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

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**The Charlestown Chiefs and Failures of Financial Disclosure**

*Kaushal v. Kaushal*, 2023 CarswellAlta 1180 (C.A.) — Watson, Crighton and Ho JJ.A.

The Appellant/Husband appealed the summary trial decision that awarded lump sum prospective child and spousal support, retroactive spousal support and an unequal division of the parties' matrimonial property.

The parties separated in April 2015, and the Respondent/Wife filed for divorce from the Husband. The Wife claimed an unequal division of property in her favour and retroactive and ongoing child and spousal support.

The litigation was obstructed by the Husband's consistent failure to engage in any meaningful way including his failure to meet his disclosure obligations. Ultimately, the case management judge struck the Husband's pleadings and directed the matter to a summary trial.

After the Husband's pleadings were struck, the Wife learned of money the Husband had hidden in bank accounts in the names of his parents. The Wife obtained an *ex parte* order prohibiting the Husband or his parents from withdrawing funds from those accounts and ordering several financial institutions to disclose to the Wife any accounts held in the Husband's name. Three days after being served with the *ex parte* order, the Husband, acting as power of attorney for his parents, withdrew \$728,000 from those account by way of bank drafts.

The Court issued Orders directing the return of the drafts and prohibiting their deposit into any third-party bank account, whereupon the Husband deposited the bank drafts into an account in Washington State. The Husband was found in contempt four times, and a warrant for his arrest was issued in October 2020. The Husband then absconded to the United States to evade arrest.

Notwithstanding these circumstances, the summary trial judge permitted the Husband to attend the trial remotely, and the Husband was allowed to cross-examine the Wife on her evidence, a right he exercised as a self-represented litigant. Why he was allowed to participate at all is a complete mystery. As Justice Myers colourfully put it in *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.), *aff'd*, (2016), 84 R.F.L. (7th) 374 (Ont. C.A.), a party who does not make early, voluntary, and complete financial disclosure is not participating in the process, and such parties must be assessed a game misconduct and ejected from the proceedings. Such a remedy is not exceptional; rather, it is the continued existence of cases where disclosure is an issue that should be exceptional. And, in this case, we have the added features of four counts of contempt and absconding with money.

The summary trial judge awarded the Wife lump-sum prospective child and spousal support, retroactive spousal support, and an unequal division of the parties' matrimonial assets in her favour.

This was the Husband's appeal. In a bout of chutzpah — from the United States — he alleged that it was "procedurally unfair" for the trial judge to award ongoing child and spousal support because the evidence did not support it; the trial judge incorrectly applied the *Spousal Support Advisory Guidelines*; the trial judge exceeded his jurisdiction by awarding retroactive and prospective spousal support; and the trial judge erred by departing from the presumption of equal division of matrimonial assets.

As a remedy for these alleged errors, the Husband was asking the Court of Appeal to remit the matter to the Court of King's Bench for a rehearing.

Have you ever seen the old advertisements on television for the Chop-O-Matic? That is what the Court of Appeal did with the Husband's arguments, finding that the record below wholly supported the trial judge's conclusions. The Court of Appeal found that the Wife's pleadings clearly advanced a claim for lump sum prospective child support. The Court of Appeal also noted that the trial judge had been influenced by the Husband's refusal to comply with his financial disclosure obligations and by his flagrant dissipation of matrimonial property, both of which justified the Court's decision in making a lump sum award. In the words of the Court of Appeal (with which we agree whole-heartedly):

[4] This Court is necessarily constrained by the evidentiary record when deciding whether a trial judge erred. The evidentiary record that is before this Court supports the trial judge's finding the [Husband] lied, misrepresented, and obstructed the proceedings in a manner that precluded the trial judge from obtaining a clear picture of the [Husband's] financial circumstances. **It should not surprise the [Husband] that the question of procedural fairness was to a significant degree circumscribed by his own conduct. Neither should it surprise him that the record is sparse given the [Husband's] failure to contribute meaningfully to its creation.**

[5] As the trial judge so eloquently stated, "... a party cannot expect that his or her failure to comply with their disclosure obligations will shield them from the Court drawing conclusions about their financial information or imputing income to them based on the best available evidence" ... **[emphasis added]**

And while the summary trial judge did not specifically refer to s. 15.2 of the *Divorce Act*, RSC 1985, c.3 (2nd Supp) (the "*Divorce Act*") or to particular cases on spousal support, he had considered the factors set out in the *Divorce Act* and the leading jurisprudence on spousal support.

