

Court Culture: The Art of War

One of the most striking aspects of the Family Courts is its adherence to the age-old concept of opponent-based hearings. In this sense, every issue that is discussed in court, is thrashed out in a relatively simplistic 'he-said' 'she-said' fashion and with the ultimate goal set as 'being in the right.' The most obvious manifestations of the problems this approach causes can be observed in divorce hearings.

When a separating couple come to court, they are usually upset, exhausted and mentally and emotionally drained. Whether it was years of being told their bums looked too big in 'that' or their football watching friends were single-handedly responsible for causing those permanent dents in the sofa, the outcome of the marriage is that the ex husband and wife to-be are seriously fed up.

The only problem is, so are the judges. With more and more divorce cases clogging up the courts, despite a recent decline in divorce rates (and marriage rates for that matter), the judges are forced to sit and listen to hours and hours of ranting and raving, done subtly of course, in the form of unpleasantly worded affidavits (third party statements) and carefully drafted skeleton arguments (a barrister's notes on how to address the issues) but nevertheless with the overall impact of making the judge feel like he has 'heard it all before'.

This is deceptive: as court culture requires lawyers to couch terms a certain way and as the legislation dealing with divorce is too simplistic and does not make room for the diverse nature of the problems couples face, everything starts to look the same from the outside. A couple arguing over contact in relation to their children, start to become pigeon-holed: if the woman is seen as uncooperative, regardless of the extent or reason for that resistance, she will quickly be labelled as hostile and perhaps full of the desire to prevent a relationship between their child and the father. If a father tries to draw the court's attention to past hearings he has been in and does so with vigour, he will most likely be labelled hostile and unrelenting and the judge, already short-tempered and desperate for a diet coke break, will start to feel resentful of being attacked and will then dismiss the father's concerns out of turn. So much emotion, so little wine.....

The overall effect of this merry-go-round of meanness of spirit ends up making the respective parties feel like they are still being persecuted but this time their ex spouse is having a go at them with an angry mob of lawyers just to add to that feeling of complete hatred. The instinct to retaliate at this point is phenomenal and often fuelled by years of hurt and pain in a marriage that was unsuccessful.

It is all an illusion, though. The lawyers' motivations for the way they prepare their paperwork is not based in a personal desire to attack the parties and the judges are just so exasperated that they find themselves running on empty most of the time. The culture in these courts is largely fostered by a lack of funding and an inability to cope with the workload. There is very little attention being paid to the kinds of logic being used to help these couples nor is there any incentive to monitor the courts' implementation of correct procedure. The Family Court is an inappropriate place to host World War Three but if you are a divorcing couple, you will have to become the ultimate disciples of war to survive the system and to protect your fundamental rights.

In Sun Tzu's classic book, *The Art of War*, he sets down rules for how to go about gaining victory. I am not proposing that divorcing couples learn how to work a bow and arrow or even engage in trying to wage war: the courts will be making war enough for the both of you, but if you are armed with knowledge about how the court really works, it will help you anticipate any flying arrows that might come your way and allow you to focus on what is really important: your child's best interests and your right to a fair and compassionate hearing.

“All warfare is based on deception”

This statement has never been truer than it is today in the Family Courts. The lawyers will be asked to give the judge a picture of the history of the parties and they will be trying to paint this picture with very basic tools: the parties recollection of events during and after the marriage, the type of conduct the court recognises in its own legislation (such as adultery as a reason for divorce) and the type of language they might use to paint a picture that best represents each party's point of view. Very little of what is there is based on hard fact or real evidence and so it is very difficult for the judge to work out what the issues really are. At this point, the judge will be trying to use his discretion to work through all the information (indeed, if he even has time to do this) and so without solid evidence, the process boils down to one man's gut instinct. This in itself is a clear indication that in family matters, the adversarial process is rendered virtually useless, especially in relation to contact hearings.

“In war then, let your great object be victory, not lengthy campaigns”

The divorce process is often long and drawn out and in most cases unnecessarily so. Besides the huge delays in court for hearings, there is an incentive for the process to be drawn out, not just to give the judges time to get through all the cases but also because the lawyers will be able to work for longer on your case, if you are using one. A sensible lawyer will help you keep your costs down, but there are lawyers who tend to forget that their first duty is to put justice and the Court first and their cash flow second. The adversarial nature of the process is also victory orientated; lawyers know that if they 'do a good job' for their client, that they will get more work and become more successful. Where you have an angry client who wants to upset the other party, this will draw out the process as one party starts to assault the other in statements and so on and the receiving party then feels they have to retaliate in their own defence and on and on it goes.

“To Fight and conquer in all your battles is not supreme excellence: supreme excellence consists of breaking the enemy's resistance without fighting”

It is a little unhealthy to view the Family Courts as the enemy, although unwittingly they become so because they frustrate the primary purpose of assisting vulnerable parties. The sentiment that fighting is not the answer is an appropriate one for these courts; the more resistance shown, the more unwilling the courts will be to listen carefully to the issues. It is perhaps just human nature to become defensive if you feel you are being attacked although the courts would do well to take into account the levels of emotion they are trying to wade through. With the right attitude and a non-adversarial based philosophy, the courts could offer a really useful forum for healing the wounds from a bad marriage that prevent resolution in divorce and then progressing to helping the couples move on. There is no other way forward if the courts wish to involve themselves in these matters. The mantra then for divorcing couples in relation to the Family Courts could be: don't fight, persist.

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