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Is An Order a Suggestion?: Contempt / Striking Pleadings as Remedies in Family Law and a Post-*Purcaru* Update

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Is An Order a Suggestion?: Contempt / Striking Pleadings as Remedies in Family Law and a Post-*Purcaru* Update

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Introduction

In the words of Justice Quinn in *Gordon v. Starr*², “Why should any litigant be spared from obeying a court order?”.

But ensuring compliance is easier said than done. Often there is much work put into securing an Order which gives the parties and the litigation in general some direction and focus but without teeth, the Order can be meaningless.

The purpose of this paper is to focus on the means of putting teeth into Court Orders, and to provide an overview of the current state of the law as it relates to securing findings of contempt and striking pleadings in family law matters.

A contempt order is meant to force compliance with substantive and procedural orders, and to protect the administration of justice. Given the nature of family law litigation, there is often a compelling and urgent need to force compliance with court orders. However, this goal must be balanced against the restraint that courts should exercise given the severe sanctions consequent to contempt orders. As stated by Justice Veit in *Salloum v. Salloum*³,

“...given the twin objectives of protecting both the best interests of the children and the administration of justice... [c]hildren are better off if their parents are not in jail or paying fines.”

It is important to keep in mind that contempt orders are not meant to punish parties who are not complying with substantive and/or procedural orders. The overarching goal is to force

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² [2007] O.J. No. 3264 (S.C.J.).

³ 1994 CarswellAlta 577 (Alta Q.B.), at para. 20.

compliance with previous court orders. In *Harry v. Singh*⁴, a mother's contempt motion against the grandparents was heard after the grandparents had stopped denying her access. It was the mother's position that the contempt motion should still be heard because "she felt they had to suffer the consequences of [their past] actions". Justice J. W. Bovard held that this did not justify pursuing the motion because "the primary object of contempt in family law is not to punish the parties, but rather, to force them to comply with court orders".

In this paper we address some of the practical issues arising out of the application of contempt orders, including the applicable sections of the *Family Law Rules* and the case law relevant to these issues. We have also summarized recent cases where the court has considered contempt motions in Appendix "A" to this paper. Finally, we discuss under what circumstances the court will strike pleadings, current trends in the case law dealing with striking pleadings, and related practical issues.

What types of orders can be enforced through contempt?

Any court order other than a payment order can be enforced by a contempt order. Subrule 31(1) of the *Family Law Rules* provides:

When Contempt Motion Available

31. (1) An order, other than a payment order, may be enforced by a contempt motion made in the case in which the order was made, even if another penalty is available.

Support orders are therefore not enforceable by contempt orders; this issue has been settled by the Ontario Court of Appeal in *Forrest v. Lacroix Estate*.⁵

However, failure to pay money into court (*Coletta v. Coletta*)⁶ and breach of an order to post a letter of credit (*Dickie v. Dickie*)⁷ are both matters that are enforceable by contempt orders.

What are the procedural requirements that a lawyer seeking a finding of contempt must follow?

Subrules 31(2) and 31(3) of the *Family Law Rules* address service of the notice of contempt

⁴ 2007 CarswellOnt 4627 (Ont. C.J.), at para. 20.

⁵ 2000 CarswellOnt 1887 (Ont. C.A.).

⁶ 2003 CarswellOnt 55 (Ont. S.C.J.)

⁷ 2006 CarswellOnt 118 (Ont. C.A.)

motion and its supporting affidavit:

Notice of Contempt Motion

31. (2) The notice of contempt motion (Form 31) shall be served together with a supporting affidavit, by special service as provided in clause 6(3)(a), unless the court orders otherwise.

Affidavit for Contempt Motion

31. (3) The supporting affidavit may contain statements of information that the person signing the affidavit learned from someone else, but only if the requirements of subrule 14(19) are satisfied.

Subrule 14(19) addresses additional requirements that hearsay statements set out in an affidavit in support of a contempt motion must meet::

Affidavit Based on Other Information

14. (19) The affidavit may also contain information that the person learned from someone else, but only if,

(a) the source of the information is identified by name and the affidavit states that the person signing it believes the information is true; and

(b) in addition, if the motion is a contempt motion under rule 31, the information is not likely to be disputed.

1. Particulars and Grounds of the Alleged Breach Should Be on the Notice of Contempt Motion Form

The factual basis for the breach of the order should be alleged on the notice of contempt motion form itself and great care should be taken to ensure that it contains all the relevant details of the alleged breach. In *Ayotte v. Bishop*⁸, a father brought a motion for contempt on

⁸ 1996 CarswellOnt 3563 (Ont. Gen. Div.), at paras. 9, 11

the basis that his ex-spouse was in breach of an access order. In deciding that the proceeding must fail on "narrow technical grounds", Justice Aston stated:

[...] The two notices of motion in the *Dare Foods* case were found to be deficient because, in the notices themselves, there was no particular allegation as to the date or place of the alleged breach of the court's prior order... a charge must be specific and "concrete facts of a nature to identify the particular act which is charged" are necessary ingredients of the grounds upon which the motion is based. [...]

[...]

I do the same in this case.

Note that Justice Aston found that it made no difference that the particulars of the breach could have been made out by reading the affidavits filed in support of the notice of motion. The particular details of the alleged breach must be complete and must appear on the notice of contempt motion form.

2. Wilful Conduct Must be Alleged

The notice of contempt motion must allege wilful conduct on the part of the party alleged to have committed the breach. In *Sharpley v. Sharpley*,⁹ Justice Maresca considered the definition of 'wilful': The moving party need not show intention on the part of the alleged contemnor to disobey or flout the order. The term "wilful" is meant to exclude only unintentional or accidental acts. The conduct must be intentional, but need not necessarily be motivated by an improper purpose. In that case, the father was found to have wilfully breached a previous order regarding financial disclosure. The father had at least some of the documents in his possession but had failed to produce them repeatedly without giving any reasonable explanation.

3. Proof of the Existence of a Previous Order

Proof of the existence of a previous order is absolutely essential to obtain a contempt order. Subrule 31(1) of the *Family Law Rules* (see above) addresses when a contempt motion is available and specifically requires a previous order to be enforced by the contempt motion. See,

⁹ 2005 CarswellOnt 7763 (Ont. C.J.), at paras. 8, 10.

for example, *Children's Aid Society of Ottawa v. S. (D.)*¹⁰, where a contempt motion was dismissed because the supervision order in question had expired.

