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Everyone knows that behind every curriculum vitae there is another story that paints the true picture of a person. In my case, that story is filled with a great many people who have inspired, nurtured, and encouraged me in all my endeavours and, most recently, in the writing of this book. I extend my deepest love and appreciation to my parents, whose constant love and support has meant the world to me. I also want to thank Morty, my spouse of twenty-four years, who spent many solitary evenings and weekends while I worked on this book. Morty was my muse, collaborator, and trusted adviser. He served as proofreader extraordinaire, tirelessly reading and rereading every word, from the valuable perspective of a non-legally trained person, insisting that the book's content and language be inclusive and accessible by being as easy to understand as possible.

I owe an enormous debt of gratitude to my dear friend and colleague the Honourable Mr. Justice Stanley Sherr, who carefully reviewed the first draft and contributed numerous insights and ideas. Without Stan's input, this book would not be nearly as comprehensive and practical as it is. Moreover, without Stan's unconditional encouragement and support, the process of writing this book would not have been nearly as enjoyable as it was for me.

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I was very fortunate to have had two pivotal experiences as a law student that shaped my legal career. In my first year, I attended a lecture given by Chief Judge Ted Andrews of the Ontario Provincial Court, Family Division (now the Ontario Court of Justice). Chief Judge Andrews displayed an infectious enthusiasm for family law and the work of the family court, and convinced me there and then that I should pursue a career in family law. One of the greatest days of my life occurred eighteen years later when Chief Judge Andrews robed me at

my swearing-in ceremony as a judge of the Ontario Court of Justice. Ted very kindly read the manuscript and wrote a wonderful prologue, for which I am extremely grateful. Thank you Ted, for your ongoing inspiration, wisdom, and friendship. You have been an instrumental mentor in my life.

My second pivotal experience as a law student occurred during the summer of 1979, when I was given the unique opportunity to work as a law clerk to the judges at the 311 Jarvis Street family court in Toronto. Judges Rosalie Abella (now a justice of the Supreme Court of Canada), James Karswick, David Main, and Joseph James made a deep and lasting impression on me and shaped my vision of family law justice. They taught me by example that family law is primarily about the best interests of children and that parents must be made aware of the damaging impact on their children of being caught in a toxic tug of war. Justice Abella has inspired me throughout every stage of my career, and she continues to serve as a cherished role model and mentor in more ways than she will ever know. She took the time from her crushing workload and extremely busy schedule to read the manuscript and offer invaluable words of encouragement and support, which means the world to me. And Justice Karswick, who is one of Canada's most respected family court judges and whom I am proud to call a beloved colleague and friend, played an instrumental role in my decision to write this book. I am profoundly grateful for his friendship and guidance, and for the generous foreword he has written.

I have had the extreme good fortune of coming to know and love one of Canada's best-known, admired, and brilliant jurists, Madame Justice Claire L'Heureux-Dubé, who served on the Supreme Court of Canada from 1987 to 2002. Justice L'Heureux-Dubé will forever be known as the "grande dame" of modern Canadian family law because of the many landmark decisions she participated in, which brought numerous progressive reforms to family law jurisprudence. She very graciously agreed to read the manuscript, and provided enthusiastic support not only for the book's message but for the notion that the time has come for family court judges to reach out to the public in the way that I have attempted to do in this book. I thank Claire from the bottom of my heart for her words of wisdom and encouragement, and for the very kind endorsement she has written in support of this book.

I extend my heartfelt thanks to my dear friend and colleague, the Honourable Judge Paula J. Hepner, supervising judge of the family court in Brooklyn, New York. Judge Hepner spent many hours reviewing the manuscript with a view to making the book as applicable as possible to readers in the United States. Her contribution to this book has been invaluable. Her prologue reinforces the fact that regardless of differences between the Canadian and American legal systems, the themes set out in this book apply to all parents and families in conflict.

