Help For Self-Reps In Family Law

GALBRAITH
FAMILY LAW
PROFESSIONAL CORPORATION

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Part 1:

Preparing for Trial

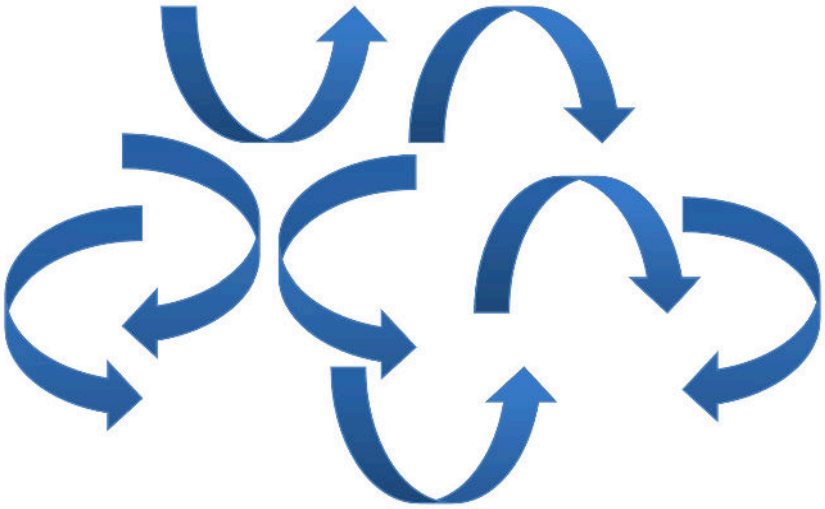
Do you feel totally unprepared and feel like you are drowning under the wave of family law litigation?

I have prepared self-represented parties for trial. I get involved early on in the process of preparing you for trial. You retain me at the stage of the trial management conference (TMC). We'll discuss the evidence you wish to present and how to present that evidence to the court at your trial. I do not attend at the TMC with you, but I will prepare you for that step in the proceeding. I do not attend the trial with you, but I will prepare you to represent yourself at the trial.

With my assistance, you can be self-represented at trial and save substantial costs. I have written this 10 part series to provide you with the basic knowledge on how to survive a family law trial. It is not a substitute for legal advice and legal representation. It is an aid. If you can't afford a lawyer to represent you at trial, I strongly recommend that you hire a lawyer to coach you through the process of a trial.

In most jurisdictions, there are two trial sittings. In the Barrie courts, the judges sit to hear trials during the months of May and November. If your matter is scheduled for trial, you should start preparing at least three months in advance. You will be required to participate in the TMC within this time frame. A TMC is held before a judge that won't be the trial judge. The judge at the TMC ensures that all disclosure has been provided, and that the parties are ready to proceed to trial. You will be required to fill out a trial endorsement form identifying your list of witnesses and, among other things, the documents that you wish to rely upon at trial.

DON'T BE SCATTERED:



KNOW THE RULES:

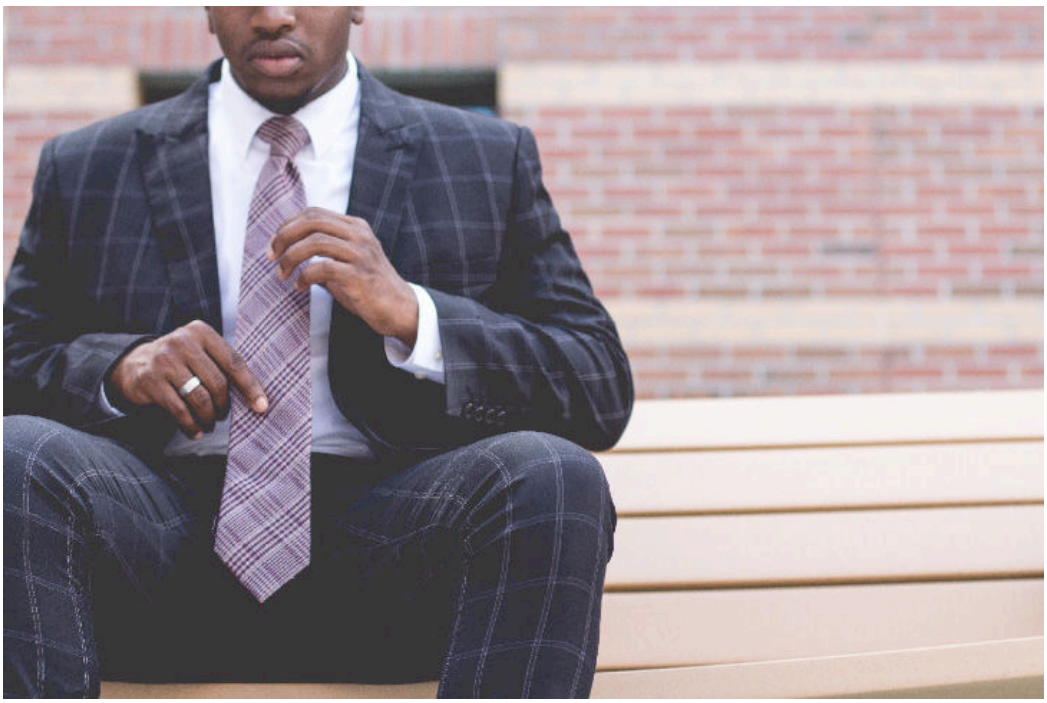
Become familiar with the *Family Law Rules*. These rules outline the procedure that must be followed in order to have the trial judge consider evidence. Be aware of the time limits for filing documents before trial. If the rules are not followed, the evidence you'd like to present may be excluded. Some documents, such as expert reports, need to be served on the other party and filed with the court 90 days before trial. If your chosen expert hasn't prepared a report within this time frame, notify the TMC judge and request a time extension to file the report.

In addition to the *Family Law Rules*, there are the *Ontario Rules of Evidence*. You must follow rules of evidence when filing business records, such as credit card statements and hospital records. Time limits are in place for filing these records prior to a trial, and procedural requirements are in place to have the record identified as a business record. These issues should be dealt with at the TMC.

Common law rules must also be followed when presenting your evidence. This means that rules established according to case law must be followed.

Rules exist on filing documents, making opening statements, presenting witness testimony, settlement negotiations, closing statements and more. Preparation should begin months prior to the trial. Before starting this daunting process on your own, consider hiring a lawyer to assist you as your coach. You can hire a litigation coach to help you prepare for trial by drafting documents, filing and serving documents on time, preparing briefs, drafting opening and closing statements, helping prepare for the examination and cross-examination of witnesses, researching law and preparing arguments based on the law.

KNOW THE PROPER DECORUM IN THE COURTROOM:



Rules of decorum are important. Remember, judges deserve your respect. They have the difficult job of listening to people tell their stories all day long. They are compassionate individuals, but they

cannot make a good decision unless you give them the evidence needed to make that decision. You must follow the rules to have the evidence considered.

You can show your respect by standing and bowing when the judge enters or leaves the courtroom. Stand when the judge addresses you. Dress appropriately and respectfully in business attire. Don't dress like you're going to the beach and don't dress like you're going to a wedding.

Remember not to interrupt the judge. This can be difficult when the other party says things you disagree with. Wait your turn. Note the points you don't agree with, and when it's your turn, let the judge know. Wait for the judge to tell you that it is your turn to speak.

Keep your eyes on the judge and not on the other party when speaking. It is the judge who you must convince, not the other lawyer and not the other party. Your argument should be concise, and not based on personal feelings and animosity. Gesturing with your hands, facial expressions, shaking your head in disapproval, and displaying anger is inappropriate in a courtroom. You must remain civil at all times.

Sometimes, the judge will be asked to make a ruling on a particular issue. You will get the chance to argue your point, but once the judge has given you your chance, you must sit down and listen to the ruling and not interrupt.

