

MEMORANDUM

To: **Andrea Bell, Acting Secretary**
Family Law Rules Committee
Counsel Civil/Family Policy and Programs Branch Court
Services Division
Ministry of the Attorney General
720 Bay Street, 2nd Floor, Toronto, Ontario M5G 2K1
Fax: (416) 326-9957

From: Steven Benmor, Executive Member
On behalf of the Ontario Bar Association, Family Law Executive

Dated: March 8, 2007

Subject: Proposed Submissions to the Family Law Rules Committee
regarding Rule 15

Attachments: Rule 15, *Family Law Rules*
Section 35, *Family Law Act*
Section 57.1, *Child and Family Services Act*

Caveats

In preparing my comments, I have considered CDLPA's submissions and the present operation of Rule 15 including its prescribed forms. Unlike CDLPA, I did not conduct a survey of our OBA membership or the Family law bar, however, I did discuss with fellow counsel their experiences and concerns regarding motions to change final orders. My views and the discussions with other counsel stemmed from our experience in the courts within and near Toronto, as opposed to CDLPA's geographic reach.

Summary of CDLPA's Submissions and Recommendations

1. Rule 15's prescribed forms add unnecessary complexity.

CDLPA recommends that the Applicant should be permitted to fast track issues dealing with support, custody and restraining orders in priority to other relief claimed.

CDLPA recommends that Rules 40 and 41 should be amended to allow fast tracking of cases in all courts for custody or support matters and allow a motion to be brought to have a case heard in priority to other cases in the event that delay will create hardship or injustice.

2. There is a dearth of Family court judges.

Case conferences for motions to change final orders need to be scheduled sooner and must be more productive.

CDLPA recommends that judicial resources must be provided in each jurisdiction sufficient to ensure that case conferences and settlement conferences can be scheduled within 3 to 4 weeks of the request, with a minimum of 30 minutes being set aside for a case conference, and 60 minutes for a settlement conference.

CDLPA recommends that judges need to be trained in alternate dispute resolution techniques so as to maximize their effectiveness within the conference format. Adjudication skills alone are insufficient to meet the needs of modern family litigation. Judges dealing with Family Law matters need to be knowledgeable in Family Law. Judges should receive mandatory training in mediation techniques to ensure the efficient handling of conferences. Judges should receive mandatory training and continuing legal education in Family Law issues prior to being assigned to duties involving Family Law matters or have an extensive background in Family Law. Judges need to be strongly encouraged to provide meaningful opinions on the merits of the case as soon as possible. The focus at case conferences should not be limited to procedural advancement, but should be clearly directed towards a discussion of the substantive issues. In jurisdictions where there is only one regularly sitting judge, some additional form of judicial resources needs to be made available.

3. The court staff are interpreting Rule 15's requirements inconsistently.
4. Rule 15(2.1) prevents a hearing of a motion to vary a final order on a temporary basis without the completion of a case conference - even in the event of 'urgency or hardship'.

CDLPA recommends that Rule 15(2.1) should be amended to add the same language found in 14(4.2) to provide the court with discretion to proceed without a case conference if satisfied there is a 'situation of urgency or hardship, or that a case conference is not required for some other reason in the interest of justice'.

CDLPA recommends that this last clause should be applicable in the event that the Respondent fails to file material opposing the motion.

5. Rule 15 does not provide direction with respect to the timing of filing of responding materials on these motions.

6. There is no default provision dealing with the timing of the filing of the Respondent's material.

CDLPA recommends that Rule 15 should be amended to provide that the Respondent has to either file a notice of intention to respond (or some equivalent document) or a responding affidavit within 30 days of service of the motion to change.

7. CDLPA recommends that Rule 15 should also provide specific direction as to how the court will proceed when there is an application to vary a custodial arrangement that is set out in an agreement.
8. CDLPA recommends that Rule 15(1) should state that "any attempt to vary any provision in an agreement other than support shall be brought by way of application".

My views

I generally concur with CDLPA's submissions (except for points 6 and 8).

But I add the following comments:

1. Rule 15 is geared to deal with a motion to change separation agreements that are filed in court, final court orders and now custody and access orders made in a protection proceeding under section 57.1 of the *Child and Family Services Act*. It also is made to deal with changing an order where there has been fraud, mistake or lack of notice.

