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Transferring a Case or a Step in a Case: Rule 5(8) of the Family Law Rules

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Rule 5 provides that a case shall be started where a party resides, where a child resides (if custody or access is in issue) or where the parties agree (if the court in the receiving municipality agrees in advance).

Rule 5(8) contemplates the transfer of a case between municipalities whether those municipalities are across the Province or merely across a region such as the GTA.
A motion is required to obtain the transfer. The test considered is as follows: Would it be substantially more convenient to deal with the case or step in the case in another municipality?

Justice H. K. O'Connell considered this test in a recent case (*MacDonald v. Jensen* 2011, ONSC 6932) where a respondent wife sought to transfer a matter from Cobourg to Toronto on the basis that custody and access issues were now being raised and that it would be more cost effective to deal with the matter in Toronto as both counsel were in Toronto, the respondent mother resided in Toronto, and the applicant father worked in Toronto. The Application itself had been issued in Cobourg, Ontario where the father resided and sought only equalization of the parties' net family property.

Justice O'Connell dismissed the custody and access issues raised by the mother as a disingenuous attempt to justify the transfer to Toronto and refused to move the matter from Cobourg. In doing so he compared the substantial convenience test of Rule 5(8) with the "preponderance of convenience" test used to justify transfers of matters under the *Child and Family Services Act* (see Subsection 48(3)). The former test is considered to set a higher standard to meet than the preponderance of convenience.

When assessing the need for substantial convenience to justify a transfer, the court considers the following:

- where the parties reside and the inconvenience of travel;
- the inability of the parties to financially continue on the case if transfererred;
- the availability of the best evidence, including witnesses, expert and lay;
- whether the case is being case managed;
- where the children are involved, where the children are ordinarily resident and the child's best interests; and

- the stage of litigation and the ability of the court of the proposed municipality to get up to speed on the case.

Simple bald allegations of increased cost and inconvenience to counsel will not be enough to justify a transfer. There must be evidence of the expense and the inconvenience to witnesses or the court.

Justice O'Connell excluded the application of Rule 13.1.02(2) (Motion to Transfer to Another County) of the *Rules of Civil Procedure* and concluded that the case could be considered fully within the family law *Rules*.

It should also be noted that a motion to transfer can apply to a step in a proceeding (e.g. trial of an issue or a motion) and there is no prohibition about renewing a request for a transfer at a later date if circumstances change.

There may be circumstances in which a transfer from one municipality to another is in fact substantially more convenient for the parties and for the court, but counsel should remember that it is not simply a question of what is convenient for parties or counsel. It must be substantially more convenient and there must be clear evidence on the motion of what that convenience would entail.

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