PEOPLE IN THE COURTROOM:

The court reporter transcribes what is said in the courtroom word for word. If you wish to appeal a decision after a trial, you will have to order the transcript from the court reporter at your expense.

The court clerk, the judge's assistant, is responsible for marking exhibits. Your documents are handed to the court clerk who will then hand them to the judge.

The court service officer (CSO) organizes the parties to enter the court when the judge is ready, and interacts with the judge to determine when he or she is ready to enter the courtroom.

TEN PART SERIES

In this ten part series, I will discuss the basics. You will receive a broad overview and enough information to help you to understand the process. If you can't afford a lawyer to represent you at trial, then I strongly encourage you to hire a lawyer as your litigation coach. Not only can working with an expert help save substantial funds, you will have the confidence that your case will be given equal consideration by the judge. But, you must start early. You must retain your litigation coach at the stage of the TMC. I hope you find the next parts of this series helpful. I am here to help you. Call me when you are ready for assistance.

Part 2:

The Trial Management Conference

Ask yourself this question: What are you trying to prove, and how will you prove it?

Start by reviewing your Claim or Answer. You may have filed these documents months ago, and they may need to be revised. Remember that the judge will only look at the Claim/Answer and not the affidavits that you previously filed in the Continuing Record. You may need to amend your Claim or Answer (pleading), and you should ask the other party to consent to this. If they don't consent, ask the TMC judge permission (to grant you leave) to amend your pleading.

A trial management conference is held before trial. You will appear before a TMC judge that will not be the trial judge. The TMC judge can make orders for disclosure, to amend pleadings and make other procedural orders. The purpose of a TMC is to make sure that

everything is ready to proceed and that there won't be delays or requests for adjournments on the first day of trial. If you need to ask for an adjournment of the trial because you have not received proper disclosure then ask the TMC judge. Don't wait to ask the trial judge.

Prepare and serve the other party with a Request to Admit Facts. You will need to fill out a form that outlines all the facts you want the other party to admit to, so that these facts don't have to be proven at trial. Use simple concise facts (not the law). Admitted facts cannot later be contradicted. If a fact has been admitted and deemed relevant, then neither party needs to prove it at trial and neither party can lead evidence to say it's not true. If a party tries to challenge an admitted fact at trial, it should be brought to the attention of the trial judge who will be making a ruling.

Once served a Request to Admit, the other party has 20 days to serve a Response to Request to Admit. If the other party fails to serve a Response then it is presumed that they have admitted the fact. In other words, it is assumed that they agree that the fact is true and that it need not be proven at trial. The Response to Request to Admit requires the other party to provide an explanation for the denial of the fact.

Prepare a Document Brief. The Request to Admit and the Response to Request to Admit can be filed in a Document Brief. The purpose of filing these documents is to shorten the trial by eliminating the need to call witnesses to testify. You will need to prepare your own Document Brief or you can ask the other party whether you can file a Document Brief together, called a Joint Document Brief.

Admitting to the truth of a statement does not automatically mean that the statement can be automatically accepted into evidence at trial. If you agree the statement is truthful but that it is not relevant, that it is too prejudicial, or that it is hearsay, you must argue that the trial judge should not consider it and ask that a ruling be made in this regard. You must be prepared to argue why it

should not be considered evidence. Make your point and then ask for a ruling by the trial judge. If the judge makes a ruling that he/she will consider the evidence that you wanted excluded, you can still argue at the end of the trial that this evidence should be given little weight.

Prepare an Agreed Statement of Facts. You can agree with the other party to file an Agreed Statement of Facts. This document contains all the facts that are admitted for their truth. The Agreed Statement of Facts may also contain a joint chronology of dates that includes when certain events occurred, what that event was and what document in the Document Brief proves the event. The joint chronology may also include: important dates, history of court proceedings, addresses, job history, marital history, caregiving history and incomes.

Prepare and serve the other party with the Request to Admit Documents. You will need to fill out a form and attach the document that you want the other side to authenticate. This simply means that the document has not been edited or otherwise tampered with. The purpose of having the other party admit the document is authentic is to avoid having to call a witness to prove its authenticity. However, this does not mean that the other party has agreed that the document is true or relevant – this still must be proven.

Bank records and credit card statements are typically accepted as business records, and their authenticity need not be proved by calling a bank representative to prove they are authentic. The bank can provide a certified copy of the original record. The bank record/credit card statement may be admitted and identified as a business record. But, if the other party does not agree to the authenticity of a document, such as a photograph, you will need to prove it is authentic. The person who took the photo will need to identify the

people in the photo, the context and date it was taken. It is then marked as Exhibit "A" for identification purposes only (I.e.: that it is authentic). This does not mean that it is admitted as evidence at trial. You must still prove that it is relevant and not prejudicial.

Even documents admitted into evidence still may require the author of the document to testify. The other party may still require you to call the author of the document for the purpose of cross-examination. If you want to cross-examine anyone on a document admitted into evidence, you must let the other party know that they need to make the author of the document available at trial for the purpose of cross-examination.

Document disclosure is very important. You may object to a document entered into evidence if the other party does not notify you that the document exists, or their intention to have it admitted into evidence. However, there is one exception. Documents used solely for the purpose of impeachment need not be disclosed. Rules must be followed when introducing a document not previously disclosed through a witness that you wish to impeach. We will discuss this under the cross-examination part of this series.

In advance of trial you will need to summons your witnesses and prepare Will Say statements. A Will Say statement is a short summary of what your witness will say. The statement provides the other party with advance notice of what you intend the witness to prove.

If you are intending to call an expert witness you will have to serve an expert report 90 days before trial. If you don't think the expert report will be available 90 days before trial, you should ask the TMC judge for an extension.

Do your legal research and prepare a Case Brief. Your case brief contains all of the case law that you intend to rely upon to prove your case.

Prepare a Trial Record. It is the responsibility of the applicant to serve and file a trial record at least 30 days in advance of trial. The *Family Law Rules* (Rule 23) tell you what documents need to go into the trial record.

Finally, you will need to prepare your opening statement. Opening statements will be discussed later in this series.

It is important that you understand the theory of your case and how to prove it. Don't throw everything at the judge and expect the judge to figure it out for you. Narrow the issues.

Ask the judge to grant you an Order based on a Draft Order. I recommend that you prepare the Draft Order and file it with the court at the outset. In your opening statement, try to convince the judge why you should be granted that order. Try to keep things simple.

I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. You will hire a real estate agent to sell or buy your home and pay a commission of 4 to 5%. You could try to sell or buy a home yourself, but it costs you time and energy and you lack the experience to get the job done right. Likewise, preparing for trial is something that a lawyer can assist you with. All of the heavy lifting is done before you even step into the courtroom on your first day of trial. You are hiring the litigation coach to help you present your case to the judge.

Part 3:

Preliminary Matters

Are you ready to begin?

Before you begin your opening statement on the first day of trial, there may be some preliminary rulings that you may want the judge to make.

You may have prepared an Agreed Statement of Facts, a list of facts that both parties have agreed are not in dispute. However, you may argue that these facts are highly prejudicial to you, that they contain hearsay or that they are not relevant to the issues that must be determined by the judge. If this is the case, then ask the judge to rule the fact is inadmissible (that it should not be considered by the judge as evidence).

You may have prepared a Joint Document Brief. The joint document brief may contain documents that you agree are authentic and don't

require proven authenticity, but you don't agree that they are relevant or you might think they are highly prejudicial to you or that they contain hearsay. You should ask the judge to rule that this document not be considered. After such a ruling, the joint document brief will be marked as an exhibit with only those documents contained in the brief that the judge has ruled are admissible. All other documents that the judge has ruled as inadmissible will be removed from the joint document brief. You may agree with the other party to excise (blank out) any statement contained in a report that is hearsay, too prejudicial, is speculative or inflammatory. You can still argue in your closing argument that the document that you didn't want admitted into evidence should be given little weight.

