BCSC - Family Trial

Memorandum to Self-Represented Litigants on Trial Procedure and Evidence

November 14, 2014 (Updated April 2019)

Memorandum to self-represented litigants on trial procedure and evidence

This memorandum is directed to parties who are not represented by counsel. It will briefly summarize the procedure for a family trial and some important rules of evidence.

A. Opening Statement

1. The claimant or his or her lawyer may begin with an opening statement. The opening statement is an opportunity to tell the Court what the claimant wants the court to order, and what evidence the claimant expects to provide to show that such an order is appropriate. What a party or a lawyer says in an opening statement is **not evidence** (because it is not provided under oath or affirmation) and the judge cannot rely on it as proof of any facts.

2. You or your lawyer can give the judge a copy of your opening statement, or of point form notes, if you wish. Any time you give a copy of something to the judge, you must also give a copy to the other parties. Even if you decide not to give the judge a copy of your written opening or point-form opening notes, you will likely want to prepare such notes for yourself.

3. Be sure to **speak slowly**, particularly if you are reading. If the judge does not have a copy of what you are reading, the judge will need to make notes, and people usually speak very quickly when they are reading.

B. The Claimant's evidence

4. The claimant will then call his or her witnesses. It is the responsibility of each party to ensure that all the witnesses they want to testify at trial are available and at the courtroom at the appropriate time. A party may need to subpoena witnesses. The procedure is set out in SCFR 14-7(31) to (39).

5. Witnesses must swear or affirm that they will tell the truth. Then the claimant or the claimant's lawyer can question them about the matters in issue. That is called examination-in-chief or **direct examination**. In direct examination, it is not permitted to ask leading questions (i.e., questions that suggest the answer) except with respect to matters that are not in dispute. That is because it will seem more like the questioner is telling the story than that the witness is telling his or her story. Examples of questions used in direct evidence are attached as Schedule A.

6. Each party should **organize** his or her evidence and questions, bearing in mind what needs to be proven to obtain the desired court order. The usual way is for each witness to tell the story **chronologically**. It is often helpful to prepare a list of the key dates and events to remind yourself to address them with each witness.

7. The claimant is entitled to testify whether or not the claimant has a lawyer. If **you wish to testify** and are acting in person, it may help you to write down a chronological list of headings to ensure that you remember to testify about everything necessary. Usually the judge and the other side will be entitled to look at any paper that a witness is looking at while in the witness box, so ensure that any notes do not include things that the other side and the judge are not entitled to know.

8. Each witness can only provide admissible evidence. See the sections about evidence and objections below.

9. After the direct examination of each witness, the respondent or his or her lawyer may **cross-examine** that witness. Everyone who testifies should expect to be cross-examined. The purpose of cross-examination is (a) to test the observations, recollections and truthfulness of the witness and (b) to bring out any facts that may assist the respondent. Leading questions **are** permitted in cross-examination. Examples of leading questions are set out in Schedule B.

10. The questions asked in cross-examination are not evidence. It is the witness' answers which are the evidence, given under oath or affirmation. If you ask a question such as "did you tell that to ...", and you disagree with the answer from the witness, you will need to provide the contrary evidence. If you are acting in person for a cross-examination, you will likely have to give your own evidence about the topic when you testify.

11. If the respondent **plans to provide evidence which is contrary** to what was said in a witness's direct examination, the respondent **should cross-examine** the witness about that. This is to give the witness a fair chance to explain. If a witness is not cross-examined about something, the judge may accept the evidence as being true because it was not challenged.

12. If a **new** matter arises during cross-examination, the claimant may re-examine the witness on that issue during a **re-direct examination**. The scope of re-direct-examination is limited to clarifying any ambiguities raised by the cross-examination or to explain new matters raised for the first time in cross-examination.
13. The judge is entitled to consider all the evidence, and so can consider answers on direct and cross-examination and re-direct examination.

14. That procedure (direct examination, cross-examination, possible re-direct

examination) continues for each witness until the claimant has presented all of the evidence in support of his or her claim.

