CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE

Second Judicial Conference on Family Law

August, 1985

PRETRIALS OF MATRIMONIAL CASES IN ONTARIO

Judge D. M. Steinberg

This memorandum is prepared for discussion on the role of the judge in pretrial proceedings in family law matters.

Perhaps we can start off with the premise that there has been some significant movement towards a new, more interventionist role for judges in family matters particularly custody cases. Two recent comments in this regard have been made by two rather persuasive authorities. In an article entitled "Procedure in Child Custody Adjudication", by the now Chief Justice of Saskatchewan, Edward Bayda in (1980) 3 Canadian Journal of Family Law 57, he concluded at pages 69 and 70:

> "What has been attempted in the hypothetical is a portrayal of the straight-jacket created by the rigid application of the adjective law that currently governs custody adjudication. In instances, that does not happen because judges simply close their eyes to some of the rules. But the Bench should not have to be put in that position. What is needed is a revision of the rules of evidence and procedure governing the trial of a custody dispute to an extent sufficient to convert it from a trial conducted in a traditional manner to a hearing conducted much along the lines of a public inquiry, where the rules of evidence and of procedure are more informal and more conducive to bring forward all of the information needed for a proper adjudication."

Perhaps Mr. Justice Morden had read that article when he expressed the following views in Gordon v. Gordon (1981) 23 R.F.L.(2d) at page 271:

> "A custody case, where the best interest of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person

> conducting the hearing take a more active role than he ordinarily would take in the conduct of the trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details."

Clearly trial judges have been given a signal to take a more interventionist position in custody matters. This principle was put to some practical application by the Divisional Court in Cillis v Cillis (1981) 23 R.F.L.(2d) at page 76. You will recall that in Proctor v Proctor (1980) 14 R.F.L.(2d) 385, affirmed (1980) 28 O.R.(2d) 776, it was held that a court had the power to stay proceedings under s. 18 of the now repealed Judicature Act where a request for medical assessment by one party to another had been unreasonably refused. The Divisional Court in Cillis v Cillis advanced much further from that position and ruled that:

(a) it was within the inherent authority of the court to order an assessment in an access matter, and

(b) it would not interfere with a contempt order made against a party where he had refused to co-operate in the assessment.

Griffiths, J., stated that:

> ".....the High Court does have an inherent or ancillary jurisdiction to make such orders as are necessary for the purpose of promoting a fair and satisfactory trial. Where the access to infants is the issue the court has

> jurisdiction to order a family clinic assessment of the parties, where that assessment appears reasonably necessary to arrive at a just and proper decision in the best interest and welfare of the children."

It is against this background that we can dicuss current procedures in pretrial conferences of family matters.

The development in Ontario of the pretrial or settlement conference in family matters emanated from the efforts of Mr. Justice Abraham Lieff. It is more particularly set out in an article he wrote on the subject entitled "Pre-Trial of Family Law in The Supreme Court of Ontario; Simplify and Expedite" ((1976) 10 Law Society of Upper Canada Gazette 300). It is interesting to note that the jurisdiction to conduct pretrials was assumed because, as Lieff, J. stated, "Nothing in our rules of practice authorizes or forbids the holding of a pretrial conference". Steering through unchartered waters, Lieff, J. developed his procedures rather cautiously and the judge assumed the somewhat passive role of a mediator or conciliator in the process. Reading through his article, I concluded that he then considered the judge's role in the pretrial process to be more or less directed towards:

(a) getting the parties and their counsel together to talk; and

(b) creating a climate for negotiation.

Lieff, J., in his pretrial procedure never went so far as to formally suggest that the pretrial judge venture an opinion on the possible outcome of the case, (although

knowing his eternal spirit of adventure and empathy with people in the pain of separation, I'm sure that he must have proposed solutions to them in his pretrial conferences).

