Overview of Family Court Procedures

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Funded by the Ministry of the Attorney General Victim and Vulnerable Persons Division

An Overview of the Courts

Family law matters are heard in different courts in different parts of the province and depending on the legal issues in dispute.

Seventeen communities have what are sometimes called Unified Family Courts. These are family courts of the Superior Court of Justice. This court hears all family law matters, including divorce, division of property, child and spousal support, custody and access, adoption and child protection matters.

The 17 jurisdictions that have this court are: Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Hamilton, Kingston, L'Orignal, Lindsay, London, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Perth, Peterborough and St. Catharines.

In the rest of the province, family law disputes are divided between two courts. The Superior Court of Justice deals with divorce, division of property, child and spousal support and custody and access. The judges in this court are federally appointed.

The Ontario Court of Justice hears custody, access, child and spousal support, adoption and child protection cases. The judges in this court are provincially appointed. This court also handles the vast majority of criminal cases, including bail hearings.

For information about court addresses:
www.attorneygeneral.jus.gov.on.ca/english/courts/Court_Addresses

For more information about Ontario's courts: www.ontariocourts.on.ca

What Goes on in Family Court

The purpose of family court is not to determine guilt or innocence – that is the job of criminal court, if charges have been laid. The purpose of family court is to assist families to find appropriate ways of moving forward after the relationship between the adults has broken down. Children are the primary focus of most family court proceedings. There is no equivalent to the Crown Attorney because the people either hire lawyers or represent themselves.

Family courts deal with:

- child protection cases (CAS)
- custody and access
- child support
- spousal support
- property division
- restraining orders
- divorce
- adoption

As noted above, criminal courts and family courts apply different legal tests. In family court, decisions are made based upon weighing the evidence on a balance of probabilities, which is a lower burden of proof. This means the judge has to believe that one person's story is more likely than not to be true as compared to the other person's story. This is a less onerous test to make than the criminal test of beyond a reasonable doubt.

Services Connected to the Family Court

Family Law Information Centres (FLIC)
FLICs are available in most courts that deal with family law matters to assist people who are not represented by a lawyer and who are entering the court system for the first time. Services provided by the FLICs include:

- pamphlets and other publications on issues related to separation and divorce and child protection matters
- the Ministry's Guide to Procedures in Family Court
- information about legal services, the court process and court forms
- information about community resources and agencies to assist families with family law issues
- at designated times, an advice lawyer from Legal Aid Ontario who can provide summary legal advice
- information about and referrals to the Mandatory Information Program

Information and Referral Coordinators (IRCs)
IRCs are available in all family court jurisdictions and serve as a point of first contact for families as they enter the family court system. They provide information about issues related to separation and divorce and can direct people to resources in the community that assist with family breakdown, including counseling and support services and alternatives to litigation.

Mediation services
The Ministry of the Attorney General contracts with external service providers to deliver mediation services in family courts. Mediation is available on-site in the court facility and off-site at the mediator's offices. User fees for off-site mediation are charged on a sliding scale based on the financial situation of the client.

Mandatory Information Program (MIP)
With certain exceptions, all parties in a family court proceeding are required to attend a 2-hour information session before they can proceed with their case. These sessions provide information about:

- the effects of separation and divorce on children
- the legal issues in a family law case
- alternatives to litigation
- community resources
- court process

If a client cannot attend the MIP that she is scheduled for, she must call to reschedule her attendance to a time when the other party will not be in attendance. If she is unable to attend in person at all, she will need permission from a judge to proceed with her case without attending a MIP.

Dispute Resolution Officers (DROs)
At some Ontario Superior Courts of Justice locations, DROs, who are experienced family law lawyers, meet with parties in cases involving motions to change and help to identify, narrow or resolve challenges and differences in the case. If a settlement is not possible, the DRO ensures that the paperwork is in order so the case can proceed to an appearance before a judge.

Family court duty counsel
In many family courts, Legal Aid Ontario (LAO) provides duty counsel on regular family court days to assist litigants in court without a lawyer, where appropriate. A simplified eligibility test is applied for duty counsel services. As noted above, advice counsel is also present in the FLIC to provide family law information, as well as summary legal advice to clients who meet the simplified eligibility test.