4. Proof of Prior Service

When seeking a contempt order, it is preferable to have clear proof of service of the order alleged to have been breached and of the contempt motion. Traditionally, courts have rigidly held that proof of service is required: for example, see *Vargas v. Vargas*.¹¹

Some recent cases have waived this requirement where the court found that it was abundantly clear that the alleged contemnor knew of the order. In *Dickie v. Dickie*,¹² Justice Laskin, in his dissent for the Ontario Court of Appeal (the Supreme Court of Canada allowed an appeal, being "in substantial agreement with the reasons of Laskin J.A."¹³), overlooked the fact that the respondent was not personally served where it was clear that the appellant was aware of the contempt motion. Justice Laskin writes (at para. 121):

[The appellant] was served with notice of the return of the of the motion by fax and courier. It might have been better had he been personally served. However, [the lower court] addressed the question of service, and found that [the appellant] was "well aware of the existence of this motion and its present return date, the nature of the relief sought, and the evidentiary foundation upon which the motion is made." The record amply supports [this] finding.

5. Procedural Fairness

The respondent to a contempt motion is entitled to strict procedural fairness because of the quasi-criminal consequences of a contempt order. This has a number of procedural implications for contempt proceedings, including:

- The finding against the respondent must be proven beyond a reasonable doubt: *Pierre v. Roseau River Tribal Council*,¹⁴
- The respondent is not compellable to testify: *Videotron Ltee c. Industries Microlec produits electroniques inc.*,¹⁵

¹⁰ (2000), 15 O.F.L.R. 108 (Ont. S.C.J.).

¹¹ (1980) O.J. No. 2166 (Ont. U.F.C.)

¹² *Supra* Note 7.

¹³ 2007 CarswellOnt 606 (S.C.C.).

¹⁴ 1993 CarswellNat 231, 1993 CarswellNat 231F (Fed. T.D.).

¹⁵ 1992 CarswellQue 125 (S.C.C.).

- The respondent has the right to demand a trial of the issue with a reasonable time to prepare a defence and call witnesses: *R. v. B.E.S.T. Plating Shoppe Ltd.*¹⁶ and
- Contempt hearings should be kept separate and apart from other civil issues between the parties: *Gribben v. Gribben*.¹⁷

A recent Ontario Court of Appeal decision, *Dickie v. Dickie*,¹⁸ provides an up-to-date summary of the procedural rights to be afforded to the respondent in contempt proceedings. In reasons subsequently accepted on appeal by the Supreme Court of Canada,¹⁹ Laskin J.A. for the Ontario Court of Appeal enumerated the content of an alleged contemnor's right to procedural fairness as follows (at para. 119):

[...] Contempt proceedings, even for breach of a civil order, are quasi-criminal. Thus, [the respondent] had the right to be served with the notice of motion particularizing the allegations of contempt, the right to a hearing, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the right to make full answer and defence, including the right to counsel, the right to cross-examine witnesses against him, and the right to call evidence.

What is the legal test for the finding of contempt? What is the standard of proof?

1. The Three-Pronged Test

In 2006, Justice Blair for the Ontario Court of Appeal set out a three-pronged test for a finding of contempt in *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*.²⁰

- First, the order that was breached must clearly state what should and should not be done;
- Second, the party that disobeyed the order must have done so deliberately and wilfully; and
- Third, the evidence must prove contempt beyond a reasonable doubt.

¹⁶ 1987 CarswellOnt 441 (Ont. C.A.).

¹⁷ 1972 CarswellBC 41 (B.C. S.C.).

¹⁸ Supra Note 7.

¹⁹ Supra Note 13.

²⁰ 2006 CarswellOnt 3772 (Ont. C.A.).

Justice Armstrong for the Ontario Court of Appeal, referring to *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*, considered this test in *Hobbs v. Hobbs*.²¹

The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order.

2. The Order Must State Clearly and Unequivocally What Should and Should Not Be Done

The court should not attempt to look past the wording of an order alleged to have been breached to determine its intent. This is because an alleged contemnor is entitled to the benefit of the reasonable interpretation of the order that is most favourable to them. Justice Frankel, for the B.C. Court of Appeal, reviews these principles in *Gurtins v. Panton-Goyert*.²²

...[I]n a contempt matter, an order alleged to have been breached must be precise and unambiguous in its direction, and the alleged contemnor is entitled to the most favourable interpretation of it [...] It is apparent from the chambers judge's reasons that, in interpreting the orders, she had regard to the transcripts of various court appearances, and to the reasons given by de Walle P.C.J. and Goepel J. for making their respective orders.

[...] As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), "[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation". [...]

In that case, the contempt motion was dismissed where the order alleged to have been breached clearly intended the parties to return the child to Kitimat, B.C. but nothing on the face of the order obligated the parties to do so (at paras. 12, 17).

²¹ 2008 CarswellOnt 5037 (Ont. C.A.), at para. 26.

²² 2008 CarswellBC 908 (B.C. C.A.), at paras. 14, 15.

3. “Wilful” Means Deliberate and Not Accidental or Unintentional

The requisite intention or *mens rea* required for a finding of contempt sets a low threshold. A party may take steps towards complying with a prior order but still be held in contempt if they reasonably could have fulfilled their obligations. However, efforts taken towards complying with the prior order may be considered as mitigating factors when the court decides the penalty to be imposed.

In *Garley v. Gabai-Maiato*,²³ Justice Wolder reviewed the case law and concluded:

The intention or the mental state of the person charged with civil contempt of court, that is the *mens rea* of the offence, does not require that the defendant intended to disobey or flout an order of the court. The offence consists of the intentional doing of an action that is, in fact, prohibited by the order. The absence of contumacious contempt is a mitigating but not an exculpatory circumstance. Wilfulness is required in the sense that the conduct be deliberate and not accidental or unintentional. [...] The wilful intentional act here is the refusal to do what was required by the court order to be done.

In that case, the respondent had been ordered to take the necessary steps to apply for a passport for his child. While the court recognized that the respondent had taken many of the necessary steps, and had encountered bureaucratic delays and obstacles with the Milton family court office, he was nevertheless held in contempt for not taking all of the reasonable steps available to him (at paras. 12 and 13).

There is a line of cases that suggests that finding that an alleged contemnor wilfully and deliberately breached a court order requires a consideration of whether the breach amounts to a substantial affront to justice. In *Fisher v. Fisher*²⁴, a mother and father with a long history of high-conflict litigation had been ordered to abide by a “code of conduct” in their dealings with each other. The father made two slight breaches of this code of conduct (unspecified in the case) and when the father gave an explanation for his breaches the court held that it was not satisfied beyond a reasonable doubt that he had acted “wilfully and deliberately”. While

²³ 2006 CarswellOnt 574 (Ont. C.J.), at para. 16.

