The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

FAMILY LAW

Chapter 1

Initial Considerations

July 2023

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A. THE PRACTICE OF FAMILY LAW

1. The Practice of Family Law is Different

Family law is really the practice of civil litigation with a very focused subject matter and its own special rules. It is different in that the issues involve parties who will likely maintain an ongoing relationship, and who may need immediate attention.

A family law case frequently requires spending a lot of time with the client in interviewing and preparation, as understanding what is truly important to the client is crucial to providing proper advice. While it is quite common for a civil litigation file to be worked on for months without the active involvement of the client, in family law that is seldom the case. Family law is also different because the facts are constantly changing and the issues constantly have to be reassessed and refocused.

A family law case may be addressed at first instance by a court process, a referral to mediation or other alternate dispute resolution process, or the scheduling of an all-party/ lawyer meeting.

> Matters can be urgent and can seldom wait for the trial to run its course before something is decided. The issues relating to parenting of children, who resides in the residence and support issues may need to be addressed through an interim agreement or interim order.
>
> It is a constant juggling game of balancing the needs expressed by the client and the cost versus benefit of procedural options.

2. The Interplay Between Family Law Practice and Civil Litigation Practice

a) Rules

The King's Bench Rules as they apply to civil litigation apply to family law proceedings, except where superseded or altered by Rule 70 which deals specifically with family law practice.

b) Pleadings

Pleadings in family law are set out in King's Bench Rule 70. The pleadings are generally on prescribed forms. When pleading something out of the ordinary, for example, a trust claim, it is advisable practice to plead such a claim fully, as if one were filing in the civil division. The King's Bench Forms and Rules with respect to motions and orders apply to family proceedings unless Rule 70 provides otherwise. The form of the family law order will refer to the statute under which the relief is being granted.

The King's Bench (Family Division) requires the use of standardized clauses for court orders known as standard clauses (Rule 70.31). Version 6 of the standard clauses is available *here*, and should be used until Version 7, in process at the time of this writing, is available.

c) Statutes

Bill 17 was introduced in March 2022 and received royal assent on June 1, 2022. It came into force on July 1, 2023, at which time it repealed *The Family Maintenance Act* in its entirety. *The Family Maintenance Act* has been replaced by *The Family Law Act*, *The Family Support Enforcement Act. The Inter-Jurisdictional Support Orders Amendment Act* came into force at the same time. There are also consequential amendments to many other statutes. These new statutes contain relief previously found in *The Family Maintenance Act*, and harmonize with the provisions of the *Divorce Act*.

Family law is largely codified within these statutes: the *Divorce Act*, *The Family Law Act*, *The Family Support Enforcement Act* and *The Inter-Jurisdictional Support Orders Act*, *The Child and Family Services Act*, *The Family Property Act*, *The Pension Benefits Act,* or relevant federal legislation, and *The Domestic Violence and Stalking Act*.

Most of the relief commonly requested will be based upon one of these statutes. Go to these statutes first for answers to questions. The answer is often contained expressly and clearly in the statute. Both the *Divorce Act* and *The Family Law Act* have detailed guidelines dealing with child support.

d) Common Law

In reported cases, courts tend to consider points at issue within statutes or other pieces of legislation. It is this ongoing consideration and re-consideration of the points in the statutes which cause the area of family law to be constantly evolving.

3. Lawyer's Role

The lawyer's role in family law, apart from the application of legal knowledge, is to assist the client through a difficult time in the most beneficial and expeditious fashion possible. Compromise in the resolution of acrimonious or contentious matters is necessary and mandated, including considering and advising clients about using ADR processes in both the Manitoba *Code of Professional Conduct*, *Rule 3.2-4* and in the *Divorce Act,* section 7.7(2*)* which states:

> ***Duty to discuss and inform***
> *7.7(2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act*
>
> > *(a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;*

(b) to inform the person of the family justice services known to the legal adviser that might assist the person

(i) in resolving the matters that may be the subject of an order under this Act, and

(ii) in complying with any order or decision made under this Act; and

(c) to inform the person of the parties' duties under this Act.

Similar duties are included in *The Family Law Act* in section 9.

The lawyer is also required to inform the parties of their own duties under sections 7.1-7.6 of the *Divorce Act* which states:

Best interests of child

7.1 A person to whom parenting time or decision-making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child.

Protection of children from conflict

7.2 A party to a proceeding under this Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding.

Family dispute resolution process

7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

Complete, accurate and up-to-date information

7.4 A party to a proceeding under this Act or a person who is subject to an order made under this Act shall provide complete, accurate and up-to-date information if required to do so under this Act.

Duty to comply with orders

7.5 For greater certainty, a person who is subject to an order made under this Act shall comply with the order until it is no longer in effect.

Certification

7.6 Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a party to a proceeding shall contain a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5.

Lawyers have the same obligation under section 9(1) of *The Family Law Act* to inform the parties of their own similar duties, set out in sections 2 through 8.

It is the lawyer's role to assist the client in obtaining whatever relief is lawfully available, and appropriate in the circumstances. Consideration of the client's, and at times the family's, long term welfare will determine the advice given.

Unlike civil litigation where a wrong or breach has occurred at a specific time leading to the possibility of liability and damages, in a family case issues will continue to evolve and change. This means ongoing evaluation and responses to matters as they arise will be required. The needs of the client are often expressed in highly charged emotional instructions. It is part of the lawyer's role to diffuse and not inflame the situation, if possible, and to attempt to elicit reasoned and sensible instructions.

There may be times when a client's position is not well-reasoned and is contrary to the guidance given. If the lawyer, after carefully considering the situation, decides to continue to act, written instructions are advisable.

Written instructions are important in two ways:

- They emphasize to the client that they may be making a mistake and that the lawyer is taking time to set this out for the client's sober second thought. Once clients are told the purpose of written instructions, they will often reconsider the positions which they have taken.
- They set down in writing that the instructions given by a client are the client's own (and against the lawyer's advice, if that is the case) and thereby protect the lawyer.

In the practice of family law you will be called upon to deal with clients who experience or perpetrate domestic violence, who have problems with substance abuse and who are emotionally distraught or unstable individuals. Although it is not the lawyer's role to be judgmental of any of these issues, it is certainly the lawyer's function to identify any factors that may impair a client's ability to make appropriate decisions, to be sensitive to these issues and to attempt to understand matters from the client's perspective.

It is the lawyer's role to identify the difficulty and refer the client to the appropriate resources. The lawyer's assistance can be indirectly rehabilitative. It is quite common that the client may be referred for counselling to any number of counselling facilities, child protection agencies, psychologists, social workers or psychiatrists.

In dealing with persons who are disadvantaged, troubled and in desperate need of help, it is imperative for the lawyer to tread carefully. People who are emotionally fragile can easily misinterpret steps that a lawyer takes or can be easy prey for the unscrupulous. If you have a concern as to the competency of your client to give you instructions, then you should obtain evidence to address your concerns. You might insist upon the client providing you with medical evidence, or, with the permission of the client, speak with third parties who may

provide insight as to the client's situation. It is necessary for you to be satisfied of the client's competency. This is a delicate matter and has to be approached with great care and tact.

> It is also important not to become emotionally involved with the client's case. Such involvement clouds judgment, and makes proper client management much more difficult.

It is inappropriate and unethical to speak disparagingly of opposing counsel or the other party. One should always strive to maintain a calm and respectful approach in family law proceedings. There is a strong possibility that negative comments shared with one's own client will be repeated to the opposing party, lawyer, or court. It is important to recognize that while clients may come and go, you will be dealing with the same professionals year after year and a hostile relationship is not a working relationship. (See *Code of Professional Conduct, Rules 7.2-1* and *7.2-4*).

