What to expect when your family law matter ends up in court?

I am a great believer in negotiated settlements resolving all the issues arising from the parties' separation or divorce. Settlements create less stress in the lives of the parties and their children, do not escalate conflict, tend to be better tailored to parties' needs, are confidential, can be reached much faster than court decisions, and are less expensive. Unfortunately, they are not always possible. When one of the parties displays bad faith by not being entirely forthcoming about his or her financial situation, trying to hide income or dissipate assets, or simply taking unreasonable positions unjustified by the law, litigation can be the only option, no matter how unwelcome it is.

Anyone considering commencing family law litigation or anyone who, willingly or not, becomes drawn into it as a respondent, should learn about the basic steps in the litigation process, costs involved, and its "side effects," which can have psychological, economical, and emotional consequences.

The steps and length of litigation depend on the number of issues to be resolved, how complicated the issues are, the level of hostility between the parties, and the level of the court that decides these issues. It is fair to say that litigation almost always takes much longer than the parties would wish it to take. Wait times and delays are built into the court process; court appearances are never scheduled soon enough, and adjournments of scheduled appearances are not uncommon.

It is helpful to realize that, in most jurisdictions in Ontario, including Toronto and Brampton, there are two levels of court that decide family issues. Ontario Court of Justice hears cases related to child and spousal support, custody and access, and paternity and child protection. Superior Court of Justice can decide matters related to divorce and equalization of property, as well as custody, access and support, but it does not decide child protection cases.

Some jurisdictions, such as Hamilton, only have one level of court that deals with all family law issues, referred to as Family Court of the Superior Court of Justice, or the Unified Family Law Court.

The proceedings in the Superior Court of Justice are typically more formal and lengthy. As a rule, they involve property issues. Consequently, the nature of the issues to be decided tends to be more complicated, and onerous disclosure requirements apply. In practice, the parties do not commence proceeding in the Superior Court unless they deal with property issues and have no other option but to do so.

Application

An Application is the first step in the family law proceeding. It is a written document submitted to the court to initiate litigation. It contains the claims of the person bringing the

Application (the applicant), such as a request for support or custody, and description of the facts giving rise to these claims.

If an application contains a claim for child or spousal support, a property claim, or a claim for exclusive possession of the matrimonial home, the party making the claim shall serve and file a Financial Statement with his or her Application. The purpose of the Financial Statement is to provide the opposing party with a detailed picture of the applicant's financial situation. Even though the Financial Statement is a lengthy and detailed document, it is usually only the first step in exchanging financial disclosure, which may involve an exchange of voluminous financial records.

If an Application contains a claim for custody and access, another lengthy document - an Affidavit in Support of Claim for Custody and Access - has to be filed with the Application.

Within thirty days from being served with an Application, the person against whom an application is made (the respondent) shall serve and file an Answer. The respondent may include in the Answer, any claim he or she may have against the applicant, including answering claims of the applicant, or putting forth entirely new claims. The answer also contains the facts supporting the respondent's claims. Just like in the case with an Application, if either Application or Answer raises issues related to child or spousal support, a property claim, or a claim for exclusive possession of the matrimonial home, the respondent has to prepare a Financial Statement. If issues of custody and access are raised, an Affidavit in Support of Claim for Custody and Access is needed.

An applicant may serve and file a Reply in response to a claim made in the Answer. The purpose of the Reply is to address any new issues raised by the respondent in the Answer, but the applicant is not allowed to raise any new claims in the Reply.

What are the costs of starting an application or responding to one? Your lawyer has to meet with you to explore your situation, gather facts and strategize about your case. If you are responding to an Application, your lawyer also has to carefully review the materials served on you by the applicant. Then, the lawyer has to draft all of the documents required to start an Application or to respond to one. In order to prepare a Financial Statement, the lawyer has to gather detailed information about your financial circumstances at the date of marriage, date of separation, and at the time of commencing the proceedings. As a guideline, I tell my clients that 10 to 15 hours of my work are required to prepare the documents, but this number can be much higher in complicated cases. If the litigation proceeds at the Superior Court of Justice, the litigants have to pay fees for filing the Application and/or the Answer. As all documents have to be filed with the court in person, the litigants also have to pay a person (called a process server) to go to court and file the documents on their behalf.

First Appearance

If the proceeding is commenced at the Ontario Court of Justice the first court date will be automatically set when the Application is filed with the court. If the matter is started at the Superior Court of Justice, one of the parties will have to set the first court date. No documents

need to be prepared for the First Appearance, and your legal costs flow only from the fact that your lawyer has to attend it.

