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A Guide to Procedures in Family Court

June 2010

This guide does not provide legal advice. It is recommended that all parties seek legal advice where possible.

PART 8: MOTIONS

Motions allow the parties to ask the court to make temporary decisions on the matters that you have asked the court to decide. Either party can make motions before the court makes a final decision on the matters in your case.

An example of a motion is where one party asks the judge for a temporary order concerning where the children will live or how much time they will spend with each parent. This temporary decision would be in place until the court makes a final decision about custody and access.

If you are the person making a motion, you are called the **moving party**. The other person is called the **responding party**.

Types of Family Law Motions

Any party named in a case may make a **motion**, unless a judge has ordered otherwise. A motion is a request to the court by a party for one or more of the following:

- A **temporary order** until a final order can be decided, especially in **situations of urgency or hardship**.
- An order to **change** a temporary order.
- An order where **all the parties named in the case agree** on what is being asked for.
- An order on **procedural, uncomplicated or unopposed** matters in a case.
- An order for **summary judgment**.
- A **contempt order** under Rule 31:Contempt of Court.
- A **refraining order** or an **alternative payment order** related to support paid to the Family Responsibility Office.
- An order to **set aside the registration of a support order** made outside of Canada.

A motion can also be made to **change a final order or a support agreement** filed with the court. However, this type of motion is referred to as a **motion to change**.

In some circumstances, you may determine that you need to make a motion without notifying the other person. This is called a **motion without notice**.

Motions for Consent Orders or an Order on an Uncomplicated or Procedural Matter

Where you and the other party agree, you can ask the court to put your agreement in a court order. This is called an order on consent. When you ask the court for an order on consent, you must attach the consent or any minutes of settlement that show what you and the other party have agreed to to your Affidavit.

In these circumstances, you should also include a draft order that includes the terms that you are seeking, if possible.

In most cases where all the parties consent to the order to be made, the parties do not need to appear in person before the judge. The clerk will present the documents you have filed to the judge.

If your materials are complete and the judge does not have any questions for you or the other person, the judge will sign the draft order. The clerk will send a certified copy of the signed order to you and every other party named in the case.

If the judge has questions for you or the other person, the clerk will contact you with a court date or provide you with a copy of the judge's endorsement that sets out any additional steps that should be taken.

Motions to Change a Final Order

Where the court has previously granted a final order or where a support agreement has been filed with the court, you may bring a motion to **change a final order or a support agreement**.

Motions to change are similar to the process involved when making an application. The motion to change and supporting documents must be served on the other party by special service. The court process begins once the motion to change is filed with the court. A motion to change may involve a first court date, if your case is at the Ontario Court of Justice or the Family Court Branch of the Superior Court of Justice, unless the application includes a claim for divorce or a property claim. For the Superior Court of Justice you will be required to schedule a case conference.

A motion to change might be made, for example, if the person paying child support loses his or her job and needs to reduce the amount of support payments. Another example is when one party wants to move, which would require a change to the custody and/or access order.

If a Motion to Change is being brought on consent of all parties, you must attach the consent or any minutes of settlement that show what you and the other party have agreed to to your Affidavit. You should also include a draft order that includes the terms that you are seeking, if possible. The motion to change and supporting documents that you filed with the court will be reviewed by the judge and either an order will be made, or an endorsement will be made that sets out any additional steps that should be taken.

See Rule 15: Motions to Change a Final Order or Agreement of the *Family Law Rules* for more information on changing a final order or agreement. You can find the *Family Law Rules* on the Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca. Go to "Family Justice" and click on "Family Law Rules". You can also review the Ministry's guides to Motions to Change which are available at: www.attorneygeneral.jus.gov.on.ca/english/family/divorce/support/motion.asp

Timing of Motions

A motion can be made at any time after the first case conference. However, there are occasions when a judge will hear a **motion before a case conference** or a **first court date** if your case is started at the Ontario Court of Justice or the Family Court Branch of the Superior Court of Justice and the application does not include a divorce or property claim. These include:

- **Situations of urgency or hardship**, such as an issue of immediate danger, health or safety that cannot wait until after a case conference or first court date. These motions are often heard without notice to the other parties named in the case; or
- **Procedural, uncomplicated or unopposed matters** (14B motions). For example, asking the court for permission to file an answer after the time to file an answer has passed.

