

Decision underscores that legal proceedings can't be ignored

By Rob Lamberti, AdvocateDaily.com Contributor



The Superior Court of Ontario was correct when it recently **refused** to rescind a divorce because the ex-wife didn't know the proceeding occurred months earlier, Markham family lawyer **Cheryl Suann Williams** tells **AdvocateDaily.com**.

If the divorce was revoked it could have proven disastrous for the husband, who had remarried, says Williams, principal of **Williams Family Lawyers**.

"If they were religious, then the new wife — to use the old expression — would have been living in sin. Depending on the community, it could have been shameful for her. That would be devastating," she says.

Williams says the ex-wife was offered a number of legal "easy fixes" to preserve rights she lost by the divorce, but the woman apparently didn't take them.

"I really see this as wasted legal fees, and unfortunately the husband only got a minimal amount of his fees back," she says.

The court heard the couple, parents of one child, separated in 2014. The husband started a simple divorce proceeding the following year. The divorce was granted in January 2018, the ex-wife was noted in default, and "the divorce order was obtained 'over the counter' by way of affidavit evidence," according to the court.

The ex-husband then went on to remarry.

During a February meeting to discuss some outside issues that needed to be settled, the Ontario woman claimed she didn't know the divorce had gone through.

In May, she filed a motion to set the divorce aside.

Williams, who comments generally and was not involved in the case, says the husband's lawyer would have had to serve the woman with a copy of the application for divorce commencing the proceeding.

"There would have been an affidavit of service from a third party that would be claiming he served the application on the wife," she says. "I don't buy that someone who has a lawyer doesn't know the divorce had gone through."

Superior Court Judge Leonard Ricchetti refused to set the divorce aside and found there was prejudice shown against the husband.

"In this case, there is real prejudice to the husband," he ruled. "He is remarried. His new wife will be prejudiced. He will be 'disadvantaged' if the order sought is granted as will his new spouse."

Ricchetti found the ex-wife had refused to accept an order that would have dealt with corollary relief, including child and spousal support.

"The refusal to consider and accept a *nunc pro tunc* order (a ruling applied retroactively to correct an earlier ruling) suggests that the wife's motivation is to exact leverage on the husband regarding the corollary relief rather than avoiding any prejudice to her," Ricchetti ruled.

Williams notes that bad behaviour is a consideration for the courts in dealing with child support and legal costs. But in this case, the husband was awarded only \$1,500 plus HST.

"As lawyers, we have a responsibility to guide our clients," she says. "You can't say, 'I'm going to ignore this,' and then near the end, jump in. They need to obey a court order unless we're getting it changed on consent or by the court."

"I don't know if this woman didn't take the good advice of her lawyer to just agree to this simple provision of a *nunc pro tunc* order, which would have easily ended the matter without conflict and a court appearance. Instead, she took it through all the way to argue it before the judge," Williams says. "Her costs could have been so much higher."

She says during a divorce a couple will make legal claims for the division of property, child and spousal support and other issues. Williams says she urges her clients to sever the divorce from the other issues.

"If there is no severance, you can't get the divorce without dealing with the other issues," Williams says.

There are numerous examples where parties in a divorce case do nothing until something major is about to occur that forces them to get involved, despite receiving a string of documents and court orders, she says.

"I was recently working on a case where over a couple of years, our client, the wife tried to serve the husband by sending lawyer's letters and getting court orders against him," Williams says.

"He does absolutely nothing until the 11th hour, when he realized that she had been granted an order, enabling her to sell the house he was still living in," she says.

Proceedings can't be ignored, no matter how painful it may be emotionally, Williams adds.