

## Family

## Disclosure in family court and the need for co-counsel

By Gary Joseph



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(October 20, 2020, 8:25 AM EDT) -- Family law matters have become increasingly complex. Managing a family law trial now involves the usual presentation of evidence but the extent of documentary evidence necessary has greatly expanded with the focus on disclosure as articulated in a number decisions of the Court of Appeal (see Justice Mary Lou Benotto's comments in *Roberts v. Roberts* 2015 ONCA 450 and Justice William Hourigan's comments in *Leitch v. Novac* 2020 ONCA 257).

Further, there are few if any family law trials involving claims for support, income determination or asset valuation where the evidence of experts is not called for. With the presence of expert testimony, the opposing counsel has need for a consulting expert. Now layer on the complexities of a COVID-19 virtual trial and one is left to wonder how all of this can be handled by one counsel for each party.

Costs at trial are an important component of the family law trial. A party may be better served by two counsel (usually senior and junior counsel) but will success at trial lead to a cost award that would cover the additional member of the team? There have been many instances when the courts, in assessing costs after trial, have considered this issue. Justice Heather McGee in *Diamond v. Berman* 2020 ONSC 4301 suggested a general rule against allowing costs in favour of two counsel. She saw the potential for financial intimidation of the opposite party and the possible discouraging of meritorious claims.

Justice John P.L. McDermot in *Iacobelli v. Iacobelli* 2020 ONSC 6128 recognized that "the complexity of the matter also would dictate where co-counsel would be permitted at trial." He would allow for an exception to the rule articulated by Justice McGee, "if a matter is sufficiently complex or the efficient presentation of evidence requires two counsel." However, he cautioned that "the matter must be extremely complex for the court to find that there is need for second counsel, and this is particularly so in family law matters where the affordability of trials and the cost of representation for matrimonial clients is increasingly in issue..."

In *Iacobelli*, while acknowledging the matter was indeed complex, Justice McDermott disallowed the claim for counsel fees for the second table lawyer.

COVID-19 and the possibility of a virtual trial heavy in documentary evidence may impact the weight of case law against costs for second counsel. The court may appreciate the added burden imposed and relax the rule against such costs. Counsel are now faced with the choice of using second counsel and the possibility of his/her fees being disallowed in a cost award with the benefit of a second set of hands, eyes and another mind focused on the case. I always chose the latter.

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