It is only in the most serious circumstances that a judge will make a temporary order on a motion before a case conference or a first court date. You should think carefully about whether or not you need to make a motion because if you make a motion and the judge decides it was not necessary to do so, the judge can order you to pay the other party's costs related to their preparation for the motion.

Motion by Telephone or Video Conference

A motion may also be heard by telephone or videoconference with the judge's permission. The person requesting a telephone or videoconference must contact the family court office before completing their motion documents. It is the responsibility of the person asking for the telephone or videoconference to make all necessary arrangements and to let the other party know by serving them with a notice of the arrangements and filing the information with the court office.

The Day of the Motion

Make sure you arrive early to court on the motion date

When you arrive at the courthouse, you should look for the name of your case or your court file number on that day's list of cases to be heard. The day's list of cases is usually posted on a board somewhere near the entrance to the court or outside the courtroom. If you have trouble finding it, you may ask staff at the family court counter.

If you do not have a lawyer and you are at a court location where **duty counsel** is available, you may wish to speak with duty counsel. Duty counsel are lawyers provided in family courts by Legal Aid Ontario and provide assistance to parties who qualify for legal aid and are attending court without a lawyer.

You should check in with the clerk in the courtroom when the motion is scheduled to be heard. When your name is called, you and the other party will sit at the tables set up at the front of the courtroom. When the judge enters, you should stand and should remain standing until the clerk says that you can be seated.

There are usually no witnesses on a motion. Instead, you and the other party will each have a chance to tell the judge what you are asking for, or what it is you do not agree with about what the other party is asking for, and why you disagree. You may only refer to the evidence in your affidavit or other documents you have served and filed with the court, so it is very important to include all of the evidence you wish to rely on in your affidavit.

The person who brought the motion will usually be asked to speak first, and then the responding party will have a chance to speak. The judge may also ask you or the other party questions about your motion.

Once you have finished telling the judge your side of the events and the judge has asked all of his/her questions, the judge may make a decision. Alternatively, he or she may **reserve the decision** to a later time or date.

If the judge reserves the decision, it means that he or she needs more time to review the evidence and consider the requests that have been made. You may need to come back to court for the decision or you and the other party may be notified of the decision in writing.

Steps to Making a Motion at Family Court

Step 1: Identifying the Forms You Need for a Motion

If you want to make a motion, you will need:

- Form 14: Notice of Motion or Form 14B: Motion Form (see below);
- Form 14A: Affidavit (General); **and**
- Form 6B: Affidavit of Service.

Use Form 14B: Motion Form where:

- You are requesting the court to make an order on an uncomplicated or procedural matter; or
- You and the other party agree about the order you would like the court to make and you have a signed consent or minutes of settlement that sets out the agreement.

If your motion involves a claim for child or spousal support or family property, you may need:

- Form 13 (or Form 13.1): Financial Statement.

If your financial statement is more than 30 days old, you will also need to update your financial information by serving and filing either:

- A new financial statement (Form 13 or Form 13.1) if any major changes to your existing financial statement are required;
- An affidavit (Form 14) that sets out any minor changes that should be made; or
- An affidavit (Form 14) saying that the information you provided in the last financial statement has not changed and is still true.

If you are asking for a temporary order for child or spousal support or to change child or spousal support, you will need:

- A Support Deduction Order Information Form.

Motions to Change

To change a final order or agreement for child support only, with the agreement of both parties, you need:

- Form 15 D: Consent Motion to Change Child Support;
- Form 25: Draft Order (you will need 5 copies);
- Stamped envelopes addressed to each party;
- Support Deduction Order Information Form; and
- Draft Support Deduction Order;

To change a final order other than for child support only, with the agreement of both parties, you need:

- Form 15A: Change of Information Form;
- Form 15C: Consent Motion to Change;
- Form 13: Financial Statement;
- Form 14B: Motion;
- Form 25: Draft Order (you will need 5 copies);
- Stamped envelopes addressed to each party;
- Support Deduction Order Information Form; and
- Draft Support Deduction Order.

If you are asking for a change in support and the other party does not agree, you will need:

- Form 15: Motion to Change;
- Form 15A: Change of Information;
- Form 13: Financial Statement.