B. THE INITIAL INTERVIEW

1. Pre-Interview Conflicts Check

Before the initial interview, ensure that there will be no conflict of interest in your acting for the particular client. This is especially important in large firms where, for example, the corporate department may be acting for the spouse on a commercial matter. You should check the names of the client, their spouses, new partners, past partners and any corporate interests that may be held by any of these individuals.

2. General Considerations

The initial interview is one of the most important steps in the handling of a family law case. A new client often arrives misinformed as to their rights and obligations, and the relief or procedural options that may be available.

In addition, a family law client is often in an emotional state, having recently made a decision to end a relationship or facing a partner's intention to alter the status quo. Within reason, it is sometimes necessary to allow clients to voice their emotions during the course of the interview. Remember, that you are acting as a lawyer and not as counsellor or therapist. Where appropriate, provide the client with a list of the contact information for a variety of counselling services. It is also important to consider the possibility of domestic violence and its impact on the client and their case.

In the preliminary interview, in addition to gathering information and assessing the case on a legal basis, you will be providing the client with necessary and vital information about the law, how it is expected to impact upon the client, and what can be expected from the legal system, including procedural options. Some clients will need advice on how to protect their interests in the meantime. Problems may be revealed for which referrals to emergency agencies and/or support services may be required. A discussion about legal fees and disbursements at an early stage is important for both the client and lawyer involved.

> Counsel must be attuned to the possibility that the client has not been able to understand, or absorb, all the information provided. Advise the client that they can contact you to clarify an issue or piece of information, if needed.

3. Assessing the Case on a Preliminary Basis

The preliminary interview generally follows three specific phases.

a) The Client's Story

The first stage of the interview should generally be the opportunity for the client to state in general terms, the nature of the problem. You should then request some

basic information so that you can discuss the client's difficulties and provide advice in a known context.

b) Particulars and Notes of Facts

This second stage of the interview involves asking questions and making notes of particulars and facts which will be of assistance in the case.

In most cases this involves obtaining:

- The names, addresses, phone numbers, dates of birth and places of birth of the parties.
- The date of marriage, place of marriage, marital status prior to marriage, and surnames of the parties before the marriage. For persons in common-law relationships, you should obtain the date cohabitation commenced and any evidence supporting this date, surnames of the parties before cohabitation and details of the registration if the common-law relationship has been registered under *The Vital Statistics Act*.
- Information about the date of separation and the circumstances of separation.
- Any pre-existing agreements (including cohabitation, spousal or prenuptial agreements, or separation agreements) or court proceedings.
- Information about any children, including their names, birth dates and present circumstances.
- Particulars as to the parties' assets and debts and information to help determine whether and how these items may be considered under *The Family Property Act* or other property legislation.

Many practising family lawyers provide a basic questionnaire to the client prior to the first interview, which may allow a more efficient use of the lawyer's time.

Checklists are commonly used at this stage of the interview. It is important when using checklists, however, to understand that they are not intended to be a substitute for direct pointed questions and should not be slavishly followed as they may be insufficient.

You will likely require more information before you can offer an informed opinion to the client. At this stage you may want to assign your client homework such as gathering financial information and obtaining copies of income tax returns, pay stubs and banking information.

If parenting is in issue, it is often very helpful for the client to provide a written narrative containing such items as:

- biography of the parties;
- history of the relationship prior to separation;

- past history of parental responsibilities and roles since the birth of the child to the point of separation;
- particulars of the parenting plan since the separation;
- what the client is hoping to obtain with respect to parenting;
- what the client believes the other parent will be seeking;
- what parenting plan meets the needs of the children and the parents;
- names, addresses and phone numbers of individuals who may assist as witnesses.

Be aware that parenting should not be an issue that is raised only because a hurt and emotional client is attempting to punish their spouse. Sensible and pragmatic advice at the outset can often ensure that expensive and acrimonious litigation is avoided. Focus on the best interest of the children. In addition, encourage the client to recognize and accept that both parents are important to the children, notwithstanding the issues that may exist between the adults.

> *For the Sake of the Children*, the parent education program provided by the Family Resolution Service is mandatory where contested proceedings will occur and where parties will engage in mediation through the Family Resolution Service.
>
> It is an important program that provides useful parenting information and should be recommended for all parties, even where contested proceedings are not envisioned.

Depending on the nature of the issues, if you must obtain information from third party sources, you must have the appropriate authorizations signed by the client. It is also important to screen for domestic violence in every case. This is crucial, not only in cases where a protection or prevention order might be of immediate necessity, but also because of its potential impact in matters pertaining to parenting.

The obligation for lawyers to encourage clients to try and resolve matters through a family dispute resolution process and the obligation for parties to attempt to do so are modified when circumstances make it inappropriate. (See the *Divorce Act*, ss. 7.7(2)(a) and 7.3, and s. 5 of *The Family Law Act*). Domestic violence should be considered in this context. Screening for family violence is intended to assist the lawyer in identifying, assessing and managing risk for the client.

> The Department of Justice Canada has an excellent resource, the *HELP Toolkit*: Identifying and Responding to Family Violence for Family Law Legal Advisers.

c) Client Options

Once you have obtained an overview of the situation from your client and identified the information which you will need, you may be ready to begin considering a general strategy and course of action with the client.

This part of the interview involves discussing the options available and beginning to formulate a plan of action. To do so, it is important to identify the issues, outline the relevant law and review the procedural options, including identifying and discussing all possible outcomes, both positive and negative. If information is missing, or incomplete, qualify the possible procedural options, as the options may change when all the information is available.

Clients are almost always unaware of the cost in dollars or in time necessary to resolve the issues arising on relationship breakdown. A full understanding of the various options for resolving the matter will help ensure that the client is not unpleasantly surprised by the expense or time involved.

To some extent the nature of the problem upon which you have been consulted will dictate the legal response, but options such as referral to support services or mediation and negotiated settlement as an alternative to court action, should be discussed. In fact, if the client is seeking a divorce you are obligated, unless it is clearly inappropriate, to discuss the possibility of reconciliation and provide information about marriage counselling services (*Divorce Act*, s. 7.7(1)).

It is also the duty of every lawyer to encourage the parties to attempt to resolve their matters through a family dispute resolution service (*Divorce Act*, s. 7.7(2)) and to advise the client of their duties to do so, set out in section 7.3, as well as the client's duties to exercise their parenting time, decision making responsibility or contact with a child in accordance with the child's best interest (s. 7.1), protect children from conflict (s. 7.2), provide complete financial disclosure (s. 7.4) and abide by all court orders (s. 7.5). These duties also appear in sections 9 and 2 through 8 of *The Family Law Act*.

> For more information see the free course provided by Justice Canada on the Duties of Legal Advisers and Parties available at *Information for Professionals*.

d) Fees

Cost is another matter which ought to be dealt with. It is generally difficult for lawyers to discuss fees with clients. It is often particularly so in the area of family law given the emotional and financial upheaval many clients are experiencing.

It is incumbent on the lawyer to fully explain the different aspects of the fee arrangements and to obtain the client's agreement. If a lawyer intends to charge

interest on overdue accounts, this must also be discussed and agreed upon with the client. Any annual or other increases to the hourly rate should also be discussed.

It would be a good practice to address the frequency of billings with the client – billing monthly to avoid any surprises about fees and payments may be in both the client's and the lawyer's interests.

> The prudent practitioner will confirm the understanding in writing early on in the client-solicitor relationship, either by letter or retainer agreement.

