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FOCUS ON FAMILY LAW

Family Law Rules may still contain a few surprises for the family law Bar

By Philip Epstein

Although the Family Law Rules came into force throughout Ontario in July 2004, for many family law lawyers, they continue to contain surprises. While many of the Family Law Rules mirror the Rules of Civil Procedure, that is not always the case. The recent case of Taylor v. Taylor [2005] O.J. No. 4593 is illustrative of the point and contains two very important and significant lessons for the practising family law Bar.

In Taylor the facts were relatively simple. Justice David Corbett had before him a motion for contempt with respect to a husband who had continually flouted court orders and caused his wife untold stress in the process. Although the husband had breached a number of court orders, the most significant one was an order requiring that he provide security for payment on the balance of an equalization payment by way of a pledge of his RRSP portfolio. This order arose out of Minutes of Settlement entered into by the parties since it is unlikely, for reasons that follow, that a court would have made such an order. Nevertheless, the parties were bound by the order and, when the husband did not comply and, in fact, breached the security provision by dissipating his RRSPs, the wife moved to cite the husband for contempt.

What the wife's counsel, Stanley Jaskot, noticed that many of the rest of us did not is that Rule 31 of the Family Law Rules, which deals with contempt, has fundamental differences from Rule 60.11 of the Rules of Civil Procedure. More specifically, Rule 31(5) of the Family Law Rules permits a court, if it finds a person in contempt to, among other things, order that person to pay an amount to a party as a penalty. An informal survey by me of many family lawyers indicated that the vast majority were unaware of this important change in the law.

Contempt has previously always been about the court acting to preserve the integrity of the legal system. As Dubin, C.J.O. noted in Ontario Attorney General v. Paul Madger Furs Limited, (1992), 10 O.R. (3d) 46 at 53 (C.A.): "We are dealing with a finding of contempt of court. Such a finding transcends the dispute between the parties; it is one that strikes at the very heart of the administration of justice in this country and in this province."

It is that description of contempt and how it is inextricably tied in with the administration of justice that probably led most family lawyers to believe that contempt proceedings could not

be used to have a court order an amount paid to the other party but only to the court itself. Findings of contempt must be made on evidence to which the criminal burden prevails. The order itself must be clear and unequivocal and not open to various interpretations and the party disobeying the order must do so in a deliberate and wilful fashion in order to satisfy the criminal burden of the nature of contempt proceedings (see Coleta v. Coleta [2003], O.J. No. 81 and Children's Aid Society of Ottawa v. D.S. [2001] O.J. No. 4585). Since the punishment for contempt was the court's way of expressing disfavour with the party breaching the order, one would have thought that Justice Corbett's order in Taylor that the husband pay to the wife $25,000 as a penalty for his contempt, was not authorized. In fact, it was as a result of the new rule, that Justice Corbett could depart from the traditional way in which a contempt penalty was handed down.

It is important to note that in Taylor one of the more significant reasons for the ordering of the fine payable to the other party was the finding by Justice Corbett that the breaches were serious, the conduct was malicious and was engaged in for economic reasons and intended to harm the former spouse.

I believe that Taylor v. Taylor is a foreshadowing of many such orders in the future. The nature of family law proceedings often creates an atmosphere in which hostility is engendered and there is a temptation to flout court orders. That is particularly so in areas of access. Often the wronged spouse would not proceed by way of contempt since, having the spouse pay a fine to the court or, alternatively, be jailed for a period of time, simply exacerbated the problem and did nothing to solve it. That is particularly so in access disputes where sending an alienating mother to jail for contempt for violating an access order served to alienate the child even further. Since courts have traditionally refused to tie access to child support, reducing child support as a way of showing the court's disapproval of the custodial parent's conduct, was also not effective. Rule 31(5)(c) may become a more useful remedy. Since the court now has power to order the party in contempt to pay a fine directly to the other party, many of the previous disadvantages arising out of contempt consequences are overcome.

However, the most commonly breached order in family law proceedings is payment of support. Counsel are to be reminded that a payment order cannot be enforced by contempt proceedings brought under the Family Law Rules, since Rules 26(4) and 31(1) are intended to occupy the field of contempt proceedings under the Rules (see Murano v. Murano [2002] O.J. No. 3632 (Ont. C.A.)). This point has been very forcefully made in a recent Court of Appeal decision, (Dickie v. Dickie [2006] O.J. No. 95, Ont. C.A.), in which a decidedly divided court held that an order requiring a husband to provide an irrevocable letter of credit to secure his child and spousal support obligations and provide security for costs cannot be enforced by contempt. In a sharply worded dissent, Justice Laskin takes serious issue with the majority and would have found that such orders in the particular circumstances of the case did amount to orders, the breach of which, could be the subject of contempt proceedings.

There is an ironic aspect to this case that is extremely important for those drafting Separation Agreements or Minutes of Settlement. The husband was in contempt for failing to use his RRSP as security for the balance of the equalization payment. Presumably, that would have meant advising the RRSP holder that it could not disperse or deal with the RRSP without the wife's written consent. This appears to be a common method of securing a future payment when no other security is available but, it is unfortunately, fatally flawed. Section 146 of the Income Tax Act, in particular, 146(2)(c.3ii) makes it clear that an RRSP cannot be pledged, assigned or in anyway alienated as security for any purposes and, certainly cannot be used in the fashion outlined in the Minutes of Settlement between Mr. and Mrs. Taylor. The effect of pledging an RRSP as security in this fashion is to cause an automatic de-registering of the Plan and the income tax consequences that flow therefrom. Accordingly, had the CRA become aware of Mr. Taylor's pledge in the Minutes of Settlement, that would have deregistered the Plan and caused him pay income tax on the entire Plan as though it had been collapsed. The irony is, therefore, if the husband had carried out what he said he would do in the Minutes of Settlement, there would have been no Plan ultimately upon which to base the security. This defence was not raised on the motion.

While I have cautioned elsewhere (Separation Agreement Annotated) about the importance of having security when payments are to be made over time in order to avoid the consequences of the payor's bankruptcy or being involved with the payor's creditors, it is essential that when security is obtained, it is not by use of an RRSP.

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