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• The Other Party Won't Follow Our Court Order – What do I do? •

Kathleen Judd and Sarah Robus



Kathleen Judd



Sarah Robus

“Orders are not suggestions” is a common sentiment in family court.

In light of the time, money, and effort involved in securing a final court order, it is no wonder that someone would become frustrated by the other party's refusal to comply with its terms.

A common question faced by lawyers, is what to do when one party fails to abide by an order — What are the options?

One form of legal recourse is to bring a contempt motion, asking the court to find that the other party is in contempt of the court order. In family law proceedings, motions for contempt are governed by the Family Law Rules. Payment orders may not be enforced by a contempt motion.

Being found in contempt is a legal consequence for non-compliance with an order. The goal is to deter individuals who feel that they do not need to comply with some or all of the terms of an

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order. Parties who fail to comply not only interfere with the court process but obstruct the course of justice. The consequences for being found in contempt range from fines to jail time. Ultimately, the objective with a finding of contempt is compliance.

In determining whether a party should be found in contempt, the court will consider the following:

- Was the party aware of the order's existence at the time of the alleged breach?
- Did the order clearly and unambiguously state what should or should not be done?
- Did the party who allegedly failed to comply do so in an intentional way?
- Was the conduct demonstrated beyond a reasonable doubt? This is an essential element because findings of contempt are quasi-criminal in nature.

A finding of contempt is a remedy of last resort. The court found in *Hefkey*¹ that a contempt finding should be made sparingly and with great caution.

In family law cases, the court will be especially concerned with whether the parties have acted in a way that accords with the children's best interests. In *Jackson*,² the court noted that a party may be excused for non-compliance if the breach was objectively in the best interests of the child(ren). The court also acknowledged the complex emotional dynamics that are involved in family law disputes, and the desire to avoid escalating the conflict further.

The importance of complying with the terms of a court order cannot be understated, and the Family Law Rules provide the court with a range of remedies for non-compliance. Because of the wide range of other available remedies, the court will often exercise their discretion to find a party in contempt sparingly, and are hesitant to do so when there are other reasonable options available to

send a message that the court order must be followed.

If you have more questions related to family law matters, please visit our website or contact Sarah Robus at Devry Smith Frank LLP to discuss any questions regarding family law and your options at 249-888-4642 or <sarah.robust@devrylaw.ca>.

[*Author's Note:* This article was co-authored by Law Student, Kathleen Judd.

This article is intended to inform. Its content does not constitute legal advice and should not be relied upon by readers as such. If you require legal assistance, please see a lawyer. Each case is unique, and a lawyer with good training and sound judgment can provide you with advice tailored to your specific situations and needs.]

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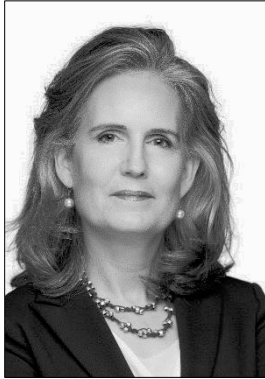
[**Sarah Robus** joined Devry Smith Frank LLP in 2021 as an associate lawyer in the Family Law group in Barrie. Prior to entering the practice of law she studied at the University of Ottawa where she obtained an Honours Bachelor of Social Sciences with Specialization in Criminology and thereafter completed her J.D. at the University of Ottawa Faculty of Law. Sarah advocates for clients involved in litigation and mediation regarding a wide range of family law issues, including high-conflict parenting issues, child and spousal support, and property division.]

¹ *Hefkey v. Hefkey*, [2013] O.J. No. 1697, 2013 ONCA 44.

² *Jackson v. Jackson*, [2016] O.J. No. 2870, 2016 ONSC 3466.

Things You Should Know About Using RDSPs as Part of Your Disabled Child's or Grandchild's Financial Future

Lisa Sticht-Maksymec



Many families are already using the Registered Disability Savings Plan (“RDSP”) as a great way to build savings for a child or grandchild who is disabled and qualifies for the disability tax credit. There are many advantages to investing in RDSPs, including

the potential to receive free government money in the form of grants and/or bonds, and payments received by the beneficiary from their RDSP do not count towards their Ontario Disability Support Program (“ODSP”) eligibility requirements. Whether you have been thinking about setting up an RDSP, or already have, you might not be aware of some of these interesting facts, as they may impact on the estate planning of the RDSP beneficiary, or their family members:

Did You Know...?