At the time of the appeal, the Husband had still not purged his contempt, and because he remained in the United States, he had successfully evaded arrest. But he was still allowed to participate in the appeal; another mystery. Why on earth should the Husband have been allowed to participate? See *Dickie v. Dickie* (2007), 39 R.F.L. (6th) 30 (S.C.C.), affg, (2006), 39 R.F.L. (6th) 1 (Ont. C.A.) and its progeny, including *Cosentino v. Cosentino* (2017), 98 R.F.L. (7th) 53 (Ont. C.A.); *Abu-Saud v. Abu-Saud* (2020), 48 R.F.L. (8th) 330 (Ont. C.A.); *Elgner v. Elgner* (2010), 85 R.F.L. (6th) 323 (Ont. Div. Ct.); *Fawson Estate, Re*, 2013 CarswellNS 260 (C.A.); and *Aalbers v. Aalbers* (2015), 71 R.F.L. (7th) 291 (Sask. C.A.).

As for the Husband's claim that the summary trial judge had misapprehended the evidence (with respect to some support payments that may have been made), the Court of Appeal, again, disagreed, and added these helpful comments that should assist future litigants facing similar situations:

[27] ... In any event, we agree with the [Wife] that the reasons clearly show the summary trial judge was influenced by the [Husband's] repeated refusal to comply with his financial disclosure obligations, to discharge his financial obligations, and by the [Husband's] flagrant dissipation of matrimonial property in deciding that lump sum awards were appropriate in the circumstances. Each of those reasons, on their own, would justify a lump sum award: *Rockall v. Rockall*, 2010 ABCA 278, [2010] AJ No 1064 (QL); *SJB v. RDBB*, 2019 ABQB 624, [2019] AJ No 1077 (QL).

[28] Speaking more broadly, this Court has noted the reality faced by judges in seeking to do justice in relation to support. For example, in *Khan v. Khan*, 2022 ABCA 370 at para 32, [2023] 4 WWR 446, this Court referred to the "informational asymmetry" which often exists in family law cases, and observed that **"a court is not unentitled to be skeptical of vague**

**and general assertions by payors, particularly where their primary emphasis in response to the claim sounds more like "you cannot prove it" than "I don't have it".** As to the choice of a lump sum award, that is an example, as also noted in *Khan* at para 35, of a judge having to "do the best they can with what they have". **A non-disclosing party should not be entitled to a benefit or advantageous inference out of their non-disclosure.** There is no basis for this Court to interfere with the trial judge's exercise of discretion on this issue. [emphasis added]

Finally, with respect to the Husband's appeal of the unequal division of matrimonial property, not only was the Court of Appeal of the view that the decision below was amply supported on the record, but the Court had absolutely no sympathy for the Husband:

[41] Moreover, **given the [Husband's] repeated and flagrant disregard for his disclosure obligations that made it impossible for the trial judge to form an accurate picture** of the [Husband's] financial circumstances or an accurate picture of the parties' s 7(1) matrimonial property, it follows that notwithstanding the summary trial judge awarded the entirety of the parties' Canadian assets to the [Wife], **we cannot fairly conclude that the unequal division of the Canadian assets unfairly or inequitably disadvantaged the [Husband] in the distribution of the entirety of the parties' matrimonial property available for distribution.** [emphasis added]

Too many defaulting litigants are given too many opportunities for a "do-over." Here the Court of Appeal shows the Husband that there are consequences for both action and inaction. To paraphrase the immortal Denis Lemieux (of Slapshot fame): "You do that, you go to the box, you know. Two minutes, by yourself, you know and you feel shame, you know." Except rather than "get free", you get your appeal dismissed. And if you've not seen Slapshot; you must.

**Here Ye; Here Ye. Take Notice by All Those Present . . .**

*Phelan v. Givlin*, 2023 CarswellOnt 10132 (S.C.J.) — Chown J.

*Phelan* was a motion to set aside a default Order made against a party who had not served or filed his pleadings. Justice Chown's decision to set aside the default Order provides a useful roadmap for dealing with this issue in family law cases. But the more interesting part of the decision is his Honour's comments about the wisdom of serving a party in default even if s/he isn't technically entitled to notice under the applicable rules of court.