You are entitled to cross-examine any expert or non-expert that has produced a report or document entered into evidence. You may wish to cross-examine the author of one of the reports filed in the joint document brief. Acknowledge the consideration of the document, but make the judge aware that you require the author of the report to be available for cross-examination.

The other party is required to summons to the court, if they are relying on a report, the doctor or psychologist who performed a custody/access assessment. You are also entitled to cross-examine a business valuator on his/her report and the other party must summons that individual to court. Be mindful that if an expert attends court unnecessarily, cost sanctions can be awarded against the party requiring the attendance of the expert without justification.

The issue of child hearsay statements should be addressed at the start of trial. The other party must consent to have the judge consider what a child said to an adult for the truth of the statement. Otherwise, it is hearsay. Children rarely testify in family law trials even if the child is 16 years old.

On the first day of trial, parties can agree to hold a Voir Dire on child's statements. A voir dire is a mini trial. If you want the court to consider what a child said to an adult for the truth of that statement, you will need to prove that it is necessary for the adult to testify and not the child (you should obtain consent from the other party). Second, you will need to show that the adult receiving the statement is reliable. To prove reliability at the voir dire, you should ask whether the statement was received first hand, whether the adult had a motive to misrepresent the statement, whether the adult's recollection of the statement is accurate and whether, in the adult's experience, the child has the tendency to fabricate the truth.

Alternatively, the court may admit the child's statement made to an adult not for the truth, but to show the child's state of mind. For example if the child was scared.

Consider documenting the statements made by the child to adult witnesses in a chart and ask the court for a ruling on whether each of the child's statement to the adult witness can be admitted for the truth of the statement or whether it can be admitted to show the child's state of mind.

Remember, I strongly recommend that you retain the services of a lawyer as your litigation coach. It is well worth it. Arguing about the admissibility of documents and child hearsay statements can be complex. You will need to gain a good grasp of the law to make your argument successful.

Part 4:

Opening Statements

Your opening statement is extremely important. This is your chance to persuade the court that your case is strong and that you have the evidence to support it.

You and the other party may have agreed at the TMC to provide written opening statements to be filed in the Document Brief. In addition to written opening statements, you should be prepared to speak about your case. Do not read your written opening statement to the court. You should speak about how you will refute the evidence presented by the other party provided in their written opening statement. Your written opening theory sets out the theory of your case. You've had the opportunity to read the other party's opening statement prior to giving your own opening statement. Use your knowledge to highlight the weaknesses in their case and highlight the strengths in your case.

Provide the court with a Draft Order. Begin by telling the judge why you should be granted the order that you are requesting. Explain why the order you are requesting is reasonable. Tell the judge that you have attempted to narrow the issues for the court. Tell the judge that your request for this order is necessary because there are fundamental differences between you and the other party on the issues addressed in the draft court order.

Inform the judge that you and the other party have prepared an Agreed Statement of Facts that outlines significant dates and significant people chronologically, such as date of separation, names of parties, names of children and names of businesses. You may also wish to include a chronology of prior proceedings, listing dates that orders were made in point form. Let the judge know where the Agreed Statement of Facts can be found (i.e.: tab number in the joint document brief).

Be certain to address the issues that are in dispute and provide proof to the court that supports your case. Tell the judge what issues you can't agree upon and why. Tell the judge what witnesses you will call or what documents you will rely upon to prove your case.

Think about the order in which you wish to call witnesses and tell the judge what that sequence will be. You should try to arrange witnesses to testify to provide a picture of your version of the facts from start to finish.

Provide the judge with a Case Brief of relevant case law. Tell the judge how the law supports your case by referring to case law. Don't go into great detail about each and every case. Simply speak to the main point to demonstrate how it supports your case. Include the applicable statutory provisions with respect to the issues you seek to prove.

Acknowledge that there may be weaknesses in your case.
Point out what those weaknesses might be by referring to the other party's written opening statement. Try to put the weaknesses in your

case into perspective. Point out that they are still outweighed by the overall evidence that supports your case.

In your opening statement, highlight the key points. Don't argue your case. If you wish to prove that the other party is intentionally underemployed, then tell the judge that there is no evidence from the other party to show that he/she is unable to work. If you wish to impute income to the other party, you must tell the court that you retained an accountant or that you have evidence to show what the other party could make if he/she worked to their full potential. Don't go into detail about what this evidence is.

Tell the judge the reasons for calling a witness or submitting a document into evidence and why this witness or document is important. If you wish to prove that the other party can provide more support because he/she earns more than what was reported then you must prove it. For example, if he/she earned a bonus that was held back, then you must provide evidence and a witness that can be called to testify to this truth. If the other party diverted income by way of third party gifts, loans etc., you must prove this by providing copies of bank statements and tracing the funds.

Remember, you can't rely solely on your own evidence. If you intend to prove that the other party has adequate means to provide more support, you can't simply state that you have seen him drive an expensive car. You must prove the accumulated wealth. You will need to obtain copies of the other party's bank statements. You will also have to show that he/she made recent expensive purchases, such as a new car, and you will have to obtain disclosure of the details of the purchase in advance of trial. You will need to provide documentary proof of the purchase.

You may need an income valuation from a certified business valuator for the purposes of trial. If you want to prove that the other party is under reporting self-employment income, you must tell the judge that there is evidence to show that they are receiving gifts instead of salary draws, so corporate tax returns are an inaccurate reflection of true income. You will prove this by providing the court with an income valuation report of the other party's business.

If property division is an issue at trial, then the Trial Record must contain each party's financial statements and net family property statements completed 30 days before trial. If there are any significant changes that need to be made to these financial statements, you should let the judge know what these are and provide the court with an updated financial statement.

You should prepare a net family property worksheet comparison and highlight the differences in each party's position. Tell the judge where this net family property comparison can be found (i.e. tab number in the Document Brief.)

If there is an OCL report or a custody/access assessment report then make sure that it is in the Trial Record. Briefly refer to the report in your opening statement and show how that report supports your position with regard to custody/access. If it doesn't support your position, then provide the court with reasons why the court should not accept the report.

Make sure that your affidavit in support of a claim for custody and access is accurate, up-to-date and is included in the Trial Record. The *Family Law Rules* require you to immediately serve and file a new affidavit (Form 35.1) if the previous affidavit is incomplete or incorrect.

Remember to speak to the judge and make good eye contact. Don't just read from your notes. Try to memorize some of your statement. Speak slowly and clearly. Remember, the judge is new to your case and is trying to understand what your case is all about. The judge doesn't know who "John" and "Sally" are and why they are now at trial asking the judge to make a decision. You need to explain it.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Preparing an opening statement is extremely important. If you don't engage the judge from the outset, it will be an uphill battle to convince them of the merits of your case.

Part 5:

Documentary Evidence

To obtain the Crown Brief for the purpose of family law proceedings, you must file a motion. The accused will have the Crown Brief in their possession. The accused is not supposed to use the contents of the Crown Brief in the family law proceedings unless the police or the Crown has consented, but this is often overlooked. The accused may choose to use only those portions of the synopsis that are favourable to their case. Unless the accused consents to provide you with the entire Crown Brief, you will need to bring a motion to request an order for disclosure.

If you want to obtain disclosure of the entire Crown Brief as the victim of the crime, you must provide the Attorney General with notice by serving a motion for production of the Crown Brief, commonly referred to as a Wagg motion. You can obtain police

occurrence/incident reports under the Freedom of Information and Protection of Privacy Act, but the identifying information of the accused as well as third parties will be blanked out (redacted). You will have to request the judge draw an inference that the information blanked out pertains to the accused. You will have to bring a motion for disclosure to get all of the information. Such Wagg motions should be made at the outset of the family law proceedings.

