Focus FAMILY LAW

Courts have wide discretion for noncompliance


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A litigant who fails to obey an order or follow the Ontario *Family Law Rules* may find themselves subject to the wide discretion of the court to "deal with the failure by making *any order* that it considers necessary for a just determination of the matter." [Emphasis added.] The foregoing discretion, embedded in amended subrule 1(8) and new subrules 1(8.1)-(8.3) which came into force on Jan. 1, provides the court with the ability to craft creative remedies to address noncompliance. As stated by Justice Joseph Quinn in *Hughes v. Hughes* [2007] O.J. No. 1282, the word "including" contained within subrule 1(8) illustrates that the listed sanctions "are not the only arrows in the court's quiver."

The availability of creative remedies for noncompliance was stressed by Justice Deborah Chappel in *Levely v. Levely* [2013] O.J. No. 753, wherein she stated that a "judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible." The emphasis on utilizing creative remedies to address noncompliance is important in light of the pronouncement from the Ontario Court of Appeal in *Hefkey v. Hefkey* [2013] O.J. No. 1697, that the "civil contempt remedy is one of last resort" and it "should not be sought or granted in family law cases where…other adequate remedies are available." Consequently, while contempt is a remedy under subrule 1(8), other adequate remedies to address noncompliance should be sought prior to contempt.

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> **Justice Deborah Chappel**
> Ontario Superior Court of Justice

In *Ignjatov v. Di Lauro* [2014] O.J. No. 3415, Justice Alison Harvison Young crafted a creative remedy to address the mother's failure to comply. In *Ignjatov,* the parties entered into minutes of settlement which required the mother to consent to the children's participation in First Communion and Confirmation religious sacraments which were to be organized by the father, and to consent to any preparation necessary to take part in the ceremonies. The father planned the First Communion and scheduled plans for the Communion weekend. He provided the mother with five months' notice of the important milestone. Despite the mother being made aware of the plans and never expressing any issues with the date, she removed the children from school on the day before the First Communion and cancelled the event via an e-mail sent the night before at the very last minute.

Justice Harvison Young found the mother's "abrupt cancellation of the First Communion" to be "shocking conduct," and found that the mother's conduct in general "reflects a systematic attempt to minimize and marginalize the father's role in his children's lives." The court further stated that "given the fact that…the Mother's conduct was a serious and unjustifiable breach of the Minutes, and reflects an unfortunate pattern of conduct on her part, it is important that it be sanctioned and that she understands that such actions will have consequences." The court accordingly ordered the rescheduling of the Communion, a police enforcement clause if access was denied again, a non-disparagement order prohibiting the mother from involving the children in adult issues, and child-appropriate cellphones programmed so that the father could reach his children while in her care. The mother had prevented telephone access and had even changed her phone number without giving the father the new number. The children had reported that the mother and her husband had called the father names such as "donkey." The mother was also ordered to pay $1,261.76 to the father for the costs incurred as a result of her cancelling the festivities of the First Communion weekend.

In *Myers v. Myers* [2014] O.J. No. 1350, Justice Helen MacLeod-Beliveau resorted to subrule 1(8) to craft creative remedies in response to the father's "deliberate, willful and blatant" non-compliance with numerous court orders pertaining to support and costs. Justice MacLeod-Beliveau struck the father's motion to change and precluded him from bringing any further motions to change until all his support arrears and cost orders were paid in full. Justice MacLeod-Beliveau also relied upon subrule 1(8) to prevent future motions to change brought by the father from proceeding unless the ongoing support orders were in good standing. Subrule 1(8) was also used to require the father to post security for costs in the sum of $25,000 if he brings any future motions to change. Lastly, Justice MacLeod-Beliveau ordered costs of the motion pursuant to subrule 1(8)(a).

The foregoing decisions illustrate that subrule 1(8) of the rules is a discretionary judicial tool for creating effective remedies to address noncompliance. The subrule can be invoked in order to ensure that cases are adjudicated justly, the integrity of the justice system is upheld, and to inform litigants that noncompliance has consequences.

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Unrealistic: Mandatory information programs and paralegal involvement urged

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When litigants proceed without counsel, 83 per cent of respondents said that settlement before trial is less or much less likely when one party is self-represented, and 47 per cent said that settlement is less or much less likely when both parties are self-represented. This low rate of settlement may be attributable to unrepresented parties' assumptions about how their cases will turn out. Almost half of the judges and two-thirds of lawyers said that self-represented parties always or usually have unrealistically high expectations for the outcome of their cases.

Making matters worse, cases involving unrepresented litigants tend to take longer to resolve than cases in which all parties are represented. More than 90 per cent of respondents said that challenges always or usually arise because of self-represented litigants' unfamiliarity with the law of evidence, the legislation applicable to their case, the rules of court, and hearing and trial processes. Less than six per cent of respondents said that these problems arise only sometimes or rarely.

When cases involving self-represented litigants are resolved, their unrealistic expectations of outcome pair with results that are worse than what would have been achieved with counsel. However, two-thirds of respondents believe that judges treat self-represented parties "very fairly," and only one thought that judges treat these litigants unfairly. The perception is that self-represented litigants do worse than represented litigants on economic issues. They may do a slightly better job with parenting issues, but only six per cent of respondents said that self-represented litigants achieve better results on parenting arrangements, and only two per cent said they achieve better results on support issues.

Litigants without counsel are often caught in a downward spiral. They generally have unrealistically high expectations for the outcome of their cases, which reduces the likelihood that their cases will be resolved without trial. When they do proceed to trial, their lack of knowledge of the governing legislation, the rules of evidence, the rules of court and court processes frequently causes additional problems and doubtless increases the length of trials and the number of adjournments, and when their trials do complete, self-represented parties usually achieve worse results than they would have with counsel. Not surprisingly given these results, 84 per cent reported that the fact that one party is self-represented increases the cost of dispute resolution for a represented party.

Respondents were also asked their views on how to improve self-represented litigants' use of the court system. Almost half the judges and more than a third of the lawyers said that it would help to have plain-language guides to court processes, the rules of evidence and the legislation. More than a third of judges and almost half of the lawyers support requiring parties to attend a mandatory information program following the commencement of proceedings. About half of the judges and lawyers supported giving paralegals a limited role in family law disputes.

Interestingly, the measures that received the least support included actually simplifying court processes, the rules of evidence and legislation, or the appointment of counsel as *amicus curiae*. When all parties are unrepresented, about a quarter of judges and lawyers support the adoption of an inquisitorial approach, and 23 per cent of judges and 36 per cent of lawyers supported the use of a mediation-litigation hybrid process, in which judicial mediation is attempted and trial ensues if settlement is not achieved.

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