The lawyer should also discuss fees and disbursements with the client when fees may be a consideration for the client in choosing between different options about how to proceed with their matter or when an unexpected situation arises such that the lawyer's previous estimate of fees needs to be revised. Where appropriate, clients should also be advised of the possibility of obtaining services through Legal Aid.

Some lawyers quote a set fee for simple matters such as uncontested divorces. However, it is almost impossible to predict if a matter will be uncontested or how complicated or time-consuming it will become. A common practice is to arrange for the client to pay an hourly fee for work done on the file and a counsel fee for days spent in court. Other factors and arrangements might also be considered (e.g., payment of the fees from some other source such as Legal Aid or an employment or prepaid legal service plan; payment postponed until a later date such as on the sale of the family home; or a schedule of interim payments, all of which should be recorded in writing).

The important point is that any arrangement must be fair and reasonable, and understood and agreed to by the client.

e) Disbursements

Disbursements are monies payable to others for specific services or for items required in the course of providing legal representation. They can include such things as court filing fees, vital statistics charges for marriage or birth certificates, long distance telephone charges, real estate or business or other appraisals and expert and medical reports.

Just as fees need to be fully disclosed, fair and reasonable, so must be the disbursements. The lawyer should only incur expenses which the client has agreed to unless such expenses are implicitly incidental to the legal services (e.g., filing fee for the petition for divorce). It should also be pointed out to the client that GST is payable on legal fees and most disbursements.

The lawyer is ethically obligated to pay disbursements which the lawyer incurs within a reasonable time unless otherwise agreed in writing at the time the expense is

incurred. Therefore, if the arrangement is that the client will be responsible for payment of the costs of expert reports, the letter requesting the report should make that very clear to the expert.

f) Legal Aid

Legal Aid Manitoba will provide legal services for low-income individuals for family related matters provided the individual qualifies financially and there is some merit to their case.

Subject to a determination of financial eligibility and merit, Legal Aid Manitoba may appoint a lawyer (by issuing them a "certificate") for many types of family law related matters such as separation and/or divorce, opposing or defending protection orders, support enforcement proceedings, parenting matters, child and/or spousal support matters, variations, child protection proceedings, grandparent or third party contact or guardianship.

Services are available throughout Manitoba. Legal Aid offices are located in Winnipeg, Brandon, The Pas, Dauphin and Thompson. Additionally, Legal Aid Manitoba staff travel regularly to 40 different communities throughout the province.

i. How to Apply

Applications can be made online at *www.legalaid.mb.ca*. However, a phone call will be required to be made within 30 days of that application to complete the process. Phone calls can be made to 204-985-8511 or 1-866-800-8056 between the hours of 9 a.m. and 4 p.m. Mondays through Fridays. If a client has no access to a computer or internet, applications can be initiated directly through this phone call. During the phone call an individual will collect information, explain what additional documents may be required and help the client through the application process.

Once all of the necessary information has been obtained by Legal Aid Manitoba, a written decision will be provided in approximately one to two weeks confirming if the client has been approved or if the application has been rejected and the reason why. If rejected, a form will also be provided to request an appeal and review of the decision which must be made in writing.

Online and telephone applications are available to individuals throughout the province including those incarcerated or in a women's shelter. There is no longer a requirement to attend in person to complete an application. An individual attending any Legal Aid office throughout the province will be instructed to follow the above process. If attending a child protection court in the province, there is generally a duty counsel lawyer available to assist and if appropriate they may be able to assist with the application process at that time.

Legal Aid Manitoba has a reciprocating agreement with other provinces in Canada. If a client lives outside of Manitoba but their legal matter is taking place in Manitoba, they may apply to Legal Aid Manitoba in the same manner set out above.

Any lawyer on the Legal Aid Panel may also complete an online application for a client which will not require the client to phone in to perfect that application. This is done through PBOnline for Private Bar Counsel or LAMAS for staff counsel. Counsel are encouraged to submit applications this way as it provides the speediest outcome for the client.

An applicant will be required to declare that the information provided during the application process is true. It is an offense to provide false information to Legal Aid Manitoba. Additional documentation may be required to verify financial circumstances and assist in the determination of merit. Such documents may include copies of Income Tax Returns, three consecutive pay statements or proof of assets/debts such as information concerning any investments, trusts, mortgages, vehicles etc.

In order to assess merit, any information pertaining to the legal matter at issue should also be provided. This may include copies of Petitions or other documents served on the person or copies of already existing court orders or agreements.

There is a $25 non-refundable application fee that can be paid by cash, money order, certified cheque or debit. Those in receipt of social assistance benefits, full-time students, those incarcerated or in a women's shelter or mental health facility are exempt from this fee.

ii. Eligibility

Financial eligibility is based on household income. Therefore, documentation for adult members of the household, including common-law spouses will also need to be provided. This may not include room-mates or the partner from which a separation is being sought, if the parties still happen to be in the same household when the Application is made. When assessing financial eligibility, consideration is also given to the number of dependents in the household for whom the applicant is responsible. The current eligibility guidelines can be found in the *Area Directors' Manual* chapter 4.

If approved there may be no additional costs associated with legal services provided. However, even those with some income or assets may still qualify for Legal Aid Manitoba through their Agreement to Pay program. Those individuals will be asked to sign an agreement to make monthly payments. There will be an initial payment followed by interest-free, monthly payments until the total Legal Aid cost of their case plus a 25% program fee (to a maximum of $1000) has been paid.

Further, if there is no income immediately available, but there is an asset such as a house such that money cannot be immediately accessed to pay the cost of a lawyer, Legal Aid Manitoba may request that a Charge on Land be signed. They will place a lien on the applicant's home requiring repayment of legal fees once the home is sold or re-mortgaged. Under no circumstances will Legal Aid Manitoba make someone sell or re-mortgage their home to pay for Legal Aid services.

In addition to being financially eligible, there must be merit to the application. Factors considered are:

- whether there is a reasonable chance of success based on the information provided;
- whether court action is necessary or whether some other agency or service can help resolve the problem;
- whether or not this is a serious legal problem for which a reasonable person of modest financial means would pay a lawyer to handle.

In most cases, matters involving parenting and child support will be approved. However, applicants may be rejected if there is no real benefit to proceeding (for example, if the applicant cannot provide any information about the responding party, including where or how they may be located). The benefit to the applicant would need to be considered before a lawyer may be approved to proceed.

Legal Aid Manitoba will not issue a certificate to seek a divorce based on what may be hotly contentious grounds of cruelty or adultery. If interim relief is required, a certificate may authorize the filing of a Divorce Petition so that the interim relief can be pursued immediately. However, the applicant will have to wait for one year of separation to finalize the Divorce on this less contentious and almost automatic ground. If the only relief being sought is Divorce, the application will be rejected and the applicant will be told to reapply after they have been separated for one full year. In those cases, they may also be referred to the University of Manitoba Legal Clinic where they can receive the services of a law student provided under the supervision of a lawyer.

Legal Aid Manitoba will not approve an application where the only issue is the division of property or pension. If the division of property is accompanied by parenting and support issues the lawyer may be given authorization to work with the client to try to negotiate a settlement of the property matters, but will not be authorized to proceed with any contested litigation related to property.

Applications may be approved to seek a court order for guardianship through the courts, however if the matter is uncontested, the applicant may be referred

to a paralegal to assist in the preparation and execution of a written agreement between the proposed guardian and parent(s).

Legal Aid Manitoba will not approve applications to pursue an adoption. However, they may approve applications to oppose an adoption application.

