LAW OFFICE OF
ANNE FREED

Memo

To: Ms. Anne Freed

From: Sheena Massiah, 2nd-year law student, Legal Assistant to Anne Freed

Date: July 30, 2009

Re: Report on "Tug of War" by Mr. Justice Harvey Brownstone[1]

I have been asked by Ms. Freed to do a summary of "Tug of War" by Justice Harvey Brownstone, as it is a book where a family court Justice himself, Justice Brownstone, discusses the fallacy that "the party will have his day in court" and encourages parties to a matrimonial separation to use Alternative Dispute Resolution (ADR) options, including collaborative process and mediation. Ms. Freed feels that this book provides a helpful reference for people embarking on a separation.

Justice Brownstone's "Tug of War" provides practical insight and valuable information to those embarking on the resolution of family conflicts; specifically separation, custody battles, and support. He provides useful advice to help understand and navigate the complex, family-court system though his writing is **not** intended to be a step-by-step guide to self-representation. In fact, he strongly advises against this course of action. Brownstone's book stresses the importance of using the court system as a last resort and the effectiveness of settling these disputes through alternative, less-adversarial methods, namely mediation, arbitration, collaborative law, and a combination of mediation and arbitration.

"Tug of War" addresses the following issues:

Chapter 1: Do you know what you're getting into?
Chapter 2: Why family court should be the last resort
Chapter 3: When going to court is necessary
Chapter 4: Alternative to litigation
Chapter 5: Lawyers: why you need one, how to choose one, and how to measure performance
Chapter 6: Custody and access disputes: "the best interests of the child"
Chapter 7: Joint custody: if parents are equal, why do so few have it?
Chapter 8: Paternity and child support
Chapter 9: The "connection" between access and child support
Chapter 10: Parallel cases in criminal and family court
Chapter 11: When private disputes become a public concern: calling in the child protection authorities
Chapter 12: So now what? After your dispute is resolved
Chapter 13: Ten tips for success in resolving parenting disputes

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[1] Brownstone, Harvey. Tug of War: a judge's verdict on separation, custody battles, and the bitter realities of family court. Toronto: ECW Press, 2009.

For the purposes of this summary, and to all those involved in family disputes regardless of the situation, the issues in chapters 1-5 are of the most importance. The remaining chapters are more tailored to those involved in specific disputes and should be referenced if they apply to your specific set of circumstances.

(Page 1- Chapter 1)

Do you know what you're getting into?

The opening chapter helps to emphasize the gravity of family disputes. Often people underestimate the expense, stress and time that goes into the resolution of these disputes, only realizing how complicated, frustrating, and unpredictable the whole process can be after they have already become engrossed in a highly-emotional court expedition.

(Page 11- Chapter 2)

Why family court should be the last resort

Brownstone explains that litigation, rather than improving parents' ability to communicate and co-operate, actually causes it to deteriorate. Instead of developing solutions jointly that are in the best interest of the child, they become "hostile adversaries". A very important point made is that the parents, who are in the best position to be making decisions regarding their children, give up this decision-making power and place it in the hands of a complete stranger to reach a solution in a very short period of time based solely on the information provided by both parties, which may or may not be a completely accurate reflection of the situation. Furthermore, the court is not bound by the parents' options. Should the judge disagree with both parents he/she may compromise between the two or develop something completely different, which the parents may be even more displeased with.

In addition, costs are a major factor in avoiding litigation. Unsuccessful parties often have to pay at least a portion, if not all in some cases, of the other party's costs. Separations are very expensive to begin with since often the income that was originally used for one household must now be divided between two- not to mention the cost of moving, furniture, etc.

The main reason litigation should be a last resort is that there is never a "winner", everyone loses- especially the children. The hostilities and bickering often continues for years after the matter is "settled" and in some cases the litigations continues throughout the course of childhood until adulthood is reached and the disputes are no longer relevant.