15. The judge cannot consider **affidavit** evidence at trial except in special circumstances and with a specific ruling permitting such evidence. The judge cannot consider affidavits filed in pre-trial procedures, except in those exceptional circumstances in which an order is made permitting evidence by affidavit, or a witness is asked about something he or she said in an affidavit.

16. If the parties conducted pre-trial **examinations for discovery** or if there are transcripts from a **prior trial**, the judge cannot consider the evidence in them unless they are presented at trial, either by being read into the court record, or when a witness is referred to the transcript. The judge can only consider the portion which is read into the court record or shown to the witness.

17. It is usual for the parties to **take notes** during the evidence of a witness. If you will be cross-examining the witness, you will probably want to make a note of everything that the witness says that you disagree with, and everything that you think assists your case. Then you can ask appropriate questions in cross-examination about things you disagree with, and you can remind the judge in final submissions about the evidence from each witness which you think assists your case.

C. The Respondent's case

18. When the claimant finishes his or her case, the respondent may make an opening statement. Sometimes the respondent does not bother making an opening statement, such as when the questions in cross-examination have demonstrated the respondent's position. After making an opening statement (or choosing not to do so), the respondent will then follow the same procedure with all of the respondent's witnesses as already described regarding the claimant's witnesses, except that the respondent will be leading his or her direct evidence, and the claimant may cross-examine. Where there is more than one respondent, each respondent can make an opening statement and follow with his or her witnesses.

1. Evidence

19. Evidence includes both the **oral testimony** from the witnesses and any documents that are accepted by the judge and entered as **exhibits**. What the parties say when they are not in the witness box is not evidence. The things they say outside the witness box during opening submissions, closing statements, and when asking a witness questions, are not evidence.

20. Each witness is entitled to provide **relevant** evidence of what the witness saw, heard, did, or said. Witnesses must not give evidence which is irrelevant, or

make argument, or quote what another person said (unless the person is the other party or a child and the court grants leave), or speculate.

21. The claimant may testify himself or herself, and like any witness, he or she is only entitled to give admissible evidence.

22. You must have at least four **copies** of any **document** that you intend to ask the judge to make an exhibit in the trial: one for yourself, one for the witness (which will be stamped as the exhibit), one for the judge, and one for the other party to the lawsuit. A document can become an exhibit only if either the parties agree, or a witness testifies about it.

23. A more complete summary of **important rules of evidence** is as follows:

    a) Unless the witness is accepted by the court as an expert witness, a witness must state only what she or he saw, heard, did or said. A witness should not say "The claimant played hockey after the accident" unless the witness saw that happen, in which case the witness should say "I saw the claimant ...". What a witness **thinks** is not evidence unless the witness is an expert witness, who the court orders may provide an expert opinion.

    b) Testimony and documents cannot be admitted if they consist of **irrelevant** information. The issues at trial determine what is relevant. You must include dates, either the day or the month or sometimes the season, or else the information may be rejected as irrelevant.

    c) Testimony must not contain **argument**. It is not evidence to say "I think it is unfair that ..." or include any rhetorical questions like "why should I do this when the other party ..."

    d) Usually it is not acceptable for a witness to quote what another person said. This is called "hearsay". However, evidence at trial may contain **hearsay** if either:

        i) The person quoted is the **other party,** or

        ii) The person quoted is a **child** and the court gives leave for that evidence to be presented as hearsay. The court will often permit such evidence to avoid children being witnesses.

    e) Testimony must not contain **speculation.** Don't say "The claimant is exaggerating." You can say "The claimant told me that ..." or "I saw the claimant...".

    f) Do not seek to include in evidence **long exhibits**, like long email chains or diary notes. Such documents usually include a great deal of inadmissible material, like argument, speculation and irrelevant information, which the

judge must ignore. Find the key part and refer to that alone.

g) **Expert** evidence, such as the opinions of doctors, can be admitted at trial only if the party seeking to provide the evidence has given the necessary notice to the other side, or in the rare cases when the court orders that it can be admitted without that notice. SCFR 13-6 and 13-7 usually require service of the expert report at least 84 days before the scheduled trial date. The expert can be cross-examined if the necessary arrangements have been made. Sometimes the party cross-examining the expert will ask to see the expert's file before completing the cross-examination.

