WHAT DOES COURT DO TO PEOPLE, AND HOW A SHIFT TO ALTERNATIVE PROCESSES CAN CHANGE THE DIRECTION AND HELP RESOLVE THE MATTER

Dear Colleagues and Friends,

I'd like to share with you two recent cases which illustrate the damage the adversarial Court process can do to parties in matrimonial cases and, as well, the positive changes that the introduction of Alternative Dispute Resolution processes into the mix can provide. Case #1 had been in Court for several years. I was retained as the mediator on the eve of an expected week-long trial, with the objective of all concerned of trying to settle this case and avoid a trial. We held an all-day "blitz" mediation. By now the lawyers were not on "friendly terms" and the parties were extremely upset and worn down by two years of adversarial court proceedings. The possibility of any viable communication between them seemed hopeless.

My first objective was to set the parties more at ease. I explained to them and their lawyers that this day was off the record, that nothing said in the mediation room would be admissible in Court, and that this was their opportunity to be completely open and honest with each other and not to use litigation tactics. I told them that, by so doing, this would offer a hope of resolution before trial. In mediation, the decisions would be in their own hands, whereas in Court a third-party stranger would make the decisions about their lives.

After the parties had several angry "he said, she said" exchanges, I was able to steer them into a more positive, non-adversarial way of talking to each other, by helping them focus on their common grounds and priorities. For example, "closure" was huge for both of them, and also having each recognize what the other had contributed to the marriage. I told the parties that, for this process to work, all present in the room – the parties, their lawyers, and the mediator – had to be 100% committed to the mediation process, and all agreed.

I reminded the parties: "You have nothing to lose here. None of this is binding or enforceable in Court." This reassured them and helped them to be more open and honest with each other. The lawyers, to their credit, let go of their litigation tactics for much of this day, enabling an open and honest dialogue to occur by all present. By the end of a long day, we had resolved the major issues with one issue remaining. In the next days, the settlement negotiations continued between the lawyers, who had, in the mediation process, regained their initial positive connection. On the day before the scheduled trial date, the parties reached a final settlement of all issues. While my hope in mediation is that the parties will have a civil and even friendly relationship afterwards, especially if there are children, this is not always the reality. However in this case, I got a call next day from the husband who said that, after his wife had signed the settlement she called him stating: "Now that this is over I'm coming over to make you dinner," and so she did! The relief of the parties and their lawyers was palpable. Both parties were happy with the settlement they had reached.

In Case #2, I was retained as the lawyer for the husband. We were at the beginning of the legal process, and the parties were not even in Court. Initial letters were exchanged between the lawyers. They included a lengthy letter from the wife's lawyer listing various allegations against the husband, and a reply letter written by the husband's lawyer (myself) in which we refuted the most damaging allegations and listed the husband's allegations, keeping the content as "low-key" as possible. A 4-way settlement meeting was arranged. In the first twenty minutes, just as in Case #1, there erupted an accusatory shouting session between the parties regarding the allegations made by each through their lawyers' letters. Each party was clearly offended by the letters and wanted to have their "day in Court." The meeting was going nowhere. I told the parties that if they found the lawyers' letters offensive, just wait until they would see the pleadings and affidavits of the other if this matter were to proceed to Court!

The lawyers were able to steer the meeting in a more positive direction by suggesting that the parties should start this day from square one. They would have to stop criticizing each other about the past and focus on moving forward, and, specifically, negotiate the children's times with each parent from today forward. The parties acknowledged that, since ongoing communication between them at this time was difficult, they would agree to set a specific schedule for the next month of each party's times with the children. They did so in the meeting.

In this case, as in Case #1, the parties became pleasant to each other, and even understanding of the other party's position. As in the mediation case, the parties had spent most of their adult lives together. The positive connection between the parties that they had enjoyed when their marriage was good, resurfaced, as had happened in Case #1. The parties were now working together rather than against each other and were able to agree on many aspects of the matter moving forward. A return date was set for a second settlement meeting to continue this positive dialogue.

These two cases reminded me of the damage that the adversarial Court process can do even if it's as early as letter exchanges between the lawyers, and how this process can often pre-empt any hope of a negotiated settlement. The cases also reminded me of how an alternative dispute resolution process, such as mediation (Case #1), or negotiation based on the needs, wants, and interests of the parties versus an adversarial approach (Case #2), can turn the tide, often very quickly. As in these two cases, changing the tone and approach made a negotiated settlement a reality.

Of course, sometimes there is no alternative but to go to Court. An example is where one side tries to negotiate, prepares full financial disclosure and sends it to the other side's lawyer, while the other side does nothing in reply and therefore effectively refuses to come to the negotiation table.

I agree with the Honourable Mr. Justice Brownstone, who in his book "*Tug of War,"* wrote that Court should be a "last resort" in family matters. Case #1 and Case #2 illustrate the fall-out that often occurs when the adversarial process is used. They also

illustrate how an “ADR” approach can, very quickly, change the direction, tone and outcome, and create possibilities for negotiating a settlement that the parties are the authors of, and that they are both happy with.

Before making the decision to go to Court, one should consider using alternatives such as mediation and collaborative practice. More information on these processes can be found on the Links and Resources page of my web site at *www.annefreed.com*.

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