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Post Divorce - Take Hold and Let Go

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Take hold and let go. Think about those words, what do they really mean? What does that have to do with the post divorce climate? And, how can we all put those words into our daily actions?

One of the major sources of angst post divorce is misbehavior, characterized by power struggles with the children as the rope. Many modification and contempt actions are grounded in the unwillingness to compromise on matters which should be of no consequence or one of the parents is not acting as a responsible parent or in other words, being an obstructionist. The why, is because the parties to the divorce continue to do the same "dance" or carry on the same tantrums they did as when they were married. They have yet to take hold of that behavior, examine it and let it go.

It does not take much to realize that at least one of the parties to this dance is not happy.

CHANGE THE RULES OF ENGAGEMENT

Refer to your Rulebook. Everyone has a Rulebook: it can be found in the terms of the Separation Agreement or Judgment of the Court. Review your Rulebook to make a list of some of the basic rules, such as parenting time; support; payment of extracurricular activities, health insurance, out of pocket health care expenses, and the like. I would prefer we lived by principles, but basic rules are the first steps to recognizing and working toward global principles.

If you do not like the dance, change the steps or get off the dance floor. If you have children, you cannot change your former spouse; the divorce merely gave you some distance, but, you are no longer compelled to dance cheek to cheek or follow that partner's lead. It is up to you. Yes, it will be uncomfortable at first, but stick to it and changes will come.

Make a list of the repetitive, irritating, unproductive behavior. Likewise, think about irritants that you may be creating. To be successful at changing the Rules of Engagement, you must abide by the same standard to which you are holding your former spouse.

Compare your two lists of irritants with your Rulebook and decide the extent of the grievousness.

Set up a time, no children allowed, in a coffee shop, to discuss face to face. Even if you have not had success in the past communicating, do it. You have changed the Rules of Engagement. Be prepared for the discussion. Have your notes. As you plan the meeting, be mindful of past abysmal discussions. Put yourself in the shoes of your former spouse as you consider your proposed resolution. Be ready to propose it and justify it, in a non-judgmental and unemotional manner. If the discussion begins to deteriorate, end it, politely, and leave. No further need for discussion. You no longer tolerate disrespect, arrogance, or a discussion which is not productive. If you have thought out your plan carefully, and it meets the standard for a modification or contempt, pursue it. Do not engage with your former spouse any further, unless you believe it will lead to a productive and beneficial result for your child.

So, what's the one conclusion I can bring this article to: Change the Rules of Engagement, and do what's right to do.

Successful Planning for a Successful Future

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The more I work with companies as a partner, and the more I think about their business goals and apply my many years of experience to provide advice based on principled thinking that not only has their back, but their future, too, the more I realize that many practitioners never urge their clients to review and renew their succession plans.

Great, first step – you have a succession plan, which should be viewed as a long-term investment in the future health of your company! You are already ahead of the vast majority of business owners; however, just because you drafted it, does not mean that it is applicable to what is going on today. Plans are about the future – and nobody gets the future right very often, as two examples below illustrate:

Company One, has a plan and the shares of their closely held company are put into trust for "tax planning" purposes; and the current trustees are the patriarch and matriarch. The second generation is running the company, and they will be the ultimate beneficiaries of the plan. Fast forward several years, the patriarch dies, and the matriarch is showing signs of dementia and is fighting succeeding any control. This plan has not accomplished what was envisioned; as now the beneficiaries, who are operating the company, are actually doing such without any real power.

Company Two, likewise has a plan and once again the shares of their closely held company are put into trust for "tax planning" purposes. The ultimate beneficiaries are several siblings, not all of whom are working in the company. The current trustees are the patriarch and matriarch. Fast forward several years, the patriarch dies, and the matriarch, not wanting to bruise any of her children's feelings, does not modify the trust. One of the beneficiaries goes off and starts a competing business. This plan has not achieved what was contemplated; as now one of the beneficiaries is a competitor!