It is interesting to note that, concurrently with Lieff, J.,'s project, other pretrial procedures were being developed across Canada in non family matters, some of which included the judicial venturing of opinions as to the possible outcome of the trial. In an article entitled On Pretrial Conferences by Messrs. Stevenson, Watson and Weissmen ((1977) 3 Osgoode Hall Law Journal 591) pretrial practices were broken down into two basic forms:

(a) the trial oriented conference;

and (b) the settlement oriented conference.

The authors' stated at pages 593 and 594:

> "The pretrial conference is a conference between the counsel in a case and a judge, typically held several weeks before the trial date and after the other pretrial proceedings are completed. In Canada to date two basic forms of pretrial conference have emerged. The first has as its principle goal the readying of the case for an orderly trial: the trial oriented conference. The second has as its major goal pretrial settlement of the case: the settlement oriented conference.
>
> In either form the conference consists of a discussion between the judge and counsel concerning the case. In the trial oriented conferences the major emphasis is placed upon clarification and reduction of the issues in the case, the limitation of the number of expert witnesses, the obtaining of admissions of facts, and agreements to dispense with formal proof of documents, The aim of such conferences is to reduce trial time, and to improve

> the overall quality of the trial by increasing the preparedness of counsel, by facilitation the avoidance of surprise, and by generally aiding clear presentation of the case. Typically, these trial oriented conferences will be conducted by the judge assigned to try the ase. The possibility of settlement may or may not be discussed, but it is not the focus of the conference though it may be a by-product thereof.
>
> At the settlement oriented conferences, the presiding judge seeks, through discussion with counsel, to assist them at arriving at an out-of-court settlement. The role of the judge here is essentially that of conciliator or third party mediator, who points out the strengths and weaknesses of each side's case and who gives his opinion as to the likely outcome of the trial, in terms of liability and damages. If it becomes clear that settlement is not possible, some time may be spent on limiting and clarifying the issues to be tried."

The Legislative History of Pretrial Rules in Ontario

In 1978 the old Rule 244 of the Ontario Supreme Court formally recognized the pretrial as part of the procedure of the courts. It provided:

> "(1) When an action, cause or matter has been set down for trial or hearing, the Court, upon the application of a party or upon its own motion, may, in its discretion, direct the solicitors for the parties or any party not represented by solicitor, to appear before it, in the case of the solicitors, with or without the parties, for a conference to consider:

(a) the simplification of the issues;
(b) the possibility of obtaining admissions which might facitiate the trial or hearing;
(c) the quantum of damages;
(d) estimating the duration of the trial:
(e) fixing a date for the trial or hearing;
(f) the advisability of directing a reference; or
(g) any other matters that may aid in the disposition of the action, cause or matter or the attainment of justice.

(2) Following the conference, counsel may sign a memorandum reciting the results of the conference and the Court may make an order giving such direction as the Court considers necessary or advisable and any such memorandum or order shall be attached to the record and shall bind the parties, provided that the judge at the trial or hearing may modify the order as he deems just.

(3) The judge who conducts a pre-trial conference in any action, cause or matter shall be deemed not to be seized of such action, cause or matter and shall not thereafter try or hear such action, cause or matter.

(4) All documents which may be of assistance in achieving the purposes of the pre-trial conference, such as medical reports and reports of experts, shall be made available to the judge presiding at the pre-trial conference.

(5) Unless otherwise ordered by the judge presiding at the pre-trial conference, the costs of the pre-trial conference shall be costs in the cause.

(6) Nothing in this rule shall prevent a judge before whom a case has been called for trial from holding such a conference either before or during the trial without disqualifying himself from trying the action."

In 1977, at the inception of the Unified Family Court, Rule 21, which I will henceforth refer to as the old Rule 21, was promulgated creating a pretrial procedure as follows:

> "(1) For the purpose of resolving or narrowing the issues or of settling the procedures at a hearing, the Court, at any stage in the proceeding, with the consent of the parties, may convene one or more meetings of the parties before a Judge of the Court or a person designated by the Court.
>
> (2) The person before whom a meeting under subrule 1 is convened shall present a memorandum of the matters agreed upon by the parties at the meeting to the parties for their approval and shall file the memorandum.
>
> (3) A Judge before whom a meeting under subrule 1 is convened shall not preside at the hearing without the consent of the parties."

