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

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Holiday Greetings

Wow. Well ***that*** was quite a year. May there never be another year like 2020 anytime soon.

But despite all of its challenges, 2020 marked an important turning point for our justice system. People have literally been speaking about "court modernization" for *years*. Plato certainly had it right in saying that "necessity is the mother of invention." It took a tiny virus to actually force the issue and make us start taking advantage of modern technologies that, if used properly, will be able to help family courts across Canada deliver faster, less expensive, and more effective and efficient dispute resolution. Virtual hearings, electronic filing, email service, and all of the other technological advances that ought to have been incorporated into the system many years ago, are finally here. And, we suspect they will be here to stay even after things normalize - whatever that means when it comes to family law.

The pandemic has also shown us how hardworking and dedicated our judges and court staff are. Through extraordinary efforts, they managed to keep the lights on during the most difficult year we faced in generations. They helped to ensure that the rule of law remained a bedrock principle of Canadian family law justice. We are grateful.

We want to thank John Bossy, our editor at Westlaw, and Kristy Warren, our associate, for their work and dedication in helping us get *TWFL* ready and online each week. We would also like to thank those that have taken time to offer their compliments and constructive criticism, and to send us hot-off-the-presses cases.

We also want express our gratitude to Philip Epstein. Phil, you are a mensch (for the Yiddish unindoctrinated: a person of integrity and character). We are forever grateful to you for your mentorship and wisdom, and for trusting us with the responsibility of trying to meet the impossibly high standards that you set during the 14 years that you authored *TWFL*.

We'll be off for the holidays for the next two weeks, but will be back with the next edition of *TWFL* on January 11th.

Merry Christmas, Happy Chanukah, Happy Kwanza, Happy Holidays - and a happy, ***healthy*** 2021 to all.

Let's be careful out there.

Aaron and Michael

P.S. We're not using our fax machine anymore. Anyone want it?

Where Have All the Children Gone? To Seek Counsel!

Justice for Children and Youth v. J.G. (2020), 43 R.F.L. (8th) 46 (Ont. Div. Ct.) - Corbett, Doyle, and Favreau JJ.

The question of whether and when a child can have his or her own counsel in a family law proceeding has been discussed in *TWFL* a number of times (see for example Philip Epstein's discussions about *M. (C.M.) v. C. (D.G.)* and *F. (V.) v. Halton Children's Aid Society* in the June 8, 2015 and May 2, 2016 editions of *TWFL*). It has been a vexing and polarizing issue.

But until the Divisional Court released its recent decision in the fascinating case of *Justice for Children and Youth v. J.G.*, we had not seen a case where the Court had to consider whether and when a Court can actually *prohibit* a child from getting advice from a particular lawyer.

The Initial Trial

The parents in *Justice for Children and Youth v. J.G.* were married in 2000 and had two children together, M.G. and A.G. They separated in 2010. After years of litigation, they endured a 12-day trial in 2015 before Justice Fryer. Her Honour's decision is available in full at *G. (J.M.) v. G. (L.D.)*, 2016 CarswellOnt 7799 (Ont. S.C.J.), but in summary:

- The father alleged that the mother had alienated the children, and asked Justice Fryer to make an order prohibiting the mother from having any contact with the children for 90 days while the children received therapeutic support from Dr. Warshak's Family Bridges program (for further information about the Family Bridges program, see Justice Trimble's decision in *X v. Y* (2016), 88 R.F.L. (7th) 430 (Ont. S.C.J.), and Philip Epstein's discussion of that decision in the September 26, 2016 edition of *TWFL*).

- The mother denied having alienated the children and asked the Court to allow her to move to Arizona with the children, as that was where her new husband lived.

- Although Justice Fryer concluded there was substantial evidence to suggest the mother had alienated the children, she declined to grant the father's request for a "no contact" Order and to enroll the children in Family Bridges. She was concerned that the negative impact of removing the children from the mother at that point would outweigh the benefits of the program, particularly since no expert evidence had been adduced about this potentially significant issue.

- That being said, Justice Fryer also denied the mother's request to move the children to Arizona as allowing the move would only exacerbate her refusal to facilitate a relationship between the children and the father.

