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‘Balls and strikes’ or ‘let’s keep talking’? | AJ Jakubowska

By **AJ Jakubowska**

Law360 Canada (March 28, 2024, 10:52 AM EDT) -- Some months ago, over a memorably delicious meal served at a venue filled with holiday sparkle, I mused with a seasoned Food and Drug Regulations (FDR) professional about parenting co-ordination, and its suitability in different family law scenarios. Only a few sentences into our lively exchange, he made his central point: in his view, some cases need balls and strikes — no more, no less.

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I found his comment refreshingly direct, especially coming from someone who has spent decades working to help families through dialogue. Perhaps these many years of experience have sharpened his ability to see things this clearly. I also found it thought-provoking given our justice system’s current push toward family dispute resolution. Our dialogue continued. We agreed, for example, that while classic parenting co-ordination is of great value to many families experiencing post-parenting agreement challenges, there is a risk that, in some instances, the process will be hijacked by one of the parties and used as a further tool for oppression and even abuse.

The idea that some cases require firm decisions — pronouncements as to a ball or a strike as those made by an umpire — is not new. In 1996, when I was called to the bar, and before formal case management, most family law cases were resolved this way. Yet there was early recognition by both family law lawyers and family court judges that many family disputes could be settled through dialogue and before a judge was tasked with making a decision in the adversarial context of a case.

As an articling student and then an associate, I was lucky to attend many such informal “mediations” with family court judges — precursors to our current, formal system of conferences designed to encourage the parties to “keep talking” until all possibility of settlement is exhausted. Family mediation and arbitration, as options for dispute resolution, were also taking shape, with some of the pioneers in our province paving the way for us with creative ideas and hours of hard work required to hone the concepts in theory and practice. I raise my hat to them.

In a recent thread in the family law lawyers’ Facebook group, which I adverted in my last piece, we considered how delays in our courts impact Ontarians’ ability to access justice. In some jurisdictions, this has now reached crisis proportions. The subject of mediation came up, and the responding comments were interesting and thought-provoking. These, and the initial “balls and strikes” comment from my FDR colleague, were the inspiration for this piece.

In our daily grind of family law practice, are we devoting sufficient time to consider what method of dispute resolution is most appropriate for our clients and their cases? This is a key question to ask, both at the beginning of the case and as it progresses. The answer may evolve over time. What considerations drive us on this question, and what factors do we use in formulating our advice to our clients on this important topic? Our legislation now obligates us to actively dialogue with it about alternative dispute resolution. How many of us actually do it and, if we do broach those subjects, at what depth do we present the options?

Do we consider not only the financial cost of various approaches but also the psychological cost of delay for our client and, most importantly, for the children? Do we take into account our client’s and

the other party’s personality profiles, and how a particular resolution approach might encourage or curb oppressive behaviour? Are there issues in our case that militate against delay? Does the impact of delay on children who might be caught in the crossfire of their parents’ dispute outweigh the financial stress on the parties of frontloading the cost of private arbitration? Posing and answering these questions, on our own and with our clients, is one of the many responsibilities we face daily as family law professionals. The stresses faced by our justice system heighten the need to consider alternatives with sincerity and vigour.

I am a big believer in family mediation. In my perfect world, everyone would mediate and every letter in a family law case would end with “Let’s keep talking.” Still, I do take off my rose-coloured glasses from time to time. I am also a litigator because I recognize that there are cases, or issues within a family law case, that cannot be resolved unless an umpire steps in. What concerns me is that for some family law lawyers, litigation is still the default. Court cases are commenced quickly and without compelling reasons to do so. My ongoing conversations with many of my colleagues confirm my theory. We are not charitable organizations, I recognize that. We are paid for services rendered, I recognize that too. Yet, our clients’ needs and the best interests of children must always take priority over our own interests, financial or otherwise. We are public servants, officers of the court and representatives of the justice system. We have the ability not only to influence the public’s perception of our profession but also the system’s capacity to deliver justice and finality promptly and cost-effectively.

I am encouraging you all, my family law colleagues, to have ongoing and committed conversations, among us and with clients, about options for dispute resolution. Consider this question both subjectively and objectively. Do not default to “same old, same old.” Creative dispute resolution calls for creative approaches, including through consensus-building, but do not be afraid to recognize that some cases need an umpire. Above all, treat each case as unique and consider it in that light.

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