



Community Legal Information Association of Prince Edward Island, Inc.

Family Court Procedure

Going to court is an expensive, lengthy, stressful procedure. There are no guarantees that you will get what you want and the risks are real and very important. There are other procedures to explore. Collectively, these are called **Alternative Dispute Resolutions**.

They include:

Negotiation: You and your Ex identify the issues where you agree. Some people are able to resolve a lot on their own.

Mediation: Mediation involves you, your Ex and a mediator. The mediator will not impose an agreement on you but will guide you both towards settlement. The mediator will help you find common ground. The mediator will give each of you the opportunity to speak and to listen. One of the objectives of mediation is to create a new way for you and your Ex to relate in future. Mediation is not appropriate if there is a power imbalance or violence in the relationship.

Collaborative Law: This involves both of you and both of your lawyers who have been trained in collaborative law. The four of you will meet together to negotiate a settlement. The presence of the lawyers ensures that your legal rights are at the forefront. This process differs from lawyer-assisted negotiation because all involved have committed to staying out of court.

These out of court options are not working for us. How do I get my case before the court?

The court cannot do anything on its own initiative. Someone has to bring a case to court. You can hire a lawyer to bring your case before the court. You can bring it to court yourself. You need to know that doing it yourself is difficult but not impossible.

How you start depends on what you are looking for. You complete a “Petition” to end your marriage. You complete an “Application” for child support or spousal support, division of property, and custody. Then you take these forms to the courthouse and file them. The Court Clerk will assign you a court number and open a court file. There is a filing fee and the amount depends on what document you are filing. Although the family

law clerks do not give legal advice, they will review the forms to ensure they are complete.

Is there anything I can do to help my lawyer prepare for court?

Your lawyer is not an investigator. Your case will be helped if you give your lawyer as much information as possible: full names and birthdates, complete addresses and phone numbers, copies of Income Tax assessments and income verification, copies of an existing agreement for child support, access or visitation. Keep track of payments, missed payments, visits, dates, and circumstances, duration of visits, missed visits and reasons given.

What do I need to know about the Rules of Court?

The Rules of Court give you information about procedures followed in Court. They set out things like response times and the procedure to notify or serve someone. If you have a question about any matter of procedure, check the Rules. If you have access to the internet, the Rules are annotated—that is, they have examples of how they have been considered by the court. You can find the Rules of Court at the library. They are also available online at: www.gov.pe.ca/courts/supreme/index.php3 .

Of particular note for family law are Rules 70 about Divorce and 71 about family law proceedings.

What court forms do I need to know about and how can I find them?

The Rules of Court have forms associated with the Rules. For example, if you are delivering documents to someone, this is called “Service” and is covered in Rule 16. There are forms for the various methods of service, Forms 16 A, 16 B or 16 C. Of particular note for family law issues are the forms under Rule 70 (regarding divorce) and Rule 71 (regarding family). The Rules of Court and the forms are on the internet at www.gov.pe.ca/courts/supreme/index/php3 . Scroll down to Forms. They are also in print at CLIA and almost every library on the Island.

There are also forms associated with the *Interjurisdictional Support Orders Act*. These are available at the Child Support Guidelines Office or at CLIA.

What is service? Who do I serve? How do I do it?

Service proves that your Ex has received copies of documents you filed in court. The court takes service very seriously. It usually means delivery of documents (petition, application, affidavits, etc.) to the other party by a person other than you. The court must be satisfied that everybody knows what is going on and has had a chance to respond.

The first document in a court action is called the Originating Document. It is the Petition

or Application and it has to be served on your Ex by personal service but you cannot do this yourself. You must arrange for someone else, usually the sheriff, to do it for you. Personal service includes:

- individual service (hand delivery) to your Ex by a person other than yourself
- delivery to your Ex's lawyer (if the lawyer has instructions from your Ex to receive documents)
- registered mail (frustrating if your Ex will not pick up registered letters)

All other documents, like affidavits and replies, may be by alternate delivery (registered mail, fax, or courier). You will have to show it was delivered. If you send something by mail, you need independent proof that it was delivered, such as a signed delivery notice. If you fax a document, keep the fax confirmation sheet. The person who delivers a document in person needs to have the person who receives the document sign and date an acknowledgement. To date, email is not an acceptable way of serving documents.

