

Deadbeat or Beaten Down? Maybe it's time to start listening to divorced dads

By John Hoffman

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Sean Cummings couldn't get used to his new soundscape. Before his separation in 1993 he had lived in a three-bedroom suburban house filled with the squeals of his three-year-old. When he walked out the door each day he'd hear the hoots and hollers of children playing, the rasp of stroller wheels on the sidewalk and other sounds associated with a neighbourhood of young families. Now he called a tiny apartment home, and most of his neighbours were other non-custodial fathers. "The silence was deafening," he recalls.

After ten months, Cummings decided that every second Thursday to Sunday was not enough time with his son. But his lawyer said he wasn't going to get any more than that. "I chose not to go to court right away to fight for more time," Cummings says. Instead he concentrated on being a good parent in the time allowed him. He also went to a self-help organization, educated himself about divorce and formed a group for divorced dads. Eventually, he would fight - to keep his son in Nova Scotia. In 1997 he won a court order preventing his ex-wife and their child from moving out of the province.

But that wasn't the end of it. The next year, Cummings' ex-wife said she planned to get a job in Calgary, and he knew he couldn't stop her without going back to court. "I did not want to go to court ever again," he says. Instead, Cummings himself (by that time remarried) relocated to Calgary, only to move back to Halifax a year later when it became clear his ex-wife had changed her mind.

This post-divorce road has had other twists and turns for Cummings and his former spouse – disagreements, time and money spent on lawyers, and heartache for both. The amount of access Cummings has to his son has changed a couple of times. At one point, it increased by two days a month – every second Wednesday evening to Sunday evening. But, currently he sees his son less than that since his ex-wife moved an hour's drive away. "Legally, I'm entitled to more time than I get, but logistically, I can't manage it."

There are two sides to every story and we only have one here. But Sean Cummings seems like a committed divorced father trying to stay involved in the life of his child. On the other hand, if you didn't know he had already started a new family, his actions could be construed as those of a "mad dad" following his ex-wife around, trying to maintain control over her.

Increasingly, fathers who don't have custody after divorce have argued that they get a raw deal – that they are little more than a paycheque and that some mothers "screw around" with access, denying them the little time they have with their children. Divorced mothers have their own concerns, some of which have been addressed by changes in the way support payments are determined and taxed. However, there's still a problem

with divorced men who don't want to support their children financially, and, in some cases, don't even want to be part of their lives. Partly due to the behaviour, of these deadbeat dads, the legitimate concerns of non-custodial fathers have often been dismissed as the rantings of angry men more interested in getting even than anything else.

The outlook for divorced dads improved in 1998 when a special joint committee of the Senate and the House of Commons looked into the custody and access provisions of the Divorce Act. Right now, the legal odds are stacked against fathers, say activists like Danny Guspie, executive director of the National Shared Parenting Association, a coalition of groups advocating equal time for both parents after divorce. "Much of the time, fathers may as well take their toys and go home," Guspie says. "The laws, and the way they are administered and interpreted, constitute a bias against fathers." That view is not shared by everyone. Judges would tell you that if they are biased, it's in favour of the child. That leads to another debate about what's best for children, which we'll get into. But the central question remains: Is there an anti-father bias in custody disputes?

What can be said with certainty is that the most common court decision is sole custody for the mother and access for the father. If that's a bias, it's a bias in favour of the primary caregiver. Courts no longer subscribe to the "tender years doctrine," which held that young children should always be with their mothers. Now the key words are "best interests of the child," and the prevailing view is that most of the time it's best for a young child to live in one home, and that should be the home of the person who looks after him most of the time, who is usually mom.

That makes sense. Few of us would like to pack our bags and move between two houses every week. However, this selection of a primary caregiver, who is usually mom, tends to marginalize the other parents, who is usually dad. And fathers ask, is it not also in the child's best interests to have a good relationship with both parents? Most of us agree it is. However, when push comes to shove, which best interest prevails? Any decision depends on individual circumstances, but most judges are more willing to give one parent a lesser role than to risk instability in a child's life. Courts correctly see kids as innocent bystanders in divorce who must be shielded from their parents' conflict. But this presents a legal hurdle for fathers.

