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

Aaron Franks and Michael Zalev

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What You Permit, You Promote - Part 2

Chamberlain v. Chamberlain, 2020 CarswellOnt 12266 (S.C.J.) - Tellier J.

In the October 19, 2020 edition of *TWFL*, we commended Justice Jarvis for not letting the parties in *Ni v. Yan*, 2020 CarswellOnt 14206 (S.C.J.), proceed with a Settlement Conference when they had not complied with their obligations under the *Family Law Rules*. This week, we commend Justice Tellier for ordering costs against one of the parties at a Settlement Conference for failing to comply with his disclosure obligations in *Chamberlain v. Chamberlain*. We hope that this is the start of a trend, and that we will see more judges send a clear message that orders and the *Rules* are not merely suggestions, and that those who do not comply will face meaningful consequences.

The husband in *Chamberlain v. Chamberlain* consented to an order at a Case Conference on June 21, 2019, that required him to produce an expert report about his income for support purposes within 60 days. The parties also scheduled a further Case Conference for September 11, 2019.

The husband subsequently asked the wife to adjourn the September 11th Case Conference because his income report was not yet ready. The wife, however, refused to adjourn the Conference, and advised the husband that she intended to proceed. Instead of bringing a motion for an adjournment or attending the Conference as scheduled, the husband simply chose not to show up. As a result, Justice Tellier ordered him to pay the wife $1,500 in costs, and scheduled a further Case Conference for November 25th. She also gave the husband some additional time to produce his income report.

Unfortunately, the $1,500 costs order was not enough to persuade the husband of the importance of complying with his obligations, because the husband had still not produced an income report or provided all of the necessary disclosure by the next Case Conference on November 25th. The wife asked for an order requiring the husband to pay $3,500 in costs for the Case Conference, but Justice Tellier adjourned the issue of costs to a Settlement Conference in 2020.

While the husband had (finally) produced his income report by the time of the Settlement Conference, he had still not provided all of the necessary disclosure. As a result, the wife asked that the husband be required to pay her $10,000 in costs for the Case Conference in November 2019 and the Settlement Conference.

In granting the wife's request for costs, Justice Tellier found that costs were justified to sanction the husband for his dilatory approach to his disclosure obligations, to deter others from engaging in similar conduct, and to indemnify the wife for the additional costs that she incurred as a result of the husband's failure to comply with his obligations:

> [22] The [husband's] approach to these obligations and this process was counter-productive. The production process has been arduous, costly, and delayed. Delay invariably works contrary to the children's best interests; it keeps the conflict between the parties going. [The husband]'s approach has deprived [the wife] of a timely resolution of all of their family law issues. It has required greater court oversight and resources. A co-operative and organized approach would have promoted efficiencies and reserved resources. Rule 2 demands no less of all parties, their counsel and the court, in the joint enterprise of dealing with cases justly.
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> [25] The purpose of [rule 17(8) of the *Family Law Rules*, which allows a court to order costs for a conference,] is twofold. First, it aims to compensate the party whose progress towards resolution is impeded by the other party's lack of preparedness or compliance with the rules, with an attendant increase in fees. Second, it serves to sanction the non-compliant party and deter others from engaging in the same conduct.

After reviewing the wife's bill of costs, Justice Tellier ultimately ordered the husband to pay $5,700 (plus HST) of the $10,000 in costs that the wife had requested (the conferences had not been a complete waste of time as some progress had been made towards resolving and/or narrowing some of the issues, and not all of the time that the wife had claimed was directly related to them).

While it is rare to see courts order costs for conferences, we hope to see more of these types of decisions. Far too many conferences end with little to no progress being made because one or both of the parties treated the conferencing process, as Justice McGee put it in *Bourgeois v. Bourgeois* (2011), 94 R.F.L. (6th) 240 (Ont. S.C.J.), "merely a series of assisted courthouse negotiation" instead of the "significant judicial event" that it is. And far too many conferences end with one or both parties not understanding why they spent thousands of dollars on legal fees on a mandatory court attendance where little meaningful progress was made. This needs to stop.

In our experience, as long as both parties are prepared to comply with their disclosure obligations, most financial issues can be resolved without the need for litigation at all. But if a party is still refusing to cooperate after being served with an originating process, and the initial Case Conference has to be wasted on getting him or her to do the things that s/he was already supposed to have done, there is really no good reason why costs should not be ordered at that point as a matter of course.