To obtain CAS records for the purpose of family law proceedings, you must file a motion. CAS records are not public documents, and disclosure of such documents is not to be shared with the public at large. Typically, the CAS will take at least 60 days to prepare the file, and they will charge a fee for photocopies. Child protection records are admissible as business records without the necessity of calling the various social workers who created them. However, opinions expressed within the records, such as the risk assessments, are inadmissible without the author being called as a witness.

To obtain health and counselling records for the purpose of family law proceedings, you may need to file a motion if the other party does not consent to produce them. Certain portions of records may be subject to privilege claimed by the patient or record keeper on behalf of the patient. You should consider dealing with the issue of obtaining health/counseling records well in advance of the trial.

Health records are business records. Such records must be identified for authenticity by a hospital records technician unless the parties consent that it is not necessary. The hospital records technician identifies that the records were made in the normal course of business at the time of the noted event, or within a reasonable time thereafter.

Medical reports are not business records. You must provide 10 days' notice to the other party that you intend to rely upon a medical report. The medical professional need not be a witness, but if the other party wants to have the author of the report present for

cross-examination, you will need to serve the medical professional with a summons to witness.

Emails and text messages can be used as evidence in family law proceedings. Try to ensure that each email stands alone. It is confusing and frustrating for the judge to receive a long chain of reply emails. You can rely upon the text messages/emails when giving your testimony. These emails/text messages should be contained within your Document Brief. Refer the judge to where they are located in the Document Brief when you provide your evidence. The other party may object to the messages. You should be prepared to argue why they are relevant and not prejudicial. Wait for the judge to make a ruling on their admissibility. When providing your testimony, provide the context for the messages. You should state the events leading up to the messages, describe the tone of messages, indicate whether they capture the entire circumstances, or whether they are inaccurate or incomplete.

Audio recordings and/or videotapes can be used as evidence in family law proceedings but they must be highly relevant. Before asking the court to hear the audio recording or view the tape, you should determine what they are intended to prove. It is not helpful to the court to show that the other party shouts and swears at you on your cell phone. You have to convince the judge that the recording is relevant to the issue of custody/access.

The best evidence would be a witness present during the conversation who then can testify about the importance of the recording as it relates to custody/access. If you recorded the other party threatening your life or the children's life, this may be admitted into evidence. If you made the recording, you will need to testify that the recording hasn't been edited and you will need to provide the date it was recorded and the context. Telephone recordings will need to be transcribed by an official transcriber who will need to swear an affidavit with regard to their accuracy.

Photographs can be used as evidence in family law proceedings. If you want to use photographs to prove a point, you should be prepared to argue their relevancy. Wait for the judge to rule on whether you can refer to them when you are testifying. If the judge approves their use, you should provide context as to when they were taken, who is in the photograph, whether it fairly and accurately depicts the scene, and whether it has been altered in any way.

A witness may refer to their notes to refresh their memory. If you want to enter the notes of a witness into evidence, you must have the witness identify that they are the author of the notes. They should indicate when the notes were taken (within 24 hours of the occurrence), that they had care and control of the notes, and that no modifications to the notes occured. If modifications were made, the changes need to be stated.

Financial documents may be used as evidence in family law proceedings. You may use financial documents to assert the value of an asset owned by you or a debt incurred by you. If financial documents are in the hands of a third party and they refuse disclosure, then you must bring a motion to obtain the records from that third party. If it is a business record, then you must serve it on the other party at least 7 days before trial.

You may wish to tender exhibits into evidence while a witness is testifying. Tendering an exhibit means you must show the witness the document and have the witness identify the date of the document and that they signed it. You must lay the foundation for the authenticity of the document. You should ask the witness who took the picture, when was it taken, under what circumstances was it taken, and ask the witness to identify the people in the picture. You must then state the relevance of the document and ask that it be tendered as an exhibit. The other party may object to having the document admitted into evidence on the grounds that it is not relevant or that it is privileged (i.e. solicitor-client). The judge will

either make a ruling that it can be accepted into evidence and he/she will ask the Registrar to mark it as an exhibit, or the judge will make a ruling that it will not be accepted into evidence and that you cannot reference or rely on the document.

Instead of tendering documents through witnesses during their testimony you can file a Joint Document Brief. To avoid spending time at trial tendering documents as exhibits, it is recommended that you prepare a Joint Document Brief with the other party and have the entire brief marked as an exhibit. At the outset of trial, identify which documents either of you don't agree to have admitted into evidence, and ask for a ruling on their admissibility. If the authenticity of a recording is in question, then you may have to call the person who took the recording to prove that it is authentic.

If there is a question of the truthfulness of a report, then you may have to call the author of the report to be cross-examined. If there is a question as to relevance, then you will have to argue that it is relevant if it relates to an issue you are trying to prove. If there is a question as to prejudice, then you will have to argue that the probative value of the evidence outweighs any prejudice. If the document contains hearsay, then consider how important that hearsay is and whether you can agree to blank out that particular statement but otherwise have admitted into evidence the totality of the document.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Preparing documents for trial and arguing about the admissibility of documents can be complex. You will need to gain a good grasp of the law to make your argument successful.

Part 6:

Witnesses

Before summoning a witness to trial, you should ask yourself: Why are you calling this witness? What fact are they proving? What is the source of the witness' knowledge? Does the witness have direct knowledge? Is the witness' evidence necessary? Does this witness' evidence speak to issues already addressed by other witnesses? You should only summons witnesses that have relevant and have first-hand information. If you are trying to prove a father hit his child, then it is not relevant to present evidence that the home is dirty.

Consider whether the witness is biased or has a personal stake in the outcome. Friends and family members are not likely to be helpful if all they can say is that you are a nice person. A friend or family member won't be able to give an opinion on your parenting capacity or attachment to the child – you will need an expert witness to give this evidence.

Instruct your witnesses. They should not guess the answer, but instead, say that they don't know the answer. Tell your witnesses to ask for clarification if they don't understand the question. Tell your witnesses not to offer more information than what is requested, and to listen to the question and answer the question precisely. Remind your witnesses that they cannot talk to you or anyone else once cross-examination has begun.

Inform your witnesses that you cannot ask them leading questions when they are testifying. When your witness testifies for you, it is referred to as Examination in Chief. When you are conducting Examination in Chief of your witnesses, you may not ask leading questions. Once you are finished your Examination in Chief of your witness, the other party will cross-examine your witness. The other party, can ask leading questions.

Explain to your witnesses why their testimony is important. In preparing your witnesses, you should explain what issues will be determined, and how the evidence relates to those issues. Explain that the judge may ask questions, and that they should address the judge as 'Your Honour'.

Explain to your witnesses that they cannot use hearsay. Hearsay evidence is not direct evidence. It is evidence of another person and that person must be called to testify as to what they saw or heard. If the witness says, for example, *"Jane told me…"* then the other party will object. If there is an objection, instruct your witnesses not to answer the question. Tell your witnesses to wait for the judge to make a ruling as to whether they should answer or not.

Some witnesses can provide direct evidence (i.e. They saw the father hit the child). Other witnesses can provide circumstantial evidence (i.e.: The family doctor can testify to examining and finding bruises on the child, inferring that the child was hit) or (i.e. The child's teacher can testify to seeing bruises on the child's face, inferring that the child was hit). If a child told a teacher or doctor they were hit, the teacher or doctor may not, unless permitted by the judge, testify to the child's statement, as it is hearsay. The judge must rule on its admissibility.

Expert and Lay Witnesses. There is a difference between a lay witness and an expert witness. A lay witness can be a family doctor that provides a medical report. They can provide opinions using their common knowledge as a general practitioner. For example, the

doctor can indicate that they took blood tests indicating liver damage that can be indicative of alcohol abuse. However, the doctor cannot provide expert opinion evidence that the liver damage was caused by alcohol abuse. You would need to call an expert to testify to this opinion.

