Family law

A view from the Bench

by The Honourable Mr. Justice D. Roger Timms
Ontario Superior Court of Justice (Family Court Branch)

Family law files, by their very nature involve emotional, if not "difficult" people and situations.[1] On occasion, we judges can be difficult as well. Too frequently we see matters where counsel have taken shortcuts, or even skipped some basic and fundamental steps.

In this article, I highlight some basic "dos and don'ts" that should help guide you through the maze of case management, while also reducing judicial ire.

File conference briefs and confirmations on time

This seems so basic that I hesitate to mention it. However, it would be a very rare day indeed without at least one case where either there is no 14C and either no brief or no up-to-date brief. Cases that are not confirmed are removed from the list by the trial coordinator. Subject to the discretion of the presiding judge, the case will not be restored. Clients will be rightly annoyed! As of last July, the whole province has been subject to the Family Law Rules. I believe that one year is more than enough time for counsel to familiarize themselves with the requirements of those rules – even for Toronto counsel!

File complete and up-to-date financial statements

A significant number of incomplete financial statements are filed in the first instance. The problem mainly lies in relation to Parts 5 and 6 (Other Income Information and Other Income Earners in the Home). In particular, very few tax returns and notices of assessment actually get attached and almost no one files proof of current income. Instead, we get the direction to the CCRA. That is of no help at the conference.

On subsequent appearances, the filing of up-to-date and corrected financial statements appears to be a problem. The provisions found in Rule 13(12) through 13(15) are quite clear and not that onerous.

File meaningful conference briefs and confirmations

It is relatively easy for counsel to file a 14C that tells the judge to "read all of the file." It is relatively easy to simply tick off the boxes in the forms required under Rule 17. It is also relatively useless.

Case management lists are significant. Each file requires at least ten minutes reading by the judge to properly prepare. We do not have the time to read the whole file. If the brief is comprehensive, it should suffice. By "comprehensive" I mean that every section has been filled in, and that particular attention has been paid to section 11 in a case conference brief or to section 8[2] in a settlement conference brief. Expand these to several pages, with headings and subheadings. If appropriate, attach ancillary documents such as net family property statements or DIVORCEmate calculations. Trial management conference briefs **must** have an opening statement for the trial attached.

Case conference briefs and settlement conference briefs are not part of the continuing record and are required to be returned or destroyed at the end of the conference.[3] However, if the conference is adjourned, the briefs should be up-dated for the continued conference, either with a whole new brief or by way of an addendum.

Proofread all documents

In this era of spell check, we all need to carefully proof read our final work. Relying on "quick correct" or the abilities of those who type the document can lead to hilarious or just plain confusing results. Judges are old-fashioned enough that we expect counsel to properly employ the basic rules of grammar.

Be on time and attend when a conference is scheduled

In fact, come early so that you don't have to say to the judge "could we please hold this case down your honour, we have just begun settlement discussions." Confirm the date with your client and make sure that she or he comes, unless already excused by the court. Remember that the first listed purpose of all conferences is to "explore the chances of settling the case."[4]

That is very difficult without both clients in attendance.

The concept that counsel of record is required to appear, unless excused by the court, until formally removed from the record, seems to have fallen by the wayside. Far too often, lawyers just fail to show up. Sometimes they tell their clients beforehand, and sometimes they do not.

Beyond a scolding on the next appearance, there is a risk of possible long term and irreparable damage to reputation. There is a risk of being made to appear just to explain one's dereliction. There is a risk of costs being assessed personally against the lawyer.[5] Unfortunately, I have had to do this several times over the past few years. It is painful for everyone. The lawyer has to be given notice and the opportunity to explain his/her absence/lateness.[6] That can entail retaining counsel. A hearing may result. It diverts everyone from the litigation itself. It costs everyone's time. If the order for costs against the lawyer personally becomes final, it is almost always with the condition that the costs not be passed on to the client and that the client not be billed for any of the time spent determining the issue. Clearly the effective hourly rate goes way down! And the client will probably say goodbye and then go and badmouth the lawyer in his/her own community.

Anticipate questions from the judge

The judge presiding at a conference is likely to pose questions. Prepare yourself and your client. The more formulistic in nature the pleadings, the more pointed those questions are likely to be.

- If you have claimed extraordinary child support expenses, do you have receipts?
- Exactly what facts would support a claim for undue hardship?
- Is the claimed deduction for date of marriage assets ever going to be provable?
- Is there any substantial factual basis for an unequal equalization or a constructive trust claim?
- Does your self-employed client have appropriate records for all of his claimed business expenses?
- If your client is relying upon her inability to work due to medical reasons, can you get a doctor's report? When?
- If the separation was two years ago, and there is nothing preventing a party's return to the work force, what has she/he done to find reasonable employment?
- If the disability insurance has ended, why is she/he not working?

These and other questions are easily anticipated.

Make offers

Do submit a reasonable offer under Rule 18 of the Family Rules and do so at all stages. I see an extraordinary number of cases where no offer at all has been made. A failure to submit a considered, reasonable offer can have disastrous consequences as a result of Subrule 18(14).

Did you explain that to the client before attending at the conference? Did you explain that "unreasonable behaviour" could deprive a successful party of costs? Did you explain that an unprepared party might well have a costs award made against him or her? Did you explain that "bad faith"[7] will likely result in costs on a full recovery basis?

Be civil

Unfortunately, notwithstanding recent attempts to promote greater civility in litigation, some counsel seem determined to act otherwise. A theatrical, fractious, belligerent attitude or a gross exaggeration of facts, serves no one's interests. A calm, prepared, stick-to-the-facts, an I-am-here-to-settle-this-case, approach serves everyone's interests.

Mediation and other FLIC services

Remember that all Unified Family Court sites have both Family Law Information Centres and mediation services available. Mediation may be available immediately on site. Take advantage of that. Could your clients benefit from attending a parent information session? Send them to the FLIC.

In conclusion, case management can be a relatively pleasant and productive experience for all of us who "toil in the vineyards of matrimonial discord."[8] How pleasant and productive it is will depend largely upon how prepared are counsel.

1 See the well written article, *Dealing with difficult clients*, by Carole Curtis, family law practitioner and bencher, in the Spring 2004 Edition of LawPRO (www.practicepro.ca/difficultclients).

2 These two respective sections are the "issues for the conference" sections.

3 See Rules 17 (22) and (22.2).

4 See Rules 17 (4)(a), (5)(a) and (6)(a).

5 See Rule 24(9) of the Family Rules.

6 See *Fekete v. 415585 Ontario Ltd.* [1998] O.J. No. 222

7 See the various provisions dealing with reasonableness, preparation and bad faith found in Rule 24.

8 A favourite and well-known phrase of Justice George Walsh, now retired.