E. Objections

24. If, at any time during the course of the trial, you believe that the other party is asking a question that is irrelevant to the case or inadmissible for some other legal reason, you should stand immediately (before the question is answered) and state politely that you **object** to the question. The trial judge will then inquire as to the nature of your objection. You will have the chance to explain why you say that the question is not proper. The other side will have the chance to explain why the question should be permitted. You will have a chance to reply if anything new was raised in the other side's argument on the objection. Usually, the trial judge can decide quickly whether or not to uphold the objection, and will make the ruling right after the submissions about the objection.

25. Once the trial judge has made the ruling about whether the question must be answered, the examination of the witness can continue.

F. Submissions (also called Argument) and Reasons for Judgment

26. After all parties have closed their case (meaning after she or he has finished presenting evidence), the claimant will make his or her **submissions (also called argument)**, the respondent will make his or her submissions, and the claimant may reply to any new matters raised in the respondent's submissions.

27. The submissions of the parties should consist of describing the evidence which each party says the judge should accept (and why), and why the law and facts show that the judge should make the requested order. For example, your outline might say, "I seek an order that child support be paid in a certain amount; you should accept the evidence that the other parent earns (a specific amount) because of the past tax returns; and the child support guidelines show that the appropriate monthly payment is (a specific amount)". It can be helpful to provide the judge (and therefore also the other party) with a **written outline** of submissions in **point form,** rather than full paragraphs.

28. In some cases, the trial judge will give reasons for judgment right after the parties have made their submissions. Usually, the trial judge will either schedule a time

to deliver oral reasons, or will advise that the reasons for judgment are reserved and will be provided in writing through the registry. In complex cases, or when the judge already has many cases under consideration, it may be a matter of months before the reasons for judgment are available.

G. Sitting schedule

29. The usual court hours for trial are from 10:00 a.m. to 11:10 or 11:15 a.m., and after a 15 minute break, from 11:30 a.m. to 12:30 p.m. The court adjourns until 2:00 p.m. and sits until 4:00 p.m., with another short break between 3:00 p.m. and 3:15 p.m. Those times may be varied or extended to accommodate witnesses.

H. Legal advice

30. The judge cannot give legal advice to litigants who are unrepresented by counsel. The judge must remain an impartial adjudicator of the issues.

31 .The parties are responsible for obtaining the legal advice that they need. They may wish to visit the website www.clicklaw.ca which has a number of resources. Under "HelpMap", it provides contacts for obtaining legal information and advice. This website also provides a roster of lawyers who are willing to provide "unbundled legal services," described below.

32. Another helpful resource is *Courthouse Libraries BC.* There is a library on the third floor of the Vancouver courthouse and in courthouses in Victoria, Kamloops, Kelowna, Nanaimo, New Westminster and Prince George. Staff at Courthouse Libraries BC routinely make referrals and provide assistance in accessing the applicable law. They can be reached at 1-800-665-2570, or by email to librarian@courthouselibrarv.ca Many public libraries also have staff who can provide assistance.

33. *Legal Services Society* also provides detailed information on family law issues at http://www.familylaw.lss.bc.ca/ as well as their new website, https://mylawbc.com/, which also assists with drafting separation agreements.

34. Other helpful websites include:
    - http://wiki.clicklaw.bc.ca/index.php/JP Boyd on Family Law which is entirely concerned with family law;
    - http://www.supremecourtbc.ca/ which has a section for family law; and
    - http://www.familieschange.ca/ and http://www.courtinformation.ca/ which provides information in many languages.

35. There are also two publications from the Continuing Legal Education Society of British Columbia which may be of assistance. See British Columbia Civil Trial Handbook (3rd Edition 2011), especially chapters 8-11, and Introducing Evidence

at Trial: A British Columbia Handbook (2nd Edition 2013). It is likely that you can look at a copy at the library in the Vancouver Law Courts.