Applications to oppose Child and Family Services (CFS) apprehensions will generally be approved as long as there is financial eligibility. However, applications to terminate a CFS order already in place will be reviewed and approved based on their merit and the likelihood of success.

Even though as a matter of policy Legal Aid does not cover every type of family law case, the Executive Director always has the discretion to appoint a lawyer and exceptions may be made where it is deemed appropriate. If merit is difficult to ascertain without further investigation, Legal Aid Manitoba may appoint a lawyer to spend a limited amount of time (e.g.: three hours) to look into the matter in greater detail and provide an opinion as to merit. In those cases, the lawyer is not authorized to initiate any type of court proceedings until and unless a new certificate is issued.

Counsel are urged to consider the *Area Directors' Manual* and specifically chapter 5 which sets out the coverage areas of Legal Aid Manitoba. Each province has its own processes and guidelines so familiarity with the processes of one province does not mean the same applies in Manitoba. Knowing what is covered by Legal Aid prior to submitting the application can save time and aggravation for counsel and the client.

iii. Matters to Consider Once Approved

The client has an obligation to stay in touch with their lawyer or their certificate may be closed for loss of contact.

Legal Aid Manitoba must be notified if there is any change in income or family size, or any other factor that would affect financial eligibility or the ability to pay for legal aid through the Agreement to Pay program. This obligation to report to Legal Aid Manitoba is on both the client and the representing lawyer pursuant to a certificate. Legal Aid Manitoba may at this time or at any time initiate a financial review and require the submission of further documents to prove ongoing eligibility.

An applicant will be asked during the initial application process if they have a choice of lawyer they wish to use for their matter. However, there is no guarantee that Legal Aid Manitoba will appoint that lawyer or that that lawyer will agree to accept the case. If no choice has been provided or the choice is unavailable for whatever reason, Legal Aid Manitoba will appoint a lawyer.

During the course of the file, if a client wishes to change lawyers they need to make a written request to Legal Aid Manitoba. This is often expensive and

causes unnecessary delay and therefore will not generally be allowed without a very good reason provided. Counsel should never assume or tell the client that Legal Aid Manitoba will assign new counsel to their case. A decision to reappoint is always made on a case-by-case basis.

If the appointed lawyer is no longer available to continue due to illness or change of employment, Legal Aid will arrange to re-assign the case to a new lawyer assuming the client continues to be financially eligible.

Once a lawyer accepts the file pursuant to a Legal Aid Certificate, they cannot charge additional private fees for any services associated with those already authorized by Legal Aid.

A lawyer and a client may choose the best way to proceed to resolve the legal matter, whether that involves collaborative law, mediation, assessments, negotiated agreements or court litigation. However, large disbursements such as assessment fees will require approval by Legal Aid Manitoba in advance. As a matter of policy, Legal Aid Manitoba will not authorize a matter to proceed to a contested trial when the application is initially approved.

If it appears the legal matter cannot be resolved in any other way, the lawyer must provide an opinion to Legal Aid Manitoba as to why a trial may be necessary and the likelihood of success.

Special authorization from Legal Aid Manitoba will be required in order to proceed to trial.

The test applied would be whether a reasonable person of modest means would pay the significant costs associated with proceeding to a contested trial. If there is not a reasonable likelihood of success or the benefit of proceeding to trial does not outweigh the cost, trial may not be approved.

This and additional information can be found on the Legal Aid Manitoba *website*.

C. POST INTERVIEW FOLLOW-UP

1. Confirming the Arrangement

After the interview, you should attend to some important preliminary matters. First, diarize any important dates, such as court appearances that have already been scheduled. If you have taken a Legal Aid application, write up the opinion as to merit and send it off or contact Legal Aid by telephone if there is some urgency to the matter.

> It is prudent to have some written record of what the instructions and fee arrangements are between you and the client. This is a good time to send a confirming letter setting out the services for which you have been retained, the precise undertakings or advice you have provided, and what arrangements have been discussed. Also include details of any homework you may have assigned to the client.

Where possible you should start work on the preliminary instructions that you have received from your client. Write a letter to the client's spouse if unrepresented or to the spouse's lawyer, begin drafting documents, and make any referrals that have been discussed with the client.

This is also the time to consider other aspects of the case. There may be tax or corporate law implications that need to be assessed and addressed. Considering how to approach a matter or what information to request from the other side is always significant. If you are not certain, you should think about a second opinion from one of your colleagues.

2. Information from Third Party Sources

It is important for you and your client to start gathering the information that you will need from third party sources. Some of the more common items are:

- **Marriage Certificate**

  A marriage certificate can be obtained from Vital Statistics at a cost of $30.00, if ordered in the regular manner, $65.00 for an expedited certificate, and at no cost if the client is on Legal Aid. You should have all the necessary information in your interview notes.

- **Court Documents and Agreements**

  If there are any previous court proceedings, examine the court file and get copies of any portions of documents that you need. If there is a previous separation agreement, or a prenuptial, spousal or cohabitation agreement, ensure that you have a copy.

- **Prior Files**

  If your client has had a previous lawyer involved in the matter, send an authorization to obtain the file and read through it when you receive it.

- **Land Title Searches**

  If your client or their spouse owns or might own real estate, do a property search at the Land Titles Office or through Teranet Manitoba, which administers the provincial systems of landholding to see how the property is actually registered and determine whether any caveats need to be filed.

- **Income Tax Returns**

  Canada Revenue Agency will provide, upon written request (include the social insurance number and client's authorization), computer printouts, which are a summary of your client's income tax returns.

- **Companies Office Search**

  Corporate records can be searched and information as to the last filed return or previous returns can be reviewed at the Companies Office.

- **Hospital Records**

  If medical records are required, most hospitals will either provide you with an extract from their records or allow you to attend to review the medical records and make copies. You will require a signed authorization from your client. Doctors will, upon request and receipt of a signed authorization, provide medical reports for a fee.

- **Credit/Debt Information**

  Depending on the specifics of the case, banks, credit card issuers, etc. will provide information with the client's authorization. Sometimes they charge for photocopies.

- **Pensions**

  If your client is a member of a pension plan, request an estimate of pension value from their pension administrator.

3. Retaining Experts

It is not unusual, even in the simplest of family files, to seek some expert opinion. Examples of experts whose opinion might be sought include:

- psychiatrists, psychologists, or social workers, on issues relating to parenting;
- real estate appraisers;
- business valuators (including income tax experts);
- appraisers of chattels, e.g., antiques, works of art and household furnishings;

- motor vehicle appraiser;
- actuary for pension valuation, particularly if the pension is not provincially regulated;
- medical doctor's opinion (for example, if a client is incapable of working).

Ensure that any experts you or your client retain have qualifications sufficient to allow them to be qualified in the courtroom as competent to give the expert opinion sought. Payment for the expert's services should also be addressed up front. If the lawyer is not undertaking to pay the expert's fees and the fee will be paid by the client, that fact should be confirmed with the expert, preferably in writing, at the time of engaging the expert.

D. THE UNREPRESENTED OPPOSING PARTY

Occasionally you will be retained by a party whose spouse is not represented by counsel. While you are ethically bound to deal with an unrepresented opposing party, you should limit your dealings as much as possible and make it abundantly clear that you act only for your client.

If you meet with the other party to negotiate, it is prudent to have another person present, and have the unrepresented party sign an acknowledgment that they have been advised to seek legal counsel, and if choosing not to retain a lawyer, that they are aware that you cannot provide legal advice of any nature. Communications to the unrepresented party should be in writing rather than by telephone.

