in the collaborative process and can facilitate productive negotiations.

In Ontario collaborative practice is more and more including other professionals, who work as a team with the clients and lawyers to solve their problems. Properly trained professionals can help expand collaborative practice to more difficult cases, involving mental health issues, children's issues, and complicated financial issues. As expressed by Mnookin, it is a joy to be part of a solution, and not part of a problem.

\* *Sandra Demson*, [srd@idirect.com](mailto:srd@idirect.com).

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## What Role, if any, Should Children Have in Collaborative Law?

*Dr. Barbara Landau\**

Collaborative Family Law in virtually all jurisdictions is recognizing the benefits of interdisciplinary cooperation. One of the most beneficial avenues of cooperation is ensuring children's voices are heard in the Collaborative process. I can anticipate several questions that are likely to be asked:

### 1. Are children's voices needed?

There are a number of arguments that suggest children should NOT be involved; namely

- Aren't parents the most effective and relevant voice?
- If the goal of CFL is to empower parents, why undermine their authority and expertise about their own children by involving children directly?
- If conflict is so harmful to children, isn't it unfair to invite them into the middle of disputing parents?
- Wouldn't it create tremendous guilt in children if they were put on the spot to select one parent over another?
- Wouldn't it induce parents to bribe or threaten their children if they know children would have a voice?
- Since children try to avoid rules and limits wouldn't they just select the parent who had the fewest expectations – which would not be in their best interests in the long run.

### 2. Why should children have a voice?

- Arguably separation affects children the most. Children feel the most out of control about a decision over which they have no choice. One child told me that "separation feels like being on a roller coaster without a steering wheel". The vast majority of children, if given a vote in their parent's divorce would opt for the family remaining together and working things out. Since this option is not available to them, giving them a voice restores some feeling of control.
- Children often have unique perspectives on their situation and what they need to assist their adjustment. Their issues are usually very different from those of their parent's, who are often caught up in their own emotional pain and in a win/lose struggle for control over the children.
- Children have opinions, and not asking for their input means their views and preferences are often overlooked. As with adults, when our views and preferences are ignored we often resist even reasonable solutions. To achieve better by-in and to ensure the children's concerns are addressed, their voices need to be heard.
- Siblings who are different ages, different genders, who have different personalities or temperaments, different interests or significant needs will have very different perspectives, which are often overlooked when children are not interviewed individually.
- Younger children (as young as 4 years of age) often are able to articulate questions, concerns, fears and constructive suggestions. Not to invite

their input means that these issues are left unaddressed or continue to cause unnecessary stress, and creative options are overlooked.

- As children get older (e.g. over 12 years) they may “vote with their feet” and refuse to follow a plan that is imposed on them. In these cases parents often blame each other for “inducing” a child to take sides.
- Having a voice does NOT mean DECIDING and this must be clarified up front. Parents decide unless a child is 14 or older, in which case it is hard to impose an unpopular outcome. Also, children should NOT be asked to ‘pick a parent’ as this does put children in a very difficult conflict of loyalties. Most preadolescent or adolescent children want to be assured they will not be asked to take sides.
- Meeting with children also allows an opportunity to discover issues of abuse, neglect or special learning needs that parents may not be aware of or willing to reveal.

### 3. How can children’s voices be heard in a Collaborative Family Law process?

Collaboratively trained lawyers are not trained in child development and usually do not have the training or skills to interview children. They should NOT directly involve children themselves as the potential damage would outweigh the benefits. It would be like bringing back the outdated practice of Judges interviewing children in chambers; an experience that was frightening, not in keeping with the child’s developmental stage, often disrespectful of appropriate boundaries, and methods of framing questions. Also, collecting affidavits from relatives, friends and neighbours is a divisive practice and of very little use as the basis for a problem solving conversation.

The goal should be to provide the parents and Collaborative Lawyers with the information needed to have a constructive problem solving conversation with the parents about significant issues that will impact the child’s development or contribute to or prevent the successful completion of a Parenting Plan.

There are a number of resources available to include the child’s perspective:

- Partner with a mediator or child therapist who has mental health training and is experienced in meeting with children. Ensure that this individual is bound by the same Collaborative Participation Agreement as the lawyers.
- Invite impartial comments from the child’s therapist, teacher, guidance teacher, day care provider or family doctor with respect to any special considerations with respect to the child’s academic,

health care, social or emotional status. It is essential that the focus be on holding a problem solving discussion of issues to protect the children’s wellbeing – e.g. “How can we best address the child’s need for asthmatic medication?” or “How can we best support the child’s learning disabilities by involving a remedial specialist, following up on the specialist’s recommendations, and encouraging our child’s progress?”

### 4. What type of contribution would children likely make?

This brings up the question of the focus of the child’s involvement. In my experience giving the child a voice can contribute in a number of ways

- They can indicate the relative importance of factors, such as remaining in the matrimonial home, the same school, attending a private vs. a public school, attitudes towards living in an apartment vs. a detached home, being close to friends, etc. Often divisive issues can be resolved by such input.
- Children can indicate whether they are ready/or not ready to meet new partners.
- They can reveal abuse by parents, new partners or extended family members.
- They can make suggestions about the degree of structure or lack of structure to visitation patterns that best meets their needs at the time, the priority to be given to their own activities e.g. one child said that the plan being considered by his parents didn’t take his basketball schedule into account, another said she wouldn’t be able to participate in Friday night pizza get-togethers with her friends.
- Special concerns can be addressed, e.g. “Who will feed the dog or the goldfish?”, “How will I get the school bus from my Dad’s?”, or “I only have one bed, where will I sleep at my Dad’s?” Some children worry about whether a divorce means that they will only be allowed to see one parent. What a relief to learn this is not the case!

Clearly the topic of giving children a voice is an important one for interdisciplinary cooperation!

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# Acting for Cassandra – Asperger’s Syndrome in Separation & Divorce

*Sheila Jennings Linehan & FAAAS Inc.\**

A tragic character of Greek mythology, Cassandra was admired by the god, Apollo. He mentored her and gave her the gift of prophecy. But he was angered because she accepted him only as a teacher, and not as a lover.

The Greeks were aware that an individual repeatedly not believed would suffer profound moral distress. The name Cassandra was chosen to represent the long time family member or partner of someone with Asperger’s Syndrome (AS), a high functioning form of autism. As with the Cassandra of Greek myth, these individuals often experience moral distress. They also become pathologized, typically developing reactive depression or the appearance of neurosis, exactly the behavior expected for a normal individual subjected to prolonged moral distress (Hackett and Henderson 2002). This pathologization of the party without the dysfunction is also a theme seen in the early work of Lenore Walker.

The Cassandra concept is particularly relevant for the case of an AS partner with children. She or he (we will use “she” in this context, because AS is at this present time, recognized in more males than females) will come to the law office and correctly inform her counsel that there are or may be potential safety issues regarding the parent with AS parenting alone. However, she may be viewed as a result of this reporting as being an alarmist or, even worse, a parent with parental alienation issues. Thus, though she accurately predicts future harm to her children, she becomes the party labelled as abnormal. British Family Court Barristers Hackett and Henderson observe in their recent *Family Law* article that it is, ironically, the non-Aspergers Syndrome mother who will most often be incorrectly identified as the problematic parent. Later, when the predicted child safety incidents occur, they are easily rationalized and normalized and the existing pattern of problems subsequently remains unidentified. This is the result of professionals inadvertently failing to identify the overall pattern and diagnosis.