In the end, Justice Fryer awarded the parties joint custody, made a multi-directional Order that tried to cover all of the issues that might potentially arise in the future, ordered a review after six months, and seized herself of the matter for the longer of one year or until the review was completed. She also wrote a message to the children to explain her role and her decision, and ordered the parties to provide a copy of it to the children.

Post Trial Events

Unfortunately, as so often happens in these incredibly difficult cases, and despite the parents having spent a small fortune on the trial, the conflict continued unabated (the costs decision, which Philip Epstein discussed in the April 10, 2017 edition of *TWFL*, indicates that the parties spent more than $800,000 between them on legal fees alone).

In November 2017, A.G. alleged that the father had engaged in inappropriate sexual conduct with him. The Children and Family Services of York Region (the "Society") was unable to verify the allegation (it was inconclusive), and it placed the children in the mother's temporary care under its supervision. The Society also required the father and the children to engage in reunification therapy.

Litigation ensued between the Society and the parents, and multiple judges "found that the mother was not cooperating with the access arrangements and was influencing the children against having a relationship with their father." The Court also declined to appoint the Office of the Children's Lawyer (the "OCL") to represent A.G., and concluded that as "this was a case of parental alienation, appointing the OCL to represent A.G. would destabilize the reunification therapy and negatively empower A.G."

On June 27, 2019, Justice MacPherson ordered that A.G. would initially stay with his paternal aunt and uncle, and would then be placed in the father's care under the Society's supervision.

But A.G., who was 14 years old by the time of Justice MacPherson's Order, would have none of it. In late July 2019, he ran away from his aunt and uncle's home, and refused to tell anyone where he was. Five days after he ran away, A.G. apparently contacted Justice for Children and Youth ("JFCY"), a legal clinic that provides services to low-income children and youth in Toronto and the surrounding area. The lawyer whom A.G. spoke to at JFCY (the "Lawyer") contacted the Society, and arranged for A.G. to return to his aunt and uncle's home.

Upon learning that the Lawyer had spoken to A.G., the father made it very clear to her that he did not want her to have any further contact with A.G.

In September 2019, the mother, father, and the Society consented to an order that gave the father sole custody of A.G. subject to Society supervision, and provided that A.G.'s access with the mother would be at the Society's discretion.

In October 2019, the father learned that the Lawyer was still having contact with A.G., and again demanded that she stop communicating with A.G. immediately.

In December 2019, A.G. ran away again, and refused to return even after a warrant for his apprehension was issued. He contacted the Lawyer, and she advised the father and the Society that she had been in touch with A.G., but that he had instructed her not to disclose his location.

The Father's Motion Against JFCY and the Lawyer

The father brought an emergency motion against JFCY and the Lawyer to compel them to disclose A.G.'s location, and to restrain them from having any further contact with A.G. After the motion was brought, but before it was argued, A.G. agreed to meet with workers for the Society, and then agreed to be placed in a foster home.

On December 20, 2019, the parents and the Lawyer appeared in court to argue the father's motion. In granting the father's motion and prohibiting JFCY and the lawyer from having contact with A.G. on an interim interim basis, the motion judge explained that:

> **The father argues that [the Lawyer] and Justice for Children and Youth have operated either unwittingly or purposefully, to empower AG and to undermine the efforts of the court to redress what is alleged to have been, and may continue to be, alienating behaviour by the Respondent Mother and the extended family**. The evidence is that there was no support from the Respondent Mother to be supportive of A.G.'s relationship with the father and his extended family. On two prior occasions this court has declined to appoint OCL to act for AG. [The Lawyer] and JCF reference a retainer by AG, the execution of which is in my view, problematic not only in light of those orders but the blank (illegible) of any steps being taken by JCF before the Respondent Father's motion to seek legal representation. **I am of the view that while JCF provides valuable assistance to children and youth, it has to date, and in this case, has been operating outside of the court's purview and in a fashion that is undermining years of court intervention particularly where reunification is the goal**.
>
> **It is not for AG to dictate to the court the terms on which he will return to his father's care or where else he should reside**. [The Society worker] described the father's conduct as empathetic and responsive to AG's needs. He has no concerns about, and did not hear from AG, about fearing his father or any kind of abuse. **AG's comments about assertions about "crazy" things between him and his father and not "taking it anymore" as reasons for leaving his father's residence give rise to impressions of a child impacted by alienating behaviour, reacting to discipline and expected behaviours**

