Can proportionality ever apply in family law disputes?

BY JUDY VAN RHIJN
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Proportionality has become a central tenet in civil litigation in Ontario, and legal forums are debating whether it can be extended to family law. Given that the expensive portion of a family law dispute is more likely to relate to issues of custody and access than finances, proportionality is not always an easy fit in the Family Court.

"Some family matters do not appear proportionate to an outside observer," concedes Julie Stanchieri of Stanchieri Family Law in Toronto. "When you see $400,000 spent on litigation, it doesn't make any sense, but there is more going on. There are emotional reasons that the issues in dispute mean more to the person. It might be an exclusion for an inheritance or childrens' issues."

A recent example of a trial that was clearly out of proportion to the issues was *Jackson v Mayerle, 2016 ONSC 1556 (CanLII)*, a 36-day hearing on a custody matter.

Justice Alex Pazaratz lambasted the couple for spending a total of half a million dollars, saying: "No matter what costs order I make, the financial ruin cannot be undone. They'll never recover. Their eight-year-old daughter's future has been squandered. How did this happen? *How does this keep happening?* What will it take to convince angry parents that nasty and aggressive litigation never turns out well?"

"In *Jackson*, the judge was extraordinarily critical," says Lauren Israel, a family lawyer based in North York. "In the law I practise, people don't spend that sort of money, but even in the law I practise, parents have to look at the whole picture. Parents need to remember there's life after litigation, and that life with children is expensive, in a good way. Spending outrageous sums of money can break a parent financially and in more than financial ways. But it's important not to just look at the money saved and the time saved and trample on people's rights."

For this reason, many family lawyers find that "proportionality" in a purely financial sense does not meld well with family law dynamics. Timothy Sullivan of SullivanLaw in Ottawa perceives the push for making proportionality in costs a rule in Family Court is coming from the bench.

"At every conference I've been to for the last 14 years, judges say family law is too expensive. Maybe some of the success in civil law is prompting family law judges to reconsider and redesign their processes. It may be the new terminology or mantra to make things 'proportional,'" he says.

Sullivan sees some problems with transferring the concept from the civil courts.

Timothy Sullivan says in civil law, parties are usually fighting over money, but in Family Court, money is seldom the high-conflict, expensive portion of a dispute.

"While in civil law, parties are usually fighting over money, in Family Court, money is seldom the high-conflict, expensive portion of a dispute. Custody, access, and future dealings between disputing former spouses are what cause costs to be incurred," he says.

"Mental health issues sometimes plays a role in the reasonableness of the parties. You can't compare the costs to the expenses of a motor vehicle accident, a dog bite, or a debt collection. Proportionality has a tough row to hoe in most family law cases."

"When you define a case as 'proportional,' you run into the attitude that it's only worth a day or X amount of dollars," warns Israel. "It shouldn't be looked at that way. If you only see proportionality as 'What's less expensive? What's quicker?' you do a disservice to the client. It needs to be proportional for this case, these parties, and these issues. You can't make it into a cookie-cutter process."

Despite this, the family law bar is increasingly aware that keeping costs low is a necessary aim.

"There's a financial rationale for all cases, not just civil," says Israel. "Litigation is expensive, emotionally and financially. When the best interests of children is at the heart, you need to make sure there is proportionality in the result, but it is a fine balance so that in the process you don't run over someone's rights."

Katherine Robinson, an associate at Shulman Law Firm in Toronto, says, "You should not look at assigning a value to a family.

"Deciding what a case is worth and assigning how many court resources are to be used is difficult when dealing with family and children and what's important to each individual person," she says.

"It comes down to the role that a lawyer plays" in terms of "giving advice and recommendations on what mechanisms to use and the different procedures available in court and out of court," Robinson says.

She refers to the amendments to the Family Law Rules that came into force in May 2015. They provide court with the ability to make procedural orders at any point in a case.

"They bring more of a look of proportionality. Judges can now try and limit some of the steps and get to the substantive talking early," she says.

Stanchieri believes the amendments are having an impact on the efficiency of the process.

"It's now possible to bring a summary judgment motion and have a determination of whether there is a genuine issue to try without going to a case conference, a settlement conference, and pre-trial meetings," she says. "The court can also change the way that evidence is presented at the hearing. Judges can weigh credibility and evaluate the necessary inferences from evidence as they typically do in a trial."

She refers to other amendments affecting discovery and filing requirements.

"There is a real push at getting the main documents early on. Even if you go to trial, there is an ability to streamline. Witnesses can file their evidence by way of affidavit so you only need cross-examination. That takes days off the trial," she says. **LT**