Trial Preparation: Tips, Tricks and Tactics for Winning Your Trial
I. Introduction

The scenario is one that plays out in every family law lawyer’s practice. You have completed a Judicial Case Conference, participated in a four-way meeting with opposing counsel and clients, and exchanged offers to settle. You have even engaged a family law mediator, but all to no avail.

There still remain one or more intractable issues that will likely only be resolved in a family law trial. Of course, prudent counsel understand that only if there is a high probability your client’s position will prevail at trial and the issues are significant, should the judicial route even be contemplated.
But the die is cast and your trial date is only three months away. Certainly you continue to pursue settlement but serious preparation must begin in earnest, for the secret for winning a family law trial is TRIAL PREPARATION. You may be the most senior lawyer or the most articulate counsel ever to practice family law, but if your preparation is inadequate you put yourself in a disadvantaged position.

This paper will set out my TRIAL PREPARATION tips, tricks and tactics with the hope that you will find a tidbit that is useful to you.

II. First Principles

In order to become or to retain your status as leading family law trial counsel there are several basic steps that are mandatory.

A. You must have a thorough understanding of the Supreme Court Family Rules that govern pre-trial procedures and trial proceedings. As a young lawyer, I read through the former Rules of Court on a monthly basis, each time discovering or remembering a gem that I had previously overlooked. Knowing the rules inside out is a great confidence builder for young counsel.

B. You cannot expect to be comfortable at trial unless you are intimately familiar with the rules of evidence. As part of your TRIAL PREPARATION you must think carefully. What is it you need to prove? How will you prove the points that are necessary to win your case? What kind of evidence is required? Can that evidence be introduced through your client’s testimony?

C. Issues such as late production of documents, hearsay, privilege, expert opinions, proof of foreign law and admissibility generally, arise in many trials. You must review the Evidence Act, particularly in cases where business records Form part of the evidence. Keep in mind that according to writer and scholar Samuel Johnson “Knowledge is of two kinds. We know a subject ourselves or we know where to find information upon it.”

D. Trials involving children can be tricky, especially when parents, grandparents and assorted other witnesses relay to the court what little Johnny, age six, told them. While hearsay rules are notoriously relaxed in family law trials, when the hearsay is more prejudicial than probative, be ready to object. If the evidence you wish to tender is close to the line, heed the words of Lord Blackburn “If you intend to offer inadmissible evidence, say it is part of the res gestae.” But first, you have to know what that means!

E. You also need to consider what kind of evidence opposing counsel will seek to proffer to persuade the court their positions ought to be preferred over yours. When you arrive in court you bring a folder with the leading case and/or textbook excerpts on each evidentiary issue that may arise. You will use this material and have it on hand for every family law trial you conduct.

F. Witness preparation is imperative and should be a priority. You will discover that most people would rather have a tortuous root canal than appear in a courtroom as a witness.

G. You must also be discerning. Even if your client insists that Aunt Aggie must be a witness, you need to exercise your professional judgment. Is Aunt Aggie’s testimony required to prove one or more of the essential elements of your case? Does her testimony overlap or repeat the testimony of another witness? A definitive sign of inexperienced counsel is a parade of relatives who provide biased, self-serving testimony. Generally speaking, a family witness is not desirable.

1 Singular of “dice” reputedly spoken by Julius Caesar.
H. Another common mistake is to believe that eight witnesses are better than one or two. It is during TRIAL PREPARATION that important decisions must be made: witnesses culled, subpoenaed, if necessary, and prepared to give their evidence. If a witness is expected to be the conduit for the admission of a document, they need to know that. It is essential that witnesses have some understanding of the trial process, courtroom etiquette and basic rules on hearsay. They can only testify in regards to their personal knowledge, based on their observations. They cannot simply parrot what they were told by the party they are supporting. They also cannot state conclusions such as “I think that Betty should have custody of Johnny.” Nobody cares what they think.

I. An important part of TRIAL PREPARATION is the selection of documents that are required to prove or defend your client’s case. Lazy counsel simply take every document they have listed and create several large books of documents for trial, with no actual thought of whether the document is really necessary. We have all read Reasons for Judgment that refer to piles of paper never addressed by any witness, simply a part of the morass.