Many who work in the divorce system say that a mother and her lawyer can use conflict to gain, or at least increase her chances for, sole custody. Where there is a difficult history, judges may rule that joint custody is likely to increase the opportunities for conflict, and so will award sole custody to the "primary" parent – usually the mother. And they may do this even if it's clear that she is the main source of conflict. That is not to suggest women create conflict more than men, nor that most women or lawyers would use this as a tactic. But Vancouver lawyer Carey Linde has seen it happen. "I once heard a judge say, 'It's apparent that this mother has set out to sabotage the communication between the parties for the purposed of being able to argue that joint custody wouldn't work. And she has succeeded.' And still he gave her sole custody!"

Another hard reality is that if a child has been living with mom during the period of separation, it becomes easier to establish her as the primary caregiver. "The man is often the one to move out," says Guspie. "Usually he does that thinking it's the best way for things to calm down, but he doesn't realize it will work against him if he gets into a custody dispute." Linde adds, "Lawyers for mothers will often use adjournments to lengthen the time the children are living with her in order to reinforce her as the primary residential parent."

Then there's the troubling area of false allegations of child abuse, which have come between some innocent fathers and their children. How often this happens is a hot topic although Queen's University law professor Nick Bala says the best evidence shows that allegations of sexual abuse occur in two to ten percent of litigated case, which are a small percentage of the total number of divorces. "Although this doesn't arise as often as some people say, the father's groups have a legitimate concern," says Bala, noting that the number of abuse allegations that are unfounded or unproven is virtually impossible to quantify.

Another source of frustration for non-custodial parents are the professionals – particularly lawyers – who make money from divorce. "There are professions in the divorce industry that have a vested interest in maintaining the adversarial status quo because that's the foundation of their business. Toronto lawyer Tracy Houlding takes issue. "Many lawyers promote settlement out of court. And there are parts of the system that are specifically geared toward settlement, like mediate and four-way settlement meetings involving the parents and their lawyers."

To be fair, it's not just lawyers. Into our divorce process we cast two angry, hurt people whose lives have just come unglued, who are terror-stricken at the possibility of losing their children, and wondering how they're going to pay for all this. It's hardly an environment for the best in human reasoning. Add two lawyers who are trying to "win" and it's very easy, wittingly or unwittingly, to fan the flames.

Al Peers, a divorced father of two from Peterborough, Ontario, gives an example. "My ex-wife and I had been having some terrible arguments when I would pick up or drop off the kids at her house," he says. "My lawyer advised me not to talk to her, since evidence of conflict could work against me. He sent a letter to her lawyer saying, 'Tell your client to leave my client alone.' Next time I went there, she was furious because of the letter. I rolled up my window to avoid the argument, which of course made her even angrier. She came flying around the front of the truck and started yelling at me through the passenger window while I'm trying to back out. Next thing you know, my lawyer gets a letter from her lawyer saying I tried to run her over, and we're both hopping mad."

Sean Cummings would like to see a whole new way of dealing with divorce. "Lawyers and courts are a necessary part of divorce, but court should be the last dispute mechanism, not the first. We need a system that rewards good behaviour. Right now there is no incentive for getting to yes." Like many others, Cummings wants to see adversarial terms like "custody" and "access" eliminated from the Divorce Act (the

parliamentary committee recommended this) in favour of "shared parenting." At present, the most common arrangement after divorce is that one parent will have a primary role – custody – and the other a secondary role. Shared parenting has no legal definition yet, but is meant to emphasize that both parents will have equal rights and responsibilities after divorce. That doesn't necessarily mean equal time in each house, but the average divorced father would likely be with his children more often, have more access to information about them and more input into decisions about them. It could also affect support payments, since parents may share child-rearing expenses more equally, unless one has a more greater income than the other.

Cummings volunteered at a Halifax divorce-education service until it closed last December due to lack of funding. "There, parents started with a 15-week program designed to give them child-centred strategies to deal with the types of conflict that occur in divorce. Then we steered them to mediation, where couples sit down with a trained professional who attempts to help them come to an agreement that meets everyone's needs as much as possible." If mediation fails, the next step should be arbitration, suggests Cummings. Each partner (with the help of legal counsel) takes a position on issues like division of matrimonial assets and how the children will be raised. The arbitrator could rule in favour of one side or fashion a compromise. "If parents can't accept that decision, the next step would be four-way negotiation, that's a face-to-face meeting with lawyers present – outside of court – where you try to make a deal. If all those steps fail, that's when you would go to court," says Cummings, who maintains that this model will reduce conflict and could save parents up to \$20,000 each in pretrial costs alone.

