



Deal or No Deal

by Scott D. Abel

Ordinarily, a deal is a deal. Two parties come to an agreement, shake hands, and then fulfill the terms of that agreement. This is no different if one were buying a car, and coming to the terms of a divorce agreement.

However, as is true in both someone buying a car, or separating from their spouse, often people do not live up to their promises. It is then up to the person who did abide by the agreement, to decide whether or not to enforce the terms of the agreement, by taking the matter to court.

So, when is a deal not a deal? In family law situations, a deal is not a

deal when children are involved. The courts are not obligated to enforce an agreement relating to children, for two reasons.

Firstly, dealing with custody and access, the courts maintain what is known as a *parens patriae* jurisdiction. *Parens patriae* is a latin phrase, which essentially means the courts have a guardian like role, to ensure that the best interests of the children are always taken into consideration.

Accordingly, two parents could come to an agreement regarding with whom the children are going to live, and how frequently the other parent will have care of the

children. If one of the parents breaches that agreement, the courts may not enforce the agreement, if the courts do not believe the agreement is in the best interests of the children.

What is equally important to what parents agree to, is how long the agreement has been in place. For example, if parents agree that they will have care of the children on a weekly basis, and next day change their minds, the courts may not enforce the agreement. However, if the care arrangement had been in place for several months, there is a status quo in place that the courts will pay attention to, regardless of the agreement between the parents.

Secondly, the courts are not obliged to enforce an agreement when child support is at issue. The Child Support Guidelines set out the amount of support that is to be paid, dependent upon the income of the payor spouse.

Often the intended recipient spouse, entitled to child support, will not ask for the support. This is often for several reasons, but regardless of the reason, the courts have an obligation to ensure the Guideline amount of child support is being paid. If the Guideline amount is not to be paid, the courts

must be satisfied that the explanation warrants a different amount being paid.

The Courts will enforce agreements where the issues do not relate to children. Those agreements must be reasonable, and free of any undue influence or coercion. Adults can make agreements that affect their own rights, as long as they do so on a fair and level playing field.

Encouraging and ensuring that both parties have independent legal advice, is one way to ensure that the agreements are fair and

reasonable. In that way, both spouses have had an opportunity to have the agreement explained to them by their own lawyer, in the privacy of the lawyer's office.

Ultimately the courts want to encourage a system where parents are free to make decisions regarding their children, and avoid the expense and angst of proceeding to court. However, when matters relate to children, a deal may not always be a deal.