Family Law Service Centres (FLSCs)
LAO operates FLSCs in 6 family court jurisdictions (Peel, Chatham, Newmarket, Sarnia, Toronto and North York). These centres provide a range of legal resources and supports for eligible clients who have family law issues, including:

- help with documents
- referrals to advice counsel
- full representation in family law cases by a staff lawyer
- referral to private lawyers who accept legal aid certificates, if the client is eligible
- mediation and settlement conferences
- referrals to community services

The centres also accept certificate applications for serious domestic violence, child protection or complex family law cases.

Ontario Court Forms Assistant
This is a free online program that provides users with a series of plain language questions and automatically fills in the court forms based on the client's responses. It contains 13 common civil and family court forms.

Family Court from Start to Finish

The information in this section does not apply to child protection cases.

Procedures and forms
The Family Law Rules contain the procedures for use in family court. The Family Law Rules can be accessed at the following website:

www.e-laws.gov.on.ca/index

In addition to the Family Law Rules, there are rules about the continuing record which must be maintained by both parties. The continuing record is where all documents in a case are filed. The record's cover, documents and tabs are available at the FLIC. or from the court counter staff. The websites for these rules are:

www.ontariocourts.on.ca/scj/en/famct/rules.htm

www.ontariocourts.on.ca/ocj/en/rules/

The Family Court forms can be obtained at the FLIC or at:
www.ontariocourtforms.on.ca/english/family/

The Family Law Rules are intended to be easy to use by individuals who represent themselves. However, there is a lot of detail in the rules that individuals must be familiar with. A failure to follow the rules can result in documents being rejected for filing at the family court office. The Ministry of the Attorney General publishes a booklet about procedures in family court which can be found at the FLIC or at the following website:
http://www.attorneygeneral.jus.gov.on.ca/english/family/guides/fc/default.asp

Starting a case
A case is started by an application, except cases that are started by notice of motion and affidavit in the following situations:

- seeking an emergency motion
- applying to change a previous court order or agreement (called motions to change)

All claims for custody or access must contain an Affidavit in Support of Claim for Custody or Access (Form 35.1)

This form is intended to provide judges with an overview of the child's needs, each parent's plan of care and any abuse issues or criminal/police/child protection involvement by either party. It is important that these facts be stated clearly and with enough detail to assist the judge in determining what is in the child (ren)'s best interests.

A financial statement must be filed when the case deals with property or support issues, unless the case fits within certain exceptions set out in the Family Law Rules.

When a financial statement is required, the following documents must be included:

- a pay stub with year-to-date income or other proof of current income
- Notices of Assessment and Income Tax Returns for each of the last three taxation years

When a case is begun by a notice of motion, an affidavit is required to provide evidence in support of the orders requested in the notice of motion.

Family Law Rules, Rule 15, requires special forms for a motion to change.
When making an application for a restraining order, the person must also complete a Canadian Police Information Centre (CPIC) Restraining Order Information Form, which is available only at the family court counter.

Where a divorce is initiated, a marriage certificate must be filed either when the application is started or before the divorce is heard.

When a court case is started, fees may be payable to the Minister of Finance. Contact the Family Court Office for information on fees that are required and the circumstances in which they can be waived.

Court appearances
The basic steps in a family court case are:

- first appearance (in the Ontario Court of Justice or the Unified Family Court only)
- case conference
- settlement conference
- trial management conference
- trial

If a case in the Superior Court of Justice (including the Unified Family Court) involves a divorce or property issues, the first case conference must be requested by a party. There is no first appearance automatically scheduled in these cases.

In addition, where a DRO program is in place, the first appearance in a motion to change is usually before the DRO.

In some jurisdictions, parties must attend trial scheduling court before their case is scheduled for trial.

Finally, a judge has the authority to combine conferences or to skip conferences. The Family Court statistics show that 95% of cases do not involve a trial.

The purpose of each conference is set out in Rule 17(4) (Case Conference), 17(5) (Settlement Conference) and 17(6) (Trial Management Conference). One of the principle purposes of all conferences is to assist the parties in settling the case. Indeed, most cases settle at the case or settlement conference stage.