> **that he does not accept and whose recourse is running away and contacting JCF. This is where, in my view, JCF is inappropriately empowering AG's recalcitrant behaviour**.
>
> AG should be returned to the father's care but that should be deferred for a short while to permit the society to formulate a plan to effect that return. AG should be made aware by [the Society worker] or the society that issues involving his representation by a lawyer and future contact with his mother and her extended family will be a direct function of his returning to his father's care and continuing to reside there until further order of this court. Any future contact with the maternal side of the family will be subject to therapeutic recommendation of Mr. Berkley. AG must understand that he must earn the confidence of the court in the decisions he is making. [emphasis added]

The Appeal

JFCY and the Lawyer appealed the motion judge's interim interim Order to the Divisional Court. In its decision, the Divisional Court started by summarizing the legal principles that apply in these types of cases, including that:

> 1. As Justice Binnie noted in the Supreme Court of Canada's decision in *Schaeffer v. Woods*, 2013 CarswellOnt 17584 (S.C.C.), in Canada, "[e]veryone is entitled to seek the advice of a lawyer."
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> 2. "There is no common law principle or legislative requirement that children are to obtain their parents' permission or an order of the court before they are entitled to obtain advice from a lawyer."
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> 3. As the Ontario Court of Appeal noted in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 CarswellOnt 9575 (C.A.), "childhood is not a 'legal disability' disentitling children from the right to retain and instruct counsel."
>
> 4. "Children are entitled to seek legal advice without permission from their parents or the court."
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> 5. A judge clearly has discretion to decide whether to grant a child standing and/or legal representation in the context of a court proceeding. However, there are significant differences between denying a child standing and/or legal representation in a proceeding, and denying a child the ability to obtain legal advice.

In granting the appeal and setting aside the motion judge's Order, the Divisional Court ultimately concluded that the motion judge had committed a number of legal errors, including:

> 1. There was no evidence to support the motion judge's finding that "JFCY had served to undermine the efforts of the courts over a period of years with the child and his family."
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> 2. The motion judge had conflated A.G.'s right to obtain legal advice with his right to seek standing and/or representation in a proceeding.
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> 3. The motion judge had denied the Lawyer an opportunity to make submissions on the motion.

That being said, while the Divisional Court set aside the motion judge's Order, it confirmed that a court can, in certain circumstances, restrain a particular lawyer from communicating with a child, but that it could not envision a situation where it would be appropriate to simply prohibit a child from getting any legal advice at all:

> [64] **While we agree that the court could intervene in a particular solicitor-client relationship between a lawyer and a child, we have difficulty imagining a case where the court would make an order that entirely precluded a child from seeking and obtaining legal advice from any lawyer**. It certainly may be appropriate for the court to intervene in a parental alienation case where the lawyer is closely allied with one parent. However, **in such cases, the court would ordinarily facilitate an arrangement for the child to obtain legal advice elsewhere, and certainly would not prohibit the child from getting legal advice altogether**.

> [65] **Where a child wishes to receive legal advice, many factors can come into play in identifying and arranging for that counsel**. We do not find it necessary to canvass the spectrum of approaches that are available. However, **where, as here, a child has independently sought out the assistance of a legal clinic that specializes in dealing with children in crisis, it is hard to imagine that there would be many circumstances, if any, that would justify terminating that relationship**. [emphasis added]

To this we would add that lawyers must be incredibly careful when deciding whether to accept a private retainer from a child who is the subject matter of an ongoing family law case, especially without the court's approval or the custodial parent's knowledge and consent. While court approval or parental consent may not be *required* before giving legal advice to a child, doing so may not be a good idea, and a lawyer in this type of situation must take extra care to ensure that he or she does not go offside his or her professional and ethical obligations and is not being used as an instrument of one of the parties.

This then gets us into a debate about whether the "tainted" wishes of a child are still the wishes of a child. On the one hand, the stated wishes of an alientated child may not be their own: *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.). On the other, the wishes of an alienated child may be warped and misconceived, but they are nonetheless real: *L. (N.) v. M. (R.R.)* (2016), 88 R.F.L. (7th) 19 (Ont. C.A.). And this is one of the reasons alienation cases are so incredibly difficult.