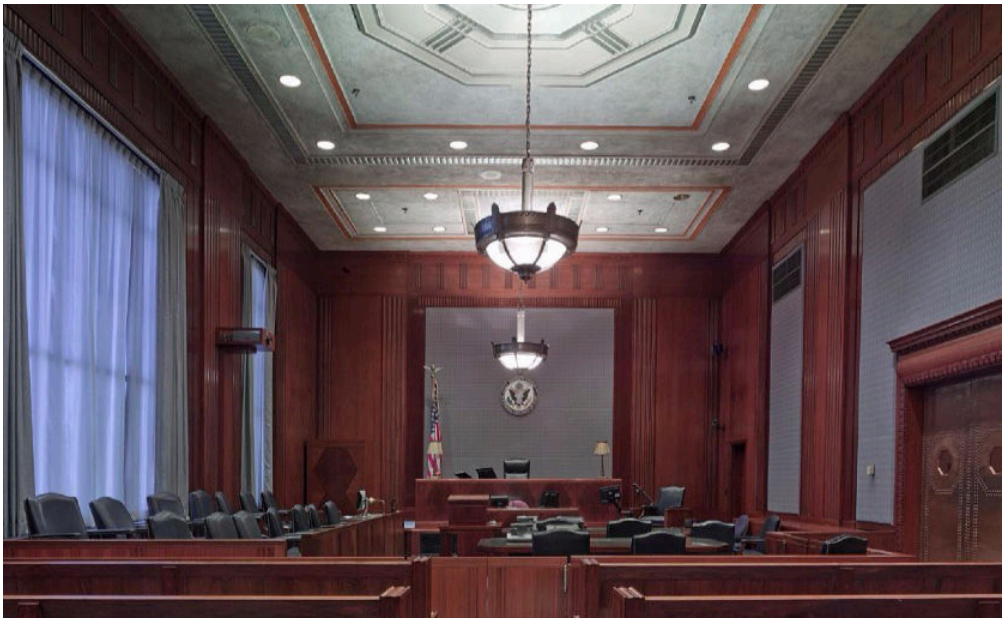
A lay witness can testify that they observed the other party intoxicated because of slurred speech, instability to walk, etc. However, this lay witness cannot testify about the level of inebriation rendering the person incapable of performing normal functions. An expert would need to be called to validate that the level of intoxication would make it difficult to perform normal daily functions. An expert witness can provide opinions only as they relate to their area of expertise. They must be qualified as an expert, and the court must rule on their qualifications before they can provide opinion evidence.

A court is not obligated to accept the opinion of an expert. The expert should be tested under cross-examination to determine whether an opinion is flawed. An expert custody/access assessor may have made errors in facts. The assessor may not have received the pleadings and affidavits from the parties, or may have incorrectly interpreted those documents. They may not have contacted important collaterals. The assessor may have used outdated or improper testing tools. The assessor may have made unjustified inferences from the testing results. If you don't agree with the opinion of an expert witness, you must cross-examine this witness on their report, otherwise, the presumption is that the opinion is correct.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Preparing your witnesses, knowing what witnesses to call to testify, knowing what sequence to call your witnesses, knowing how to prepare Examination in Chief and cross-examination are skills that experienced legal counsel can assist you with.

Part 7:

Examination in Chief
(Direct Examination)



The sequence of calling your witnesses to testify at trial is important. You might be required to testify first and then call your witnesses to testify. There is a good reason for this sequence of calling witnesses. The other party may object to you hearing the testimony of each of your witnesses. They may argue that your testimony is tainted by the testimony you have heard from your witnesses. Likewise, none of your witnesses will be able to sit in the courtroom to hear the testimony of other witnesses unless they have already testified.

Consider how you will present your case when you are testifying. When testifying, begin by describing the history of your relationship. Speak factually and don't speak about things that are not relevant. Remember to speak clearly and concisely. Remember to describe your relationship to the people that you are referring to. For example, if you refer to George, then tell the judge that George is your ex-wife's new partner.

Stick to themes, such as custody/access that are relevant to your case. You may choose to deal first with custody/access. It is much easier for the judge to get a picture of your story if you work with themes. For example: Let's talk about your son or let's talk about your marriage: *"Explain, tell me about, why…"* You can review the details of the court case and all of the temporary orders made. You can refer to the Trial Record to guide you through this narrative. The Trial Record should contain all of the court orders that were made. Describe the custody and access arrangements before, during and after separation in chronological order.

You may then choose as your next theme, the issue of support payments. You should describe the child support quantum that you are receiving or paying and when payment commenced. You can refer to the court orders that were made in this regard contained in the Trial Brief. You can then describe how much you think you should pay or should receive for ongoing support and how much you think you owe or are owed in child support arrears. You can refer to any tables or Divorcemate calculations that are contained within the Exhibit (Document) Brief.

Describe why you are entitled to spousal support or why the other party is not entitled. Describe the quantum you should pay or receive, and the duration you feel is fair and equitable. Refer to the Divorcemate calculations filed in your Exhibit Brief. Describe your income by referring to your T1 and NOA contained within the Trial Record and included in your certificate of financial disclosure.

If domestic violence is an issue, then provide evidence of the abuse. The issue of domestic violence is relevant to the issue of child/custody and to the issue of a restraining order. Try to separate the two issues. Speak about why you feel that a restraining order is necessary to ensure your safety.

Property issues should be dealt with last. Refer to the Net Family Property Statement/Net Family Property Comparison to describe why you think your figures are more accurate than those of the other party.

You can refer to these documents in the Trial Record and Exhibit Brief. After you tell the judge your side of the story, the other party (or his/her lawyer) will cross-examine you. After you complete your cross-examination, you will then call your first witness. Call custody/access witnesses first and then call witnesses to deal with support and financial/property issues.

When conducting your Examination in Chief avoid leading questions. You can lead the witness about facts that are not in dispute. For example, you can ask them their name, age, occupation, residence, and qualifications. You may not otherwise ask leading questions. If your witness can answer *"yes"* or *"no"* to your question, then you have asked a leading question. To avoid asking your witness leading questions, ask them how, where, why, when, who, please describe, and then what happened? Begin your questions with: Explain…, Tell me about…, Why... You cannot ask your witness: *"You read that memo, didn't you?"* This is a leading question. You should ask, *"What material, if any, did you read?"* or *"Can you tell us whether or not you read any material?"*

When conducting your Examination in Chief, stick to the facts. Don't ask questions about feelings, judgments or opinions about the other spouse. Instead ask: *"How did you react when he..."* You and your witnesses cannot give an opinion that they are not qualified to give. For example, you can't testify that your ex-spouse has a personality disorder.

Lay the foundation for a document that you wish your witness to testify about. If you want to ask the witness about a document, like, an email that has been entered into evidence in the Document Brief, refer to the tab of the Brief where the email is located, and have the witness identify it as his or her email. Ask whether they adopt all of the statements in that email as their own, whether they wish to clarify or correct something said in the email, ask them to provide the context for the email and whether they wish to update that email with new information.

During Examination in Chief, you and your witnesses cannot rely on documents or statements that have not been admitted into evidence. You can't ask: *"What happened after Mr. Jones shot the gun?"* This assumes a fact that is not agreed upon in evidence: That Mr. Jones shot the gun.

Certain documents are privileged. You cannot ask about what a lawyer and client discussed. This is called solicitor-client privilege. The other party cannot ask to see the notes that you prepared with your witnesses. This is called litigation privilege.

You can object to evidence that you want excluded. However, you should consider preparing a Joint Document Brief and at the outset of trial have the judge make rulings on whether this evidence should or should not be admitted into evidence. The other party can ask to see your doctor's notes and records. There is no privilege attached to them. If you want to exclude them, you must prove why they should be excluded.

This is called the Wigmore Test:

1. The communication between you and your doctor originated in confidence and it was presumed it would not be disclosed.

2. Confidentiality is essential to the relationship you have with your doctor.

3. Community members would agree that the confidential nature of your relationship with your doctor is important to maintain.

