A **Mini Guide to Family Law Trials** at the Ontario Superior Court of Justice

Ontario Superior Court of Justice (September 2024)

Contents

What is a trial?

Most family cases eventually settle by agreement, but sometimes a case will go to trial for a final resolution.

At a family law trial, you and the other party appear in front of a judge and present evidence to support your claims. At the end of the trial, the judge makes a court order about all the unresolved issues in your case.

See Rule 23 of the Family Law Rules for more information on how to prepare for your trial and present evidence at trial.

See also, the Ministry of the Attorney General's Guide to procedures in a family law case: Family court trial.

How to prepare for your trial

Trial record

At least 30 days before the start of your trial, the applicant must serve the other party with a trial record and then file it with the court. See rule 23(1) for a list of the required documents.

The respondent may add required documents to the trial record up to seven days before the start of the trial. See rule 23(2).

The completed Trial Scheduling Endorsement form must also be included in the trial record.

Financial statements

If support or property is an issue at trial, you must continue to update your Financial Statement before trial in accordance with rule 13 unless your Trial Scheduling Endorsement Form does not require this. Your updated Financial Statement must be included in your Trial Record.

Offers to settle

You may make an offer to settle at any time during your court case. An offer to settle outlines what you are willing to accept to resolve your case. Your offer to settle should be clear, reasonable, and fair. Offers to settle can help you come to an agreement with

the other party, and they can also be used to request costs against the other party, if your case goes to trial.

The trial judge can only see any offers to settle after they have made a decision about your case.

More information about offers to settle can be found at rule 18 and rule 24 and Steps to Justice: What is an offer to settle in a family court case?

Your witnesses at trial

You should only call witnesses whose evidence can help prove your case.

Your witnesses should be notified about testifying according to the following procedure:

- Fill out Form 23: Summons to a Witness and list any documents that you want them to bring.
- Serve the form on the witness and file it with the court.
- Provide the necessary witness fee set out in rule 23(4)

Remind your witnesses to bring any documents they have which you want to provide as evidence. These documents must be shared with the other party in advance of the trial, according to the timelines set out in the *trial scheduling endorsement form*. If your trial is taking place in person, the witness should bring the original document along with four copies.

It is your responsibility to make sure your witnesses are available when needed so that the trial is not delayed.

Documents as evidence

Documents can be submitted as exhibits during the trial if they are **admissible**. A document is admissible if it is relevant to your case and genuine.

You can use admissible documents as evidence either when you testify or when you are questioning a witness who can testify about the document. If anyone disagrees about whether a document is admissible, the judge hears submissions from both parties and decides whether it is admissible.

You should prepare a file of all the documents that you plan to rely on at trial. This is called a **document brief**. Each party must exchange document briefs well in advance of your trial and according to the dates set out in the Trial Scheduling Endorsement Form.

Before the trial, you must inform the other party of all the documents that you plan to use at trial. If you haven't done this, you may not be allowed to use the documents at trial; the trial could be postponed; or you could be ordered to pay costs. See rule 19.

How to behave in court

1. Turn off all electronic devices that aren't being used in the hearing.
2. Stand up when the judge enters or leaves the hearing room and when you are speaking to the judge.
3. Refer to the judge as "Your Honour" and ask the judge for permission to speak before you begin speaking.
4. Always speak directly to the judge, not to the other party, except when you are examining a witness.
5. During the trial, don't interrupt other people except to object to an inappropriate question.
6. Don't argue with the other party or the judge.
7. Pay careful attention to what is being said. You can take notes while you are in court and you can also ask court staff for a copy of the digital recording that is being made.
8. If you want to use your own recording device, you must get permission from the court first.
9. Don't eat food or chew gum. Only water is allowed in the courtroom.
10. Refer to any witness by their title (such as Doctor or Professor) or by their identified pronouns. Don't use their first name.
11. Any documents you wish to give to the judge must be handed to the court Registrar.

12. If your hearing is being held by videoconference, the same guidelines apply, although you do not need to stand when the judge joins the online session.