This so called *Cassandra Phenomenon* is increasingly recognized in the field of autism however, and the term is now used by the internationally-recognized experts on Asperger’s Syndrome: clinical psychologist and author Tony Attwood (Australia) and Marriage Counselor Maxine Aston, formerly with the RELATE Program of England. Support for individuals experiencing this

problem is provided by the international non-profit organization, FAAAS, Inc. (Families of Adults Afflicted with Asperger’s Syndrome, Inc.) out of the U.S.

In the family law literature, AS has been addressed only a handful of times. This is a result of the very recent recognition of this problem. It has been the subject of four reports in British law journals (Young, 2001; Hackett & Henderson, 2002; District Judge Mitchell, 2003; Jennings Linehan & Schloss 2003) and two reports in the child welfare literature in Great Britain and Canada (Forrester & Aston, 2000; Jennings Linehan & Schloss, 2003).

The Cassandra Phenomenon was the topic of lectures by Maxine Aston at the third FAAAS, Inc. International Conference, co-sponsored for the second time with Massachusetts Mental Health Center, a major teaching hospital of Harvard Medical School, in Boston, 2003. FAAAS stands for Families of Adults Afflicted with Aspergers Syndrome. The AS partnership in general and the Cassandra Phenomenon in particular have been addressed in lectures by Dr. Tony Attwood at major conferences in England, Australia and the United States. Another speaker at AS conferences is Dr. Venetia Young, a physician and family therapist who also counsels couples where one party has AS. Dr. Young authored the law journal article entitled “*Encounters with Asperger’s Syndrome in the Solicitors Office*” (*Family Law*, 2001) in part to alert the British family law bar to the clinical problems and legal issues in the more difficult custody and access cases involving a parent with AS. The UK and Australian family courts appear now to be aware of adult autism and its role in child welfare cases and in the sometimes complicated custody and access disputes that come about in these families.

U.K. Family Barristers Hackett and Henderson wrote their article “*Asperger’s Syndrome in Child Contact Cases*” in part as a response to Dr. Young’s feature article in *Family Law*. Both articles were subsequently addressed by U.K. District Judge John Mitchell in his *Family Law* article, “*Contact and the Unusual Parent.*” None of these articles is more than 3 years old, a fact that speaks to the novelty of this issue in the family law context.

*continued on page 24...*

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# Counselor's Corner: Introducing a New Metaphor for Divorce and Remarriage

Susan Gamache, Ph.D.\*

*"You do not perceive something until you have the right metaphor to receive it" – Thomas Kuhn, The Structure of Scientific Revolutions*

Metaphors are powerful vehicles of communication. They synthesize amounts of information into a single, unified package. Perhaps less obvious, they encourage us to SCREEN OUT aspects of a phenomenon that DO NOT FIT with the chosen metaphor. Such is the case with the metaphor we currently use to describe divorce and remarriage. The current metaphors prevent us from seeing important aspects of the divorce/remarriage process and discourage us from moving forward to a more sophisticated understanding of this intensely personal, yet very social, phenomenon of marital transition in the late 20<sup>th</sup> century.

In our culture today, we understand the nuclear or first marriage family as the "real" family. We describe this family form as natural, "normal", or "intact". Should Mom and/or Dad choose to end their marriage, it is popularly understood that their marriage "failed" and the children are now from a "broken home". The presence of divorce in our society is considered evidence of the moral breakdown or degeneration of society. Thus, the metaphor communicated by our language is what I shall refer to as the broken/damaged/failed metaphor.

These metaphors describe divorce and remarriage as essentially a bad thing, i.e., a series of events that are evidence of problems within the individuals concerned or society in general. In stark contrast to the images of the first marriage family: the proud family portraits, Norman Rockwell dinners, and The Cleavers, images of the divorced family include the broken heart, shattered glass on the family photo or the photo torn down the middle. The divorcing couple is perceived as of the "Me Generation", indulging in out-of-control conflict for selfish, petty reasons, out of touch with the impact of this conflict on their broken-hearted children. Images associated with the stepfamily include Cinderella and the wicked stepmother, the romantic new couple and the abandoned child, or suitcases at the bedroom door.

From this perspective, divorced families have somehow "failed"; they are broken, smashed, damaged beyond repair. They can never be as "good" as the nuclear family

again. They have fallen from the moral high-ground to the moral low-ground. They cannot regain the moral "high-ground" no matter how well they navigate the divorce or how hard they work to create a successful co-parenting relationship with a former spouse. Further, this negative cloud follows the family into the next stage of the process, the creation of the stepfamily.

Although these metaphors are extremely negative, they are not entirely inaccurate. They describe well the damage to children, adults, and family associated with divorce. Thirty years of study on divorce has clearly identified risk factors: family finances may be seriously affected, parenting relationships may be stressed, damaged or lost, children may begin a series of rapid changes to include loss of family home, neighborhood, and extended family. Creating a stepfamily can also include risks. Adjusting to new stepparents, stepsiblings, shared resources, shared parenting, coordinating family life with a former spouse, etc. can be stressful for everyone.

Nevertheless, however accurately the broken/damaged/failed metaphor may describe the difficulties associated with some marital transitions, it is far from complete. It does not allow us to consider many other critical factors in the divorce/remarriage domain such as the impact of no divorce on adults and children, the well-managed divorce, the successful stepfamily, and divorce and remarriage as partially a social phenomenon rather than solely a personal experience. In order to consider these other vital aspects of divorce and remarriage we must find another metaphor, one that allows us to see beyond the limitations of the broken/damaged/failed perspective.

## A New Metaphor for Divorce and Remarriage

To this end, I propose a new metaphor of health and wellness for family relationships using a continuum on which the left side represents relational illness, or unhealthy relationships including abuse or toxic forces in couple and/or parenting relationships. In the middle is neutral ground, neither toxic, nor extremely fulfilling. To the far right, high quality health in family relationships, experiences of loving fulfillment in the couple and/or parenting relationships.

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The Health and Wellness metaphor allows us to see the aspects of divorce and remarriage that may put children and adults at risk. At the same time it allows us to consider the well-managed divorce and successful stepfamilies, two categories which by definition must be screened out of the broken/damaged/failed metaphor. By adding neutral to positive aspects of divorce and remarriage to our pre-existing view of broken and damaged, we can see the whole picture and acknowledge important aspects previously screened out.

A view of divorce and remarriage that does not get much air time is that it is a normal occurrence and important option for today's families, a social phenomenon that is reasonable given the social context of the late 20<sup>th</sup> century and not necessarily indicative of personal or social deficits. Unfortunately there are no images of "normal" or "goodness" for families post-divorce or remarriage that can match the power of the glow of the Norman Rockwell family portraits, the sharp pain of the smashed glass on the family portrait, or the sinister smile of Cinderella's wicked stepmother.

Other social phenomena that influence the likelihood of life-long marriage can also be considered using this metaphor. For example, our ever-increasing life expectancy is profoundly changing our ability to remain in one marriage "til death do us part".

The average length of a marriage in the late 1700s was only 7 years. As life expectancy in 1850 was on average, only 40 years, marriages were generally ended by the death of one of the spouses before the 10-year mark. As marriages were predominantly ended by the death of a spouse, the surviving spouse was not faced with having to work out custody and access, child support and co-parenting relationships with the deceased. Remarriage rates were very similar to those today. Furthermore, in the 1800s, 50% of children had lost one or both parents by the time they reached 13 years of age.