4. The prejudice to you in having the notes and records disclosed would outweigh the probative value.

Keep notes of what each of your witnesses states in his/her evidence. It is important to keep good notes so that you can refer to the testimony of each witness in your closing argument. Although the court reporter is recording everything that is being said in court, a transcript will not be ready until weeks after the trial. Should you wish to appeal the order that the judge makes at trial, a transcript may be ordered.

You may want to ask the judge for permission to allow someone to take notes for you. This person cannot be called to testify at trial. Most likely, they will have to sit in the body of the courtroom and will not be permitted to sit beside you at the counsel table.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Examination in Chief is a skill that experienced legal counsel can assist you with. The Examination in Chief of you and your witnesses can make or break your case.

Chapter 8:

Cross Examination

Cross-examining a witness is the most difficult part of a trial. It is a skill that many lawyers are not comfortable with because it must be practiced. Lawyers don't get to practice this skill unless they represent clients at trial frequently. Very few family matters end up going to trial, so don't feel intimidated when you are on the stand being cross-examined by a lawyer representing the other party. The lawyer may stumble awkwardly when trying to elicit information from you.

Remain calm. Be certain of your answers before responding. Don't volunteer information. Instead, wait for the question to be asked, and answer that specific question only. Don't appear overconfident. Make good eye contact with the lawyer and look to the judge to ask for clarification if you don't understand the question. Don't be evasive, and answer all questions truthfully and to the best of your knowledge.

When you are cross-examining a witness or the other side, be respectful and courteous. Avoid becoming dramatic – this is only seen on television shows. Keep notes of what the witness says during your cross-examination. You will need to refer to your notes in your closing arguments to point out inconsistencies and lack of credibility. You may ask the judge permission to allow someone to take notes for you. That person will sit in the body of the courtroom and cannot testify at trial.

The purpose of cross-examination is to show:

1. That, the witness is contracting him/herself or another witness.
2. That the witness supports your theory of the case.
3. That the witness is biased and motivated to lie.
4. That the witness is not reliable because they can't remember the event, could not have possibly seen or heard the argument, could not have possibly known whether a person was sober or intoxicated.
5. To have the witness admit that they are uncertain, unaware, are making assumptions, or have inaccurate information.

Don't ask open ended questions, instead ask close-ended questions:

Don't ask: *"Would you agree for the period 2014 to 2016 the children resided primarily with your wife?"*

Instead, break it down so that the witness can only answer yes or no.

Ask: *"During the school year in 2014, other than on alternating weekends when the children were with you, the children were with your wife, correct?"*

"So they were primarily with your wife during the school year?"

"And there was no change in the parenting schedule during the school years, 2014, 2015, 2016, correct?"

"And except for 2 weeks of summer camp, the usual schedule applied?"

"And the usual school schedule applied during the summer for the years 2014, 2015, 2016, except for 2 weeks of summer camp each summer?"

"So the children resided primarily with your wife from 2014 to present?"

Ask questions to lead to answers of yes or no:

"Your evidence as I understand it, was that at all times you did everything to encourage John to visit his dad?"(yes).

"You believe that John should have a relationship with both parents?" (yes) .

"You believe that it would be harmful for him not to have a relationship with both parents, agreed?" (Yes).

Use prior inconsistent statements to show the witness is not credible:

If there was an inconsistent statement made by the witness, then you should first provide the context by refreshing the witness' memory as to time, place and the person to whom the statement was made. Then, allow the witness to adopt the current statement as true or to refute the current statement and adopt the earlier statement as true.

Example of using prior inconsistent statement to show witness is not credible:

Ask: *"In your Examination in Chief you said the car was red, correct?"*

"Are you sure that it was red?"

"Have you ever told anyone that the car was blue?"

"Do you have a friend named Dan?"

"Do you recall seeing Dan at the Shopper's Drug Mart on Jan. 1, right after New Year's Eve?"

"How long have you been friends with Dan?"

"Are you still friends with Dan?"

" Is there any reason that you can think of for Dan to be untruthful about conversations that you have had with him?"

"And do you recall talking with your friend, Dan, at that time about the car?"

"Do you recall that you told Dan the car was blue?"

"Dan will testify that you told him the car was blue"

"Do you agree that on that date at the Shopper's Drug Mart, you told Dan the car was blue?"

"Would you agree with me now that you told Dan the car was blue?"

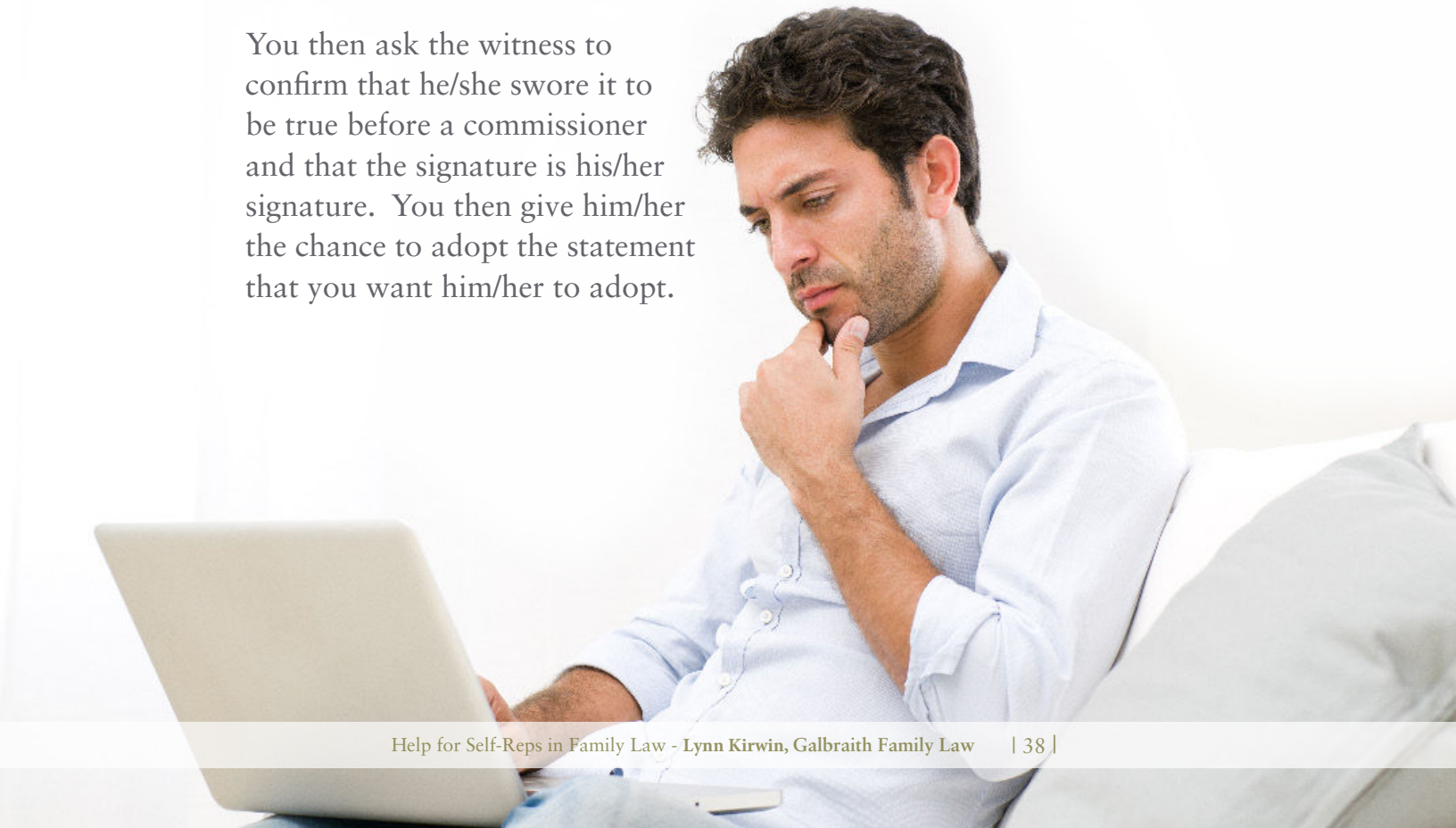
"Would you agree with me that you made this statement about one year ago and closer to the time of the event?"

