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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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TBST Court Misconduct: "Go to The Box and Feel Shame"

Shaw v. Myers (July 4, 2022), Doc. Toronto FS-22-00030399-0000 (Ont. S.C.J.) — Shore J.

When we talk about the family justice system, we tend to focus on the problems — and there are certainly many of those (including interminable systemic delays that only seem to be getting worse).

In a perfect world, these problems could/would be fixed by the federal government appointing enough judges to handle the court's actual workload (ideally ones with significant expertise in family law), and by provincial governments providing the justice system with the resources it actually needs to be able provide timely and efficient family justice. But we don't live in a perfect world.

That being said, we do, fortunately, have judges, lawyers, and court staff who are dedicated to doing what they can to stretch the resources we do have as far as they can go (and then some). And, with some creative thinking, they have found ways to make meaningful improvements to the family justice system without the additional resources the system desperately needs.

Justice Shore's recent decision in *Shaw v. Myers* provides us with an opportunity to discuss one recent change implemented by Ontario's Superior Court of Justice that has significantly improved access to family justice for people in Toronto.

Starting on January 3, 2022, the Superior Court in Toronto has made judges available in family law cases ***every*** Monday to deal with limited urgent and procedural matters in "To Be Spoken To Court" or "TBST Court". The judge at TBST Court has authority to make ***any*** Orders that could be made at a regular conference, including orders to preserve the parties' rights pending further order or agreement, and procedural orders to ensure that the matter moves forward appropriately (see Rule 17(8) of the *Family Law Rules*, O. Reg. 114/99, for a list of the Orders that can be made at a conference, and part B.5 of the Notice to Profession for Toronto — https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/ — for further information about TBST Court).

So, instead of having to wait months or more just to get to an initial Case Conference, or having to jump through hoops to try to get in front of a judge for an urgent motion prior to the initial Conference (and forcing parties to incur the significant costs that these types of motions usually require), parties can simply schedule an attendance in TBST Court on any Monday, prepare very brief written submissions, and get before a judge very quickly.

In individual cases where a parent has unilaterally withheld a child, unreasonably cut-off financial support, or used heavy handed tactics to try to delay the matter, the ability to get the matter before a judge almost immediately is invaluable. Nothing forces parties to act reasonably (or, at least, less unreasonably), than knowing that they are going to have to imminently explain themselves to a judge who has authority to make Orders. And, on a more systemic level, allowing litigants to get matters before

a judge as soon as problems arise should help to reduce the number of cases that spiral out of control into the high conflict messes that are severely taxing the system's already overburdened resources. Quite simply, the ability to get to a judge right away prevents motions, and certainly urgent or long ones.

We understand that, at least anecdotally, TBST Court has been working incredibly well, and has already helped keep many cases on the rails that would have otherwise almost certainly spiraled out of control. But we also understand that there have also been instances where parties have tried to misuse or abuse TBST Court, and the husband in *Shaw v. Myers* was one of them.

The husband in *Shaw* issued his Application on June 22, 2022, and scheduled an attendance in TBST Court for July 4, 2022. However, the materials he filed for TBST Court did not explain why any of the issues in the case were urgent. Accordingly, the presiding judge, Justice Shore, rejected the husband's request to proceed in TBST Court, ordered him to pay the wife $1,500, and wrote an Endorsement making it clear that the Court is not going to allow TBST Court to be misused:

> TBST Court should not be used to try to bypass the *Rules* to get an early conference or urgent motion date. **Being unhappy with the status quo does not make an issue urgent. TBST Court is to be used and reserved for cases where there are clearly urgent issues or where there is a potential for high conflict and early judicial intervention will assist.** I do not want this endorsement to be read as trying to discourage litigants from using TBST Court in appropriate cases. There are many benefits to litigants and the Court in this process. **The vast majority of litigants in Toronto have used the TBST Court process effectively and efficiently, saving time and money, and improving access to justice.**
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> The case before me today misused this process, taking resources and time away from others. [emphasis added]

If our readers are aware of any other local initiatives in which you think other jurisdictions may be interested — we'd love to hear about them.

Well — We Finally Disagree with Each Other

Radosevich v. Harvey, 2022 CarswellOnt 8618 (Div. Ct.) — Pomerance J., Kurke J., and Davies J.

