EDUCATE, COLLABORATE, MEDIATE, ARBITRATE, COORDINATE—BUT NEVER, NEVER LITIGATE

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“DISCOURAGE LITIGATION. PERSUADE YOUR NEIGHBORS TO COMPROMISE WHENEVER YOU CAN. AS A PEACEMAKER THE LAWYER HAS A SUPERIOR OPPORTUNITY OF BEING A GOOD MAN. THERE WILL STILL BE BUSINESS ENOUGH.” ABRAHAM LINCOLN

This article offers for inspection the proposition that contested custody proceedings are corrosive to parents and toxic for children and custody issues should never be resolved by trials.

When Albany County Family Court first moved into its new Courthouse last year, I thought that putting bullet proof glass in the judges’ chambers was a bit extravagant and security overkill. After all, how many judges have been shot in chambers by a sniper? After my colleague was recently shot just that way in Reno, Nevada, the bullet proof glass decision now looks foresightful.

It also got me to thinking about how often the entire process of custody litigation can cause very good people to take complete leave of their senses. Sometimes, perhaps as in Reno, people who are just a step from going off the deep end, in an act of irrational desperation, resort to drastic measures that have tragic ends.

So, it is worth asking, are we really doing the best we can? Is our current
family justice system the best we can offer separating parents? If we could design a system from scratch, is this what we would end up with? Churchill once said that democracy is the worst form of government ever invented except for all the others that have been tried. The corollary to that for Family Court would be that the adversarial litigation system is the worst form of conflict resolution for families ever invented—period. Here is why custody cases should never be tried.

Someone once noted that in criminal cases you see the worst people at their best and in custody cases you see the best people at their worst. When parents come to Family Court they encounter something like a reverse Heisenberg uncertainty principle. Werner Heisenberg was a German physicist who won the Nobel prize for his work in quantum physics. He was the leading scientist in Hitler’s efforts to build an atom bomb. The conventional wisdom is that he sat on his hands and delayed the final product until the Allied forces were approaching Berlin. Closer to the truth is that although the Germans discovered nuclear fission, had the first military project set up to research the feasibility of an atomic bomb and had access to large supplies of uranium and heavy water, they never came close to building a bomb.

Heisenberg’s uncertainty principle states that when one views the internal workings of an atom, the very act of that inspection changes the way things look. In Family Court, the inspection that we bring into parents’ lives changes them and most often makes them worse. Even the language we use puts them in full battle mode. How often do we hear a parent say, “I’m going to fight for custody, he won’t even get visitation.” This, of course, is the language of the law. “For by your words you will be judged and by your words you will be condemned,” Jesus said in Matthew 12:37. Let’s review the ten reasons why a custody case should never be tried and why this conflict resolution method should be condemned.

1. NO ONE CAN AFFORD A TRIAL. No parent has a litigation savings account set aside to pay for protracted custody disputes. When parents split, their finances are already stretched to the breaking point. Paying for a lawyer usually tips them over the edge. Frantic parents max out their credit cards, sell their jewelry or other valuables, or borrow from their parents. If there is any lawyer out there reading this who has actually collected his or her entire fee after a full contested custody trial, please email me. I would like to meet such a fortunate person. Let’s not forget the emotional costs. When parents are in the process of separating their children are often the unwilling occupants of a war zone. They never know when some family IED will explode, resulting in some part of the house being trashed and the police at the door.

2. YOU CAN’T PROVE A POSITIVE. In our Law School trial advocacy course we were all taught that you can’t prove a negative. In Family Court it is just the opposite—you can’t prove a positive. A custody determination is supposed to be based on the best interest of the child. This proposition is not susceptible to being proven by evidence under our adversarial litigation system. Instead, we are really determining the least detrimental alternative. For example: It is almost impossible to prove with any poignancy how one parent nursed a child during
illnesses or made the school lunches or did the laundry. But let a parent send their child to school without his or her lunch and into court will come the subpoenaed school teacher to testify about such a depravity. Of course, what the propounding parent thinks is such powerful proof is nothing of the sort because there is no Family Court Judge in America (or parent for that matter) who has not sent his or her child to school without a lunch.

3. PARENTS ARE AT THEIR WORST WHEN YOU MUST DETERMINE THEIR BEST. I mentioned above how the Heisenberg Uncertainty Principle for Family Courts posits that in the course of a contested custody proceeding parents will put their worst foot forward. Eight years of cooperative co-parenting will be flushed down the toilet and the Family Court Judge will be presented with the last six months worth of trash talking and other related bad behavior. From this detritus of family relations, the Judge is expected to somehow divine the “best interest” of the child.

4. YOU CAN’T PUT YOUR FOOT IN THE SAME RIVER TWICE. This saying is attributed to both the Greek philosopher Heraclitus and an old Indian proverb. It speaks of the constantly changing aspects of every person’s life. The adversarial litigation system, with its well established rules of evidence, is very good at resolving disputes that have been fixed about a point in time; a car accident, a bank robbery, a note unpaid. In a custody dispute, the Judge is asked to review an extended time line of a family and then predict, sometimes for the next eighteen years, which parent will do best by the child. To think we can do this is, as Jeremy Bentham once said in another context, non-sense on stilts. Another advantage that the civil and criminal litigation processes has is the presence of a jury which can speak with the moral authority of the community. In Family Court you have one judge doing what he or she thinks is best. But we kid ourselves if we think we are applying some value-neutral, best interest standard instead of one based on our own prejudices and biases.

