

Family

What to do when third parties impede settlement

By **Lorne Wolfson**



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(February 7, 2018, 9:39 AM EST) -- While most family law cases involve only two parties, there can be many other parties who may play a significant role in the settlement of the case. These can include cheerleaders, those involved in third party claims, third parties from whom disclosure is sought, creditors, the Canada Revenue Agency or the Children's Aid Society.

Cheerleaders

Unlike other litigation, the settlement of family law cases cannot be addressed without careful consideration of the presence or absence of cheerleaders. In this context, "cheerleaders" are friends or family of either or both parties who can exert influence over the process of settlement.

I encourage clients to bring a trusted friend or relative to meetings with counsel. Often the third party can digest and record for the client what was discussed during the meeting and help the client focus on the issues and the course of action recommended by counsel. A positive cheerleader can greatly assist a client in dealing with both the emotional and legal issues. On the other hand, a negative cheerleader can inflame emotions, undermine the advice of counsel, and in other ways provide a destructive influence on the settlement process.

Where counsel suspects that negative cheerleaders are lurking in the shadows, they should be invited to a meeting with counsel during which they can be educated as to the issues and alternatives in the case and as to how they can play a positive role in the process.

Similarly, I often encourage my clients to bring positive cheerleaders to the settlement meeting or mediation. Even if the cheerleaders are not positive, it may be preferable to have them in the room than interfering with the process from afar. Where the client relies on the advice of cheerleaders (for example, a wife who relies on her father's advice or a husband who is afraid to settle without the approval of his new partner), it may be practically impossible to reach a settlement without the cheerleaders either being in the room or readily available by telephone. Obtaining the cheerleader's "blessing" to the proposed deal is often a critical step in reaching settlement.

Claims by or against third parties

Many family law cases involve claims by or against parties other than the spouses themselves. Typical examples include claims by or against parents (for example, was the money advanced to buy the house intended as a loan or a gift?), closely held corporations (for example, a claim for an interest via constructive trust in property owned by a corporation or to enforce minority shareholder rights) or to set aside a transfer to a non-arm's length party as a fraudulent conveyance. These cases pose special challenges for counsel looking for a timely and cost-efficient settlement.

Whether the third party actually needs its own counsel or is simply retaining one to project an image of independence, in many cases the third party will retain its own lawyer. By doing so, the prospects of settlement become more challenging. Litigation becomes more complex, as each party is required to deliver pleadings and has rights for disclosure and questioning. Mediation, arbitration and collaborative negotiation are not available unless all of the parties and their counsel agree to adopt the same process. Settlement communications are more complex and costs can increase at an accelerated rate. Finally, many of the values of settlement (for example, to preserve a working

relationship for the sake of the children) do not resonate for third parties in the same way that they may for the spouses.

The key to resolving these cases is to get the third party to appreciate and to acknowledge that his interests are aligned with one of the spouses and that he has an interest in contributing to a settlement of the issues between the spouses. Unless counsel has a co-operative relationship, this development will usually require the involvement of a neutral (a mediator or a judge at a pretrial). Generally, the more third parties, the more difficult and more costly the resolution of these cases will be.

Disclosure from third parties

Often disclosure is sought from non-arm's length individuals and corporations who take the position that they are not obliged to produce the information or documentation sought by one of the spouses. Luckily, these problems have been minimized by the courts (at least, in Ontario) taking a very strong position in requiring third parties to provide disclosure that is reasonably necessary for the proper resolution of family law litigation. It is for this reason that many counsel will not agree to mediate or arbitrate until the disclosure sought has been produced.

In recent years, courts have recognized that disclosure should not only be relevant but also proportionate to the matters in dispute. Moreover, where there is a legitimate interest to protect, courts will impose confidentiality terms on the production of disclosure to supplement the deemed undertaking rule.

This is part one of a three-part series.

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