In the past 150 years, the average life span has doubled, thereby making a commitment to remain in one marriage "til death do us part" a much more challenging proposition. With an 80-year life span, we can consider the 40-60 year marriages as average. Never before have so many had the opportunity to be married to the same person for so long. Never before have we faced the challenge of continuing to be involved with a former spouse through a co-parenting relationship. However, the ever-increasing proportion that reaches 75 or 80 years of age is affecting more than just our pension plans and the need for understanding geriatric needs. It is changing the way we live our lives through all of our adult years.

For example, as adults in our society, we are exposed to rapid change on all fronts, and the pace of this change is steadily increasing. No longer do young people graduate from high school or a university and find the one job they will maintain for their working lives. Men no longer marry a woman who will stay home to tend the home and hearth; they do not envision themselves retiring with the gold watch at 65, leaving them both to rock on the front porch eager to see their grandchildren. Today, most women and most mothers work outside the home. Changing careers mid-life is no longer new for men or women. The Internet is steadily transforming the world of information technology. And even though some of our grandparents may have lived for 75 or 80 years, they did not have to deal with the ever-increasing pace of change that confronts each of us everyday.

The challenges associated with remaining in one marriage for a lifetime have increased dramatically. Perhaps our challenge could be described as how to choose a partner with whom we can grow and change in a compatible fashion through an ever-lengthening adult lifetime of unpredictable and rapid change. Perhaps it is becoming obsolete to consider romantic love as the main criterion for choosing a life-long marriage partner.

Finally, we must consider the "no divorce" option. Our current limited view of divorce seems to suggest that if only we can convince people not to divorce, all will be well. However, John Gottman's research on marriage relationships should convince us otherwise. After twenty-five years of research attempting to predict which couples will divorce and which couples will remain together, Gottman has found that the relationship of couples that chose to divorce were characterized by what he calls The 4 Horsemen of the Apocalypse: criticism, contempt, defensiveness and withdrawal/stonewalling. He further found an association between these relationship dynamics and physical symptoms four years down the road. What this research strongly suggests is that when relationships move into the "unhealthy" side of our continuum, they can become extremely toxic; resulting in substantial emotional and physical damage. As much as I believe in the power of couple's therapy, I do not believe that we have the therapeutic technology to restore love and harmony to every troubled relationship. It would appear the "no divorce" option is no panacea.

Accepting divorce and remarriage as important options is not incompatible with supporting life-long marriage as a valid social institution. Initiatives such as, "The Smart Marriages Conference", are essential to the growing challenges involved in lifelong marriages. However, to accept divorce and remarriage as legitimate choices is to acknowledge

that lifelong marriage may be right for many people much of the time, but not for all the people, all the time. If a choice is made to end a marriage, this is not necessarily an indication of failure, or personal, social, or moral deficits. Equally, as the next section demonstrates, post divorce families are not necessarily broken/damaged/failed families nor are stepfamilies necessarily hopelessly chaotic or neglectful of children.

### **But What about the Kids?**

Our current metaphor suggests that the “intact”, “natural”, “real” family is always the best for children and that the “broken home” of the failed marriage is always bad. There is, however, growing research evidence that for children, divorce and remarriage may not be the universally negative and damaging events they were once assumed to be. It is clear, however, there are risks for children in prolonged exposure to parental depression and marital conflict.

After at least two decades of research, Hetherington (1987) suggests that children may be winners, losers, or survivors of their parents’ divorce and remarriage. Issues of temperament, conflict, and resources may influence the divorce experiences so much that the issues of divorce itself tell us little. Many children do not appear to be negatively affected at all.

In a comprehensive review of the literature on the effects of divorce on children, Emery (1982) suggests that it is the conflict associated with the divorce that is damaging, not the divorce itself. He found that children in conflictual nuclear families were more likely to have problems than children from divorced, conflict-free homes.

In a review of more than twenty studies that compare the well-being of children in nuclear, sole parent, and stepfamilies, Ganong & Coleman (1993) found that while children in nuclear families tended to do slightly better, the differences between the types of families was so small as to be nearly irrelevant. These researchers recommended that comparing families by family structure was not useful. Asking why some families and some children did so much better than others was a more useful question.

Finally, in another study (Fendrich et. Al. 1990) researchers found that psychiatric diagnoses for children were much more strongly associated with parental depression than with whether or not the children’s biological parents were still married to each other, divorced or remarried. Children whose parents were not depressed were still eighteen times more likely to have psychiatric problems when they had been exposed to their parents’ marital conflict over the long term.

These finds challenge two fundamental aspects of the “broken / damaged/ failed” metaphor. First, divorced families would be problem-free if only the divorce had not occurred. The nuclear family structure, i.e. biological parents married to each other, does not guarantee the emotional and social well-being of children, particularly in high-conflict nuclear families. Second, divorce and remarriage cannot be assumed to be either good or bad. It is not the structure of a family but rather the quality of relationships within it, both between spouses and between parents and their children, that are most important. Extending our metaphor allows us to focus on what really makes a difference in children’s lives and adult’s lives, rather than getting pulled into a political or moral debate on divorce and remarriage.

### **Advantages of the Health and Wellness Metaphor**

Using a metaphor that extends from the extremely negative, through neutral to the extremely positive has many advantages. To illustrate, let’s think of divorce within the spectrum of all possible family relationships, like a surgery within all possible levels of health.

1. The quality of relationship health matters, just as the quality of physical health matters.
2. As a society we can direct resources toward the prevention of divorce, just as we work toward the prevention of surgery. We can do preventive work through education by teaching our children about relationships and addressing relationship styles with our teens and young adults. We can fund marriage preparation courses. Once married, we can take our relationship vitamins (couple groups, retreats). If we’re not feeling well in our marriage, we tend to our relationship by getting some help (friend, mentor, elder, lay counselor). If our marriage gets really unwell or sick, we can keep trying with more intensive help (therapy) to get it back into a loving, fulfilling relationship.
3. If we have tried everything possible over a sufficient period of time and the relationship is still unwell, it is likely that it will continue to be unwell and/or get worse. We know that people cannot not change. Eventually, something will have to give. Physical, emotional, relational, or spiritual difficulties are likely to increase. Many times our parenting will suffer because our children see us when we are tired, angry, despondent, and ultimately depressed. Perhaps more importantly, these elements cannot

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but influence our ability to show our children our joy and love for them, as the research on the profound effect of parental depression and marital conflict on children suggests.

At this point, separation and divorce may be best considered like surgery. It is a last resort. All possible avenues have been exhausted. Quality of relationships, spousal and PARENTAL are declining and will likely continue. Like surgery, the couple did not plan for this to happen. When they were married they did not intend to work toward divorce. However, as the quality of relationship continues to decline, perhaps the risks of divorce, like the risks of surgery, become less than the risks of no divorce. What is worse than heart surgery? No heart surgery! If we keep our focus on the quality of family relationships rather than on the structure of the family, we can consider the relative risks of different options from a much more sophisticated perspective. To reduce complicated situations to black and white or right and wrong options will not help us move forward in an intelligent and compassionate fashion.

4. If marital separation and divorce are chosen as the best option, then perhaps we as a society could offer the same resources as we would for someone undergoing major surgery. In the case of surgery, there is first a careful assessment of the problem. There is education about what to expect. The intervention is done professionally, in a caring environment with sterile equipment to reduce the possibility of infections. Post-operative care is provided until the patient is able to return to self-sufficiency. In many cases we do not have to evaluate the effectiveness of the surgery to improve a declining quality of life until well into the recovery process. Friends and family come in close to help. Sometimes they send flowers.