Encourage the other party to obtain independent legal advice prior to signing a separation agreement and reflect such advice in the body of the agreement, whether it was followed or not. The agreement should not be signed in your office or with you as a witness.

> Never refer the other party for independent legal advice to another lawyer in your own firm or to another lawyer with whom you share space.

E. ALTERNATE FAMILY DISPUTE RESOLUTION PROCESSES - MEDIATION

The *Divorce Act* and *The Family Law Act* mandate a new obligation on parties to protect children from any conflict arising from court proceedings, to exercise their parental responsibilities consistent with the children's best interests, and to attempt to resolve matters in a family dispute resolution process.

In addition, the *Triage/Case Management Model* of the Court of King's Bench establishes prerequisites the parties to a family proceeding must complete prior to meeting with a judge.

Most parties to a separation will have an ongoing relationship even after a divorce because they have children. The need to cooperate in day-to-day matters, and the potential need to alter arrangements for support or parenting matters as circumstances change are all good reasons to try and resolve matters by agreement, rather than engaging in contested court proceedings.

> Irrespective of the issues to be resolved, many parties prefer to try to resolve their matters by agreement in a dispute resolution process that is usually faster, less expensive and more cooperative.

Litigation is not always a bad thing and, in some cases, it is the only alternative. However, when parents litigate parenting issues there are inherent dangers to the parties and to the children. The process may contribute to the perpetuation of the attitude that the children are pawns or prizes that go to the winner. Alternate Family Dispute Resolution processes, in contrast to the adversarial approach, are more cooperative ways in which to resolve disputes.

1. What is Mediation?

Mediation can deal with all issues arising out of marriage breakdown, including parenting, support and division of property. In Manitoba, mediation is available through the Family Resolution Service of Manitoba Justice, a court connected service, and through private mediators.

Within the Family Resolution Service, mediation services are available to separating couples, guardianship applicants and grandparents to resolve conflicts on a variety of issues including parenting arrangements, family support and division of property. The Family Resolution Service also offers general conflict resolution support which may include development of a joint resolution plan.

There are many private mediators in Manitoba. Private mediators may or may not mediate the full range of issues involved in family cases. The range of issues often includes spousal and child support, as well as family property. The Family Resolution Service also provides comprehensive mediation which typically will include one family mediator, who is usually responsible for assisting the parties with developing their parenting plan, and a lawyer mediator, who assists the parties with child and spousal support issues and family property.

Mediation is a cooperative process, through which a neutral third party professional can help separating couples find solutions to the issues arising out of separation or divorce. Mediation is not reconciliation counselling, aimed at healing the relationship. The mediator acts as a facilitator in helping the parties reach their own agreement. The most common problem dealt with by mediators is that of optimizing parents' time with their children. The parents themselves make the agreement. The best interests of children are paramount to the mediator.

The role of the mediator is to direct discussion into productive channels, to encourage compromise and to foster the attitude of problem solving. The goal of mediation is to help the parents arrive at an amicable settlement, to ensure that the children's interests come first and to help parents and children understand that separated or divorced couples are still mothers and fathers.

2. Benefits of Mediation

The benefits of mediation are numerous. Research shows that self-made agreements reached through mediation are more likely to be honored than court-ordered decisions. Accordingly, there is a reduced likelihood of future litigation. Further, mediation provides an opportunity not found in the adversarial system for parents to meet in a neutral environment in order to discuss unresolved issues.

The mediation process helps parties develop some trust again in each other as parents and allows for future cooperative negotiation when the need for changes arise. In addition, mediation is confidential and allows parties an opportunity to talk candidly.

3. Mediation Resources in Manitoba

a) The Family Resolution Service

The Family Resolution Service (FRS) helps families navigate separation and divorce both in and out of court. Services include Early Resolution Supports, a newly expanded Child Support Service, Maintenance Enforcement Program and Supervised Access and Exchange Services. Early Resolution Supports are delivered by a team of Family Guides who specialize in family violence and safety planning, mediation, family assessments and court processes.

Early Resolution Supports are aimed at assisting parties in resolving matters by consent outside of court. If families are proceeding to court, they are supported in

meeting the pre-requisites of the Family Division of the Court of King's Bench. Services include:

- Supports for families experiencing violence including safety planning and Protection Order applications.
- Legal information about court processes, forms and order drafting at the request of a judge for self-represented litigants.
- The mandatory parent education program, *For the Sake of the Children*, available free online in both English and French.
- Family-related mediation (i.e., parenting plan issues only).
- Comprehensive co-mediation (i.e., mediation of a parenting plan and financial issues, including child support, spousal support and family property).
- Brief consultation service to the court, dealing with the wishes/concerns of children ages 11 to 16.
- Preparation of court ordered assessments.
- Grandparent advisor to provide information on the laws and services that can help when extended family contact/guardianship is in dispute. This service includes mediation between the parents/guardians and the grandparents upon request.

Matters may be referred to the Family Resolution Service by lawyers or the Court. Parties may also self-refer.

b) Mediation Prior to Court Proceedings

If clients are participating in mediation prior to the commencement of court proceedings, court proceedings should not be initiated until either mediation is completed or has broken down.

c) Mediation through Family Resolution Services

i. Comprehensive Co-Mediation

Family Resolution Services offers comprehensive co-mediation services. This Involves considering all the issues that arise from separation/divorce: parenting issues (parental responsibilities/parenting time), child support, spousal support, and division of family property. Co-mediation means that a family law specialist/lawyer and a family relations specialist/social worker will work together with the family to assist in resolving their issues. Where there are children of the relationship, the parenting plan issues are almost always dealt with first.

Prospective mediation participants may be referred by the court, lawyers, or other agencies, or they may be self-referred. Variations of existing orders or agreements will also be accepted.

The co-mediation process will generally be as follows:

- Prospective participants will be required to complete *For the Sake of the Children*, a supportive information program for parents undergoing separation/divorce.
- There will be individual interviews to assess whether mediation is appropriate in the particular situation, and to explain the process.
- There will be a maximum of three to four co-mediation sessions, involving two mediators and both participants.

Legal information is provided to mediation participants, but no legal or other advice is provided. Participants in mediation are encouraged to obtain independent legal advice.

Changes to any agreements that are arrived at through mediation can be made upon review with the parties' lawyers. There is no charge for the mediation process throughout the duration of the program. Participants will, however, be responsible for any related costs, such as legal, other consultations, appraisals, or valuations. The process is confidential.

When the mediation is finished, the rules (Rule 70.16(2)) require the mediator to notify the parties, or their lawyers, in writing of the terms of any settlement that has been tentatively reached, and to advise the court that mediation has been concluded. If the mediation has been successful in producing an agreement, Family Resolution Service mediators draft a written memorandum of agreement, which they advise the parties to review with their counsel with a view to incorporating the terms into a formal agreement. The memorandum is not a legally binding document.

The agreement is then formalized as a legal separation agreement, or as a consent order, as decided by the parties with their lawyers.

If the parties are unable to conclude a final binding agreement on all of the issues mediated, despite the achievement of a mediated parenting agreement, neither party will be able to enter that parenting agreement into evidence in later court proceedings, unless the parties agree. Sections 48(1) and (2) of *The Court of King's Bench Act* and sections 20.3(1) and (2) of

The Provincial Court Act preclude the parties and the mediator from giving evidence in court as to what transpired in the mediation.