A trusted friend may serve the document or you can hire a process server. If your claim includes a custody issue you must also serve the Director of Child Welfare.

You must serve the Originating Document (the Application or Petition) on your Ex within 6 months of filing the document in court.

What do I need to know about completing and filing court forms?

A lot of information is needed to complete these documents. The information is requested on the forms for a reason and you should not ignore any part. You have to address the specific issue the question is about. For example, there are several questions for details about your children. If you have no children, put this in your answer. You must say that there is no chance of reconciliation, even though this seems obvious to you. The judge has to hear your statement (or see that you have sworn to it in writing). When completing the forms, be as thorough and as clear as you can. Focus on the question being asked. Some court forms must be sworn before a Commissioner of Oaths.

How do I decide what information to include in applications, motions, affidavits and presentations to the court?

If there are forms for these documents they give a good idea of what information to include. Some examples are:

	Rules of Court
Petition for Divorce	Form 70 A 1
Applications	Form 14 E
Motions	Form 37 A
Affidavits	Financial Statement, Form 70 I
Affidavit of Service	Form 16 B Form 4 D

One of your objectives in presenting your case is to help the court by providing thorough, clear and correct information. Not all of the questions are applicable to every case, but you must say why they are not applicable. Keep in mind that you may have to prove whatever you have included in your Application or Petition. If you do not know the answer to a question, try to find out. If you are still not able to answer the question explain what you have done to find the answer. Answer all the questions. You cannot be selective about the information you choose to provide. Include all of your arguments and do not hold any information back for the hearing.

Applications and Motions do not need to have any evidence in them. Affidavits are where you put evidence. For example, in an Application to vary child support because your child has increased medical expenses due to the onset of epilepsy, you say the child has increased medical expenses because of epilepsy. Then you add things such as the opinion from the physician, copies of receipts for the treatments or medications into the affidavit.

Affidavits are written evidence. The Affidavit ought to include only the facts. The Rules of Court have a list of things that are necessary to include in some affidavits. For example in Rule 70.23(7) for an Affidavit for Support, there is a list of information that you must include:

Contents of Affidavit in Support

- (7) An affidavit in support of the application shall set out,
- a) the place or ordinary residence of the parties and the children of the marriage;
 - b) the current marital status of the parties;
 - c) particulars of the change in circumstances relied on;
 - d) particulars of current custody and access arrangements and of any proposed change;
 - e) particulars of current support arrangements and any proposed change;
 - f) particulars of any arrears of support under an order or agreement;
 - i) in an application to vary a support order, whether the support order was assigned and any particulars of the assignment known to the applicant; and
 - g) particulars of any efforts made to mediate the matters in issue or of any assessment made in relation to custody or access.

When you are preparing affidavits, write specifically. If you are referring to an existing order, refer to it by date. Evidence will be better with details than with general statements. You do not need to present or repeat the position of the other side.

If you discover a mistake in any documents you gave to the court, you must correct the mistake and tell your Ex and the Court.

At the end of some of the forms, there's a space for me to sign. There is also a space for a Commissioner of Oaths to sign. What's a Commissioner of Oaths?

A Commissioner of Oaths is a person before whom you swear evidence. You may have some people (including yourself) tell the court what they know in written form instead of speaking in court. The writing is called an affidavit. These people are your witnesses and they are giving evidence. The affidavit must comply with the evidence rules. If they are in court, witnesses swear on a Bible or solemnly affirm to tell the truth. They also give the affidavit under an oath or affirmation.

The Commissioner of Oaths will often ask the witness for picture identification such as a driver's license.

Commissioners of Oaths include:

- all lawyers and Notary Publics
- members of the Legislative Assembly
- legal assistants (not always)
- some courthouse staff

The policies of law offices vary about fees for notarizing documents. If the lawyer does not prepare anything or give legal advice, he or she may not charge any fee. They may add a note under their signature saying “no legal advice sought or given.”

The Commissioner of Oaths will not read the contents of the affidavit. His or her job is to confirm that you (or your witness) are following evidence law. A Commissioner of Oaths is only able to take the oath or affirmation of someone in this province. If the affidavit is to go to another province or country, it must be sworn or affirmed before a Notary Public.

What do I need to know about serving the Director of Child Welfare?