It touches me deeply that Judith Ryan, one of the world's best known family law lawyers, mediators, and educators, has seen fit to endorse this book as a must-read for family law lawyers and clients. I am honoured and gratified by Judith's words in support of this book's message.

I want to thank Jack David and everyone at ECW Press for their enthusiastic support of this project, as well as my editor, Heather Sangster.

And finally, to all of the lawyers and litigants who have appeared in my court, I want you to know that I have learned something from each and every one of you. I thank you for the honour and privilege of touching your lives, and I hope that at least some of the messages conveyed in this book will ring true for you. My sincere wish is that you will never again have to resort to litigation as a means of resolving family disputes.

**Foreword by
CHIEF JUDGE TEDFORD G. ANDREWS (RETIRED),
ONTARIO PROVINCIAL COURT, FAMILY DIVISION
(NOW THE ONTARIO COURT OF JUSTICE)**

I am honoured to have the opportunity to write a foreword to this book. It was written by a judge for whom I have the greatest respect and whom I am truly happy to call my very good friend. Mr. Justice Harvey Brownstone has an uncommon depth of insight into, and a genuine concern for, the adults and children with whom he deals in his daily service in the interests of justice.

The text discloses the inner struggles of parents, lawyers and even judges in the maelstrom of marital conflict. Justice Brownstone's observations are perceptive and comprehensive on the interface between the court and the public who appear before the court. The reader can sense his passion for the subject and his compassion for the parents and children involved in the disputes that come before him.

The writings of this dedicated author are of vital importance to every law student aspiring to be a family law lawyer. Experienced family law lawyers also would benefit from the clarity of defined issues, to update their knowledge and skills. Most urgently this book has messages vitally important for couples and parents who enter the world of new rights and responsibilities following separation.

There are numerous texts written on various aspects of marital conflict by professionals in social work, psychology, psychiatry, and the law, but I know of none written by the key person in the unique and solitary position of observing and analyzing human behaviour and making judgments that will have profound effects on people's lives.

This text is a very valuable contribution. Every lawyer's office should have several copies to offer to clients entering legal spousal conflict.

**Foreword by
JUSTICE JAMES D. KARSWICK
ONTARIO COURT OF JUSTICE**

This book is superbly unique.

It was written by a presiding, experienced, knowledgeable, and caring family court judge who is so touched by the countless families that come into his courtroom that he feels compelled to share his observations, opinions, and recommendations with all who will listen, so that the parental separation and the court experience can be less stressful, less confrontational, and more beneficial, especially for the children. After all, as the Honourable Mr. Justice Brownstone repeatedly points out, it really is, and should be, about the children, our most treasured resource.

Justice Brownstone does not give legal advice — that you should get from a family law lawyer — nor does he give you a detailed, step-by-step methodology for filing court papers and marshalling evidence for the court hearing — that you can get from your lawyer or the many manuals on how to proceed in the family court.

This book prepares you for the emotional impact that separation and court will have on the family and especially upon the children. It points out how, with maturity and a focus on the interests of the children, parents — with the help of professionals and, on occasion, with the help of the family court judge — can negotiate and achieve their own individual and sustainable resolutions.

There are those few cases that simply need to go through the entire family court process. The author discusses those cases and makes many helpful recommendations on how to deal with them in a constructive manner.

Family breakups are increasing, greater numbers of separating parents are reluctant or ashamed to get professional help, and many simply cannot afford to pay a family law lawyer. Consequently the family court judges are having to hear more and more cases where the parents are self-represented.

Obviously, these parents lack the training to present their cases properly, and even if they had that knowledge, the stress and emotion of having to directly confront an ex-partner in a courtroom about the welfare of their children is hardly something any parent is really

capable of doing in a rational and focused manner.

Justice Brownstone discusses the fundamental challenges that parents need to address, no matter what the legal rules may be. The challenges facing separating parents and their children transcend geographical, linguistic, and cultural boundaries.

It is the parents, who love their children and know them better than anyone, who are most capable of determining what is best for their children. Remember, it is only the parents caught up in their tug of war who abdicate their responsibility to a stranger — the judge.

