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Family

Breach of court orders and 'no audience' concept

By **Gary Joseph**

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(January 28, 2021, 8:29 AM EST) -- I have now written and published articles expressing my views on the Ontario Divisional Court decision in *Lokhandwala v. Khan* 2019 ONSC 6346. (For those who do not bother to read my frequent rants, in *Lokhandwala* the court expressed its displeasure with leave motions on interim orders.) I now follow with a related discussion of the issue of audience and the right of appeal in family law matters.

I begin by noting that I fully endorse the view that court orders are not mere suggestions but directives that must be followed until varied, rescinded or set aside. As an officer of the court, lawyers have a positive duty to advise clients of their obligations under an order of the court and the imperative of full compliance. However, the right to be heard and the right of meaningful appeal are also important components of our system of justice.

The recent Court of Appeal decision in *Abu-Saud v. Abu-Saud* 2020 ONCA 314 is perhaps not the best fact situation in support of my argument, but it does represent a recent decision on this very timely issue. Azam Asaad Abu-Saud was described by the trial judge as someone who never willingly paid support, ignored court orders and unilaterally reduced his monthly support payments. His breaches of court orders were found to be "deliberate, relentless and indefensible." While the support arrears were relatively modest, the Appeal Court had no problem with quashing his appeal and ordering fully indemnity costs against him.

What is useful in this decision for counsel in general is the court's review of the case law on denial of audience (the right of a lawyer to appear in court) and the affirmation of the court that denial (or in this case, the quashing of an appeal) is not automatic. The court was open to considering the breach in the context of willfulness, quantum, reasons for the breach and attempts to remedy the breach. While there is little that is new here, counsel should be reminded of the discretion available to the court and the absence of automatic denial. This discretion lies with trial judges too. In practice it seems now that every breach leads to threats of "no audience."

Circling now back to earlier discussions of the *Lokhandwala* decision, given the very narrow ability to appeal interim (temporary) orders, counsel may often find a client with a clear inability to fully comply with an order and who has been promised relief at trial. However, his/her efforts to participate at trial may be inhibited by the now frequent request (by opposite counsel) of "no audience."

To this client and to counsel for such clients, I suggest the following:

- "No audience" is not automatic;
- At all times urge your client to fully comply with the order but in circumstances where full compliance is impossible, partial compliance is better than no compliance;
- Make good faith efforts to negotiate forbearance agreements or attempt to post security for arrears should they exist (for example an irrevocable Direction to pay from house proceeds);
- Be well prepared to present evidence of why the temporary order should not be continued at trial and why the trial court should perhaps rescind arrears or otherwise deal with the past breaches in a manner favourable to your client.

Good lawyering is necessary as described above. The right to be heard *audio alteram partem*, (no person should be judged without a hearing) is a principle of fundamental justice. It is a concept that can be traced back to early Greek drama and can be found in the writings of major religions. I suggest that the obligation of counsel to take steps to preserve this right for a client wherever possible is equal to that of the obligation to urge compliance with court orders.

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