If you are claiming custody or access to a child, you must serve the Petition on the Director of Child Welfare; most of the time this is just procedural. If there are concerns raised about the safety of the child, the Director of Child Welfare will investigate and may intervene.

What is a financial statement and how do I complete it?

The financial statement is also known as Form 70 I of the Forms of the Rules of Court. It is a thorough presentation of your income, expenses, assets and debts. The financial statement is an affidavit. You must provide a financial statement if you are asking the court for the following:

- variation of an existing support Order,
- a first order for support for yourself or your child or
- an order to divide your property.

Your Ex must provide the same information.

The financial statement is a statement of current expenses and estimates of future expenses. The judge may ask you the basis of both. For example, if you put in a figure for medical expenses you should be prepared to say what the treatments are, what condition the treatments are for, and the monthly costs.

What affidavits are necessary and what do I need to include in them?

The affidavits that you need to complete depend on what you are trying to do. If you are making a claim for support or division of property, then you must complete a financial statement. The financial statement is an affidavit.

The Rules of Court that can be found on the Supreme Court website at www.gov.pe.ca/courts/supreme/index/php3 set out required information for affidavits for specific purposes. If your Ex did not respond to your petition for divorce, you can make a motion to go straight to judgment. To do this, you prepare an affidavit with all of the information in Rule 70.19(5).

If you want to vary, suspend or end a support order, your affidavit must include information listed in Rule 70.19(7).

You must also prove that your Ex has been informed about what is going on. The Affidavit of Service is evidence that your Ex received the notice of the court proceeding, and any court documents you filed with the court. (See Rule 16 and 6 Forms 16 A, 16 B, or 16 C).

Form 4 D of the Rules of Court sets out the template or form of any affidavit. The person writing the affidavit includes complete and basic information, such as their full name and hometown. The text is always written from the witness's perspective: "*I, Jane Doe, of My Town, Kings County, PEI, MAKE OATH AND SAY AS FOLLOWS*".

The affidavit should include the witness's role and how they came to know what is written. For example: "*I am the director of Small Fry Day-care Inc. As such, I have personal knowledge of Jane Doe's child's attendance at our day-care.*"

After that, the facts of the statement are in numbered paragraphs.

You may not include hearsay evidence. Your evidence must focus on getting evidence directly from the source, rather than repeating what you have learned from other people.

You may wish to help your witness prepare the affidavit. Because affidavits are evidence, your Ex has the right to cross-examine the person on their evidence. Advise your witness that it is possible that the other side may cross-examine them. You should confirm they are willing to attend a hearing and answer questions from the other side.

What are the differences between a petition, a motion, an application, an affidavit and other documents filed with the court?

A **Motion** is a court hearing that resolves some matters before the trial or provides temporary relief until the trial. Unless the Order includes a termination date, the Order you receive on a motion remains in effect until it is changed by a judge.

A motion is used when an action has already started. Some examples include:

- asking for child support while you are waiting for the hearing (also called interim relief)
- starting a Motion for Judgment if your Ex ignores your Petition
- making a Motion for an extension when you are responding to something and want an extension of time

The person who makes a Motion is the Moving Party; the person who responds is the Responding Party.

An **Application** is one of the originating processes that start your court action for relief either under the *Family Law Act*, the *Interjurisdictional Support Orders Act*, or the *Custody Jurisdiction and Enforcement Act*. If you already have an Order under the *Divorce Act* and you want to vary it, you do so by Application. If you make the Application you are the Applicant and your Ex is the Respondent.

To end your marriage, you file a **Petition** for Divorce (the Petition may include division of assets, custody and support). If you make the Petition you are the Petitioner. Your Ex is the Respondent.

An **Affidavit** is written evidence from a witness, including you. It may be from a physician about a medical condition, a teacher about a child's education, an eyewitness to a specific and important event, an employer regarding any aspect of your work. If you make an Affidavit you are an Attesting Witness.

What steps do I need to take if I don't get a response to my Divorce Petition from my Ex?

Ordinarily you would expect your Ex to file an Answer to your Petition within 20 days if he or she is in PEI; within 40 days if he or she is somewhere else in Canada or the USA; within 60 days if he or she is overseas. If your Ex does not respond to your Divorce Petition, you may ask the Registrar to note them in default and make a Motion for Judgment. You will be asked to prove that they received the Petition (Proof of Service, Rule 16). When the registrar has noted your Ex in default, you are not obliged to notify your Ex of the date of the hearing. Your evidence will not be contested by the other side.