As Justice Brownstone reminds us: “Family courts are not in the business of rewarding or punishing anyone, even though there is often a win-lose mentality among litigants — and, unfortunately, even among some misguided lawyers. Everyone should be mindful that there are no winners in family court when the fighting continues — everyone loses, especially the children.”

Justice Brownstone’s timely work should be read by anyone contemplating separation or going to the family courts.

Indeed, it can be useful to professionals in the field of family law so that they may gain greater insights into the challenges as seen from the perspective of the separating families and as observed by an experienced and talented family court judge.

I have been a family court judge for more than thirty-two years, and still I find this book fascinating, engrossing, and enlightening. I only wish I could have read it twenty years ago because it certainly would have enabled me to be a better, more understanding, and more effective judge.

**Foreword by
JUDGE PAULA J. HEPNER, SUPERVISING JUDGE
NEW YORK STATE FAMILY COURT
BROOKLYN, NEW YORK**

Justice Harvey Brownstone's book is a powerfully accurate description of the drama that unfolds daily in the courtrooms of judges presiding over child custody and visitation (access) disputes between parents. From his thirteen years of experience hearing and deciding these cases he offers the reader invaluable lessons about what these cases are and are not about and why they become tugs of war and what prevents them from being resolved expeditiously for the sake of the children whose emotional well-being is at stake.

While the book outlines the various stages of a custody or visitation case, Justice Brownstone's purpose is not to write a do-it-yourself manual so parents may feel comfortable representing themselves. On the contrary, Justice Brownstone explains that when parents resort to the courts to decide which parent should have custody of their children, or whether the parent who does not have custody should be able to spend time with the children, they will find themselves in the middle of complex proceedings where unfamiliar legal principles and procedures are applied. These principles and procedures prescribe what information must be presented to the judge, govern the conduct of the case, and determine its outcome.

Justice Brownstone makes it absolutely clear to parents who bring their own custody and visitation battles to the family court that the process is not like going on television to tell their story to the judge, answer some questions, and have it over in fifteen minutes, minus the commercials. With real-life examples carefully selected from cases he has heard, Justice Brownstone illustrates the pitfalls of self-representation by demonstrating where critical mistakes were made or crucial opportunities were missed. In so doing, Justice Brownstone convincingly makes the case that to the maximum extent possible parents should obtain legal counsel or, if hiring an attorney is not feasible, parents should at least obtain legal advice and assistance to help in the preparation and presentation of the case.

This book is also about why these cases take so long to complete, which Justice Brownstone concludes is attributable to immature

behaviour. While the laws and legal procedures applicable to custody and visitation cases differ from country to country and jurisdictions within countries, the information contained in this book has universal application for all parents regardless of where they live or where they litigate because parents are human and their behaviour does not vary much from place to place. I am a family court judge sitting in Brooklyn, New York, the busiest family court in the United States. Every single anecdote described in this book is familiar to me. In the past eighteen years, I have encountered each and every one of the parents portrayed in the pages of this book behaving in exactly the same way in my courtroom. For this reason, parents everywhere can learn something extremely important by reading Justice Brownstone's book and taking his message seriously.

It does not matter what child psychologist or psychiatrist one consults or what parenting books or magazines one reads. None will suggest that resorting to the courts to settle issues of custody and visitation is good for the children involved. On the contrary, there is uniformity of opinion that for children, the process of litigation can be extremely damaging. The reason for this is primarily due to the unbelievable stress children experience from being at the centre of their parents' tug of war. Children wait for months, and sometimes years, to learn which parent they are going to live with, while their parents prolong this uncertainty through relentless contretemps of bickering, personal attacks, and obstructionist tactics. To minimize the harm to children, Justice Brownstone describes some alternatives to litigation and explains the benefits of each.

