

TAB 2

Finding Undisclosed Income and Assets

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The Six-Minute Family Law Lawyer



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Continuing Legal Education

THE SIX MINUTE FAMILY LAW LAWYER 2004

The Law Society of Upper Canada

November 30, 2004

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FINDING UNDISCLOSED INCOME AND ASSETS

Undisclosed and/or unreported income can affect both property and support levels, resulting in reduced child and/or spousal support amounts as well as a reduced equalization payment. The effect of undisclosed or unreported income can often be a multiple of the amount from a property perspective.

A forensic accountant is often engaged to review the disclosure by a party and to provide his or her opinion as to the completeness of the amounts shown therein. We look for missing and unreported income; although this exercise is not always fruitful, in many cases, it can add significant property value and increase the monthly support to the recipient spouse.

Undisclosed or unreported income can be identified by many means, including the following:

1. Working Backwards – Lifestyle Review

It is quite often that a couple will have a lavish lifestyle although, based on the financial information disclosed, the source of income required to support the lifestyle is not evident. In these situations, it is necessary to undertake a “lifestyle review”. A lifestyle review involves the identification of the expenditures made by the couple on a weekly/monthly or annual basis, adjusted to reflect income taxes and timing. In essence, this approach determines what level of income there must be in order to substantiate the lifestyle.

Items which need to be considered include the following:

- Cash spending money;
- Child care expenses;
- Private school fees, camp and other section 7 expenses;
- Vacations;

- Significant spending events such as Christmas, anniversaries and birthdays;
- Presents;
- Clothing allowances;
- Credit card expenditures; and
- Occupancy expenses including house operating costs, mortgage costs and property taxes.

In addition, a review of the spouse's bank account records may identify sources of deposits during the relevant time period. These "deposits" may represent sources of cash flow (not necessarily sources of income) that were not previously disclosed. In addition, the bank accounts may also identify transfers to and from other bank accounts which were also not previously disclosed. A comparison should be made between the "deposits" and the disclosed income levels.

2. Top Line Skimming

In many cases, the spouse will own a small and/or private business. The business will often fluctuate from year to year in terms of revenues and profitability. A key indicator of completeness and accuracy of income is the level of "gross profit percentage". The gross profit percentage represents revenue generated less direct costs of providing the product or service. A red flag is raised when the gross profit percentage fluctuates significantly from year to year, particularly where there is no trend in the changes.

In order for the gross profit percentage to decrease, either (i) the revenue decreases due to decreasing selling prices whereas the costs remain constant or, (ii) the revenue stays the same and the costs increase. There can also be a combination of these factors.

When fluctuations in gross profit percentage are noted, these must be investigated in order to determine the causes. If the reasons for the fluctuation are not plausible and/or cannot be confirmed by others in the industry and/or the particular marketplace, this would suggest that revenues might not be completely reported.

In the event the quantum of unreported revenue can be estimated, this will not only increase the value of the company from a property perspective, but will also reflect incremental profits which can then be used to substantiate a higher level of spousal and/or child support.

3. Expense Exaggerations

Owners often have their company pay certain expenses which may be personal in nature. Similar to a reducing gross profit percentage, this results in reduced profits in the

company, and reduced income for support purposes. It should be noted that expenses allowed as deductions for tax purposes by Canada Revenue Agency may still not be appropriate for valuation and income determination.

Fluctuations in expenses and particularly those which may be personal in nature (travel and promotion, general office expense, travel, telephone, salaries to related parties, professional fees, etc.) should be closely scrutinized to determine the components thereof. If the trend is an annual increase in these expenses in excess of the general rate of inflation, particular attention should be paid to them.

In the event that personal expenses are being paid through the company, this needs to be adjusted for purposes of determining the value of the company (property) as well as the amount of income available to the individual for support purposes. For guideline purposes, it may also be appropriate to gross up these amounts for personal income tax to reflect the equivalent amount of pre-tax income the individual would need to earn in order to have the funds to pay these expenses.

Once again, identifying and confirming personal expenses in the company's records will help to increase value for property purposes and income for support purposes.

Finding Undisclosed Income and Assets

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RE: CONSOLIDATED ONTARIO FAMILY LAW STATUTES AND REGULATIONS 2004 0-459-27411-2,
pp. 292-295, 418-427, 436-439

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The Law Society of
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Continuing Legal Education

Finding and Proving Undisclosed Income and Assets

Prepared by Harold Niman and Anita Volikis¹

I CASES

(A) Effect of Failure to Disclose – Inferences to be Drawn

Hogan v. Hogan, [2004] O.J. No. 3929 (S.C.J.)

McLean v. Vassel, [2004] O.J. No. 3036 (S.C.J.)

MacKenzie v. MacKenzie (2003), 47 R.F.L. (5th) 104 (N.S.C.A.)

Baziuk v. Baziuk, [2001] O.J. No. 3060 (Ont. S.C.J.)

Reyes v. Rollo, [2001] O.J. No. 5110 (S.C.J.)