²⁴ 2003 CarswellOnt 1170 (Ont. S.C.J.), at paras. 11, 15.

considering whether a contempt order was appropriate in this situation, Justice Chadwick stated (at para. 11):

Contempt of Court is the big stick of civil litigation. It should be used sparingly and only in the most clear cut of cases. There are other procedures available to enforce orders; other than a contempt motion. To use contempt motions to enforce minor but annoying breaches of a Code of Conduct, takes away and waters-down the effectiveness of the contempt procedure. Contempt should be reserved for those serious breaches, which justify serious consequences.

In another access case, *Reithofer v. Dingley*,²⁵ the court held that contempt orders should be made only where behaviour undermining an access order was sufficiently deliberate and intentional. In this case, the court found that the mother was discouraging her children from having a relationship with their father in a variety of ways. Despite this finding and without explanation, the court was somehow not satisfied “beyond a reasonable doubt that [the mother] wilfully disobeyed any of the existing court orders with respect to [the father’s] access”. The court distinguishes this case from prior cases where parties were found in contempt for refusing access in a way that was “obvious, deliberate and wilful.”

4. Defences

➔ Refusing Access Out of a Legitimate Concern for Children

In *Johannesson v. Johannesson*,²⁶ the court acknowledged (at para. 28) that “a refusal to permit access out of a legitimate concern for the children, rather than a desire to frustrate access or deny contact, does not amount to contempt.” In that case, the mother unilaterally decided to supervise access out of a baseless fear that the father would abduct their children. The contempt motion was dismissed on the basis that the order was not worded clearly enough to discern whether the mother had in fact breached it.

²⁵ 2000 CarswellOnt 1087 (Ont. S.C.J.), at paras. 51, 54.

²⁶ 2003 CarswellOnt 2433 (Ont. S.C.J.).

➔ Justifiable Belief That the Breach is in the Best Interests of Children

Generally, a justifiable belief that disobeying a court order is in a child's best interests is no defence to contempt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*.²⁷ The appropriate course of action is to move to vary the order.

This defence has frequently been unsuccessfully relied on in access cases. In *R. (S.) v. R. (M.)*,²⁸ a child would violently protest any attempt at access by the access parent. Instead of finding that the parent with primary care had a justifiable belief that it was in the best interests of the child to refuse access, the court found that the parent rewarded the child's protests and that it was ultimately in the best interests of the child that access occur. Justice Wein made a compelling argument regarding why this defence should have limited application in family cases (at para. 234):

In the family law environment, with its undertow of feelings, it is too easy for one party to believe that he or she knows right, even after a matter has been determined by the court, and to decide then to ignore that order...

In another access case, *Fluet v. Ramage*,²⁹ a child would tell his mother that he did not want to see his father. The court accepted that the child did not want to return to his see his father, but nevertheless held that the mother's reliance on her son's wishes was not an acceptable defence to contempt (at para. 22):

To be effective, the administration of justice requires compliance with court orders. Like this case, access seems to be the source of endless conflict in domestic cases and Ms. Charlene Judy Ramage needs to understand that breach of a court order is serious. [The order] is presumed to advance the best interests of the child and, until it is varied or terminated by a subsequent order, it must be respected and exercised according to its terms.

²⁷ *Supra*, Note 19.

²⁸ 2002 CarswellOnt 1423 (Ont. S.C.J.).

²⁹ 2006 CarswellOnt 6058 (Ont. C.J.), at paras. 20, 22.

➔ Inability to Comply With a Court Order

Inability to comply with a court order, however, may be an acceptable defence. In *Taylor v. Taylor*,³⁰ the alleged contemnor had been ordered to file a letter of credit as security. The bank refused him and the court accepted that given his credit history, it was unlikely that any financial institution would provide him with a letter of credit.

Once the court has found contempt, what are its choices in terms of disposition?

1. Legislation

Subrules 31(5) and 31(6) of the *Family Law Rules* list the orders that are available to the court should a person be found in contempt of the court:

Contempt Orders

31. (5) If the court finds a person in contempt of the court, it may order that the person,
- (a) be imprisoned for any period and on any conditions that are just;
 - (b) pay a fine in any amount that is appropriate;
 - (c) pay an amount to a party as a penalty;
 - (d) do anything else that the court decides is appropriate;
 - (e) not do what the court forbids;
 - (f) pay costs in an amount decided by the court; and
 - (g) obey any other order.

Writ of Temporary Seizure

31. (6) The court may also give permission to issue a writ of temporary seizure (Form 28C) against the person's property.

Note that the list of available orders specified under Rule 31 is not exhaustive; subrule 31(5)(d) allows the court to order "anything else that the court decides is appropriate." This is significantly broader than the analogous Rule 60.11 of the *Rules of Civil Procedure*, which lists only the specific contempt orders which are available to the court.

There are statutory limits on the contempt orders that can be made by the court, as set out in subrule 31(7):

³⁰ 2005 CarswellOnt 5264 (Ont. S.C.J.).

Limited Imprisonment or Fine

31. (7) In a contempt order under one of the following provisions, the period of imprisonment and the amount of a fine may not be greater than the relevant Act allows:

1. Section 38 of the *Children's Law Reform Act*.
2. Section 49 of the *Family Law Act*.
3. Section 53 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*.

Finally, contempt orders for imprisonment or for payment of fines can be suspended upon the fulfillment of conditions imposed by the court. This is consistent with the purpose of contempt orders, which is to compel compliance rather than to punish the contemnor.

Conditional Imprisonment or Fine

31. (8) A contempt order for imprisonment or for the payment of a fine may be suspended on appropriate conditions.

2. Considerations in Determining an Appropriate Disposition

In *Geremia v. Harb*,³¹ Justice Quinn enumerates a helpful list of considerations that should be part of determining a disposition for contempt orders (at para. 13):

In determining an appropriate sentence in this case, my considerations have included the following:

- (a) available sentences;
- (b) conditional sentences;
- (c) proportionality of the sentence to the wrongdoing;
- (d) must the sentence correlate to the contempt?
- (e) similarity of sentences in like circumstances;
- (f) aggravating factors;
- (g) mitigating factors;
- (h) deterrence, denunciation and integrity of the legal system;
- (i) appropriateness of a fine; and

³¹ 2007 CarswellOnt 4956 (Ont. S.C.J.).

(j) appropriateness of incarceration.

Justice Quinn also enumerates aggravating factors (at paras. 24-29) and mitigating factors (at paras. 30-36) (paraphrased below):

Aggravating Factors

- (a) Lack of Remorse
- (b) Multiple Breaches
- (c) Effect on Relationship Between Parent and Child
- (d) General Effect on Extended Families

Mitigating Factors

- (a) Remorse
- (b) First-Time Offender
- (c) Redeeming Post-Contempt Conduct
- (d) Whether the Contemnor Faces Severe Legal Costs

In this case, the mother's genuine remorse and the fact that she was a first-time offender led the court to order a suspended sentence, to be served upon a subsequent breach of any order (at para. 41).