5. TRIALS DESTROY ALL GOOD WILL. At the end of a contested custody proceeding, after a forensic psychologist has hung out and analyzed every last piece of the family’s dirty laundry and after two litigators have peeled away every last ounce of dignity from the parents, the parents will have emotional scar tissue that will last the rest of their lives. If they had any good will toward each other at the start of the proceeding—at the end they will thoroughly hate their attorneys, the judge, the court system and each other.

6. CONTESTED CUSTODY PROCEEDINGS ADDICT PARENTS TO CONTROVERSY. The process that we provide to parents for resolving the most intimate, private and emotionally traumatic problems of their lives has, at its base level, a requirement that both throw as much mud at the other until both are completely dirty. At the end of this process we have neutered virtually all of their conflict resolution skills. The parents’ only hope is if they can go cold turkey and never return to Family Court again. This happens when the process has bankrupted the parents financially and emotionally, sort of like when an addict hits rock bottom. That sounds depressing but our goal should be a process where
parents can resolve their own disputes. How to do this before the family emotionally exsanguinates is the problem.

7. IT’S THEIR KIDS - THE PARENTS SHOULD DECIDE WHAT’S BEST. When parents walk into their lawyer’s office the control over their lives and the future of their children starts to slip away. It’s not that lawyers are usurpers of parental power. It’s that the process makes this inevitable. When the petition is filed in court and the case comes before a judge, parental power slips farther away from the Mother and the Father. Once the custody trial starts, they have cast their fate to the wind. So the process is backwards. At every point our goal should be to empower the parents and assist them in reaching decisions that are in their children’s best interest. Instead, at every step we dis-empower them.

8. KIDS WANT THEIR PARENTS TO BE IN CHARGE. Every time I interview the children they almost always say two things. First, they want their parents to get back together. Second, they don’t want to be forced to choose between their parents. The kids still expect their parents to be in charge and this means that they don’t want to be conspirators in psychological warfare. When parents know that a law guardian, a forensic psychologist and a Family Court Judge will be speaking to their kids, there is the irresistible urge for each parent to lobby the kids at best and to alienate them at worst. Because of the emotional high drama that surrounds the separation of two parents, it is almost impossible for them to speak to the kids in a neutral way and to speak well of the other parent.

9. JUDGES ALWAYS KNOW LESS THAN PARENTS. The amount of relevant information that can be presented to a Family Court Judge in the form of exhibits or witness testimony is minuscule compared with what the parents know about their kids and what each parent knows about the family. If someone is going to make a mistake, it is much better that the parents make it rather than the Judge. The parents can make day-to-day adjustments in the best interest of their children. Once a Judge has issued an order, the parents are stuck with it. The court order has no mechanism for adjustment. It cannot take into consideration the ever changing circumstances of children’s lives. Only if the parents disregard the order, can they make improvements for their children. However, the process that resulted in the issuance of that order has also stunted the parents accommodation skills.

10. YOU REAP WHAT YOU SOW. The psychological literature is clear and abundant on the deleterious affect of domestic violence on children. Corrosive domestic violence in this area is not limited to the kids watching one spouse beat up the other. It also includes the day in and day out exhibition by the parents of incivility toward each other. The kids soak up these lessons like sponges. The kids are well aware when mommy or daddy has to go to court, sort of like when a student has to go to the principal’s office after school to report for detention. The week before court is excruciating for everyone. So the lesson for the kids is what? “When you grow up and get married and have kids and can’t get along you first say and do terrible things to your husband or wife and then you go to court and let some stranger in a black robe
decide what’s best for your kids.”

Not all is doom and gloom. There are many things going on in the court system designed to address just the problems that I describe here. First, we now have referrals to parent education programs for all parents filing custody petitions. These programs educate the parents about the process they are going through and the effects on the children.

Second, there is new aspect of lawyering that is coming to the forefront around the country. Collaborative Law involves two lawyers and their clients agreeing that they will work toward a non-litigated settlement of the parents’ disputes. If either parent chooses to litigate the matter in court, they agree that they must hire new attorneys.

Third, most Family Courts have court annexed mediation programs. These programs have trained family law mediators and welcome the presence of attorneys or self-represented litigants can appear on their own. They have a high success rate at resolving custody disputes and also have the advantage of being quick, efficient and free.

Fourth, arbitration is used less frequently and case law in most states does hold that parents can not contract away their parental decision making authority to a private entity. However, arbitration can work well with ancillary issues such as property distribution, which often spills over to the custody area.

Fifth, parent coordinators are also a relatively new phenomenon. This program involves a trained professional, usually a psychologist or mediator, who helps parents implement their court order.

As noted above, the litigation process often leaves the parents’ good will toward each other running on empty. A parent coordinator will help them get through the initial stages of the post-breakup period. It also gives the parents some traction and momentum in their ability to work together to resolve the inevitable problems that always arise after court proceedings are concluded. Most importantly, it provides a way for the parents to avoid going back to court.

So the message for the Courts and the bar is as Lincoln noted so long ago—be the peacemaker. And there may be added benefits to this approach. As someone else once said much longer ago: “Blessed are the peacemakers for they shall be called Sons of God.”