When we consider separation and divorce from this perspective, it is easy to see that as a society, we are not doing much to support families through this “surgery”. There is little support available when trying to decide if separation is the best option. There are few resources to help adults and children with preparation for or the actual separation. There is little or no concern about “infection” in the relationship between the adults, although we know it is in everyone’s best interests to establish a positive

co-parenting relationship and stay out of court if at all possible. As a society we do not wait for a period of recovery before passing judgment on the adults involved, even though this surgery may leave them less than completely functional for a period of time. Friends and family often do not come in closer or send flowers. In fact, many who have separated feel just the opposite, that people withdraw until the dust settles, and even then, may not return.

5. Using this metaphor, we can finally set the place of remarriage within the recovery process. Most people who divorce will enter into another intimate relationship with another adult. From within a recovery metaphor, wouldn’t we want this for them, given the long lives we are now projected to live? By keeping an eye on the big picture, we can see that families can navigate the end of the couple relationship, continue effective co-parenting relationships, AND create successful stepfamilies. Like recovery from a surgery, it is not always easy (though remarkably, sometimes it is, we just don’t hear about it). However, compared to the actual situation prior to the decision to separate, the quality of family relationships may well have a greater likelihood of developing in positive directions than if the no surgery option had been chosen.
6. From a societal perspective, this metaphor allows us to acknowledge the importance of divorce and remarriage as honorable institutions within our society AND AT THE SAME TIME support all avenues that would steer us away from having to use them. We can appreciate having a hospital in our community and work toward good health. We can support divorce and remarriage as legitimate social institutions and still work toward strong, loving and fulfilling relationships.

### **The Consequences of Not Extending Our Metaphor**

1. Seeing post-divorce families and stepfamilies as broken, damaged, failed or wrong supports prejudice and bias by family structure. This may be the last “ism” – family structure-ism: a frame of reference in which divorce and remarriage are always considered bad no matter what. When we see the individual or family by virtue of the structure only, systematically not seeing anything else we are prejudiced.

2. To continue to focus on family structures hides the power of the quality of family relationships in our lives. For children, a more important question is the quality of parenting relationships they have, not the structure of their families. Although marital transition, like surgery, includes risks, no divorce cannot guarantee high quality home environment for children.
3. To maintain the broken, damaged metaphor keeps all responsibility for this massive social phenomenon with the individuals involved and allows social institutions like governments, schools, hospitals, churches, the legal system and even family therapy from dealing with divorced families and stepfamilies on a social level.
4. Finally, if we cannot see that it is possible to conduct a well-managed divorce, and to create a successful stepfamily, then we cannot hold individuals who make these choices account-

able for how they conduct themselves through this process. There are many individuals and families who have survived divorce, and created loving stepfamilies. If we cannot acknowledge them, we cannot invite them to be role models and/or mentors for those who are struggling. Equally, if we believe that attending parent education groups or support groups for separating parents or stepfamilies is valuable, then we must find a way to include the possibility of success in our understanding of divorce and remarriage. This is necessary for the individuals involved to be able to imagine getting through the process without irreparable damage to the quality of health in current family relationships and to create and maintain loving and fulfilling family relationships in the future.

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***Family Court - Simcoe County Experience continued from page 1.***

of counsel and to explain why the case was not yet resolved. If a satisfactory explanation was not advanced, the Judge became more active in a management role. Case conferences and settlement conferences were therefore mandatory and were fully utilized. One Judge became familiar with the issues on the file and usually was successful in achieving settlement for the parties without a trial. If a motion was required, because the case management Judge was familiar with the issues, it was not necessary for the lawyers to spend valuable client time “educating” the Judge on the factual background, the issues, the context or the case history. If a trial was necessary, it was heard by another family law Judge appointed to the court. Only in cases of emergency were non family law Judges imported to the court to provide assistance. The average case was resolved in an 8 to 10 month time frame – from filing to trial, even though the number of cases handled was large and we had only two Judges assigned to the Court.

The senior Family Court Judge had the scheduling power over Family Court.

We were very proud of the system we had and we were extremely happy with its success. We firmly believed that we had a “template” which could be expanded to every

region in Ontario, regardless of its geography and regardless of the makeup of the bar. All that was needed were lawyers, judiciary and courts administration who understood the system and were willing to work within it.

In 1999, when the Province determined to expand the court again, our Association was fully behind that expansion. Like most lawyers, we missed the fact that, at the same time as expansion, the Provincial Government, for some reason, decided to remove the scheduling power from the Senior Family Judge. This amendment to the “process” slipped by us unnoticed. Naturally this Family Court scheduling function was quickly delegated to the Regional Senior Justices. This was a subtle but very important change. Suddenly, the Regional Senior Justices had an added burden which, over time, became very difficult to manage within the context of their other responsibilities. At the same time, the Federal Government seemed to abandon the philosophy of appointing specifically “patented” Family Court Judges. As a result, Family Court lost significant manpower and resources. It quickly began to look nothing like the court of which we in Simcoe County were once so proud.

With the expansion in 1999, Simcoe County (relating our own experience) received two brand-new Judges. At the same time, the Family Court Rules came into existence but we paid very little attention to them because we assumed

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that case management as we knew it would continue. As our experience with the new rules increased, we made the slight adjustments required and looked forward to the expansion of what we thought would be a very successful system throughout the Province.

As everyone is no doubt aware, Simcoe County and particularly Barrie has experienced a population boom of rather unprecedented proportions in recent years. Needless to say, the number of family law files opened by family law lawyers in Barrie has increased dramatically. We can assure you that no family law lawyer is without work. In fact, many clients complain that they have to wait weeks just to get an appointment here. Despite that fact, we no longer have two Family Court Judges. We are now down to one.

As a result of increased demand on the system and the lack of judicial appointments to the Family Court bench, we no longer have “single Judge case management” as we did between 1995 and 1999. In fact, what we now have is very similar to what we had before 1995, before Family Court existed. Compare the following description of what happens today in Simcoe County to the “old pre 1995 days” when cases were managed under the same Rules of Civil Procedure applicable to non family cases:

- Judges who now hear family law cases in our area come from all sorts of legal backgrounds. Some have an interest in and understand family law. Some don't. Some sit in Family Court regularly. Some don't. Those who don't are not to be faulted at all – they never “signed on” to hear family cases and we ought to respect their desire to hear and try other matters.
- Although we still have what is in name called the Superior Court of Justice Family Court, we are never in Family Court (as we once knew it) for trial and rarely in Family Court for motions. Trials are held during three week sittings in the spring and fall if a trial might last more than five days. If a trial is going to be less than five days, it is set for “the week of” a civil sittings during which non family civil cases will also be tried. In all trial sittings, non family law Judges are routinely scheduled to hear family trials.
- Motions are placed on a mixed civil list such that family motions are dealt with by the same Judge who handles other civil matters such as construction liens, mortgage remedies, contract cases, personal injury and the like. The Judge who hears the civil motions may or may not be

a Family Court Judge. What frequently happens is that if a “Family” Judge is assigned to this list, that Judge usually wants to hear the family motions first but if a non family Judge is assigned to that court, that Judge will want to hear the civil motions first.

- We have all experienced situations in our Region where, at trial, family law cases are heard by Judges whose pre-appointment experience in the law was entirely in the criminal law field while at the same time in the same courthouse, a family law Judge is trying a criminal case. Needless to say, our family law clients have some difficulty understanding the rationale for this type of scheduling. To analogize to the medical system, our clients don't seek out an oncologist for a viral infection. They are becoming more and more vocal in their desire to have their case assigned to a Judge who understands family law, wants to listen to that type of case and wants to sit exclusively in Family Court. Most importantly, they want to economize and find it a very expensive process to have their lawyer repeatedly bring the Judge up to speed on what is happening with their case.