J. Document selection is a crucial step that requires the matching of a particular document to the witness who will identify it and testify concerning it.

K. Examination for discovery often yields significant admissions; however, not every case requires it. Think strategically. You may decide to hold back certain questions until trial for greater impact.

L. To undertake a skilled cross-examination, preparation is everything. My practice is to begin by reviewing all sworn evidence of the opposing party and highlight the evidence that I need that opposing party to confirm. Frequently, this evidence will be entered through the opposing party’s evidence in chief, but to the extent it is not, I cross-examine on those topics. This strategy is a win/win because if the witness agrees, the evidence I need goes in. If the witness disagrees and the sworn evidence is significant, I can impeach the witness with his former sworn statements.

M. Once again, a thoughtful analysis is required to determine what evidence need be elicited from opposing party. Counsel should eschew the practice of extended cross-examination (days instead of hours) that is unfocused, irrelevant and illustrative of inexperienced or overbearing counsel.

N. The key to cross-examination is LISTENING TO THE WITNESSES’ ANSWERS. Typically, those answers will lead to further productive and fertile avenues of cross-examination.

III. Supreme Court Family Rules

Since July 2010 the family law bar and bench have their own set of rules that govern matters specific to family law proceedings. Some of the most important rules and changes to the former Rules that relate to pre-trial preparation are summarized below.

A. Rule 1-2 (3)—Waiver of Rules

This section allows a court to order, only by consent, that any provision of the Supreme Court Family Rules (the “Rules”) does not apply.

B. Rule 1-3—Object of Rules

The objectives of the Rules is to resolve family law cases fairly, taking into account the impact of litigation on children and minimizing conflict in a just, speedy and inexpensive manner, based on the interests of children and the importance and complexity of the issues.
C. **Rule 5-1—Financial Disclosure**

The Rule on Financial Disclosure:

a. Identifies documents that must be produced;
b. Provides for particulars where a Form 8 (formerly Form 89) is deficient;c. Specifies that financial information must be kept current;d. Provides that a Form 8 must be updated before an application or a trial, if it is older than 91 days before the application or trial commences.

D. **Rule 6-1—Address for Service**

Introduces a new concept called an “accessible address” defined as an address that describes a unique and identifiable location in the Province, that is accessible to the public during normal business hours.

This new Rule should eliminate the problem of box office addresses and apartment suites that are impenetrable.

E. **Rule 7-1—Judicial Case Conference**

Thirty days prior to a Judicial Case Conference the party setting the Conference must deliver a Form 8 with attachments to the opposing party. Seven days before a Conference the opposing party must also deliver a Form 8 and attachments. Both counsel must file their Forms 8 with the court seven days before the Conference.

F. **Rule 7-2—Settlement Conferences**

A settlement conference will only be scheduled if it is with the consent of both parties or ordered by a judge or master. The officiating jurist must not be the trial judge unless agreed to by both parties.

G. **Rule 9-1—Discovery and Inspection of Documents**

Lists of Documents must be exchanged unless counsel agree that lists are not required or the court otherwise orders. Documents not produced pre-trial may not be used in evidence or for the purpose of examination or cross-examination, unless the court orders otherwise.

H. **Rule 9-2—Examinations for Discovery**

Discovery is limited to five hours duration unless otherwise agreed by the parties. An application may be brought to increase discovery hours based on the criteria set out in Rule 9-2(3). Discovery rules also apply to persons residing outside of BC.

I. **Rule 9-3—Discovery by Interrogatories**

Interrogatories may only be used if the party to be examined consents or if the court grants leave.

J. **Rule 9-6—Admissions**

Admissions in a Notice to Admit will be deemed to be admitted if there is no reply within 14 days of delivery. A party cannot withdraw an admission made in a Notice to Admit, a deemed admission or an admission made in a pleading unless the parties consent or with leave of the court.
K. Rule 9-7—Depositions

By consent or by court order a person may be examined before or during a trial and their evidence may be used at trial. The grounds for ordering a deposition include the convenience of the person, the physical or mental health of the person, the prospect of their unavailability to attend the trial, whether video-conferencing is available and the expense of attending the trial in person. This Rule also applies to persons residing outside of BC and, if necessary, a Letter of Request may be sent to a foreign court.

