

Section 211 Report Model Order for Use in Family Law Disputes before the Supreme Court of British Columbia with Annotations

Version 1
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This model order may be used, in whole or in part, to draft Supreme Court orders for the appointment of mental health professionals to conduct assessments and prepare reports under section 211 of the Family Law Act. It may be adapted as necessary.

Please forward your comments and concerns to John-Paul Boyd at jpboyd@boydarbitration.ca.

Appointment of assessor

1. *[Name of professional]*, or, in the event *[name of professional]* is unable or unwilling to accept the appointment, *[name of alternate professional]*, (the “Assessor”) is appointed to prepare a written report concerning the arrangements for the parenting of, or contact with, *[names and birthdates of all children who are the subjects of the assessment]*.

This paragraph identifies the professional being appointed to prepare the section 211 report, and the children the report concerns. An alternative professional may be identified to avoid a return to court in the event the first professional declines their appointment.

2. In the event *[name of professional]* or *[name of alternate professional]* is unable or unwilling to accept the appointment, *[name of professional]* or *[name of alternate professional]* will forthwith advise the court in writing and will copy the communication to the parties.

Purpose of assessment and target due date

3. Pursuant to section 211(1) of the *Family Law Act*, the Assessor will assess and prepare a report concerning (check all that apply):

- the needs of the child(ren) in relation to this family law dispute,
- the views of the child(ren) in relation to this family law dispute, and
- the ability and willingness of [*names of adults who are the subjects of the assessment*] to satisfy the needs of the child(ren).

The terms of this paragraph are taken directly from section 211(1) of the Family Law Act. As that section provides, an assessment may concern one or more of these subjects.

4. The Assessor will make their best efforts to complete the report by [*date*]. If circumstances arise such that the Assessor will not be able to complete the report by the expected completion date, the Assessor will forthwith advise the parties.

This paragraph sets a preferred date for the completion of the report, recognizing that the completion of section 211 reports can be delayed for any number of bona fide reasons.

5. The Assessor will give a copy of the completed report to each party and give a copy of the completed report to the court.

The terms of this paragraph are taken directly from section 211(4) of the Family Law Act.

Cooperation of and communication from parties

6. The parties will meet with the Assessor, and take such steps as may be required for the child(ren) to do so, when and where requested by the Assessor.
7. The parties will promptly provide to the Assessor any information and documentation the Assessor requests.
8. The parties will promptly sign and return to the Assessor any releases of confidentiality or authorizations the Assessor may require, including for the release of the records of, or to speak to, any professionals who have direct knowledge of the child(ren) or the parties, including any counsellors, therapists, doctors, teachers, social workers and other professionals, provided that the Assessor may only seek the release of the records of, or speak to, any mediators or counsellors assisting spouses to achieve the reconciliation of their relationship either:
 - by the consent of the parties, in which case the parties will promptly sign and return to the Assessor any releases of confidentiality, authorizations and waivers of privilege required for this purpose, or

- to the minimum extent required for the purposes of the assessment, where the importance of preserving the parties' confidentiality is outweighed by the importance of discovering the facts of the case and ensuring a just result.

This paragraph is designed to facilitate the assessor's communication with third-party professionals who may have useful information about the parties or the children but whose relationships with the parties or the children are likely to be accompanied by expectations or requirements of confidentiality or privacy. Assessors are likely to require the parties to execute releases to authorize other professionals to speak with them.

*Special rules apply to mediators, family justice counsellors, and therapeutic counsellors that severely limit their ability to share information under sections 11, 12 and 13 of the Family Law Act and section 10 of the Divorce Act. The first option for obtaining the evidence of mediators and counsellors requires the consent of the parties. The second option adopts the test in *M.(A.) v Ryan*, [1997] 1 SCR 157.*

9. Except when meeting with the Assessor as requested or otherwise directed by the Assessor, all communications between a party or their lawyer and the Assessor must be in writing and be copied to the other party or their lawyer.

The purpose of this paragraph is to limit ex parte communications with the assessor.

10. For the purposes of the preparation of the report, any expectations or entitlements of confidentiality as between the Assessor and the parties and the Assessor and the child(ren) are hereby waived, and the parties will promptly execute consents to this effect at the request of the Assessor.

