Rule 2 Hearings : ExpeditedJustice for Families
By Ken Nathens *, Clayton R. Spencer and Rachel Baron

Family Law Trials take their toll on litigants, both financially and emotionally. Although most matters settle prior to trial, for those litigants who do not settle, the trial is a lengthy, exhausting and expensive process. The trial process has not changed in any substantive fashion for many years, notwithstanding the improvements to the pre-trial family court process made over the last twenty years. It is now time to examine and improve the trial process in the family court.

By the time a matter is set down for trial, it is not unusual for the parties to have spent up to two years preparing their cases, and attending a series of court appearances. In some courts and for some procedures, there may be five or more court attendances that include:

1. A First Appearance before a Rule 39 Clerk,
2. A Dispute Resolution (Case) Conference.
3. A Case Conference before a Judge.
4. A Settlement Conference (often more than one or two).
5. A Trial Scheduling Conference and/or a Trial Management Conference, and
6. A Trial.

The appearances set out above are designed to reduce litigation and lower costs by encouraging settlement at early stages of litigation. The pre-trial management process often results in early resolution. However in some cases, the result is the opposite: prolonged litigation at higher costs due to the multiple court appearances that are mandated by the Ontario*Family Law Rules*(*FLR*). Litigants who start off with lawyers often cannot afford to keep them through the entire process, resulting in longer delays as parties shed counsel and greater numbers of unrepresented litigants clog the system and take up judicial resources.

The situation is no better once the matter finally reaches the trial list. Many litigants view trial as a chance to finally be “heard”.The parties hope that the judge will listen to them, feel their pain and emotion, and understand their point of view. The reality is that trials are business-like affairs and judges seldom show emotion or indicate the manner in which he or she will decide a case prior to rendering a judgment. Even after trial, many litigants still feel that they have not been heard or understoodby the Judge.

Trials can take an enormous amount of time, particularly in Family Law cases. For instance, litigants may feel that they must call all possible witnesses regarding their parenting abilities, no matter how little a witness may add to the pool of evidence. It is not uncommon in custody and access cases to have more than ten witnesses take the stand.Therefore even a “short” custody and access trial may last five days or more, with the more complicated ones taking substantially more.

Traditionally, all witnesses at a trial give oral or *viva voce* evidence. Evidence is adduced by a series of questions posed on behalf of both sides of a dispute. The questions are answered orally by the witness, while documentary exhibits are presented to the Court through witnesses.

Ontario's*Family Law Rules* provide specific mechanisms to shorten the trial process. Rule 2(2) of the FLR states that the primary objective of the rules is to enable courts to deal with cases justly. Rule 2(3) provides that dealing with cases justly includes "saving expenses and time" and "dealing with the case in ways that are appropriate to its importance and complexity". Rule 2(4) stipulates that parties and their lawyers are required to help the court to promote the primary objective. Along with the specific procedural powers of the court as set out in Rule 1(7.2), the court has extensive powers available to help focus trials.

<u>The Court's Current Powers</u>

Many Courts are interpreting these rules as valuable tools to assist in moving the trial process along in a more responsible, efficient manner. By relying on Rule 2 and Rule 1(7.2)(i), judges are ordering "focused hearings" or "abbreviated trials". For instance, a judge may order that instead of a mother being placed on the witness stand to provide evidence orally for a number of days, that she have a written affidavit prepared in advance that sets out all of her evidence that she wishes to present to the Court along with all documents to be relied on. The affidavit will then be subject to cross examination by the opposite party in order to test the credibility of the witness. With such an order, a witness that might otherwise have take two to three days on the stand if all evidence was adduced orally may have his or her time on the stand reduced to one day, or perhaps even a half day.

Judges are also relying on Rule 16 of the FLR in order to make final orders on motions that rely on affidavit and other written materials. Rule 16, referred to as the : "summary judgment rule" permits the Court to make a final order when there is "no genuine issue that requires a trial". In reality, many, if not most cases do not require a trial, particularly when there are no serious credibility issues that require oral evidence. Rule 16 provides the Court with substantial power to weigh evidence, evaluate credibility, and draw reasonable inferences from evidence without the need for oral evidence. The Court may permit limited oral evidence to supplement the affidavit material if it feels that such evidence is necessary to determine all facts justly and to supplement the written materials provided.

Some Judges remain reluctant to order focused or abbreviated trials. Perhaps they are of the view that every litigant isentitled to their day in court and the full trial process, no matter how long and expensive that processmight be. Often, if the partiesdo no consent to an abbreviated trial process, the case management Judges will not order it. However, in some courts, such as the Ontario Court of Justice at North York, the abbreviated process is becoming the norm rather than the exception. Judges in this court take the view that while litigants may be entitled to a

court determination of his or her matter, it is the Court, and not the litigant who will decide the manner in which justice is to be served.

Courts must aggressively use whatever tools are at their disposal to move cases through the system efficiently. Judicial resources are finite. They cannot be spent on ten to fifteen day custody trials where every member of a family is called to provide similar (and usually overlapping) evidence. Except in the rarest of cases, there is no need for full trials relying solely on oral evidence. Facts can be determined based on written evidence if the evidence is presented clearly and counsel or litigants are permitted adequate time to present their case. Cross examination of witnesses on his or her affidavits is a powerful tool to determine credibility.

A Shift in Focus

We propose that all matters requiring a final hearing or trial be heard in a focussed or abbreviated fashion. Full trials should be reserved for complex cases only, as determined by the Case Management Judge. Only if it is clear and obvious based on the particular facts of the case that a focused trial would not be in the interests of justice would a full trial consisting entirely of *viva voce* evidence be permitted.

Although recent province-wide practice directions were issued to establish a new step in Family Law cases, the Trial Scheduling Conference, we recommend that a formal amendment to the FLR be made in order to implement the shift away from the full trial process. Only minor amendments to the FLR and court forms would be required to put this shift into practice. Currently, there is no rule that indicates that a full trial is required to resolve matters. Instead, Rule 2(3) already suggests that the court must ensure a fair process for the litigants, save time and expense, deal with the case in a way that is appropriate to its importance and complexity, and give appropriate resources to each case. Rule 2(5) already requires the court to actively manage cases. We propose an amendment to Rule 2(5) to add a new subsection requiring the court to give directions and make orders for focussed hearings using the procedural rules in Rule 1(7.2), unless the court determines that a full trial is required. A minor amendment to the Trial Scheduling Endorsement Form can be made to indicate that the case management Judge has determined that a full trial is not required, and permitting the court to give specific directions for a focussed hearing. Should either party dispute the court's determination or any of the directions given, they could make submissions regarding same on a modified Trial Management Conference Brief.

By implementing such measures, trial lengths will be shortened without impairing a litigant's ability to make their case or test the evidence of the other party. As the duration of the trial will be shortened, more litigants will be able to afford to retain or keep counsel for the hearings. Access to justice will be improved, while at the same time freeing up judicial resources.

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