A Guide to Family Law Proceedings in B.C.

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Most family law matters are settled without the involvement of the court except, if the couple was married, to obtain a divorce order. Upon deciding to separate, a couple has two choices: settle by written agreement or allow the court to settle the dispute by court order. The least favourable alternative is court. A judge doesn't know you or your family dynamics and will only hear evidence in a formal court room and in a short time period. You cannot control or predict the outcome. You do know that the financial and emotional cost will be high. This information should be sufficient to motivate you to look for ways to negotiate and settle as many of your family law issues as you can before resorting to the court.

About 98% of all family law matters are settled amicably in the form of a written Separation Agreement and a consensual divorce order. On average, a Separation Agreement takes three months to complete and then the divorce, if there is to be one, follows the separation by one year. The only reason that people must go to court is to get a divorce order because, by the Divorce Act, only the Supreme Court can grant a divorce.

Without knowledge of family law and the legal system, you may end up listening to the wrong people (like friends, co-workers and neighbours) and you may make poor choices and bad decisions based on incomplete or wrong information from well-meaning individuals. Only an experienced family law lawyer can fully explain your legal rights, obligations and options to you because no other person will have their expertise. Family law changes and develops from year to year, so even experienced lawyers have to work hard at staying fully informed. How can you expect to sort it all out on your own?

The following information is intended to provide a brief overview of the family law proceeding process.

Lawyer's Retainer and Fees
Most people going through a divorce or a separation are concerned about lawyer's fees and associated costs because divorce or family law litigation is expensive.

Your family law lawyer will bill you on a monthly basis, based on the lawyer's hourly rate (plus disbursement expenses and taxes) for the time spent on their case. Clients who want an estimate in advance of the total fees are bound to be disappointed because, in most cases, it is extremely difficult to give a reliable estimate. No one can predict all the variables involved. Your lawyer will keep you informed about costs in the monthly invoices and billing reports. At times, the legal fees and costs are foreseeable but this is rare.

When being retained by a client, all family lawyers will ask you to pay them a deposit in "trust" to be applied towards the costs of your case. This deposit is the "retainer". You will also sign a Retainer Agreement with your lawyer. Your retainer fund must be replenished on request of your lawyer.

A Guide to the B.C. Supreme Court and Family Law Process

Commencement of Action
In British Columbia, a family law action is commenced by the "Plaintiff", by filing a Writ of Summons (the "Writ") and a Statement of Claim, together with the marriage certificate if the Plaintiff claims a divorce. The Statement of Claim (the "Claim") can be short: only claiming a divorce. It can also be lengthy, claiming every

type of relief and remedy available to a couple and their children. Lawyers prefer to claim every type of relief available because of the rule: "*If you don't claim the remedy or relief at the beginning, the court cannot order it later*." The rule is based on fairness and the duty to tell the other parties (the "Defendants") what facts and remedies the Plaintiff is claiming so they know how to respond and defend. The content, format and numbered paragraphs contained in the Writ and Claim for family law proceedings are dictated by the Supreme Court Rules and Regulations. The Plaintiff's lawyer adds other essential facts, unique to the Plaintiff's case, that are critical to the outcome of the case.

The law requires that the Defendant is served personally with the Writ and the Claim. The Plaintiff has to file an Affidavit of Service to prove that the Defendant was served properly or the court may not grant any Orders until satisfied that this is done. The Plaintiff's lawyer hires a process server to serve the Defendant in person if he or she is not already represented by a lawyer.

From this point onward, the Claim can take two courses: settlement or litigation. Many family law cases are a combination of these. Most simply settle by written agreement and confirming court order.

The Defendant's Response and Counterclaim

After being served with the Writ and Claim, the Defendant has up to 21 days to file and serve a Statement of Defence on the Plaintiff's lawyer, in which the Defendant agrees or disagrees with the statements made by the Plaintiff in the Claim. The Defendant may file a Counterclaim that is similar to the Claim, stating the facts and the relief that he or she will be seeking in the counter-claim action. In family law cases, the Defendant's lawyer can receive an extension of time to file the Defence and Counterclaim by consent of the Plaintiff's lawyer.

No Defence or Counterclaim need be filed if the parties' have a Separation Agreement and the relief claimed by the Plaintiff is only for a divorce order or is otherwise consistent with the Separation Agreement. It is prudent to avoid over-simplifying the Claim if the Separation Agreement is complex and/or involves child custody and support.

Interim Court Orders

After the Writ and Claim have been filed, the court has "jurisdiction" to make interim orders for relief that is intended to be short term. However, interim orders don't have expiration dates unless the court includes an expiration date in the order. Custody, guardianship, access and support; document disclosure; interim possession of the family residence, no contact and protection orders are examples of "interim" orders.

Judicial Case Conference and Mediation

The Courts and the government recognize the importance of settling family matters at an early stage and to facilitate the settlement process, have developed a procedure called a "Judicial Case Conference" which all parties and their lawyers must attend with some documentation being filed in advance to assist the court to prepare for the "JCC." When a Statement of Defence is filed, the Trial Coordinator sets a JCC which is a 1.5 hour mediation session with a Justice or a Master presiding as the mediator. The goal is to settle as many issues as possible and to grant some preliminary orders, which is a very efficient, cost effective method of obtaining orders by consent. The Justice or Master often gives the parties his or her impression of the outcome of the case, indicating what they would decide if the matter was heard by them in court. This is useful for the parties to hear because it can deter unnecessary litigation by indicating the likely outcome at trial. The Justice or Master cannot make any orders without both parties' consent. However, they do order document disclosure and set dates for discoveries and trial. These orders are invaluable because the time lines dictate the rest of the proceedings, like putting a train on the tracks and starting the journey to the end point.

Mediation and round table negotiation sessions can take place outside the court room and often take place soon

after the Judicial Case Conference, provided that all document disclosure is complete and no expert reports are required or outstanding.

Evidence Gathering Procedures

Each party is required to disclose all relevant documents and records in their possession and control. We have listed in other articles the type of documents that will be demanded by the parties. Document disclosure can take months and even years, as in the case of reluctant litigants who must be taken to court several times to obtain document production orders under threat of contempt proceedings. The parties themselves are subject to being personally cross-questioned under oath in a meeting room, with lawyers and court reporter present. The transcript of these "Discoveries" is evidence to be entered in court, in various hearings, with the purpose of shortening the trial or even settling the case.

Settlement Negotiations and Agreements

Most family law matters are settled by informal agreement reached over a cup of tea at the kitchen table. There is usually nothing to dispute as the law is very clear and most people part company relatively amicably. We assist you to take the informal agreement forward into a formal written agreement that you can "take to the bank" for new mortgage financing, and other purposes. If the informal agreement appears to us to be problematic, unfair or unworkable, we will advise and assist you to obtain a more workable agreement. At the end of the day, it is the parties that are in control and have to live long-term with their agreement.

Trial

If you and your spouse cannot settle all issues, then some or all of the issues will proceed to trial. Your case will usually take one to three years to get to trial and then will take between five and ten days on average (some trials last up to 80 days) to "try" and there will be witnesses called and documentary evidence entered. The trial opens with "opening" statements and closes with closing statements: a recital of the key points of evidence, a summary of the applicable law and a closing argument from each lawyer, telling the Justice why he or she should find in favour of the Plaintiff or the Defendant. Expert evidence may play a large role in the trial outcome: accounts, business valuators, psychiatrists and psychologists are among the type of experts that could be called upon to shore up the case of either party.