

DISPUTES ARE NOT THINGS

In an excellent article titled "*The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*"ⁱ authors Felstiner, Abel and Sarat, opined that disputes are **NOT** things. And yet, many people treat them as though they were. In a case I once decidedⁱⁱ I quoted this article, saying:

...for these parents, this dispute has become tangible. Their dispute has become a "thing." Indeed, the dispute between these parents has become the "puca"ⁱⁱⁱ that accompanies them everywhere. As such, these parents have, to a large extent and whether equally or not, lost focus upon what is important, their daughter X, and instead have fixed their attention upon and directed their energy and resources into their dispute. This has been to their and their daughter's great disadvantage."

For the parents in the above dispute, their lives (and their daughter's) had been consumed by their dispute. Their daughter was born in 2011. Their litigation commenced a few months after she was born. By the time the litigation concluded, it was the later part of 2016. So, for the first 5 years of this child's life, her parents were completely absorbed in litigation.^{iv}

That child would now, at the time I write these words in 2024, be 13 or 14 years old, and in High School. I don't know how she is going, but I hope it is well. I hope she is happy in life (and I hope her parents are too). I hope she spends time with both of her parents and loves them both.

I can't help but wonder how much better things might have been if these parents had been able to decide their parenting arrangements between themselves instead of having had me make important decisions for their daughter for the first five years of her life. I did the best I could, based on what they and legal principles told me. But I have no idea whether it was, genuinely, the best thing for that little girl.

The circumstances of this case are an extreme example. But the case is, to my mind, emblematic of what drives disputes and causes them to become "*things*." These parents did not trust each other. They felt each was capable of anything and, so, when there were several interpretations of events, they immediately assumed the worst. But they didn't just assume the worst. That "*worst*" interpretation became a concrete, unshakeable reality for them. And, so, their dispute became a thing, something they litigated about.

Whilst this was a parenting case, the same issues can bedevil any dispute. Parties distrust each other and suspect that each is capable of the worst

possible behaviour - squirrelling away assets, deliberately deflating the value of assets or failing to disclose assets. Sometimes, that distrust is well founded and well placed. All too often, it is not.

When parties are hurt and angry over the breakdown of their relationship, they are then asked to deal with these issues calmly and rationally. That's hard. But litigation makes it harder. Litigation is an adversarial process - each party has a position that they advance and argue for. It turns things into "win/lose" because not everyone can get their best possible outcome.

Litigation comes at a cost. Not just financial cost (though that can be significant) but delay and lives put on hold whilst waiting for a hearing and then a judgement, ill-health, and irreparable damage to ongoing relationships. It also means that you lose control over the decision. Someone tells you when you can see your children or how much of your money you'll get.

Mediation offers a real alternative where you make decisions together. Unlike litigation, where everyone argues for their best possible result, mediation is about compromise, about finding the best solution that can be achieved (for all parties) without the fight of litigation and all the costs it entails.

A mediated outcome is about finding an outcome that is acceptable to all and which meets the needs of all concerned, (including those who are not parties to the dispute, such as children). Mediation is quicker, cheaper, and less injurious to its participants. As Abraham Lincoln remarked (not just a US President but a lawyer) "*Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.*"

Do not let your dispute become a thing. See it for what it is – a disagreement about an outcome. There is never one and only one right answer – even if you ask a court to decide. Mediation helps you explore all the various solutions and try and work together to find the one that is "liveable" for all.

ⁱ William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980-81) 15(3-4) *Law & Society Review*, 631

ⁱⁱ Rigg & Stilwell (No.4) [2016] FCCA 2205 (26 August 2016)

ⁱⁱⁱ This was, of course, an illusion to the great James Stewart film "*Harvey*," which Harvey is a 6' 3 ½" invisible rabbit who accompanies James Stewart's character, Elwood P Dodd, everywhere he goes, even having a place set at the dinner table. The film, perhaps, has a happier, albeit bittersweet ending, than Mr Rigg and Ms Stilwell's litigation.

^{iv} At paragraph 26 of the judgement, you will find this summary of the court's role in the family's affairs:

"In X's short life not less than eight separate Interim Orders had been made by the Court whether by consent, following presentation of evidence and contested determination or a combination of the two. Final Orders were also made on one prior occasion and the Orders to be made at the conclusion of this Judgment will represent the second Final determination of proceedings between these parents in X's short life."