

# **NOTICE #9 TO THE BAR**

## **Child and Adult Protection Urgent and Emergency Matters Affidavit Evidence and the Length of Hearings Rules 1, 27, 28, 59.38, 59A and 60A**

Since March 23<sup>rd</sup>, 2020, the Family Division has operated under an essential services model, dealing with urgent and emergency matters using electronic and fax filings (as outlined in Notices #1 and #2). The Family Division continues to be guided by the recommendations of the Department of Health and Wellness and the protocols imposed by the state of emergency; we are operating with minimal staff and limiting traffic to the courthouses.

This Court has successfully transitioned to dealing with most child protection, adult protection and urgent/emergency matters by teleconferencing. These matters are a significant part of the Court's caseload and will continue to be addressed in this way.

Rule 28 provides a presiding Judge with wide discretion to limit evidence and the duration of hearings when a Judge is called upon to hear matters deemed urgent or an emergency.

Unless a party makes a request in writing to vary the following; other parties have an opportunity to respond and a presiding Judge gives different directions, the following will govern aspects of proceedings pursuant to the Children and Family Services Act, the 'CFSA' and with necessary modifications, those proceedings pursuant to the Adult Protection Act 'APA':

1. Each party must file a list of witnesses prior to a contested hearing and for each witness an affidavit containing the direct evidence of that witness must be filed. The filing deadline shall be determined by the presiding Judge.
2. Direct evidence will be by affidavit. A witness who has not filed an affidavit will not be permitted to testify.
3. Effective immediately no affidavit filed after May 1 may exceed twenty-five (25) pages. and on June 1 the limit on the length of affidavits will become twenty (20) pages. Subject to 4, in both cases exclusive of exhibits.
4. Case recordings shall not be attached as exhibits to affidavits.
5. Unless otherwise ordered by the Court, each party will be provided time for cross-examination of other parties and their witnesses by telephone or video as outlined below:
  - A. Commencement of an Interim Hearing; cross examination will be permitted only with leave of the court R 60A(4)  
Contested completion of the interim hearing: 2 hours for each party apportioned as decided by that party
  - B. Protection Hearing: 3 hours for each party, apportioned as decided by that party
  - C. Disposition Hearing: 3 hours for each party, apportioned as decided by that party
  - D. Review: 3 hours for each party, apportioned as decided by that party
  - E. Review: Permanent Care Hearing: determined on a case by case basis but will presumably be done with cross examination being in person and for a duration determined by the presiding Judge.

Attached as Appendix "A" is a backgrounder that forms part of this Notice.

## Appendix "A" to Notice # 9

### Background: Filing Limits

The CFSA five (5) day hearing stage is often viewed by counsel for the Applicant as requiring that it put all of its case forward at this first appearance. Evidence received at the 5 day is frequently the principal evidence relied upon throughout a proceeding. The 5-day affidavit will often exceed 50 or more pages, with some affidavits approaching 100 pages and these may have extensive exhibits. The result is documents prepared on short notice and filed for the 5 day appearance often lack focus and have the effect of burdening the court and Respondents with detailed descriptions of circumstances of limited relevance and significance. Much of the material in these cases could be presented in fewer pages.

Guidelines are necessary to assist all parties in the preparation of affidavits. Affidavits need to be more precise and to more clearly and concisely communicate the basis of a claim that a child is in need of protection. Given the lower threshold and relaxed evidentiary rules applicable during an interim hearing, particularly at the 5 day stage, a limit on the number of pages for affidavits permits the amount of information required to accomplish that task. As stated this is particularly so in light of the evidentiary rules at the interim hearing stage, which are commented upon in the following.

Affidavits of two or three times the appropriate length with extensive exhibits, filed on the eve of the 5 day hearing are not uncommon. This current practice is contrary to the intention of the CFSA and our rules.

#### **Evidence at the 5 day**

From time to time it is important to reread sections of the CFSA and our Rules to remind oneself of the policy choices made by the legislature and reflected in s. 39 of the CFSA and the Rules. Clearly, the overriding emphasis at the 5 day appearance is on identifying risk to a child and protecting a child even at the cost of a very compromised 'hearing'. The Rules require that this objective be met in a concise, focused and proportionate manner.

The burden of proof on the Applicant at the interim hearing stage is not as high as at later stages.