3. Specific Contempt Dispositions

→ Costs

Where a contemnor has compensated for their breach and/or complied with all court orders since the breach, the court may decide not to punish the contemnor apart from ordering costs against them. This is in line with the principle behind contempt orders, given their potentially severe consequences and their view towards enforcing compliance rather than punishing contemnors. For example, see *Ralston v. Schultz*,³² where a contemnor was in breach of an access order but subsequently allowed for make-up access and had subsequently complied with the order.

A recent case from Alberta, *C. (D.B.) v. W. (R.M.)*,³³ suggests that costs-only dispositions are appropriate where the interests of the children would be compromised were the court to order

³² 2005 CarswellOnt 630 (Ont. C.J.), at para. 13.

³³ 2005 CarswellAlta 2017 (Alta. Q.B.), at para. 30.

a more severe disposition. Justice Topolniski considers this principle before ultimately making a costs-only contempt order (at para. 30):

Like the present case, *Van de Veen v. Van de Veen* (2001), 300 A.R. 361, 2001 ABQB 753 (Alta. Q.B.) involved parental alienation at the hands of the mother. Veit J. found the mother in contempt and ordered a sanction of costs to indemnify the father for all costs of the proceedings. She observed (as Martin J. did in this case) that normal sanctions for contempt were unsatisfactory as they would punish not only the mother but also the children. The circumstances there precluded transferring the children to the custody of their father and, although warranted, jailing the mother would harm the children and their possible eventual relationship with their father. Fining the mother would deprive the children of her financial support.

→ Penalties

Subrule 31(5)(c) of the *Family Law Rules* (see above) allows the court to order that one party pay an amount directly to another party as a consequence of a contempt order.

Ordering a penalty achieves the objectives of contempt orders generally, with the added benefit of potentially compensating a party for having to pursue enforcement of court orders through a contempt motion. In his annotation to *Taylor v. Taylor*,³⁴ Philip Epstein, Q.C. considers the circumstances where it is appropriate for the court to order a penalty against a contemnor:

[...] However, in *Taylor* the husband, who had continually flouted court orders and caused his wife untold stress in the process, was found to have done so deliberately and maliciously and to have acted for economic reasons with the intention of injuring the other spouse. That kind of conduct makes it appropriate to order the penalty paid to the other spouse since the other spouse is in fact the injured party. Ordering the contemnor to pay a fine to the court or in fact jailing the contemnor was not going to advance the wife's position and get her what she needed to get and that is compliance with the minutes of settlement. The effect of the [penalty] was two-fold: to send a clear message to the husband that this kind of conduct will not be tolerated by the courts and that there are serious financial consequences to him for failure to comply with the court order.

→ Fines

Under subrule 31(5)(b) of the *Family Law Rules*, the court may order a contemnor to pay a fine in an amount that is appropriate given the severity of the breach. The amount of the fine may be limited by statute when ordered due to a breach of obligations or orders under the

³⁴ *Supra*, Note 30.

provisions enumerated in subrule 35(7); fines due to contemptuous behaviour that resists obligations or orders made under the *Family Law Act*, or respecting custody of or access to a child is limited to a maximum of \$5,000. Fines due to contemptuous behaviour resisting obligations or orders made under the *Family Responsibility and Support Arrears Enforcement Act* cannot exceed \$10,000.

Fines may also be suspended pending subsequent breaches, or any other appropriate conditions imposed by the court, under subrule 35(8). Finally, subrule 35(10) allows the court to order payment of the fine either in a single payment upon a date that the court chooses, or in instalments over a period of time that the court considers appropriate.

Fines are sometimes rejected as a sanction because of the harmful effects it can have on a contemnor's dependents: for example, see *Fisher v. Fisher*.³⁵

→ Imprisonment

Under subrule 31(5)(a) of the *Family Law Rules*, the court can order that a contemnor be imprisoned for any period of time and under any conditions that are just. Subrule 31(7) limits the duration of imprisonment when ordered due to a breach of obligations or orders under the provisions enumerated in subrule 35(7); imprisonment due to contemptuous behaviour that resists obligations or orders made under the *Family Law Act*, or respecting custody of or access to a child is limited to a maximum of 90 days. Imprisonment due to contemptuous behaviour resisting obligations or orders made under the *Family Responsibility and Support Arrears Enforcement Act* cannot exceed 180 days.

Imprisonment is a severe disposition for a finding of contempt, especially in family law matters, and is therefore relatively rare. It is only imposed in extreme situations, where the integrity of the administration of justice outweighs the rights of the contemnor and the interests of any dependents.

In *McMillan v. McMillan*,³⁶ even in the face of repeated breaches of an access order, a mother was only imprisoned for 5 days. There were virtually no mitigating factors, and the contemnor

³⁵ *Supra*, Note 24.

³⁶ 1999 CarswellOnt 1028 (Ont. Gen. Div.), at paras. 23-28.

had breached the access order several times over the last 8 years. Justice Quinn carefully considered the circumstances before ordering imprisonment:

...[D]espite the variety of sentences that may be imposed, I do not know what else I can do to impress upon Ms. McMillan that she must abide by court orders, other than impose a custodial sentence. Giving Mr. McMillan makeup access or awarding full indemnity for his legal expenses incurred in this matter certainly is not the answer because such "punishment" does not address the harm that has been done to the administration of justice through the flagrant conduct here (which occurred despite the warning from a judge of this court as to the likely consequences of such conduct).

[...]

...[I]ncarceration would not be in the best interests of the children. I agree. But when would it *ever* be in the best interests of children to send the custodial parent to jail? To create, repair or enhance the relationship between the access parent and the children? I should think that imprisoning the custodial parent is a very high price to pay if this is the only result sought to be achieved. Of all of the sentencing factors applicable in this case, I think the most important one is the need to preserve the integrity of the administration of justice; and that, as I see it, can only be achieved through a sentence of incarceration.

→ Suspended Dispositions

Given that the goal of contempt orders is to force compliance with court orders, suspended dispositions are often effective because they remind the contemnor of the importance of the orders and the severity of the potential consequences. Where many mitigating factors to the breach are present, suspended dispositions will often be appropriate: for example, see *Bubis v. Jones*.³⁷

→ Other Dispositions

Subrule 31(5)(d) of the *Family Law Rules* allows the court to order "anything else that the court considers appropriate." Among many innovative orders, courts have:

- Transferred custody to the access parent: *Starzycka v. Wronski*,³⁸
- Ordered a parent to pay money into an RESP fund for a child: *Garley v. Gabai-Maiaoto*,³⁹

³⁷ 2000 CarswellOnt 1243 (Ont. S.C.J.).