There were obvious differences of some consequence betweeen those two rules, (which have since been repealed),

(1) The old Supreme Court rule envisaged a pretrial only after an action had been set down for trial. Therefore until someone in the case moved to set the matter down for trial, no action could be taken by anyone to pretry the case (excepting of course pretrials on motions under old rule 775(g)).

The old Unified Family Court rule placed no such restriction on the time when the pretrial might be held. As a matter of practice a pretrial was automatically scheduled as soon as an answer was filed. This placed the court in a strong position to:

(a) ensure the action proceeded along at a brisk pace;

(b) supervise disclosure; and

(c) get the parties together to discuss settlement before a great deal of time has passed and attitudes had hardened.

(2) The old Supreme Court rule enabled the court on its own motion to schedule pretrials without the consent of the parties. Pretrials could in effect be mandatory at the insistence of the court. Not so in that Unified Family Court rule. It required the consent of the parties for a pretrial to be held.

(3) In the old Supreme Court rule the judge hearing the pretrial was precluded from hearing the action, even if it was settled at the pretrial. In the old Unified Family Court rule, the pretrial judge was not so precluded and might hear the action with the consent of the parties. As a matter of practice the pretrial judge heard the action if it was settled although there was some danger in this if during the trial the settlement broke down (see Scott v Scott (1980) 11 R.F.L.(2d) 1).

(4) Perhaps the greatest difference in those two rules was the emphasis given by either to the settlement of the action. In the old Supreme Court rule the word settlement was not mentioned. In the Unified Family Court rule, settlement was a stated goal of the pretrial conference.

The old Supreme Court rule might therefore be said to have provided for a "trial oriented conference". The old

Unified Family Court rule might be said to have provided for a "settlement oriented conference".

This distinction between the two approaches towards the pretrial may be more than just in judicial attitude or approach. The settlement oriented conference necessarily implies a full disclosure of each party's case in the conference. This is not necessarily so in the trial oriented conference. For example, in Yemen Salt Mining Corporation v Rhodes Vaughan Steel Ltd. et at (1977) 7 C.P.C. 37, Berger, J. held that the British Columbian Supreme Court Rule 35(4), which is similar to the old Ontario Supreme Court Rule 244, was not so broad so as to permit the Court to direct the parties therein to exhange written statements of experts before trial.

With the passage of the new Rules of Civil Procedure for the High Court in 1985, as well as the Unified Family Court rule amendments, a converging of intent in these procedures has begun to develope, in that settlement has now become, in both courts, the prime reason for the pretrial, and now in both jurisdictions the judge can mandate them without the prior approval of the parties.

Rule 50.01, 50.02, 50.04, 50.05, 50.06 and 50.07 of the High Court Rules provide:

> "50.01 Where an action has been placed on a trial list or an application is ready to be heard, a judge may, at the request of a party or on his or her own initiative, direct the solicitors for the parties, either with or without the parties, and any party not represented by a solicitor, to appear before a

judge or officer for a pre-trial conference to consider,

(a) the possibility of settlement of any or all of the issues in the proceeding;
(b) the simplification of the issues;
(c) the possibility of obtaining admissions that may faciliatate the hearing;
(d) the question of liability;
(e) the amount of damages, where damages are claimed;
(f) the estimated duration of the hearing;
(g) the adviability of having the court appoint an expert;
(h) the advisability of fixing a date for the hearing;
(i) the advisability of directing a reference; and
(j) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

50.02(1) At the conclusion of the conference,

(a) counsel may sign a memorandum setting out the results of the conference; and
(b) where the conference is conducted by a judge, the judge may make such order as he or she considers necessary or advisable with respect to the conduct of the proceeding.

and the memorandum or order binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.

(2) A copy of a memorandum or order under subrule (1) shall be placed with the trial or application record.