Mandatory Information Program (MIP)

Both the applicant and the respondent have to attend the Mandatory Information Program (the MIP), which is a two-hour presentation delivered by a lawyer and a mental health professional. It is aimed at providing the litigants with basic information about family law, the litigation process, options available for resolving their differences (including alternatives to going to court), the impact of the separation on children and adults, and community resources available to deal with problems arising from separation.

When the application is filed with the court, a MIP notice is issued for each party giving them dates and times to attend their respective MIP sessions. The parties do not attend together; each is given a different date and time. After each party attends the MIP session, he or she receives a certificate of attendance, which should be filed with the court.

Case Conference

In every case where an Answer is filed, at least one Case Conference takes place. It is a mandatory step in every family law proceeding. In general, motions cannot be brought before the Case Conference.

The purpose of the Case Conference is to explore the chances of settling the case, identify the issues in dispute, and explore ways to resolve them. Case Conferences also ensure full financial disclosure, and set the date for the next step in the case. The waiting time for the date of the case conference is usually between 2 and 3 months in the Ontario Court of Justice, and between 3 and 4 months in the Superior Court of Justice.

The parties have an option of scheduling an Early Case Conference, which has a shorter wait time, but only gives the parties about 15 minutes of the Judge's time. Early Case Conferences were established to enable the parties with pressing matters to address any urgent matters without the delay related to the unavailability of the regular Case Conference dates. During the Early Case Conference, the Judge will determine whether the issues advanced require any determination at that time. The issues typically dealt with during the Early Case Conference include financial disclosure, custody and access, child support and spousal support.

Both the regular Case Conference and an Early Case Conference are usually preceded by extensive communications and negotiations between the parties' lawyers. The attendance at a Case Conference requires your lawyer to prepare a Case Conference Brief, and oftentimes to update your Financial Statement and your Affidavit in Support of Claim for Custody and Access. As a result, the costs of attending a Case Conference can be considerable.

Once the Case Conference takes place, the Judge can decide whether another Case Conference is required, or if the matter should proceed to a Settlement Conference or a Trial Management Conference.

Settlement Conference and Trial Management Conference

The Settlement Conference usually follows the Case Conference. Its purpose is to first and foremost explore the prospects of settling the case. It provides the parties with an opportunity to settle or narrow the issues in dispute, ensure disclosure of relevant evidence, and in instances where a settlement seems unlikely, to begin planning for the trial.

The Trial Management Conference, which usually follows the Settlement Conference, is aimed not only at exploring a potential for settlement, but also at planning for the trial. The issues to discuss include the names of the witnesses and the length of their testimonies, the necessity for hiring interpreters, reports to be completed and exchanged before the trial, completeness of the financial disclosure, and the length of the trial. The trial date is set either prior to the Trial Management Conference, or at the Trial Management Conference.

Just like it is the case with Case Conferences, briefs have to be prepared before Settlement Conferences and Trial Management Conferences. Parties are required to exchange their offers to settle before the Settlement Conference. In addition, before each conference, your lawyer has to update your Financial Statement. Multiple meetings between you and your lawyer, as well as extensive negotiations and strategizing, usually precede all conferences.

All of these preparations are very time consuming and end up being quite costly for the parties. As a guideline, I tell my clients that the time required to negotiate, prepare the necessary documents, and to attend at each of the conferences will likely exceed 20 hours.

In addition to the expense involved, court appearances are usually very time consuming and stressful to the parties. It is a standard practice that all the litigants and their lawyers show up in court in the morning and wait until their case is heard, which can be late in the day. In some, thankfully infrequent, situations, the parties and their lawyers may show up at court only to learn that, due to unexpected circumstances, their conference (or motion) will not be heard on that scheduled day.

There are a few things every litigant should know about the Conferences which form the required steps of the litigation process.

First, the family law proceedings are settlement oriented, and the parties are given numerous opportunities to settle their matter without a trial. Therefore, the overreaching purpose of the Conferences is to encourage the parties to reach a settlement.

As no meaningful settlement can be reached without full financial disclosure, another important purpose of the conferences is to ensure that the parties fully disclose their financial

circumstances to each other, and produce all the documents necessary to verify their financial circumstances.

The Judges who preside over the Conferences do not decide any substantive legal issues unless the parties reach a resolution of such issues on their own, and ask the court for a consent order. For example, if the parties resolve the issue of custody, they may ask the Judge for a Final Order ruling on this issue. This issue is then considered resolved. If it was the only issue at dispute, the litigation is over. If it was one of the many issues, the litigation continues on all other issues.