³⁸ 2005 CarswellOnt 7576 (Ont. C.J.).

- Ordered a parent to pay money into court as security against future contempt: *Korwin v. Potworowski*;⁴⁰
- Ordered a parent to seek counselling: *Kramer v. Kramer*;⁴¹ and
- Ordered a party's pleadings struck: for example, see *Diciaula v. Mastrogiacomo*⁴² (more on this below).

In what circumstances will a court strike pleadings?

If the court determines that the big stick of contempt is neither appropriate nor viable in a matter because the contemnor has shown such blatant disregard for court orders that they are unlikely to be forced into compliance, the Court may strike a party's pleadings. The Court has the power to make any Order that is just or appropriate where a party has wilfully failed to follow the Rules or obey the Order: Rules 1(8), 2(2)-(5), and 14(23) of the *Family Law Rules*.

The Court of Appeal has recently opined on the jurisdiction and wisdom of striking pleadings in *Purcaru v. Purcaru*⁴³. In this case, the applicant wife brought a motion to strike the husband's pleadings at the opening of trial, alleging several breaches of various non-depletion, non-dissipating and restraining orders. After hearing oral evidence about the alleged breaches, the trial judge struck the husband's pleadings and precluded him from participating in the trial before hearing the trial, which was uncontested at that point.

In striking the husband's pleadings, the trial judge noted:

The likelihood that any realistic light would be shone on the matters in issue if the [husband] continues in my view is so slim as to be unrealistic. My preference would be to have both parties participate so that a correct factual determination could be made as to the assets to be divided and the appropriate level of child and spousal support in arrears, if any, to be fixed and calculated. But without a willing participant, the chances of doing that are nil (para. 7).

The Court of Appeal did not allow the husband's appeal and found that it was within the trial

³⁹ *Supra*, Note 23.

⁴⁰ 2006 CarswellOnt 3436 (Ont. S.C.J.); affirmed 2007 CarswellOnt 6852 (Ont. C.A.).

⁴¹ 2003 CarswellOnt 1228 (Ont. S.C.J.).

⁴² 2009 CarswellOnt 1981 (Ont. Sup. Ct. Fam. Ct.).

⁴³ 2010 CarswellOnt 563 (Ont. C.A.) per Lang J.A.

judge's discretion to strike the husband's pleadings and hear the trial on an uncontested basis. The Court noted that: "At some stage, this type of extreme misconduct will result in the loss of the recalcitrant litigant's right to participate in the proceedings." (para. 5).

The husband's breaches were particularly egregious in *Purcaru*. This is an unusual case, and the Court of Appeal was quick to underline to importance of a party's right to participate in the litigation (at paras. 47-49):

I wholly accept Mr. Purcaru's argument that pleadings should only be struck and trial participation denied in exceptional circumstances and where no other remedy would suffice.

This is particularly so in a family law case where the resulting judgment may provide for continuing obligations that can only be varied on proof of a change in circumstances. A change in circumstances may be difficult to establish if the initial judgment is based on incorrect assumptions, thus perpetuating injustice. Similarly, special care must be taken in family law cases where the interests of children are at issue. The consequences of striking pleadings or limiting trial evidence when custody or access is at issue was discussed in *King v. Mongrain* (2009), 66 R.F.L. (6th) 267 (Ont. C.A.), where Gillese J.A. observed at p. 273 that pleadings should not be struck if such a remedy leaves the court with insufficient information to determine custody. See also *Haunert-Faga v. Faga* (2005), 203 O.A.C. 388 (Ont. C.A.).

The adversarial system, through cross-examination and argument, functions to safeguard against injustice.

For this reason, the adversarial structure of a proceeding should be maintained whenever possible. Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court. As this court said at p. 23 of *Marcoccia v. Marcoccia* (2008), 60 R.F.L. (6th) 1 (Ont. C.A.), the remedy of striking pleadings is "a serious one and should only be used in unusual cases". The court also explained at p. 4 that the remedy imposed should not go "beyond that which is necessary to express the court's disapproval of the conduct in issue." This is because denying a party the right to participate at trial may lead to factual errors giving rise to an injustice, which will erode confidence in the justice system.

The above cited passage from *Purcaru* is an eloquent and articulate statement of the underlying principles that should be considered where a court is deciding whether to exercise its discretion to strike pleadings. However, we do not think the Court of Appeal's caution and summary of the law as set out above is new – striking pleadings is an extraordinary remedy and the case law has been clear for some time now about the seriousness of this remedy. Notwithstanding, the

need for a big stick is abundantly clear in the unusual cases where striking is permitted and The Court has the inherent jurisdiction to control its own process: *Hughes v. Hughes*⁴⁴. That being said, has the release of *Purcaru* changed the way the Court responds to non compliance? We think so. We have reviewed the case law since *Purcaru* and note a more permissive trend when it comes to non-compliance: see for example *W. (L. H.) v. W. (A.E.F.)*⁴⁵ and *Kaiser v. Wein*⁴⁶. We discuss this trend in greater detail below.

Mr. Justice Quinn has clarified in *Gordon v. Starr*⁴⁷ that it requires an “extraordinary event” to trigger the “‘unless’ provision” of subrule 14(23), which allows the Court to order that this subrule does not apply; the moving party must establish that an “extraordinary event” occurred on the balance of probabilities. Otherwise, the application of subrule 14(23) by the court is mandatory (see *Diciaula v. Mastrogiacomo*, *Moran v. Cunningham* and *Ferguson v. Charlton*).⁴⁸

Where a party has had ample opportunity to bring himself into compliance with existing Orders, and the breaches are clear, the pleading will be struck. Additionally, any further steps initiated by the defaulting party may be subject to the requirement that costs be posted prior to the step being heard: *Costabile v. Costabile*⁴⁹ and *Cunningham v. LeFebvre*⁵⁰. Pleadings will only be struck where there is clear evidence of deliberate default and a complete disdain for orders of the Court: *Lugg v. Comtois*⁵¹ and *Murano v. Murano*⁵². Generally, cases will use restraint in striking pleadings. In *Lugg v. Courtois*,⁵³ the father repeatedly breached a series of financial disclosure orders. Providing for early resolution or timely litigation is a fundamental objective of the family law legislative scheme in Ontario; as such, the *Family Law Rules* provide for full financial disclosure at the earliest opportunity in family law matters. With the father repeatedly and deliberately blocking financial disclosure, Justice Blishen considered whether striking his pleadings was an appropriate remedy (at para. 14):

⁴⁴ [2007] O.J. No. 1282 (Ont.Sup.Crt., Fam.Crt.) per Quinn J., at para. 27.

