

CHANGING LANDSCAPES IN FAMILY LAW
PRACTICE AND THE PROFESSIONALS' ROLES
IN ACHIEVING RESOLUTION

Presented to the Estate Planning Council

November 5, 2018

Maria Mitousis, Petersen King Law Corporation

OUTLINE

- Current Landscape
- What is changing
- Processes Available
- Roles of Professionals (lawyers, accountants and planners)
- Avoiding Conflicts
- Financial Statements & FPA accountings
 - Family Property Act
 - Child Support Guidelines

THE LANDSCAPE

- One size does not fit all in separation and divorce
- Many issues to contend with:
 - Parenting
 - Domestic violence
 - Income determination
 - Child support
 - Spousal support
 - Financial disclosure

THE LANDSCAPE

- Preservation of assets
- Accounting and equalization
- Severing tenancy
- Homestead issues
- Sale of real property
- Gifts, loans from family members and how they affect family assets
- Pensions, retirement benefits
- Business valuation

THE LANDSCAPE

- Professional advisors family lawyers interact with most frequently:
 - Financial planners
 - Accountants and CBVs
 - Estate planners

THE LANDSCAPE

- What are your roles?
 - How many have provided advice to both parties post-separation or even assumed mediator-like role?
 - Advised one party only? Spoken to their lawyer?
Prepared income calculations and asset/debt summaries?
 - Witness in court for one party?
 - Expert witness on one or more issues?

CHANGES

NEW FAMILY LAW MODEL

- Initiative of the Court of Queen's Bench
- Rolling it out now - CPD sessions and practice directions
- Representing massive changes to the way family law files will move through court
- Access to court as a dispute resolution option will now require strict pre-requisites to be certified as complete and the setting of trial dates at the first case conference and it will occur within 12 to 15 months
- Court says that if the case requires litigation it will proceed under strict case management
- Exhaust your out of court options!

- How do family law files presently get resolved?
- It's a spectrum from:
 - Contested Court proceedings
 - Court proceedings – case conferences and judicially assisted resolution
 - Negotiation (with or with out formal court proceedings filed)
 - Collaborative Family Law
 - Arbitration
 - Mediation-Arbitration
 - Mediation
 - “Kitchen Table” (lawyers/advisors in the background)

SHIFT TO OTHER PROCESSES

- Contested Court proceedings
- Court proceedings – case conferences and judicially assisted resolution
- Negotiation (with or with out formal court proceedings filed)
- Collaborative Family Law
- Arbitration
- Mediation-Arbitration
- Mediation
- “Kitchen Table” (lawyers/advisors in the background)

MEDIATION

MEDIATION

- Offered privately:
 - Family Mediation Manitoba – referral list including family lawyers
 - Therapists, counsellors (mostly for parenting issues)
 - Financial specialists/advisors
 - Fairway divorce and similar services
- Offered as public service:
 - Family Conciliation
- Coaching – 4 party mediation (mostly for parenting issues)

MEDIATION

- Pros

- Quick to commence
- Client centred
- Interpersonal issues addressed
- Focus on family
- Can be customized by selecting mediator with appropriate skill set
- Private

- Cons

- Requires both parties to commit and act in good faith
- Risk of not having experienced professional selected
- Requires parties to have legal advice (During? Before? After?)
- Can fail and need to start again
- Lawyers required to draft agreement and/or provide ILA

MEDIATION-ARBITRATION

MEDIATION-ARBITRATION

- Offered privately
- Lawyers and retired judges, retired lawyers generally
- Arbitration Contract signed between parties (ILA required)
 - Mediate issues first
 - If no resolution the process switches to an arbitration
- Parties can participate on their own or with legal counsel

MEDIATION-ARBITRATION

- Pros
 - Benefits of mediation
 - An outcome will be achieved
 - Interpersonal issues addressed
 - Focus on all issues
 - Can be customized by selecting mediator with appropriate skill set
 - Private
- Cons
 - Because of the binding outcome cost is higher as parties opt to have legal counsel (at least during the arbitration process)
 - Arbitration (informal to formal like a court process) not as accessible
 - Some limits presently (custody issues in the jurisdiction of the Court) – amendments are required
 - Fewer certified arbitrators available

COLLABORATIVE PRACTICE

COLLABORATIVE PRACTICE

- Collaborative Practice is a voluntary dispute resolution process in which parties settle without litigation.
- In Collaborative Practice:
 - The parties sign a collaborative participation agreement describing the nature and scope of the matter;
 - The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;

COLLABORATIVE PRACTICE

- Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;
- The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
- The parties may jointly engage other experts as needed.

