The Top Eight Best and Worst Features of Our Family Court System

> "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us…
>
> Charles Dickens, Tale of Two Cities (1859)

Like Dickens' epic story, present day family law practice involves Light and Dark, wisdom and foolishness, best and worst. Specifically, one can argue that the unification of the Family Court of the Superior Court of Justice combined with the introduction of the *Family Law Rules*[1] and *Child Support Guidelines*[2] all highlight the increasing attention to the importance of consistency and uniformity in family law. On the whole this has led to increasing specialization on the part of the bench and bar which, in theory, should lead to better service to the end user client. Ironically, a contrary argument can also be made that these very things have made it *harder* for lawyers, the prime provider of client services in the family law regime, to do just that. This paper attempts to draw attention to the very good and the very bad of our present day family court system, both the Light and the Dark, the wise and the foolish, in the hopes that we can make the bad good and the good better for users to come.[3]

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[1] Family Law Rules (Superior Court of Justice and Ontario Court of Justice) made under the *Courts of Justice Act*, O. Reg. 114/99, as amended.
[2] Regulations Establishing Federal Child Support Guidelines, SOR/97-175, as amended.
[3] "family court system" includes, for purposes of this paper, the Ontario Court of Justice, Superior Court of Justice and Family Court of the Superior Court of Justice

THE WORST

1. ***Inconsistency Between Courts re: Access to Justice***

One of the worst features of our present day family court system is the difference between courts in terms of being able to get in front of a judge and obtain a meaningful order. The divergence across the Greater Toronto area is, to put it mildly, staggering. For example, a father seeking an interim order for access in the Superior Court of Justice in Brampton can bring a motion at the time his Petition is issued and have it heard within a week. A father who instead files an Application in the Ontario Court of Justice down the hall must wait four months for his motion.

That this causes counsel to forum-shop should be of no surprise. That it should be remedied and avoided at all costs is trite to say – yet it continues. Why? It is submitted that the reasons have everything to do with the different rules of procedure in play. The Superior Court of Justice in Brampton follows the Rules of Civil Procedure[4] while the Ontario Court of Justice in Brampton follows the *Family Law Rules*. In general the former provide less obstacles to a party seeking a judge's gavel while the latter seem to be very effective in gate-keeping the parties from seeing that gavel being used. The time has come to end this two-tiered system - all parties and counsel should be forced to play by one set of rules.

[4] Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

2. ***Delay to Access to Justice in Family Law Rules Courts***

In general, most family law lawyers would agree that the *Family Law Rules* make it harder for counsel to obtain orders on motions. It is simply more time-consuming and expensive to get to a motion and, for those who have the resources and patience for both, by the time of the motion the outcome is often a foregone conclusion. However, even in courts which do not yet have the *Family Law Rules*, there is a big difference. In the Superior Court of Justice in Brampton, for example, which operates under the *Ontario Rules of Civil Procedure* there are no prerequisites to bringing a motion. In the Superior Court of Justice in Toronto, however, one must first attend a Family Information Session which is usually held four weeks after process has been issued and, absent an emergency, attend a case conference which is usually held two to three weeks thereafter. When one adds the necessary scheduling problems between counsel and the bench, these two steps wind up adding between sixty to ninety days to any litigant seeking a motion.

With the exception of the Superior Court of Justice in Milton and the Superior Court of Justice in Brampton, every court in the Greater Toronto area forbids the bringing of a motion prior to a case conference absent an emergency. This requirement, in and of itself, is not the problem. In almost every case, a prompt case conference presided over by an interested judge will result in, at the least a narrowing of issues, the setting of an agreed-upon timetable for the exchange of documents and an opinion on each party's chances of obtaining what they want at trial. At the most, it results in a temporary order with a promise to return for a further conference, or sometimes even a final consent order. Further, one of the best features of a well-run case conference held at an early

stage of the case is the perception both clients have at its conclusion that the system is *fair*. With respect, this is simply not the case at this time.