L. Rule 10-3—Chambers

An order in Chambers may be made in the absence of the opposing party if the court decides that the objectives of the Rules require it. A non-appearing party may apply for a reconsideration of a matter if they can show their absence was not due to willful delay or default.

M. Rule 10-4—Affidavits

Exhibits to affidavits need not be filed with the court, but must be available for the use of the court and prior inspection of a party where the exhibit is more than ten pages. Exhibits ten pages and under must be attached to an affidavit. An affidavit may contain statements on information and belief where the source of the information is identified and the order sought is not a final order.

N. Rule 11-3—Summary Trial

A summary trial must be heard at least 42 days before the scheduled trial date.

O. Rule 12-4—Injunctions

An injunction may be ordered even if a claim for an injunction is not a part of the relief claimed.

P. Rule 13-1—Court Ordered Reports under Section 15 of the Family Relations Act

A party who wishes to cross-examine the person who prepared a report must provide at least 49 days notice.

Q. Rule 13-2—Duty of Expert Witness

An expert appointed under Rule 13-1 must not be an advocate for any party.

R. Rule 13-3—Appointing Joint Experts

If any party wishes to proffer an expert report on financial issues, that evidence must be presented to the court by means of a jointly appointed expert unless the parties agree otherwise or the court otherwise orders.

Expert evidence on non-financial issues may also be presented by a jointly retained expert or by a party’s own expert.

S. Rule 13-4—Jointly Appointed Experts

Includes provisions regarding the retention of a joint expert, including the matters to be settled prior to the appointment and the requirement of a written agreement signed by the parties or their lawyers and the expert.

If you wish to introduce the evidence of another expert, you must bring an application for leave to do so within 21 days of the receipt of the joint expert’s report.
T. Rule 13-6—Expert Reports

An expert report must be delivered to opposing counsel at least 84 days before the scheduled trial date. A responsive expert report must be served on opposing counsel at least 42 days before the scheduled trial date.

Upon request by opposing counsel, an expert must promptly provide documents, written statements, notes of independent observations, data compiled, and testing results.

Upon request by opposing counsel, an expert must make available his or her file at least 14 days before the scheduled trial date.

U. Rule 14-3—Trial Management Conference

Unless otherwise ordered a conference must take place at least 28 days before the scheduled trial, preferably by the judge who will preside at trial.

Counsel must file and deliver a trial brief in Form F45 setting out positions, witnesses, and experts, and both counsel and clients must attend except in a case where a client is available by telephone or an individual is present or readily accessible who has full authority to make decisions for the client.

V. Rule 14-7—Evidence and Procedure at Trial

A party must not lead evidence from a witness unless that witness is listed in the witness list, unless otherwise ordered by the court.

Deposition evidence may be tendered at trial and the deposed witness may also testify orally at trial, however, the entire deposition must be tendered unless otherwise agreed by the parties or ordered by the court.

A party seeking to introduce affidavit evidence must serve a copy of the affidavit to opposing counsel at least 28 days before applying for an order for same.

If authorized by the court a party may use a recording device to record evidence at trial.

W. Rule 18-2—Jurisdictional Disputes

A party disputing the court’s jurisdiction must file a Jurisdictional Response in Form F78.

X. Rule 22-4—Electronic Filing

A person wishing to file documents electronically must enter into an agreement with the Court Services Branch of the Ministry of Attorney General.

An affidavit or other signed document must be accompanied by a statement in Form F96 indicating that the original paper version of the document bears the signature of the deponent, the filed document is a true copy and the person or lawyer filing has no reason to believe that the signature is not the signature of the identified signatory.

IV. Practical Preparation

With the introduction of the new Rules, it is even more necessary to create a time line for each client matter in order to thoughtfully consider the pre-trial procedures that Form a part of your trial preparation and to avoid the embarrassment of missed deadlines, or worse. An example of a typical eleven month time line is set out below.
• January 2, 2011  Notice of Family Claim Filed and Delivered, Provide draft Form 8 to client to complete and advise client of documents required.

• January 15, 2011  Follow up with client re: Form 8 and documents.

• February 1, 2011  Response to Family Claim due.

• February 7, 2011  Finalize client’s Form 8 and required documents and deliver to opposing counsel.