These 4 cases are very different and require different approaches and forms based on the underlying legislation to permit changes. Moreover, each order or agreement may involve claims for changes to custody and access or financial issues – which are very different.

I believe that Rule 15 must be studied and procedures established to address these varied cases.

2. At present, to change a final custody, access or support order (the typical case), 5 forms must be prepared, served and filed:
 - a. Notice of Motion;
 - b. Affidavit;
 - c. Financial Statement;
 - d. Change Information Form; and
 - e. Summary of Court Cases.

[I note that Rule 15(12) is not clear on what exact forms are required.]

This does not account for the Income Tax Returns and Notices of Assessments, exhibits and Affidavit of Service that must be filed, as well.

Rule 15(7) sets out the information that should be included in the supporting affidavit. This form should set out this criteria so that this information is included (like in a Financial Statement). This will help unrepresented litigants and counsel who are retained to respond to such motions.

Rule 15(8) is not adequate.

I support the use of a separate Continuing Record for Rule 15. But the Orders section should include all final endorsements, Orders, applicable assessments or reports from the Office of the Children's Lawyer and any document that relates to the relief sought.

3. I believe that motions to change should be treated the same as originating Applications as regards case conferences. However, there ought to be a case conference date made available within 60 days of the commencement of the proceeding and 30 days from personal service.

To illustrate the present problem with the current state of scheduling the 1st case conference, in Central East (Barrie), the next available case conference date for family court is July 2007 – a wait of some 5 months. This is to be juxtaposed to the civil process where a party can commence a statement of claim and bring a motion within weeks (or days if there is an emergency).

4. Judges on a 1st case conference for a motion to change should have a standard approach to identify the financial disclosure that is to be made, the procedural orders that must be made (assessment, the involvement of the Office of the Children's Lawyer, etc.) so that these cases move through the system more expeditiously as opposed to using the case conference as a futile preliminary step to the contested motion.

5. If the moving party, her counsel or the court believe that the motion to change cannot be decided on affidavit material and that Questioning or a trial is required, this should be addressed early at the 1st case conference.

6. Clear deadlines should be set for the delivery of responding material to the motion to change such as:

'No later than 30 days after service of the Notice of Motion, Affidavit and Financial Statement, the other party shall serve and file her Affidavit and Financial Statement, failing which the moving party may seek a final order by Motion Form and Affidavit for Uncontested Trial.'

I suggest language similar to Rule 15(11) as opposed to CDLPA's recommendation of filing a notice of intention to respond.

7. Each motion to change support provisions should require that a Confirmation of Assignment Form be completed, faxed to the respective social services agency who will confirm or deny a financial interest, and then filed with the motion material. This should be included in the forms section. Rule 15 (4, 5 and 6) is not adequate.

8. There is confusion as to the venue for the motion to change where the order was made in one court, but one or both of the parties have moved to another jurisdiction. The courts have differed on this issue. I suggest that, as it relates to the issues of custody, access or child support, the same rule apply to motions to change as to originating Applications. The motion is to be brought in the jurisdiction where the child resides. Small Claims Court uses an affidavit form to declare the proper jurisdiction. Maybe this should be included in the list of materials or be a separate affidavit.

Section 35(2) of the *Family Law Act* seems to allow the separation agreement to be varied in any court where it is filed.

9. Why does rule 15(9) only allow consent orders regarding child support ? Should this also include changes to access ?

10. Is Rule 14(d) applicable to ex parte motions ?

11. Who are the parties to a motion to change a custody and access order under section 57.1 of the *Child and Family Services Act*. CAS ? Should the protection file be made public for this ? Should the courtroom be vacated when such a motion to change is heard, as in normal protection cases ?

Section 35 of the *Family Law Act*

35. (1) A person who is a party to a domestic contract or paternity agreement may file the contract or agreement with the clerk of the Ontario Court of Justice or of the Family Court of the Superior Court of Justice together with the person's affidavit stating that the contract or agreement is in effect and has not been set aside or varied by a court or agreement.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by the Statutes of Ontario, 2006, chapter 1, subsection 5 (2),

(a) by striking out "or paternity agreement"; and
(b) by striking out "contract or agreement" wherever it appears and substituting in each case "contract". See: 2006, c. 1, ss. 5 (2), 6 (2).