The Divisional Court's decision in *Radosevich v. Harvey* is the first time an appellate court in Canada has considered the following question:

> *Can a spouse sue their family law lawyer for negligence in relation to an improvident settlement before exhausting their remedies against the former spouse?*

Based on the Divisional Court's decision, the answer to this question is now clearly "no".

In October 2017, the Appellant, Ms. Radosevich, and her former husband, Mr. Radosevich, signed a Separation Agreement that resolved the issues arising out of the breakdown of their marriage. The Respondent lawyer, Ms. Harvey, represented Ms. Radosevich throughout the negotiations, and when the Separation Agreement was signed.

After the Separation Agreement was signed, Ms. Radosevich decided she was not happy with the settlement. She also claimed that she had not understood the nature and consequences of the Agreement because her lawyer failed to properly advise her of her rights (particularly with respect to retroactive spousal support and the husband's income), and because she had been under duress when she signed it because of a power imbalance between her and Mr. Radosevich.

In Ontario, we regularly see claims to override spousal support agreements pursuant to *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), and to set aside agreements pursuant to s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3, which allows a court to set aside all or part of a domestic contract:

> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract (i.e. duress, unconscionability, undue influence, mistake, etc.).

Based on *Miglin* and s. 56(4), if Ms. Radosevich could prove that she had not understood the nature and consequences of the Agreement and/or had been under duress, she would certainly have had a decent chance of being able to override and/or set aside the Separation Agreement. And, had she been able to do so, she could potentially have eliminated (or at least seriously mitigated) her potential claim for damages against Ms. Harvey.

But Ms. Radosevich decided not to bother trying to make a claim against Mr. Radosevich to override or set aside the Separation Agreement. She skipped that step entirely, and proceeded straight to a negligence claim against Ms. Harvey for damages based on the support she believed she should have received from Mr. Radosevich.

Ms. Harvey brought a motion to stay Ms. Radosevich's claims on the basis that they were an abuse of process which, as the motion judge, Justice Vella, explained, "is a flexible doctrine that vests discretion in the court to consider whether the current proceeding is unfair to the point that it is contrary to the interests of justice", and that permits "proceedings that are inconsistent with the objectives of public policy [to] be barred."

The 2015 case of *Sutton v. Balinsky*, 2015 CarswellOnt 11289 (S.C.J.) involved an almost identical set of facts. In that case, Justice Dunphy determined that it was, in fact, an abuse of process for the wife to sue her professionals (her lawyer and accountant) over an allegedly improvident family law settlement *before* she had pursued her potential remedies against her former husband. Because of the importance of his Honour's decision, and as we have not previously discussed it in *TWFL*, we have excerpted some of the key parts of that decision in full:

> [13] I also find that the action as framed is an abuse of process and should be stayed for that reason. **The plaintiff is pursuing her legal and financial advisors in damages for a remedy that ought to have been pursued, if at all, under the *FLA* as against her husband. It would be contrary to public policy and fundamental principles of fairness to permit the plaintiff to circumvent the *FLA* in this fashion.** The defendants have no right of contribution or indemnity against the husband whose obligation it is to provide support or make equalization payments. Her rights to support and divisions of property arise under the *FLA* and should be determined under that statute and not in this collateral fashion.
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> [177] . . . The plaintiff is seeking in this action to accomplish indirectly (via a damages claim) what she chooses not to seek to do directly in *FLA* proceedings (seek to set aside the Marriage Contract and claim greater support and equalization payments). There is no election of remedies between civil and statutory remedies where *FLA* rights are concerned. **If the plaintiff has a claim under the *FLA*, she must pursue it directly under the *FLA* and not indirectly via a negligence or similar action against her lawyer or financial advisor, particularly where the consequences of the very thing she complains of — lack of disclosure and proper understanding — have been considered and provided for by the legislator.**
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> [179] **It would be contrary to public policy to permit a spouse in [the plaintiff's] situation to treat support and equalization as something that she can elect to pursue from the pocket of her choice if she believes she has been led into a bad domestic contract.** It would be fundamentally unfair to permit her to treat her lawyers and financial advisors as de facto guarantors of her rights to support or equalization payments, particularly where they have none of the rights that guarantors have of contribution or indemnity from the party upon whom the obligation primarily lies. [emphasis added]