⁴⁵ 2012 CarswellOnt 6566 (Ont. S.C.J.) per Kiteley J.

⁴⁶ *Kaiser v. Wein* (25 May 2012), Toronto FS-09-351069 (Ont. S.C.J.) (unreported).

⁴⁷ *supra*, note 2, at para. 16.

⁴⁸ [2009] O.J. No. 1447 (S.C.J.), at para 8, [2009] O.J. No. 2877 (Ont.Sup.Crt.), at para. 58 and [2008] O.J. No. 486 (Ont.Crt.Jus.) at paras. 55 – 64.

⁴⁹ [2004] O.J. No. 4778 (Ont.Crt.Jus., Fam.Crt.) per Perkins J. (upheld on appeal per [2005] O.J. No. 5129 (Ont.C.A.), at paras. 15, 16 and 18.

⁵⁰ [2006] O.J. No. 760 (Ont.Crt.Jus.) per Panet J., at paras. 27-32.

⁵¹ [2005] O.J. No. 736 (Ont.Sup.Crt.) per Blishen J., at paras. 12-14.

⁵² [2002] 2002CarswellOnt 3079 (Ont.C.A.), at para. 57.

⁵³ *supra*, note 49.

Striking a parties' pleadings is an extreme remedy which should be used sparingly; only in cases of the most serious breaches. There must be clear evidence of deliberate default, see *Lanfrey v. Lanfrey*, [2003 CarswellOnt 2229](#) (Ont. S.C.J.), and a complete disdain for orders of the court, see *Woolf v. Woolf*, [2001 CarswellOnt 2993](#) (Ont. C.A.). As was stated by Lax J. in *Rueter v. Rueter*, [\[2002\] O.J. No. 4477](#) (Ont. S.C.J.),

It is clear from the case law that courts should use utmost caution in striking the pleadings of a party. Clearly, it is very serious to deny a party the right to participate in the trial process, although in particularly egregious cases, it may be appropriate to do so: see, *Murano v. Murano*, [\[2002\] O.J. No. 3632 \(C.A.\)](#). ...

Even under these circumstances, the court ultimately decided to give the father one last chance to comply given that he had shown "considerable efforts to comply with the orders for significant, detailed, lengthy financial disclosure" but made a detailed order directing the father to comply with the outstanding orders, and with the proviso that the matter be immediately returned to Justice Blishen to show cause as to why his pleadings should not be struck should the father fail to comply within eleven (11) days.⁵⁴

In *Murano v. Murano*,⁵⁵ the Ontario Court of Appeal confirms the court's jurisdiction to a strike a party's pleadings for failure to comply with the rules or a court order (at para. 55):

At least three (3) provisions in the *Family Law Rules*, apart from Rule 31, allow the court to strike pleadings for failing to comply with the rules or a court order. Rule 13(17) permits the court to dismiss a party's case or strike out any document filed by a party if the party fails to obey an order to file a financial statement or fails to provide information as required in that rule. Rule 14(23) permits the court to dismiss a party's case or strike out any document filed by a party if the party fails to obey an order made on a motion. Finally, Rule 19(10) provides that the court may dismiss a party's case if the party fails to follow the production requirements set out in that rule or fails to obey an order made under that rule.

However, the court cautions against striking pleadings that are related to the interests of children (at para. 57):

As for Mr. Murano's submission that the motions judge disregarded the best interests of the child, I agree that it is generally preferable to avoid the sanction of striking pleadings where children's interests are involved. However, in this case, the record amply supports the motions judge's decision.

⁵⁴ *supra*, note 49, at paras. 15-17.

⁵⁵ *supra*, note 50.

In this case, the contemnor largely disregarded child support, spousal support and financial disclosure orders. Though he did make limited efforts to comply with the orders eventually, the court held that his compliance was “too little, too late” and struck his pleadings. The Ontario Court of Appeal upheld the decision, noting that the father had a remedy available to him.

*Diciaula v. Mastrogiacomo*⁵⁶ is an extremely unusual case where pleadings relating to parenting issues were struck on a final basis. The father had repeatedly and deliberately breached a variety of orders. Finally his disregard for court orders reached its apex; the court had previously stayed the father’s motion for contempt pending compliance with four conditions and after a year he had not made any effort towards fulfilling those obligations.

More Caution since *Purcaru*?

As discussed above, some recent decisions in Ontario have relied on *Purcaru* to decline to strike a contemnor’s pleadings even where, as consistent with previous case law, the contemnor has shown repeated and egregious disdain for court orders, the administration of justice, or both.

A court’s decision to strike a party’s pleadings in these circumstances is largely discretionary but that discretion must be exercised on a principled basis. To what extent should courts prioritize fairness and justice before they begin to condone conduct where, in the words of Justice Quinn in *Geremia v. Harb*, “the parties have gorged on court resources as if the legal system were their private banquet table”?⁵⁷

*W. (L.H.) v. W. (A.E.F.)*⁵⁸

This case exemplifies the dilemma of this emerging trend. In this decision the court provides a summary of the litigation history which spans five (5) pages, chronologically beginning on October 2010 and ending on March 20, 2012. The decision was released on April 12, 2012.

The summary describes the self-represented father’s breach of several court orders including his failure to provide voluminous court-ordered financial disclosure, an instance where he

⁵⁶ *supra*, note 42.

⁵⁷ 2008 CarswellOnt 2483 (Ont. S.C.J.), at para. 94. Justice Quinn’s comments were with respect to an order he made against both parties on his own initiative that they be required to obtain leave before bringing any further motions in that proceeding after a long and tortured litigation history. We think his description is apt for our present discussion even if they were not made within the context of a motion to strike pleadings.

⁵⁸ *supra*, note 44.

refused to return the children to the mother, failed to cooperate with the Office of the Children's Lawyer on two (2) separate occasions, and failed to pay seven (7) costs awards at three levels of court totaling \$34,855.00 plus interest. Elsewhere the decision notes that the Father brought over a dozen motions in the twelve (12) months directly preceding this hearing.

The father was eventually restrained from bringing motions without seeking leave and restrained from emailing the mother's counsel more than once per day. He continued to bring motions without first seeking leave and continued to send Mother's counsel frequent emails on a daily basis and as the court notes, their content was at times inappropriate. In addition to the various attendances and orders, the father had served at least some ten (10) additional Notices of Motion, some with and some without affidavits, which were ultimately not filed or pursued.⁵⁹

The court ultimately declined to strike the father's pleadings, instead imposing a strict timetable for the parties to follow, without any mention of consequences should the Father not abide by the timeline. In doing so, the court relies on paragraph 47 of *Purcaru* (see above)⁶⁰ which it interprets to stand for the legal rule that pleadings should only be struck and trial participation denied in exceptional circumstances and where *no other remedy would suffice* (para. 56).