*Note: A useful summary of this chapter can be found on **page 20**.*

(Page 23- Chapter 3)

When going to court is necessary

Though Justice Brownstone insists that under most circumstances court is not that answer, he acknowledges that there are times when litigation may be the only course of action. These include:

- A refusal by your ex-partner to provide financial disclosure
- When domestic violence is an issue- an emergency temporary restraining order
    - Compelling evidence of the misconduct is required
- Substance abuse
- Mental illness- only if it impacts the parent's ability to provide proper care for the child

    - Must convince the court that the invasion of your ex-partner's privacy is justified and necessary to obtain a psychological report for assessment
- Child abuse or neglect

This chapter also stresses the importance of not exaggerating the facts or making wild accusations without some basis of proof. If the court disagrees with your assessment it sends a clear message that you are being unfair to the other parent and this will greatly harm your own credibility, reasonableness, and how your parenting skills are assessed.

(Page 37- Chapter 4)

Alternatives to litigation:

Justice Brownstone strongly advises that *alternative dispute resolution* is employed rather than litigation. This refers to the implementation of mediation, collaborative law, arbitration, or a combination of mediation and arbitration. Doing so allows the parties involved to maintain control of the decision-making (aside from arbitration), which in turn increases the likelihood of satisfaction with the results. Using these alternate processes also tends to decrease the level of conflict while increasing mature communication and behaviour through rational discussion by both parties.

Mediation (p. 37):

This is one alternative to litigation. "A mediator is an impartial professional with expertise in helping parties negotiate fair, constructive, and mutually agreeable resolutions to their disputes."
Mediation is advantageous because it possesses the following qualities:

- Time-effective
- Inexpensive
- High success rate
- Encourages a co-operative spirit
- Inspires creativity to create parenting plans that meet the unique needs of the entire family

Mediation is intended to, "reach a fair and workable agreement with individualized solutions that satisfy the underlying interests of both parents and each of their children."

Mediation can only be pursued if:

1. Both parents are motivated to try to settle the dispute
2. Both parents are capable of stating their needs and interests
3. Both parents understand their rights and responsibilities under the law
4. Both parents are consenting to participate in the mediation process
5. No power imbalance exists that would make it impossible for one parent to negotiate with the other as an equal.

Note: Should you wish to contact Family Mediation Canada you can do so at: www.fms.ca

Collaborative Law (p. 40):

Collaborative Law (Process) is another alternative to litigation. In collaborative law, parents and their lawyers work co-operatively to reach a solution. The focus is on common interests, understanding different perspectives/ concerns, an open exchange of information, treating each other with respect, and discussing a wide range of options.

A contract must be signed which states that if an agreement is unable to be reached (which rarely happens), all professionals and lawyers involved in the process must resign and cannot participate in any litigation regarding the dispute. This method requires adherence to ethical actions to be successful. If this requirement is breached and the parties are forced to litigate, the process can create a much higher cost than if litigation had just been pursued in the first place. Therefore, it is necessary to be dedicated to the collaborative process and its prerequisites.

Using this method, the personal details of the family breakdown remain confidential because without litigation there are no records that are accessible to the public in court files. This is often a very appealing feature of the collaborative law option.

Note: For more information on collaborative law consult the Collaborative Family Lawyers of Canada: www.collaborativelaw.ca.

Arbitration (p. 43):

In arbitration the evidence is presented similar to a court case and the arbitrator makes a decision, just as a judge would. The parties are bound by whatever decision the arbitrator makes just as a court decision would in litigation.

The most appealing feature of arbitration is that the parties maintain their privacy. Similar to collaborative law, the arbitration occurs outside of the court system and therefore the public has no access to those records containing the personal information. In addition the other pros of using an arbitrator are:

1. Only one decision-maker is used
    a. Increases consistency
    b. Less time is spent "catching up the judge" on the details of the case
2. The decision-maker is a family law specialist
3. The process is faster than using the court system

Arbitration can be a very effective tool however it can also be expensive because the arbitrator will normally be an expert lawyer in the field, which means charging a high hourly rate. Also, if you do not approve of the arbitrator once the process is begun, it is difficult to change arbitrators. At the outset of the arbitrator selection both parties must agree to remain committed to that individual and the decision they make, unless both parties agree to replace the original selection. Furthermore, it is likely that you will still have to go to court to enforce the arbitrator's decision.