Schnell v. Schnell, [2001] S.J. No. 704 (C.A.)

Motyka v. Motyka (2001), 12 R.F.L. (5th) 421 (B.C.C.A.)

Orszak v. Orszak (2000), 8 R.F.L. (5th) 350 (Ont. S.C.J.)

Burnett v. Burnett, [1999] O.J. No. 3063 (S.C.J.)

(B) Imputing Income

(i) Need for Evidentiary Basis:

O'Brien v. O'Brien (2003), 39 R.F.L. (5th) 161 (Ont. S.C.J.)

Knoth v. Knoth (2003), 38 R.F.L. (5th) 123 (B.C.S.C.)

West v. West (2001), 18 R.F.L. (5th) 440 (Ont. S.C.J. Fam. Ct.)

Laraque v. Allooloo (1999), 48 R.F.L. (4th) 381 (N.W.T.S.C.)

Risen v. Risen, [1998] O.J. No. 3184 (Ont. Gen. Div.)

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(ii) Unreasonable Deduction of Business Expenses:

Manning v. Manning, [2004] O.J. No. 3167 (S.C.J.)

Naidoo v. Naidoo (2004), 2 R.F.L. (6th) 362 (Ont. S.C.J.)

Sarafinchin v. Sarafinchin (2000), 189 D.L.R. (4th) 741 (Ont. S.C.J.)

Brans v. Brans (2000), 13 R.F.L. (5th) 335 (Ont. S.C.J.)

Omah-Maharajh v. Howard, [1998] 7 W.W.R. 342 (Alta. Q.B.)

(iii) Maintenance of Lifestyle:

Arlt v. Arlt (2003), 243 Sask. R. 110 (Q.B.)

Lavoie v. Wills (2000), 13 R.F.L. (5th) 93 (Alta. Q.B.)

Depace v. Michienzi (2000), 5 R.F.L. (5th) 40 (Ont. S.C.J. Fam. Ct.)

Burnett v. Burnett, [1999] O.J. No. 3063 (S.C.J.)

Lynch v. Lynch (1999), 1 R.F.L. (5th) 309 (Ont. S.C.J.)

Hum v. Man, [1998] O.J. No. 3873 (C.A.)

Stamp v. McIntosh (1998), 49 R.F.L. (4th) 416 (Alta. Q.B.)

(C) Document Disclosure from Non-Parties

Noik v. Noik, [2001] O.J. No. 372 (S.C.J.) (c/ unreported decision of Mesbur J. in Serra v. Serra)

Pastway v. Pastway, [2000] O.J. No. 3062 (S.C.)

(D) Interim Orders

Bedard v. Bedard (2003), 36 R.F.L. (5th) 10 (Ont. S.C.J.)

Steele v. Koppanyi (2002), 29 R.F.L. (5th) 217 (Man. C.A.)

Spiring v. Spiring (2002), 31 R.F.L. (5th) 433 (Man. Q.B.)

Dunne v. Kehler (1999), 3 R.F.L. (5th) 35 (B.C.S.C.)

Penner v. Penner (1998), 38 R.F.L. (4th) 25 (Alta. C.A.)

II RULES AND STATUTES

(a) *Family Law Rules:*

- Rule 13 – financial statements
- Rule 14(17) – evidence on a motion
- Rule 19 – document disclosure
- Rule 20 - questioning

(b) *Child Support Guidelines:*

- Section 19 – imputing income, reasonableness of expenses
- Sections 21 to 24 – income information, obligations, adverse inferences and consequences of failure to comply

Family Law Rules

Rule 12 — Withdrawing, Combining or Splitting Cases

12. (1) Withdrawing Application, Answer or Reply — A party who does not want to continue with all or part of a case may withdraw all or part of the application, answer or reply by serving a notice of withdrawal (Form 12) on every other party and filing it.

(2) Withdrawal — Special Party's Application, Answer or Reply — A special party's application, answer or reply may be withdrawn (whether in whole or in part) only with the court's permission, and the notice of motion for permission shall be served on every other party and on:

- (a) the Children's Lawyer, if the special party is a child;
- (b) the Public Guardian and Trustee, if the special party is not a child.

(3) Costs Payable on Withdrawal — A party who withdraws all or part of an application, answer or reply shall pay the costs of every other party in relation to the withdrawn application, answer, reply or part, up to the date of the withdrawal, unless the court orders or the parties agree otherwise.

(4) Costs on Withdrawal by Government Agency — Despite subrule (3), if the party is a government agency, costs are in the court's discretion.

(5) Combining and Splitting Cases — If it would be more convenient to hear two or more cases, claims or issues together or to split a case into two or more separate cases, claims or issues, the court may, on motion, order accordingly.

(6) Splitting Divorce from Other Issues — The court may, on motion, make an order splitting a divorce from the other issues in a case if:

- (a) neither spouse will be disadvantaged by the order; and
- (b) reasonable arrangements have been made for the support of any children of the marriage.