Interestingly, Madam Justice Kiteley then goes on to consider another remedy that is specifically provided for by *Purcaru* but ultimately decides that it is actually precluded by subrule 10(5)(b) of the *Family Law Rules* (at para. 59):

Para 59 of the reasons for decision in *Purcaru* poses another challenge in that it is explicit that the judge hearing the motion to strike pleadings is obliged to consider whether, while striking the pleadings, the party might nonetheless have some role to play in the trial such as cross-examination of a witness or making submissions at the conclusion of the trial. Rule 10(5)(b) of the *Family Law Rules* makes it clear that a party whose pleadings have been struck has no further role to play in the proceedings. Subrule 10(5)(b) was not considered by the Court of Appeal. I assume that rule 10(5)(b) means what it says. While there appears to be some limited undefined relief [*Higgins v. Higgins*, [2007] O.J. No. 3656 at para. 18; followed in *Oelbaum v. Oelbaum*, [2010] O.J.

⁵⁹ *ibid*, paras. 6-7.

⁶⁰ *supra*, note 43.

No. 3781] from that subrule, if the motion is successful and I strike his Answer and Claim, Mr. W. will have no further participation in the proceedings.

The “limited undefined relief” is a reference to the passage in *Purcaru* which states (at para. 59)⁶¹:

The trial judge did not explicitly consider providing Mr. Purcaru with other lesser forms of trial participation that may have assisted the court with its fact-finding role. For example, the trial judge did not specifically address permitting Mr. Purcaru to cross-examine his wife or her expert to test the value of her assets and liabilities. Nor did he address whether Mr. Purcaru could present argument at the conclusion of the evidence. It would have been helpful if the trial judge had specifically discussed these alternatives because a litigant denied the right to call evidence may still potentially contribute to a trial. That contribution could be made through partial or full cross-examination of one or more witnesses, or by making oral submissions on the evidence and the law. However, a review of the record in this case demonstrates several reasons why the trial judge decided against allowing Mr. Purcaru the opportunity to cross-examine or present oral argument.

It appears that the real impetus for the court refusing to strike the father’s pleadings was that his “key issues” have never been heard or decided on their merits (para. 17). The court also mentions that it is not satisfied that the father’s conduct was “wilful” with regard to his repeated breaches of court orders (at para. 64 (a)). Query whether a non-compliant litigant gets to have “key issues” heard, or whether this is a privilege reserved for parties who are in compliance with Court Orders. Otherwise, if the impetus for refusing to strike the Father’s pleadings was that his “key issues” have never been heard or decided on their merits, surely striking the father’s pleadings while granting some limited participatory rights at trial could have ensured a fair hearing on the merits while maintaining the integrity of the justice system.

Notably, Madam Justice Kiteley granted the father limited participatory rights, limited to participating in a Settlement Conference. This then leaves somewhat of a vacuum for the parties: if the matter does not settle, the father still has no standing by result of his non-compliance, but is not out of the action. What are the parties to do? There have been several

⁶¹ *ibid.*

subsequent decisions where the Court has struggled with whether limited participatory rights should be granted to a party whose pleadings have been struck.

In *Higgins v. Higgins*,⁶² the Ontario Court of Appeal explicitly acknowledges that in some cases courts should grant relief from the strict operation of Rule 10(5)(b). In this case the moving party's pleadings had been struck and the court therefore had to determine whether it should "entertain" his appeals. The court decided that he was not entitled to "special consideration" because he had made no serious effort to comply with his ongoing support obligations.

In *Oelbaum v. Oelbaum*,⁶³ the court acknowledges that (at para. 28):

...the Court has inherent jurisdiction to ensure that cases are determined on their merits and that the exercise of the court process does not lead to unfairness or abuse. See *Higgins v. Higgins*, (2007), 232 O.A.C. 340, in which the Court of Appeal stated at para. 18 that there may be some cases in which a court should grant relief from the strict operation of Rule 10(5)(b) of the Family Law Rules. [...]

The court goes on to determine that the principles developed under Rule 19.08 of the *Rules of Civil Procedure* (setting aside a default judgment) are helpful by analogy in guiding the court's exercise of discretion to assess whether such relief should be granted. The court states that the ultimate determination is whether the interests of justice favour such relief, which must include consideration of potential prejudice to the moving party and potential prejudice to the respondent, as well as the effect of any order the judge might make on the overall integrity of the administration of justice.

For other recent cases acknowledging that the court may strike a party's pleadings but still decide the extent to which that party may participate at trial see *Molina v. Molina*,⁶⁴ and *Nashid v. Michael*.⁶⁵

As we have discussed elsewhere in this paper, a determination that there was a "wilful" breach of a court order only requires that the court find that the conduct was deliberate in the sense

⁶² 2007 CarswellOnt 6119 (Ont. C.A.), paras. 17-18.

⁶³ [2010] O.J. No. 3781 (Ont. S.C.J.), paras. 28-35.

⁶⁴ 2011 CarswellOnt 3569 (Ont. S.C.J.), para. 52.

⁶⁵ 2012 CarswellOnt 1001 (Ont. S.C.J.), para. 31.

that it was not accidental.⁶⁶ It is difficult to see how the breaches outlined in the decision could not reach this low threshold.

*Azimi v. Mansoury-Tehrany*⁶⁷

The court relies on *Purcaru* to stand for the principle that pleadings should only be struck “where no other remedy is available” (at para. 20). The court notes that the self-employed applicant had significantly breached various disclosure orders for over two (2) years. Attached to the endorsement was schedule with approximately thirty (30) items of court-ordered disclosure, the majority of which was never provided or found to be deficient. The court finds that the applicant “has wilfully failed to comply with the disclosure orders” and that “much of the disclosure that the applicant failed to provide was relevant, and indeed crucial to determination of the financial issues.” Then, at paragraph 31 the court states:

I am accordingly ordering that the application be struck and that the Respondent may proceed by way of uncontested trial under Rule 23 pursuant to her Answer and Claim by Respondent. However, in light of the Applicant's comments made at the hearing that he was willing to make the disclosure, I am going to stay the order striking the Applicant's pleadings for 30 days; I do so keeping in mind the statement in *Purcaru*, supra that the intent of any order ought not to be to remove the litigant from the process, but to have that litigant provide the outstanding disclosure and comply with the orders in question. Accordingly, I am ordering that within 30 days of the date of this order, the Respondent must provide all outstanding disclosure without exception as well as file a financial statement with all required attachments including proof of current income and must also bring a motion to reinstate his pleadings. If filed, the stay will be extended until the motion is heard, and I am directing that it be returnable before me. If I order costs in this proceeding, the Applicant must pay the costs as ordered to continue the stay. I am also going to order that if the Applicant brings a motion to reinstate his pleadings, that he pay into court security for costs of the motion the sum of \$2,500; I am seriously concerned that, based upon the history of this matter, that the Applicant may fail to act in good faith in providing disclosure and in reinstating his pleadings; I do not want the

⁶⁶ *supra*, note 23.