If one were to *assume* alienation in this case, something is not right - and there is something wrong with the idea of a child seeking independent representation (perhaps not independent advice), and/or being directed to independent representation by a parent with less than altruistic intentions. However, if one were to assume no alienation, there is certainly nothing wrong with a child getting advice or seeking independent representation; indeed, this is one of the functions of the Children's Lawyer.

We understand that the father has sought leave to appeal the Divisional Court's decision to the Court of Appeal, and will keep you apprised of any further developments in this fascinating yet tragic saga.

In the meantime, this case serves as yet another reminder that the legal system cannot always provide an effective remedy when dealing with parent-child contact problems, particularly when they involve older children who can "vote with their feet." So when dealing with these cases, it is a good idea to keep in mind what Philip Epstein had to say in his discussion of *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.), another high conflict case involving serious parent-child contact problems, in the October 7, 2019 edition of *TWFL*:

> **The road to hell is paved with good intentions**. There can be no doubt there was alienation here and alienation of a severe kind. **There can be no doubt as well and unless the trial judge intervened, there was no hope whatsoever of the relationship between the child and the father being repaired**. The mother would not engage in therapy and she had no insight into the damage she was causing her child. Accordingly, if one was to seek any remedy, the only remedy possible was custody reversal and therapeutic intervention. **However, the child was 14 years old and had long formed views about his relationship with his father and wanted none of it**. He has demonstrated that he was prepared to wilfully disobey the court order and thwart all attempts by the court to impose therapeutic intervention and a relationship with his father. **If the child was not severely damaged before all of this happened, there can be no doubt that he is severely damaged now**. The judge was convinced that to a very large degree, the child was the author of his own misfortunate in that he simply was choosing not to cooperate and obey the court orders. It is easy to be a hind sight quarterback. **It might have been best in the long run to recognize that given the child's age, it was too late to repair the relationship** and that a custody reversal was going to compound the problem. That now seems to be the case. It is also easy to understand why a trial judge would go to such lengths to try to "fix the problem". **Is 14 years too late to try to repair a severe alienation case? Is custody reversal too extreme for a 14 year old? Does the rule of law have any role to play in these impossible cases?** These are all fascinating and important questions for counsel and health professionals to wrestle with. [emphasis added]

While there may not be a "right" answer to these difficult questions, when dealing with these types of cases it is important to at least try to grapple with them, and to always assess whether things have reached the point that the medicine might be worse than the disease.

I'm Not So Average After All!!!

Phillips v. Saunders, 2020 CarswellBC 2385 (C.A.) - Newbury, MacKenzie and Willcock JJ.A.

It remains a common misconception that the appropriate method of determining income under the *Child Support Guidelines* is to use the average of the last few years. This appeal arose from a case where the trial judge did just that - averaged the payor's last four years of income for the purposes of calculating a lump sum support award - but in circumstances where the payor's income had been steadily *decreasing* over that period.

Both parties were doctors. They were in a common law relationship for 22 years. They separated on May 24, 2014. At the end of a six-day trial, the trial judge found that the recipient was entitled to lump sum compensatory support of $110,000 (the equivalent of monthly support of $5,600 for 36 months after discounting for tax).

In arriving at the lump sum amount, the trial judge calculated the payor's income for support purposes based on the average of his income for the four previous years (pursuant to s. 17 of the *Guidelines*). She did so despite also finding that the payor's income had steadily declined, and was expected to continue to decline, as a result of his advancing age and a medical condition.

The payor appealed.

The recipient (the respondent on the appeal) argued that the trial judge had not, in fact, averaged the payor's income under s. 17 of the *Guidelines*, but had imputed income to him under s. 19. She also argued that the decision to impute income had not been based solely on a finding that his income was declining, but also on the trial judge's conclusion that the sharp decrease in the payor's income may have been caused by his general opposition to the idea of paying spousal support.

The payor's income, both personally and through his medical corporation, for the years in question was $364,399 in 2014; $339,594 in 2015, and $272,023 in 2016. He estimated his 2017 income would be $187,275, and argued that was the amount that should be used as his income for support purposes.

The recipient argued that the payor had purposefully reduced his income by taking fewer shifts at work. In addressing that allegation, the trial judge stated as follows:

> [90] As to his reduction in shifts, I am not satisfied he has done so for any other reason than the expected and natural slowing down of his career commensurate with his age. I find his testimony credible when he described how it is getting harder for him to keep up the same pace he did as a younger man, especially with his most recent medical complications. No adjustment to his income is warranted for his reduced capacity to work.

