

Cold Courts

Canada has a cold climate, but eventually we have summer. A courtroom is as cold as a stone.

You don't want to have a family law trial. Here are some reasons why:

- * Your day in court may be a long time in coming. Even if you have moved quickly through all the legal steps required before trial, your trial may not start as scheduled. Trial coordinators routinely overbook courtrooms. They expect some cases to settle before trial, and if their predictions are wrong, you may get bumped because no judges are available. This usually means months more of waiting for a new trial date.

- * Testifying is emotionally draining. You feel like you are being tested - and you are. While the other side is looking for holes in your evidence, the judge is assessing your credibility. Your memories are disputed. Your perceptions are challenged. Your morals and values (or lack of them) are on display.

- * Listening to the other side's testimony can be equally draining. How can the person you loved be so critical of you now?

- * You are probably used to living your family life "behind closed doors." In the courtroom, there are no closed doors. If it's relevant, you must disclose it, even if it is embarrassing or humiliating.

- * A real trial is never like television. Often, long stretches are just plain boring. Remember, when the judge walks into the courtroom, he or she knows almost nothing about your case - maybe just your names. Both sides have to give the judge all the background information needed to make a decision. It can include going through hundreds of tedious exhibits and dredging up ancient history.

- * Witnesses, (sometimes even professional witnesses), take sides. You line up your family members to testify for you and your spouse does the same. This often divides families even more than they were before the trial. What does this teach your children? Sometimes your own witnesses don't say what you expect them to say, and they make things worse for you instead of better. Or your witness may reveal something in cross-examination that is harmful to your case.

- * Not all your evidence may be admissible. Although judges might relax the Rules of Evidence in custody trials, (for example, the rule against hearsay is not as stringently enforced), for the most part the Rules still apply. The judge may exclude evidence you think is essential.

- * You don't get to pick your judge. Some judges are very experienced in family law, but your case might be that judge's first family law trial ever.

- * While judges do their best, they are only human, and they have bad days too. All judges bring their own cultural baggage with them. From the judge's point of view, your case may be not nearly as strong as you think it is.

* Judges can deal with only legal issues. Many non-legal issues surface in a family law trial. You (or your spouse) might need psychological counselling for mental health or emotional troubles. Your spouse might have a substance abuse problem or a gambling addiction. Maybe you are both poor money managers. One of you might have serious physical health issues. There are no legal solutions to these problems.

* Judges are good at making decisions about what happened in the past - who was at fault for that car crash? Did the accused commit that crime? Like everyone else, though, judges are not good at predicting the future - who will be the better parent in five years?

* Just because the trial is over doesn't mean that you're finished. The judge may take weeks or even months to issue a decision.

* When you get your judgment, remember that it is only a piece of paper. You may have to take many more legal steps to enforce it. What you thought was a successful outcome may evaporate when you can't enforce it.

* The court will post your judgment on the internet. No more privacy. Your boss and your neighbours can find out about your criminal record, your alcoholism, your mental illness, your finances.

* If you are unsuccessful in proving your case, you may have to pay the other side's costs.

* Undoubtedly, one of you will be unhappy with the trial judgment. Sometimes, the trial judge makes a decision that neither of you expect and neither of you like.

* You think (or your spouse thinks) the trial judge made a serious mistake and you want to appeal. But appeal courts don't generally interfere in family law decisions. Unless the trial judge made a clear error in law or there was a major deficiency in her understanding of the evidence, the trial judgment will stand. Even if you can prove an appealable error, depending on how the trial unfolded, you may not get the order you want. The appeal court has the option of sending your case back to the lower court to be re-tried. More time. More expense.

* Trials are expensive, and appeals cost even more money.

There are many alternatives to trial. Check out the skilled mediators, negotiators, and arbitrators in your area. The courts now offer judicial dispute resolution in various forms. You can present your case to a judge informally without having a trial. Both you and your spouse can go to lawyers who practice collaborative family law to keep you out of the legal system entirely.

Having said all of this, some cases do have to go to trial. Unlike television, brilliant legal argument does not usually win trials. Most often, the facts determine the outcome. The judge gets to decide which facts are true and which are not. Lawyers can do their best to present the case, but they cannot change the facts to turn a bad case into a good one. The best cases for trial are the ones where the only issues are legal, such as the correct interpretation of a statute.

The statistics from Alberta's Court of Queen's Bench consistently show that fewer than 5% of all divorce cases end in trial. Choose your battles wisely, and stay out of the cold.

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