

Family Law Chambers Procedure Manual

Prepared for: Legal Education Society of Alberta

Family Law: Chambers Advocacy and Practice Pointers

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For presentation in:

Red Deer, Alberta – April 21, 2017

INTRODUCTION

This Manual sets out many common and uncommon court procedures. Interesting cases are listed, as well as practical suggestions. However, this document can only assist in preparing arguments and identifying issues, it is not legal advice or an opinion. Additional research should always be performed where warranted. As it is intended that this Manual will be updated and re-released in the future, please email Ken Proudman at ken@millerboileau.com if any changes or corrections should be made.

ADDITIONAL RELIEF

Relief is generally sought in the Notice of Application. However, Rule 1.3(2) permits the Court to grant relief whether or not it is claimed or sought in an action. Additional relief can also be sought through methods other than a Notice of Application or pleadings where it is precise and raised in advance.¹

ADVANCE COSTS

Law

Governed by Rule 12.36. Unlike security for costs, advance costs are designed to place in the hands of the moving party the funds needed to party for some of the moving party's litigation costs.²

The test in civil matters is as follows:³

1. The party seeking the order must be impecunious to the extent that, without such an order, the party would be deprived of the opportunity to proceed with the case;
2. The claimant must establish a prima facie case of sufficient merit; and
3. There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

¹ *DWH v DJR*, 2013 ABCA 240 at paras 41-44.

² *Durocher v. Klementovich*, 2013 ABCA 115.

³ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

Although some courts have stated that a strict application of the civil test should not be applied in the family law context, the Alberta Court of Appeal recently seemed to have endorsed the civil test in *Pecharsky v. Pecharsky*, 2016 ABCA 259 at para 4, in which it was alleged that the lower court had implemented the wrong test. In any event, courts are usually required to find severe financial disadvantage which may prevent a case from being put forward.⁴ There must also be an evidentiary basis to prove that without costs the party would be without the resources necessary to respond.⁵

A separate list of factors is to be considered in appeals.⁶

The payor is not entitled to know what the recipient's counsel is doing in service of the recipient, and isn't entitled to challenge whether that work is reasonable.⁷ In some cases it can be ordered that a Bill of Costs be provided periodically, but only to certify that fees and disbursements are charged in relation to the case, as the payor is not entitled to particulars of specific work performed, to know the purpose of disbursements, and is not entitled to a review based on simple doubt.⁸

The trial judge can account for advance costs in a matter deemed appropriate.⁹

There is nothing to prevent the Court of Appeal from also ordering advance costs.¹⁰

Practice tips

Each party should lead evidence as to the existence of liquid assets, such as cash, bank account balances, and investments. However, even when neither party has significant liquid assets, in some cases an significant imbalance of income may be sufficient.

The Court may tie an advance costs order to specific services, such as expert reports, although courts will often be reluctant to impose conditions, as it can be seen as an attempt to impede the opposing side from being represented by counsel, or to obtain privileged information.

⁴ *Lakhoo v. Lakhoo*, 2015 ABQB 357 [here one party had approximately 100 times the financial resources].

⁵ *McDonald v McDonald*, 1998 ABCA 241 at para 539; *MacFarlane v. MacFarlane*, 2016 ABCA 183 at para 25.

⁶ *Scott v. Glazebrook*, 2015 ABCA 235.

⁷ *Lakhoo v. Lakhoo*, 2016 ABCA 200 at para 20.

⁸ *Lakhoo v. Lakhoo*, 2016 ABCA 200 at paras 22 and 23.

⁹ *Gerlitz v. Gerlitz*, 2005 ABCA 424 at para 8.

¹⁰ *Scott v. Glazebrook*, 2015 ABCA 235 at Note 1.