In concluding that the claim was an abuse of process, Justice Dunphy also considered the wife's argument that she should not be forced to incur costs to pursue potentially risky claims against the husband before she could sue her advisors. However, his Honour rejected this argument because, in his view, the risk and issues in both actions would be "substantially the same":

> [172] The plaintiff's position is that she is under no obligation to sue all possible defendants. In particular, **she claims that a law suit against her husband would be a potentially risky affair** as the husband would likely plead that she fully understood the nature and consequences of the Marriage Contract by reason of the advice of [her lawyer]. The law of mitigation does not oblige her to run such risks and she may choose her defendant. **It is no abuse of process to pursue her legitimate legal rights and choose the path that seems to her or her legal advisors to offer the best chance of success with least risk. She is not obliged to choose the path best suited to the defendants or to maximize their own chances of obtaining contribution.**
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> [173] **The flaw in the plaintiff's position is that there is no material difference in terms of risk as between the proceeding she has chosen to bring and the one she chose not to bring.** She alleges that the negligence or breaches of duty of the defendants prevented her from appreciating the nature and consequences of the agreement she was entering into and that the failures of disclosure brought about by those same breaches deprived her of the ability to know what she w[a]s getting and what she was giving up. The statute which gave her the rights she claims to have lost (the FLA) also provides her with a direct means of recovering them (through an application to set aside the Marriage Contract under s. 56(4)). **The issues in this case (were it heard on the merits) and the issues in a suit to set aside the Marriage Contract under the *FLA* would be substantially the same: whether she received disclosure of all material assets and whether she understood the nature and consequences of the Marriage Contract when she entered into it.**
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> [174] In my opinion, **it would be fundamentally unjust and an abuse of process to permit the plaintiff to claim what amounts to a variation of her Marriage Contract through the device of a damages claim instead of pursuing the remedy specifically provided for that purpose under the *FLA***. [emphasis added]

Now back to *Radosevich*. The motion judge, Justice Vella, adopted Justice Dunphy's reasoning in *Sutton*, and granted Ms. Harvey's motion for a stay. However, she also made it clear that it was open to Ms. Radosevich to apply to lift the stay once she had pursued her remedies against Mr. Radosevich:

> [14] For these reasons, I concluded that Ms. Radosevich must attempt to vary the separation agreement, and otherwise avail herself of whatever remedies she might have against her former husband under the relevant family law legislation first, before coming to the civil court to advance an action based on solicitor's negligence against her former lawyer. The remedies advanced by Ms. Radosevich against Ms. Harvey are, in substance, matters governed by the *FLA*; namely, whether retroactive spousal support ought to be paid by her husband, and whether the lump sum spousal support agreed to be paid was fair in light of her husband's true financial picture.
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> [15] However, in the event that after pursuing her remedies under the relevant family law legislation, Ms. Radosevich is in fact without a remedy because she may not be able to establish any of the grounds under s. 56(4) of the *FLA*, as urged by her lawyer before me, this order is without prejudice to her right to bring a motion to lift the stay and revive this action.

Ms. Radosevich applied for, and obtained, leave to appeal Justice Vella's decision to the Divisional Court. (Generally, an Order granting a stay is considered a final Order for the purposes of an appeal — see *McClintock v. Karam*, 2017 CarswellOnt 4552 (C.A.) at para. 1. However, there is an exception to the general rule where, as in this case, a matter is stayed pending the disposition of other proceedings — see *General Capital Growth Ltd. v. Burlington (City)*, 1979 CarswellOnt 422 (C.A.) at para. 3.)

Before the Divisional Court, Ms. Radosevich argued that any attempt to set aside or override the Separation Agreement "would be doomed to fail, and that she should not be required to suffer the costs consequences of a frivolous action." But Ms. Radosevich was unable to persuade the Court that her claims against Mr. Radosevich were "doomed to fail" given the significant overlap between her potential claim against Mr. Radosevich, and her claim against Ms. Harvey:

> [7] The appellant argues that a claim under the *FLA* is doomed to fail. We disagree. **Whether the appellant can succeed on a claim to set aside parts of the separation agreement will depend on the evidence led by the parties.** However,

> the *FLA* clearly governs the dispute. Contrary to the appellant's arguments, **the grounds alleged against the respondent solicitor are the very grounds that may be used to set aside a separation agreement under the *FLA***.
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> [11] **It inexorably follows that it was open to the motions judge to conclude that the action against the solicitor was an abuse of process.** The appellant may seek to lift the stay of the civil action if she is unsuccessful in family court. However, to begin with the civil claim is to litigate with the cart before the horse. We see no basis for appellate intervention. [emphasis added]

While this is certainly a reassuring result for family law lawyers across Canada — and at the risk of hate mail — we must wonder whether the pendulum may have swung a bit too far.