This, of course, was an important finding.

In then considering the payor's income for support purposes, the trial judge used what she referred to as the "standard approach" - averaging:

> [97] The [payor] relied on tables prepared by counsel, which I presume are properly based on his income tax returns. His average income for the same period is $325,338. However, he submits only his anticipated 2017 earnings of $187,275 should be used. **While I have accepted [the payor's] legitimate reasons to slow down his practice and change his method of compensation**, there is a stark reduction in his income between 2016 and his estimated 2017 income ($272,023 and $187,275). **Given my findings above that [the payor's] opposition to the notion of spousal support (see above para. 45), I am concerned whether this reduction may have been motivated to some degree by his animus about spousal support**.

> [98] **However, I have also accepted that it is reasonable for him to be slowing down**. His income has declined from 2014 to 2017, although not at a steady rate. His 2015 income was about 6.8% lower than his income for 2014; his 2016 income was about 20% lower than his income for 2015. His estimate for 2017, however, represents about 31% decrease from his 2016 income. I do not find that the evidence supported that he would earn about 1/3 less in 2017, than in 2016, even taking into account all the factors I have mentioned here.
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> [99] For that reason, rather than rely on his estimate, I prefer to use the figure suggested by [the recipient]: $200,000. Using that estimate, and averaging over four years, comes to about $294,000 annual income.
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> . . . . .
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> [101] That recognizes a 23-year-long spousal relationship with large differences in the parties' gross income, **but also my acceptance that [the payor] is entitled to a decreased trajectory of earnings since separation**, and both of them are within a decade of a reasonable retirement age. [emphasis added]

Based on the trial judge's finding that the payor's income for support purposes was $294,000 and the recipient having an average income from 2014 to 2016 of $131,616, the trial judge ordered the payor to pay support of $5,600 a month based on the mid-range of the SSAGs.

Two things to note: (1) The bolded portions in paragraphs 97, 98, and 101 above contradict each other; and (2) it is clear that the award was meant to be *prospective*. That is, the payor's historic income was not being considered for the purposes of paying a retroactive award. That may have called for different considerations.

Subsection 17(1) of the *Guidelines* provides as follows:

> **Pattern of income**
>
> 17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court ***may*** have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. [emphasis added]

Section 17, as it currently reads, does not require averaging. In fact, it does not require anything other than a "fair and reasonable" determination of income given any historic patterns or fluctuations.

Those that are slightly "less young" may remember that the prior incarnation of section 17 (changed to its current form in 2004) actually called for using the most recent year of income in the case of an increasing or decreasing income trend, and for the averaging of the prior three years of income in the absence of any such trend. Clearly, with the amendments in 2004, Parliament specifically disposed of mandated averaging.

Therefore, the suggestion by the trial judge that averaging was the "standard method" of income determination was clearly incorrect.

As noted by the B.C. Court of appeal in *Harras v. Lhotka* (2016), 83 R.F.L. (7th) 272 (B.C. C.A.):

> [24] While s.17 allows the court to examine income over the previous three years, there is nothing in the language of the section that *requires* the use of averaging in setting income. This makes sense; accepting that one of the goals of the *Guidelines* is the fair determination of the amount available to pay child support, fairness is unlikely to be achieved by the mechanical application of averaging. The remarks of the Alberta Court of Appeal in *Ewing v. Ewing*, 2009 ABCA 227 (Alta. C.A.) at paras. 37-38 on this point are apposite:

> . . . But we would point out, for future cases, that section 17 does not suggest that the way to establish fair income is to average. It merely directs the court to set a fair and reasonable amount taking into consideration the past three years' income and any patterns of income, fluctuations in income and non-recurring gains. The court has the discretion to elect the fairest method, and that could be done by averaging the three years prior to the gain, or a court could remove part, or all, of the non-recurring gains, or take whatever steps it determines are appropriate to arrive at an income figure that is fair for the purposes of support.
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> . . . although setting a fair income is highly discretionary, there should be a logical basis for the method chosen and averaging will not always be appropriate.