For information about virtual courtroom etiquette see the guide on the Superior Court of Justice website at: https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/virtual-courtroom-etiquette-rules/

If you have issues participating at your court event because of a disability, you can get assistance from the court's Accessibility Coordinator.

Overview of the trial process

Excluding witnesses

When the trial begins, if you or the other party asks the trial judge for an order excluding witnesses, the judge will likely grant the order. In that case, all witnesses except for you and the other party will be asked to stay outside the courtroom until it is time to give their evidence. This is done to make sure that a witness doesn't change their evidence in response to hearing another witness' evidence.

If an order is made excluding witnesses, you must not discuss any of the evidence given at the trial with any of your witnesses. You must also make sure that your witnesses are aware of this order and know they can't discuss their evidence with anyone until after the trial is over.

Opening statement

The applicant goes first in a trial and they generally start with an **opening statement**. In their opening statement they summarize what they expect their evidence will be and let the judge know the specific orders they're asking for. The respondent may then give an opening statement right away if they wish, or they may wait until after the applicant has finished calling all their evidence.

Evidence

After the opening statements, the parties introduce their evidence. Evidence can include testimony from witnesses, including the applicant, or the introduction of documents. Documents submitted at trial are called **Exhibits**.

The applicant's witnesses go first. When a party questions their own witnesses, it is called the **examination in chief.** After their examination in chief, those witnesses can be questioned by the respondent party, which is called a **cross-examination**. If a witness has been cross-examined by the respondent, they can be re-examined by the applicant only to clarify issues that were raised during the cross-examination. After the Applicant's last witness has been called, he or she closes their case.

The trial then continues with the examination of the respondent's witnesses. First there is an examination in chief, then the witness are cross-examined by the applicant, and then the respondent can re-examine them if necessary. After all the respondent's witnesses have been called, the applicant may bring reply evidence that relates to any new issue that the respondent has raised.

Closing statement

After all the witnesses have been called, both parties can make submissions, called a **closing statement** about what they think the judge's decision should be, based on:

- what the witnesses have said,
- the documents that have been submitted as evidence, and
- the laws that apply.

The closing statement should go through the testimony that the witnesses have given, and the documents that have been accepted as exhibits, to show why the judge should agree with your position. You should **only** refer to evidence or issues in your closing if they were raised during the trial.

If you make your closing statement orally, the applicant goes first, followed by the respondent. The applicant then has a limited opportunity to reply to the respondent's statement. The judge may ask for closing statements to be delivered in writing.

Examining witnesses

Examination in chief

When you are examining your witnesses in chief, you give them a chance to give their evidence on the issues that you and the other party don't agree on. To prepare, make a list of questions that you plan to raise with each of your witnesses in advance.

You are **not** allowed to ask **leading questions** during examination in chief, except to establish basic facts (name, age, profession). A leading question is a question that suggests the answer to the witness. For example, you should not ask your witnesses the following question: "She is always late in picking up the children, right?"

If you ask questions that start with "who", "what", "where", "when", "why", "how" or "please describe", it will help you avoid asking a leading question.

If you decide to testify on your own behalf, please note the following:

- You will be asked to swear an oath or promise that you will tell the truth.
- The judge may ask you questions.
- You can use a written outline of your evidence if you agree to show it to the trial judge and the other party first.
- If you made notes at the time something happened, you must ask the judge for permission to look at those notes and explain why you need to look at them. For example, you may need to review your notes to refresh your memory. You will also have to show the other party your notes first to see if they have any objections.
- This is your opportunity to give evidence, not make arguments. You must only say what you personally saw, heard, did or received. You cannot give evidence on what another person told you that they saw, heard, did or received. Information you heard from other people is referred to as **hearsay**.
- Once your evidence as a witness is finished and you leave the witness stand, you can no longer give evidence without permission from the judge.

Cross-examination

You will be able to cross-examine each of the other party's witnesses in order to test if they are telling the truth and to bring out evidence that is helpful to your case. Unlike the examination in chief, you *can* ask leading questions in cross-examination.

During cross-examination, it may be helpful for you to ask a witness about:

- their ability and opportunity to observe the things that they told the Court.
- their ability to give an accurate account of what they saw or heard whether they have any interest in the case or any other reason to be biased.