Rule 13 — Financial Statements

13. (1) Financial Statement with Application, Answer or Motion — If an application, answer or notice of motion contains a claim for support, a property claim, or a claim for exclusive possession of the matrimonial home and its contents:

- (a) the party making the claim shall serve and file a financial statement (Form 13 or 13.1) with the document that contains the claim; and
- (b) the party against whom the claim is made shall serve and file a financial statement within the time for serving and filing an answer, reply or affidavit in response to the motion, whether the party is serving an answer, reply or affidavit in response to the motion or not.

(1.1) Form 13 for Support Claim Without Property Claim — If the application, answer or notice of motion contains a claim for support but does not contain a property claim or a claim for exclusive possession of the matrimonial home and its contents, the financial statement used by the parties under these rules shall be in Form 13.

(1.2) Form 13.1 for Property Claim With or Without Support Claim — If the application, answer or notice of motion contains a property claim or a claim for exclusive possession

of the matrimonial home and its contents, the financial statement used by the parties under these rules shall be in Form 13.1, whether a claim for support is also included or not.

(1.3) Exception, Certain Support Claims — If the only claim for support contained in the application, answer or notice of motion is a claim for child support in the amount specified in the table of the applicable child support guidelines, the party making the claim is not required to file a financial statement, unless the application, answer or notice of motion also contains a property claim or a claim for exclusive possession of the matrimonial home and its contents.

(1.4) Transition — A person who files a financial statement or a new financial statement on or after April 28, 2003, is required to use Form 13 or Form 13.1, as the case may be, as made by Ontario Regulation 92/03, even if the case was started before April 28, 2003.

(2) Claim for Payment Order under CFSA — If an application, answer or notice of motion contains a claim for a payment order under section 60 of the *Child and Family Services Act*, clause (1)(a) does not apply to the children's aid society but clause (1)(b) applies to the party against whom the claim is made.

(3) Financial Statements in Custody and Access Cases — If an application, answer or notice of motion contains a claim for custody of or access to a child and this rule does not otherwise require the parties to serve and file financial statements, the court may order each party to serve and file a financial statement in Form 13 within the time decided by the court.

(4) Financial Statement with Motion to Change Support — The following requirements apply if a motion contains a claim for a change in a support order or agreement:

- 1. The party making the motion shall serve and file a financial statement with the notice of motion.
- 2. The party against whom the claim is made shall serve and file a financial statement as soon as possible after being served with the notice of motion, but in any event no later than two days before the motion date. Any affidavit in response to the motion shall be served and filed at the same time as the financial statement.

(5) No Financial Statement from Assignee — The assignee of a support order is not required to serve and file a financial statement under subrule (4).

(6) Full Disclosure in Financial Statement — A party who serves and files a financial statement shall:

- (a) make full and frank disclosure of the party's financial situation;
- (b) attach any documents to prove the party's income that the financial statement requires;
- (c) follow the instructions set out in the form; and
- (d) fully complete all portions of the statement.

(7) Income Tax Documents Required — The clerk shall not accept a party's financial statement for filing unless:

- (a) copies of the party's income tax returns and notices of assessment for the three previous taxation years are attached as the form requires;
- (b) the financial statement contains the party's signed direction to the Canada Customs and Revenue Agency (Form 13A) for disclosure of the party's income and deduction printouts; or

(c) the financial statement contains a sworn statement that the party is not required to file an income tax return because of the *Indian Act* (Canada).

(8) No Financial Statement by Consent — Spousal Support in Divorce — Parties to a claim for spousal support under the *Divorce Act* (Canada) do not need to serve and file financial statements if they file a consent,

- (a) agreeing not to serve and file financial statements; or
- (b) agreeing to a specified amount of support, or to no support.

(9) No Financial Statement by Consent — Change in Support — Parties to a consent motion for a change in support do not need to serve and file financial statements if they file a consent agreeing not to serve and file them.

(10) Documents not to be Filed without Financial Statement — The clerk shall not accept an application, answer, reply, notice of motion or affidavit in response for filing without a financial statement if these rules require the document to be filed with a financial statement.

(11) Additional Financial Information — If a party believes that another party's financial statement does not contain enough information for a full understanding of the other party's financial circumstances,

- (a) the party shall ask the other party to give the necessary additional information; and
- (b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement.

(12) Updating Financial Statement — Before any case conference, motion, settlement conference or trial, each party shall update the information in any financial statement that is more than 30 days old by serving and filing,

- (a) a new financial statement; or
- (b) an affidavit saying that the information in the last statement has not changed and is still true.

(12.1) Minor Changes — If there have been minor changes but no major changes to the information in a party's past statement, the party may serve and file, instead of a new financial statement, an affidavit with details of the changes.

(12.2) Time for Updating — The material described in subrules (12) and (12.1) shall be served and filed as follows:

1. For a case conference or settlement conference requested by a party, the requesting party shall serve and file at least seven days before the conference date and the other party shall serve and file at least four days before that date.
2. For a case conference or settlement conference that is not requested by a party, the applicant shall serve and file at least seven days before the conference date and the respondent shall serve and file at least four days before that date.
3. For a motion, the party making the motion shall serve and file at least seven days before the motion date and the other party shall serve and file at least four days before that date.
4. For a trial, the applicant shall serve and file at least seven days before the trial date and the respondent shall serve and file at least four days before that date.