By ensuring that parties know that they will face immediate financial consequences if they are not properly prepared for court, we can maximize the chances that each conference will be productive. We can also avoid wasting judicial and court resources that were already stretched thin before COVID-19, and that will eventually have to try to clear out the enormous backlog that has built up over the last eight months as a result of the pandemic.

Abuse Of Process: If at First You Don't Succeed, Please Don't Try Again

Hicks v. Gazley, 2020 CarswellAlta 1683 (Q.B.) - Lema J.

In the November 2, 2020 edition of *TWFL*, we wrote about Justice Lema's decision to dismiss the husband's request to sever the divorce from the corollary relief because the husband had not complied with his disclosure obligations.

Well, the husband was not prepared to give up that easily. Almost immediately after Justice Lema dismissed the husband's motion, the husband brought another motion for the exact same relief.

The husband tried to introduce additional evidence to show that he had, in fact, "sufficiently completed" his disclosure by the time of the initial motion, and explained that the one thing that had not been provided by the time of the motion was provided after it was dismissed. The wife disagreed, and claimed that significant disclosure was still outstanding.

Justice Lema found that he did not need to decide who was right, as it would be an abuse of process to allow the husband to proceed with a second motion to sever the divorce based solely on additional evidence that could have been produced on the prior motion:

> [10] The reason is that **a party is expected to present all available evidence and make all available arguments at an application**, versus not doing so and seeking either that the judgment be revised in light of submitted-post-application evidence or a re-do of the application - that is, put one's "best foot forward" at the application. As Justice Binnie stated for the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) (para 18):
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> > The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best food forward to establish the truth of their allegations when first called upon to do so. **A litigant, to use the vernacular, is only entitled to one bite at the cherry. . . . An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided**.
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> [11] The Supreme Court of Canada earlier discussed the problems posed by re-litigation and the exceptions (where re-litigation may be permitted), in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) (at paras 35, 40, and 51-53):
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> > **Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" . . . and as "oppressive treatment"** [citations omitted]
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> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
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> [14] From these cases, I glean that **it can be an abuse of process to re-litigate an issue decided in a previous hearing where the party seeking to re-litigate had an adequate opportunity to put forward the party's evidence and arguments and where, at the proposed re-litigation, that party would rely exclusively on evidence known and available to the party before the first hearing**.
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> [15] In the present case, the evidence of the state of the undertakings which [the husband] wishes to bring forward now was known and available to him before the now-decided application. It was not in evidence there because [the husband] decided not to introduce it.
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> [18] As a result, I find that **a re-hearing for the same relief rejected earlier by me and based only on evidence existing and available before the last application would be an abuse of the Court's process** within the meaning of the above re-litigation cases. [emphasis added]

To this we would add that, in addition to being an abuse of process, the husband's motion was likely also *res judicata*, which is another doctrine that courts apply to prevent parties from re-litigating matters that have already been decided. Although *res judicata* usually arises where a party has started a new proceeding for the exact same relief that was already dealt with on a final basis in a prior proceeding, it can also apply to interlocutory issues like the husband's request to sever the divorce in *Hicks*. As Justice Macdonald noted in *Ward v. Dana G. Colson Management Ltd.*, 1994 CarswellOnt 496 (Gen. Div.), which was cited with approval by the Ontario Court of Appeal in *Earley-Kendall v. Sirard*, 2007 CarswellOnt 4088 (C.A.):

> [12] . . . **A decision in an interlocutory application is binding on the parties, at least with respect to other proceedings in the same action**. I agree with the submission that the general principle is that **it is not open for the court, in a case of the same question arising between the same parties, to review a previous decision not open to appeal**. If the decision was wrong, it ought to have been appealed within the appropriate time-frames. **This principle is not affected by the fact that the first decision was pronounced in the course of the same action**. See *Diamond v. Western Realty Co.*, [1924] S.C.R. 308. [emphasis added]

Of course, this result does beg one question: How is this fellow going to get a divorce?

Is it "shocking" that this was "shocking"?

Jayawickrema v. Jayawickrema, 2020 CarswellOnt 11421 (S.C.J.) - Jarvis J.

In the May 11, 2020 edition of *TWFL*, we commented on the case of *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.). In that case, Justice Jarvis released reasons in which the wife was found to owe the husband $66,200 as an equalization payment. However, although the evidentiary part of the trial was completed on November 28, 2019, and delivery of written submissions was completed by January 15, 2020, between receipt of those submissions and the release of the judgment, the world was introduced to COVID-19.