Mediation-Arbitration (p. 46):

This option commences in the form of mediation, but should the parties be unable to reach an agreement, it is agreed in advance that the mediator will convert into an arbitrator and decide the issue based on the evidence presented. The advantages of this form of dispute resolution are as follows:

- Extremely efficient

- The mediator is already familiar with the case before making a decision
- There is a strong incentive to reach an agreement
- The parties are likely to listen to the mediator-arbitrator's input and proposed solutions
    - If they do not, it will likely result anyways if an arbitration decision is required
- The parties tend to remain reasonable and courteous during the proceedings in an attempt to leave a good impression with the mediator-arbitrator

However, this alternative may be more expensive than simple mediation because of the legal fees involved. Lawyers are more involved in this process. Yet, if solely mediation is initially pursued and fails, which leads the parties to then engage in arbitration or litigation; a mediation-arbitration would be less expensive in the long run compared to this other option.

For all of the reasons presented these alternate methods of dispute resolution should be seriously considered before making a decision on how to proceed, especially if litigation is path that the parties initially found most desirable. These alternate options are less destructive, more co-operative, and therefore more advantageous options to put into action.

(Page 49- Chapter 5)

Lawyers: why you need one, how to choose one, and how to measure performance

If your situation is such that you cannot afford a lawyer, ensure that you at least meet with one for a consultation. You can confirm that court documents have been completed correctly and a lawyer will help you to determine:

- What evidence is relevant to your case
- The admissibility of evidence
    - The evidence presented cannot breach the 'hearsay rule'
- What your actual rights and obligations are as well as your ex-partner's
- What the rules are that govern how court cases are run
- What the best course of action is from an objective standpoint
- Which of the possible courses of action are in your best interest

Note: A summary of 'why you need a lawyer' can be found on page 60.

Justice Brownstone strongly suggests that when searching for a lawyer you retain a family law specialist. To do so, the best way is often through word of mouth or through referrals. When selecting a lawyer ask:

- What his/her experience is in the field
- What percentage of his/her work consists of family law
- What services he/ she provides (mediation, arbitration, litigation, etc)
- What the hourly rate is

Also, obtain a second opinion if you are unsure of the quality of the advice.

When choosing a lawyer the aim is to obtain the best possible legal advice, NOT to find someone who agrees with you. Brownstone emphasizes that a lawyer can only help you if you follow the advice they provide. That said, in assessing your lawyer, they should possess the following qualities (page 70):

1. Know the law.
2. Be well prepared.
3. Be professional and courteous to other lawyers at all times and retain his/her objectivity.

4. Be practical, child focused.
5. Resort to court action only when it is truly necessary.
6. Communicate with his/ her client.
    a. Give clear legal advice with concrete options.

Justice Brownstone states that if you take nothing else from his book heed his advice on retaining a lawyer as this will play a crucial role in your success throughout the course of the dispute.

(Page 167- Chapter 13)

Ten Tips for Success in Resolving Parenting Disputes

1. Be child-focused.
2. Learn to distinguish between a bad partner and a bad parent.
3. Never speak negatively to the child about the other parent.
4. Never argue or fight in front of your children.
5. Listen to the other parent's point of view even if you don't agree with it.
6. Consider mediation before giving the decision-making power to a judge.
7. Separate your financial issues from your parenting issues.
8. Be flexible and reasonable in making access arrangements.
9. Your children still see you as a family, so communicate!
10. Don't hesitate to get help.

Justice Brownstone concludes his book with the statement: "The theme of this book is maturity. I believe the key to resolving parental disputes is for parents to behave in a civilized, reasonable, mature way with each other."

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