The irony of all of this is that we have to operate under rules which are designed for single Judge case management. If we do not have that system, then the Family Law Rules actually work to the detriment of the family law client. For example, a major corporation can move to court immediately bringing a motion to deal with any issue, regardless of its importance to the overall case. The family law client has to await a case conference (usually 4 to 6 weeks) which is often before a non family Judge who would otherwise have heard the motion. One additional rather costly step is imposed on the family law client for what appears to be no good reason. We do not argue for the abolition of the Family Law Rules. Under the 1995-1999 system under which we operated, the Rules were much the same as we have them now and with the help of the case management Judge we routinely set processes in motion specifically adapted to the particular case either on consent or by order of the case management Judge when different approaches made sense. The Rules are not the problem, in our view. What is missing is “single Judge” case management.

Lawyers, of course, can survive in any system. Several lawyers in our area saw a clear opportunity to provide service to a public that desperately wanted it. A number of lawyers therefore formed a private court utilizing The Arbitration Act to provide alternate dispute resolution

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to clients who did not wish to risk obtaining a Judge who did not understand this area of law. This is gaining momentum as frustration with the current system mounts. People are opting out of the public system.

We are not the only lawyers in the Province to start up this sort of ADR enterprise. We understand that clients elsewhere are also learning about the advantages of arbitration and its advantage of “specialized dispute resolution”. In fact, it is common knowledge now that lawyers recommend routinely to their clients in complicated cases that an arbitrator be selected whose specialty lies in family law to assist in the resolution of their case. Not only does the client receive in such a system a specialized service that is in no way guaranteed in the Superior Court of Justice Family Court, but the client is also able to adapt the rules suitable to the resolution of his or her particular case.

In other words, the current sad state of affairs in Family Court only creates further advantages for lawyers who now see themselves frequently as mediators and arbitrators offering additional services to supplement their already busy family law practices. It is almost contrary to our interests to “bring back the Family Court”.

Unfortunately, creating a system outside the Family Court does not truly serve the public interest nor does it honor the spirit of The Courts of Justice Act. Nor, in our view, does it honor our professional obligation. There ought not to be one system for the rich who can afford arbitration services and another system for those who cannot. It is up to lawyers to advocate the public interest even if that means potentially unintentionally harming their own self interest or inadvertently offending those Judges who truly do not wish to sit in Family Court. In fact, it is hoped that efforts to “bring back the Family Court” will mean that Judges can sit on cases which interest them and for which they have a special skill and aptitude. We argue that specialization should not be limited just to family law.

Therefore, the Simcoe County Family Law Lawyers’ Association has once again formed a committee to re-establish the Family Court in Simcoe County. In our vision, the Family Court means “single Judge case management” as we had it from 1995 to 1999 although under the new rules. It means having motions and trials heard by Judges who have an interest and a background in family law, who want to hear family law cases and who want to sit at least for a sufficient length of time exclusively in a Family Court setting. It means doing away with mixed motion lists and mixed trial lists.

Our efforts to date have included letters to the Chief Justice of Ontario, the Attorney General for Ontario and

the Minister of Justice in Ottawa. We have scheduled meetings with one of our local Members of Parliament, Aileen Carroll, who is also a Cabinet minister. We are hoping to persuade the Attorney General of Ontario to return the scheduling power to the Senior Family Judge and we are hoping to persuade the Minister of Justice to appoint Family Court Judges to the Family Court. This will give our Chief Justice the manpower needed to once again firmly entrench the Family Court in our justice system.

We fully recognize that our efforts will be rather fruitless unless there is a groundswell of support from all areas outside Simcoe County. We also fully recognize that Simcoe County is but one area in this very large Province and that each area may well have different needs. However, we do not believe that this should be used as an excuse to eliminate the Family Court. We firmly believe that there is ample intellectual and administrative expertise at all levels of input to overcome any obstacles to the full realization of the Family Court. We are blessed with many Judges and talented members in courts administration who know what is needed and how to achieve it. What is needed above all is the *will* to do it and the willingness to delegate the power to the appropriate personnel.

Most importantly we all have to recognize the tremendous gains to be made for the benefit of so many Ontarians, particularly the children, who suffer the tragedy of family breakdown. We have to realize that a large portion of courts administration is caught up with the resolution of issues related to family breakdown. The Unified Family Court was ahead of its time. We need to return it to its rightful place in Ontario.

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## 2. Problems with Deferral under the Current Scheme

A pension is, in many cases, the most significant asset owned by a spouse, resulting in a larger net family property and a correspondingly significant equalization payment owed to the other spouse. Yet, unlike real property, which can be sold on the open market or easily transferred, a pension is not a ready source of cash or capital a spouse can look to in order to satisfy the equalization obligation. As a result, a pension member may be required to make a substantial payment to his spouse years before retirement.

This payment is often viewed as unfair by the pension holder, who does not consider the pension to be an asset but a source of future income but who is nevertheless obliged to transfer other capital assets, such as an interest in the matrimonial home, to satisfy the equalization payment. Sometimes there are insufficient assets altogether to satisfy the payment. The spouses are then left with two choices. One involves deferred instalment payments pursuant to section 9(1)(c) *FLA*, (assuming the spouse has an adequate income stream not already burdened with support obligations) or an “if and when” settlement, that is, an agreement or order to divide the pension payments themselves upon retirement. “If and when” settlements involve a number of very real problems, which have lead many family law practitioners to avoid them, including a concern regarding potential negligence claims.

Some of these problems are:

- a. The non-member spouse’s entitlement to payment is deferred until a future date, namely retirement of the member, over which the member spouse has control;
- b. The language of the agreement or order may or may not exclude the non-member from sharing enhancements or increases after the valuation date (date of separation);
- c. The non-member’s entitlement ends when the member dies, which may occur before retirement, in some cases leaving the non-pension member former spouse with nothing;
- d. The implementation of the settlement can be frustrated by the operation of section 39(3) of the *Pension Benefits Act*, the “Fifty Percent Rule”, which restricts pension administrators from

paying more than 50% of the “commuted value” of what accrued over the marriage. The manner in which the “commuted value” is calculated for the purposes of the *PBA* differs from the calculation of the pension’s worth for family law purposes;

- e. The non-member’s interest is held in trust by the member and many pension administrators decline to deal directly with the non-member spouse, necessitating litigation and delay in payment;
- f. The non-member’s benefit is not secure and life insurance to protect it may be prohibitively costly;
- g. If the payments (or part of the payments, due to the Fifty Percent Rule) are made directly by the member spouse to the non-member spouse, there are income tax problems. The member is making the payments from after-tax dollars. Even if an adjustment is made to reflect the taxes paid by the member on the pension income, that may be at a higher rate than the one attracted by the non-member’s payments were it paid directly from the pension plan; and
- h. The experience of pension administrators has sometimes been that the agreements or court orders providing for the division of the pension created problems of interpretation and implementation as a result of ambiguous, imprecise or incomplete language.

The obvious solution is to amend the *FLA* to permit the pension to be to be shared and distributed at source upon retirement, with the non-pension member, former spouse receiving a pro-rata share based on years of marriage (or perhaps cohabitation) in relation to years of service. This method for dealing with the pension has been coined the “Deferred Settlement Method” or the DSM. The core component of our law reform proposal is to provide for a consistent, legislated system of deferred settlements. We believe we have the support of pension administrators throughout the province, who would be responsible for administering these arrangements.