COLLABORATIVE PRACTICE

- Provides clients with the support and guidance of lawyers without going to court.
- Benefit of coaches, child and financial specialists all working a professional team.

COLLABORATIVE PRACTICE

Lawyers:

- Area of expertise is Family Law
- Trained in Collaborative Practice, conflict resolution and mediation
- Adopt a non-adversarial approach to address division of assets, setting of spousal support, child maintenance and custody and access issues
- Guide clients through the legal process and prepare the necessary documents

COLLABORATIVE PRACTICE

Relationship Coaches:

- Licensed and/or registered psychologists and social workers whose primary area of practice is in family relationships
- Manage conflict between spouses and optimize communication so that couples can successfully move through the divorce process and develop an effective co-parenting relationship for the future
- Each spouse will have their own coach and coaches work in collaboration with the team

COLLABORATIVE PRACTICE

Child Specialists:

- Licensed and/or registered psychologists and social workers with training in child-development issues as well as having expertise related to the concerns of children of divorce
- Provides a safe environment for the child(ren) to express their feelings and works to ensure that the needs of the children are considered in the legal process

COLLABORATIVE PRACTICE

Financial Specialists:

- Certified Financial Planners with training in Collaborative Practice and conflict resolution
- Specialized training in financial issues related to separation and divorce
- Works for both divorcing parties to clarify the current financial status and help the parties to choose the best financial outcome based on the particulars of each case

CONFLICTS OF INTEREST

When your clients separate? What role can you continue to have?

CONFLICTS OF INTEREST

- What if the client advises that they are contemplating separation? They are not sure? Wants your advice and your opinion.
- You are a fiduciary and have duty to both
- Comes down to the ability to provide unbiased, objective and unconflicted advice.

CONFLICTS OF INTEREST

- Accountants – beware – how quickly an amicable matter can convert into a contested matter
- The accountant can play very different roles depending on process
 - Are you a neutral expert as in the collaborative process?
 - Are you an expert witness retained as part of the litigation process?
 - Are you a witness for one party with knowledge of the client's income and planning?
- There is no confidentiality or privilege in any of your communications with your client or his/her lawyer or other parties

**THE FINANCIAL PROFESSIONALS
ROLES IN THESE PROCESSES**

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- No matter the process selected our clients are keen to keep legal fees to minimum, they want certainty and a quick resolution. We always start in the same place.
- Much work gathering important information and analyzing data are better done by the financial professional:
 - Preparing statements of assets and liabilities
 - Analyzing any tax implications within the family law context
 - Facilitating the financial disclosure process.

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- Standard lists of disclosure include:
 - income tax returns and supporting documents;
 - bank and investment statements and reports;
 - business income tax returns and business financial statements;
 - mortgage statements; and
 - credit card statements.

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- Why is this information required?
 - We have to complete a Financial Statement (Form 70D)
 - Mandatory document for all court filings (both applicants and respondents)
 - Even in non-contested proceedings the information is necessary to discharge our duties
 - Sworn document – to file improper or incomplete 70D can be seen as misleading or purposefully evasive
 - Failure to provide – costs, fines, contempt, being found by the court the client is not believable and not coming to the court with clean hands

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- Income information
 - Last three years
 - Present year estimate
 - Child support
 - Spousal support
- Part 2 relates to present income and the descriptions of the materials largely mirrors line items in an income tax return (sources, adjustments, deductions)

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- Part 3 is all about Assets
- Identify (based on category): RRSPs, vehicles, tools, accounts, pensions, etc.
- Estimate the value at two dates
 - Date of separation
 - Present date
- Value are fair market value

HOW FINANCIAL PROFESSIONALS CAN SUPPORT THESE PROCESSES

- Part 4 are debts and other liabilities
- Mortgages, lines of credits, credit cards
- Again, the amount is required at the two dates
 - Date of separation
 - Present date

THE FAMILY PROPERTY ACT

APPLICATION AND EXCLUSIONS

APPLICATION

- Generally speaking (subject to specific provisions in the Act of course) applies to all assets accumulated during the conjugal cohabitation

EXCLUSIONS

- S.4(I) assets acquired before relationship are **EXCLUDED**
(Unless acquired in specific contemplation of the marriage)
 - BUT
 - Appreciation
 - Depreciation
 - Income earned from the Asset is **SHAREABLE**

EXCLUSIONS

- S.7(1) Gifts or trust benefit from a THIRD PERSON
- S.7(3) Inheritance
- S.7(4) Income, appreciation, depreciation is excluded too
- S.8(1) award for personal injury or disability
- S.12 Assets outside of Manitoba are NOT excluded

PART II OF THE FPA

- Provides the operative legislative language to require ACCOUNTING and EQUALIZATION of assets
- If there are issues of valuation S. 15 says you can go to a reference
 - Judge may be required first resolve issues of shareability or exclusions
 - Reference is a trial before a Master
- Queens Bench Rules – Rule 70.25(1) – Family Property Act References – is the framework – forms, requirements, evidence and timelines

THE CHILD SUPPORT GUIDELINES REGULATION

CHILD SUPPORT GUIDELINES REGULATION (FEDERAL & PROVINCIAL)

- Presumptive rule that the tables must be followed
 - Exceptions allow for some discretion:
 - Incomes over \$150,000
 - Shared or split custody
 - Adult children

CSGR – HOW DOES THE COURT DETERMINE INCOME?