"Would you agree with me that this statement made one year ago is more likely to be more accurate given it was made closer to the time of the incident?"

Do not allow the witness to explain the inconsistency. You just want him to agree with you that there is an inconsistency. You will point to the inconsistency in your closing argument. If the witness agrees the car was blue then ask the judge to adopt this as true, given it was made closer to the time of the event. If the witness maintains that the car was red, then in your closing argument, you will ask the judge to put very little weight on what this witness has said because he is not credible due to the inconsistencies in his statements.

Using Affidavits to contradict a witness for the purpose of showing the witness is not credible. You can refer to a previous sworn affidavit to impeach credibility of the witness or to clarify a contradiction. If the witness made a prior inconsistent statement, then you must provide the context in which this statement was made. For example, in referring to an affidavit sworn by the witness you must show the affidavit to the witness and ask the witness whether he recalls swearing the affidavit on this date.

You then ask the witness to confirm that he/she swore it to be true before a commissioner and that the signature is his/her signature. You then give him/her the chance to adopt the statement that you want him/her to adopt.



Example of using an affidavit to contradict a witness:

"Mr. Q. you swore an affidavit on July 12, 1999, correct?"

"This is your signature, correct?"

"You swore this affidavit in 1999, when the events were still fresh in your mind, correct?"

"You swore to tell the truth in that affidavit, correct?"

"You knew it was important to tell the truth, correct?"

"You did tell the truth, correct?"

"You read the affidavit before you signed it, correct?"

"You would have corrected it if it was inaccurate, correct?"

"You didn't wish to change anything in that affidavit before testifying in this trial, correct?"

"In this affidavit at paragraph #4 you stated that you hit the child, correct?"

"So, you would agree with me that you stated in your affidavit that you hit the child?"

"You have sworn to tell the truth today and you swore in the affidavit to tell the truth and yet there is a contradiction."
"Would you agree with me that memories get worse over time?"

"Would you agree with me that memories are better closer to the time of the event?"

"Do you agree the memory you had of the incident in 1999 is more correct than the answer you gave today?"

Don't ask the witness to explain the inconsistency. You just want them to adopt the earlier statement as being correct.

The Rule in Brown v Dunn

The Rule in Brown v Dunn is a very important rule of evidence that you should try to remember when cross-examining witnesses. Essentially, it is a rule of fairness. If, you cross-examine your ex-husband, knowing that you will be providing evidence in your testimony alleging he was violent towards you, then you must cross-examine your ex-husband on that point. You can't introduce it for the first time in your own testimony. If you intend to use the evidence of domestic violence, it is only fair that you give your ex-husband a chance to address this issue in his testimony.

Example of Rule in Brown v Dunn when you have prior knowledge of a fact:

In proceeding to cross-examine Ms. P. you must ask her about a fact that you have knowledge about, that is that Mr. J. will be called to testify and will contradict her testimony.

"Ms. P., you testified that you heard an argument between the mother and father and that you actually saw the father hit the mother while you were outside walking your dog, correct?"

"Ms. P., you are friends with Mr. J., correct?"

"How long have you known Mr. J.?"

"Is there any reason you can think of that Mr. J. would not tell the truth about conversations he had with you?

"Mr. J. will be testifying that he in fact was with you when the alleged assault occurred and that you were not walking your dog."

"Would you agree with me that you didn't actually see the assault but rather you just heard the couple arguing?"

Example of the Rule in Brown v Dunn when you don't have prior knowledge of a fact:

"Mr. J. you stated that you were standing beside Ms. P. when you heard arguing between the mother and father, correct?"

"And that you and she were in your backyard, correct?"

"You were standing with Ms. P. in your backyard and she was not walking her dog when you heard the argument, correct?"

Next, ask the judge for permission to recall Ms. P.:

"Your Honour, Ms. P. provided evidence that she was walking her dog at the time she heard the argument between the parents." "Mr. J. is saying that she was standing beside him in the backyard."

If you want to give Ms. P. an opportunity to explain then you must ask that she be recalled:

"I therefore request that Ms. P. be recalled so that she has an opportunity to respond to Mr. J.'s testimony which is material evidence and contradicts her testimony."

Recall Ms. P. to the stand:

"Ms. P. you recall testifying that you were walking your dog when you heard the argument between the parents, correct?"

"You testified that Mr. J. is a friend of yours, correct?"

"After you testified, Mr. J. testified and he told us that you in fact were in the backyard with him when the argument ensued between the mother and father."

"Do you still maintain that you were walking your dog at the time of the argument?"

"Do you still maintain that you heard the argument while walking your dog and witnessed the assault?"

"Were you in the backyard with Mr. J. at any time at or around the time of the argument?"

"Was your dog with you in the backyard at Mr. J.'s home?"

"Can you explain whether it is possible that you heard the argument and then proceeded to the front yard to walk your dog but did not actually witness the assault take place?"

Hypotheticals

The other party can ask your witness hypotheticals i.e. assuming the car was red and not blue, you would agree with me that...and your answer would be different, correct?

If cross-examining an expert, you can ask a hypothetical question. If cross-examining an expert, you can refer to literature and ask whether the expert adopts that literature as authoritative.

Then, show how the literature doesn't support the expert's opinion. Experts can give opinion evidence only on issues for which they have been found to have the expertise.

Documents to Impeach Testimony

Lay the foundation to introduce into evidence a document not already admitted into evidence. During cross-examination, you can show the witness a document that they have not seen before, but you must lay a foundation to give the context of the document. First, you must have the witness identify the document, and introduce it into evidence through the witness before you question them about it. For example, you know that the witness signed a mortgage application wherein he testified his income was $X.

You must have him identify the document, ask if he recalls signing the application, and ask if it's his signature on the bottom of the page. You may then ask that this mortgage application be marked as an Exhibit. You may then cross-examine him on the mortgage application. If he/she lied to Ontario Works that he has no income when in fact he is paid in cash, you can cross-examine the witness on his recent purchases by presenting to him a copy of his mortgage application. This goes to the issue of credibility. It shows that the witness is susceptible to dishonest behaviour.

Admission/Bias/Unreliable

Try to keep it simple. If the witness describes the father as a good father and that she saw the child and the father together frequently, you may have knowledge that the witness is a night owl and sleeps during the day. You will want to get her to admit that this is the case and therefore, she could not have seen the father and child together frequently because she sleeps during the day. You can ask anything about any issue. You don't have to stick to just what was said in Examination in Chief. But, do not present facts to a witness that you know are untrue.

Try to show that the witness is biased toward the party that called them as their witness. For example, if it is true, then try to elicit information from the witness that he/she is owed money by the party or is indebted to them somehow, or is motivated by a desire to help that party because then that party will help them.

Try to show that the witness doesn't have direct knowledge of a fact. If the witness states that they are certain the mother would intervene to stop the father from exposing the child to violence, try to get the witness to admit that they have never actually witnessed the mother stopping the father from shouting in front of the child. If the witness says the mother doesn't drink, then try to get the witness to admit they have only seen the mother on very few occasions during the last year. She calls herself a close friend yet what does she know of the mother's personal history?

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Cross-examination is a very difficult skill to learn. Experienced legal counsel can provide you with a list of potential questions to be asked on cross-examination of each witness.

Part 9:

Objections

Objections are difficult to carry out. When and why you should object to something is hard to discern. The judge can become annoyed if you keep objecting and interrupting the flow of the witness' testimony. Don't object unless you are certain as to why you are objecting.