The parties are not bound to use Family Resolution Service mediators. They may choose to hire their own private mediator at their own cost.

d) Private Mediators

Section 47 of *The Court of King's Bench Act* specifically provides for court referral to mediators. It states:

> ***Referral to designated mediator***
> *47(1) Where a judge or master is of the opinion that an effort should be made to resolve an issue otherwise than at a formal trial, the judge or master may, at any stage of the proceeding, refer the issue to a designated mediator.*
>
> ***Action by designated mediator***
> *47(2) A designated mediator to whom an issue is referred under subsection (1) shall attempt to resolve the issue.*

There are a number of private mediators in Manitoba. Private mediators may mediate parenting issues as well as financial issues.

A directory of private mediators is available through the ADR Institute of Manitoba, Family Mediation Canada and The Family Arbitration and Mediation Legal Institute of Manitoba (*FAMLI*).

4. Mediator Qualifications

There are no legislated requirements in order for individuals to be permitted to hold themselves out as mediators. Therefore, anyone could potentially call themselves a mediator. However, the Law Society of Manitoba has included a rule in the *Code of Professional Conduct* dealing with lawyers as mediators.

Rule 5.7-1 states:

> ***5.7-1*** *A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:*
> *(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and*
> *(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.*

Family Mediation Canada (FMC), a multi-disciplinary national organization which promotes mediation in family law matters, has developed a model of rigorous practice standards and training/certification programs in order to certify competent family mediators. The ADR Institute of Canada also offers designations and accreditation for family mediators both at the generalist and specialist levels. In addition, some provincial mediation associations have developed their own accreditation programs to ensure mediators are properly trained and qualified.

5. Pre-Mediation Considerations

a) Identifying Appropriate Cases - A Lawyer's Perspective

A lawyer deciding whether to recommend mediation to a client should consider whether mediation can advance the client's interests, emotionally, financially and, perhaps, strategically.

By definition, mediation is a voluntary process whereby both participants must be able to negotiate safely and competently. It permits parties to handle their affairs off the record in a relatively cooperative setting. It further permits the parties to move at their own pace. If both parties value cooperation and, despite their dispute, each is able to reasonably maintain their own equilibrium and focus on the needs of the children, mediation may be extremely useful. Even if mediation is not successful, the parties may feel better for having tried and partial agreements may be reached.

If the client feels that it would be too emotionally painful to engage in contact with a former partner, is afraid of their former partner, or feels the children are at risk, mediation may not be possible. In such cases mediation may only threaten your client's emotions, safety or financial interests. The lawyer should then deal with the matters in another forum.

b) Mediation and Protective Orders

In some cases where protection orders have been granted it may still be possible to attend for mediation in appropriate circumstances.

c) Preparing the Client for Mediation

Lawyers can facilitate mediation by explaining the process to clients and encouraging discussions with the other party. In the case where mediation is to involve issues of parenting, the lawyer should discuss the best interests of the child and explain the legal implications of parenting time and decision-making responsibility.

When people come to a lawyer in a parenting dispute they are often angry. The lawyer should not focus solely on aggressive legal action that may, by the nature of the process, have destructive consequences for the children. There are no winners in protracted battles. Lawyers must emphasize the risks to children of litigation and should inform clients of the proven benefits of mediation. However, both parties' lawyers must be supportive of the mediation process in order to allow it to work.

Mediation is not a substitute for legal advice or litigation where required. Lawyers must still be involved and should be involved at the outset to help the client understand the law, make informed agreements and complete the legal process.

6. The Lawyer's Role During Mediation

Lawyers are generally not equipped to deal with the emotions involved in disputes surrounding children. Referring cases to mediation prior to commencing court proceedings gives the parents a chance to let go of some of their hostility and deal with the emotional aspects of their cases with the help of a trained mediator.

Generally speaking, the lawyer should not interfere during the mediation process. In particular, court proceedings should not be initiated while mediation is ongoing as this may be counter-productive to the process. The lawyer should be available to their client to answer questions on any legal issues that may arise. The lawyer may speak to the mediator if any problems arise.

7. The Lawyer's Role After Mediation

If an agreement is reached through mediation, the role of the lawyer is to review the agreement with the client and to prepare a formal separation agreement and/or court order confirming the terms of the agreement. In the event that the lawyer does not recommend a portion of the agreement, the lawyer may contact the mediator to review the matter. Generally speaking, if problems arise, it is best to refer the parties back to mediation before resorting to the adversarial process.

If an agreement is not reached through mediation, there are other alternatives available to the client and lawyer. Attempts at negotiation may be made through the lawyers. If negotiation of a settlement is not possible, the lawyer might consider arbitration, or take steps to proceed through the litigation process.

8. Confidentiality of Mediation

The Court of King's Bench Act deals with the issue of the confidentiality of the mediation process. In the event that a matter proceeds to court after mediation, confidentiality will be attached to the mediation process. This confidentiality applies regardless of whether the mediation was ordered by the court or was undertaken at the request of the parties and whether the mediator was court-appointed or in private practice. Section 48 ensures that parties who are mediating with private practising mediators and who agree that the process should be confidential, will enter into these discussions on the same footing as parties mediating with one of the mediators at the Family Resolution Service. It states:

Mediation by designated mediator

48(1) Subject to subsection (3), unless the parties otherwise agree, neither

(a) a designated mediator who renders services

(i) under section 47 of this Act or section 20.2 of The Provincial Court Act; or

(ii) at the request of the parties; nor

(b) a party to the mediation;

is competent or compellable to give evidence in a family proceeding in respect of

(c) a written or oral statement made by a party during the mediation; or

(d) knowledge or information acquired during the mediation by a person referred to in clause (a) or (b).

Mediation by private practising mediator

48(2) Subject to subsection (3), unless the parties otherwise agree, where the parties have agreed in writing that the mediation process will be confidential, neither

(a) a private practising mediator who renders mediation services to parties; nor

(b) a party to the mediation;

is competent or compellable to give evidence in a family proceeding in respect of

(c) a written or oral statement made by a party during the mediation; or

(d) knowledge or information acquired during the mediation by a person referred to in clause (a) or (b).

Exception

48(3) Subsections (1) and (2) do not apply with respect to a proceeding under Part III (Child Protection) of The Child and Family Services Act.

F. ALTERNATE FAMILY DISPUTE RESOLUTION PROCESSES - COLLABORATIVE LAW

1. What is Collaborative Law?

Collaborative law is a dispute resolution model in which both separating spouses retain separate lawyers, whose role is to provide support to parties to find solutions to the issues of their separation.

The goal of the collaborative law process is to reach an agreement through interest-based negotiations. This usually happens through a series of meetings involving the appropriate professionals.

> It is important that the lawyers have conflict resolution training and training in the collaborative law process. This allows the lawyers to guide the parties through the process and assist them in identifying their underlying interests, managing their conflict, and finding appropriate arrangements for their family.

The term collaborative law pertains to the lawyers' role. Collaborative law recognizes the value of an interdisciplinary approach and encourages the involvement of various professionals to educate, assist, and support the individuals and their family in the transition process. Collaborative law also emphasizes the lawyers as part of a team whose purpose is to provide support to the parties as they make decisions that are in the best interests of their families.

2. Collaborative Practice - An Interdisciplinary Approach

The collaborative process is an interdisciplinary process. The collaborative team usually consists of two collaborative lawyers, either one or two family professionals, a financial specialist, and in some cases a child specialist. The professionals are involved as a team from the beginning of the process to assist the parties in reaching a healthy agreement for their family. It is important that the team develop effective protocols for sharing important information within the team and for dealing with the various issues. The goal is to understand the larger family picture and to work together to help the clients develop solutions.