In our submission, the court must retain jurisdiction to treat the pension as a capital asset for the purposes of equalization in the appropriate circumstances. Therefore, we propose the new legislative scheme stipulate that the deferred settlement method is the presumed method for dealing with a pension. This presumption would be

rebuttable by either party. A companion clause would set out a non-exhaustive list of factors for consideration, to guide the court in the exercise of its discretion to order the DSM or an equalization. We have not yet addressed the contents of this non-exhaustive list but it is contemplated to include circumstances such as short marriages, minimal accrual of value in a pension, a long period between valuation date and retirement date, or pensions in a foreign jurisdiction. As is the case now, parties would be free to contract out of these statutory provisions.

If the pension is indeed included in an equalization calculation at separation, then two further problems remain relating to its valuation and the so-called 'double dipping' issue.

### 3. Valuation Issues

There remains considerable controversy regarding the appropriate method of valuing a pension. Accordingly, actuaries retained to conduct such valuations for the purposes of determining a pension member's net family property will often give a broad range of figures depending on the methodology employed and the variables assumed, such as the date of retirement, mortality, indexing or tax rates. This inevitably creates uncertainty for the parties who often select an arbitrary figure within the range to avoid the attendant costs of litigation. Alternatively, the parties are compelled to resort to the litigation process, at great expense, to have the court determine the fair and just value. The SCC decision in *Best* partially clarified the appropriate methodology for valuing certain types of pensions, since the statute currently provides no guidance in this regard. Consideration must be given to the question of whether to codify the pro-rata method or whether to consider and provide an alternative valuation method, such as the value-added method.

There are other valuation issues that need to be addressed, namely:

- a. whether the value of death benefits should or should not be included in the value of the pension;
- b. determining a rate of accrual that is consistent;
- c. how to value pensions in pay; and
- d. how to value the survivor benefits and whether or not these should be considered an asset of the surviving spouse or non-pension member, as opposed to the pension member.

### 4. Double-Dipping

The issue of double-dipping arises in the context of an application to vary a spousal support order upon the retirement of the pension member. Specifically the court must reassess entitlement when a retired payor is seeking to reduce or terminate his or her obligation on the primary basis that his or her pension is now in pay and was previously considered in the distribution of property. Given the discretionary nature of spousal support, the judicial response to this conundrum is inconsistent. Some courts have ordered that support be terminated once the pension is in pay, others have excluded the already equalized portion of the pension asset when assessing the ability to pay following retirement. In other instances double-dipping has been permitted to ensure that the needs of the dependant spouse are adequately met.

In *Boston*, the Supreme Court of Canada theoretically resolved this problem by creating a presumption that double dipping was to be avoided such that upon retirement, only the unequalized portion of the pension income stream would be available for support. In practice, most of the cases following *Boston* have permitted double-dipping in order to meet the needs of the dependant spouse. If the DSM becomes the presumed method for disposing of the pension, then in most cases this problem will be avoided. For the other cases, if the pension valuation issues are clarified and made consistent through amendment, then the parties, or the trier of fact will be better able to determine, with precision, what portion of the pension in pay was not already equalized and is therefore potentially available to satisfy a support claim.

### 5. Survivor Pensions

One of the problems with survivor benefits is the apparent restriction on the right of individuals to opt out of the provision for a joint and survivor pension. Currently, a signed waiver or domestic contract must be delivered within twelve months immediately preceding the payment of the first pension benefit. There are a number of circumstances where a member or his or her spouse may wish to exercise the waiver later than the prescribed time. For example:

- a. married spouses subsequently separate and the survivor portion of the pension is valued at such an amount that the non-member spouse does not want it to be taken into account or wishes to waive it and obtain an alternate benefit;

- b. both spouses have their own separate pensions after retirement, and wish to release the survivor claim against the other's pension, and cancel the reduction in payment that must be paid monthly to fund this option;
- c. it was never the intention of the spouses for one to receive the survivor pension, but this was not brought to the attention of the pension administration within the twelve (12) month period; and
- d. for any number of other reasons, the parties themselves do not want to continue providing for a spousal survivor's benefit or a court feels that it would be inappropriate to do so.

Accordingly, we propose an amendment to sections 46(1) and 46(2) of the *PBA* to permit flexibility in waiving this benefit and to do so within different time frames.

## 6. Miscellaneous Pension Issues

Our committee has identified a number of other problems. For example the *FLA* limits the deferment of an equalization payment to a maximum of ten years. Perhaps an amended *FLA* could confer discretion on the court to extend this time for satisfying the equalization payment if the main asset to be equalized is a pension. We also propose an amendment to section 39(3) of the *PBA* that would eliminate the 50% rule prohibiting a pension member from distributing more than 50% of his or her pension to non-pension members. This is particularly necessary given the increasing number of successive marriages and multiple claimants.

## 7. Summary

Other jurisdictions have amended their family property laws or their pension benefits legislation to address these issues. These legislative schemes provide us with useful models for considering reform in Ontario. We are in the process of reviewing the provincial and territorial counterparts to our *Family Law Act* and *Pension Benefits Act* to locate useful provisions within those schemes and to avoid what we perceive to be their pitfalls. The Canadian Institute of Actuaries, which has been actively engaged in urging other jurisdictions to legislate the availability of the DSM, has produced a comprehensive consultation paper suggesting various solutions. As this law reform initiative evolves, we hope to be actively involved in a consultation process with the Attorney General to discuss these problems and consider various legislative remedies.

## D. OTHER REFORM CONCERNS

### 1. Matrimonial Home

The matrimonial home has historically been accorded special treatment in family law. When the *Family Law Act* was enacted to expand the property rights and obligations of married spouses, it maintained a distinction between this and other assets, creating what many have come to regard as unfair results. There are three main problems in relation to the matrimonial home: its lack of deductibility from a person's net family property on the date of marriage; the inability to protect inherited or gifted money that has been put into the matrimonial home, or an inherited or gifted home, from equalization; and the inability of unmarried couples to secure exclusive possession when such relief is appropriate. This lack of possessory rights to the matrimonial home for unmarried couples means a person who is victim of domestic violence has no claim to exclusive possession to secure her safety. Likewise, a parent who would otherwise be entitled to sole custody and should be given temporary exclusive possession of a home to serve the best interests of the children has no such entitlement if he or she is not married to the owner of the home.

### 2. Support for the Adult Child

Where the parents of adult children are, or once were, married, they are able to bring child support claims under the *Divorce Act* which allows for support for children, "the age of majority or over and under their [parent's] charge but unable, by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life". By contrast, adult children of parents who have never been married must establish a child support claim under the provisions of the *FLA*, which restricts eligibility by requiring an adult child to be in a full time program of education. No provision is made for illness, disability or other circumstances causing a child to remain dependent. This different standard of eligibility for support constitutes discrimination on the basis of age, family status or disability, contrary to the equality provisions of the *Charter*.

### 3. Parentage

The emergence of Assisted Reproductive Technologies (ARTs) has a significant impact on how the law defines families. While it was once assumed that families had one mother and one father, the law is now struggling to define families where there are more than one mother, more than one father, or where there is no mother or no father. The relevant statutory provisions affecting parentage need amendment to adequately address the needs and issues of modern families.

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#### **4 & 5. Disclosure & Retroactivity of Child Support under the *Guidelines***

Confusion exists regarding judicial authority to order child support retroactively to the time of a payor's change in income. The different results in the Ontario Court of Appeal cases in *Walsh and Horner* have compounded this confusion. Changes to the *Child Support Guidelines* requiring payors to provide annual income disclosure rather than placing the onus to ask on the recipient parent or leaving this to contract will ensure children receive the benefit that corresponds to parental ability to pay. Secondly, the *FLA* ought to be amended to clarify the court's discretion to order child support retroactively to the time of the change and to codify the right of the child to support regardless of a parent's efforts to seek the child support through court application in a timely fashion.

