Rules of Evidence in Family Law: Are There Any?

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*I must apologize, in advance for any disservice that my paper might do to that of D.A. Rollie Thompson, who, I discovered after commencing this paper, had already written a paper entitled, “Are There Any Rules of Evidence in Family Law?”¹. I commend his paper to those wanting a more in depth and philosophical excursion on the topic. This paper is not intended to be as broad or as specific – but is intended to highlight to counsel that though we practice in the area of family law, what we do is important, and it is perhaps the single most common experience the general public has with the judicial process. As such, family law practitioners are ambassadors of the legal profession to a great extent – and with that role comes a responsibility – a responsibility to act ethically and with regard the principles of law and judicial process that have evolved since the days of the Magna Carta.

The title of this paper is somewhat tongue-in-cheek, but it belies something that we, as family lawyers, struggle with every day. In no other area of law do we constantly question what we do and how we do it. Whether it is as lawyers, or as judges, we are asked to address in a rational way, the irrational.

People come to us with pain and anger and fear, and we are asked to take hold of that and to transform it, like straw into gold, into a neat and sensible outcome.

In the effort to do that, quite often, it strikes me that we as lawyers, and as judges, often for the noblest of reasons, let ourselves down. We involve ourselves in the passion of the litigants, and in so doing, we skirt the broader needs of society to operate within a system of rules and principles that should provide structure and reason to those to whom those terms are an anathema.

What am I talking about? – I’ll illustrate.

Some time ago, I came before a now retired Judge of the Court of Queen’s Bench, on an application relative to the issue of interim child support. The points were argued strongly from each side, and somehow, during the course of our representations, my fellow counsel remarked that they were also seeking to obtain some specified summer access.

The presiding Justice, by now, not completely happy with my client on the economic front, pointedly asked me, “and so what is wrong with their request?” I responded that I wasn’t certain what my client’s position was, as it hadn’t been raised before that moment, and I suggested that I would take that up with my client and respond to my friend in due course. The response from the bench was something along the lines of “I don’t see a problem with the request, and if you’re client doesn’t agree, well, I can fix that.” At this point, my anger got the better of me, and I responded, “Sir, with all respect, I know this is only family law, but perhaps even in family law an application shouldn’t be heard where no motion was filed.” The court summarily ordered the access sought.

Was that a proper outcome in that case? Perhaps – the point, however, being that in the zeal to do “what is right”, my fellow counsel and the Judge, in my mind, embarrassed the system. They let themselves and the legal system down.

The point of this paper – is to implore you not to succumb to that pressure, to that temptation, to ignore rules of evidence and procedure in the zeal to “do what is right”. We are often the last bastion of reason in our clients’ world where reason does not exist. The legal system and our obligations as stewards of that system require that we abide by those rules, by those principles – and our client’s needs are sufficiently important that we should attend to those needs seriously and properly – not haphazardly and with caprice.

Oddly enough – as I was preparing this paper, I came across a decision of our Court of Queen’s Bench that illustrated this point, and if you want to truly see what not to do as