BCSC - Family Trial

Memorandum to self-represented litigants on trial procedure and evidence

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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 judge what the claimant wants the judge to order, and what evidence the claimant expects to provide to show that such an order is appropriate. What the claimant or a lawyer says in the opening statement is **not evidence** (because it is not provided under oath or affirmation) and cannot be relied on to prove any facts.

2. You 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 side. 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, who must swear or affirm that they will tell the truth, and the claimant will question them about the matters in issue. That is called examination-in-chief or direct examination. The claimant cannot ask leading questions (i.e., questions that suggest the answer) except with respect to matters that are not in dispute.

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

6. After the direct examination of each witness, the respondent may cross-examine that witness. 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. If the respondent intends to provide contrary evidence, the respondent should cross-examine about it, to give the witness a fair chance to explain.

7. 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.

8. The judge is entitled to consider all the evidence, and so can consider answers on direct and cross-examination and re-direct examination.

9. 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.

10. 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.

11. If the parties conducted pre-trial **examinations for discovery**, 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.

12. Each party should **organize** his or her evidence and questions. The usual way is to tell the story **chronologically**. It is often helpful to prepare a paper with the key dates and events to remind yourself to address them. If you want to look at a paper while you are testifying, you should seek the permission of the judge to do so. The judge and the other party will usually be allowed to look at the paper. Pause between events and dates so that the judge and the other side can make notes.

13. 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 the appropriate questions in cross-examination and refer to the answers during submissions.

C. The Respondent's Case

14. When the claimant finishes his or her case, the respondent may make an opening statement. He or she will then follow the same procedure as the claimant did with all of his or her 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 and follow with his or her witnesses.

D. Evidence

15. 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.

16. 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.

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

18. 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 Court, 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.

19. 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 something like “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) Sometimes it is acceptable for a witness to quote what another person said. This is called “hearsay”. 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 provide **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 judge orders that expert evidence is appropriate and the expert is properly qualified. The party seeking to provide the evidence must have given the necessary notice to the other side, except in the rare cases when the court orders that it can be admitted without that notice. 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

20. 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. Usually, the trial judge can decide quickly whether or not to uphold the objection.

21. If the trial judge upholds an objection, the witness must not answer the question. If the trial judge rejects the objection, the witness must answer the question, and the trial continues as though there had been no objection.

F. Submissions (also called Argument)

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

23. 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; the court 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.

G. Sitting Schedule

24. 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

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

26. 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. One of them is http://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law which is entirely concerned with family law.

27. Another helpful site is http://www.supremecourtbc.ca/ which has a section for family law. There are two publications from the Continuing Legal Education Society of British Columbia which may be of assistance. See British Columbia Civil Trial Handbook (2nd Edition 2005), 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.