#### **6. Provisions for Out-of-Court Variations**

The Federal-Provincial-Territorial initiatives to establish tribunals to adjudicate routine child support variations should be expanded. This will ensure ready access to justice to many potential litigants while freeing up limited judicial resources for the more complex family law cases.

#### **7. Right to Access After Adoption**

Current legislation in Ontario does not permit an adoption order to co-exist with an access order. A child cannot be placed for adoption where there is an outstanding order of access made under the *Child and Family Services Act*. Despite recent amendments to the *CFSA* aimed at avoiding delay, many children are kept in foster care for long periods of time while attempts are made to reunite them with their family. Further, the complexity of legal issues in such cases means that often children are older when it is finally necessary to make a decision about whether or not the child's ties should be severed from their natural family and placed for adoption. Accordingly, judges frequently face the quandary of whether to place an older child for adoption, notwithstanding their significant ties with members of their natural family. Statistically, it is known that children who stay in long-term foster care are moved on average, every twenty-four months, thereby depriving them of the stability and security of a permanent home. Experts in the area of child welfare and adoption agree that adoption offers a child the security and permanence lacking in long term foster care. In many cases before the courts, natural parents consent to adoption as long as they could maintain some type of contact with the child, whether it be face to face contact or being provided pictures and other information. Many litigated cases

would be resolved if birth parents were granted the right of post-adoption access.

#### **8. Different Property Regimes for Married, Unmarried and Same Sex Spouses**

Numerous legislative reforms and *Charter* challenges have resulted in the same legal treatment of married, unmarried and same sex couples. Several provinces have amended their property regimes to create the same rights and obligations to all such couples. While the decision by the SCC in *Walsh v. Bona* continues to be debated, few family law lawyers would dispute that many of our heterosexual unmarried couples are surprised to discover this differential treatment. The *Family Law Section* recommends that the differential treatment of property rights for married, unmarried and same sex couples be reviewed.

#### **E. CONCLUSION**

Pension reform is long overdue and has the support of all the stakeholders. The OBA Family Law Reform Committee is committed to working with the Attorney General by bringing its experience and expertise to the drafting table. We are equally concerned that these other areas of reform be given the attention they deserve. They are less technically complex and, with the exception of whether to devise a property regime that creates the same entitlements and obligations to all couples, these other issues are non-contentious and readily amenable to legislative reform.

***Acting for Cassandra - Asperger's Syndrome in Separation & Divorce* continued from page 12.**

The international conferences form an important part of the literature on the AS marriage, family and parenting. Transcripts are available on the FAAAS, Inc. website, [www.faaas.org](http://www.faaas.org). Important in this collection is the lecture outline entitled "*The Healing of Cassandra*," which is the result of Aston's ongoing research into AS partnership and her lecture at the Harvard teaching hospital on its impact on the non-autistic spouses, usually women and often women who are mothers.<sup>1</sup>

The conference transcripts serve to amplify the voices of family members from around the world who openly discuss with a clinical psychologist what it is to be in a relationship with a person with AS. In none of the regions where the conferences have taken place do these family members feel they have a meaningful voice in their family courts, presumably because custody and access assessors, family lawyers, children's lawyers, and social workers are not all yet fully aware of this unique neurological syndrome and its impact on children and partners (see Jennings Linehan & Schloss *International Family Law* 2003) before during and after separation.

A recently published American book, *Asperger's Syndrome and Adults... Is Anyone Listening? Essays and Poems by Partners, Parents and Family Members of Adults with Asperger's Syndrome* (Rodman, 2003) discusses the 'side-effect' of this neurological disorder on others. Rodman's book offers the reader a view into the lonely world of Cassandra. Included are valuable articles by author and activist Brenda Wall (England) "When Love Is Not Enough," a piece by Marguerite Long (Australia) "Behind a Glass Wall," and a paper by disability activist and author Judy Singer (Australia), "When Cassandra was Very Very Young," from the viewpoint of the now adult daughter of a mother with Asperger's Syndrome.

The National Autistic Society of Great Britain has published a book (2001) written by couples counsellor, Maxine Aston, entitled *The Other Half of Asperger's Syndrome: A Guide To Living in an Intimate Relationship with a Partner Who Has Asperger's Syndrome* (2001). It describes, in part, the AS marriage from the perspective of 'Cassandra'. It briefly addresses marital breakdown and how it might look depending on who left the union. Aston has also written more recently the successful book *Aspergers In Love* (2003) which examines the important aspects of relationships that are complicated by the presence of AS and it covers off a number of pertinent issues to family lawyers such as communication and parenting with Aspergers Syndrome.

Liane Holliday Willey (1999) wrote her important book *Pretending to be Normal: Living with Asperger's Syndrome* in part, in an effort to illustrate how a wife and mother with AS struggles in her relationships as a partner and as a parent living with this difficult condition. Holliday Willey offers us valuable insight into the experience of mothering by a highly educated (the author holds a PhD in education) and observant woman with the AS diagnosis<sup>2</sup>. Parts of this book evoke great compassion in the reader, yet other sections leave the reader feeling distinctly uncomfortable, especially with respect to issues concerning the best interests of the child. Holliday Willey was recently in Toronto and is a regular speaker at the Geneva Centre for Autism in the city. Her work is an important piece in the education of professionals, including divorce professionals, about autistic individuals and their families and the often overwhelming struggles they face on a daily basis.

The controversial article co-authored by Welsh social worker Ruth Forrester with Maxine Aston "*Living with Asperger's Syndrome*" was published in the British social work journal *Community Care* in 2000. This pioneering article offers insight into some of the more difficult AS marriages. It addresses abuse that may occur in some AS marriages and addresses the effect that *the very idiosyncratic problems* have on non-autistic spouses and children. *The Asperger Marriage* (2002) is a controversial book written by a married couple with children, one of whom has the diagnosis. They propose what the authors consider to be practical solutions and advice on dealing with the kinds of marital challenges that AS poses to partnership. This book is seen in the autistic community as being a supportive guide to parties who wish to reconcile or work on the marital issues that have arisen with the presence and context of Asperger's Syndrome.

Critics of the former article argue that AS marriages are not as dysfunctional as its authors describe. In contrast, critics of the latter commentary point out that the authors paint a subjective portrait of denial, offering up the Pollyanna version of AS partnership. The U.S. support organization FAAAS has noted that both perspectives, however far apart, have something important to offer the legal profession in their education about separation with Asperger's Syndrome.

In truth, there is no single, representative AS marriage. There are only individuals struggling in these marriages. Interestingly, when one partner is on the spectrum and the other is not, the union has been termed a mixed marriage, by some members of the autism community, reflecting their view of AS as a kind of cultural difference rather than as a neurological disorder. The geography of autism is

not yet fully mapped out however. As clinical psychologist and University of Toronto Professor Jordan Peterson has noted, in loyalty to personal interest subjective meaning can serve as an antidote to the overwhelming temptation constantly posed by the possibility of denying anomaly. And there is a great deal of anomaly and paradox in the syndrome Hans Asperger identified, and a great deal of anomaly in these families. However anomalous, the presence of Asperger's Syndrome in separation, divorce and child protection must be addressed by professionals. It is an important landmark on the family law map.

