GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

TAB 6B

When and How Tos-Practical Tips for Work Common to your Practice Area

Financial Statements/Financial Disclosure What Not to Forget and Remedies if the Other Side Does Forget

Kristen Normandin
Goldhart & Associates

New Lawyer Practice Series
Family Law

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

Financial Statements/Financial Disclosure
What Not to Forget and Remedies if the Other Side Does Forget
by Kristen Normandin

Upon a review of the *Family Law Rules* it is clear that financial disclosure is of paramount importance in family law cases. The starting point for financial disclosure is the financial statement and in the absence of it being completed properly, it is of no value to anyone. The notion that financial disclosure is fundamental is clear when you carefully review the remedies to deal with the failure to comply with the *Family Law Rules* in this regard.

Review of the Family Law Rules Regarding Disclosure and Financial Statements

Rule 13 of the *Family Law Rules*

Rule 13 of the *Family Law Rules* clearly sets out when a party must serve and file a sworn financial statement. A party must serve and file a Form13.1 Financial Statement for any claims which are comprised of a support claim *and* a property claim, whereas a party is only required to serve and file a Form 13 Financial Statement for claims related to support only.

Rule 13 (6) of the *Family Law Rules* provides:

> Full Disclosure in Financial Statement – A party who serves and files a financial statement shall,
>
> (a) make full and frank disclosure of the party's financial situation;
> (b) attach any documents to prove the party's income that the financial statement requires;
> (c) follow the instructions set out in the form; and
> (d) fully complete all portions of the statement.

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

Exception to Filing a Financial Statement

An interesting exception to the Rules regarding financial statements is Rule 13 (1.3) which provides that a recipient spouse need not file a sworn financial statement if the only relief they are seeking is the table amount of support pursuant to the *Child Support Guidelines*.

Rule 13 (1.3) may be used in cases where a recipient parent does not want to make any financial disclosure. One of the only exceptions to this exception is where there is a claim (by way of Application, Answer or Notice of Motion) for property or a claim for exclusive possession of the matrimonial home and its contents.

An example of when Rule 13 (1.3) is applicable is as follows:

Bob and Amy are married in 1995 and separate in 2000 on account of Bob being controlling of Amy, both financially and emotionally. However, prior to their separation, in 1997, they have one child, Sara. Upon their separation, they settle all issues arising from the breakdown of the marriage, including custody/access, exclusive possession of the matrimonial home, equalization of net family property and mutual releases for spousal support. Bob and Amy entered into a comprehensive Separation Agreement settling all issues and included the standard provisions dealing with child support for Sara (who resides primarily with Amy).

In 2005, Bob, who is bitter about the separation, believes that Amy has recently re married someone of significant financial resources. As a result, he stops paying support and refuses to provide financial disclosure. Bob tells Amy that she can afford to support Sara now that she is remarried and decides he is no longer going to pay. Amy, of course, seeks advice and commences an Application for the table amount of child support, pursuant to the *Child Support Guidelines*. Relying on Rule 13 (1.3), Amy does not file a sworn financial statement. She is of the view that Bob is simply trying to be involved in her life and have access to her financial circumstances, which would be unnecessary and

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

intrusive.

Unfortunately, there is no relevant reported case law regarding this Rule[1] however, in a recent case, this issue was canvassed at a Case Conference in Toronto (at 393 University Avenue) and the judge hearing the Case Conference was of the view that, notwithstanding Rule 13 (1.3) that a sworn financial statement should be filed.

The difficulty with the exception to this rule is that the foundation of our family law system is based on full and frank financial disclosure. It seems inconsistent that a party who is seeking support by way of Application or Motion should not be required to file a financial statement. On the other hand, when the financial statement only serves as a window into a recipient's irrelevant financial circumstances, it begs the question, why is the disclosure relevant? It may be worthwhile to rely on the rule in certain files however, whether or it will be applied is another story.

What Not to Do!

There are a number of common complaints that parties, and their counsel make when receiving a financial statement, most of which can be avoided with diligence and most often, common sense. The following are only some of the examples of what not to do:

1) *Do not blindly rely on your client to tell you what should be in the financial statement*

   It is your responsibility, as counsel, to know what should be included in a financial statement and to ask questions to ensure your client understands what needs to be included, and how to obtain the information. This principle has been enunciated in the case law. In *Buttrum* v. *Buttrum*[2], the Honourable Justice

[1] In the case of White v. Richardson [2005] O.J. No 1715, there is reference to the Rule but this case is not applicable for the purpose of this paper because residence of the child was in dispute.

[2] (2001) 15 R.F.L.(5th) 250 ("Buttrum")

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

Aitken considered counsel's role in the preparation of a financial statement and stated:

> "Although I am not suggesting such was the case here, I caution lawyers that they are providing poor service to their clients if they delegate responsibility to the clients to figure out how to complete the forms, with the lawyers' assistants merely typing them. Completion of a client's financial statement must be done under the direction of the lawyer. The lawyer must ask pertinent questions to ensure that disclosure has been accurate and complete, the form has been filled in clearly, and all necessary notes and explanations have been added to make it comprehensible to the opposing client, the opposing counsel and the court."