(13) Questioning on Financial Statement — A party may be questioned under rule 20 on a financial statement provided under this rule, but only after a request for information has been made under clause (11)(a).

(14) Net Family Property Statement — Each party to a property claim under Part I of the *Family Law Act* shall serve and file a net family property statement (Form 13B) or, if the party has already served a net family property statement, an affidavit saying that the information in that statement has not changed and is still true,

- (a) not less than seven days before a settlement conference; and
- (b) not more than 30 days and not less than seven days before a trial.

(15) Correcting and Updating Statement or Answer — As soon as a party discovers that information in the party's financial statement or net family property statement or in a response the party gave under this rule is incorrect or incomplete, or that there has been a material change in the information provided, the party shall immediately serve on every other party to the claim and file the correct information or a new statement containing the correct information, together with any documents substantiating it.

(16) Order to File Statement — If a party has not served and filed a financial statement or net family property statement or information as required by this rule or an Act, the court may, on motion without notice, order the party to serve and file the document or information and, if it makes that order, shall also order the party to pay costs.

(17) Failure to Obey Order to File Statement or Give Information — If a party does not obey an order to serve and file a financial statement or net family property statement or to give information as this rule requires, the court may,

- (a) dismiss the party's case;
- (b) strike out any document filed by the party;
- (c) make a contempt order against the party;
- (d) order that any information that should have appeared on the statement may not be used by the party at the motion or trial;
- (e) make any other appropriate order.

O. Reg. 544/99, s. 5; 202/01, s. 3; 92/03, s. 1

Rule 14 — Motions

14. (1) When to Make Motion — A person who wants any of the following may make a motion:

1. A temporary order for a claim made in an application.
2. Directions on how to carry on the case.
3. A change in an order or agreement (but not a change in a final order in a child protection case that is reviewable under section 64 of the *Child and Family Services Act*).

(2) Who May Make Motion — A motion may be made by a party to the case or by a person with an interest in the case.

3) Parties to Motion — A person who is affected by a motion is also a party, for purposes of the motion only, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

4) Case Conference for Every Motion — A case conference shall be held for every motion.

4.1) No Motion before a Case Conference — No notice of motion or supporting evidence may be served and no motion may be heard before the case conference is held.

4.2) Urgency, Hardship Etc. — Subrules (4) and (4.1) do not apply if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.

(5) Motion to Change Final Order — Despite subrule (4), a party may serve a notice of motion and supporting evidence for an order to change a final order or agreement under rule 15 before a case conference has been held, but the motion may not be heard before a case conference has been held.

(6) Other Motions — Subrule (4) does not apply to a motion,

- (a) to change a temporary order under subrule 15(14) (fraud, mistake, lack of notice);
- (b) for a contempt order under rule 31 or an order striking out a document under subrule 122;
- (c) for summary judgment under rule 16;
- (d) to require the Director of the Family Responsibility Office to refrain from suspending a licence;
- (e) to limit or suspend a support deduction order;
- (e.1) in a child protection case;
- (f) for an oral hearing under subrule 37(8) or 37.1(8); or
- (g) to set aside the registration of an interjurisdictional support order made outside Canada.

(7) Motion Involving Complicated Matters — The judge who hears a motion involving complicated matters may,

- (a) order that the motion or any part of it be heard as a trial; and
- (b) give any directions that are necessary.

(8) Motion by Telephone or Video Conference — A party who wants a motion to be heard by telephone or video conference shall,

- (a) obtain an appointment from the clerk for the hearing of the motion;
- (b) make the necessary arrangements;
- (c) serve a notice of the appointment and arrangements on all other parties, and file it; and
- (d) participate in the motion as the notice specifies.

(9) Documents for a Motion — A motion, whether made with or without notice,

- (a) requires a notice of motion (Form 14) and an affidavit (Form 14A); and
- (b) may be supported by additional evidence.

(10) Procedural, Uncomplicated or Unopposed Matters — Motion Form — If a motion is limited to procedural, uncomplicated or unopposed matters, the party making the motion may use a motion form (Form 14B) instead of a notice of motion and affidavit.

(11) Motion with Notice — A party making a motion with notice shall,

- (a) serve the documents mentioned in subrule (9) or (10) on all other parties, not later than four days before the motion date;
- (b) file the documents as soon as possible after service, but not later than two days before the motion date; and
- (c) file a confirmation (Form 14C) not later than 2 p.m. two days before the motion date.

(11.1) No Late Documents — No documents for use on the motion may be served or filed after 2 p.m. two days before the motion date.

(12) Motion Without Notice — A motion may be made without notice if,

- (a) the nature or circumstances of the motion make notice unnecessary or not reasonably possible;
- (b) there is an immediate danger of a child's removal from Ontario, and the delay involved in serving a notice of motion would probably have serious consequences;
- (c) there is an immediate danger to the health or safety of a child or of the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences; or
- (d) service of a notice of motion would probably have serious consequences.