Because every adult with AS is different, so too are the marriages, affected as they are by a significant neurological difference. Some of the variation among AS marriages may result from variation in the severity of the AS, and it may also depend on the number of successful accommodations provided by the non-AS partner and children. Other important clinical and non-clinical factors that may influence the instability in these marriages, such as the number of co-morbidities in the AS party suffers, the mental and physical health status of the non-autistic partner, and importantly the neurological status of their children.<sup>3</sup> Many adults with AS will have spectrum sitting children. This is of course an important feature that must be addressed also in post separation planning.

It must be remembered too, that parents with AS often have quite astounding gifts and these gifts ought to be shared with their children in the creation of parenting plans or residential schedules/access arrangements. As well, in spite of an often seeming remoteness and aloofness, these parents are often very connected to their children. Lawyers acting for individuals with Aspergers Syndrome need to learn as much as they can about the condition and how it affects communication and how it impacts on relationships. Such individuals struggle greatly with and must overcome many difficulties and as such they too need understanding counsel.

In the now vast literature on Asperger's Syndrome, strikingly little is available concerning marriage and divorce in families where there is autistic spectrum disorder. This is a glaring omission given the knowledge base already available regarding AS differences.<sup>4</sup>

For family therapists, marriage counsellor Maxine Aston has written "*Asperger's Syndrome in the Counselling Room*" (2003), and British activist Brenda Wall along with FAAAS, Inc. recently prepared a brochure concerning *Asperger's Syndrome partnerships*, which is available at the FAAAS, Inc. website. The first printed acknowledgement that persons with AS marry and have marital difficulties resulting from their autism was a fact sheet published by

the National Autistic Society of Great Britain, "*Help for Partners of People with Asperger's Syndrome*". Wall, a pioneer in this field, met with Dr. Francesca Happe (Senior Cognitive Psychologist at the Institute of Psychiatry, King's College, London and widely respected author on autistic spectrum disorders). Dr. Happe subsequently helped persuade the National Autistic Society of the U.K. to publish the first fact sheet in 1998.

Several other self-published flyers and newsletters have been prepared by groups and individuals supporting relatives of individuals with Asperger's Syndrome. These have been instrumental in the successful implementation of Cassandra-related initiatives. Currently, Aston is offering a support group known as The Cassandra Unity Project through a family counselling centre in Coventry (U.K.). A sample of the other spousal support groups include ones organized by Karen Rodman (FAAAS, Inc. USA) by Linda Newland (Aspires, USA), and Carol Grigg (GRASP, Australia) as well as the group *Aspouse* (Australia) and an unnamed group in Toronto (Canada) run by an autism advocate.

Support groups for spouses are notably absent from the larger organizations that support persons with autism. This matter raises interesting questions. Hopefully this omission will be remedied with time. These large, funded and publicly-supported organizations typically offer sibling support and parent support groups for families with autistic children in them, but have failed overall to acknowledge the concept of the Cassandra Phenomenon. The reasons for this are beyond the scope of this article.

This article offers one perspective only of a multi-faceted issue. Non-autistic men marry women on the autistic spectrum, and they have a story to tell that family lawyers need to hear and understand. Women on the spectrum are often drawn to men on the spectrum because of lifestyle similarities. There are gender issues within autism that need to be explored. Adult children of parents with autism have only now found their voice. Minor children of autistic parents need help to find theirs. Spouses of autistic partners are still searching for assistance and validation from publicly supported organizations. Persons living with autism spectrum disorders have important stories to tell and they need the compassion and understanding of family lawyers and others involved in supporting them through the significant life transition of separation.

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\* *FAAAS Inc. (Families of Adults Afflicted with Asperger's Syndrome, see [www.faaas.org](http://www.faaas.org))*.

<sup>1</sup> Many with AS have successful marriages. Aspires is a group in the US that supports parties in these marriages and their website has a great deal of literature on supporting these relationships.

<sup>2</sup> Asperger's Syndrome does not appear to present the same way in women as it does in men and lawyers and social workers need to be particularly aware of this unusual diagnostic circumstance. For more information see Christopher Gillberg and Tony Atwood's extensive work in this area.

<sup>3</sup> Many adults with AS have children with AS or who are otherwise on the autistic spectrum diagnosed with PDD-NOS or other autistic conditions.

<sup>4</sup> There are a few articles available. See: *The Parent with Neurological Disorder. Are their Children at Risk?* (Schloss and Jennings Linehan in *OACAS Journal* 2003), *Special Needs Practice Issues for Ontario Mediators* (Jennings Linehan 2003 in *Solutions OAFM*) and "Who's Minding the Children? Child Contact and the Neurologically Impaired Parent", (Jennings Linehan & Schloss 2003 in *International Family Law*).

## Movie Review

### *Sideways*, directed by Alexander Payne ("About Schmidt")

Reviewed by Sandra Demson\*

If you love southern California – the colour of the sunlight low in the late afternoon, the coastal highway winding along the Pacific, and, above all, the rolling vineyards of the Central Valley, inland from Santa Barbara, then *Sideways* is the movie for you.

It's the story of a couple of dudes, who take a week long golf and wine tasting foray, before the actor one of them (Thomas Haden Church) ties the knot. His buddy from college days, a teacher would be novel writer (Paul Giamatti) is still hopelessly mired in his former marriage, and in his depression is swinging back and forth between the two failures he sees in his life – to get his wife back, and to get his novel/life story published. It sounds tedious, but the movie product is anything but – excellent acting by relatively new faces to the silver screen, skilful photography of California's most luscious scenery with faces and screen writing that capture the comedy and the rawness of their (love) lives in this time of marriage transitions.

If *Sideways* is gone from the theatres when you read this, the DVD experience may be even better. The rhapsodic ode to the pinot grape is worth everything!

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*The articles that appear in this publication represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.*

## Book Review

### *Rumpole: The Beginning*

Jacqueline Mills\*

I don't know when John Mortimer started writing the Rumpole books, but I do recall watching the televised versions starring Leo McKern long before I went to law school. As much as Rumpole is well characterized in the books, Leo McKern provided the definitive picture of him and I have read all of the Rumpole stories since then with Leo McKern in mind.

The latest Rumpole book will never be made into a televised version, at least not with Leo McKern, but reading the book, you can picture it all in your mind's eye. Without ever having seen the Old Bailey or the Inns of Court, you can picture the bars, the courtroom scenes and the chambers meetings. If you close your eyes, you can even imagine a young Leo McKern in the part. You see, Rumpole has decided to write his memoirs.

The book is based on the young Rumpole, new at the Bar but already developing his caustic view of the Bench, witnesses and other esteemed members of the Bar. Finally, we get the story of the Penge Bungalow murders, a case that has been frequently cited in previous Rumpole stories; indeed, just about every one. One of the great joys of the Rumpole stories is that the plots are realistic. These are not fantastical stories that make no sense, in the manner of many so-called "legal thrillers". They make an abundance of sense and are peopled with characters who are flawed, but very real, and it is a joy to finally read a full length book, rather than a series of short stories.

We also finally learn how Rumpole met and wed the infamous Hilda, She Who Must be Obeyed. I must say that I have never been particularly partial to Hilda. I could never see what had drawn Rumpole and Hilda together, why each was attracted to the other, or whether it was a successful drawing together. I am only a little wiser after reading this book – but isn't that the reality? We hardly ever do understand what draws two people together and what the secrets of their union are.

While I will read many more informative and entertaining books this year, it was a special pleasure to relax into a Rumpole, particularly in these dark days of winter when we need all the comfort we can get.

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