In addition to administrative functions, such as setting dates for further court appearances, a case conference has a number of purposes. In it, a judge will explore with the parties the chances of settling the case and identify which issues are in dispute and which are not. The judge can also use this opportunity to ensure that both people are sharing the relevant information with one another and to explore ways in which issues may be able to be resolved.

As the name indicates, settlement conferences also offer an opportunity to explore the chances of settling the case. Even if this is not possible, with the assistance of the judge, the parties may be able to narrow the issues in dispute and deal with any outstanding disclosure problems or other things that need to be addressed to move the case forward (for example arranging for an appraisal of the matrimonial home). At a settlement conference, the judge may also give the parties an idea of how the case might be decided if it went to trial and discuss issues related to the trial, such as witness and other evidence and the trial management conference.

At the trial management conference, the judge will usually, once again, explore the possibility of settling the case. If this is not possible, the conference is used to confirm witnesses, organize the trial, estimate its length and set a date.

How to prepare for a conference
The Family Law Rules set out the types of documents that must be filed in advance of each conference. The judge's first impression of the case will be obtained from the conference briefs and, as a result, it is important for the briefs to be well prepared.

Rule 17(13) requires each party to file a brief in advance of a case, settlement, or trial management conference. Financial statements, or updates to previously filed financial statements, are also necessary (Rule 13(12)). There are deadlines for filing the conference briefs and the consent of the other party to allow you to file a brief late may be required. However, the court office will not allow briefs to be filed later than 2:00 p.m. two days before the date scheduled for the conference.

In addition, each party must file a Form 14C to confirm their attendance at the upcoming conference no later than 2:00 p.m. two days before the date scheduled for the conference. Failure to file a 14C can result in the conference not being heard that day. As conference briefs are not added to the file and are returned or destroyed upon the conclusion of the conference, it is important that new claims are also added to the parties' original application or answer. A court order may be required to allow the addition of new claims. Pertinent information not included in the original application or answer can also be added to the continuing record by way of an affidavit.

Definition of applicant and respondent
- The applicant is the person who starts the case in court.
- The respondent is the other person who then must respond to the application.

How judges conduct conferences
Prior to hearing the conference, the judge will have read the conference briefs filed by each party. The manner in which a judge holds the conference is entirely within his or her discretion. The parties may express a preference as to how they wish the conference to proceed, but it is ultimately up to the judge to decide. Judges frequently use one of two methods to conduct a conference:

- Where both parties have lawyers, the judge may call them into his or her office (known as the judge's chambers). After hearing from each lawyer, the judge will make recommendations for the lawyers to communicate to their clients. If the parties are not able to reach a resolution to the disputed issues or on how the case should proceed, the lawyers may return to see the judge in chambers or the judge may call the parties into the courtroom or into the judge's chambers. Judges sometimes meet separately with each side of the case in order to provide explanations as to why they have made the recommendations they have.
- Alternatively, the judge may call everyone into the courtroom. The applicant's lawyer (or, if none, the applicant) speaks first and sets out the issues that they are asking the judge to deal with and the orders that the judge is asked to make. The respondent's lawyer (or, if none, the respondent) speaks next. The applicant can then reply to what the respondent has said. The judge may then determine which issues are in dispute and make recommendations that can be helpful to the parties in settling their case. A judge may make orders at the conference, if the parties agree or if the judge thinks they will help the case progress. Recent changes to the Family Law Rules encourage judges to make orders maintaining the financial stability of the family at conferences. A judge will often ask the parties to take the opportunity to speak outside the courtroom to see if they can settle their case.
- If the applicant or respondent wishes to bring someone into the courtroom with them at a conference, the usual procedure is to request the judge's permission to do so.

What to expect at conferences

A judge has the ability to assist the parties in settling the case at each step. The role of the judge at a conference, then, is to recommend settlements, but a judge cannot impose a settlement. If the parties cannot resolve their case, it moves forward to the next step.

The judge has the power to make certain orders at the conferences, even if both parties are not in agreement. Rule 17(8) sets out what orders judges are permitted to make at conferences.

