

NOTICE TO PROFESSION
CHANGES TO THE FAMILY LAW RULES
IN FORCE SEPTEMBER 1, 2011

Please note that O. Reg. 383/11¹ comes into force on September 1, 2011. In summary, the regulation makes the following changes:

- Rule 8.1 has been amended to require family law litigants throughout the province to attend a mandatory information program.
- Rules 14 and 17 have been amended to make conferences and Form 14B motions work more effectively.
- Rule 19 has been amended to exempt children's aid societies and the Office of the Children's Lawyer from having to produce an affidavit of documents on demand.
- Rule 20.1 has been added to clarify the duties and role of expert witnesses.
- Rules 7 and 34 have been amended to implement Bill 179, An Act to amend the *Child and Family Services Act* respecting adoption and the provision of care and maintenance.

In addition, the following court forms have either been amended or created:

1. Form 8D.2: Notice of intention to place a child for adoption
2. Form 8D.3: Notice to child of intention to place for adoption
3. Form 8D.4: Notice of termination of access
4. Form 20.1: Acknowledgement of expert's duty
5. Form 33B.2: Answer (*Child and Family Services Act* other than child protection and status review)
6. Form 34E: Director's consent to adoption
7. Form 34G.1: Affidavit of society employee for adoption of a Crown ward
8. Form 34K: Certificate of clerk (adoption)
9. Form 34L: Application for openness order
10. Form 34M: Consent to openness order under s. 145.1 of the *Child and Family Services Act*
11. Form 34M.1: Consent to openness order under s. 145.1.2 of the *Child and Family Services Act*

All of these forms have a version date of August 2, 2011 and relate to Bill 179 with the exception of Form 20.1: Acknowledgement of expert's duty, which is a new form. The court forms can be found at www.ontariocourtforms.on.ca.

¹ O. Reg 383/11 is expected to be published on e-Laws on August 19, 2011 and in the Ontario Gazette on September 3, 2011.

A further explanation of the changes is set out below. Please note that this is not intended to be a substitute for reading the *Family Law Rules* and amendments in their entirety.

Rule 8.1 (MIPs)

- Rule 8.1 previously dealt with the MIP at the Toronto Superior Court of Justice only.
- Rule 8.1 has been amended to apply to all litigants in cases started after August 31, 2011 that deal with:
 - custody;
 - access;
 - net family property;
 - the matrimonial home;
 - support;
 - a restraining order; or
 - motions to change (except motions to change support only).
- Parties are exempted from attending a mandatory information program if:
 - They are proceeding on consent;
 - They only seek a divorce, costs or the incorporation of the terms of an agreement or prior court order; or
 - They have already attended a mandatory information program.

Case Management Changes

Combining Conferences

- In order to clarify that it is not always necessary to attend a case, settlement and trial management conference before a case can be set down for trial, rules 14 and 17 have been amended.
- Before being amended, subrule 14(4) said :
“No notice of motion or supporting evidence may be served and no motion may be heard before a case conference dealing with the substantive issues in the case has been completed.”
- Subrule 14(4) has been amended by removing “case” before conference, to make it clear that parties only have to attend a conference. The conference could be a settlement or even trial management conference if the parties were ready to have those discussions the first time they see a judge.
- For similar reasons, subrule 17(1) has been amended to say that a judge must conduct “at least one conference” instead of “at least one case

conference” and “a settlement conference, a trial management conference or both.”

- For further clarification, subrule 17(7) has been amended to add “at any time” to the existing rule that “on the direction of the judge, part or all of a case conference, settlement conference and trial management conference may be combined.”

Form 14B Motions

- Subrule 14(10.1) has been added to specify that parties have four days to respond to a Form 14B motion (the same time period as for a regular motion) and that if no response is filed within four days, the court will deal with the motion as an unopposed motion.
- To further emphasize that Form 14Bs are to be used for “procedural, uncomplicated or unopposed” matters, subrule 14(10.2) was added to clarify that if a party brings a Form 14B motion and a response is filed, the moving party cannot file a “reply”. The rationale for this was that if the case requires a reply, it is not “procedural, uncomplicated or unopposed”.