Effect of filing

(2) A provision for support or maintenance contained in a contract or agreement that is filed in this manner,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (2) is amended by the Statutes of Ontario, 2006, chapter 1, subsection 5 (3) by striking out "or agreement" in the portion before clause (a). See: 2006, c. 1, ss. 5 (3), 6 (2).

- (a) may be enforced;
- (b) may be varied under section 37; and
- (c) except in the case of a provision for the support of a child, may be increased under section 38,

as if it were an order of the court where it is filed.

Section 57.1 of the *Child and Family Services Act*

57.1 (1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 57 (1) would be in a child's best interests, the court may make an order granting custody of the child to one or more persons, other than a foster parent of the child, with the consent of the person or persons.

Deemed To Be Order Under *Children's Law Reform Act*

(2) An order made under subsection (1) and any access order under section 58 that is made at the same time as the order under subsection (1) shall be deemed to be made under section 28 of the *Children's Law Reform Act* and the court,

- (a) may make any order under subsection (1) that the court may make under section 28 of that Act; and
- (b) may give any directions that it may give under section 34 of that Act.

Rule 15 of the *Family Law Rules*

Rule 15: Motions To Change A Final Order Or Agreement Application

15.(0.1) subject to subrule (0.2), this rule applies to a motion to change,

- (a) an agreement for support filed under section 35 of the *Family Law Act*;
- (b) a final order; and
- (c) an order made under section 57.1 of the *Child and Family Services Act*.

(0.2) this rule does not apply to a motion or application to change,

- (a) a court order made under the *Child and Family Services Act*, other than an order made under section 57.1 of that Act, or
- (b) an agreement made under that Act.

Special Service, Minimum Notice Period — Motion To Change Final Order Or Agreement

(1) notice of a motion to change a final order or agreement and the supporting evidence shall be served by special service (subrule 6 (3)), and not by regular service,

- (a) not later than 30 days before the motion is to be heard, if the party to be served resides in Canada or the United States of America;
- (b) not later than 60 days before the motion is to be heard, if the party to be served resides elsewhere.

Regular Service on Officials, Agencies, etc.

(2) despite subrule (1), the notice of motion and evidence may be served on the persons mentioned in subrule 8 (6) (officials, agencies, etc.) by regular service.

Motion Not To Be Heard Before Case Conference

(2.1) a party may serve a notice of motion and supporting evidence for an order to change a final order or agreement before a case conference has been held, but the motion may not be heard before a case conference has been completed.

Place For Motion To Change Order Or Agreement

(3) Rule 5 (where a case starts) applies to a motion to change an order or agreement as if the motion were a new case.

Change Of Support — Service On Assignee Of Support

(4) in a motion to change a support order or agreement that has been assigned to a person or agency, as the *Divorce Act (Canada)* and the *Family Law Act* permit, the parties shall serve their documents on the assignee as if the assignee were also a party.

Assignee May Become Party

(5) on serving and filing a notice claiming a financial interest in the motion, the assignee becomes a respondent to the extent of the financial interest.

Sanctions If Assignee Not Served

- (6) if the assignee is not served as subrule (4) requires,
- (a) the court may at any time, on motion by the assignee with notice to the other parties, set aside the changed order to the extent that it affects the assignee's financial interest;
 - (b) the party who asked for the change has the burden of proving that the changed order should not be set aside; and
 - (c) if the changed order is set aside, the assignee is entitled to full recovery of its costs of the motion to set aside, unless the court orders otherwise.

Contents Of Affidavit

- (7) an affidavit for use on a motion to change an order or agreement shall set out,
- (a) the place where the parties and the children ordinarily reside;
 - (b) the name and birth date of each child to whom a proposed change relates;
 - (c) whether a party has married or begun living with another person;
 - (d) details of current custody and access arrangements;
 - (e) details of current support arrangements, including details of any unpaid support;
 - (f) details of the change asked for and of the changed circumstances that are grounds for a change in the order or agreement;
 - (g) details of any efforts made to mediate or settle the issues and of any assessment report on custody or access;
 - (h) in a motion to change a support order or agreement, whether the support was assigned and any details of the assignment known to the party asking for the change;
 - (i) in a motion to change a child support order or agreement, income and financial information required by section 21 of the applicable Child Support Guidelines; and
 - (j) in a motion to change a child support order or agreement to an amount different from the amount in the table of the applicable Child Support Guidelines, evidence to satisfy the court that it should make the order asked for.