Hearsay is something you should object to. If someone is about to repeat something told to them by another party, stand up and state your objection. Ask the judge for a clear ruling on the objection and ask the judge to state whether the witness can answer the question or not. If the judge rules against you and permits the evidence to be heard, then you must state for the record that you maintain your position. This is important in case of an appeal.

Child statements made to an adult are hearsay. A voir dire (mini trial within the trial) must be held before the child's statements can be admitted into evidence. At the voir dire, it must be proven that it is necessary to have an adult testify, because it would be too traumatic for the child. Also, it must be shown that the adult receiving the statement is reliable to report the statement truthfully.

Leading the witness during Examination in Chief is something you should object to going into evidence. In other words, if the other side tries to suggest the answer to his/her witness, then you should object.

Irrelevant testimony is something you should object to going into evidence. But, you should be careful that it is clearly irrelevant.

Privileged information is something you should object to going into evidence. It can be either litigation privilege or solicitor-client privilege. If the answer to the question is privileged then you should object. You may have had conversations with a lawyer that you previously retained. Any such conversations are privileged. Litigation privilege is testimony or documents prepared solely for the purpose of litigation.

Improper opinion evidence is something you should object to going into evidence. If a lay person provides their own opinion of a person's mental health, such as referring to the person as having a dual personality, this is improper opinion evidence.

If the answer calls for speculation then you should object. You should object if the witness presumes a fact that is not proven, such as that the father hit the child because the witness saw the child with a swollen eye.

If the answer requires the witness to testify with respect to facts not yet in evidence then you should object. For example, if the lawyer states to his client, " I understand there is a very long wait list at Athena's" you should object and ask whether the lawyer intends to call a witness from Athena's to testify that there is a long wait list.

If the lawyer asks questions during cross-examination that breaks the rule of Brown v Dunn, you should object. The rule in Brown v Dunn is best explained through an example: The witness in chief said the dog was brown. Opposing counsel doesn't ask the witness during cross-examination whether the dog was white. He then leads evidence through his witness to say the dog was white.

He obviously knew that he was going to try to contradict the first witness by asking his own witness about the colour of the dog.

It isn't fair to contradict the original witness by calling new evidence, because the original witness didn't get a chance to address the testimony of the subsequent witness who said the dog was white. Either you can object and ask that the original witness come back to address this issue, or you can object and ask that the second witness not be permitted to testify about the dog being white.

You should object if the other party asks your witness about a document you have never seen before. Ask to see the document before it is shown to the witness. You may want to object, for example, to the authenticity of the document since it is not an original or it wasn't written on letterhead.

You should object if the other party misstates the evidence. For example, if during cross-examination the lawyer says that a witness said the car was blue when in fact the original witness said it was red.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. Practice and preparation with a litigation coach will ensure that the judge gives your case equal consideration. You would be ill advised to do an Ironman without a coach. Likewise, completing your first trial, requires a litigation coach.

Part 10:

Closing Arguments

You must drive home your points to the judge. The opening argument provides the judge a roadmap to what will be proven, and the closing argument provides the judge with a roadmap of what has been proven.

You should refer to case law contained within your Case Brief and show how the facts drawn out at trial support your position in respect of the case law that you rely upon.

Refer to the notes that you kept in regard to the Examination in Chief and in your cross-examination of witnesses to show how the evidence supports your case. You should point to inconsistences to show a lack of credibility in the witnesses provided by the other party.

Point out how the testimony of your witnesses supports the documentary evidence, or conversely, show how the testimony of the witnesses undermines the documentary evidence of the other party.

If you see the judge taking extensive notes during a witness' testimony, make note of it and refer to that point in your closing argument.

Request that an adverse inference be found in respect of witnesses not called to testify.

Point out what was not proven as a fact. Use the other party's opening statement as a guide to what they intended to prove and show how they failed to prove it.

Acknowledge weaknesses in your case and ask that greater weight should be given to the strengths in your case.

Point out for the judge how the other party has failed to address their weakness in the theory of their case.

In custody/access matters refer to s. 24 of the CLRA and how the facts and documentary evidence prove your position.

In a motion to change, refer to the existing court order and point out what facts and documents prove a material change.

In proving imputed income, summarize the facts proven at trial that show how the evidence supports your position to impute income. Use case law and point to the statutory provision that supports your position.

An example of imputed income closing argument statement:

i) The financial statement sworn by the other party shows an income of X, while his yearly expenses far exceed his income.

ii) The other side lists significant debts described as promissory notes and yet during cross-examination, he admitted that he does not make monthly payments nor could he show who holds the promissory notes.

iii) The financial statement shows a monthly credit card payment of $X "paid in full each month" and a monthly Visa credit card payment of $X, "paid in full each month." His chequing account reveals that he made payments on credit cards that were not disclosed in either financial statement. In 2013 he paid $X on an Amex card and $X on a CIBC Visa card. In 2014 he paid $X on an Amex credit card.

Ask that the court draw an inference that the payor has undisclosed income based on the cash flow he has in his personal account to make credit card payments, and based on his expenses listed in his financial statement.

Point out case law that supports your argument that the court can draw an inference that the other side has undisclosed income. i.e. Court's jurisdiction to draw an inference: See Bak v. Dobell, [2007] O.J. No. 1489 (Ont. C.A.); Rzadki v. Rzadki, 2015 ONSC 1166 (Ont. S.C.J.) at para.72).

Point out statutory sections that support your argument that the court has the power to impute income to a payor. For example, s. 19 of the Guidelines, subsections (d) (f) and (g) apply:

> 19. (1) The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include,
>
> (d) It appears that income has been diverted which would affect the level of child support to be determined under these guidelines;

(f) the parent or spouse has failed to provide income information when under a legal obligation to do so;

(g) the parent or spouse unreasonably deducts expenses from income.

Point out that the other party failed to produce documents sufficient to allow submissions to be made on what expenses should be added back into income pursuant to s. 19(g). If the payor is self-employed, this is a relevant area of inquiry as it typically leads to income being added back and grossed up. Ask the court to make an adverse inference against the payor for failure to provide full disclosure.

Conclude based on the facts that that the other party has the ability to pay, and that there is an evidentiary basis to impute income.

Remember, I strongly recommend that you retain the services of a lawyer to be your litigation coach. It is well worth it. The skills of an experienced legal counsel are invaluable. Would you let a dental hygienist perform a root canal on your tooth? When you have a sewage backup, do you try to fix it on your own, or do you call a plumber? If your internet service goes down, do you spend hours trying to figure out the problem, or do you call your internet support provider to help you figure it out? Would you let your family doctor operate on your herniated disc? Would you trust the information provided by your child's school teacher that your child has ADD? No. All of these issues need the experience and expertise of a professional. You too, need the experience and expertise of a lawyer to help you through the maze of legal processes and procedures when trying to represent yourself at trial.

When you can't settle your case and need an expert to assist you in preparing for trial, please call me.

Call: (705) 727-4242 and ask for Lynn Kirwin.

I would be pleased to help you.

About the Author

Lynn graduated from the University of Windsor Law School and has over 25 years' of experience as a family law litigator, child protection litigator and in representing children as a member of the panel of lawyers for the Office of the Children's Lawyer.

Lynn has authored many books on family law, which have been published by Thomson, Carswell. Lynn firmly believes in resolving matters for families by using a practical and collaborative approach and is a certified collaborative lawyer.

Lynn is the current Chair of a Women's Shelter in Orillia, a member of the Simcoe County Family Law Lawyer's Association and Collaborative Practice Simcoe County.

Lynn has two daughters who attend university. She and her husband enjoy outdoor sports such as road cycling, cross-country skiing and mountain biking with their two beagles in Simcoe County Forest.

Lynn has coached many self-represented clients through the court process, including at trial.