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— Franks & Zalev - This Week in Family Law

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You Take the High Road and I'll Take the Low Road . . .

Hilton v. Hilton, 2021 CarswellOnt 490 (C.A.) - Tulloch, Miller, and Paciocco JJ.A.

The wife started divorce proceedings in September 2018. The husband did not really seem to care. By the time of the first Case Conference in March 2019, the husband had not filed an Answer.

The wife brought a motion for an order for an uncontested trial. At the Case Conference, Justice Fryer found the husband in default and ordered him to deliver his Answer, disclosure, and a sworn Financial Statement within 30 days. Her Honour stayed the wife's motion for an uncontested trial until the 30-day period expired, and if the husband delivered his materials as required, the default would be set aside and the motion for an uncontested trial would be dismissed. If not, the uncontested trial would proceed.

Again, the husband did not seem terribly bothered - by the next Case Conference in June 2019, he had still not filed any materials. Accordingly, Justice Fryer confirmed the husband's default and scheduled the uncontested trial. For good measure, she also ordered the partition and sale of the matrimonial home.

The uncontested trial was held in November 2019 before Justice Fryer, as a result of which the wife was granted exclusive possession of the matrimonial home, an order for the sale of the matrimonial home, and temporary spousal support. The determination of final spousal support and child support were adjourned to the continuation of the uncontested trial, which had not taken place at the time of this appeal.

In February 2020, the husband woke up. He brought a motion in which he claimed several heads of relief, including:

• setting aside all orders made to date; and

• granting leave to serve and file an Answer and Financial Statement.

The motion was dismissed by Justice Nicholson on the basis that the husband had not *appealed* any of Justice Fryer's Orders.

The husband then appealed Justice Nicholson's dismissal of his motion and asked that the Court of Appeal set aside Justice Nicholson's Order. The husband *also* asked the Court of Appeal to set aside all of Justice Fryer's previous Orders.

The husband's counsel made a clever argument. He argued that the motion before Justice Nicholson had been brought under Rule 25(19) of the *Family Law Rules*, O. Reg. 114/99 (although he did not specify that Rule in his Notice of Motion). He based

his argument on the allegation that the wife had defrauded the Court through misrepresentations and material omissions in her evidence at the hearing of the uncontested trial. The husband argued there were things the wife knew that she did not disclose, and things she said that she knew were not true.

However, in the motion before him, Justice Nicholson did not address the substance of the motion to dismiss prior orders on the basis of fraud. He dismissed the motion on the basis that Justice Fryer's Orders could not be set aside because the husband had not appealed any of them.

This was a problem. It allowed the defaulting husband to argue that the only route for him to challenge Justice Fryer's Order from the uncontested trial was to bring a motion to change under Rule 25(19) of the *Family Law Rules*, because an appeal would have been premature: See *Ketelaars v. Ketelaars* (2011), 2 R.F.L. (7th) 296 (Ont. C.A.) and *Gray v. Gray* (2017), 98 R.F.L. (7th) 109 (Ont. C.A.). In *Gray*, the Court of Appeal specifically held that Rule 25(19) provided a more effective and appropriate way to correct orders (within the ambit of the Rule) than an appeal.

The Court of Appeal was somewhat, but not entirely, convinced; but it was convinced enough. It noted, however, that some of the Orders the husband was looking to set aside were made on the basis of his own failure to provide required disclosure. Justice Nicholson was correct that to set aside *those* Orders, an appeal would be required.

However, to the extent the husband was claiming relief on the basis of the wife's fraud, those arguments should have been substantively addressed by Justice Nicholson on the merits. It seems not all default orders are created equal; some require an appeal, and some require that a motion to set aside first be heard on the merits. Query whether this is a useful dichotomy and won't lead to confusion - and different processes to deal with a single Order. Why should the reason for the request to set aside an Order dictate the proper route to address it?

In a delightful understatement, for the Court of Appeal, Justice Tulloch noted:

> [10] By failing to comply with the *Family Law Rules* and the orders of Fryer J., the [husband] is the author of much of his misfortune. When a party does not participate in the process, things tend to not go well. Nevertheless, the [husband's] allegations of the [wife's] misrepresentations and material omissions must still be determined on the merits.

As a result, the appeal was allowed in part, and the Court of Appeal directed that the husband's allegations of the wife's misrepresentations and omissions be returned to the Superior Court of Justice for a determination of the merits under Rule 25(19)(a) of the *Family Law Rules*.

No Divorce for You!

Zantingh v. Zantingh, 2021 CarswellOnt 4204 (S.C.J.) - Raikes J.

