



WHAT DOES JUSTICE PRICE SAY ABOUT CONFERENCES IN FAMILY COURT?

On June 25, 2021, the Honourable Court Justice Price wrote a judgment for all to read that explained what the purposes are of a Case Conference, Settlement Conference and Trial Management Conference.

In Casson v. Casson, 2021 ONSC 4601, Justice Price wrote:

The procedural arc of a Family Law case entails three conferences:

The Case Conference is designed to ensure that the parties have all of the information and documents they need in order to obtain advice from the lawyers they retain or consult and engage in discussions with each other in an effort to come to an agreement on the issues in dispute. If agreement can be reached at the Case Conference on a substantive issue in dispute, the Court may make an Order, on consent, resolving that issue.

The Settlement Conference, which normally follows several months after the Case Conference, is an opportunity for the parties to receive an opinion from a judge of the Court that will eventually try their case as to how any issues on which they disagree is likely to be decided at trial. This may enable the parties to compare the likely outcome with the proposals they have discussed, and come to an agreement if they have been unable to do so to that point. If they are unable to agree after obtaining this opinion, they are asked to identify the issues on which they need a decision from a trial judge, and the witnesses they intend to call at trial, and the time they will need with each of the witnesses and to make their argument to the court. The Court can then make a realistic estimate of how long the trial will take, and find the earliest date when a judge and courtroom can be made available to them. The Court also sets a timetable for the remaining steps that must be taken before the trial begins.

At the Trial Management Conference, the parties check in with the Court and confirm that they have completed the steps set out in the timetable made at the Settlement Conference, and are ready to proceed to trial.

The purpose of the three conferences, taken as a whole, is to give the parties the best opportunity possible to make the decisions in their case themselves, by agreement, rather than having a decision imposed on them by the Court. Litigants can derive substantial benefits from making the decisions in the case themselves, with the help of their lawyers.

Four major benefits are as follows:

1. The parties are better situated than a trial judge to find an outcome that is acceptable to both of them. The parties can guide their lawyers, or their own decision-making, by their own priorities and motivations. The trial judge cannot lawfully base a decision on the parties' motivations but rather, must base a decision on the factors set out in the relevant legislation and in the reasoning approved by higher courts. Unless the parties' motivations are legally relevant, in the sense of being capable of lawfully affecting the judge's decision, evidence about them is not even admissible.
2. The parties can make the decisions in their case themselves at much less expense than obtaining a decision from a trial judge would entail. The lawyers in the present case estimate that the trial is likely to take five to seven days. Based on even a five day trial requiring 6 hours of each lawyer's time each day, and preparation for an equal amount of time, the trial, conservatively, will require 30 hours. Each of the lawyers has practiced law for 20 years or more. If successful at trial, they are entitled to claim an inflation-adjusted, partial indemnity hourly rate of \$460.00, based on the 2005 Costs Bulletin. The compensation one of the parties, if unsuccessful, is likely to be ordered to pay to the other for trial and preparation is therefore approximately \$27,600.00 (5 days x 6 hours x \$460 x 2). If the successful party achieves an outcome that is better than an Offer to Settle, the unsuccessful party is likely to be ordered to pay 50% greater compensation, (substantial indemnity costs being 1.5 times partial indemnity costs), for a total of \$41,400.00. The cost of the lawyers' time for preparing pleadings, financial statements, net family property statements, and disclosure, is likely to exceed \$10,000.00, and the three conferences are likely to cost over \$3,000.00 each, for another \$10,000.00. The cost of those steps, when added to the cost of trial and preparation, will likely be \$61,400.00 or more. Adding H.S.T. will increase that amount to \$69,382.00. Given that the unsuccessful party will have to pay his or her own lawyer an even greater amount than the 60% or 90% to be paid in costs to the other party, the cost each party faces, if unsuccessful, is likely to reach \$140,000.00. Adding the cost of experts, such as Mr. Casson's Chartered Business Valuator, whom he says he has paid \$32,000.00, the cost each party

faces, if unsuccessful, is likely to exceed \$170,000.00. If the parties are able to find a mutually acceptable outcome through negotiation or mediation, the cost is likely to be far less.

3. There is a greater likelihood that the parties can get on with their lives after making the decisions themselves, by agreement, than if they must get a decision from a trial judge. The decision at trial, where one of the parties, if unsuccessful, faces costs of \$170,000.00 or more, may be catastrophic. If Ms. Casson, who earns \$43,3432.00, were unsuccessful, and faced costs on that scale, she could feel compelled to consider an appeal, which in family cases is likely to entail an additional \$20,000.00 to \$25,000.00. This could bring the potential costs of the unsuccessful party, including the fees to be paid to his or her own lawyer and the compensation to be paid to the other party, could reach, or exceed, \$200,000.00. If the parties, with the help of their lawyers, can find an outcome they both feel they can live with, and avoid the expense of a trial, they are more likely to be able to move on with their lives.
4. The potential impact of the outcome on the parties' children is likely to be better if the parties can reach agreement than if they must get a decision by a five to seven day trial that will deplete family resources otherwise available to meet the children's post-secondary expenses and other needs. Additionally, the anger and resentment the parties may feel toward each other at the end of an expensive trial may spill over onto their children, with a negative impact on their relationships with the parent whom they blame for the outcome. An agreement between the parents is more likely to leave the children with the view that their parents had differences that prevented them from remaining with each other, but were rational, fair-minded people who could resolve their differences without catastrophically depleting the family's collective resources.

The conferences in a family law proceeding are an important means of enabling the parties to achieve a just outcome at the least cost and with the least delay. The Case Conference plays an important role, by ensuring that each of the parties has the information and documents they need in order to make or assess offers to settle. If a party lacks a document that is likely to affect his or her willingness to accept a settlement, the party's lawyer is unlikely to want to advise acceptance. Doing so without a document that the client is entitled to demand may result in an unfair outcome and the lawyer's liability for the client's loss. It is therefore of fundamental importance that lawyers encourage their clients to comply with their obligations to make full financial disclosure in a timely manner.

The obligation to make full financial disclosure includes providing a timely response to Requests for Information made before the Case Conference, and providing timely updates of financial information, as circumstances change.

Steve Benmor, B.Sc., LL.B., LL.M. (Family Law), C.S., is the founder and principal lawyer of Benmor Family Law Group, a boutique matrimonial law firm in downtown Toronto. He is a Certified Specialist in Family Law and was admitted as a Fellow to the prestigious International Academy of Family Lawyers. Steve is regularly retained as a Divorce Mediator, Arbitrator and Parenting Coordinator. As a Divorce Mediator, Steve uses his 30 years of in-depth knowledge of family law, court-room experience and expert problem-solving skills in Divorce Mediation to help spouses reach fair, fast and cooperative divorce settlements without the financial losses, emotional costs and lengthy delays from divorce court. You can find his CV at https://benmor.com/wp-content/uploads/2022/11/Steve_CV.pdf. He can be reached at steve@benmor.com