Thoughts on Litigating Family Law Files

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INTRODUCTION

The advertising of this paper and its accompanying presentation, is the *"Do's and Don'ts of Litigating Family Law Files".* If you can take anything away from this paper it is – *don't! Don't litigate family law files unless there is no other option*. This does not mean that every file is appropriate for the mediation or collaborative law processes, nor does it mean that the alternative to those processes is "*war".* It is not, or at least it ought not to be. It does mean that a litigation file can nonetheless be a cooperative file, resulting in negotiated resolution.

Family law is a unique area of practice where the designation of a party as "plaintiff" or "defendant" is not particularly relevant as it is in other areas of civil litigation [however the rules for compromise using court process continue the distinction (*ARC* Rule 4.29), unfairly I would suggest, in the family law context]. Nor is family law like criminal law where the end result is black and white – guilty or not guilty. Notwithstanding that one party may be more or less successful than the other party in terms of the relief requested and that which is granted if the matter is fully litigated through to a judicial determination, there is generally not a "winner" or "loser". Rather, a "win" is where the file is resolved short of trial. Settlement should always be the goal of the parties, and counsel. Remarkably, and despite the acrimony that often characterizes a file at the outset, the vast majority of family law files are settled.

We, as counsel, have a professional duty to promote resolution and not to fan the flames of discord. This duty is codified at Rule 2.02(7) of the Law Society of Alberta Code of Conduct as follows:

> *"A lawyer must advise and encourage a client to compromise or settle a dispute whenever possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings."*

We also have statutory obligations under the Divorce Act:

> *"**9.(1) Duty of legal advisor** It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding*
>
> *(a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and*

(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counseling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation,

unless the circumstances of the care are of such a nature that it would clearly not be appropriate to do so

(2) Idem *It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the souse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating matters."*

and we have similar obligations pursuant to the Family Law Act:

"5. Duty of lawyer ***(1)*** *Every lawyer who acts on behalf of a party in an application under this Act has a duty*

(a) to discuss with the party alternative methods of resolving the matters that are the subject of the application , and

(b) to inform that party of the collaborative processes, mediation facilities and family justice services known to the lawyer that might assist the parties in resolving those matters."

It is the writer's view that a file will settle relatively painlessly if both parties are motivated to settle reasonably, regardless of the process. Conversely, if either (or both) of the parties is uncooperative or has unreasonable expectations, arriving at resolution will be more difficult. On a family law (or any) file, we cannot change who the parties are, what their personalities are like, what the facts are and, in most cases, the state of the law. **We should, however, do what we can to be part of the solution and not part of the problem.**

The term "litigation" is used to distinguish the type of file in which one is able to access the judicial system from those types of files where the judicial system expressly cannot be employed at all. Unfortunately, the lexical dichotomy that has developed has brought with it a negative connotation to a process which has, as **one of its tools**, access to the Courts for procedural assistance and substantive resolution of the issues arising out of relationship breakdown. It is not all or nothing. There are a number of processes that may be utilized during the course of the file as appropriate within what we term in our office a "cooperative traditional" method of practice.

What follows is a discussion of practice pointers and strategies that may be useful to effectively move family law litigation files to resolution, either as determined by the parties or by 3rd parties (Judges or Arbitrators).