Orders at Conferences

- Subrule 17(8) (b) has been amended to specify that, at a conference, a court can make orders that require one or more parties to attend:
 - A mandatory information program;
 - A case or settlement conference before an authorized person (i.e. a Dispute Resolution Officer);
 - An intake meeting with a court-affiliated mediation service; or
 - A program offered through any other available community service or resource.
- Subrule 17(8) (b.1) was also added to include examples of temporary or final orders that the court can make to facilitate the preservation of the rights of the parties until a further agreement or order is made, such as:
 - Designation of beneficiaries under life insurance policies, RRSPs, trust, pensions, annuities, etc.;
 - Preservation of assets;
 - Prohibiting the concealment or destruction of documents or property;
 - An accounting of funds under the control of a party;
 - Preserving health and medical insurance coverage; and
 - Continuing the payment of periodic payments required to preserve an asset or benefit.
- This list is not intended to be exhaustive.

Affidavits of Documents

- Rule 19 previously allowed a party to demand an affidavit of documents from any other party at any time.
- Subrule 19(1.1) was added to exempt children's aid societies and the Office of the Children's Lawyer from having to produce affidavits of documents on demand.
- Subrule 19(6.1) was added to provide that *on motion*, a court can order a CAS or the OCL to produce an affidavit listing documents that are relevant to the case and in their control or available to them on request.

Rule 20.1 Experts

- Rule 20.1 was added to introduce provisions relating to experts that are similar to those in the *Rules of Civil Procedure* (RCP).
- The rule includes details of the expert's duty to the court to provide opinion evidence that is fair, objective and non-partisan and relates only to the matters that are within the expert's area of expertise. This duty prevails over any obligation to the party who retained the expert.
- Subrules 20.1(3 to 6) deal with court appointed experts.
- Subrule 20.1(9) requires experts to file their reports and provide a copy to the parties.
- Subrule 20.1(10) details information that must be included in an expert report and requires an expert to complete a Form 20.1: Acknowledgement of expert's duty.
- The rule largely mirrors the expert evidence provisions in the RCP but excludes:
 - Assessments ordered under the *Child and Family Services Act*;
 - Custody and access assessments under the *Children's Law Reform Act*; and
 - Orders appointing the OCL under s. 112 of the *Courts of Justice Act*.

Bill 179

Background

- Bill 179: An Act to amend the *Child and Family Services Act* respecting adoption and the provision of care and maintenance comes into force on September 1, 2011.
- After proclamation, the CFSA will permit a CAS to place Crown Wards for adoption as long as the CAS has given anyone who has been granted an access order 30 days notice of their intention to place the child for adoption.
- A person who has been granted an access order has the right to bring an openness application within 30 days of being given notice by the CAS.
- The legislation requires that an openness application be filed within 30 days. The legislation does not allow for an extension of the 30 day time limit.
- CASs must also give notice that the access order will be terminated to anyone who is the subject of an access order, including the child. The person who is the subject of the access order is not entitled to bring an application for an openness order.
- The child cannot be placed for adoption before the 30 days expire unless everyone who has been granted an access order has filed an openness application. The commencement of an openness application does not preclude an adoption placement.
- Once the child is placed for adoption, the access order is terminated.
- The legislation requires the CAS to notify the prospective adoptive parent(s) of any openness application. It is possible for the adoption application to proceed and be granted even if there is an outstanding openness application.

Court Files

- All documents relating to notices and openness applications should be filed in the child protection court file, i.e. the same file in which the Crown wardship order was made.
- Subrule 7 (6) is amended to clarify that applications that deal with service of notices of intention to place a child for adoption (Forms 8D.2, 8D.3 and 8D.4) and openness orders keep the existing court file number.
- Subrule 7(6) includes a new paragraph 6, which directs that in applications brought under s. 145.1.2 of the *CFSA* (i.e. by a person entitled to access who

has been served with a notice of intention to place a child for adoption) the applicant would be the person bringing the application and the respondent(s) would be the CAS and anyone else entitled to notice.

- Subrule 34(18) sets out the procedure for an application to allow alternative methods of service or an order dispensing with service and clarifies that these applications “shall be filed in the same court file as the child protection case in which the child was made a Crown ward.”