As noted in the first judgment, Justice Jarvis was not prepared to order that the equalization payment be made without hearing further evidence from the parties on the issue of unconscionability. His Honour specifically directed the parties to consider the impact of the Ontario Court of Appeal decision in *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.), in which the Court of Appeal allowed a reduction in equalization on account of post-separation reductions in values. Also at play was the fact of a relatively short (3-year) marriage.

In this decision, Justice Jarvis considered the potential claim for an unequal division of net family property.

It is really quite rare for a court to award an unequal division of property on account of the very high threshold of "unconscionability" required in s. 5(6) of the Ontario *Family Law Act*. It means more than just "unfair" or even "very unfair". It is even more than "harsh" or "unjust" or inequitable. It must shock the conscience of the court: *Scheel v. Henkelman* (2001), 11 R.F.L. (5th) 376 (Ont. C.A.); *Ward v. Ward* (2012), 26 R.F.L. (7th) 358 (Ont. C.A.); *Symmons v. Symmons* (2012), 29 R.F.L. (7th) 187 (Ont. C.A.). No matter the descriptor, it is meant to be a very high standard.

Therefore, the successful claim for unequal division of net family property in *Jayawickrema* makes it worthy of review.

The wife suggested that no equalization payment should be ordered. She suggested that an equalization would be unconscionable for several reasons:

> (a) The short duration of the marriage;
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> (b) The economic contributions she made to the husband and to the household;
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> (c) The absence of any contribution by either party to the market driven increase in value of her property in Sri Lanka, which was primarily responsible for the equalization payment of $66,200; and

(d) The impact of COVID-19 on the value of her assets.

The wife suggested that her net worth was $726,127 when the parties separated and only $374,051 on May 21, 2020. However, about $340,000 of the decrease in the wife's net worth was attributable to a mortgage on the wife's commercial unit that she purchased after separation.

Under s. 5(6) of the *Family Law Act*, the court may award a spouse an amount that is more or less than half the difference between the net family properties of the parties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to:

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(c) the part of a spouse's net family property that consists of gifts made by the other spouse;

(d) a spouse's intentional or reckless depletion of his or her net family property;

(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property. [emphasis added]

Only sections 5(6) (e) and (h) were relevant to this matter.

Cohabitation less than five years: s. 5(6)(e)

To avail of s. 5(6)(e), the wife would have to show:

(a) That the parties cohabited for less than five years;

(b) That the presumptive amount to be paid is disproportionately large in relation to the period of cohabitation; and

(c) That equalizing the net family property would be unconscionable.

As noted, the parties lived together for three years. That was not in dispute, and there was no suggestion that there was pre-marriage cohabitation to extend the period.

There is no mathematical formula to determine whether an equalization payment is "disproportionately large" in cases where parties have cohabited for less than five years. Rather, as the Ontario Court of Appeal noted in *Gomez v. McHale* (2016), 79 R.F.L. (7th) 305 (Ont. C.A.), the trial judge has to look carefully at the backgrounds of both parties, determine whether an equal division would be "unconscionable", and fix what s/he views as a "reasonable figure."

Accordingly, what Justice Jarvis had to decide was whether an equalization payment of $66,200 for *these particular parties* would shock the conscience of the court given that they only cohabited for three years. Justice Jarvis found that it would, for four reasons:

(a) Most of the value of the wife's net family property related to the market-value-increase in her properties in Sri Lanka, and was not remotely due to the effort of either party. Almost 70 percent of the wife's net family property was a result of passive increase in market value.

(b) The increase in each party's net worth on the valuation date ($179,331 for the wife's realty and $110,400 for the shares the husband received as a gift) had nothing to do with childcare responsibilities, household management, or financial provision inherent in the parties' marital relationship, the foundational purposes for equalization as set out in s. 5(7) of the *Act*. That is, neither increase had anything to do with the marital relationship.

(c) The wife was a recent immigrant and, according to His Honour, the sacrifices made by a party coming to Canada were a relevant consideration. Indeed, in *Karkulowski v. Karkulowski*, 2015 CarswellOnt 2321 (S.C.J.), the Court considered a wife's immigration from Poland in circumstances where the period of cohabitation was two years. While the husband claimed that it would be unconscionable to equalize the parties' net family properties, in denying that claim, the court observed that the amount of the payment was not disproportionately large given the wife's physical contributions to the parties' relationship. We note, however, that *Karkulowski* was a claim *for* an unequal division *against* an immigrant spouse and *Jayawickrema* was a claim *for* unequal division *by* an immigrant spouse. Those situations may very well not be analogous.