What little civility is left between two parents before walking into court is almost always destroyed by their posturing in the litigation. To reach a decision, judges who preside over these cases need to learn an enormous amount about the parents' lives and their personalities, their stability and judgment, their occupations and work schedules, the roles they have played in their children's lives, and the bonding that exists between parent and child. Almost always, however, the only information parents will present is their list of injustices, portraying each other in the worst possible light: the most abusive, the most irresponsible, the most uninvolved, the most inconsiderate, the most immoral, the most inadequate, the most controlling, the most . . . the most . . . the most. Indeed the majority of parents view the case

as *their* chance to get *their* day in court when, in actuality, it is their *children's* day in court. Most parents come to court believing that they are the only two people in the case and that it's all about them when, in fact, it's about those who are not in the room — the children they seem to have forgotten. For parents who did not realize this before, it will become evident very shortly from reading Justice Brownstone's book. Told in the first person and in the form of a personal one-on-one dialogue, this book presents the reader with a chance to hear first-hand from an experienced jurist devoted to the welfare of children how important it is to approach these cases with a mature perspective and a realistic assessment of which parent can meet the children's needs, instead of focusing on how each parent failed to meet the other's needs.

Justice Brownstone speaks for family court judges everywhere in trying to educate parents to focus on what is best for their children. This book will have achieved its purpose if parents can recognize themselves in the pages ahead and can alter their outlook and behaviour so that their children spend much less of their lives being interviewed by social workers, attending psychological evaluations and discussing the case with their lawyers and more time on sports, playing an instrument, or learning computer graphics.

DO YOU KNOW WHAT YOU'RE GETTING INTO?

AFTER MORE THAN FOURTEEN YEARS OF PRESIDING IN FAMILY COURT, ONE QUESTION HAS NEVER CEASED TO AMAZE ME: how can two parents who love their child allow a total stranger to make crucial decisions about their child's living arrangements, health, education, extracurricular activities, vacation time, and degree of contact with each parent? This question becomes even more mind-boggling when one considers that the stranger making the decisions is a judge, whose formal training is in the law, not in family relations, child development, social work, or psychology. Now add the fact that, because of heavy caseloads and crowded dockets, most judges have to make numerous child custody, access, matrimonial property, and support decisions every day on the basis of incomplete, subjective, and highly emotional written evidence (called *affidavits*), with virtually no time to get to know the parents and no opportunity to meet the child whose life is being so profoundly affected. What person in their right mind would advocate for this method of resolving parental conflicts flowing from family breakdown? These are some of the questions that family court judges agonize over. Some say the answers are complicated and have much to do with social conditioning, economic class, levels of education, sophistication, familiarity with community resources, and even culture. I say the answers are simple.

The institution of marriage has not been a great success in North America. The United States has the highest divorce rate in the west-

ern world, followed by the United Kingdom and Canada.¹ Moreover, divorce statistics do not take into account couples who lived in common-law (unmarried) relationships and broke up. There is no reliable way to track the breakup rate for those couples, but you can be sure that it is at least as high as the divorce rate. There are also many thousands of couples who never lived together, but had a casual relationship resulting in the birth of a child. Family courts are heavily populated with such couples, but we have no way of knowing their numbers in society at large.

We do know that the vast majority of couples who break up manage to settle their affairs, including the custody and access arrangements for their children, without ever setting foot in a courtroom. The most common way to achieve this is by separation agreement or some other form of domestic contract (see Chapter 12). However, for the many couples unable to reach agreements, the family court becomes the place of first and last resort.

What we judges see in family court is beyond belief and certainly more dramatic and gut-wrenching than any television show or movie. If you don't believe me, visit any family courtroom in any town and chances are you'll see real-life examples of what I will describe in this book. As any family law lawyer, judge, or litigant will tell you, family court litigation is expensive, time-consuming, unpredictable, and highly stressful. The level of hostility and anger between parents involved in high-conflict custody disputes is often so toxic that it is almost palpable. I have dealt with thousands of couples whose bitterness toward each other coloured every aspect of the proceedings and completely diverted the focus away from the children and their needs. Frequently, I get the impression that such parents are in a struggle over power and control or are on a quest for vengeance and self-validation that has nothing to do with their children. Imagine how difficult it is for a judge to make the best possible decision regarding a child's living arrangements when faced with parents who seem unable or unwilling to focus on their children. Sometimes I have had to involve a child protection agency and place the children in foster care to insulate them from the parental conflict (see Chapter 11). On more than one occasion I have been told by a parent that he/she would rather have his/her children living in foster care than with the other parent. On one even more appalling occasion, I was told by a parent

that it would be better for the children to be dead than to live with the other parent! This is the tragic reality of family court.