You will also be required to serve the responding party with:

- Form 15B: Response to Motion to Change;
- Form 15C: Consent Motion to Change.

See Rule 15: Motions to Change a Final Order or Agreement of the *Family Law Rules* for more information on changing a final order or agreement. You can find the *Family Law Rules* on the Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca. Go to "Family Justice" and click on "Family Law Rules". You can also review the Ministry's guides to Motions to Change which are available at:

www.attorneygeneral.jus.gov.on.ca/english/family/divorce/support/motion.asp

All of the court forms you will need are available at the family court office or on-line at www.ontariocourtforms.on.ca. Read and follow the instructions on the forms carefully.

Step 2: Requesting a Motion Date and Completing the Forms

You must contact the family court office for a motion date. The date you are given must be filled-in on the notice of motion or motion form before you serve it on the other parties named in the motion.

You will need to:

- Sign and date your notice of motion or motion form; and
- Write the court file number in the top right hand corner of each document.

Affidavit

Evidence on a motion is usually provided to the court in writing in the form of an affidavit - Form 14A: Affidavit (General)

The affidavit is a document that contains your sworn or affirmed evidence about the issues you are asking the judge to decide. It is your opportunity to give the judge the information that he or she will need in support of what you are asking for.

After completing the affidavit you must sign it in front of a **commissioner for taking affidavits**. There are commissioners for taking affidavits at the family court office.

Remember, it is a criminal offence for a person to swear or affirm a false or misleading affidavit. It is the responsibility of the person making the affidavit of service to make sure that the information in the affidavit is true.

Completing an Affidavit

Preparing an affidavit can be difficult. The following tips should help you to complete an affidavit.

- A. Clearly set out the type of order you are asking for. For example:
- A custody order—are you asking for sole or joint custody;
 - An access order—specify the time you think the children should spend with each parent;
 - A support order for yourself or the children—remember to consult the Child Support Guidelines and tables;
 - A restraining order—what are the specific terms you are looking for? Are you asking that the responding party be restricted from contacting

you and/or the children, from coming within a certain distance of you, your home, workplace or the children's school? Or are you asking for something else?

B. Set out the facts the judge will need to know. Remember it is the facts about what you are asking the court to make a decision on that the judge will need to make a decision. Include all of the information you think is necessary to support your motion. This information should include the history of your court case and the relevant information that explains why you are asking for a certain order. For example:

- If you are proposing a specific type of access, you must explain why this access is in the best interests of the children.
- If you are asking for a change in support payments, you must provide the judge with information about what circumstances have changed and why you think a change is necessary now.
- If you are asking for a restraining order, you must outline the specific instances in your relationship and since your separation that makes you believe that a restraining order is necessary.

The affidavit must contain facts only and should, as much as possible, be what you know, not what you think may have or may be happening. What you put in your affidavit must be correct and a true description of what is or has happened. Remember that the affidavit will become part of your court record, which is public. Stick to the facts the judge needs to know to make a fair and informed decision.

The information in your affidavit should, as much as possible, be what you know. You can include information that has been provided to you by someone else, but if you do you must name the person who gave you the information and state that you believe it to be true. For example;

Facts you know to be true

The respondent and I were married on July 5, 1993.

What you have been told by others and what you think to be true

The respondent's employer, John Doe, tells me that the respondent started working at his current job in November 2008. I believe this information to be true.

C. A document referred to in your affidavit must be attached to your affidavit. This document is referred to as an "Appendix", and it must be specifically

referred to in your affidavit. Each appendix must be given a letter of the alphabet to identify it. For example:

The child's parent and I developed an access schedule that sets out the days on which the children were to be at his house and the days on which they were to be at my house. Attached and marked "Appendix A" is a copy of that schedule.

It is important to understand that you cannot ask the court to look at a document (other than a court form) unless it has been attached to an affidavit as an appendix.