Family professionals specially trained to deal with separation issues act as coaches for the parties in the collaborative process. The primary focus of the family professionals is to work with the parties in developing a parenting plan. They also assist with the barriers that can affect the parties' abilities to collaborate and reach agreement. These barriers can include a variety of emotions that come from the separation. The professionals will help the clients

deal with the issues with a view to assisting them to move forward in their separation. The family professionals also assist with communication issues between the parties, and specifically assist with developing healthy communication patterns for co-parenting. Sometimes a child specialist will be involved to help the parents determine what is best for the children.

Certified financial planners who have special training in dealing with issues surrounding separation and training in the collaborative process can meet with one or both parties to help collect and organize their financial information, offer information on issues such as options for asset division, and how various support scenarios would affect each party in the present and future.

3. Interest-Based Negotiations

One of the main conflict resolution strategies used in the collaborative process is focusing on interests rather than positions. If parties can understand their own underlying interests and communicate these to each other, they often realize that both of their interests can be met by mutually acceptable solutions.

In position-based negotiations each party tends to focus on one position to meet his or her needs. If those positions are not acceptable to the other party, it becomes a win/lose situation.

> In collaborative practice the goal is not to get a bigger piece of the pie, but to assist the parties to identify what constitutes the pie and then support them in the dividing of the pie in a way that makes sense for their family.

4. Collaborative Law Retainer Agreement

It is important that the client understands and agrees that the lawyer will be playing a different role in the collaborative law process than they would be in other processes. A collaborative lawyer has an ethical obligation to represent their client as skillfully as possible. There is a substantial difference between the way this is achieved in the collaborative law process and the way it is achieved in the traditional litigation-oriented approach. The collaborative lawyer does not take on a gladiator type of role "fighting" for the client's rights.

The client must understand that their lawyer will be listening carefully to the other spouse, trying to build a trusting relationship and to understand their concerns. Further, the client must appreciate that the lawyer will be honouring the strict obligation of full disclosure and good faith. The lawyer cannot continue to act if the client does not honour that obligation. For many such reasons, it is recommended that the lawyer have the client sign a collaborative law retainer agreement, in addition to the usual retainer agreement.

5. Collaborative Law Participation Agreement

As the collaborative law process is quite different from other dispute resolution processes with which the clients may be familiar, it is very important that they be fully informed of the nature of the process, and the expectations, obligations, and limitations. It is imperative that the parties sign a participation agreement to ensure that the expectations of the collaborative law process are protected.

The Participation Agreement or Collaborative Commitment Agreement is signed by both parties and the members of their professional team. It provides that if either party decides to leave the process for the adversarial approach, both lawyers must withdraw from the case. The agreement stipulates that neither lawyer will litigate the case, or even threaten to do so. It also provides for the without prejudice nature of the process.

Another linchpin of the collaborative process is that the parties commit to providing full disclosure of all relevant information. The participation agreement provides that although the parties retain solicitor–client privilege with regard to communication with their lawyers, if a party refuses to disclose relevant information or instructs their lawyer not to disclose it to the other party, then the lawyer must withdraw from the process. In such a case, the other party would likely suspect a problem and end the collaborative process.

6. Collaborative Law Differs From Other Processes

a) Mediation

A mediator must remain neutral and must not give legal advice. In mediation, parties are strongly encouraged to each retain lawyers to provide them with legal advice and to suggest possible solutions, but these lawyers are usually not involved in the mediation meetings. The collaborative law process involves full team meetings where both lawyers are present and can offer legal advice. Further, both lawyers are free to suggest possible options for settlement.

b) Negotiated Settlements

These often involve settlement meetings between the parties and their counsel.

There is no commitment that the lawyers involved will not ultimately litigate the case. In negotiated settlements there usually is no explicit commitment from the clients that they will:

- provide full disclosure;
- act in good faith;
- use conflict resolution strategies to reduce the conflict; and
- seek win/win solutions.

7. Collaborative Practice Training and Collaborative Practice Manitoba

At this time there are no specific legal requirements to practise collaborative law in Manitoba, other than being licensed to practise law in Manitoba.

Collaborative Practice Manitoba is a group of lawyers, mental health professionals (relationship coaches and child specialists) and financial planners who are trained and experienced in collaborative practice. Currently, general membership requirements for lawyers are:

- membership in good standing in the administrative body regulating lawyers in the lawyer's own jurisdiction;
- at least two days multidisciplinary collaborative training;
- at least four days training in client centred, facilitative conflict resolution.

It is recommended, but not required, that members have completed a further fifteen hours of training in specified areas such as negotiation, communication and mediation skills training. There are also continuing education expectations to maintain membership.

> Further information about Collaborative Practice Manitoba can be found on the website at *collaborativepracticemanitoba.ca*.

Other trained collaborative law lawyers in Manitoba practise collaborative law but are not members of Collaborative Practice Manitoba.

Conflict resolution, collaborative practice, and inter-disciplinary training are currently offered through Collaborative Practice Manitoba. Conflict resolution training is also available through other organizations such as Mediation Services. There are also excellent training opportunities outside Manitoba. Specific information about requirements for membership in Collaborative Practice Manitoba is available on the website.

G. ALTERNATE FAMILY DISPUTE RESOLUTION PROCESSES - ARBITRATION

The Arbitration Act now includes specific provisions for "family arbitration" which deals with matters that could be included in a spousal or common law agreement as defined in *The Family Property Act* or a separation agreement as mentioned in *The Family Law Act.* Family arbitration can deal with parenting arrangements, child support, spousal or common law partner support and property matters, and must do so in accordance with the law of Manitoba or another Canadian jurisdiction (see s. 1(1)).

The arbitrator dealing with a matter involving a child has a specific obligation to do so in accordance with the child's best interests.

The *Family Arbitration Regulation 105/2019* sets out important requirements for family arbitrations. Section 1 sets out the qualifications for family arbitrators who must be (a) a practicing lawyer under *The Legal Profession Act* and (b) have practiced law for at least 10 years, with family law as their primary area of practice.

Sections 5(1.1) and 5.1 of the Act sets out that a family arbitration agreement must be made in writing after the dispute has arisen, or may be included in a cohabitation, prenuptial, spousal, common law or separation agreement that provides for the arbitration of future disputes.

Section 2(1) of the Regulation requires the family arbitration agreement to include a provision that requires each party to have obtained independent legal advice respecting the contents of the agreement, the conduct of the family arbitration, and the effect of a family arbitration award. Section 2(2) of the Regulation states that a family arbitration agreement is not valid unless each party has obtained independent legal advice before executing the agreement and has attached to the agreement, a certificate of independent legal advice.

Section 3 of the Regulation requires a family arbitrator to consider whether proceeding with arbitration could expose a party or a child to a risk of domestic violence or stalking and requires the arbitrator to ask the parties about any history of domestic violence. A court has the power to set aside a family arbitration agreement and any resulting award if a party took advantage of the other party's vulnerability, a party did not understand the nature or consequences of the agreement, or if the contract is voidable at law.

The agreement and any resulting award may not be set aside unless the court would replace it with a substantially different order.

The Act sets out rules governing the selection of the arbitrator or arbitral tribunal and the conduct of the arbitration. Parties may modify many such provisions by agreement.

Family arbitration awards will be unenforceable if inconsistent with the legislation including *The Family Law Act, The Family Property Act* and *The Law of Property Act*.

An award is binding on the parties unless it is varied upon appeal (s. 44(2.1)) or is set aside (s. 45). An appeal requires leave of the court on a question of law or mixed law and fact unless the award includes a right of appeal. An appeal proceeds directly to a judge for determination (s. 44(3.1)).