This paragraph waives the assessor's duty of confidentiality with respect to the parties and the children arising as a result of their professional code.

Preparation of report

11. Subject to paragraphs 8 and 12 of this Order, the Assessor may interview any counsellors, therapists, doctors, teachers, social workers and other professionals who have direct knowledge of the child(ren) or the parties and who, in the opinion of the Assessor, are likely to have information that will assist the Assessor in the preparation of the report.

The governance of this paragraph by paragraphs 8 and 12 is intended to reflect the limitations imposed by sections 11, 12 and 13 of the Family Law Act and section 10 of the Divorce Act.

12. The Assessor may not interview any family justice counsellors.
13. The Assessor may interview one or more people identified by the parties for the preparation of the report.

This paragraph allows, but does not require, the assessor to interview the collateral references named by the parties. The discretion afforded the assessor recognizes their interest in avoiding duplicative interviews that add little or nothing to their understanding of the circumstances of the parties and the children.

14. In the event the Assessor requires the services of an interpreter in the preparation of their report, the Assessor will retain an independent interpreter certified for interpretation in legal disputes by the Society of Translators and Interpreters of British Columbia, or the equivalent body in another jurisdiction.

This paragraph specifies the minimum training standard required of translators used by assessors.

15. Subject to paragraphs 8 and 12 of this Order, the Assessor may obtain and review the records of any counsellors, therapists, doctors, teachers, social workers and other professionals who have direct knowledge of the child(ren) or the parties for the preparation of the report. The Assessor may, subject to any agreements between the parties or the further order of the court, review only the following additional documents for the preparation of the report (check all that apply):

- in the case of matters before the Supreme Court, the Notice of Family Claim, Response to Family Claim and Counterclaim, or, in the case of matters before the Provincial Court, the Application to Obtain an Order, Application Respecting Existing Orders and Agreements and Reply,
- in the case of matters before the Supreme Court, the following Notices of Application and Application Responses, or, in the case of matters before the Provincial Court, the following Notices of Motion: *[identify documents]*,
- the following affidavits: *[identify documents]*,
- the following orders, awards and agreements: *[identify documents]*, and
- the following other materials: *[identify documents]*,

as well as such further and other materials as may be requested by the Assessor.

This paragraph is intended to allow the court to specify and limit, in advance, the nature and number of documents the assessor is required to review for the preparation of their report to reduce the burden on the assessor, the time required to complete their report and the cost to the parties.

The governance of this paragraph by paragraphs 8 and 12 is intended to reflect the limitations imposed by sections 11, 12 and 13 of the Family Law Act and section 10 of the Divorce Act.

16. In addition to family violence and any other issues that the Assessor identifies, the Assessor must address in the report the following specific issues and allegations, and their impact, regarding (check all that apply):

- a child or children resisting or refusing parenting time or contact with a party,
- the relocation of the child(ren), in light of the factors identified at
 - sections 46 or 69 of the *Family Law Act* or
 - section 16.92(1) of the *Divorce Act*,
- substance abuse,
- other mental health concerns, and
- [*identify other specific issues or questions to be assessed*].

This paragraph confirms that enquiries into the presence of family violence are required by section 37(2)(g) of the Family Law Act and section 16(3)(j) of the Divorce Act, and allows the court to identify any specific issues the assessor must address. The list of issues provided in this paragraph only identifies the most common issues and is not meant to limit the number or nature of the issues the assessor may be required to address.

The assessor's obligation to consider the best-interests factors specified in the Family Law Act or the Divorce Act is addressed at paragraph 20.

17. The Assessor will observe the child(ren), and the child(ren) and the parties, for the purposes of the report, in a manner as comparable as possible, unless in the opinion of the Assessor an observation would be unsafe or is contraindicated. The observations will take place in an environment or environments in which the child(ren) are most likely to be comfortable, where practical and appropriate in the opinion of the Assessor.

This paragraph is meant to ensure that the children are observed in as natural an environment as possible as similarly as possible. It recognizes that home observations may not always be feasible.

18. The Assessor must identify in the report all persons they have interviewed and all documents they have reviewed in the preparation of the assessment.
19. The Assessor must identify any person whose statements are referenced in the report.