The problem stems from the fact that with the exception of the aforementioned two courts, it takes far too long for a case conference to be held. In most Toronto-area courts this year, a span of about six weeks passed between the time originating process was issued and a case conference was held. It is submitted that this long delay is caused by the high volume of cases and fewer judicial resources. This results in front office clerks being unable to give any early dates. Human nature being what it is, this often leads to one party using the delay to their advantage. A parent with an average case for sole custody, for example, is often able to improve their chances by leaving the matrimonial home with the children, filing an Application and proposing a structured access schedule. By the time of the case conference six weeks later only the exceptional case or judge would consider altering the arrangement. Similarly, a support payor who refuses to pay a reasonable amount of spousal support winds up being in an extremely favourable position because he knows the recipient needs money now and that the quantum paid will be a factor the judge will consider if and when a motion is held. Often, the result at the motion is identical to the quantum paid on a "without prejudice" basis.

The delays in the family court system are bad enough. What is worse is that courts, at least in the Greater Toronto area, seem to be unable or unwilling to ignore how delay impacts on a party's perception that the system is fair to them. It is submitted that

this perception strikes at the heart of the anger many counsel and clients presently feel in towards the family court system.

The more a client thinks the system is fair, the more they will buy into it and the quicker a long-lasting resolution will ensue. The less a client thinks the system is fair, the more he or she will try to do an end-run around any order or agreement, fail to comply with orders and, worst of all, spread the word to colleagues, friends and relatives that the lawyers and judges were not helpful and the system was unfair from the start.

Assuming that for the present no infusion of new judicial and/or administrative resources is on the horizon, it is submitted that one of the ways that the family court system can combat the effects of delay is to broaden the number of instances when a litigant can bring a motion prior to a case conference.

Under Rule 14(4.2) of the *Family Law Rules*, no motion may be served or heard before a case conference is held unless there is a "situation of urgency or hardship or a case conference is not required for some other reason in the interest of justice". Although not defined in the Rules, "urgency" was defined in *Hood v. Hood*[5] as "pressing, demanding attention, imperative, crucial, serious, vital, primary and essential". In terms of specific instances in family law where urgency exists, the court in *Hood* said urgency contemplates such issues such as abduction, threats of harm and dire financial circumstances. In *Re Lafond and Lafond*[6], the court considered the definition of "urgent"

[5] *Hood v. Hood* 2001 CarswellOnt 2613 (Ont. S.C.J.).
[6] (1979), 23 O.R. (2d) 437 (Ont. Co. Ct.).

as set forth in rule 17 of the old Provincial Court (Family Division) rules and adopted the words of Morrison Prov. J. of the Provincial Court (Family Division) in *Campbell v. Campbell*[7] where he referred to the Concise Oxford Dictionary, 5th ed., which defines "urgent" as "pressing, calling for immediate action or attention".

It is submitted that the Family Law Rules Committee should set out specific criteria for what constitutes a situation of urgency, hardship or "for some other reason in the interest of justice." This writer submits that considering the delays in today's current family court system climate, the following should be deemed to be "situation of urgency":

> (a) absent a situation involving violence or the reasonable likelihood that violence will ensue, one party leaves the matrimonial home with one or all of the children without a written agreement or court order authorizing them to do so;
>
> (b) a party is without any financial resources and the other party is refusing to provide reasonable support; and
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> (c) there is a reasonable fear a party may try to leave the Province of Ontario with a child without a written agreement or court order authorizing them to do so.

[7] (1978), 2 R.F.L. (2d) 249.

Severe cost consequences should ensue for those who are found to have brought their motion without meeting one of the above factors.

It is submitted that "for some other reason in the interest of justice" should include, but not be limited to any instance where a case conference date is more than six weeks away from the date of issue. This would send a strong message to the powers-that-be that legislation cannot be passed without examining the context in which the legislation is being used and the effects which it brings on the end-users.