50.04(1) A judge who conducts a pre-trial conference in a proceeding shall not preside at the hearing of the proceeding.

(2) Where a pre-trial conference in a divorce action has resolved all the issues, the judge who conducted the pre-trial conference may preside at the trial on consent of the parties.

50.05 All documents intended to be used at the hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as medical reports and reports of experts, shall be made available to the pre-trial conference judge or officer.

50.06 A judge who conducts a pre-trial conference may make an order for costs of the pre-trial conference but,
(a) in the absence of such an order; or
(b) where the conference is conducted by an officer,
the costs shall be assessed as part of the costs of the proceeding.

50.07 Subrule 50.04(1) does not prevent a judge before whom a proceeding has been called for hearing from holding a conference either before or during the hearing to consider any matter that may assist in the judge, most expeditious and least expensive disposition of the proceeding without disqualifyng himself or herself from presiding at the hearing."

The new Unified Family Court Rule 21 provides:

"21.-(1) For the purpose of resolving or narrowing the issues or of settling the procedures at a hearing, the Court, at any stage in the proceeding, may convene one or more meetings of the parties before a Judge of the Court or a person designated by the Court.

(2) The person before whom a meeting under subrule (1) is convened shall present to the parties, for their approval in writing, a memorandum in Form 2A of the matters agreed upon by the parties at the meeting and the person shall file the memorandum unless the parties file a cosent to a final order disposing of all issues.

(3) A Judge before whom a meeting under subrule (1) is convened shall not preside at the hearing without the consent of the parties."

Settlement oriented pretrial conferences may be broken down into two types:

(a) the "climate" inducing conference, described by Lieff, J. in his aforementioned article; and

(b) the "mini trial" type in which the judge hears counsel with their parties in the pretrial room and suggests a possible outcome of the case, so as to assist in settlement.

I have a view of the pretrial that conforms to the mini trial approach. This means that participation by the clients is essential. Since the pretrial is a court proceeding sanctioned by the rules, wherever possible the parties should be present in the pretrial session, or as we now call it in Hamilton, the settlement conference. By and large the only exception to this is if one counsel alerts me before hand that his client is violent.

My reasons for this approach are as follows:

(a) I believe that in all aspects of the proceedings before the court, the clients are entitled to witness the proceedings that they are paying for. It's their lives.

(b) Clients, I think, are paranoid about court proceedings. It's a natural reaction when your life is suddenly thrust into the hands of a virtual stranger. If the judge and lawyer have a huddle to the exclusion of the clients, they have the natural feeling that they are being sold down the river. And that sometimes happens.

(c) The pretrial is a time for openness. It is not, I repeat, <u>not</u>, adversarial. It was designed as an

alternative to the adversarial process. Lawyers promote the adversarial process as a way at getting at the truth. It often doesn't work in family matters - so the pretrial was developed as a way of getting the parties in a free and open quasi round table type discussion to arrive at their own version of how to restructure their family life. To exclude the parties in any stage of this pretrial I think defeats its purpose.

In Hamilton pretrials are routinely organized by the trial co-ordinator in every case where an answer is filed. As soon as the answer is filed each counsel is called, and appointments are agreed to. Pretrial dates are set usually about six weeks from the date of the filing of an answer.

Most cases are straightforward, and on a usual day scheduled for pretrials, 4 - 5 will be set down for each half day. Many usually settle - and so the court has a lot of time for each case. If a pretrial is complicated a full one half day can be allotted.

At the time appointed counsel had best appear with his client, prepared to proceed. If he is not, costs of the day will go against his client. The minimum is $250.00 (the minimum counsel fee for a half day in court).

What often happens is everyone, save the judge, gets together beforehand and talks. Often settlement happens before the pretrial.

Let's assume counsel and their clients are called in to conference with the judge at the pretrial. What will

happen? As you might guess, what will happen is that the parties will engage in what almost might be described as a "mini trial" on a very informal basis.

(a) We all sit together informally at a table. I would prefer a round table, but we only have a T type table in Hamilton.