Never argue with your witness or try to give evidence through your questions. Instead, you should put your view of the facts to the witness in the form of a question. For example, you could ask, "Do you agree that I did not see the children during the month of July?"

Prior statements

If a witness has made a sworn or unsworn statement before trial that is important to your case and then the witness says something different at trial, you can cross-examine them about the statement they made. You can also cross-examine a witness about a statement they made earlier that was helpful to your case. This can include things like an older affidavit. To do so, you must:

- first ask the witness if they remember making the statement
- then read the prior statement
- then ask the witness to confirm that the statement was made, and if it was true

If the witness says the earlier statement was true, it is evidence that the statement is true. If the witness says it isn't true, it can only be used to question whether the witness is telling the truth now. This is sometimes called the **witness's credibility.**

If you plan to contradict a witness with specific evidence that you intend to give or have one of your witnesses give, you must ask the witness about that intended evidence when you cross-examine them. This gives the witness an opportunity to give their version of the facts. If you don't do this, the judge may not allow you to present that evidence, or they may give it less weight.

Hearsay

Normally, the only evidence a witness can give is what they personally saw or heard. When a witness testifies about what another person said it is called **hearsay**. Hearsay is generally not allowed to show that the statement was true, but can be allowed to show that a statement or observation was made.

There are limited situations when hearsay may be admitted because it is accepted as necessary and reliable. Statements are seen to be **reliable** when they are trustworthy because of the situation under which they were made. Statements are **necessary** when there is no alternative way to bring that piece of information before the court.

Objections

At any time during the questioning of a witness by the other party, you have the right to object to questions that are being asked, or documents that are being introduced, before they are submitted as evidence. You can only object to something if you can show that there is a reason why it is not proper for the judge to hear or receive the evidence.

Some common objections include questions that are irrelevant, leading, confusing, vague or argumentative, or testimony that is beyond the witness's personal knowledge or expertise.

If you want to make an objection, you should stand up and wait for the judge to ask you to speak. When the judge is ready, you should state the reason for your objection. After hearing the other side's response, the judge will decide whether your objection is valid.

Expert witnesses

Expert evidence is usually brought in when the expert can give the Court information that is outside of the experience and knowledge of the judge, and which can help to determine the issues. There are two types of experts:

Litigation experts

A litigation expert is hired to provide an opinion for the purpose of the court case. A litigation expert normally does not have any other professional involvement with the family.

The most common litigation experts in family law cases are parenting assessors or financial experts.

If you want to give evidence from a litigation expert, you must follow rule 20.2 by serving a written expert report at least six days before your settlement conference, and any supplementary reports at least 30 days before your trial. Unless the other party agrees to the introduction of the expert report at trial, you must call the expert as a witness.

Participant experts

A participant expert can provide an opinion based on their involvement with the family outside of the court case, such as a family doctor.

If you want to give evidence from a participant expert, you must also give notice to the other party at least 6 days before your settlement conference. If you choose to rely on the expert's written opinion, you must also serve it on the other side by that date. See subrule 20.2 (14).

Qualifying the expert

The judge must decide whether to accept a person as an expert. This is called **qualifying the expert**. They do this based on the expert's education, experience, and any special knowledge of the issue. You should tell the judge if you wish to object to the qualification of the other party's expert witness.

If qualified, the expert will be permitted to give their opinions in the field of their expertise.

The judge's decision

After the parties make their closing statements, the judge may make a decision right away and tell you what it is. They can also *reserve* their decision which means that they will take more time and you will hear from the Court later, in writing.

Once a decision is made, the judge may schedule a separate hearing to deal with costs or may ask you to file written arguments about who should pay costs and how much they should pay.

Costs

Under the *Family Law Rules*, the successful party is usually allowed to have a portion of their legal costs paid by the other side. You may be asked to tell the judge why you are asking for costs either verbally or in writing and to provide the judge with a summary of your expenses.

The judge considers several factors in deciding what costs should be paid, including how reasonable the party was during the trial and whether the party as good as or better than their offers to settle in the trial.

More information about how costs are decided can be found at rule 18 and rule 24 of the Family Law Rules.