At any conference, a judge may make the following orders:

- an order for document disclosure
- an order for questioning on affidavits that have been filed
- interim child and spousal support orders (unless there is a substantial dispute over whether there is an entitlement to receive support, or there is a significant issue about the actual income of a spouse) preservation orders (orders which restrain the parties from disposing of their assets)
- an order requiring a party to maintain insurance coverage for their dependents or to maintain RRSP designations
- an order requiring a party to make periodic payments in order to preserve an asset

- an order requiring one or both parties to attend:
  - (i) a mandatory information program, if they have not already done so
  - (ii) a case conference or settlement conference conducted by a DRO
  - (iii) an intake meeting with a court-affiliated mediation service, or
  - (iv) a program offered through any other available community service or resource
- any orders that the parties could make on consent

Even though judges cannot make an order on every issue that arises at a conference, they can help the parties to settle issues to avoid having to attend a motion.

A motion is necessary when an individual wants to obtain a court order that a judge is not able to make at a conference. Motions involve the preparation of affidavits and attendance before a judge to formally argue the motion based on the affidavit evidence that each party files. A judge makes a decision at the end of the motion, and the unsuccessful party is usually required to pay a portion of the winning party's legal expenses (known as "costs"). There is a significant cost involved in attending a motion, and each party bears the risk that he or she may be required to pay some of the other party's legal expenses as well as their own.

A judge may ask whether the parties wish to use a mediator either on- or off-site. It is important to note that mediation can pose specific risks for abused women and their children. Refer to the Mediation Section for a detailed discussion of this issue.

Simplified Steps in a Family Law Case

Application ***(to be served immediately)***
Form 8: General Application **OR** Form 8A: Divorce Application
AND
Financial Statement
Form 13 Support Claims **OR** Form 13.1 Property and Support Claims
AND
Continuing Record
AND
If a claim is made for custody or access, complete
Form 35.1: Affidavit in Support of Claim for Custody or Access

Answer ***(30 days after being served with the Application)***
Form 10: Answer
AND
Financial Statement
Form 13 Support Claims **OR** Form 13.1 Property and Support Claims
AND
If a claim is made for custody or access, complete
Form 35.1: Affidavit in Support of Claim for Custody or Access

Reply
10 days after being served with the Answer, the applicant may file a Form 10A

First Court Date (OCJ or UFC only)
Administrative appearance before a Court Clerk
First Case Conference Date Scheduled

Case Conference
(multiple Case Conferences are possible)
Both parties must file a **Form 17A**
Applicant must file no later than **seven days before** the date scheduled
Respondents must file no later than **four days before** that date

Settlement Conference
(multiple Settlement Conferences are possible)
Both parties must file a **Form 17C**
Applicant must file no later than **seven days before** the date scheduled
Respondents must file no later than **four days** before that date

Trial Management Conference
Both parties must file a **Form 17E**
Applicant must file no later than **seven days before** the date scheduled
Respondents must file no later than **four days** before that date

Trial
95- 97% of cases will be resolved before trial.

*** No brief or other document to be used at a conference may be served or filed after 2 p.m. 2 days before the date scheduled.**
*** Form 14 C – Confirmation of Appearance must be filed by 2 p.m. 2 days before *each* court date.**
*** 6B Affidavit of Service must be filed each time documents are served.**

Alternative Dispute Resolution

There is an increasing emphasis on the use of alternative dispute resolution (ADR) techniques to resolve family law differences and disputes. Anyone who uses ADR may do so before starting a case in the family court or after one has begun. If the ADR is successful, the people will not need to go to court, but if it is not they can begin or return to the court for assistance in resolving their differences.

ADR provides a less formal way than going to court to settle a disagreement. Participants can negotiate or work with a mediator or arbitrator. Negotiation, mediation and arbitration are all types of ADR. People cannot be forced into ADR for a family law case – it must be a voluntary decision.

In some family law cases, ADR can be better than going to court. Participants can have more control over their cases and the final settlement, and ADR can be faster, cheaper and more private than a court case.

However, ADR is not appropriate for all kinds of disputes. In particular, ADR may not be appropriate if the woman's partner was abusive or violent, or tries to bully or scare her. If one partner has more power than the other (whether because of abuse, level of education, self-confidence, familiarity with Canadian laws or ability to speak English), ADR does not necessarily offer all of the protections that may be available in a court proceeding.