The judge may ask for more details if something is not clear to him or her. The practice among solicitors is to accept reasonable requests for extensions.

What do I do if I receive a Counterpetition?

This is complicated and we suggest you speak to a lawyer for legal advice if this happens. Ordinarily you would expect three documents to be exchanged in what are called the Pleadings:

- the person (party) who begins the process starts by a **Petition**,
- the other side (party) makes an **Answer** and
- the first may **Reply**.

At the same time though, the other party may start a **Counterpetition**, you may make an **Answer** to the Counterpetition and they may **Reply** to the Answer to the Counterpetition.

The place to dispute statements made in the Petition is in the Answer.

If your Ex wants to raise something else, he or she may file a Counterpetition, or may combine the two documents and call it the Answer and Counterpetition. If you wish to respond to anything in the Answer you may do so in a Reply (Form 70 E). Completing a Reply is not always necessary. However, **you must respond to the statements in the counter petition within 20 days after it was served on you** (do not count the day you received the Counterpetition). If you do not Answer the Counterpetition you are agreeing with the contents. The response you prepare is called an Answer to the Counterpetition (Form 70 F). Remember this is complicated. A lawyer can prepare or help you to prepare any or all of these documents.

Is any of the information in documents connected to my family court case accessible to the public?

The content of the file is not generally open to the public, but it is available to the other party. If the judge's decision has a new point of law decided, the judge may publish reasons for his or her decision. If this happens, the reasons for the decision will be available to lawyers and may include names. Family law hearings are closed to the public because of the private and confidential information discussed. If you are concerned about this, discuss this with the clerk before the hearing. If children are involved it is very common for a judge to write his or her decisions using initials instead of full names.

How can I see my court file?

Keep copies of all your documents. If you wish to see your court file, you may go to the Supreme Court and ask the Registrar of the Family Division if you can see your file. Documents in family law issues are not open to the public as they would be for many civil actions. The Registrar may ask you for photo identification.

Are there different procedures to follow if my Ex lives outside the province?

- You may start your action for a new Order under the *Family Law Act* or to vary an existing Order under the *ISO Act*.
- If you are looking for relief under the *Divorce Act*, there is a two-hearing procedure. One hearing is held in PEI for your evidence and one hearing is where your Ex lives for your Ex's evidence.
- You may need to hire someone in the other jurisdiction to serve the originating documents on your Ex. If you ask an acquaintance to serve the document, their Proof of Service should be witnessed by a Notary Public in that jurisdiction.
- The responding time frames are a little longer for someone served outside PEI. If you were serving someone in PEI they usually have 20 days to respond. If your Ex lives elsewhere in Canada or the U.S. the response time will be 40 days. If your Ex lives overseas the response time is 60 days.
- If you are calculating child support based on the *Child Support Guidelines* from the *Divorce Act*, you must use the tables for the province where your Ex lives, not where the children live.

The Child Support Guidelines offices in Charlottetown at the Honourable C. R. McQuaid Family Law Centre, 1 Harbourside and in Summerside in the Court House at 108 Central Street have copies of the tables. The purpose of these offices is:

- to provide information about the *Child Support Guidelines* and
- to assist self-represented clients who are applying to the courts for either first-time child support or a variation of child support in an existing Order or Agreement.

The child support tables and information are also available at the CLIA office in room 158, The Sullivan Building, 16 Fitzroy Street, Charlottetown. CLIA may be reached toll free at 1-800-240-9798 (local calls at 892-0853), by e-mail at clia@cliapei.ca or by visiting the office between 8:30 a.m. and 4:00 p.m. Monday to Friday.

How much does it cost to file each document?

Costs to start an action are called the filing fees. Besides the initial fee, there are no more filing fees for any other documents related to the same matter. For example, if you want to file an affidavit in support of your position there is no court fee to do that. In 2005, the fees were:

- \$85.00 for a Divorce Petition
- \$25.00 for a Divorce Answer
- \$25.00 for an Application
- \$25.00 for a Small Claim Notice of Claim
- \$25.00 for an Adoption Application

Other than filing fees, you should be aware of some other fees that lawyers call disbursements. If you hire a process server to serve a document there will be fees to pay. Taking a case to court is a paper procedure. Every time you file a document you should have a copy for the court, one for you and one for your Ex, so there will be photocopying costs. If you are dealing in long distance, you will have costs to fax documents, register letters, or courier larger packages.