The husband wanted a divorce, so he moved for an order severing the divorce from the corollary relief. The wife opposed the divorce, and asked that the husband be ordered to pay for an updated income report from the jointly retained expert.

The litigation was very high conflict, colourfully described by Justice Raikes as "a fire that is burning bright but helping no one."

The parties married in 1996. They could not agree on the date of separation. He said 2011; she said 2015. It always amazes when the alleged dates of separation are so disparate.

They had two children who are 21 and 19 years old, respectively. The wife continued to live in the matrimonial home. She had two sources of income: a Canada Disability Pension and spousal support.

At a Case Conference in December 2015, on consent, it was ordered that the husband pay spousal support of $2,080 a month, which included $80 per month in spousal support by way of payment of car insurance. It was also agreed that the parties would each pay half of the property taxes and insurance on the home.

The Consent Order also required the parties to jointly retain a CBV to value the husband's interest in the family business and to determine the husband's income for support purposes.

The wife opposed the divorce for the following reasons:

1. The husband had failed to make full financial disclosure since the start of the proceedings 5-1/2 years ago;

2. The husband had delayed providing required information to the CBV and had not provided the CBV with the information requested by him;

3. The husband was in arrears of spousal support of about $26,000;

4. The husband had not paid his share of the property tax and insurance on the matrimonial home;

5. The husband had no specific plans to remarry; and

6. The husband had not met his onus to establish on a balance of probabilities that the wife would not be prejudiced by the divorce.

The husband disputed any arrears of spousal support, but admitted he had not paid his half of the property taxes. He also admitted that he had not provided the CBV with all the requested documents.

In Ontario, Rule 12(6) of the *Family Law Rules*, O. Reg. 114/99, provides that a court may sever the divorce from the other issues if neither spouse will be disadvantaged and if reasonable arrangements have been made for the support of any children of the marriage (this was not an issue in this case).

A "disadvantage" as used in Rule 12(6) means a legal disadvantage that the other party may suffer if severance is granted. For example, severance may be denied for prejudice to the other spouse where the order could deprive that other spouse of medical benefits: *Shawyer v. Shawyer*, 2016 CarswellOnt 2093 (S.C.J.) at para. 58. That said, a party cannot withhold a divorce as leverage: *Al-Saati v. Fahmi* (2015), 59 R.F.L. (7th) 219 (Ont. S.C.J.) at para. 27. The onus of showing that the responding party will not be prejudiced by the severance is on the party requesting severance: *Bakmazian v. Iskedjian*, 2015 CarswellOnt 18171 (S.C.J.) at para. 10.

Litigants in Ontario take for granted the ease with which Ontario courts regularly sever a divorce from corollary issues. It is not so in other provinces; see, for example, *Carmyn Alyson Aleshka v. Gregory Fettes* (2021), 51 R.F.L. (8th) 294 (Man. Q.B.); *Mann v. Mann*, 2013 CarswellBC 2834 (S.C.); *Hicks v. Gazley* (2020), 48 R.F.L. (8th) 439 (Alta. Q.B.); *Clow v. Palmer* (2009), 73 R.F.L. (6th) 65 (P.E.I. C.A.).

Here, the wife suggested that she would be prejudiced as she would not be covered by the husband's health insurance after a divorce. The problem with this argument was that the husband gave evidence that he had actually opted out of his company health benefit plan in 2012 and that his attempts to rejoin had been declined. That is, he had not had health benefits since 2012. In response, the wife alleged that she had actually availed of the husband's health benefits in 2015.

Medical benefits had never been a significant issue or the subject of previous judicial comment or agreement in the case. In these circumstances, could it really be suggested that the wife would be prejudiced by a divorce? His Honour could not say for sure either way. But he did find that the husband's "bald assertion" that he had not had coverage since 2012 was insufficient - he could have provided independent proof, but he did not.

As a result, Justice Raikes was not satisfied on the evidence that no prejudice would result to the wife by granting the order to sever, and he denied the severance.

We note in passing that it was not necessary for Justice Raikes to deny the divorce based on not knowing the current state of the husband's health benefits and the wife's possible resulting prejudice. The wording in Rule 12(6) is permissive (the Court

"may" sever the divorce). Therefore, even absent a finding of direct prejudice, the Court has the residual discretion to refuse to sever, "where doing so would not be efficient or where the moving party has failed to comply with court orders or the rules including financial disclosure." For example, in *Hicks v. Gazley*, the Court found that a lack of incentive to cooperate in the future may be sufficient reason to deny severance.