• February 10, 2011  Consider need for further particulars of Response and Counter Claim.

• February 10, 2011  Obtain client’s and opposing counsel’s dates and schedule Judicial Case Conference. Obtain date of March 25, 2011.

• February 12, 2011  Compile and review cases relevant to legal issues raised.

• March 11, 2011  Respondent’s Form 8 and attachments due.

• March 17, 2011  File and deliver client’s Form 8 to Registry.

• March 25, 2011  Attend Judicial Case Conference, set trial management conference for November 2, 2011, set trial date for December 5, 2011. Obtain s. 57 declaration and discuss joint retainer of business valuator.

• March 30, 2011  Follow up in writing on Respondent’s List of Documents with opposing counsel and consider what other documents should be produced by your client. Settle on matter of expert witness and instruct expert witness. Advise expert in writing that the report is required 90 days before trial of December 5, 2011, but to begin settlement discussions request the report by June 30, 2011.

• April 10, 2011  Review file and documents to determine what documents are still outstanding and advise opposing counsel.

• April 28, 2011  No response from opposing counsel. After 35 days from date of first request for documents, prepare application for production of documents and deliver to opposing counsel on May 5, 2011, to be heard on May 20, 2011.

• May 10, 2011  Respondent’s Response and Affidavit for documents application due.

• May 18, 2011  File Applicant’s Response to Respondent.

• May 20, 2011  Obtain order for document production.

• June 4, 2011  Receipt of Respondent’s documents.

• June 6, 2011  Obtain opposing counsel’s dates for discovery. Set examinations for both parties for June 20, 2011.

• June 20, 2011  Complete discoveries.

• June 25, 2011  Consider need for pre-trial examination of other persons, interrogatories or deposition. Take required steps.

• June 30, 2011  Draft and deliver Notice to Admit.

• July 2, 2011  Begin to draft settlement offer.

• July 14, 2011  Response to Notice to Admit due.

• July 15, 2011  Deliver settlement offer to opposing counsel.

• August 15, 2011  Receipt of counter offer from Respondent.

• August 18, 2011  Seek opposing counsel’s consent to set down a settlement conference and/or mediation to be set no later than 90 days before trial.

• August 30, 2011  Attend settlement conference.
• **September 11, 2011** Deadline to deliver joint expert report.

• **September 12, 2011** Request expert’s file. Consider expert report and determine if additional expert evidence is required. Bring application for leave to introduce further expert evidence, if necessary.

• **October 1, 2011** Commence preparation of client’s updated Form 8. Prepare trial management brief.

• **October 23, 2011** Deliver trial management brief to registry and opposing counsel.

• **November 1, 2011** Commence final trial preparation including drafting chronology and Scott Schedule, determine sufficiency of document production, consider witnesses required, deliver updated Form 8.

• **November 2, 2011** Attend trial management conference with client.

• **November 7, 2011** Deadline to advise expert witness of requirement for cross-examination. Prepare Trial Record.

• **November 15, 2011** Preparation of witness’ evidence. Selection of documents for trial. File Trial Certificate and Trial Record.

• **November 18, 2011** Obtain instructions for further settlement discussions, schedule meeting with opposing counsel for four-way meeting for November 24, 2011. Make arrangements with opposing counsel for joint book of documents.

• **November 24, 2011** Meet with opposing counsel for settlement discussions.

• **November 25, 2011** Finalize Joint Book of Documents. Draft outline of questions for witnesses.

• **November 30, 2011** Finalize Brief of Authorities. Prepare cross-examination of opposing counsel’s witness’.

• **December 2, 2011** Draft opening submissions.

• **December 3, 2011** Meet with client to prepare for direct and cross-examination.

• **December 5, 2011** Trial begins.

### V. Conclusion

Trial work is rigorous and exhausting, even more so when appropriate preparation has fallen by the wayside. Most trial counsel do not have a phalanx of lawyers back at the firm doing their bidding. Be kind to yourself before your trial commences. You will have enough to handle at trial without catching up on matters that should have been done before trial.

Finally, take note of the admonition of Associate Chief Justice of the United States Supreme Court, Louis Brandeis, who wrote in 1916:

> A judge rarely performs his functions adequately unless the case before him is adequately presented.