Without parties' consent, the court can and does rule on procedural issues during the Conferences. Orders for disclosure are common at Conferences - especially Case Conferences – as are the orders for valuation of assets, involvement of the Office of the Children's Lawyer, custody assessments, and adding or removing a party. Almost always, at the end of the conference, the Judge sets a date for the next step in the proceedings.

Motions

A motion is made by a person who wants the court to either make a temporary order for a claim made in an application, get directions on how to carry on the case, or make a change in a temporary order. However, one cannot bring a motion before a Case Conference, unless the case involves urgency, such as a removal of the child from the jurisdiction. In some cases, a motion can be made without notice to the opposing party if the nature or circumstances of the motion make a notice unnecessary, or not reasonably possible. An order made on a motion without notice is usually short lived and only lasts until the motion is reheard with the participation of all the parties involved.

At the very minimum, a motion requires preparation of a Notice of Motion and an Affidavit. An Affidavit is a sworn statement of facts. In most motions, affidavits of the parties constitute the only evidence to support the parties' claims. The affidavits tend to be lengthy, and supported by multiple exhibits (documents corroborating the statements of the person swearing an affidavit such as pay stubs, bank statements, letters from the doctor, etc.) They are of crucial importance and require meticulous fact finding by your lawyer as well as careful and persuasive drafting.

Preparation of the motion materials, and attending to argue the motion, are complicated and time-consuming tasks, which translate in high legal costs to be paid by the parties. As a guideline, I tell my clients that preparation of the necessary documents may easily take up to 25 hours of my work. My attendance at court, which can be a full day or more, is in addition to the preparation time. Remember that anything that you want the Judge to know about your case has to be contained in your Affidavit. Contrary to what many people believe, there is no "telling things to the Judge." Every fact and every document that you want the Judge to consider has to be included in your Affidavit. The nature of the court process is such that the Judges decide the motion based on the parties' affidavits and the legal argument made by your lawyer.

Long Motions

Long motions usually involve complex issues and complicated fact scenarios. Quite often, with the court's permission, oral evidence is admitted during long motions. Parties are still required to present their evidence in the form of affidavits, but they can be cross-examined on their affidavits. In addition to presenting their legal arguments in the oral form, the lawyers for each party prepare them in written form by submitting their Facta.

Preparation for the long motions is more extensive and, consequently, more time consuming. Not surprisingly, long motions take longer, sometimes days rather than hours. Legal bills grow in proportion to the time required by your lawyer to prepare motion materials and attend at court to argue a motion.

Motions are very different than Conferences. As a result of a motion, though not always at the end of the motion, the Judge decides the issues. Parties' consent is not required. The issues (with some exceptions) are decided on a temporary basis. So if the parties cannot agree on who has the custody of the child before the matter is decided at trial, and the motion is brought on this issue, the Judge will make a temporary decision which will remain in force until trial. Quite often, the parties decide not to proceed to trial, and the temporary motion order becomes, for all practical purposes, a final order. Motions are commonly brought to decide the issues related to child support and spousal support, as it may take a year or more before the trial takes place and the party who should be receiving child support and spousal support may not be in the position to wait that long. The parties often reach settlements in court just before the motion is being heard.

Questioning

The parties in a family law case may decide that they need to question the other party. Questioning gives the parties an opportunity to ask each other any questions that are relevant to the determination of the disputed issues. The questioning may take place by consent of the parties, or by the court order. It takes place orally, under oath or affirmation, and in the presence of the court reporter. The parties' witnesses may also be questioned.

Questioning requires the lawyer to prepare and to attend. Lawyers not only question the opposing party and his or her witnesses, but are also present when their client is being questioned. In addition to paying their lawyers for the time spent preparing for and attending questioning, the parties have to book a court reporter's room at their own expense, and order transcripts (a noticeable per page fee applies.) Because questioning is such an expensive step in litigation, it is only ordered when, in the court's opinion, the expense is justified by non-disclosure and the complexity of issues, as well as is in proportion to the value of the parties' assets, spousal support, and child support claims. The transcript of questions and answers can become evidence on a motion, or during the trial.

Office of the Children's Lawyer Disclosure Meeting

The Office of the Children's Lawyer (the OCL) Disclosure Meeting takes place when custody and access are at issue and the OCL is involved. The role of the OCL is to collect the information about family members, to assess the family dynamics, and to recommend what custody arrangements will be in the best interest of the child. The purpose of the Office of the Children's Lawyer Disclosure Meeting is to allow the OCL to present its findings and recommendations. The findings of the OCL, while not binding on the court, have considerable influence over the court's decisions and play an important role in facilitating settlements.