What do I need to do to prepare for Court?

If you have a lawyer representing you, your lawyer will likely meet with you to review the presentation of your evidence and your case. If you are representing yourself, the Supreme Court provides a guide to help you. You can find this online at www.gov.pe.ca/photos/original/smallclaims.pdf Practice Notes, available on the Supreme Court website at www.gov.pe.ca/courts/supreme/index/php3 also give guidance to unrepresented litigants. An example is Practice Note 2, about Court Room Decorum and Legal Etiquette. The judge will have reviewed your written materials. You must prepare your oral presentation to the judge. Have someone you trust listen to your presentation ahead of time and offer suggestions.

If you have submitted affidavit evidence, then you should make sure that your witness will be attending. You and your witnesses should review the affidavit(s). Prepare answers for questions you expect to be asked. If you have any further written information such as documents or photographs, you should bring at least three copies--one for the court, one for you, and one for your Ex. You may wish to bring a fourth copy for your witness if you both want to look at it at the same time.

If the other side has served documents on you, review these as well. Evaluate the other side's position for strengths and weaknesses. Have someone you trust review both sides' documents before court. Look for inconsistencies in the evidence. Prepare questions to ask the witness to bring any inconsistent points out.

At the hearing, be aware of the time. The court reserves blocks of time for each hearing. The court tries to keep to this schedule. If you wish to take someone with you for support, ask the court clerk about this ahead of the date of the hearing.

What is the role of lawyers, judges, clerks, and other players in the family court process?

Your lawyer is an **officer of the court** and your **advocate**. Your lawyer is considered an aid to the court to clarify your case and provide your evidence.

Judges hear and weigh all of the evidence. They decide issues of law and application of the facts to these laws. Judges are in control of the courtroom. Judges must ensure that each party has an opportunity to speak.

At the hearing, a court clerk will be present. He or she announces the case and works on the transcription of the proceedings. The clerks manage the exhibits.

You file your documents with a Family Court Registrar who **manages the files**. He or she will encourage you to bring your documents for review before you go to the expense of photocopying. Although they are not able to give legal advice, registrars are a great help in identifying mistakes or omissions.

What are interim hearings?

Interim hearings are court hearings for temporary Orders that must be dealt with before the date of the hearing. For example, if you need child support but cannot wait until the Hearing, you may seek an interim Order. If a judge makes an Order, it will remain in place until a judge makes a new Order.

What is discovery?

Discovery is the obligation to give all of your information to the other side. The only exception is for legal advice you receive from your lawyer. Discovery rules (Rule 30 & 31) prevent surprises at the hearing. Both sides must disclose whatever information they have about the matters in dispute, favourable or not. If you want to use a document in court, you must disclose it to the other side. This is an ongoing obligation so if you receive new documents you must disclose them as you receive them.

What do I need to know about examining witnesses?

You will usually submit your evidence in written form in affidavits. If you are unable to do this, then examining a witness is just asking them questions. You “examine” the witnesses you bring with you (sometimes called “direct examination”) and you “cross-examine” the witnesses of the other side. Examination happens before cross-examination. You will need to prove every statement you make in your Petition or Application. Some things will be easy to prove and may be admitted by your Ex. Other things may be harder to prove. If you don’t have personal knowledge of an important issue, you must have a witness give first hand evidence. The evidence must be in the witness’ own words, not just confirming or denying your words.

What do I need to know about cross-examining witnesses?

If someone gives verbal or affidavit evidence, you have the right to ask them more questions about the evidence they have given. Likewise, if you have a witness present evidence, the other side has the right to ask more questions. You should know who all the witnesses are before the hearing and you probably have an idea of what they will be saying. Before the hearing, prepare some key points that will challenge or complete their story. If those key points do not come out in their examination, ask these questions on cross-examination.

What witnesses do I need to call?

It depends on what you have to prove. If you need evidence on your income, bring your employer. If you need evidence on the value of your house, bring your real estate valuator. If you need evidence on your child care arrangements, bring your child care provider.