36. *The BC Family Law Unbundling Roster* is an initiative hosted by Courthouse Libraries BC and supported by Access to Justice BC and Mediate BC. Unbundling of legal services allows clients to pay for some assistance depending on when they want help and what they can afford. Lawyers and paralegals self-select to be listed in the Roster, but inclusion does not imply endorsement. Unbundled legal services can be used to assist with preparation for trial. For more information see http://www.unbundlinglaw.ca.

Schedule A

Sample questions for direct examination at trial (in this example, the Claimant is seeking equal parenting time)

1. What is your birthdate?
2. How old are you?
3. What is the respondent's birthdate?
4. How old is the respondent?
5. When did you start living with the respondent?
6. Did you marry the respondent? If so, when?
7. When was your first child born and what is his or her age?
8. When was your second child born and what is his or her age?
9. When did you separate from the respondent?
10. Has the court made any orders about parenting time? If so, what were they?
11. Have you entered into any agreements with the respondent about parenting time? If so, was it written or oral? If written, is this a copy? If oral, please explain what you and the respondent agreed upon.
12. The term "family violence" is defined in the *Family Law Act* to include many things. I am showing you a copy of the definition and I ask you to read it to yourself. Are you aware of any incidents of family violence that affect your children?
13. Have you been involved in any court proceedings in British Columbia, apart from this one, concerning your two children or any other children?
14. Have you been involved in any court proceedings outside British Columbia which concern any children?
15. Have you been convicted of any criminal offences and not pardoned?
16. Are you currently charged with any criminal offences?
17. Where do you live?
18. Please describe your home, including the number of bedrooms and the size.
19. Does anyone else live in your home?

20. How close is your home to your children's school by car?
21. Where does the respondent live?
22. Please describe the respondent's home, including the number of bedrooms and the size, if you know.
23. Do you know if anyone else lives with the respondent?
24. How close is the respondent's home to your home by car?
25. Before you separated from the respondent, what did you normally do when you were with the children?
26. Since you separated from the respondent, when have you been seeing the children?
27. Did you tell the respondent that you wanted to see the children more often?
28. Have the children said anything to you about how much time they want to spend with each parent?
29. If so, what did the children say to you?
30. If the parenting schedule is changed to increase your parenting time, how do you plan to manage your work responsibilities?
31. If the parenting schedule is changed so that the children sometimes stay overnight with you, what are your plans for the children's sleeping arrangements?
32. If the parenting schedule is changed so that the children are with you on days that they go to school, what are your plans for getting them to and from school?
33. If the parenting schedule is changed so that the children are with you on days that they have after school activities, what are your plans for getting them to and from after school activities?
34. If the parenting schedule is changed so that the children are with you on days that they are sick, what are your plans for caring for them?
35. If the parenting schedule is changed so that the children are with you on days that they have medical or dental appointments what are your plans for getting them to and from appointments?

Schedule B

Sample Questions for cross-examination at trial of Claimant by Respondent (in this example, the claimant wants equal parenting time and the Respondent opposes that)

Commentary:

There are two main purposes of cross-examination. One purpose of cross-examination is to have the witness give evidence which **assists** the party cross-examining. The other is to confront the witness about any evidence which the cross-examiner considers to be **incorrect**.

A cross-examination should be based on a theory. This sets out sample questions for the theory that the Claimant's work schedule will make equal parenting time impractical.

Questions for theory that the Claimant's work schedule will make equal parenting impractical

1. You are working for Peter Left as a gardener in a landscaping business; is that correct?
2. You only started working for Peter Left in October 2012; is that correct?
3. Is it true that Mr. Left sometimes asks you to work on Saturdays?
4. Is it true that Mr. Left sometimes asks you to work after 4 pm?
5. How often have you worked past 4 pm for Mr. Left in the last three months?
6. Is it true that you have never refused to work overtime that Mr. Left requested?
7. Is it true that you have never started work as late as 9:30 am?
8. Is it true that you have never finished work as early as 3 pm?
9. Is it true that you have never left work to take care of a sick child?
10. Is it true that you have never left work to take one of the children to an appointment?
11. Did you testify that you only missed seeing the children on two Saturdays since separation in July 2012?
12. You spent the month of January 2013 on a driving trip to Mexico, is that right?
13. You did not see the children on any of the Saturdays in January, is that right?