ADR is only likely to be successful if both participants can listen, be honest in their communications, and are willing to compromise in order to reach an agreement that is acceptable to both of them. It is not likely to be successful for a woman who has left an abusive partner, because he can use the process to continue to manipulate, intimidate, and control her to get what he wants.

By its very nature, ADR assumes the participants have a relatively equal ability to negotiate about important issues. If a woman is threatened or intimidated by her abusive partner, she may be coerced into making agreements that do not ensure safety and freedom from control for herself and her children. Women often hope that the ADR process will help them resolve issues with an abusive and controlling spouse more quickly and may reduce their demands in the hope of reaching an easier settlement, only to find that the abuser continues to exert control and make more demands. This can replicate the dynamics of abuse, and severely disadvantage the woman and her children.

The woman may still be experiencing threats and may still fear for her own safety and her children's safety, given past abuse, and/or ongoing abusive behaviour and threats of abuse. When a woman has been previously raped or assaulted, it can be very difficult for her to speak up about her needs or her fears in front of the abuser in the mediation process. Even in shuttle mediation (where the mediator meets with the parties in separate rooms and goes back and forth), if her reports or requests are communicated

to the abuser, she may be placed at risk of further abuse or harassment.

Women often fear that they will not be believed because the abusive partner can be very charming and convincing. Abusive men often threaten that they will obtain custody of the children if the woman does not give up her financial rights. This can be a deadly combination for women, who may assume their partner's version of events will be given more credibility than their own, and who will do anything to make sure they maintain custody of their children.

If the professional does not have extensive experience and knowledge in the field of woman abuse, there is a danger that she/he will minimize the woman's report of violence and the ongoing safety risks and will not appreciate the impact of parenting arrangements on the ongoing safety of the woman and the children.

This does not mean that ADR is never helpful in woman abuse situations. Women must be aware of the risks and the importance of choosing a professional with extensive experience with woman abuse cases.

Where the abuse has been ongoing over a period of time, ADR is less likely to be an appropriate option.

There are four main types of ADR that people use to resolve family law disputes.

Negotiation
This can be a very informal process in which the two people talk until they come to an agreement. They might talk directly to one another or through their lawyers. If they are able to come to an agreement, this can form the basis of a separation agreement.

Mediation
A mediator helps people come to an agreement by talking to each other, even if they are initially in a conflict.

In open mediation, the contents and outcome of the process may be shared with others, including the court. In closed mediation, none of the details of the process may be shared.

Mediators are generally social workers, psychologists, or lawyers. A mediator is required to be fair and not favour one person over the other. They do not tell the people how to resolve their dispute, but make suggestions about possible resolutions. It is up to the people to accept or not accept those suggestions. Even if the mediator is a lawyer, she/he cannot give legal advice.

For this reason, it is important to work with a lawyer as well as the mediator through this process.

Because mediation, like other kinds of ADR, is voluntary, either person can end the

process if they are not happy with how it is going. In this case, the people can try another method of ADR or (more likely) go to court to resolve their dispute.

At the beginning of the process, mediators will conduct extensive screening interviews, individually, with each party to ensure that:

- they are participating voluntarily
- abuse has not occurred to such an extent that either person is incapable of mediating
- no harm will come to the women or children as a result of mediation
- any inequality in bargaining power can be managed to ensure that negotiations are balanced and procedurally fair
- parties are psychologically ready to mediate and have the capacity to do so
- the complexity of the case does not exceed the mediator's education, training or competence

A woman who has been abused and who wishes to access mediation services should ensure that the mediator has expertise in abuse issues.

The woman should be aware of the need for a separate screening interview and should be clear about circumstances under which the mediator will not conduct joint sessions. She should also be clear about how the mediator will protect her confidentiality if it is determined unsafe to proceed jointly or even in shuttle mediation.

Once the initial interviews are complete, the mediator will, typically, meet with both parties to discuss issues and to work towards a settlement. In cases involving woman abuse, the mediator may use shuttle mediation.

It is helpful if both parties seek independent legal advice at an early stage of the process to clarify their legal rights.

If the mediation is successful and the two people come to an agreement, then the mediator typically drafts a memorandum of understanding which sets out his or her understanding of the agreement.