To have allowed the divorce in these circumstances would have signalled that the husband's conduct was of no consequence. And that could not be. As a result, no divorce for the husband - without prejudice to the request being renewed upon the husband doing what he had agreed to do by way of providing documents to the jointly retained CBV.

Signed, *Sealed* and Delivered

M.P.K.B. v. K.B. et al (2021), 52 R.F.L. (8th) 335 (Ont. S.C.J.) - Robertson J.

This was a motion in writing by the father for an order to seal the court record. The father wanted to change a custody and access order that was granted as a final disposition in a child protection case. To apply for the change, he had to include a copy of the original order (the order he wanted to change). That order identified the children. The father was concerned that he would be committing a crime if the file was not sealed as it is illegal to publish identifying material in relation to a child protection proceeding.

The original custody order had been granted as a final disposition in a child protection matter about three years ago. Such a disposition is to be considered to be an order for custody made under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*").

Rule 15 of the *Family Law Rules*, O. Reg. 114/99, requires an applicant to attach the order sought to be changed to the Motion to Change a final custody/access order made under the *CLRA*. Further, the father's materials, of necessity, would include historic information from the initial child protection proceeding.

For good reason, child protection proceedings are private and closed. It is against the law to publish identifying information contained in a child protection proceeding. [The statute restricts publication of identifying information in an order made under s. 57.1 of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("*CFSA*") (now s. 102(1) of the *Child, Youth and Family Services Act* ("*CYFSA*")).]

But custody proceedings under the *CLRA* are public and open. Given this dichotomy, the father sought directions.

Section 70 of the *CLRA* allows the court to limit access to court records or to keep identifying information confidential. Subsection 70(2)(b) directs the court to consider the effects of not making an order under that section:

> **70 (1)** Where a proceeding includes an application under . . . Part [III], the court shall consider whether it is appropriate to order,
>
> (a) that access to all or part of the court file be limited to
>
> (i) the court and authorized court employees,
>
> (ii) the parties and their counsel,
>
> (iii) counsel, if any, representing the child who is the subject of the application, and
>
> (iv) any other person that the court may specify; or
>
> (b) that no person shall publish or make public information that has the effect of identifying any person referred to in any document relating to the application that appears in the court file. 2009, c. 11, s. 18.

Considerations

(2) In determining whether to make an order under subsection (1), the court shall consider,

(a) the nature and sensitivity of the information contained in the documents relating to the application under this Part that appear in the court file; and

(b) whether not making the order could cause physical, mental or emotional harm to any person referred to in those documents. 2009, c. 11, s. 18.

Order on application

(3) Any interested person may make an application for an order under subsection (1). 2009, c. 11, s. 18.

While a court can make an order under s. 70 of the *CLRA* on its own initiative (*P. (P.) v. D. (D.)* (2016), 73 R.F.L. (7th) 105 (Ont. S.C.J.) at para. 5), in *Danso v. Bartley* (2018), 13 R.F.L. (8th) 341 (Ont. S.C.J.), Justice Myers held that s. 70 was not the only consideration for the court. Rather, the court must also consider the "open court principle" as set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.). That test requires that the court determine whether:

a. a sealing order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings

It is also open to the court to consider whether less "invasive" measures (initialization, for example) would be sufficient to protect the children's interests.

Justice Robertson noted that the privacy interests in child protection proceedings and the open court principle intersected in this case, and will in any case where a party seeks to vary a custody order made in the context of a child protection disposition. In *A.P. v. L.K.* (2019), 29 R.F.L. (8th) 205 (Ont. S.C.J.), Justice Akbarali considered the balance to be struck between the open court principle and children's privacy interests. In considering the test in *Sierra Club*, Justice Akbarali noted:

[36] . . . permitting limits to the open court principle when necessary to protect the interests of children recognizes that children who are the focus of family law proceedings do not choose to be involved in those proceedings and, for the most part, have no ability nor agency to protect their own interests. Moreover, children are a particularly vulnerable group; their vulnerability may put them at greater risk of harm if their interests are not adequately protected.

Similarly, in *Himel v. Greenberg* (2010), 93 R.F.L. (6th) 357 (Ont. S.C.J.), Justice Spies said that, "[w]here the sealing order relates to the personal information of a child, the best interests of the child, is a value of super-ordinate importance that can override the open court principle". See also *K. (M.S.) v. T. (T.L.)*, 2003 CarswellOnt 9517 (C.A.).

Giving the matter some consideration, Justice Robertson decided that, this being the early stages of the Motion to Change, the file should be sealed. Once all the materials were filed, the court would then be in a better position to determine if the sealing order should continue, be varied or discharged. Until then, the father's concern was entirely legitimate.

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