Can my children be witnesses in court?

The court needs to consider the views and preferences of the child. The more mature the child, the more weight this will carry. Their wishes are not presented by taking them to court and putting them on the stand. They may be interviewed by the judge or a family court counsellor outside of court.

Child witnesses are uncommon. Care has to be taken to prepare and examine a child. Whoever is presenting this evidence must show that the child understands the difference between truth and lies and can tell the truth. In family matters there is an added level of complexity.

Someone asked the Supreme Court of PEI to allow a child witness in a family matter. Justice Campbell made the following observations:

“Given [the child’s] age and the tremendous pressure it would put on a child to publicly or at least directly express a preference for one parent or another, I denied the motion. In my view, the potential trauma involved in obtaining [his/her] testimony, even with the aid of screens or video cameras far outweighs the benefit of hearing [his/her] views firsthand. I distinguished this from a situation where a child is either a victim of criminal activity or witness to a particular event. Not only is the potential for influence great, but if [his/her] expressed preference did not carry the day, [he/she] could fear retribution from the “winning” parent (even if the fear would be completely unjustified) and suffer further harm as a result.”

Can my Ex cross-examine me?

If your Ex does not have a lawyer, you may be cross-examined by your Ex. Anyone who gives evidence for you may be cross-examined. If you give evidence, you may be cross-examined. If you have a lawyer, part of your lawyer's job will be to object to improper questions. If you do not have a lawyer, it is the Judge's job to preserve court room decorum.

How am I supposed to conduct myself in court?

See Practice Note 2 on the Supreme Court Web site at www.gov.pe.ca/courts/supreme/index.php3

- If you are anxious about the day, you may ask the court for an opportunity to look at the courtroom to "scout it out".
- Address the judge as "My Lord" or "My Lady," or "your lordship" or "your ladyship": "May I direct your ladyship to paragraph 17 of the witness's affidavit..." OR "May I direct the Court to paragraph 17 of the witness's affidavit. . ."
- Do not address the witnesses or your Ex by their first name.
- Stand when the judge enters the room.
- Stand when you are speaking.
- Speak to the judge, not to the other party directly. The exception is if you are examining or cross-examining a witness. When you speak to a witness, make sure the judge can hear and see everything.
- The judge controls the courtroom; for example, you ask the judge for consent to break for lunch.
- If the judge is searching for a document to which you are referring, wait for him or her to find it.
- Be respectful to the judge even if you do not agree with what he or she is saying.
- Stand tall, speak loudly and clearly. The tables all have microphones but they do not amplify your voice; they tape it for the court record.
- If you do not understand what someone is asking of you or what is happening, ask your lawyer. If you do not have a lawyer, ask the judge.

What are the potential court outcomes?

The court can grant what you asked for completely, grant it partially or deny it. The court cannot grant a different remedy on its own initiative. For example, if your Application was for child support, the court cannot order spousal support.

The court may also award costs. You may incur costs in working on your court case such as copying, faxing, process server fees, filing fees, and lawyer's fees. The court may order your Ex to pay your costs. Or the court may order you to pay your Ex's costs. If one of you is taking an unreasonable position, then the Court will likely order that person to pay the other side's costs for wasting the Court's time. You should have your itemized costs available for presentation to the Court.

Can the family court judge order me or my Ex to attend a parenting program?

A judge may strongly recommend or even order you to attend these programs. If a counsellor, lawyer or police officer has recommended any of these programs to you, it might be in your best interests to attend the programs.

Can a family court judge order us to go to mediation?

A family court judge can strongly advise you to try mediation. If you are both willing to mediate, the judge may appoint a mediator.

This information has been prepared by Community Legal Information Association of Prince Edward Island, Inc. It contains general information about family law and family court. It does not contain legal advice. To obtain legal advice, contact a lawyer. If you don't know a lawyer, call the Lawyer Referral Service at 892-0853 in the Charlottetown area or 1-800-240-9798 toll-free. The Lawyer Referral Service provides you with a half hour appointment with a lawyer for \$10 plus tax.

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For more information, you can telephone CLIA at 892-0853 or 1-800-240-9798, visit our website at www.cliapei.ca or email us at clia@cliapei.ca.

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