Exhibit To Affidavit

(8) in addition, a copy of any existing order or agreement that deals with custody, access or support shall be attached as an exhibit to the affidavit.

Child Support Change On Consent

(9) subrule (10) applies instead of subrule (7) if the parties have agreed to an order,

- (a) that changes only a child support order or agreement; and
- (b) the only terms of which are one or more of the following:
 1. payment of child support, whether in accordance with the applicable child support guidelines or not, or ending child support.
 2. suspension, reduction or cancellation of unpaid child support.
 3. payment of unpaid child support in accordance with a payment schedule.
 4. payment of costs.

Child Support Change On Consent — Material To Be Filed

(10) in a case described in subrule (9), instead of serving and filing a notice of motion and the affidavit described in subrule (7), the parties shall file,

- (a) a change information form (form 15) with all required attachments;
- (b) a consent (form 15A);
- (c) five copies of a draft order;
- (d) a stamped envelope addressed to each party;
- (e) a support deduction order information form prescribed under the *Family Responsibility And Support Arrears Enforcement Act, 1996*; and
- (f) a draft support deduction order.

Consent Motion — Parties Not To Come To Court

- (11) if the parties have filed the material described in subrule (10),
- (a) they shall not come to court, but the clerk shall present the material to a judge; and
 - (b) the judge may make the order asked for, or require one or both parties to file further material or come to court.

Contested Child Support Change — Material To Be Served

(12) if a motion to change a child support order or agreement is not proceeding with the other party's consent,

- (a) the party asking for the change may serve and file a change information form (form 15) with all required attachments, instead of an affidavit;

- (b) the party responding to the motion shall serve and file an affidavit that sets out any disagreement with the evidence of the party asking for the change; and
- (c) if a party claims that an order should not be made in accordance with the tables in the applicable child support guidelines, the support recipient and the support payor shall each serve and file an affidavit containing the evidence required by the following sections of the applicable child support guidelines, or the evidence that is otherwise necessary to satisfy the court that it should make the order asked for:

- section 4 (income over \$150,000)
- section 5 (step-parent)
- section 7 (special expenses)
- section 8 (split custody)
- section 9 (shared custody)
- section 10 (undue hardship)
- section 21 (income and financial information)

Powers Of Court

(13) if the court is of the opinion that a motion, whether made on consent or not, cannot be properly dealt with because of the material filed, because of the matters in dispute or for any other reason, the court may give directions, including directions for a trial.

Changing Order — Fraud, Mistake, Lack Of Notice

- (14) the court may, on motion, change an order that,
 - (a) was obtained by fraud;
 - (b) contains a mistake;
 - (c) needs to be changed to deal with a matter that was before the court but that it did not decide;
 - (d) was made on a motion without notice; or
 - (e) was made on a motion with notice, if through accident or inadequate notice an affected party did not appear on the motion.

Application of Rule 14

(15) Rule 14 applies with necessary modifications to a motion to change a final order or agreement.

Motion Under Rule 14

(16) a motion under Rule 14 may be made on a motion to change a final order or agreement.

Section 35 of the *Family Law Act*

35. (1) A person who is a party to a domestic contract or paternity agreement may file the contract or agreement with the clerk of the Ontario Court of Justice or of the Family Court of the Superior Court of Justice together with the person's affidavit stating that the contract or agreement is in effect and has not been set aside or varied by a court or agreement.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by the Statutes of Ontario, 2006, chapter 1, subsection 5 (2),

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Effect of filing

(2) A provision for support or maintenance contained in a contract or agreement that is filed in this manner,

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57.1 (1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 57 (1) would be in a child's best interests, the court may make an order granting custody of the child to one or more persons, other than a foster parent of the child, with the consent of the person or persons.

Deemed To Be Order Under *Children's Law Reform Act*

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