3. ***Orders at Conferences***

The circumstances as to when it is appropriate to make an order at a conference, particularly a case conference, need to be clarified. Under Rule 3.02 of the *Toronto Family Case Management Rules* which govern court practice at 393 University[8], at a case conference a judge may make a procedural order or an order for interim relief "where appropriate". Similarly, provided "notice" has been served and "if it is appropriate", under Rule 17(8) of the *Family Law Rules* a judge may make a temporary or final order at a case conference, settlement conference or trial management conference. Notwithstanding the above rules which clearly contemplate an interim order for substantive relief being made at a case conference, almost rarely will a judge at a case conference make a substantive order of any kind unless it is on consent. With respect, this is very damaging to the integrity of the family court system, especially when one realizes that prior to appearing at the conference the following have usually taken place:

[8] The Family Case Management Rules for the Superior Court of Justice in Toronto, O.Reg. 655/00, as amended (renewed until December 31, 2002).

(a) usually at least six weeks has passed from the time originating process was issued;

(b) each party has met with his or counsel at least three times;

(c) negotiations of some sort have usually taken place between counsel, either by letter, phone or four-way meeting;

(d) an Application, Statement of Claim, Petition, Answer and Counterpetition and sometimes Reply has been drafted, served and filed;

(e) a Financial Statement with three years of income tax returns and paystubs have been served and filed;

(f) some disclosure has usually been exchanged;

(g) attendance at a Family Information Session has been complied with (if the case is at 393 University);

(h) Case Conference Briefs have usually been prepared, served and filed;

(i) the parties have usually met at court to once again try and resolve all outstanding issues on an interim basis; and

(j) each party has spent at least $1,500.00.

This writer submits that when all of the above factors are taken into consideration, failing to make an order for interim relief often, but not always, has the following effects:

(a) it severely impairs, if not effectively destroys one party's case on a particular issue;

(b) it enables the more well-heeled party to perpetuate an unfair advantage over the other;

(c) it causes further frustration to both parties and counsel;

(d) it causes both parties to spend further sums of money;

(e) it can lead to one party to feel they have no choice but to sign a temporary consent which, given the chance, they would otherwise not; and

(f) it perpetuates the stigma that the family court system is not responsive to their needs, expensive and time-consuming.

As a solution to this continuing problems, this writer encourages counsel to rely on the provision in Rule 17(8)(b) which clearly confirms that as long as "notice" has been served, the court may make a temporary or final order. Whether notice is a letter, a notice of motion or an affidavit is not clear and remains to be seen. What is clear however, is that continuing refusal on the part of the judiciary to make substantive orders at case conferences, particularly on the issues of temporary access and child support, is contrary to the spirit of the Primary Objective which requires the court to, among other things, help the parties settle all or part of their case, control the progress of the case, identify issues and dispose of those issues that do not need a full investigation and trial.[9]

4. ***Children's Lawyer and Newmarket Court***

As at the time of writing this paper, a titanic battle is being played out in Newmarket court over the order appointing the Office of the Children's Lawyer. Simply put, the bench in Newmarket is refusing to execute orders appointing the Office of the Children's Lawyer because the order contains provisions authorizing the disclosure of information on clients by the police. This writer knows of no steps being taken by either the bench or the Children's Lawyer administration to resolve this problem, leaving counsel to struggle with the option of starting up a new case in a different court to obtain the order, agreeing to a private assessor on their own or simply abandoning the attempt to appoint a lawyer and bringing a motion for interim relief without the assistance of that office. It may be that negotiations are ongoing "behind the scenes". If that is the case, let us hope this problem is resolved quickly for its perpetuation severely undermines the

[9] Rule 2(5), *Family Law Rules*.

integrity of the family court system and its ability to provide users with swift and fair justice. If it is not the case, the government should become involved forthwith to assist the parties to resolve the issue as none of the alternatives is fair to litigants or counsel.

5. ***Too Much Paper***

Courts which strongly adhere to the provisions of the *Family Law Rules* are becoming far too cumbersome in which to carry on a case and expensive for most litigants to afford. One of the principal reasons this is so is that these courts, specifically, Brampton, Newmarket and Oshawa, are rigidly adhering to rules which require too much unnecessary paper to be filed, specifically:

(a) an Affidavit confirming there have been no major changes to a party's Financial Statement which is more than thirty days old, failing which a new Financial Statement must be served and filed[10];

(b) complete income tax returns to be attached to a party's Financial Statement[11];

(d) that a Case Conference Brief be filed without exception[12]; and

(e) the simple length of the Financial Statement which many counsel find onerous and unnecessary.