(b) There is no reporter - only a clerk is there to assist.

(c) all those involved may smoke if they wish.

(d) I explain the purpose of the meeting, (ie) to settle the case. I ask the parties if they's like to settle the case at the meeting. No one has ever said no. I tell them that if they can settle they can have their divorce that day, but that I can't pre-try grounds for divorce. I then tell them that if they can't settle I won't be the judge who hears their case and that as far as I am concerned, this hearing is confidential.

(e) I then ask each lawyer to outline the issues and present, in summary form, what his client's evidence would be at trial. I then make it a point to ask questions to counsel and then clients about the case. I try to leave the impression with the clients that posturing is of little value and that the most equitable solution is what we are trying to get at.

In that regard, in custody or access matters I ask the parties, who are sitting face to face, their impressions of the other as a father or mother. The answers are usually very positive.

The following are some of the methods I use for resolving cases:

(a) In maintenance matters I will give a suggested range for settlement. Sometimes I will actually suggest an amount.

(b) In property matters I will sometimes narrow the range of dispute, which often is so small that it doesn't justify the cost of the trial.

(c) In custody and access matters I emphasize the need to share the parenting responsibilities.

After our session I send the parties out to discuss settlement. I am also available, in the normal day, to see the parties again.

If a settlement occurs, minutes will be drawn up in long hand and an order will then be made. If a divorce can be heard, a reporter is brought in and we proceed, on consent, to hold the hearing right then and there.

If the parties want further time to negotiate, time will be given; the case will be spoken to on the record at a later date, but only to hear if it is settled or not. We do not adjourn pretrials. That only increases the legal expenses of the parties. You only get one crack at a pre-trial.

If the case is to be contested, a memorandum is prepared outlining what the outstanding issues are, including the estimated time of trial. It is signed by the judge and counsel.

The important positive results of this process, as I see them to be, are as follows:

(1) By having the spouses involved in this procedure, it served as a mini trial. Some parties, especially husbands, just want a chance to tell a judge that he's not as bad as the pleadings and the affidavits have made him out to be. Once they have had their say in a pretrial, they are ready to settle.

(2) At an early stage of the case, the parties are confronted with the realities of their case, especially so since the question of prospective costs is explored. In that regard, I try to be as positive and sympathetic towards both parties as possible. In that milieu, a lot of vindictiveness disappears and many of the claims made as bargaining levers melt away.

(3) I might also point out that often at the pretrial, the client gets to see his lawyer in action for the first time. Usually whatever fantasies he may have had of his being the next Clarence Darrow disappear, when it becomes apparent that no matter how good he is, he can't make a silk purse out of a sow's ear.

(4) The pretrial offers the client with the opportunity to confront his or her opposite spouse for probably the first time in quite

> awhile. None of the name calling which materialized in the first loneliness of the separation arises and often in custody case they acknowledge that they both really care for the children

Client preparation, regarding the pre trial is essential. I think that when a client first retains counsel, counsel had best prepare him or her for the ordeal that he or she is about to undergo, even to the extent of referring him or her to a counsellor to develope the inner strength necessary to undergo the process. Many law firms have developed professional relationships with social workers, mediation counsellors, psychiatrists and psychologists.

By the time pretrial comes along a lawyer should ensure that his client is at his or her strongest and not ready to cave in.

The Unified Family Court has regularly scheduled days for the hearing of pretrials. In each week two judges will hear pretrials for a total of about 2 ½ days. Bearing in mind that the pretrial is set from betweeen five to nine weeks after the filing of an answer the results have been satisfactory in terms of promoting early settlement of cases.

How successful is the pretrial process in the Unified Family Court? In 1984 898 cases were set down for pretrial hearings. Only 164 were set down on the trial list.

A large number of those cases set down for trial settled after the pretrial, but before trial.

Aside from being of assistance to the parties, the pretrial has helped to keep the court workload manageable. This is consistent with the findings of Messrs. Stevenson, Watson and Weissman in their study on pretrial conferences earlier mentioned.