2) *Do not include estimates for each value in the financial statement*

This is not only an impractical practice, but often times, lazy. When a client arrives at your office with their draft financial statement and lists of estimated amounts for each asset and debt, these amounts should not be acceptable. Presumably, and more often than not, a client will first meet with counsel shortly after their separation (or while they are preparing to separate). Therefore, the valuation date (for property claims) is definable and the disclosure should be readily available. With online banking today, values for certain accounts such as bank accounts, credit cards, mortgages and lines of credit, are available and your client only needs to print off one 'screen' for many values.

Note: there are obviously certain circumstances where you may be forced to file a "quick" financial statement with an Application or an urgent motion (such as child welfare, exparte motion, spousal abuse, etc.) and this is not meant to apply to those situations. It is however, important to note that counsel should amend the financial statement promptly after these events to avoid future difficulties in the litigation.

3) *Do not forget to provide a document disclosure brief with your financial statement*

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

While there are certain items where noting "to be determined" may be appropriate, you should get into the practice of preparing a financial disclosure brief when you prepare your financial statement. This practice mirrors the comments of Justice Aitken in *Buttrum* but also saves your client a significant amount of time and expense in the event that there are disputes about the values set out in the financial statement at a later date.

4) *Do not file a Form 13.1 Financial Statement for unmarried parties*

There is no equalization of net family property when co habiting parties separate and as a result the parties only need to file a Form 13.

5) *Do not underestimate your client's lack of knowledge of the financial affairs*

Do a sub search on property. By way of example, you have a party attend your office that will be certain that they are a joint owner of a property. In fact, even their spouse may claim that they are a joint owner of a property. However, in reality, it turns out the property is owned by only one party. If a settlement is reached, based on that information of joint tenancy and an equalization of net family property is determined, it is likely that the error in ownership may adversely affect one party. If the parties do not realize this until years after the settlement, the client's will look to their counsel for the potential loss. This is a potential LawPRO problem that is easily avoidable.

6) *Do not ignore non traditional debts such as contingent tax liabilities, disposition costs and capital gains*

Again, this is a potential LawPRO issue that should not occur. When a party thinks about their "debts", they think about their mortgage, a line of credit and credit cards.

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

However, clients (particularly financially unsophisticated ones) may rarely take into account disposition costs of a matrimonial home or other property. The effect of this omission may materially affect their net family property. By way of example, if your client owns two properties on separation, being a matrimonial home in Toronto (valued at $1,500,000.00) and a cottage in Muskoka (valued at $1,500,000.00), failing to advise of the disposition costs may result in a increased net family property by as much as $180,000.00 (being $3,000,000.00 at 6%). The effect of this omission will not only be obvious in families with high value properties. For instance, at 6%, the disposition costs on a $500,000.00 property are still $30,000.00. Also, be mindful of the potential capital gains tax payable upon the disposition of a property, other than the matrimonial home. Seek accounting advice in this regard.

The effect of not including the contingent tax liabilities has essentially the same effect as omitting the disposition costs (a potentially increased net family property). When a client has an asset such as RRSP, it is imperative that you consider the contingent tax liability for that asset. Generally, the average ranges for the contingent tax liability on an RRSP are between 20% and 30%.
Note: generally, taxes are accounted for in pension valuations so there is no need to consider the tax liability for a pension as your valuation provides a net number.

7) *Do not list exclusions without listing the corresponding asset*

If a client has evidence of an exclusion, such as an inheritance or a gift, it is necessarily included in the financial statement as either an inheritance or a gift, and therefore excluded. However, a common mistake is that the inheritance or gift will not be reflected as a corresponding asset. The effect of this will be an artificial reduction in a party's net family property. By way of example, if your client excludes an inheritance of $200,000.00 but does not list it as an asset (which would then result in it being a "wash"), the exclusion is applied against all other assets, which assets would otherwise be *included* in calculating net family

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

property.

8) *Do not ignore a Home Buyers Loan*

The Home Buyers Loan is a program designed to allow first time home buyers the ability to use up to $20,000.00 from their RRSP, on a tax free basis, to use towards the purchase of a principal residence. If you have a client that has participated into the Home Buyers Loan program, you should indicate this on their financial statement. The RRSP will show a reduced amount and there will be a debt for the amount owing (as paid to the RRSP). To offset the debt, there should be a receivable for the amount that will be paid back to the RRSP.

9) *Do not forget to include tax instalments*

This can sometimes be an oversight on account of the fact that it may be considered an income issue. However, if a party is indebted to CRA to make instalment payments on account of their taxes, then a debt to reflect that amount owing, at the date of separation, should be included in the financial statement.

10) *Ask about unusual assets or debts.*

Do not forget to ask about items such as tax shelters which may result in potential (future) tax liabilities.

Remedies for Failure to Provide Disclosure

Rule 1(8) of the *Family Law Rules* provides (in part):

The Court may deal with a failure to follow these rules, or a failure to obey an order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate,

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

including:

a) an order for costs;

b) an order dismissing a claim made by a party who has wilfully failed to follow the rules or obey the order.