- The burden is to establish on reasonable and probable grounds that an identifiable risk exists. This is contrasted with the usual civil burden that conclusions must be based on evidence that support a finding on a balance of probabilities and it is well below the test in criminal matters, that of proof beyond a reasonable doubt.
- Not only is the threshold for a finding of risk lower at the 5-day hearing, the rules of evidence are also significantly relaxed. For example (1) the Applicant need not comply with the expert's rule, that is it may offer an expert opinion without filing the expert report when the purpose of the expert opinion is to establish whether there are reasonable and probable grounds that an identifiable protection concern exists (R60A.10(3)) and by way of further example it is observed that (2) s. 39(11) of the CFSA provides for the purpose of the interim hearing "the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances"

- Given a Respondent is entitled to only 2 days notice of the proceeding (CFSA s.39(2)) the result is most Respondents do not exercise their right to offer affidavit evidence at the 5-day hearing. They are typically unable to prepare to do so.
- R60A.10(4) provides a judge may act solely on affidavit evidence at the 5-day 'hearing' and oral evidence may only be presented with the permission of the judge. No right to offer oral evidence or to cross examine exists for Respondents, notwithstanding the issues that will be decided.
- If the court can complete the interim hearing at the 5-day appearance, it must make the reasonable and probable grounds finding or dismiss the application - CFSA s.39(2). If the finding is made, s.39(7) the need to find a substantial risk, which would justify removing a child from a parent, has no application at the 5 day hearing.
- The Court's obligation at the 5-day hearing and pursuant to the CFSA s. 39 (3), when the hearing cannot be completed and the parties don't agree that a finding of reasonable and probable grounds exist to support a finding, is to adjourn the hearing but before doing so the Court must make an interim order that reasonable and probable grounds to support a finding exists. This finding will last until the interim hearing is completed- R63A.10 (5).
- All parties are permitted to file additional material for consideration of the court, prior to completion of the interim hearing, i.e. for the 30-day hearing. If a Respondent wishes to challenge the case of the Applicant it will almost always happen at the 30-day hearing.

The 5-day and the 30-day although often characterized as two separate hearings are parts of the same hearing, not separate hearings.

Although the CFSA does not say a 5-day finding of reasonable and probable grounds can be changed at completion (see CFSA s. 39(4)), the effect of R60A.10(5) is that the 5-day order expires on the date of return for completion of the interim hearing.

## **COVID-19**

The limit on the length of affidavits, exclusive of exhibits, applies to all affidavits including those filed at the 5-day hearing. The limitation is designed to address the need for a more efficient court process during the COVID -19 crisis, and beyond. This is a time of severe restrictions on the court's ability to offer trials. Our proceedings are limited to urgent and emergency matters which include CFSA matters. The limitations identified are within the range of what is contemplated and will govern during this period and thereafter.

Concerns have been expressed and considered by the Court that limiting affidavits to 20 pages as per Notice 9 may be a challenge for parties, given the absence of limits previously. As a result the page limit for affidavits during the month of May will be 25 and the 20 page limit will be effective June 1.

## **Judicature Act**

The Supreme Court has enacted Rules pursuant to the authority conferred upon it by s. 46 of the Judicature Act which provides:

## Rules of Court

46 The judges of the Court of Appeal or a majority of them may make rules of court in respect of the Court of Appeal and the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular,

- (a) regulating the sittings of the Court and of the judges of the Court in chambers;
- (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;

\*\*\*\*\*

- (e) prescribing and regulating the proceedings under any enactment that confers jurisdiction upon the Court or a judge;

\*\*\*\*\*

- (i) regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceeding or on any application in connection with or at any stage of any proceeding;

- (j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying R.S., c. 240 judicature 29

## Rule 1, 28 and 59A

Rule 1 provides the purpose of the Civil Procedure Rules, governing procedures in this court have as an object “the just, speedy, and inexpensive determination of every proceeding”.

Rule 28 empowers this court to customize processes when dealing with emergencies and informs the Court’s management of child protection files through the COVID-19 period and beyond.

Rule 59A.01 identifies the object of the Rule as the promotion of the “proportional, just, timely, and cost-effective resolution of disputes”

Rule 59A.05 provides that at every appearance a judge may by direction or order *inter alia*

...

- (i) Manage the hearing, trial, or dispute resolution process by :
  - (i) limiting the use of expert evidence
  - (ii) limiting the number of witnesses
  - (iii) limiting the number of affidavits
  - (iv) limiting the number of paragraphs and pages in affidavits
  - (v) specifying the issues to be addressed in affidavits
  - (vi) setting page limits for written submissions.....

\*\*\*\*\*

Rule 59A.05 (k) provides a judge may give any direction and make any order that is appropriate to promote the proportional, just, fair, timely and cost effective resolution of issues in dispute.

The foregoing Rules of our court are consistent with the judgment of the Supreme Court of Canada in *Hyrniak v Mauldin* 2014 SCC 8. Although that case focused on the Ontario summary judgment rule the court's discussion of access to justice issues and the need for proportionality has application to this discussion.