(13) Filing for Motion Without Notice — The documents for use on a motion without notice shall be filed on or before the motion date, unless the court orders otherwise.

(14) Order Made on Motion Without Notice — An order made on motion without notice (Form 14D) shall require the matter to come back to the court and, if possible, to the same judge, within 14 days or on a date chosen by the court.

(15) Service of Order Made Without Notice — An order made on motion without notice shall be served immediately on all parties affected, together with all documents used on the motion, unless the court orders otherwise.

(16) Withdrawing a Motion — A party making a motion may withdraw it in the same way as an application or answer is withdrawn under rule 12.

(17) Evidence on a Motion — Evidence on a motion may be given by any one or more of the following methods:

1. An affidavit or other admissible evidence in writing.
2. A transcript of the questions and answers on a questioning under rule 20.
3. With the court's permission, oral evidence.

(18) Affidavit Based on Personal Knowledge — An affidavit for use on a motion shall, as much as possible, contain only information within the personal knowledge of the person signing the affidavit.

R. 17(24) Ont. Reg. 114/99 — Family Law Rules (Superior Court ...

(24) Settlement Conference Judge Cannot Hear Issue — A judge who conducts a settlement conference about an issue shall not hear the issue, except as subrule (25) provides.

(25) Exception, Child Protection Case — In a child protection case, if a finding that the child is in need of protection is made without a trial and a trial is needed to determine which order should be made under section 57 of the *Child and Family Services Act*, any judge who has not conducted a settlement conference on that issue may conduct the trial.

O. Reg. 544/99, s. 8; 202/01, s. 5; 91/03, s. 6

Rule 18 — Offers to Settle

18. (1) Definition — In this rule,

“offer” means an offer to settle one or more claims in a case, motion, appeal or enforcement, and includes a counter-offer.

(2) Application — This rule applies to an offer made at any time, even before the case is started.

(3) Making an Offer — A party may serve an offer on any other party.

(4) Offer to be Signed by Party and Lawyer — An offer shall be signed personally by the party making it and also by the party's lawyer, if any.

(5) Withdrawing an Offer — A party who made an offer may withdraw it by serving a notice of withdrawal, at any time before the offer is accepted.

(6) Time-Limited Offer — An offer that is not accepted within the time set out in the offer is considered to have been withdrawn.

(7) Offer Expires When Court Begins to Give Decision — An offer may not be accepted after the court begins to give a decision that disposes of a claim dealt with in the offer.

(8) Confidentiality of Offer — The terms of an offer,

(a) shall not be mentioned in any document filed in the continuing record; and

(b) shall not be mentioned to the judge hearing the claim dealt with in the offer, until the judge has dealt with all the issues in dispute except costs.

(9) Accepting an Offer — The only valid way of accepting an offer is by serving an acceptance on the party who made the offer, at any time before,

(a) the offer is withdrawn; or

(b) the court begins to give a decision that disposes of a claim dealt with in the offer.

(10) Offer Remains Open Despite Rejection or Counter-Offer — A party may accept an offer in accordance with subrule (9) even if the party has previously rejected the offer or made a counter-offer.

(11) Costs not Dealt with in Offer — If an accepted offer does not deal with costs, either party is entitled to ask the court for costs.

(12) Court Approval, Offer Involving Special Party — A special party may make, withdraw and accept an offer, but another party's acceptance of a special party's offer and a

Rule 19 — Document Disclosure

R. 19(4)

special party's acceptance of another party's offer are not binding on the special party until the court approves.

(13) Failure to Carry Out Terms of Accepted Offer — If a party to an accepted offer does not carry out the terms of the offer, the other party may,

(a) make a motion to turn the parts of the offer within the court's jurisdiction into an order; or

(b) continue the case as if the offer had never been accepted.

(14) Costs Consequences of Failure to Accept Offer — A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.

2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.

3. The offer does not expire and is not withdrawn before the hearing starts.

4. The offer is not accepted.

5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

(15) Costs Consequences — Burden of Proof — The burden of proving that the order is as favourable as or more favourable than the offer to settle is on the party who claims the benefit of subrule (14).

(16) Costs — Discretion of Court — When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.

Rule 19 — Document Disclosure

19. (1) Affidavit Listing Documents — Every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,

(a) relevant to any issue in the case; and

(b) in the party's control, or available to the party on request.

(2) Access to Listed Documents — The other party is entitled, on request,

(a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; and

(b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a).

(3) Access to Documents Mentioned in Court Papers — Subrule (2) also applies, with necessary changes, to a document mentioned in a party's application, answer, reply, notice of motion, affidavit, financial statement or net family property statement.

(4) Documents Protected by Legal Privilege — If a party claims that a document is protected by a legal privilege, the court may, on motion, examine it and decide the issue.