Succession plans should be constantly updated; whenever things change, refresh your plan – things always change! While this might seem like chaos, it's actually the opposite; the constantly revised succession plan is what makes order out of chaos, which allows you to remind yourself of your goals and to judge how well your business is performing. It becomes a long-term planning process that sets up your strategy, objectives and the steps you need to take by persistently being aware of the results to be obtained. This process of updating your succession plan will give everyone an opportunity to express their needs and concerns. Giving everyone that voice will also help create a sense of responsibility throughout your organization. This also relates to cultural issues, which are a significant contributor to any achievement of successful succession plans.

Start with the proposition that your succession plan is wrong. All succession plans are wrong. So keep the plan fresh and watch closely as reality moves forward. A successful planning process continuously watches the difference between the plan and reality. Reality swallows our assumptions and we need to keep track of where, why, and, how we were wrong. While a good succession plan is never done, it can effectively weather the unexpected as well as execute seamless transitions from one generation to the next.

It's All in the Strategy

In the last issue of The Brief, Karen Greenberg wrote about an international adoption case involving a young girl whose future with her adoptive family was uncertain and unresolved. Well, we are happy to report, that our persistent, aggressive approach to never take no for an answer, succeeded.

We caught the attention and concern of the girl's country of origin, when we filed a Verified Complaint in Equity in the Probate and Family Court, requesting and receiving a preliminary injunction to prevent any agent of the country's central authority from removing the girl from our client's home. We also filed a Guardianship Petition and the Court granted our client temporary guardianship of the child.

We have a few loose ends to tie up, but rest assured, this young lady is staying with her family and will be adopted with the consent of her country of origin.

Lawyers and Litigants: Beware of Frivolous Lawsuits

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There is a statute in Massachusetts, G.L. c.231, section 6F, that authorizes an award of reasonable attorney's fees incurred in litigation when "all or substantially all" of the opposing party's claims are "wholly insubstantial, frivolous and not advanced in good faith." If a judge finds that the claims meet that standard, the statute mandates the award of reasonable counsel fees and expenses. A claim is considered to be frivolous if there is an absence of legal or factual basis for the claim. Although the statute is frequently invoked by attorneys, either at the onset of a case or at the conclusion of a hearing or trial, judges rarely find a plaintiff's claims are so devoid of merit as to be considered "wholly insubstantial, frivolous and not advanced in good faith."

Nonetheless, in a recent case in the Probate Court, Konowitz & Greenberg prevailed on a motion for attorney's fees under the statute where an elderly widow filed an action against the estate of her late husband. The widow became so enraged after her husband's death when she learned that he left her nothing after fifty years of marriage that she filed a Complaint in Equity seeking recourse from the court. The Complaint misstated the most basic facts upon which her claims were based, and contained multiple causes of action such as undue influence, fraud and duress, without any supporting facts. The errors in the Complaint were so egregious that we wrote to the widow's attorney and advised her to withdraw the Complaint before we proceeded with a Motion to Dismiss and a Motion for Attorney's Fees and Costs.

The widow's attorney not only refused to withdraw the Complaint, but during the hearing on our Motion to Dismiss, she more or less admitted in open court that she made up facts to file the claim so that she could have the opportunity to investigate the facts during the discovery process!

As a result, our client, the executor of the estate and trustee of the decedent's trust, was forced to incur significant legal fees to defend against the Complaint. Once the court reviewed the pleadings there was only one just result: dismissal of the Complaint and the award of attorney's fees and costs to our client. The judge ruled in our favor not only because the causes of action in the Complaint were unsubstantiated but also because the trust and estate of the decedent incurred expenses to defend against the plaintiff's frivolous action. The court found that it was inequitable to the beneficiaries of the decedent's estate and trust to bear the cost of the defense of the plaintiff's action when the Complaint failed to support her causes of action.

The widow's strategy backfired, a strategy that was based on greed, a theme that carried through her marriage and beyond. Not only did she have to pay her attorney to pursue a frivolous case, she lost the case AND had to pay thousands of dollars in additional attorney's fees to our client. In Massachusetts, lawyers and litigants who persist in pursuing claims that have no legal or factual basis should rethink their strategy rather than run the risk of being ordered to pay their opponent's litigation costs, including attorney's fees.

Kristin's Korner

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As the Office Manager at Konowitz & Greenberg, I identify with and treat each client as though I have been in their shoes, because in many respects, I have. I was "the client," terrified of the unknown, looking not only for the legal guidance necessary to protect my future, but also the emotional support to get there.