Documents

- Subrule 34(6)1.1 clarifies what forms and documents must be included in an adoption court file where the child was a Crown ward and there was an outstanding access order.
- A summary of the forms and their uses is set out in subrule 34(17).

Timelines

- A timetable is included at subrule 34(19) and requires that a hearing should be heard within 90 days of an openness application being filed.

Forms

Forms 8D.2, 8D.3 and 8D.4

- Pursuant to the CFSA amendments, when a CAS wants to place a child for adoption and there is an outstanding access order, the CAS must give notice to anyone who has the right of access and to anyone who is the subject of the access order. Three different notices were created because the content of the notice and the rights of the people being served differ.
- The notice forms are:
 - Form 8D.2: Notice of intention to place a child for adoption;
 - Form 8D.3: Notice to child of intention to place for adoption; and
 - Form 8D.4: Notice of termination of access
- The forms are intended to work as follows:
 - Scenario 1: Order says: "Grandmother shall have access to child."
 - The grandmother has the right of access and would be entitled to bring an openness application. She would receive Form 8D.2: Notice of Intention to Place a Child for Adoption.

- The child would be the subject of the access order and consequently would be entitled to receive notice, but not to bring an openness application. The child would receive Form 8D.4: Notice of Termination of Access.
- Scenario 2: Order says: "The child shall have access to grandmother."
- The child has the right of access and, therefore, would have the right to bring an openness application. The child would receive Form 8D.3: Notice to Child of Intention to Place for Adoption.
 - The grandmother would be the "subject" of the order, which would mean that she would be entitled to notice that the access would end, but she would not be entitled to bring an openness application. She would receive Form 8D.4: Notice of Termination of Access.
- Form 8D.4 is intended to be used to notify either a family member or the child who would not be entitled to bring an openness application that their access will end.

Form 33B.2

- The only amendments to Form 33B.2: Answer (*Child and Family Services Act* cases other than Child Protection and Status Review) are the additional references to Form 34L in paragraph 2.

Forms 34E and 34G

- Form 34E: Director's consent to adoption was amended by removing paragraph 3 in the existing form which says: "There are no outstanding access orders to this child."
- In order to accommodate the need for CASs to report on both appeals and openness orders when a court is considering an adoption for a Crown ward, Form 34G.1: Affidavit of society employee for adoption of a Crown ward was created.

Form 34K

- The changes to Form 34K: Certificate of clerk (adoption) are in section 2, which deals with additional material for Crown wardship adoptions. The form was amended to require information about service of notices on openness applications and Form 34G.1

Form 34L

- In order to enable parties to use the same application form for applications under both sections 145.1 and 145.1.2 of the *Child and Family Services Act*, the following changes were made to Form 34L: Application for openness order:
 - "In all cases, the applicant will be a children's aid society" was removed after Applicant in the name of the case;
 - The Legal Aid information was updated; and
 - Information for parties with accessibility needs was added.

Forms 34M and 34M.1

- There are different tests for openness applications brought by a CAS under s. 145.1 and openness applications brought by other parties (or the child) under s. 145.1.2.²
- The only change to Form 34M was to change the name of the form from "Consent to openness order" to "Consent to openness order under s. 145.1 of the *Child and Family Services Act*".
- Form 34M.1: Consent to openness order under s. 145.1.2 of the *Child and Family Services Act* is similar to Form 34M, but includes an additional paragraph dealing with the ability of the prospective adoptive parents to comply with the openness order, as required by the legislation. The signature lines are also different to reflect that different parties' consents would be necessary under s. 145.1.2 applications.

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² Pursuant to s. 145.1, if a child is made a Crown ward without access, only the CAS can bring an application for an openness order and the test is that the openness order must be in the best interests of the child and permit the continuation of a relationship with a person that is beneficial and meaningful to the child. An openness order also cannot be made without the consent of the CAS, the person who will be permitted to communicate with or have a relationship with the child, the prospective adoptive parent and, if the child is 12 or older, the child.

Pursuant to s. 145.1.2, an openness application can be brought by a person entitled to access and the test is that the openness order would be in the best interests of the child, permit the continuation of a relationship with a person that is beneficial and meaningful to the child and the child has consented (if 12 or over) and the court must also consider the ability of the prospective adoptive parent(s) to comply with the arrangement under the openness order.