Everyone who works in family law, including judges, agrees on two things: family court is not good for families, and litigation is not good for children. The emotional carnage resulting from family litigation, and its impact on the unfortunate children of warring parents, cannot be overstated. And yet, family courts everywhere are jammed with couples asking judges to decide who gets custody of their children, how often the children will see the noncustodial parent, how the matrimonial property is to be divided, and how much spousal and/or child support must be paid. More surprisingly, an alarmingly high number of people appear in court without a lawyer and try to navigate the court process on their own, without any idea of their rights and obligations, the procedural requirements, the rules of evidence, or the types of orders a court can and cannot make. As you might expect, the results for these people are often extremely frustrating at best and disastrous at worst.

Ask anyone who has ever appeared in family court as a litigant — even if they had a lawyer — and they are almost certain to describe their experience as unsatisfactory. Why? What can be done to help people so that their family court experience is more predictable, more positive and constructive, less time-consuming, and consequently more beneficial to themselves and their children? An even more important question is, What can be done to help people avoid going to court in the first place? That is what I am going to explain in this book.

What is the difference between the couples who settle their disputes privately and those couples who require a judge to make the decisions? Do the parents in the first group dislike each other any less than those in the second group? Does the first group have access to resources unavailable to the second group? Do the two groups come from separate and distinct socio-economic or cultural groups? Not in my experience. In my opinion, the major difference between couples who resolve their disputes privately and those who turn to a judge has to do with one overriding characteristic: *maturity*. We who work in family court know that a person's maturity level has nothing to do with economic circumstances, education, culture, race, religion, or sexual orientation. We see rich people and poor people in our courtrooms, and we see people from all walks of life and from every racial,

cultural, ethnic, and religious background, and from every lifestyle and orientation imaginable. Trust me: judges see it all. What we *don't* see very often in our clientele is maturity.

In the context of a relationship breakdown, being mature means loving your children more than you dislike your ex-partner. Being mature means caring enough about your children that you will force yourself to deal in a civilized way with someone you may hate. Being mature means thinking twice and measuring your words carefully before you shoot your mouth off when you're upset with your ex-partner, especially in front of the children. It means always insulating your children from parental conflict so they know your breakup has nothing to do with them. It means doing what is necessary to make the transition in your children's lives as easy for them as possible. Being mature means putting your children's needs ahead of your own. It means truly understanding and accepting that your children are entitled to love and be loved by *both* of their parents. It means giving your children emotional permission to express and receive that love, even though you and the other parent dislike each other. Being mature means being willing and able to reach compromises so that your children can have peace rather than be caught in a tug of war and conflict of loyalties. Being mature means recognizing that you can be an ex-partner but you are never going to be an ex-parent. True maturity requires parents to appreciate that children need both parents in their lives, working co-operatively to make the best possible decisions for their upbringing.

In my experience, mature people fully understand that even though they no longer love each other, they are the most qualified people to make important decisions for their children. After all, parents know their children best. Children deserve to have parents working together as a team in all matters affecting their welfare. Mature people do not give up their parental decision-making responsibilities to a total stranger, even if that stranger wears a robe and is called "Your Honour."

The purpose of this book is to help separated and divorced parents, as well as parents who never lived together, conduct themselves with the maturity their children need and deserve, so they can resolve parenting conflicts in a civilized and proactive way, hopefully without court involvement. I believe that maturity of perspective and behaviour