If the parties were unable to settle their issues after all of the conferences, a trial date is usually set. A vast majority of family law cases (over 95%) settle before the trial, and most family law cases settle early in the process, sometimes as early as during the Case Conference. The stress, inconvenience, and costs of litigation play a great role in discouraging the parties from going all the way to trial. If the parties decide to proceed to trial, the bulk of the costs lie ahead of them. It is estimated that, including preparation time, a single day of trial can cost from $10,000 to $20,000. In most cases, the lawyers require their clients to provide them with trial retainers (money that guarantees lawyer's payment) well in advance of the trial.

Shortly before the scheduled trial date, the "assignment court" takes place. Its purpose is to update the court about the case, as well as to present the parties with yet another opportunity to settle some or all the issues.

Trial

Trial is the final step in the family law litigation process. At the trial, the Judge decides any unresolved issues for the parties. The Judge's decision is final and binding. At the trial, both parties have the opportunity to orally present the evidence in support of their claims. In addition, parties' witnesses testify before the Judge and documentary evidence is presented.

Parties' lawyers have a lot to do to prepare for the trial. The general rule is that every document or piece of evidence that the parties intend to rely on during the trial has to be presented to the opposing party in advance of the trial. Requests to Admit have to be exchanged, documentary evidence and financial records have to be prepared for filing with the court, trial records have to be prepared and filed, witnesses have to be prepared and lawyers have develop strategies for examining the witnesses. Any reluctant witnesses have to be summoned to appear at court. Reports, such as the OCL report, or Custody and Access arrangements have to be reviewed and analyzed. If expert witnesses testify, they have to be prepared. Their fees are substantial and add to the overall costs of the trial. Lawyers also have to prepare their opening and closing arguments, research the relevant law and prepare the applicable jurisprudence for sharing with the Judge and the opposing party. At the same time, intensive negotiations take place and offers to settle, sometimes multiple ones, are exchanged.

A simple, single issue family law trial can easily take two or three days. A complicated, multi issue trial usually takes up to two weeks. In some situations the trial can exceed two

weeks. This can happen when witnesses have to testify through an interpreter, when there are multiple witnesses, especially expert witnesses, and when documentary evidence is voluminous; all of which is quite common.

After the trial takes place, the judge renders his or her decision based only on what was said at trial by the parties, their witnesses, and their lawyers.

Most people expect that after the trial is finished, the court will immediately release its decision. In most cases, the decision is actually released quite some time after the trial is over. In family law cases, there are usually no clear winners or clear losers. Most often each party will win something but lose something else. For example, one may win on the issue of child support, but lose on the issue of spousal support; win on the issue of equalization of property, but lose on the issue of custody and access.

Ontario has a "no fault divorce," so if you go through litigation with the hope that the court will somehow blame your ex for the breakdown of the relationship, you will be bitterly disappointed. Moreover, the conduct of the parties during their relationship, in most cases, has no bearing on how the financial issues are decided. In other words, the fact that your spouse cheated on you does not change the rules of property equalization or spousal support.

So what happens if you lose? Or more typically, what happens if you lose more than you win?

If you lose a motion, you can expect to be ordered to pay a part (sometimes a big part) of the winning party's legal costs. The same happens if you lose at trial. If a successful party behaved unreasonably, he or she may be deprived of all or part of their own costs, or may even be ordered to pay all or part of the unsuccessful party's costs. If you win, or mostly win, you can expect that the losing party will have to pay some of your costs.

Offers to settle are of great help in assessing how much of the winning party's costs are to be paid by the losing party. If you won at trial and the terms of the order are the same or better for you than the terms of your offer to settle (for example, if you were ready to accept $1000 per month in spousal support, but you won $1,200), you can expect that the losing party will pay a noticeable part of your trial costs. Still, full recoveries of legal costs by the winner are virtually unheard of.

The news is not so great for the losing party, especially if he or she acted unreasonably during the litigation (for example, did not provide financial disclosure, or advanced claims unsupported by evidence and the existing state of the law). In addition to paying his or her lawyer, the losing party may also be ordered to pay some of the winner's legal costs.

All things considered, avoiding litigation and settling your family law matters without going to court is always preferable. In an ideal world, only cases involving new legal issues should be litigated. In the real world, however, matters go to court because parties take unreasonable

positions, are unwilling to compromise and lose sight of what is in the best interest of their children.