The law has essentially settled such that "s. 17 averaging" is appropriate where there are large annual fluctuations in income (for example, *Dornik v. Dornik* (1999), 1 R.F.L. (5th) 37 (B.C. C.A.); *Cornelissen v. Cornelissen* (2003), 46 R.F.L. (5th) 366 (B.C. C.A.)) and inappropriate where there is evidence of consistently declining or consistently increasing income (for example, *Jakob v. Jakob* (2010), 80 R.F.L. (6th) 264 (B.C. C.A.)). See also *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.)).

This makes sense. All else being equal, to average in the case of a clear trend is to ignore reality. To paraphrase the Ontario Court of Appeal in *Mason*, while the *Guidelines* may rely on the more recent past to predict the near future, they do not mandate averaging as a default methodology. There is just no point in averaging when it is clear that current income will bear no resemblance to past income - in the case of new employment, illness or disability, for example, as the idea is that support be based on *current* income.

As a result, the Court of Appeal quite properly determined that the trial judge erred in her determination of income. There was no basis for "imputing" income to the payor for the three years following the trial at levels above the level imputed for 2017. Accepting that the payor had legitimate reasons to "slow down" and that he was "entitled to a decreased trajectory of earnings" - to then set a level of prospective income above the amount he was likely to earn based on averaging was an error. Having imputed income of only $200,000 to the payor for 2017, it was an error to then impute annual income of $294,000 to him in 2018, 2019, and 2020.

As a result, the appeal was allowed, and the Court of Appeal substituted a lump sum award for spousal support of $46,310 (an amount equivalent to 36 months at the mid range of the SSAGs based on the payor's income of $200,000 and the recipient's income of $131,616 after discounting for tax).

A Word from the Ontario Court of Appeal on Striking Pleadings for Non-Disclosure: "Yes"

Sparr v. Downing, 2020 CarswellOnt 18224 (C.A.) - van Rensburg, Benotto, and Thorburn JJ.A.

This decision is not long, and it doesn't make new law. It does, however, show that in these days of scarce judicial resources, courts are becoming less-and-less tolerant of litigants who do not follow Orders, and more-and-more prepared to see those litigants lose the right to participate.

The Appellant's pleadings were struck for failure to comply with financial disclosure orders. He appealed on the basis that the remedy was excessive and because, in his view, he had provided "sufficient" disclosure.

The only issue in the case was the appropriate amount of child support.

Since 2014, four different judges had made six different orders that required the Appellant to produce specific financial documentation. He did not do so. He had breached the orders; he had been warned; he had been given "one last chance" - and that was that. Bye-bye pleadings.

If financial disclosure is one of the most important obligations - an obligation that should be automatic - then this remedy is not at all excessive. In fact, *six* previous chances is probably *three* previous chances too many. And the Court of Appeal has been upholding the use of Rule 1(8)c of the *Family Law Rules*, O. Reg. 114/99, in similar circumstances: *Roberts v. Roberts*

(2015), 65 R.F.L. (7th) 6 (Ont. C.A.); *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.), leave to appeal refused, 2017 CarswellOnt 1934 (S.C.C.); *Peerenboom v. Peerenboom* (2020), 39 R.F.L. (8th) 11 (Ont. C.A.); *Mackey v. Rerrie*, 2016 CarswellOnt 10853 (C.A.); *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.); and *Martin v. Watts*, 2020 CarswellOnt 8657 (Ont. C.A.).

The Court also made it clear that it is not up to litigants to decide whether disclosure is "sufficient." That is up to the Court.

While striking pleadings should most definitely not be the consequence of first resort, it should not take breaching six previous Orders to get there, either.

As suggested by Justice Myers in *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.):

> [22] A party should not have to endure order after order after order being ignored and breached by the other side. A refusal to disclose one's financial affairs is not just a mis-step in the pre-trial tactical game that deserves a two minute delay of game penalty. Failure to disclose is a breach of the primary objective. Especially if it involves breach of a court order, a party who fails to disclose evinces a determination that he or she does not want to play by the rules. It is time to oblige such parties by assessing a game misconduct to eject them from the proceeding.
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> . . . . .
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> [77] Implementing a culture shift to enhance access to justice by promoting efficiency, affordability, and proportionality requires the court to re-draw the line between limiting drastic measures and applying the law robustly. In my respectful view, a little less judicial diffidence, a little less reluctance to hold accountable those who would deny justice to their former spouses, and a little more protection of abused parties from abusers, might be a better fulfillment of our critical responsibility . . . it is time for the court's words were taken to mean what they say.

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