

CHILD LAW MATTERS

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THE ROLE OF MEDIATION IN THE PROCESS OF LITIGATING FAMILY LAW DISPUTES: *BROWNLEE v BROWNLEE* 25274/2008 (South Gauteng High Court)

Mediation has always been regarded as a voluntary alternative to litigation. However the High Court recently had to remind attorneys as well as litigants that drawn out litigation should be avoided where all or some issues can possibly be resolved through mediation. This was in the divorce matter of *Brownlee v Brownlee* where the issues in dispute concerned the maintenance of children, the division of the estate in terms of the accrual system and maintenance for the plaintiff. The court made orders with regard to the aforementioned issues and, lastly had to decide on a suitable costs order. In the process leading to the order quoted hereunder, Brassey AJ made some profound remarks regard the role of mediation in litigation. The order of the court with regard to the costs reads as follows:

"7. Each party shall bear his or her own costs -

7.1. which may encompass disbursements (including counsel's fees),

7.2. but, as to the fees claimable by the attorney, shall not exceed the costs

recoverable on a party and party basis -

7.2.1. as taxed

7.2.2. or, following advice received from an independent legal practitioner, as agreed."

The court's order to cap the costs of the attorneys was influenced by their failure to advise and explore mediation with their clients. The court said that one of the matters that attorneys had to consider in a pre-trial conference is whether the dispute should be referred for possible settlement through mediation. The evidence before the court was that the litigants had never been advised to consider mediation and as a result of the acrimonious litigation the costs that the litigants were to pay were escalated. The court described the process by which the case had been

resolved as a tragedy not because of the time it took to resolve the issues, but because of the costs that the parties had to bear. Brassey AJ emphasised that mediation can assist in settling disputes and said the following:

"If mediation is appropriate in commercial cases, how much more apposite is it in family disputes. They engage the gamut of emotions, from greed through pain to vengefulness; they generally involve the rights of children, majors as well as minors, who can only experience fear and bewilderment at the breakdown of the structures of love and support on which they, as family members have come to depend; and the division of the estates of the parties, intertwined as they invariably are, can be very complex and are frequently made more so by the parties bloody-mindedness and duplicity."

While not all disputes can be settled through mediation, as it is a process that is the litigants' prerogative, legal representatives play a significant role and should advise their clients of the process and find suitable mediators for the relevant circumstances. In the words of the court:

"Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequence of continued litigation, particularly if the case is the loser."

It was not the court's view that mediation would have resolved the matter in its entirety, but that the parties would have possibly had only two issues to go on trial about. The court was disappointed by the actions of the legal representatives in this matter as they had rejected the use of mediation during the pre-trial, hence the order that their costs were to be capped. Brassey AJ

stated that *"in a very real sense, this was a case in which, if the parties did not need mediation, the legal representatives certainly could have profited by it."*

The judgment has affirmed the importance of mediation, not only as a process that can reduce the costs of litigation. The Court also views mediation as an alternative that, if explored properly, can minimise the animosity that comes with family law disputes. The confidentiality of the process would also protect the interests of children. Attorneys have been reminded of their duty to advise their clients to consider mediation, where it is a realistic alternative to litigation or can avoid drawn out costly litigation by reducing disputes.