(5) **Use of Privileged Documents** — A party who claims that a document is protected by a legal privilege may use it at trial only,

- (a) if the other party has been allowed to examine the document and been supplied with a copy, free of charge, at least 30 days before the settlement conference; or
- (b) on the conditions the trial judge considers appropriate, including an adjournment if necessary.

(6) **Documents of Subsidiary or Affiliated Corporation** — The court may, on motion, order a party to give another party an affidavit listing the documents that are,

- (a) relevant to any issue in the case; and
- (b) in the control of, or available on request to a corporation that is controlled, directly or indirectly, by the party or by another corporation that the party controls directly or indirectly.

(7) **Access to Listed Documents** — Subrule (2) also applies, with necessary changes, to any document listed in an affidavit ordered under subrule (6).

(8) **Documents Omitted from Affidavit or Found Later** — A party who, after serving an affidavit required under subrule (1) or (6), finds a document that should have been listed in it, or finds that the list is not correct or not complete, shall immediately serve on the other party a new affidavit listing the correct information.

(9) **Access to Additional Documents** — The other party is entitled, on request,

- (a) to examine any document listed in an affidavit served under subrule (8), unless it is protected by a legal privilege; and
- (b) to receive, free of charge, a copy of any document that the party is entitled to examine under clause (a).

(10) **Failure to Follow Rule or Obey Order** — If a party does not follow this rule or obey an order made under this rule, the court may, on motion, do one or more of the following:

1. Order the party to give another party an affidavit, let the other party examine a document or supply the other party with a copy free of charge.
2. Order that a document favourable to the party's case may not be used except with the court's permission.
3. Order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order.
4. Dismiss the party's case or strike out the party's answer.
5. Order the party to pay the other party's costs for the steps taken under this rule, and decide the amount of the costs.
6. Make a contempt order against the party.
7. Make any other order that is appropriate.

(11) **Document in Non-Party's Control** — If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be

unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,

- (a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and
- (b) order that a copy be prepared and used for all purposes of the case instead of the original.

Rule 20 — Questioning a Witness and Disclosure

20. (1) **Questioning — Procedure** — Questioning under this rule shall take place orally under oath or affirmation.

(2) **Cross-Examination** — The right to question a person includes the right to cross-examine.

(3) **Child Protection Case — Available as of Right** — In a child protection case, a party is entitled to obtain information from another party about any issue in the case,

- (a) by questioning the other party, in which case the party shall serve the other party with a summons to witness (Form 23) by a method of special service set out in clause 6(3)(a); or
- (b) by affidavit or by another method, in which case the party shall serve the other party with a request for information (Form 20).

(4) **Other Cases — Consent or Order** — In a case other than a child protection case, a party is entitled to obtain information from another party about any issue in the case,

- (a) with the other party's consent; or
- (b) by an order under subrule (5).

(5) **Order for Questioning or Disclosure** — The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.
2. The information is not easily available by any other method.
3. The questioning or disclosure will not cause unacceptable delay or undue expense.

(6) **Questioning Special Party** — If a person to be questioned is a special party, the court may, on motion, order that someone else be questioned in addition to or in place of the person.

(7) **Questioning About Affidavit or Net Family Property Statement** — The court may make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit or net family property statement.

(8) **Questioning or Disclosure — Preconditions** — A party who wants to question a person or obtain information by affidavit or by another method may do so only if the party,

- (a) has served and filed any answer, financial statement or net family property statement that these rules require; and

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(b) promises in writing not to serve or file any further material for the next step in the case, except in reply to the answers or information obtained.

(9) Notice and Summons to Non-Party — The court may make an order under this rule affecting a non-party only if the non-party has been served with the notice of motion, a summons to witness (Form 23) and the witness fee required by subrule 23(4), all by special service (subrule 6(3)).

(10) Penalty for Failure to Obey Summons — Subrule 23(7) (failure to obey summons to witness) applies, with necessary changes, if a person summoned under subrule (9) fails to obey the summons.

(11) Place of Questioning — The questioning shall take place in the municipality in which the person to be questioned lives, unless that person and the party who wants to do the questioning agree to hold it in another municipality.

(12) Other Arrangements for Questioning — If the person to be questioned and the party who wants to do the questioning do not agree on one or more of the following matters, the court shall, on motion, make an order to decide the matter:

1. The date and time for the questioning.
2. The person responsible for recording the questioning.
3. The method for recording the questioning.
4. Payment of the expenses of the person to be questioned, if a non-party.

(13) Notice to Parties — The parties shall, not later than three days before the questioning, be served with notice of the name of the person to be questioned and the address, date and time of the questioning.

(14) Questioning Person Outside Ontario — If a person to be questioned lives outside Ontario and will not come to Ontario for questioning, the court may decide,

- (a) the date, time and place for the questioning;
- (b) how much notice the person should be given;
- (c) the person before whom the questioning will be held;
- (d) the amount of the witness fee to be paid to the person to be questioned;
- (e) the method for recording the questioning;
- (f) where necessary, that the clerk shall issue,
 - (i) an authorization to a commissioner (Form 20A) who is to supervise the questioning outside Ontario, and
 - (ii) a letter of request (Form 20B) to the appropriate court or authorities outside Ontario, asking for their assistance in getting the person to be questioned to come before the commissioner; and
- (g) any other related matter.

