

High Conflict Custody and Parenting Matters

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HIGH CONFLICT CUSTODY AND PARENTING MATTERS

INTRODUCTION

High conflict custody and parenting matters are often the most challenging of the conflicts that Family Law lawyers face. One considers the matter high conflict if the parties, through the litigation process, are in a dispute on virtually every issue and step that they face. The challenge for legal counsel is, on the one hand, to prepare the matter for litigation, and on the other hand, to attempt to manage and control the level of conflict, with a goal to resolution through an alternate dispute process, prior to the Trial or Arbitration. We must be problem solvers in the face of the very challenging conflict.

I intend to take us briefly through a high conflict custody matter, including the following topics:

1. The initial consultation with your client;
2. Gathering evidence;
3. Litigation support;
4. Developing a strategy;
5. Questioning;
6. ADR; and
7. Preparing for Trial/Arbitration.

I will leave the details to the presentation, as well as the questions and answer period at the LESA Custody & Access Seminar.

One should never forget that we are seeking the best results for our clients, having regard to the facts presented when applied to legal principles. We must try not to get caught up in the emotional aspects of the case.

While this is trite, legal counsel must have a good working knowledge of all Family Law principles and the relevant Case Law relating to high conflict custody matters. This includes the Alberta *Rules of Court* (Part 12, in particular) and Principles of Evidence. It is most helpful to have a general understanding of the DSM-5 and the role that a psychologist or social worker might play in these type of cases; given that mental illness may play a significant role. Much of what I describe below becomes instinctive over time; keeping in mind that each case requires its own unique approach.

Please do not let the file become high conflict as a result of the conduct of legal counsel!!

I am including the following for your consideration:

- Appendix A Questioning Check List
- Appendix B Case Law Summary
- Appendix C Resource Materials

HIGH CONFLICT – WHAT IS A HIGH CONFLICT CUSTODY MATTER?

The concept of “High Conflict Custody” is not always obvious. The following are examples of different views of high conflict custody matters:

In the case of *N.R.G. v. G.R.G.*, 2015 BCSC 1062, Paragraph 276, the Honourable Mr. Justice Kent stated the following:

“In high conflict separations, both parents commonly attempt to undermine their children’s relationship with the other parent.”

At paragraph 293, Justice Kent goes on to state the following:

“In high-conflict matrimonial litigation, such as the case at bar, the adversarial system often serves to only increase the acrimony between the parties. People who once loved each other exchange vile insults and attach nasty labels to perceived deficiencies in character. Friends, family, police, teachers, and Ministry officials are summoned to denigrate one parent and advocate on behalf of the other. The interests of the children, best served by the positive involvement of both parents, are sacrificed on the altar of self-centered animosity.”

The decision of *N.R.G. v. G.R.G.* was appealed to the British Columbia Court of Appeal. The Court of Appeal described a high conflict custody matter at paragraph 79:

“However, in high conflict custody cases the stakes are particularly high; children can be seriously harmed by the ongoing acrimony and lack of a timely resolution.”

The Court of Appeal continues at paragraph 80 as follows:

“It is common for these cases to become before the Court numerous times before the trial takes place. The problems do not end with the trial judgment. After the trial, it is equally common to have one parent, or both, make repeated applications to the Court, often trying to change the result at trial. Issues that have been decided at a trial are re-argued. Highly contentious access problems arise. There are allocations of breaches of Court Orders. These problems can, if unchecked, go on for many months, or even years. It is the trial Judge who knows the situation; that Judge, in my opinion, should deal with the matters as it continues to unfold...”

The Parenting After Separation for Families in High Conflict (PASHC) Course, which is offered to families in Alberta free-of-charge, considers “high conflict” to be:

Anytime one parent is requesting limited parenting time for the other parent.

The above definition is based upon materials from the High Conflict Institute in San Diego, California.

INITIAL CONSULTATION WITH CLIENT

At this consultation, counsel will typically determine if the matter will be high conflict. There may be incidences of abuse (psychological and physical), alienation, and/or mental illness. At that time, the client will not only advise counsel of the facts and circumstances, but will typically insist upon a particular resolution. Often one party will demonstrate vindication, anger or other irrational behavior.

During the first consultation, one gathers facts and advises the clients of their rights and obligations as it relates to parenting and other matrimonial matters. Having regard to legal principles, one will determine weaknesses in the case and thereafter develop a strategy. At this consultation, counsel will consider if the matter will ultimately proceed to Mediation, Arbitration, Mediation/Arbitration or Trial? Of course, throughout, the parties must consider factors such as urgency and cost. For example, if the matter requires an urgent resolution as a result of serious allegations such as abuse or neglect, an immediate Chambers Application might be necessary. In many high conflict matters, immediate action may be necessary and certainly a delay of 2 or 3 years is not in the best interest of the parties. Time is typically of the essence.

Typically if one has determined that the facts give rise to serious issues of abuse, neglect, alienation or manipulation, litigation support is most helpful. In approximately 75% of these matters, I retain a psychologist in order to assist me in:

1. Understanding the case from a behavioural scientific perspective;
2. Managing the expectations and behavior of my client’
3. Adjusting the behavior of my client;
4. Preparing my client for any assessments or therapeutic intervention that might be necessary, (ie. Practice Note 7 or 8 Assessments).

With the assistance of a psychologist for litigation support, if counselling is necessary for either parent, or the children, that must be addressed immediately. If it is necessary to proceed with a