The parties in *Phelan* separated on May 25, 2021, and had a child together. In January 2022, the mother served the father with an Application to deal with decision-making and parenting time. However, after the litigation started, but before the father had finalized his Answer, the mother suggested mediation to try to resolve the matter. The father responded "YES! Lawyers stink" (if you've been doing this work for even a brief period of time, this probably isn't the first time you've heard a family law client express this sort of sentiment). He instructed his lawyer to put the preparation of his Answer on hold, and off to mediation they went.

The mother and father attended two mediation sessions without their lawyers on September 1, 2022 and October 1, 2022. While they were not able to resolve the matter, they made progress. They also had at least some discussions about attending couples therapy, although it does not appear that they ever did so.

On October 31, 2022, the mediator contacted the parties to suggest a conference call with their lawyers to update them about the status of the negotiations, and to discuss next steps.

Unbeknownst to the father at the time, on November 1, 2022, the mother swore an Affidavit in support of a request for an uncontested trial, which is the process used in Ontario for obtaining an Order against a party who has not served or filed a pleading within the required period of time.

On November 7, 2022, the mediator advised the father that the mother had decided to end the mediation process. However, neither the mediator nor the mother advised the father that the mother was planning to proceed with the litigation on an uncontested basis.

On November 10, 2022, without any notice or warning, the mother filed her materials for the uncontested trial with the Court. As the materials did not explain that the parties had been negotiating and that the mother had only terminated the mediation process a few days earlier, on November 21, 2022, the Court granted the mother's request for an uncontested Order.

The father found out about the uncontested Order on November 23, 2022, and immediately took steps to bring a motion to have it set aside. The mother vigorously opposed the father's motion and, after months of delay (presumably because the Court did not have any earlier dates), the matter was eventually argued before Justice Chown on May 11, 2023.

In Ontario, the starting point for setting aside an uncontested Order is found in rule 25(19) of the *Family Law Rules*, which allows a court to vary or set aside an Order in the following circumstances:

25(19) The court may, on motion, change an order that,

- (a) was obtained by fraud;
- (b) contains a mistake;
- (c) needs to be changed to deal with a matter that was before the court but that it did not decide;
- (d) was made without notice; or
- (e) was made with notice, if an affected party was not present when the order was made because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present.

In this case, Justice Chown was satisfied that both rules 25(19)(d) and 25(19)(e) were applicable as the mother had not given notice of the uncontested trial, and although the father had notice of the Application itself, he had not filed an Answer because he had (understandably) understood the parties were trying to resolve the matter through mediation.

After having determined he had jurisdiction to set aside the uncontested Order, Justice Chown had to decide whether it would be appropriate to do so on the particular facts of this case. To decide that issue, Justice Chown turned to *Zia v. Ahmad* (2021), 58 R.F.L. (8th) 1 (Ont. C.A.), where the Court of Appeal summarized the factors judges should consider when deciding whether to set aside a default Order:

- [4] . . . a) whether the moving party moved promptly, after learning of the order, to have it set aside;
- b) whether the moving party has provided an adequate explanation for the failure to respond to the proceeding in accordance with the *Family Law Rules*;
- c) whether the moving party has established an arguable case on the merits;
- d) whether the moving party is acting in good faith and with "clean hands";
- e) the prejudice that may be suffered by the moving party if the motion is dismissed and to the responding party if the motion is allowed; and,
- f) whether, in the final analysis, the interests of justice favour setting aside the judgment.

See also *Mountain View Farms Ltd. v. McQueen*, 2014 CarswellOnt 3011 (C.A.) at para. 50, which has also been applied in the family law context (see e.g. *Lucreziano v. Lucreziano* (2021), 58 R.F.L. (8th) 144 (Ont. S.C.J.), at para. 42.), where the Ontario Court of Appeal explained that the relevant "factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default."

After considering the evidence before him, Justice Chown was satisfied that the uncontested Order should be set aside, and that it was "not a close call." The father hadn't served his Answer because: (a) he reasonably believed that the parties were trying to resolve the matter through mediation; (b) the mother hadn't provided reasonable notice that she would be terminating the mediation and proceeding with the court process before she filed her materials for the uncontested trial; and (c) the mother had not provided a fair explanation for why the father hadn't filed his Answer. Furthermore, the father would be substantially prejudiced if the Order was not set aside as he would never have a chance to have his case, which was at least arguable, heard and decided on the merits.

As a result, Justice Chown set aside the uncontested Order, and properly ordered the mother to pay the father \$6,000 in costs within 30 days.