(15) Commissioner's Duties — A commissioner authorized under subrule (14) shall,

- (a) supervise the questioning according to the terms of the court's authorization, these rules and Ontario's law of evidence, unless the law of the place where the questioning is to be held requires some other manner of questioning;

Rule 20 — Questioning a Witness and Disclosure

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(b) make and keep a copy of the record of the questioning and, if possible, of the exhibits, if any;

(c) deliver the original record, any exhibits and the authorization to the clerk who issued it; and

(d) notify the party who asked for the questioning that the record has been delivered to the clerk.

(16) Order to Bring Documents or Things — An order for questioning and a summons to witness may also require the person to bring any document or thing that is,

- (a) relevant to any issue in the case; and
- (b) in the person's control or available to the person on request.

(17) Other Rules Apply — Subrules 19(2), (4) and (5) (right to examine document and obtain copy, documents protected by legal privilege, use of privileged documents) apply, with necessary changes, to the documents mentioned in the order.

(18) Scope of Questions — A person to be questioned may be asked about,

- (a) the names of persons who might reasonably be expected to know about the claims in the case and, with the court's permission, their addresses;
- (b) the names of the witnesses whom a party intends to call at trial and, with the court's permission, their addresses;
- (c) the names, addresses, findings, conclusions and opinions of expert witnesses whom a party intends to call or on whose reports the party intends to rely at trial;
- (d) if it is relevant to the case, the existence and details of any insurance policy under which the insurance company may be required to pay all or part of an order for the payment of money in the case or to pay back to a party money that the party has paid under an order; and
- (e) any other matter in dispute in the case.

(19) Refusal to Answer Question — If a person being questioned refuses to answer a question,

- (a) the court may, on motion,
 - (i) decide whether the question is proper,
 - (ii) give directions for the person's return to the questioning, and
 - (iii) make a contempt order against the person; and

(b) if the person is a party or is questioned on behalf or in place of a party, the party shall not use the information that was refused as evidence in the case, unless the court gives permission under subrule (20).

(20) Court's Permission — The court shall give permission unless the use of the information would cause harm to another party or an unacceptable delay in the trial, and may impose any appropriate conditions on the permission, including an adjournment if necessary.

(21) Duty to Correct or Update Answers — A person who has been questioned or who has provided information in writing by affidavit or by another method and who finds that an answer or information given was incorrect or incomplete, or is no longer correct or complete, shall immediately provide the correct and complete information in writing to all parties.

(22) **Lawyer Answering** — If there is no objection, questions may be answered by the lawyer for a person being questioned, and the answer shall be taken as the person's own answer unless the person corrects or changes it before the questioning ends.

(23) **Method for Recording Questioning** — All the questions and answers at a questioning shall be recorded electronically or manually.

(24) **Obligation to Keep Information Confidential** — When a party obtains evidence under this rule, rule 13 (financial statements) or rule 19 (document disclosure), the party and the party's lawyer may use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained, subject to the exceptions in subrule (25).

(25) **Use of Information Permitted** — Evidence and any information obtained from it may be used for other purposes:

- (a) if the person who gave the evidence consents;
- (b) if the evidence is filed with the court, given at a hearing or referred to at a hearing;
- (c) to impeach the testimony of a witness in another case; or
- (d) in a later case between the same parties or their successors, if the case in which the evidence was obtained was withdrawn or dismissed.

(26) **Court May Lift Obligation of Confidentiality** — The court may, on motion, give a party permission to disclose evidence or information obtained from it if the interests of justice outweigh any harm that would result to the party who provided the evidence.

Rule 21 — Report of Children's Lawyer

21. Report of Children's Lawyer — When the Children's Lawyer investigates and reports on custody of or access to a child under section 112 of the *Courts of Justice Act*,

- (a) the Children's Lawyer shall first serve notice on the parties and file it;
- (b) the parties shall, from the time they are served with the notice, serve the Children's Lawyer with every document in the case that involves the child's custody, access, support, health or education, as if the Children's Lawyer were a party in the case;
- (c) the Children's Lawyer has the same rights as a party to document disclosure (rule 19) and questioning witnesses (rule 20) about any matter involving the child's custody, access, support, health or education;
- (d) within 90 days after serving the notice under clause (a), the Children's Lawyer shall serve a report on the parties and file it;
- (e) within 30 days after being served with the report, a party may serve and file a statement disputing anything in it; and
- (f) the trial shall not be held and the court shall not make a final order in the case until the 30 days referred to in clause (e) expire or the parties file a statement giving up their right to that time.

Rule 22 — Admission of Facts

22. (1) Meaning of Admission that Document Genuine — An admission that a document is genuine is an admission,

- (a) if the document is said to be an original, that it was written, signed or sealed as it appears to have been;
- (b) if it is said to be a copy, that it is a complete and accurate copy; and
- (c) if it is said to be a copy of a document that is ordinarily sent from one person to another (for example, a letter, fax or electronic message), that it was sent as it appears to have been sent and was received by the person to whom it is addressed.