In the last eight months, I have worked closely with our attorneys to emphasize the fine art of emotional support and managing client expectations, both legal and financial. I have streamlined many of our office procedures, including adding a feature for payment of retainers and invoices directly through our website. We empathize with our clients, and with our ability to work together as a TEAM we are also able to identify the needs of our clients. I know each of us at Konowitz & Greenberg has your best interest at heart and we will do everything we can to ensure the best possible outcome.

Preparing to Try Your Case...at Mediation

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I think of myself as a trial attorney. Someone who can look at the facts of your case and figure out the best way to win in front of a jury. What evidence do we need to look favorable to a jury? How can we make the other side look bad? What evidentiary issues will we face? These are the types of questions I ask throughout a case. But the reality is that most cases do not go to trial. In fact, the average litigator rarely tries cases. And many younger attorneys never get the chance to appear before a jury. Avoiding trial makes sense. Trials, in particular jury trials, are unpredictable. Having both tried cases in front of juries, and sat on a jury, I know this firsthand. I often tell my clients of one of my first jury trials as an example of this unpredictability. I had just finished clerking and was second-chairing a trial with a more experienced attorney. While the jury was deliberating they asked a question. Convinced that the question meant we would likely lose, we quickly tried to settle. Plaintiff's counsel, bolstered by the question, refused to even consider a settlement offer. The jury came back in our favor, awarding the plaintiff nothing. Given the rarity of actual trials you might think that preparing each case as if it will eventually be tried would be a waste of resources. You would be wrong.

Cases resolve because of the doubts each litigant has regarding the merits of their positions. A looming trial date causes litigants to face these doubts in light of the unpredictability of trial. But an effective attorney can force the opposing side to deal with weaknesses in their case much earlier. At Konowitz & Greenberg, we do this by maintaining a trial attorney's mindset from the start of a case. All the evidence we review in a case, from the initial client file, to responses to written discovery, to deposition testimony, is reviewed with an eye towards what can be used at trial. What weaknesses of the opposing party can we expose? What evidence would we love a jury to hear? This is the information that we then use to implant doubt in the opposing party and their counsel.

We want to make the other side face the uncertainties in their position as early in a case as possible. We do this through a variety of methods, including comments made during phone calls with opposing counsel, early demand letters, and carefully crafted mediation strategies. In fact, I recently was able to successfully resolve a protracted personal injury case at mediation, at least in part, because of these methods. The case involved an elderly client who slipped and fell at a shopping center causing extensive injuries. Leading up to mediation, I sent a strong demand letter to opposing counsel, laying out all of the evidence in our favor. While a settlement offer in response to this letter would have been great, the real purpose of the letter was to put a spotlight on the many ways the other side could potentially lose. At the mediation, I used all this evidence to craft an argument focused on the triability of the case. Any time the mediator focused on a perceived weakness in the case, I shifted the conversation to why the case would be successfully tried. From the start of the mediation the opposing side and mediator knew what our theme would be at trial, and what evidence we would use to bolster that theme. Again, this forced the other side to deal with how the weaknesses of their case would be viewed by a jury. The opposing party chose to settle, rather than proceed to trial and face uncertainty. More importantly, we also avoided the uncertainty of a jury trial, achieving an excellent result for our client. Without focusing on how we would try the case, such a result would have been difficult, if not impossible, to accomplish.

At Konowitz & Greenberg we view every piece of litigation as if we are going to take it to trial. This allows us, more often than not, to achieve positive outcomes for our litigation clients well before trial. Most times this result is obtained through mediation and settlement. And if, by chance, we are not able to settle your case, we will be ready for trial.

At Konowitz & Greenberg, we believe in a proactive and preventative approach to the law.

We take pride in working collaboratively as a TEAM and with an extensive network of trusted advisors to provide comprehensive, yet cost-effective, creative solutions for our individual and business clients with the legal issues they face in the following areas: corporate transactions, advising small and medium private entities; all matters relating to divorce, post divorce, alimony, support, and custody issues; adoption, contested and complex adoptions, consult to agencies on complex adoption matters; estate planning, estate and trust administration; business, civil and personal injury litigation and appeals; and real estate transactions. Responsiveness to our clients is our priority.

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