[10] Rules 13(12) and 13(12.1*), Family Law Rules*.
[11] Rule 13(7), *Family Law Rules*.
[12] Rule 17(13), *Family Law Rules*.

The result of the above is that a party's legal bill is often far greater than it needs to be. It also clutters up the Continuing Record to the point where by the time of the case conference three volumes have already been filed – all before a single order has been made.

Not all courts are this rigid. Judges in the Ontario Court of Justice, specifically in North York and Scarborough, regularly tell counsel whether or not a brief will be required for the next step which is very much appreciated. They will also allow income tax summaries if the complete return is not available. A brief will not be refused for filing because a two-page affidavit detailing changes to one's Financial Statement is not attached. This approach, it is submitted, is more consistent with requirement that cases must be dealt with "justly", which the *Family Law Rules* defines as ensuring the procedure is fair to all parties, saving expense and time and dealing with the case in ways that are appropriate to its importance and complexity.[13]

Further, creating unnecessary costs is not the exclusive domain of courts applying the *Family Law Rules*. Counsel who practise in the Superior Court of Justice in Toronto regularly cringe at having to prepare a factum for every motion. As well they should. Absent a complicated motion a factum will be rarely helpful. Counsel know this and deal with it by trying to file late or putting in only minimal effort into its drafting. This writer suggests that a better approach is for the case conference judge to endorse on the case conference record whether or not facta will be required. It is further suggested that

[13] Rule 2(3), *Family Law Rules*.

counsel should be consulted by the case conference judge as to whether facta would be helpful before making their decision.

6. ***Standard Track Cases, Fast Track Cases and the Dreaded First Appearance***

A creation of Rule 40 of the Family Law Rules, standard track cases are cases involving property or divorce claims. Fast track cases, defined in Rule 39, are cases involving neither. The irony is that in practice, fast track cases move at a much slower case than standard track cases. This is because every fast track case involves an appearance before a First Appearance Clerk or FAC whose job it is to confirm that all necessary documents have been filed, refer the parties to sources of information about the court process, send the case to the judge if no answer has been filed and schedule the case for a case conference is an answer has been filed.[14]

A bigger waste of time has never before been invented. Why parties with counsel need a third party to inform them about alternatives to the court process when they have already searched for and found a lawyer, met with the lawyer at least a few times, discussed and confirmed their strategy, made a specific decision to commence and pay for litigation, is beyond this writer. It is even further beyond comprehension by this writer why it is only parties involved in non-property non-divorce cases who require this assistance.

It is acknowledged that sometimes a consent is the result of an attendance before the FAC which has the effect of reducing the court workload. Most often, however, it is

[14] Rule 39(5), *Family Law Rules*.

not and the end result is a further delay of another four weeks before a case conference can be held. A contributing factor here is that in some courts counsel who ask to see the case management judge at a FAC are *absolutely refused* even when provided with a good reason. This is simply not fair and puts counsel in the very unfortunate position of having to explain to their clients why despite being in court they are not allowed into the courtroom.

The idea of a FAC is weak to begin with. When combined with an already extended time frame in which counsel can obtain an order on motion and the reluctance by most of the bench to make a meaningful order at a case conference, the FAC only further allows one party to use time and delay as a weapon over the other – something no one believes should be allowed to occur. The requirement of a FAC to be held in fast track cases should be deleted.

7. ***The Family Responsibility Office ("FRO")***

The biggest problem counsel face with the Family Responsibility Office is the time lag between the time the order is made and the time the support recipient receives her first cheque. This lag is totally unacceptable. Proof that it is totally unacceptable is that counsel regularly negotiate that for the first two months the payor will provide post-dated cheques and the recipient's counsel agrees to provide a receipt for same which the payor's counsel then forwards to FRO so that his client is not faced with a double payment. And this only occurs when relations between counsel and the parties is sufficiently tame. Not uncommon is the case where if the support recipient fails to agree

to opt out of the FRO regime, the payor refuses to provide even a month's worth of cheques, knowing full well the recipient will struggle mightily to make ends meet until FRO gets around to enforcing the order.