(2) **Request to Admit** — At any time, by serving a request to admit (Form 22) on another party, a party may ask the other party to admit, for purposes of the case only, that a fact is true or that a document is genuine.

(3) **Copy of Document to be Attached** — A copy of any document mentioned in the request to admit shall be attached to it, unless the other party already has a copy or it is impractical to attach a copy.

(4) **Response Required within 20 Days** — The party on whom the request to admit is served is considered to have admitted, for purposes of the case only, that the fact is true or that the document is genuine, unless the party serves a response (Form 22A) within 20 days,

- (a) denying that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine; or
- (b) refusing to admit that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine, and giving the reasons for each refusal.

(5) **Withdrawing Admission** — An admission that a fact is true or that a document is genuine (whether contained in a document served in the case or resulting from subrule (4)), may be withdrawn only with the other party's consent or with the court's permission.

Rule 23 — Evidence and Trial

23. (1) Trial Record — At least 30 days before the start of the trial, the applicant shall serve and file a trial record containing a table of contents and the following documents:

1. The application, answer and reply, if any.
2. Any agreed statement of facts.
3. If relevant to an issue at trial, financial statements and net family property statements by all parties, completed not more than 30 days before the record is served.
4. Any assessment report ordered by the court or obtained by consent of the parties.
5. Any temporary order relating to a matter still in dispute.
6. Any order relating to the trial.
7. The relevant parts of any transcript on which the party intends to rely at trial.
8. Any expert report on which the party intends to rely at trial.

Child Support Guidelines

(c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997), SOR/97-563, s. 2; SOR/2000-337, s. 2

Income

15. (1) Determination of annual income — Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

(2) Agreement — Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

16. Calculation of annual income — Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

SOR/2000-337, s. 3

17. (1) Pattern of income — If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of non-recurring amount during those years.

(2) Non-recurring losses — Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

SOR/2000-337, s. 4

18. (1) Shareholder, director or officer — Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

(2) Adjustment to corporation's pre-tax income — In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

19. (1) Imputing income — The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

(2) Reasonableness of Expenses — For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

SOR/2000-337, s. 5

20. Non-resident — Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

Income Information

21. (1) Obligation of applicant — A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment and re-assessment issued to the spouse for each of the three most recent taxation years;
- (c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
- (d) where the spouse is self-employed, for the three most recent taxation years
 - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and

(iii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

(e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

(f) where the spouse controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

(g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and

(h) in addition to any income information that must be included under paragraphs (c) to (g), where the spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.

(2) Obligation of respondent — A spouse who is served with an application for a child support order and whose income information is necessary to determine the amount of the order, must, within 30 days after the application is served if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court, as well as the other spouse or the order assignee, as the case may be, with the documents referred to in subsection (1).

(3) Special expenses or undue hardship — Where, in the course of proceedings in respect of an application for a child support order, a spouse requests an amount to cover expenses referred to in subsection 7(1) or pleads undue hardship, the spouse who would be receiving the amount of child support must, within 30 days after the amount is sought or undue hardship is pleaded if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the other spouse with the documents referred to in subsection (1).

(4) Income over \$ 150,000 — Where, in the course of proceedings in respect of an application for a child support order, it is established that the income of the spouse who would be paying the amount of child support is greater than \$150,000, the other spouse must, within 30 days after the income is established to be greater than \$150,000 if the other spouse resides in Canada or the United States or within 60 days if the other spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the spouse with the documents referred to in subsection (1).

(5) Making of rules not precluded — Nothing in this section precludes the making of rules by a competent authority, within the meaning of section 25 of the Act, respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child support order.

SOR/2009-337, s. 6

22. (1) Failure to comply — Where a spouse fails to comply with section 21, the other spouse may apply

(a) to have the application for a child support order set down for a hearing, or move for judgment; or

(b) for an order requiring the spouse who failed to comply to provide the court, as well as the other spouse or order assignee, as the case may be, with the required documents.

(2) Costs of the proceedings — Where a court makes an order under paragraph (1)(a) or (b), the court may award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

23. Adverse inference — Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

24. Failure to comply with court order — Where a spouse fails to comply with an order issued on the basis of an application under paragraph 22(1)(b), the court may

(a) strike out any of the spouse's pleadings;

(b) make a contempt order against the spouse;

(c) proceed to a bearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate; and

(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

25. (1) Continuing obligation to provide income information — Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

(a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

(b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and

(c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

(2) Below minimum income — Where a court has determined that the spouse against whom a child support order is sought does not have to pay child support because his or her income level is below the minimum amount required for application of the tables, that spouse must, on the written request of the other spouse, not more than once a year after the determination and as long as the child is a child within the meaning of these Guidelines, provide the other spouse with the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents.

(3) Obligation of receiving spouse — Where the income information of the spouse in favour of whom a child support order is made is used to determine the amount of the order,