The more interesting part of the decision, however, is Justice Chown's recommendation that even though rule 10(5) of the *Family Law Rules* expressly states that a party who has not filed a pleading is not entitled to any further notice of steps in the case or to participate in the case in any way (and that the court may deal with the case in the party's absence), courts should generally still require the party seeking an uncontested Order to serve the materials on the party in default. We can do no better than to repeat his Honour's discussion of this point in full:

### PRACTICE POINT

[29] In a growing number of civil cases, courts have required plaintiffs advancing default proceedings to serve the motion materials on a defendant when bringing a motion for default judgment: *Mueller-Hein Corp. v. Donar Investments Ltd.* [2003] OJ 2302 (SCJ), at para. 52; *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, at para. 10; *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083 at para. 11; *DCR v. Vector Card Services*, 2013 ONSC 5881; *Western Steel and Tube Ltd. v. Technoflange Inc.*, 2017 ONSC 2697; *Natural Energy Systems Inc. v. Hallett*, 2019 ONSC 1372; *Grabenheimer v. Lala*, 2019 ONSC 2811; *Celik v. TD Bank*, 2020 ONSC 1714; *Advant Leasing Limited v. Kozicki*, 2020 ONSC 4292; *Alfonso Izzo v. Tonnina Ministro*, 2020 ONSC 6703; and *Strada Aggregates Inc. v. YSL Residences Inc.*, 2020 ONSC 7034; *Dong v. Liu*, 2021 ONSC 4626; *Seecharran v. Seecharan*, 2021 ONSC 6885; *Lake v. Toronto District School Board*, 2023 ONSC 1807.

[30] This jurisprudence has also been adopted in family cases: *Roberts v. Santilli*, 2019 ONSC 64; *Provenzano v. Provenzano*, 2004 CanLII 5075 (ON SC), at para. 10. An early example in a family case is *Campeau v. Campeau*, 2005 CanLII 25948, at para. 19. In it, the court adopted the reasoning in *Mueller-Hein*, saying that even where it is arguable that a rule may authorize an *ex parte* motion, a lawyer should consider whether the better practice would be to give notice, and that this will be an easy decision for the lawyer where it is apparent that, when the *ex parte* order comes to the attention of the adverse party, that party will probably move to set aside the order.

[31] **I agree with the perspective that it is "by far the better practice" to give notice to the defendant or respondent when seeking default judgment in civil proceedings or in an uncontested trial in family proceedings.** The outcome of this case demonstrates why. It should have been obvious to the [mother] that the order made after an uncontested trial was very likely to only result in further proceedings.

[32] **It is typically better for all concerned including the court and the non-defaulting client to ensure that the defaulting party has knowledge of the proceeding and the default hearing and appears to have chosen not to participate.** When that is the case, the default judgment is much more likely to withstand a motion to have it set aside or changed. **In the circumstances of this case, the [mother] should have served her materials for the uncontested trial on the [father]. [emphasis added]**

We echo these views — to some extent. In a situation such as this, where one party was clearly and understandably taken by surprise, notice should have been given. But, respectfully, notice should not be required in all instances. If a party has been served and chooses to not participate, they should be left to the consequences of that decision.

If you don't want to serve the materials on a party who is in default, which the *Family Law Rules* specifically say you are not required to do, you should still make sure to build a strong evidentiary record to give your client at least a reasonable chance of being able to uphold the Order if/when the other party tries to challenge it. For example, you might want to start with a letter telling the other party they are in default, and that you will be proceeding on an uncontested basis if they fail to cure their default by a certain date that is reasonably far off in the future (e.g. two weeks — not 48 hours). You should also tell the other party the specific relief you will be seeking. If the other party fails to respond, warn them again in writing, and give them another opportunity to respond. And finally, if they fail to respond again, write to them again to say that since you have not heard from them, you will be filing the necessary materials with the court, and then wait at least a few days to give them a final chance to respond. That is the standard of perfection when dealing with parties that could otherwise claim surprise.

Had the mother in *Phelan* built this sort of record and the father had still not filed an Answer before she proceeded with the uncontested trial, the result would have almost certainly been very different. Alternatively, had these types of warnings prompted the father to file his Answer, and we suspect they would have, the parties could have avoided wasting significant amounts of their own time and money and scarce judicial resources dealing with whether the uncontested Order should be set aside.

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