1. An RDSP beneficiary may be eligible to receive up to \$3,500 per year in matching grants from the federal government, up to a lifetime maximum of \$70,000; and up to \$1,000 per year in bonds, up to a lifetime maximum of \$20,000.
2. If you obtained the RDSP after 2008 you can claim the grants and bonds for prior years going back as far as 2008, up to a maximum of 10 years.
3. If a parent opens an RDSP account for a minor beneficiary and if the beneficiary, after having turned 18 is, in the opinion of the RDSP issuer (*i.e.*, the bank) contractually competent, the beneficiary will replace the parent as the plan holder to manage the account themselves. The contractually competent beneficiary could (but need not) agree to keep the parent on the account as a joint holder with the beneficiary, for ease of administration.
4. The funds in an RDSP belong to the beneficiary, and not to the holder or contributor. (Though in some cases the beneficiary may be one and the same person as the holder).
5. If a parent opens an RDSP account for a minor beneficiary and if the beneficiary, after having turned 18 years of age, has someone other than the parent (a sibling perhaps) appointed by a court as the child's legal guardian for property, then the guardian replaces the parent, as the account holder.
6. Where the beneficiary of the RDSP is not contractually competent and both parents are the joint holders of the RDSP, when one parent dies, the surviving parent will continue holding the account as the sole holder. For this reason, it is generally advisable to have both parents, rather than just one, to be the holders of the RDSP account.
7. Retirement savings can be rolled into an RDSP for a deceased person's financially dependent child or grandchild, on a tax-deferred basis. The maximum rollover is \$200,000 (subject to the contributions and other rollovers already received in the RDSP). Note that the amount rolled over

will not be eligible for the government grants. Note also that this portion will be taxable in the hands of the beneficiary when it is later withdrawn.

8. It is also possible to roll a Registered Education Savings Plan (RESP) into an RDSP on a tax-deferred basis, if the RDSP beneficiary is also the beneficiary of the RESP, and provided certain other requirements are met.
9. When the RDSP beneficiary dies, the remaining amounts in the plan after the grants and bonds are repaid to the government, are not returned to the contributors. Rather, they are paid to the beneficiary's estate.
10. If the RDSP beneficiary has not made a Will (not everyone has the legal capacity to make a Will), then the remaining amounts in the plan, as with the other assets of the beneficiary's estate, are payable to the beneficiary's heirs in law. First priority goes to the deceased beneficiary's spouse and children or further descendants, if they have any. If the beneficiary is not married and has no child or further descendants, then the remaining amounts of the RDSP will be divided equally between the beneficiary's parents (even if only one parent was the sole contributor to the RDSP), or if both parents have predeceased, the remaining amounts will be divided among the beneficiary's siblings.
11. Where the RDSP holder dies, the plan continues. The funds do not form part of the deceased holder's estate. Who will replace the holder, depends on the circumstances at that time: If the beneficiary of the plan is contractually competent, then he/she becomes the holder. If the beneficiary is not contractually com-

petent, but has a court appointed guardian for property, then the guardian becomes the holder. Note that if only one parent was the holder, and then dies, the surviving parent does not automatically become the holder.

12. In the case of an adult who might not be contractually competent to enter into an RDSP themselves, the federal government has temporarily allowed certain qualifying family members to become the plan holder to replace the deceased parent holder. This temporary measure will expire on December 31, 2023. Thereafter, it will be necessary for a guardian for property to be appointed by a court for an adult beneficiary who has no holder, and who does not have a power of attorney for property or other legal substitute decision-maker to replace the deceased holder. If you have been thinking about setting up an RDSP for your disabled adult child who might not be contractually competent, you should make those arrangements while you still can.

[**Lisa Sticht-Maksymec** is a senior member of Pallett Valo's Wills and Estates Practice. With over 15 years of experience in estate planning, estate administration and estate litigation, Lisa identifies practical solutions to clients' estate planning needs, and consults on complex estate administration to advise about the best ways to plan for the efficient administration of estates.

Her approach explores both legal and practical solutions to matters that are inevitably personal, sensitive and emotional. Lisa works with high net-worth individuals, families, spouses in blended families, and successful business owners and entrepreneurs who are looking for efficient ways to transfer their wealth to the next generation. She also works closely with families who have children with disabilities to protect ODSP eligibility.]

Evolution of the Family — The Importance of Biological Ties

Laurie Pawlitzka



In Canada, as the make-up of families change, the resolution of parenting issues becomes more complex. The laws in each province and the federal laws set out a non-inclusive list of factors for the court to consider when deciding parenting issues.

Included in those factors is the relationship between the child and the parent as well as the child's relationship with other family members.

Two recent cases highlight a significant change in interpreting the law regarding a child's best interests and the effect of a child's biological ties on the outcome.