Step 3: Serving the Forms

After completing all the required forms for your motion, you will need to make arrangements to serve the responding party and any other person or agency required to be served with a copy of all of the documents you want the judge to consider. In most cases, the notice of motion or motion form and any accompanying documents can be served by **regular service**. However, you must ensure that the documents are received within the timeframes set out in Rule 14: Motions for Temporary Orders or Rule 15: Motions to Change of the *Family Law Rules*. You can find the *Family Law Rules* on the Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca. Go to "Family Justice" and click on "Family Law Rules". You can also review the Ministry's guides to Motions to Change, which are available at: www.attorneygeneral.jus.gov.on.ca/english/family/divorce/support/motion.asp

Rule 3 of the *Family Law Rules* deals with the issue of time when serving documents, including how to count the number of days. Generally speaking, counting starts on the day after the first thing happens. For example, if you serve a document on Monday that requires 7 days service, the first day you count is Tuesday and the 7th day is the following Monday.

For more details, see Rule 3 at <http://www.attorneygeneral.jus.gov.on.ca>. Click on "Family Justice" then scroll down and click on "Family Law Rules".

You should always check the *Family Law Rules* and the family court form to make sure that you are serving and filing your documents properly and on time. Court staff cannot accept your documents if you have not complied with the times set out in the court rules.

See **A Guide to Family Procedures, Part 6: Serving Documents** for additional information on serving documents.

If you are served with motion materials and you need more time to prepare your materials, you can ask the judge to adjourn (or reschedule) the motion to a later date; however the judge may not agree to do so. If the judge agrees to the adjournment, he/she may impose conditions, such as the payment of a specific amount of money for child support until the motion can be heard.

If possible, it is best to try to agree on a date for a motion ahead of time so that you can both be prepared.

Step 4: Completing the Affidavit of Service and Filing the Forms with the Court

You will need the original form(s) to file with the court, together with one copy for:

- Your copy of the continuing record;
- Each party named in the answer; and
- Any other person or agency required to be served

After the documents have been served, the person who served the documents will need to complete Form 6B: Affidavit of Service for each person served.

The **affidavit of service** tells the court when, where and how your documents were provided to the responding party and any other person or agency required to be served. See **A Guide to Family Procedures, Part 6: Serving Documents** or more information.

The affidavit of service requires the person who served the documents to **swear or affirm** that the information in the affidavit is true. After completing the affidavit of service, the person must sign it in front of a **commissioner for taking affidavits**. There are commissioners for taking affidavits at the family court office.

Remember, it is a criminal offence for a person to swear or affirm a false or misleading affidavit. It is the responsibility of the person making the affidavit of service to make sure that the information in the affidavit is true.

Making a Motion Without Notice

In extreme circumstances, you may need to make a motion without notifying the other person. This is called a **motion without notice**.

Making a motion without notice means that the other party will not know that you are asking the court to make an order and, as a result, they will not be at court on the motion date to tell the court their side of the events. Because the judge hearing the motion without notice may not have all of the information needed to make a decision, the judge may not make the order you have requested.

You may consider making a motion without notice if:

- It's not possible to provide the other party with notice because, for example, you do not know where the other party is so you cannot serve him or her;
- There is an immediate danger that a child will be taken out of Ontario and requiring service on the respondent could result in serious consequences; or
- There is an immediate health or safety risk to you or your child and delay in serving the other party would probably have serious consequences.

You would use the same forms as you would if the motion was with notice to the other party. However, in your Notice of Motion, you should ask the court for permission to have the motion heard even though it has not been served on the party. You do not serve the materials on the other party until after the motion is heard by a judge and only if the order requested in your motion materials is granted. Where the judge makes an order on the motion date, you must serve the other party with all your motion documents and a copy of the order made on the motion without notice.

Your motion documents must be filed with the court **on or before** the motion date.

If the judge gives you the order you have requested on the motion without notice, he or she will also order that you come back to court, usually within 14 days, so that the order may be reviewed. The reason is to provide the other party with an opportunity to tell the judge their side of the events. At this time, the judge can decide whether the order should remain, be changed or revoked.

Confirming the Motion

At least two days before the motion date you must **confirm** that the motion is ready to be heard. You will need to file with the court, Form 14C: Confirmation. If you do not confirm that the motion is going to proceed, it may not be able to be heard on the day that has been scheduled by the clerk.

See Rule 14: Motions for Temporary Orders of the *Family Law Rules* for additional information on the rules for Motions. You can find the *Family Law Rules* on the Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca. Go to "Family Justice" and click on "Family Law Rules".