- Simple cases – employees, T4 income, other ordinary sources, total income in T1 General adjusted as necessary
- Not so easy? Patterns of income over a period of three years
- The tax returns don't provide a complete picture?
 - Then you may seek to IMPUTE

CSGR – OBLIGATION

Obligation to provide financial information to the other parent

20(2) A parent whose income information is necessary to determine an amount of child support **must provide the following to the other parent,** or his or her authorized representative or an order assignee, after receiving a written request from the other parent, or his or her authorized representative or the order assignee,

CSGR – DISCLOSURE

- (a) a **sworn Financial Statement** in the form required by the Court of Queen's Bench;
- (b) a copy of **every personal income tax** return filed by the parent for each of the three most recent taxation years;
- (c) a copy of **every notice of assessment and reassessment** issued to the parent for each of the three most recent taxation years;

CSGR – EMPLOYEE

(d) where the parent is an **employee**, the most **recent statement of earnings indicating the total earnings paid in the year to date**, including overtime or, where such a statement is not provided by the employer, a letter from the parent's employer setting out that information including the parent's rate of annual salary or remuneration;

CSGR – SELF-EMPLOYED

(e) where the parent is self-employed, for the three most recent taxation years

(i) the financial statements of the parent's business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the parent does not deal at arm's length;

CSGR – CORPORATION

(g) where the parent controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries,

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

CSGR – TRUST

(h) where the parent is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements

CSGR – OTHER INCOME

(h.1) in addition to any income information that must be included under clauses (d) to (h), where the parent receives income from **employment insurance, social assistance, a pension, workers' compensation, disability payments or any other source**, the indicating the total amount of income from the most recent statement of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information;

CSGR – IMPUTATION

- If the tax return doesn't provide the full picture – turn to s. 18, the Court can impute income if:
 - Parent is intentionally underemployed
 - Exempt from paying federal/provincial tax
 - Payor lives in a country with significantly lower effective tax rates
 - Income appears to have been diverted and would affect the level of child support ordered – SPRINKLING OR INCOME SPLITTING OR PARKING IN CORPS

CSGR – IMPUTATION

- Parent's property not reasonably used to generate income –
RETAINED EARNINGS OR INVESTMENT PORTFOLIOS
- Parent has failed to provide financial information – FORM 70D and
S.20
- Parent unreasonably deducts expenses → ADD BACKS PLUS
GROSS UPS
- Parent derives significant income from dividends, capital gains or
other sources that are taxed at a lower rate
- Parent is a beneficiary under a trust

CSGR – DEDUCTIONS FOR CRA

Reasonableness of expenses

18(2) For the purpose of clause (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act* (Canada).

CSGR – PRE-TAX CORPORATE INCOME

Shareholder, director or officer

18(3) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income for taxation purposes does not fairly reflect all the money available to the parent for the payment of child support, the court may determine the parent's annual income to include:

CSGR – PRE-TAX CORPORATE INCOME

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year, or

- (b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income;

CSGR – PRE-TAX CORPORATE INCOME

Adjustment to corporation's pre-tax income

18(4) In determining the pre-tax income of a corporation for the purposes of subsection (3), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

CSGR – PRE-TAX CORPORATE INCOME

- If the company has pre-tax corporate income available, the onus then shifts to the payor to establish "clear evidence" that the corporation's pre-tax corporate income is not available to them for support purposes.
- Because the payor spouse has a "greater appreciation of the workings and needs of the company, or will be best able to identify individuals who can be called as witnesses to address the issue"

CSGR – PRE-TAX CORPORATE INCOME

- In *Nesbitt, v Nesbitt (2001)* the Manitoba Court of Appeal imputed the payor spouse with all of the corporation's pre-tax corporate income as payor could not explain why, from a business standpoint, it was reasonable or necessary to leave money in the business. The cash reserve of the corporation had more than doubled over a three year period.

THANK YOU

Email: mm@petersenking.com

Website: www.petersenking.com

Telephone: (204)992-9900