Earlier this year, the Supreme Court of Canada released a decision which considered the importance of biological ties when determining a child's best interests. In *B.J.T. v. J.D.*, the biological mother and father lived in one of Canada's western provinces and had a short but tumultuous marriage. The mother had mental health issues; the father had allegedly been physically violent. The mother returned to the east coast of Canada without the father knowing about the pregnancy. The mother's mental health issues worsened after the baby's birth, and ultimately the baby's maternal grandmother moved to the east coast to help care for the child. The grandmother cared for the child for over two years. The mother's mental health declined further, and she refused to allow the grandmother to continue to care for the child.

Child protection services apprehended the child from the mother, and the grandmother returned to care for the child. Meanwhile, the father, despite that he had never met the child, decided that he should bring the child back to western Canada to

live with him. After a period of integration between the child and the father, child protection services agreed that the father should have the child. The grandmother disagreed. The trial judge decided that it was in the child's best interests for the grandmother to continue to raise the child. The provincial Court of Appeal set aside the trial judge's decision, relying in part on the father's closer biological ties with the child.

Justice Sheila Martin of the Supreme Court of Canada wrote for a unanimous Court. In restoring the trial judge's decision, Justice Martin considered the relevance of a biological tie when determining a child's best interests. Justice Martin recognized that the institution of the family in Canada has undergone a profound evolution, and a biological tie is just "one factor among many".

As both the grandmother and the father had a biological connection to the child, Justice Martin went further, commenting that "a biological tie may be intangible and difficult to articulate; it is difficult to prioritize over other more concrete best interest factors". The Supreme Court of Canada agreed with the trial judge, who had decided that the grandmother was more inclined to facilitate the father's time with the child than vice versa, and as such, the grandmother should be the child's primary caregiver. In *B.J.T.*, Justice Martin recognized the changing nature of the Canadian family, observing that children are increasingly being raised in families where biological ties do not define the family relationship.

Again in 2022, the issue was front and centre in the province of Ontario where the parties seeking to be the child's primary parents had no biological ties at all to the child.

J and C were male same-sex partners who had been together for 10 years. They were friends with a woman, B and her new partner, A. As friends,

the woman, B, had discussions with J and C about acting as their surrogate. Both couples were of limited means, and while they tried to deal with the legal aspects of a surrogacy arrangement, no surrogacy agreement was signed. Circumstances changed when B inadvertently became pregnant with her partner, A's child. Even though the initial plan had been that C would provide the sperm, once B became pregnant, plans for the baby did not really change. However, a formal surrogacy arrangement was no longer possible as surrogacy law requires that a legally binding agreement be made before pregnancy.

Throughout B's pregnancy, J and C prepared their home for a newborn, contributed to B's pre-natal expenses and organized their future work schedules so that between them, they would be full-time caregivers for the baby. B and A did none of these things. When the baby was a day old, B and A handed her over to J and C in a coffee shop parking lot. But when the baby was four months old (having not seen her at all since her birth), B and A demanded the baby back.

Predictably, litigation followed.

At a trial in the Superior Court of Ontario, the judge, Gregson J. had to decide whether the child should continue to live with J and C, who

should be responsible for making major decisions for the child and what arrangements, if any, should be made for contact with the non-residential couple. Justice Gregson decided that J and C, despite having no biological ties to the baby, should be the child's primary caregivers and should make all major decisions for the child. Among other reasons, she found that the baby was flourishing in the care of J and C, and that they were also prepared to facilitate B's and A's relationship with the baby.

As Justice Martin observed in *B.J.T.*, "change and evolution [in the Canadian family] continues today". As a result, in Canada, a mere biological connection to a child is no longer a 'tie-breaker' when the best interests of a child are involved.

[*Editor's Note:* This article was originally published by the Commonwealth Lawyers Association.]

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Judge Appoints Receiver to Get to the Bottom of Husband's Assets in Divorce Case

Adam Black



Judicial intolerance for spouses who provide incomplete financial disclosure in divorce cases appears to be on the rise, amid an increasing backlog of cases that is putting significant demand on courts and judges throughout the country.

Financial disclosure is an essential tenet of family law: Without it, a separated spouse is unable to determine their entitlement to division of property, child support and spousal support, and court proceedings can be prolonged unnecessarily while those issues are sorted out.

