



## Article

### Family Law

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# Disorder in the court: When one spouse ignores rulings, the other often pays the price

By Laurie H. Pawlitza

Family courts seem to have an abundance of litigants who view court orders as “suggestions” only.

Orders for support and for the payment of costs to the other party often go unheeded. Before a court deals with the problem, there are often repeated breaches of orders. For the innocent litigant, the court system can seem anything but just.

First, it is the responsibility of the compliant spouse to bring the conduct of the breaching party to the attention of the court and request that sanctions be imposed.

Because the breached orders are often for payment of support or for the reimbursement of legal costs, this sometimes also places an untenable financial burden on the innocent spouse.

A recent Ontario Court of Appeal case demonstrates the difficulty in balancing remedies when a non-compliant spouse may actually have a bona fide claim.

The history of the case is not atypical, except that the father’s almost constant presence in the court system for the past nine years related to litigation regarding not just one, but two former spouses: his former married spouse and his former common-law spouse. The two relationships gave rise to six reported decisions at three levels of court, including a twelve-day trial. There were appearances before at least eleven different judges over the years.

The father’s two relationships were short. Despite this, two children were born of his married relationship, and one from his common-law relationship. Much of the litigation with each spouse related to parenting issues. Over the years, three different child psychologists were involved with the two families. The child psychologists commented unfavourably on the father’s narcissism and other personality traits. The father was also convicted of assaulting his wife and her brother.

After the 2011 trial with his married spouse, the father was ordered to pay \$50,000 to his married spouse for her success at the trial. The father promptly filed a consumer proposal to reduce his indebtedness, and did not pay the costs owing.

He returned to court the next year to reduce the amount of child support ordered. The Court found that “the father (was) using this court as a new forum for him to be able to continue to control and harass the mother,” and also found that the father was treating the court as his “playground.” To control the father’s propensity for litigation, the court ordered “security for costs” of \$59,500 (\$50,000 for the unpaid costs of the trial and \$9,500 for arrears of child support).

Security for costs is one of the remedies available to a judge if the litigant has unpaid costs owing, or if there is good reason to believe that the case is a waste of time or a nuisance and the litigant has insufficient assets in Ontario to pay the costs. In this case, the order meant that until the father paid the security for costs, he could not move to change the amount of support.

The following year, in 2013, the father separated from his common-law spouse, then engaged in a lengthy court proceeding with her. After he was ordered to pay support and failed to do so, he returned to his old playbook and moved to change the child-support payable.

A different judge ordered that the father post a further \$40,000 as security for costs before he could take any steps to change the child support owing for his third child. Undeterred, in 2015, the father started a new proceeding against his common-law spouse on property issues, breaching court orders in that proceeding as well.

By 2016, the father owed his two former spouses \$150,000, had been briefly jailed, and had assigned himself into bankruptcy. The father again started proceedings to change his support obligations for the children of his marriage. They were dismissed. The court imposed yet another hurdle: in the future, the father would be required to seek leave of the court before bringing any more proceedings.

In 2019, the father returned for a third time to seek a reduction in his child-support obligations to his married spouse, and to vary the 2012 order requiring him to post \$59,500 before he could make this motion. That motion, too, was dismissed.

The father appealed the dismissal to the Court of Appeal.

Counsel appearing for the father admitted that the father’s conduct over the prior nine years was poor, and that while he was in arrears of child support, he was paying as much as his financial circumstances allowed. The father said he could borrow \$10,000 and he would pay that sum instead of the \$59,500 as security for costs so he could bring his motion to change the support.

The Court of Appeal was in a difficult situation. The *Family Law Rules* allow the amount, form and method of giving security to be changed by court order at any time. At the motion below, the father had provided some evidence, suggesting that his financial circumstances had indeed changed since the 2011 trial.

Despite the father’s prior conduct, the Ontario Court of Appeal reduced the amount that the father was required to post from \$59,500 to \$10,000, calling an order for security for costs a “blunt instrument” which was not “intended to act as a roadblock to genuine claims.” Because the apparent decline in the father’s income could result in reduced child-support payments, the court reminded litigants that security for costs orders “should be used sparingly and carefully.”

There is no doubt the Court of Appeal had to recognize that financial circumstances can change, but tried to ensure that the wife would have at least some protection if the husband’s motion to reduce support failed.

However, the original order for security for costs followed a year after the support and costs order made at the lengthy trial. Support was based on the father’s own lawyer’s agreement about his income. Despite this, the father failed to pay the support ordered and costs.

Given that the wife never received the support and costs, it is likely that she found that the Court of Appeal's balancing fell far short of a just result.

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