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Family

The trouble with invisible litigants

By **Gary Joseph**

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(August 14, 2020, 8:14 AM EDT) -- Most of the family law bar is now familiar with the Court of Appeal decision in *Leitch v. Novac* 2020 ONCA 257. Once released, I wrote and commented on Justice C. William Hourigan's "granular" dissection of the lower court ruling, his powerful comments on non-disclosure and his condemnation of "invisible litigants" said to be "family members or friends of a family law litigant who insert themselves into the family law process." The recent decision of the same court in *Peerenboom v. Peerenboom* 2020 ONCA 240, while not specifically referring to *Leitch*, in my mind, is a further caution from the court as to involvement of family members in family law litigation.

Two trials preceded this appeal. In the first trial the wife sought to determine the validity of a default judgment the husband's father had obtained against the husband arising out of a series of promissory notes signed by the husband for loans made to him during the marriage. The trial judge refused to set aside the default judgment. There was no appeal from this order and the husband's father (Harold) obtained a writ of execution.

The second trial was in the matrimonial proceedings commenced by the wife. The wife had added Harold as a respondent. In this trial the wife obtained an order staying enforcement of the writ of execution. Harold appealed that order wishing to proceed to enforce his judgment. At the commencement of the matrimonial trial, the husband's pleadings were struck. The husband appealed that order. If allowed to proceed with his appeal, there were two aspects of the matrimonial trial order the husband wished to appeal.

My focus here relates to the stay of the writ of execution by order made in the matrimonial trial and the appeal from that order. This part of the appeal involves a fascinating exploration of whether a writ of execution is or is not an "encumbrance" within the meaning of this term in s. 21 and 23 of the *Family Law Act* (FLA). These provisions are designed to protect the interests of spouses in matrimonial property from unilateral dealings that threaten to interfere with their interests (see *Walduda v. Bell* [2004] O.J. No. 3071, at para. 14).

Justice Katherine van Rensburg for the Court of Appeal narrows the scope of this inquiry to whether, and in what circumstances, a writ of execution by a third-party creditor can be an "encumbrance" by a spouse (see s. 21 and 23 FLA). A court's power to set aside an encumbrance under these provisions is dependent on establishing that the other spouse encumbered the property without consent. Thus, typically the FLA provisions do not apply to executions by third-party creditors.

Ultimately, the Appeal Court finds that the writ of execution was not an encumbrance of the matrimonial home by the husband (the spouse). As such the trial judge erred in issuing a stay of the writ relying upon s. 23(d) of the FLA. However, that was not the end of the appeal inquiry.

Justice van Rensburg continued to consider whether the stay of the writ of execution was then justified under s. 106 of the *Courts of Justice Act*. This provision gives courts broad discretion "on its own initiative or on motion by any person, whether or not a party, to stay any proceeding in the court ..." This authority has been found to permit a court to stay the enforcement of a judgment. A stay may be granted where the conduct of the judgment creditor is oppressive or vexatious or an abuse of process and where the stay would not cause an injustice to a plaintiff. Using this provision

and citing various case law in support of her view, Justice van Rensburg found that the stay of Harold's writ of execution was indeed justified as "there was no question that his objective in enforcing the judgment [by filing a writ of execution] was to put the equity in the home beyond the wife's reach."

The Appeal Court found that by filing the writ of execution against the matrimonial home, Harold was trying to do indirectly what he could not do without the wife's consent. For these reasons Harold's appeal of the stay of the writ of execution was dismissed.

Most of us have experienced the efforts of family members or friends eager to assist family law litigants. The fact scenario of parental loans confirmed by Promissory Notes is quite common as is the subsequent civil suit brought soon after separation with the resultant undefended or consent judgment by and against the offspring of the lender. These "invisible litigants" — sometimes well intentioned, sometimes not — often act in an effort to promote their offspring's position in the family law litigation. Here the Court of Appeal has signalled that such actions can be viewed as causing an injustice to the opposite party and will not be permitted.

While not as powerfully stated as in *Leitch*, it continues the view of the Court of Appeal that such actions meant to assist one or the other spouse are to be discouraged. The message not so elegantly put, for me, is "family and friends" stay out of it; your intervention is not welcome! I expect this view will be adopted by courts throughout the province as judges are eager to avoid expanding and otherwise permitting the expansion and further complication of family law disputes.

One last note: I understand that there is a leave application pending to the Supreme Court of Canada in the *Leitch v. Novac* matter.

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