Although Rule 1(8) does not expressly give a court power to strike a Respondent's pleadings, that power can reasonably be considered appropriate in cases where a Respondent has wilfully refused to follow the Rules or obey an Order of the Court[3].

Rule 13(16) of the *Family Law Rules* provides:

> If a party has not served and filed a financial statement or net family property statement or information as required by this rule or an Act, the court may, on motion without notice, order the party to serve and file the document or information and, if it makes that order, shall also order the party to pay costs.

Rule 13(17) of the *Family Law Rules* provides:

> Failure to Obey Order to File Statement or Give Information – If a party does not obey an order to serve and file a financial statement or net family property statement or to give information as the rule requires, the court may,
>
> (a) dismiss the party's case;
>
> (b) strike out any document filed by the party;
>
> (c) make a contempt order against the party;
>
> (d) order that any information that should have appeared on the statement may not be used by the party at the motion or trial;
>
> (e) make any other appropriate order.

Rule 14 (23) of the *Family Law Rules* provides (in part):

[3] *Myles* v. *Reed* [2003] O.J. No. 848

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

A party who does not obey an order that was made on motion is not entitled to any further order from the court unless the court orders that this subrule does not apply, and the court may on motion, in addition to any other remedy allowed under these rules,

a) dismiss the party's case or strike out the party's answer or any other documents filed by the party;
b) postpone the trial or any other step in the case;
c) make any other order that is appropriate, including an order for costs.

Rule 31 of the *Family Law Rules* provides (in part):

When Contempt Motion Available – An Order, other than a payment order, may be enforced by a contempt motion made in the case in which the order was made, even if another penalty is available.

Contempt Orders – If the court finds a person in contempt of the court, it may order that the person,

(a) be imprisoned for any period and on any conditions that are just;
(b) pay a fine in any amount that is appropriate;
(c) pay an amount to a party as a penalty;
(d) do anything else that the court decides is appropriate;
(e) not do what the court forbids;
(f) pay costs in an amount decided by the court; and
(g) obey any other order.

Striking a Pleading and Orders of Contempt

When a party is refusing to provide financial disclosure, an appropriate remedy may be to bring a motion to strike a pleading.

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

Striking a pleading is an appropriate remedy in cases where the deliberate failure by a party to provide disclosure causes prejudice to the other party. The prejudice caused by the non disclosing party must be met with appropriate sanctions, particularly given the importance of disclosure under the *Family Law Rules*[4].

A pleading should be struck were a party has been granted numerous opportunities to rectify breaches of Orders and where the party breaching the Order failed to even provide evidence that reasonable efforts were being made to rectify the breach. Breaches of orders should not be tolerated by the Court[5].

A contempt order may be made if a party's behaviour (to breach the order) is wilful which is a failure to act in accordance with an Order unless it is unintentional or accidental[6].

The purpose of the *Family Law Rules* (and Toronto Case Management Rules) is to ensure that issues regarding disclosure are dealt with in a timely way. In the absence of proper disclosure, parties cannot deal with the substantive issues on their merits. When it is clear that a party has thwarted the disclosure process so as to impede a more expeditious resolution, an Order of Contempt may be appropriate[7].

When a party has been afforded ample time to produce financial disclosure pursuant to an Order and fails to do so, an Order of Contempt is an appropriate remedy, even if disclosure is provided on the eve of the motion (if the disclosure continues to be

[4] *Shamli v. Shamli* [2004] O.J. No 4999

[5] *Costabile* v. *Costabile* [2004] O.J. No 4778, [2005] O.J. No 5129

[6] *Sharpley* v. *Sharpley* [2005] O.J. No 5697 ("Sharpley")

[7] *Bespaly* v. *Bespaly* [2003] O.J. No 759

GOLDHART & ASSOCIATES
FAMILY LAW · MEDIATION · ARBITRATION

2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

deficient). A party that is ordered to provide disclosure cannot do so at their "convenience" but rather as it is ordered by the Court[8].

The purposed of a contempt order is twofold:

1) it is meant to encourage the contemnor to purge the contempt and comply with the terms of the order;
2) it is meant to deter parties from non compliance with court orders. More particularly "the sentence should send a message to support payors that they cannot frustrate the intent of the legislation and file to support their children adequately through non-compliance with order for disclosure.....To permit support payors to avoid their obligations to their children through willful disregard of court orders is simply not acceptable[9]."

Conclusion

It is imperative that counsel take the time to properly prepare financial statements the first time. The consequences for failing to take the necessary steps to prepare disclosure properly are onerous and prejudicial to clients. Many lawyers frequently prepare financial statements for settlement purposes which means there may be a tendency to do so with less accuracy. However, prudent practice dictates that financial statements should be prepared with the same accuracy and attention to detail as if they were being prepared for trial (even though they may not get near the courtroom door).

Kristen Normandin
February 13, 2008

[8] *Bhoi* v. *Bhoi* [2001] O.J No. 4864

[9] *Sharpley*