The court can also vary, suspend or terminate any part of an award that could be varied, suspended or terminated under *The Family Law Act* (s. 45(9)). A family arbitration award respecting child support is eligible for recalculation by the Child Support Service (s. 1 *The Child Support Service Act*).

An application to enforce a family arbitration award can be made to court and proceeds directly to a judge for determination (s. 49(2.1)).

Awards can be enforced by the court in the same way as its own judgments (s. 49(8)). A family arbitration award respecting child or spousal support may be registered with the court and, upon registration, is enforceable by the Maintenance Enforcement Program.

Parties may find arbitrations useful in circumstances where mediation has failed and/or for matters in which compromise is not possible or difficult. It is an alternative, like court, in which the power to make determinations is given to a neutral third party.

The parties have a greater degree of control over the process and procedure and may obtain a speedier and less expensive result than proceeding through all the steps of litigation to a trial.

The Family Arbitration and Mediation Legal Institute of Manitoba (FAMLI) is an association of lawyers and other professionals dedicated to helping individuals and families resolve their family law disputes outside of the court system through mediation and/or arbitration. FAMLI maintains a registry of mediators and arbitrators who meet the requirements of *The Arbitration Act*.

H. A CHECKLIST FOR AVOIDING CLAIMS OF NEGLIGENCE

1. Ensure that all necessary conflict searches have been done for all names and previous names of all parties and new or past significant others, corporate interests, etc. The lawyer should also be aware that conflicts may arise in the future.
2. Comply with client identification and verification requirements.
3. At the initial interview receive instructions, discuss fees and retainers.
4. Screen for domestic violence.
5. If you do not receive instructions to proceed, write the client and advise that you are waiting for instructions from them. Advise of any relevant limitation periods and of the consequences of delay.
6. If you are retained, write to the client to confirm the terms of your retainer, including what you have been retained to do and the fee arrangements. Also confirm what will be done next and whether by you or the client.
7. Make a note on the file where mail and email messages are to go to preserve client confidentiality.
8. Ensure that the client receives copies of all correspondence and email messages having a substantial bearing on the matters for which you have been retained.
9. Keep notes of all conversations or communication with the client, especially concerning legal advice given to the client and instructions received from the client and date all notes.
10. Confirm the client's instructions in writing, especially if they are contrary to your advice.
11. Keep dated notes of all conversations and meetings with opposing counsel and anyone else regarding the matter.
12. Respond to all telephone and e-mail messages as soon as possible. If a message is urgent, respond immediately.
13. File all messages that contain information of substance.
14. Use checklists where applicable.
15. As part of daily practice use a daily "To Do" list.

16. Be careful in using precedents as some may be outdated or inapplicable to your client's circumstances.

17. Diarize limitation periods on a "bring forward system."

18. Develop a plan for all steps and relevant dates and update the plan regularly.

19. Keep a status report on each file, so in your absence another lawyer can easily assume conduct of the file.

20. Review dormant files (those without any ongoing or pending activity) at least every three months.

21. Several times during the year check your filing cabinet for inactive files or files that can be closed.

22. Always keep your client informed; be honest with yourself and with your client.

23. Keep abreast of changes to relevant laws.

24. Attend continuing education programs in family law and any related programs in other areas such as advocacy skills and negotiation.

25. Get your client's written instructions before sending an offer to settle and to ensure that the client reviews the offer to settle before it is sent to opposing counsel.

26. Either have the client's written instruction to accept an offer or confirm the instructions clearly in a letter to the client.

27. **Never** act for both parties.

28. Engage experts where required. Make sure the terms of the engagement are clear to preserve client privilege and regarding who is to pay the expert.

29. Get the advice of a tax lawyer, corporate lawyer or other lawyer in a relevant specialized area, when required.

30. Report to the client after each court appearance, including case conferences, regarding judge's directions, timelines or agreements between counsel, even where the client has been in attendance.

31. Advise the client immediately in writing of court decisions and of any costs ordered. Report on any rights to appeal or to seek a review and the timelines to do so.

32. Advise the client of all settlement offers received, even if you know it will be rejected.

33. Always have the client attend in court with you unless impossible. Arrangements can be made for telephone or video attendances in many cases.

34. Advise the client of pension rights under the Canada Pension Plan and provincial legislation and any relevant limitation periods.

35. In a pre-nuptial agreement, discuss changes that may happen in future years. Consider what may happen if the relationship is of short, medium or long duration, and with or without children. Consider if the agreement will remain appropriate upon separation, divorce or death.

36. Do not give independent legal advice on an agreement without seeing a sworn financial statement of the other side unless the agreement's preamble sets out all relevant financial information. Make sure you have all relevant facts that bear on the contents of the agreement.

37. Do not allow an unrepresented party to sign documents at your office.

38. When the other side refuses to obtain independent legal advice, put a clause in the agreement saying that independent legal advice was recommended, but it was declined.

39. Discuss all legal principles with the client including:

    a) parenting time and decision-making responsibility;

    b) child support including section 7 expenses, amount and duration;

    c) spousal support amount and duration including *Income Tax Act* provisions re deduction/inclusion of spousal support and re payments made prior to but in contemplation of agreement;

    d) potential trust claims;

    e) property matters including pensions and real estate;

    f) protection and prevention orders;

    g) wills, insurance and beneficiary designations.

40. Do not give legal advice over the phone or otherwise to a person who is not a client.

41. If documents are to be sent in trust, work out trust conditions before client signs the agreement and/or before sending documents.

42. Ensure that commitments in agreements are implemented. For example, if agreement provides that a parent is to irrevocably designate the children on an insurance policy, follow up to make sure this is done.

43. Keep accurate time records in order to bill appropriately and in case your account is ever taxed.

44. Send detailed interim reports and statements of account to the client where appropriate and a final report with the final statement of account.

I. RESOURCES FOR FAMILY LAW CLIENTS

Your client may need help finding and accessing community resources such as support groups or shelters. 211 Manitoba is a searchable online database of government, health, and social service organizations from across the province. It is a free, confidential information and referral system and is available online only at *www.mb.211.ca*.

Another source is the Manitoba Bar Association annual Legal Directory and Day Planner, which can be ordered, for a fee, through the MBA office (204-927-1210).

You should also investigate what assistance programs are available through the Winnipeg Police Department, the R.C.M.P. and local hospitals.

The Family Law Manitoba *website* provides information and resources about parenting, relationships, child support, safety and resolution. It also provides a large searchable database of resources that can be filtered by region, category and source type. (The database is accessible directly at Family Law Manitoba *resources*). Family Law Manitoba offers wide ranging information on relationships, parenting, money (financial disclosure and child and spousal support), property, safety (family violence and protection of children) and information on resolving disputes through court and other methods. The website lists the services delivered by the Family Guides of the Family Resolution Service. Family Law Manitoba also hosts the online "For the Sake of the Children" parenting education program.

Other resources include:

Legal Health Checks – information on a variety of family law subjects
www.cba.org/CBA-Equal-Justice/Resources/Legal-Health-Checks

Successfully Parenting Apart: A Toolkit
www.cba.org/Sections/Family-Law/Resources/Resources/2017/Successfully-Parenting-Apart

Child Rights Toolkit
www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit

Making Plans: A Guide to Parenting Arrangements after Separation or Divorce
www.justice.gc.ca/eng/fl-df/parent/mp-fdp/index.html

Parenting Plan Checklist
www.justice.gc.ca/eng/fl-df/parent/ppc-lvppp/index.html

Interactive Parenting Plan Tool
www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/form/form.html