In most improvident settlement claims against a family law lawyer, it will probably be reasonable to insist that clients take reasonable steps to pursue their family law remedies against former spouses before they can sue their advisors.

But there are also going to be situations where it may not be fair or reasonable to force a client to incur significant costs to pursue a former spouse (and to take on the risk of having to pay costs if they are unsuccessful), as a precondition to being able to pursue a negligence claim. The law is clear that even if a court finds that there are sufficient problems with a family law agreement to engage *Miglin* and/or s. 56(4) of the *Family Law Act* (or the equivalent statutory provisions in the other provinces and territories), it still has discretion to uphold the agreement. As the Ontario Court of Appeal explained in *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.):

> [33] **It is now well established that a finding that a party has violated a provision of s. 56(4) of the *FLA* does not automatically render the contract a nullity.** Rather, a trial judge must determine whether it is appropriate, in the circumstances, to order that the contract be set aside. **This is a discretionary exercise.** See *Dochuk v. Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.). . . . [emphasis added]

The proper balance in these types of cases has generated a significant amount of debate between us (the *TWFL* authors) in recent weeks. One of us (we won't say who), thinks that the reasoning in *Radosevich* is largely correct, and thinks it is difficult to come up with even a hypothetical fact scenario where a court would be willing to allow a lawyer's negligence to leave a client with significantly less money than s/he ought to have received at law, or to give the opposing spouse a windfall because of the other spouse's lawyer's negligence. In these types of cases, it seems far more likely than not that the court would intervene and make things right *between the spouses*. And, if the client whose lawyer was negligent ultimately gets what s/he ought to have received in the first place, that would eliminate (or at least significantly mitigate) any potential claim for damages against the lawyer.

But the other one of us (again, we won't say who), thinks that *Radosevich* is an invitation to be negligent and that *Radosevich* will result in too many instances where a client who was, in fact, poorly served by a lawyer will be precluded from pursuing a remedy because s/he simply does not have the resources to litigate the claim to set aside or override the family law agreement, and/or may not want to take on the risk of pursuing contentious litigation against a former spouse. This is also far less of a problem in civil claims against lawyers, because, unlike in family law, lawyers in civil cases can act on contingency.

The other of us continues: Let's assume for a moment that the respondent lawyer in this case *was* negligent. Let's assume that after lengthy negotiations, the lawyer never told her client, the wife, that she could claim retroactive spousal support. And let's assume that the client then settled her matter without any retroactive spousal support and signed a Separation Agreement with the benefit of the lawyer's Certificate of Independent Legal Advice. Should the client have to first try to set aside the Separation Agreement? The husband is going to rely on the Certificate of Independent Legal Advice provided by the lawyer attesting to the fact that the wife understood her rights, obligations and the agreement. The wife may not be able to afford to unsuccessfully sue her husband and take on the risk of having to pay his costs if she is unsuccessful, and may then be left without sufficient resources to be able to sue her lawyer.

We also wonder if the situation might not be different with respect to a marriage contract (as in *Sutton v. Balinsky*) and a separation agreement (as in *Radosevich v. Harvey*). A marriage contract is prospective. A separation agreement is retrospective, assigning rights and obligations based on past events. Giving bad advice with respect to those past events should perhaps be treated differently.

In any event, no matter which of us is right, we are inevitably going to see more and more of these types of motions in the months and years to come, and it will be interesting to see how the courts balance these competing arguments. We suspect we may also see more cases where parties decide to simply sue both the lawyer and former spouse at the same time, or try to avoid the abuse of process issue entirely by finding more creative ways to frame claims against family law lawyers to ensure that they do not directly overlap with the client's potential family law remedies.

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