Both parties should then seek independent legal advice before entering into a legally binding agreement that reflects the terms of the memorandum. When the woman meets with her lawyer to review the memorandum of understanding, the lawyer will advise her whether or not it is appropriate given the client's issues and concerns. If it is not, then the lawyer may advise her against entering into a legally binding agreement. If the terms of the memorandum are appropriate, then the lawyer may draft a separation agreement, minutes of settlement or a court order.

It is important that a woman meet with her lawyer in between mediation sessions so that she is receiving advice along the way. If the parties reach a mediated settlement and then receive legal advice afterward, it can be very difficult to re-open the negotiations. It is much better for the woman to negotiate in mediation with full knowledge of her legal

rights and the range of appropriate settlements. She will be more likely to agree to a memorandum of understanding that is in her interests which can later be incorporated into a legally binding document.

Mediation is not a process to be entered into lightly. Mediators strongly encourage individual, independent legal advice prior to signing any agreements. While withdrawing from the mediation process is simple, changing a mediated agreement is not.

Arbitration

In arbitration, the people hire a third person to make a decision to resolve their conflict. The arbitrator cannot grant a divorce or issue a restraining order, but can decide on custody, access, support, and/or division of property issues. The arbitrator's decision is similar to a court order but is called an arbitration award. Arbitrators must use Canadian or Ontario family law to make their decisions and can only decide on issues the people have asked them to address.

Once an arbitration award has been made, either side can apply to the court for enforcement of the award. The court will normally enforce the terms of the award unless the arbitration has not been conducted in accordance with the requirements that apply to family arbitrations.

For these reasons, it is very important for people to have their own lawyers to assist them through the arbitration process. Although there are significant differences between arbitration and mediation, the same concerns and cautions about using mediation in situations involving woman abuse may apply to arbitration.

Arbitration can be expensive, as the parties must pay for their lawyers as well as the arbitrator. For this reason, it is not an option for many people. However, some people prefer arbitration because personal information about their family life or finances is not available in a public court file, as would be the case if they went to court.

Collaborative family law

Collaborative family law is a relatively new form of ADR, in which the people and their lawyers work together to resolve the issues. This can be a faster and cheaper process than going to court if the two people respect one another and can work together to solve their problems. Where there has been a history of abuse, collaborative law is less likely to be appropriate or successful.

The collaborative law process is different from the traditional lawyer-negotiation process for several reasons, including:

- Additional training is required before a lawyer can hold him/herself out as a collaborative lawyer. Lawyers receive training in interest-based negotiation and dispute resolution skills.
- All issues are addressed in meetings with clients and their lawyers together rather than through exchanges of correspondence.

- This is a client-centered rather than a lawyer-driven process. Clients are in control of the process (i.e. the order in which issues are addressed, the discussion of the issues, the exploration of potential outcomes), whereas the lawyers remain more in the background to provide guidance to the parties, oversee the process and intervene when necessary.
- A lawyer must resign from the process if his or her client is not abiding by collaborative law principles such as producing documents or negotiating in good faith.
- The parties are encouraged to create a resolution which suits the needs of their family, which may be different from the outcome if traditional legal principles were applied. How the law applies to their case is only one factor to be considered.
- If the parties are not able to resolve their case and a court case becomes necessary, the collaborative lawyers cannot take the case to court. The couple must start fresh with new lawyers.

There is as yet no systematic screening tool used by lawyers to screen cases for violence against women, although it is expected that such a tool will be developed as the collaborative law process becomes more popular.

If a woman decides to try the collaborative process, it is important for her to realize that there are disadvantages to attempting this process with an abusive spouse. First, if she has to go to court when that process breaks down, she will have to retain a new lawyer. Second, a delay in starting the court process can work to the woman's disadvantage, especially if she is in need of certainty with regard to the parenting arrangements or if she is in need of support to maintain stability for herself and her children.

Most importantly, this process is based on the assumption of a relatively equal ability to negotiate. If a woman is intimidated or threatened in a face-to-face meeting with her abuser, she may be coerced into agreements that do not ensure the safety and well-being of herself and her children.

It is important to note that while a woman may feel she can negotiate in the hope of reaching a quicker settlement, she may, in fact, still be intimidated and threatened by the abusive and controlling partner. The format of collaborative law requires face to face meetings between the parties, and therefore provides the abuser with an opportunity to have direct contact with the woman.