Another problem is that parties are unable to rely on receiving their cheques from FRO on a specific date. Cheques come when they come which is hard to accept if you require that cheque to make a rent payment due on the first of the month. More funds need to be devoted to FRO so they can ensure more hands are processing more cheques more quickly with the goal of getting the support cheques to recipients *no more than one week* after the support is due.

8. ***Enforcement of Custody/Access and Restraining Orders***

One of the worst parts of being a family law lawyer is having to tell clients that their custody or access order is not sufficient to retrieve a child from a withholding parent or enable them to force a refusing parent to comply with visitation. Requiring parties to first obtain a "police assistance" clause, whether it be for a custody order, access order or even a restraining order[15], should not be necessary. Any clearly defined order for custody, access or a restraining order should be respected and enforced by the authorities as such. In the absence of a change on the part of police authorities who are almost always unwilling to enforce an order without such a clause, it is suggested that much like the FRO enforcement clause must be inserted into every support order, every custody/access/restraining order should contain a police assistance clause.

[15] The type of restraining order contemplated here is what is often termed a specific restraining order, namely, one which contains specific provisions prohibiting a party from coming within a certain distance of the other.

THE BEST

1. ***Real Case Management***

Most courts in the Greater Toronto Area have case management rules. For those courts using the *Family Law Rules*, "case management" is where the same judge supervises its progress, schedules conducts all conferences and hears all motions.[16] The Superior Court of Justice in Toronto also has case management rules but in reality there is nothing about present day practice in that court that is case managed. The Superior Court of Justice in Milton and Brampton have no case management rules and follow the *Rules of Civil Procedure*.

Real case management is highly effective. It provides for consistency of rulings within a case, enables the parties and counsel to predict what the judge may or may not do at the next stage of a case, allows for the judge to become very familiar with the parties and counsel and minimizes the ability of counsel to judge-shop or seek adjournments when rotating judges are assigned not to their liking.

Some courts are more case managed than others. Scarborough court, Jarvis court and North York are by far the most case managed courts in the Greater Toronto area. Barring illness, these courts have been successful in ensuring that each case, from start to finish, has the same judge. The results are excellent and counsel in general seem to appreciate the consistency. Newmarket, Oshawa and Brampton are also case managed

[16] Rule 39(9), *Family Law Rules*.

courts although less so and, frustratingly, it seems as though whenever you want your case management judge to deal with the case that day, a different judge is assigned.

2. ***Duty Counsel***

The family court system would certainly crumble were it not for the excellent work duty counsel provide. Once used only in the Ontario Court of Justice, now each court in the Greater Toronto area is well-stacked with duty counsel. In some courts, they are so well provided for, there are separate duty counsel for child protection matters, first appearances and motions. The benefits of having more rather than less duty counsel are obvious but still worth highlighting:

(a) as a large part of their job involves educating non-represented litigants, they afford the judge more time to judge and less time spent informing;

(b) when non-represented litigants have counsel, even if only for the day, the chances of a consent being reached outside the courtroom are much greater. This then means courtroom resources can be used more effectively for truly contested motions or conferences;

(c) when a consent cannot be reached, they are very effective in narrowing the issues before the court which saves further courtroom time; and

(d) they are usually very familiar with each judge's idiosyncracies and tendencies and imparting this knowledge to the non-represented litigant and opposing counsel also increase the likelihood of a consent.

3. ***Advice Counsel***

A recent development in most courts, advice counsel are extremely helpful in assisting non-represented litigants complete their paperwork and informing them of what documents they require and what key facts they need to include. As the advent of the *Family Law Rules* has resulted in more paperwork and longer lines at the front counter, the job of helping litigants with these tasks has quite rightly been shifted to lawyers qualified to provide advice. Like Duty Counsel, one of the chief benefits of advice counsel is they are often aware, and can impart to litigants, a judge's tendencies and demands.