This paragraph is intended to discourage assessors from reporting information without identifying the source of that information.

20. The Assessor will address in their report all of the factors and considerations identified in
 - section 37(2) and (3), section 38, and section 41(a) to (h), (j) and (l) of the *Family Law Act*, or
 - section 16(2), (3), (4) and (6) of the *Divorce Act*

that are, in the opinion of the Assessor, relevant to the arrangements for the parenting of or contact with the child(ren).

Payment of assessor's fees and disbursements

21. [Specify party or parties responsible for payment of Assessor's retainer] will pay any retainer or deposit requested by the Assessor to secure payment of the Assessor's fees for the report, and any disbursements incurred by the Assessor in the preparation of the report, no later than the date specified by the Assessor.

This paragraph is intended to facilitate the assessor's retainer by making it clear that the parties must pay the retainer or deposit required by the assessor by the date required by the assessor.

22. The parties are at liberty to apply at the final determination of this matter for a reallocation of the cost of the report.
23. If a party requires the Assessor to produce a copy of some or all of their file on the report, the Assessor is entitled to be compensated for the Assessor's time spent reviewing the file as necessary to comply with their professional standards at the Assessor's ordinary hourly rate, and for the reasonable cost of photocopying. Subject to an agreement between the parties or further court order, the party requiring the

production of the file will be responsible for the fees and disbursements of the Assessor incurred to do so.

24. If a party requires the assessor to attend court to be cross-examined, the Assessor is entitled to be compensated for their time, including for any time required to prepare for or to attend court to be cross-examined, at the Assessor's ordinary hourly rate, and for any disbursements incurred by the Assessor in attending court to be cross-examined. Subject to an agreement between the parties or a further court order, the party requiring the Assessor to attend court to be cross-examined will be responsible for the fees and disbursements of the Assessor incurred to do so.

Paragraphs 23 and 24 address the assessor's post-report fees and expenses. They make it clear that the assessor is to be paid for all work provided and expenses incurred after delivery of their report.

25. Neither party may require the Assessor to produce copies of any psychometric tests that were administered to a party or to a child, or any materials related to those tests, that are protected by copyright, except to provide these materials to a regulated psychologist qualified to administer and interpret those tests.

This paragraph addresses psychologists' obligation to not release copyrighted psychological test materials to anyone other than psychologists who are members of a regulating body and are qualified to administer and interpret psychological tests.

26. Where a party has retained a mental health professional who is qualified to review the Assessor's report, the parties will sign such consents as may be necessary to release the Assessor's clinical file to the professional for the purposes of a review.

This paragraph anticipates the possibility that a party may wish to retain another mental health professional to critique the assessor's report, and requires the parties to execute the consents that the assessor may require in order to release otherwise confidential material to the reviewing professional.

Bar on reports and complaints

27. The parties will be and are hereby restrained from
- a) making complaints or reports about the Assessor to the Assessor's governing professional body, consumer protection bureaux and similar organizations,
 - b) posting complaints, comments or reports about the Assessor on social media of any kind, and

- c) posting complaints or reports about the Assessor to review websites, professional rating websites and similar websites

without leave of the court until such time as a final order or written agreement addressing the arrangements for the parenting of or contact with the child(ren) is made and, in the case of a final order, until any appeal periods have expired or any appeals have concluded.

The purpose of this paragraph is to prevent a party from attempting to sabotage the assessment or attempting to influence an assessor, or the court's willingness to rely on a report, when the assessment is complete. The mischief that can be caused by a party acting in bad faith should not be underestimated or understated. However, this paragraph does NOT prevent a party from proceeding with a complaint to the assessor's governing body. A party may file a complaint, whether made in bona fides or male fides, any point in the life of a file with leave of the court.

Acknowledgement of Assessor

I, *[name of professional]*, have reviewed and understand the draft order above. I am prepared to accept the proposed appointment and conduct and complete an assessment on the terms described in this draft order.

Signed at *[place]*, British Columbia on this the *[number]* day of *[month]*, *[year]*.

[Name of professional]

This acknowledgement may be used where counsel is able to provide a copy of a proposed order to the assessor before applying for the order.