That was what transpired in a recent case before Justice Leonard Ricchetti of Ontario's Superior Court of Justice, with the judge ultimately tak-

ing the “extraordinary” step of appointing a receiver to provide the disclosure related to the husband’s assets and income.¹

In the case, a husband and wife separated at the ages of 77 and 72 respectively, following their 47-year marriage. The couple generated significant wealth through a land development business the husband started shortly after the couple married. According to the husband’s net worth statement, which he prepared seven months prior to separation, he was worth approximately \$78 million. Despite the husband’s own description of his wealth, following the parties’ separation he alleged he had no net worth and was forced to live in his office because he could not afford to rent a home.

Unfortunately, the hallmark of the couple’s separation has been the husband’s steadfast refusal to provide the necessary and relevant financial disclosure to his ex-wife. The wife commenced court proceedings just five days after the parties separated in November 2019. Since that time, there have been approximately 15 court hearings, almost all of which focused on the husband’s incomplete disclosure. Several orders were made compelling the husband to provide, for example, real estate appraisals, corporate information, documents related to money advanced to family members and information about a corporate re-organization.

The husband failed to comply with many of the court orders. In May 2022, the wife asked Justice Ricchetti to find the husband in contempt of six court orders. In the contempt hearing, the husband admitted his failure to comply and pointed his finger at others in defence of his breach. He stated he had “been unable to comply with Court Orders as a result of a lack of financial resources, lack of adequate internal workforce for the demanded financial disclosure and lack of control over third parties, who were requested to prepare reports”.

Justice Ricchetti rejected the husband’s suggestion that he was not to be blamed for the incomplete disclosure and noted the “difficulty with the outstanding disclosure is that it is all within the husband’s control — not as he suggests within the control of third parties”.

Against that backdrop, Justice Ricchetti considered whether the husband was in contempt. He began his analysis by stating the “case demonstrates the unfortunate waste of considerable judicial resources when parties choose NOT to comply with their fundamental obligation on separation — disclosure of complete, and accurate financial information and documentation. The game of ‘hide and seek’ of the party’s assets and income is to be discouraged in the strongest means possible”.

Over the course of a five-day hearing before the judge, the husband and wife provided evidence. The judge assessed the husband’s evidence and rejected it “in its entirety”. According to Justice Ricchetti, the husband’s evidence “constituted bald denials, veiled and clear attempts to blame both of his prior counsel” and “was inconsistent and contained unbelievable explanations”.

According to Justice Ricchetti, a finding of contempt should be made “sparingly and as a last resort” in only the “clearest of cases and with the greatest of caution”. For the judge, this was one of those cases. The judge found the husband to be in contempt of the disclosure orders since he “acted in a deliberate manner to not comply with the disclosure orders so as to avoid disclosing his personal and financial information.”

On August 5th, approximately three months later, a hearing to determine the penalty for contempt took place. At that hearing, Justice Ricchetti first considered if the husband had brought himself into compliance with the court orders. In other words, had the husband purged his contempt? Despite the opportunity to right

the ship, the husband had not done so and, not surprisingly, he remained in contempt.

In designing the penalty, the judge had regard to the goals of a sentencing for contempt which are (1) deterrence to prevent further non-compliance through an awareness that “there are serious consequences for the deliberate and flagrant disobedience of court orders and for failing to make complete and accurate financial disclosure” and (2) denunciation which should help to “maintain confidence to parties in family law proceedings and the general public who use the justice system” by demonstrating that the “administration of justice is seriously undermined where parties can ignore statutory obligations or court orders”.

The judge ordered the husband to pay a financial penalty of \$50,000 to the wife. In doing so, Justice Ricchetti noted the amount was “unacceptably low” but that he was unable to order a higher amount since the wife requested only \$50,000.

In a relatively rare step, the contempt penalty also included the appointment of a receiver. A receiver is a neutral and independent third party tasked with controlling all or part of a person’s or business’ affairs. In this case, the receiver will be given all the powers and rights the husband had to “seek, request and obtain possession of all relevant financial documentation and information relating to the issues in this case”. Simply put, the husband’s refusal to provide disclosure is corrected by giving someone else the power to provide it.

Justice Ricchetti recognized the “appointment of a receiver is an extraordinary and intrusive remedy”. However, in the circumstances of this case, the result is both proportionate and fitting.

If the husband continues to frustrate the disclosure process and the work of the receiver, Justice Ricchetti’s decision leaves the door wide open to the appointment of a receiver who will take full possession of all the husband’s property and business interests.

[*Editor’s Note:* This article was originally published in the *Financial Post*.]

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1. *Boutin v. Boutin*, [2022] O.J. No. 2454, 2022 ONSC 3229 - contempt liability hearing. *Boutin v. Boutin*, [2022] O.J. No. 3753, 2022 ONSC 4776 - contempt sentencing hearing.