(d) None of the wife's contributions to the husband were monetized. The husband claimed that he earned nothing, was unable to support her and their child and even pursued spousal support from the wife.

Any other property-related circumstance: s. 5(6)(h)

Justice Jarvis considered *Serra*, where the Ontario Court of Appeal looked at whether a significant market-driven decline in the value of a party's most significant asset subject to equalization was a proper basis to apply s. 5(6)(h) of the *Family Law Act*. In concluding that equalizing the parties' net family properties would be unconscionable in that case, the Court took into consideration not only the fact that the equalization payment exceeded Mr. Serra's total net worth post-separation, but also his lack of control over market conditions, the impact of an asset-preservation order that Ms. Serra had obtained, and Mr. Serra's need to continue funding his support obligations. The Court also considered Ms. Serra's financial circumstances and commented that the trial judge found that she had been very well compensated for her contributions to the business during the marriage.

Justice Jarvis also referred to *Kean v. Clausi* (2010), 90 R.F.L. (6th) 186 (Ont. S.C.J.), where the Court allowed the wife's claim for unequal division because the husband had poorly managed the wife's investment accounts post-separation such that they very significantly decreased in value.

Justice Jarvis correctly noted, however, the key difference between *Serra* and *Kean* on the one hand and *Jayawickrema* on the other. In the former two cases, the impact of the market-driven factors occurred after separation but prior to trial and were, therefore, tested by cross-examination. Here, the decrease in market value took place after trial, and at a time when both the temporary and long-term consequences of COVID-19 could not be predicted or tested. This is a very important distinction. Ultimately, Justice Jarvis was not convinced that the wife had met the "exceptionally high" evidentiary onus for unconscionability required by s. 5(6)(h).

The Result

In *Serra*, the Court held that once the "unconscionability" threshold was crossed, the Court should exercise its discretion fairly and equitably according to the circumstances of the case.

In some cases, where s. 5(6)(e) has been found to apply, courts have applied a mathematical formula, prorating the presumptive equalization payment to the period of cohabitation less than five years. See, for example: *Sarcino v. Sarcino*, 1999 CarswellOnt 819 (Gen. Div.); *Burden v. Burden*, 2014 CarswellOnt 15467 (S.C.J.); *Stergiopoulos v. Von Biehler* (2014), 52 R.F.L. (7th) 470 (Ont. S.C.J.); *Kucera v. Kucera* (2005), 16 R.F.L. (6th) 250 (Ont. S.C.J.). There is something to the notion of a formula. The

results would be predictable, and perhaps the formulaic result could be displaced with the right facts and circumstances. But an initial presumption of proration would certainly reduce litigation save for outlier cases with extreme facts. However, to be clear, in *Gomez v. McHale*, the Court of Appeal suggested that while such a formula "can be of assistance in some cases", it should not displace a broader consideration of all the relevant factors.

Justice Jarvis noted that a common theme in this case had been the family-driven nature of the assets bought by each of the party's parents, and the fact that their respective increases in net worth during cohabitation had nothing to do with their marital relationship. Had the wife never owned realty in Sri Lanka, or had it not significantly appreciated in value during the parties' cohabitation, she would have owed the husband an equalization payment of only $31,731.97, mostly as a result of the increase in her savings.

Justice Jarvis was also clearly bothered by the fact of the wife's uncompensated contributions to the company owned by the husband's family.

Ultimately, while recognizing that he was not bound to apply a mathematical formula, Justice Jarvis found that using a proportional formula would be helpful in this particular case. He determined it would be "fair and equitable" for the wife to make an equalization payment to the husband in the amount of $9,500. This figure was based on the actual period of cohabitation (three years) as a percentage of the statutory 5-year period (that is, 36/60 = 60 percent), but divided in half to recognize the wife's contributions to the husband's family's company.

While we understand - and endorse - the mathematical formula, we have to think that the wife's contributions to the husband's family's company were not properly addressed in a claim for unequal division, but in a claim for unjust enrichment, *quantum meruit*, or even spousal support. We are also not convinced that an equalization payment of $66,200 resulting from a 3-year marriage where the wife's net family property was almost $260,000 and the husband's was almost $126,000 meets the threshold of "unconscionability." Does that "shock the conscience of the Court?" In *Ward*, the Court of Appeal cautioned that the threshold of "unconscionable" should not be "diluted" to mean inequitable. In any case, here in combination with other considerations, it clearly shocked Justice Jarvis, and that is really all that matters.

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