4. ***The Dispute Resolution Officer (DRO) Program***

The brainchild of Ross Davis, the DRO program at the Superior Court of Justice in Toronto continues to provide excellent legal services to users at no cost. A mandatory step for any litigant, represented or not, who wishes to change an existing support or custody/access order, the DRO program is informal, easy to use and extremely effective in narrowing issues in dispute, providing for the timely exchange of documents, setting timetables where the case cannot be settled and, best of all, providing less experienced counsel hear the opinions and comments of tried and true practitioners, each of whom has

at least ten years experience in family law. The program was so popular it was copied in Scarborough where the Family Law Referee program was implemented a few years ago.

5. ***Trial Co-Ordinators in the Ontario Courts of Justice in Toronto***

The trial co-ordinators in the Ontario Courts of Justice in Toronto are definitely one of the shining stars of our family court system. Cynthia Campoli in Scarborough, Amit Thakore at Jarvis court and Josh Harroch in North York are all to be commended for making the stress of family law litigation easier on all counsel. Specifically, they each will regularly do the following even though a strict reading of their job description does not require them to:

(a) answer questions from counsel on the phone about which forms to use when;

(b) inform counsel on the phone of whether or not their matter is on the list;

(c) fax endorsements to counsel upon request;

(d) accept Form 14B motions by fax and forward them to the judge;

(e) inform counsel of when reasons for judgment will be ready;

(f) provide counsel with information as to certain preferences of the judges in regards to procedure and forms; and

(g) provide counsel with information about available dates and times.

Each of the above on its own may not appear to be important or significant. Taken as a collective, however, it makes life much easier for lawyers. This is not to say there are no helpful staff in other courts; there are. The problem is that for whatever reason, they are not as accessible to the public. Perhaps it is due to the structure of the staffing or the volume of cases in those courts. The difference, however, is significant and worth mentioning.

6. ***The Family Law Rules***

While it is the norm to harp on the effect the *Family Law Rules* have had on hampering counsel from helping their clients, it would be unfair not to mention some of the benefits the Rules have brought. The drafters of the Rules must be commended for providing far more certainty than existed before about the following issues: where a case starts and is to be heard (Rule 5), financial statements (Rule 13), motions to change an order or agreement (Rule 15), summary judgment (Rule 16), offers to settle (Rule 18), document disclosure (Rule 19) and trial records (Rule 23). On the whole, there is far more structure and order to how a case proceeds than before their passage. Unlike in the past, counsel and parties now expect that their case will follow the now-familiar pattern of First Appearance (in fast track cases only), case conference, motion, settlement

conference and trial. And while there are and will always be room for improvement, on the whole the concept of a unique set of rules for family law proceedings is, it is submitted, a good idea that all have come to accept.

7. ***Judges Who Get Through to the Client***

Like clients and lawyers, judges differ in personality and manner. What is consistent between judges, is that those who are able to, for lack of a better term "get through" to clients, are able to help them resolve cases faster than those that do not. What does "get through" mean? It is not easy to define but can be summarized as ensuring that no matter how sophisticated the client is, he or she leaves the courtroom with a solid understanding of what was done or recommended and why. Sometimes this involves a careful choice of words and diplomatic demeanour; other times the use of plain, blunt no-holds barred language works best. Whatever the manner, judges who listen and are keen to transmit their opinions, reasons and experience to the clients are a priceless commodity which should not go overlooked. They should be, and for the most part are, much more than decision-makers. They can, and largely do, shape clients' experiences for the better and help ease them in the transition from an intact family to separate households.

8. ***The Family Law Bar***

It has been this writer's experience that one of the best things about being a family law lawyer is that no matter what the question is, another lawyer's expertise is only a phone call away. Whether the query be ethical, legal or procedural, the family law

bar is, for the most part, comprised of friendly practitioners who are always willing to help each other when asked or offer guidance and practice tips. So much of what we do as family law lawyers involves judgment, judgment about personalities, judgment about interpretation of law and procedure, that only with experience comes true knowledge.