What could be wrong with such an approach? The problem, some feel, is that fathers stand to gain more than mothers. Even mediation, which is becoming increasingly popular as a less expensive, less stressful divorce procedure, is seen by some as a net loss for mothers. "Women can lose big time in mediation," says Bonnie Diamond, executive director of the National Association of Women and the Law. "We're not proponents of a heavily adversarial system either. But with mediation, what appears to be an open and honest process often reinforces a power imbalance that is there in society and in some families. If you set up the system Mr. Cummings proposes, I worry that women who are under duress and in need of protection and advocacy may not get it."

Diamond also objects to the presumption of shared parenting. "When it's possible it can be a good outcome for everybody but, let's face it, the reason many marriages break down is difficulty in joint decision-making. Why should we expect parenting to be any better when the couple has separated?" Both she and Bala say the experience of some American states that have adopted a presumption of shared parenting shows that it does not necessarily reduce litigation. "Nobody's saying that shared parenting is easy," Cummings responds. "All those studies prove is that people need more help with it. The law could change tomorrow but shared parenting won't work unless parents are taught how to do it."

Diamond also questions whether shared parenting will serve children well. "There are lots of studies showing that shared parenting - particularly when it involves something like the children packing their bags and moving from house to house each Sunday - is not the best thing for children. It's less secure and it robs them of a pattern of parenting that they've come to know. And the literature about the effect of divorce on children clearly shows that the most important determining factor for their well-being is a good relationship with their main caregiver."

It's interesting, then, that one of the most outspoken advocates of shared parenting, Senator Anne Cools, supports her argument with yet another large body of evidence. "The literature is very clear that the single greatest indicator of children's well-being is the presence of a father in the child's life," she says, noting that divorce often results in the diminishment and sometimes complete absence of paternal influence.

Cools argues that it's really a question of children's rights. "Children are entitled to the love and support of both parents," she says. "I am not talking about how many nights a child sleeps in whose house. Those are details to be worked out in individual cases. I simply want the law to adopt the principle that both parents are equal and valuable to the child. Once the law takes that position, many of these problems will sort themselves out.

Cools maintains that changes in legislation recognizing the value of both parents would change the divorce culture, so that children would no longer be seen as the appendage of one parent or the other, says Cools. Adds Cummings: "Legislation can say to parents, 'You have a moral obligation to set aside your differences and focus on raising your children.' Existing legislation does not encourage that." But others worry that changes may make it easier for an abuser or control freak to harass his (or her) ex-spouse and may force children to divide their time between two parents who are always at odds.

Systemic changes that put fathers more squarely in the picture may create a new mindset for divorcing parents, even if legislation cannot take away all of the rancor and vindictiveness that accompany too many break-ups. We need to develop specialized services – other than legal ones – for families involved in high-conflict divorces, and divorced parents who are sharing responsibility for their children need education to help them make it work.

As the deliberations continue there are hard questions to answer. Even if we continue to accept the importance of a primary caregiver, have we tended to evaluate care in mother-centric terms? In cases where the parents agreed when they were together that the mother would stay at home and the father would go out to work, is it fair to relegate him to two-weekends-a-month status because, as Guspie puts it, "he did what the family thought was best"? Can we ask men to take on a more involved role with their children but continue to ask them to move to the sidelines when a marriage ends?

Have we underestimated the depth of feeling of fathers for their children? When we imagine a non-custodial mother, we immediately think about how hard it would be for her (or speculate about how bad a parent she must be), yet we consider it normal for dads to be in such a position. Can a court, or anybody else, say you're not entitled to an ongoing, close relationship with your child if you've done nothing wrong other than get divorced?

And can we really say we know how much children need and want their fathers? Guspie says that many shared parenting advocates are themselves children of divorce who felt the lack of a father in their own childhood and don't want to see the pattern repeated.

Anne Cools believes that increasing involvement of fathers in children's lives is a good thing for everyone, and she's convinced that the changes she seeks are coming sooner or later. "It's a new generation of involved fathers and I tell you these men will not easily be shut out of the lives of their children."