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Signing on to Gary Joseph's plea | AJ Jakubowska

By **AJ Jakubowska**

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Law360 Canada (April 17, 2024, 1:45 PM EDT) -- In a world that constantly presents us with two choices, evolve or repeat, I found Gary Joseph's most recent piece — entitled "A plea for civil discourse in high-conflict parenting disputes" — particularly engaging. I take up his invitation and join his crusade. A dear colleague, he writes with insight and sensitivity, and from long-time experience, on an important topic: He raises valid questions about the role of family law practitioners in high-conflict parenting disputes.

The settlement he describes in his piece is a cause for celebration, truly, and all involved must be commended. Some may ask why the case went as far as it did, to trial. I will not pose that question for two reasons: First and unfortunately, for some people, only standing at the edge of the trial abyss focuses the mind. Second, in his piece, Gary adeptly identifies the types of problematic tactics that can fan the flames of a parenting dispute to the point of a full-blown five-alarm fire, including vitriolic letter writing to create a "paper record" and hurling unsupported allegations. He was not initial counsel on the matter and may have inherited it with some unfortunate features already baked in.

To Gary's list of problematic tactics I will add surreptitious recordings, essentially intercepts of communications between parents and children. Our courts have viewed the practice with "*general repugnance*" (*Scarlett v. Farrell*, 2014 ONCJ 517) and held that it "*should be strongly discouraged*" (*Hameed v. Hameed*, 2006 ONCJ 274). Use of such recordings as evidence has been permitted only in exceptional circumstances.

In light of this, I find concerning the decision by one of the pioneers of co-parenting platforms and apps to now offer recording as a "service" for parents. More than that, on its website, the company asserts that the recordings and transcriptions are admissible in court. Family law practitioners know that admissibility is a question reserved for family court judges, but does the public? Is there a message being sent that our courts approve of such recordings? If a reputable app offers recording as part of their service, why would parents not use it and consider it an acceptable practice?

As a companion to Gary's piece, I offer the following points to consider when taking on what may have the early hallmarks of a high-conflict parenting matter:

1. **Lay a solid foundation and do so early**: Our first meeting with a parent, even before we are retained, can be a powerful tool for setting expectations and laying important groundwork for future steps in the case. The person sitting before us is often stressed, disappointed, scared and in search of a champion to join their cause. If parenting is an issue in their case, the cause can take on the dimensions of an epic fight, with the other parent cast in the role of the villain or mythical dragon.

   Sometimes, by the time the "aggrieved" parent consults us, the intensity of the battle itself has overshadowed its perceived goal: doing what is best for the children. This is the time to refocus the lens — to signal early on, and repeatedly throughout the case, that all work around parenting must be child-focused, as opposed to concerning itself in any way with the "rights of the parents." This is the time to explain the "best interests" test before the court and to cover basic rules of evidence and admissibility.

2. **"Your children are impacted by your conflict"**: Parents involved in high-conflict disputes must be reminded of this reality over and over again. It's not a question of schooling them — it's about pointing them to evidence-based research. During the course of my practice, I have encountered a number of parents who insisted their children were not affected by their parents' dispute because they did not hear their arguments or because their schoolwork did not suffer.

In my view, family law practitioners should receive at least basic family relations training and be able to discuss with their clients the science pointing to both short- and long-term consequences of children's exposure to parental conflict. Warring parents should know what their choices and actions can mean for their children, in practical ways and with real-life examples. We can and should be the first source of such important information.

3. **"Family court is not like TV's *Judge Judy*"**: Many clients come to us with preconceived notions of court and litigation, often fertilized by broken-telephone anecdotes from friends and neighbours, and the media's not-so-accurate portrayals of courts and the litigation process. Participants in parenting disputes will benefit from understanding, early on, the realities of family court: that it is a methodical, sometimes dry and always very deliberate consideration of relevant evidence and the applicable law and that family court judges do not wag their fingers at "cheaters" or punish parents for re-partnering too soon after the separation. And no, character letters are of no use and polygraphs are not administered in family court.

On my podcast, *SANE SPLIT*, I recorded an episode on this very point, referencing *Judge Judy* throughout. Unlike producers of TV shows, family court judges do not thrive on or even take note of "drama," and ratcheting up a parenting dispute to 11 only to portray the other parent as a villain misses the point altogether.

4. **Alternative dispute resolution**: Some matters do need a decision-maker. It can be challenging to suggest mediation to a parent in a high-conflict parenting dispute — after a drawn-out battle, they may have no motivation left for any "reasonable" dialogue. They may also think their money is better spent on securing a decision. But in the right circumstances, there is no harm in trying, in my view, particularly if the suggestion of mediation includes arbitrating if it fails. Parenting disputes have a tendency to escalate over time, so selecting arbitration may help corral the matter since this process is generally faster than addressing parenting issues in court. Providing our clients with options is important.

To my friend Gary: Thank you for taking on this important crusade. And may the force be with you. Advocating for our clients with zeal cannot, and does not have to, involve doing harm in the process.

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