⁶⁷ 2012 CarswellOnt 2248 (Ont. S.C.J.).

Applicant to use this provision for the purposes of delay. If he does not complete all of these steps, the Respondent may proceed by way of Form 23C uncontested trial.

Though we think it unlikely that the applicant would have submitted the disclosure that he had failed to provide for almost two (2) years based solely on comments made to the court during the hearing that he was willing to provide same, this decision is an interesting compromise and does a good job of balancing the comments made in *Purcaru* against the integrity of the administration of justice.

*Bourgeois v. Bourgeois*⁶⁸

The Respondent had breached a total of six (6) court orders including two (2) disclosure orders, orders for production of an income analysis and business valuation, an order to submit intake forms to the Office of the Children’s Lawyer, and an order to produce proof of an irrevocable designation of his life insurance policy. In general the court found that the evidence on the record leads to the conclusion that the respondent “has not diligently and conscientiously made reasonable efforts to place [disclosure] before the court” (para. 3).

The court cites *Purcaru* at paragraph 16 to stand for the principle that pleadings should only be struck “where no other remedy would suffice” and then states (at para. 17):

However, by the slimmest margin, I find that striking the respondent's pleading is not the most reasonable course of action for the reason that, now almost two years since the original disclosure orders, the respondent has made further efforts at disclosure which are substantially better than his initial efforts. I am also not convinced that his recalcitrance is an attempt to mislead the court or to be dishonest, as the evidence falls short of this type of fraudulent activity.

The court then attaches a schedule to the endorsement listing the steps that the respondent must take within approximately two months from the date of the judgment or else the court states that the applicant may move to strike the respondent’s pleadings and which the court makes clear that it would absent extremely compelling circumstances outside of the respondent’s control

⁶⁸ 2011 CarswellOnt 6571 (Ont. S.C.J.).

Kaiser v. Weir⁶⁹

This is an interesting case because the court decides to strike the father's pleadings with respect to financial issues but not with respect to custody and access. The extent of the father's noncompliance is not described in the decision because it was not in dispute that the father had a history of noncompliance and the father even conceded that there was sufficient a sufficient basis upon which the court might exercise its discretion to strike his pleadings.

The court notes that there is a distinction to be drawn between financial and parenting issues when requesting that pleadings be struck, and decides that the father's claim for access should not be struck out on the basis of noncompliance because it is preferable that a determination of the children's best interests be made with the input of both parents.

The court does acknowledge that there is precedent where a party's pleadings have been struck in relation to a joint custody claim where it was unrealistic. The court briefly considers the merits of the Father's claim before deciding that since the father was still an active part of the children's lives, it was not prepared to decide his joint custody claim without his input.

If Striking Does Not Work, Stay the Pleadings

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.⁷⁰

In order to satisfy a stay of proceedings, two (2) conditions must be met:

- (a) the moving party must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to that party or would be an abuse of process in some other way; and
- (b) the stay must not cause an injustice to the responding party.

In both, the burden of proof is on the moving party: *Varnam v. Canada (Minister of National Health & Welfare)*⁷¹.

⁶⁹ *supra*, note 45.

⁷⁰ Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

⁷¹ [1987] 1987 CarswellNat 253 (Fed.Crt.T.D.), per McNair J., at para. 7.

In cases where there is a history of active litigation, conduct disobeying court orders, and unfulfilled support obligations, the court will generally find that the defaulting party's conduct is inappropriate and unreasonable: *Andrews v. Andrews*⁷² and *DiMillo v. DiMillo*⁷³.

However, it bears repeating that the remedy of staying is a discretionary one: *Dickie v. Dickie*⁷⁴.

Conclusion

The Province of Ontario passed a law a few years ago prohibiting the use of cell phones and other smart phones while operating a vehicle. The purpose of the law is to discourage unsafe driving practices. While there was an initial grace period, the police have since actively ticketed where a driver is caught speaking on or texting on a cell phone or smart phone while driving. Now, particularly in the City of Toronto bluetooth and similar devices abound. Why? Because we know there will be a consequence for failing to comply with the law.

If a party to a proceeding is clear that there will be consequences for failing to comply with a court order and that there will either be the strong possibility of a finding of contempt or a striking of pleadings, it stands to reason that the party in question will make better efforts to comply with court orders. Further, these consequences send a message from the court about the importance of the orders that its brother and sister judges make: the orders are important, deserve respect, and compliance is not an option but an obligation.

The Ontario Court of Appeal has made it clear that striking pleadings is a remedy of last resort and that the adversarial structure of a proceeding should be maintained wherever possible to safeguard against injustice. Unfortunately, if courts blindly pursue a paradigm of justice that requires allowing a repeat-offender contemnor to participate as an equal party, the courts may well become complicit when the consequent injustice shifts onto those opposing parties who are attempting to litigate in good faith. In some situations, striking pleadings and granting reduced participatory rights to non compliant parties might appropriately address these competing interests. As we have seen, another effective compromise that courts have been implementing is granting the contemnor "one last chance" such that the pleadings will be struck within a set

⁷² [2000] 2000 CarswellOnt 311 (Ont.Sup.Crt.) per Nelson J., at paras. 8-14.

⁷³ [2007] 2007CarswellOnt 358 (Ont.Sup.Crt.) per Mazza J., at paras. 21-23.

⁷⁴ [2007] O.J. No. 1749 (Ont.Sup.Crt.), per Thorburn J., at para. 47.

time period if the contemnor has not sufficiently complied with the outstanding court orders within that time. As counsel, we should also be reinforcing the importance of court orders by:

- ensuring that our clients have copies of each and every order and endorsement that is made by the court by electronic and paper means;
- writing a reporting letter to our clients each time an order is made, clearly reminding the client of their obligations under the order;
- ensuring that we have bring forward systems so that, if an order provides that a client must produce disclosure by "x" date, we have a bring forward copy of the order at least ten (10) days prior and can provide written and oral follow ups to the client;
- providing our clients with copies of the relevant provisions in the *Family Law Rules*, and
- diligently pursuing any breaches if we are acting for the non-offending party, which includes bringing motions promptly and seeking orders that matters be peremptory on the offending party wherever possible.