

NOTICE TO THE PROFESSION

COURT OF QUEEN'S BENCH

RE: VARIOUS RULE AMENDMENTS

The Statutory Rules Committee has recently passed a number of amendments to the rules. Changes to Rule 70 (family proceedings) and Rule 74 (surrogate practice non-contentious proceedings) arose from Bill 53, *The Common-Law Partners' Property and Related Amendments Act* and some of these involve changes to the forms. Practitioners are asked to take particular note of these because future filings will have to comply with the amended forms; however, rejection fees in this regard will be waived until October 1, 2004.

In addition, unrelated amendments were made to Rules 70 and 74, Rule 67 (Estates of Minors), Rule 1.03 (definition of judgment), Rule 4.09 (court documents) and Rule 73 (payment into and out of court).

Amendments Required by the Proclamation of *THE COMMON-LAW PARTNERS' PROPERTY AND RELATED AMENDMENTS ACT*

General

The Common-Law Partners' Property and Related Amendments Act, S.M. 2002, c. 48, was passed by Manitoba Legislature on August 9, 2002. It will come into force on June 30, 2004. The *Act* amends 56 statutes to extend Manitoba's family property regime to both opposite sex and same sex common-law partners so that common-law partners will be able to share in the property accumulated during their relationship if it should end and so that a surviving common-law partner has a claim to property on his or her partner's death.

The *Act* creates a registry system under *The Vital Statistics Act*, allowing common-law partners who are adults living in Manitoba to register their relationships if they wish to do so, and also a fall-back system so that people living in conjugal relationships become common-law partners after they have lived together for a certain period of time even if they do not register their relationships. The time period to qualify is different depending on the statutes with three years cohabitation being the most common:

- *The Marital Property Act* (to be renamed *The Family Property Act*) – three years;
- *The Homesteads Act* – three years;

- *The Intestate Succession Act*, *The Family Maintenance Act* and portions of *The Wills Act* – three years or one year if there is a child of the relationship;
- The four pension acts – one year if neither party is married or three years if either party is married.

The *Act* provides that a common-law relationship may be terminated:

- a relationship that has been registered can only be terminated by registering a “dissolution” once the couple has lived apart for at least one year;
- and if a relationship was never registered, it can only be terminated by the passage of time which in most cases is three years of living apart.

The Intestate Succession Act, portions of *The Wills Act* and *The Family Property Act* (currently *The Marital Property Act*) will apply to common-law partners as defined by the legislation.

The amendments will not apply to relationships that ended or individuals who died before June 30, 2004.

Specifically, like a spouse a common-law partner will be able to claim under Part IV of *The Family Property Act* (in addition to a support claim under *The Dependents’ Relief Act* or exercising their right to a life estate in the homestead).

Where there is a full or partial intestacy, the common-law partner will have rights under *The Intestate Succession Act*.

The Court of Queen’s Bench Surrogate Practice Act has been amended to define “next-of-kin” as including a spouse or common-law partner of the deceased.

Provisions of *The Wills Act* dealing with attestation of wills (sections 12 to 14) are amended to include references to common-law partners so that, for example, if a witness to a will is a common-law partner of a beneficiary, the bequest will be void.

Under *The Intestate Succession Act*, priority will be given to the most current spouse or common-law partner; claims under *The Family Property Act* will have priority over claims under *The Intestate Succession Act* and under *The Homesteads Act*, priority will be given to the first spouse or common-law partner to acquire homestead rights.

These are essentially the changes which triggered amendments to Rules 70 and 74. [As well, a minor amendment was made to Rule 55.01(3) (Procedure on Reference)].

Rule 55

Rule 55.01(3) was amended to substitute “*The Family Property Act*” for “*The Marital Property Act*”

Rule 70

Rule 70 (a number of “housekeeping” amendments were made to Rules 70.03(2)(b), 70.25(1), 70.25(2) & (4), 70.31(11)(c), Form 70D, Form 70A, Form 70B, Form 70R, Form 70U, Form 70AA changing references with respect to “*The Marital Property Act*” to “*The Family Property Act*” and adding in references to “common-law partners” and “common-law partners’ support” and substituting “family property” for “marital property”.

Rule 74

Rule 74.02(20) and Rule 74.02(21) (“Void gift to beneficiary endorsed on will”) are amended by adding “or common-law partner as defined in subsection 12(1) of *The Wills Act*”.

The more substantive amendments are to:

- Form 74A (Request for Probate of Will)
- Form 74D (Request for Administration with Will Annexed)
- Form 74F [Affidavit of Execution of Will (or Codicil)]
- Form 74L (Request for Administration)
- Form 74N (Nomination of Administrator)
- Form 74R.1 (Request for Resealing of Foreign Grant of Probate)
- Form 74R.4 (Request for Resealing of Foreign Grant of Administration with Will Annexed)
- Form 74R.6 (Request for Resealing of Foreign Grant of Administration)

Each of the above forms (except 74F – Affidavit of Execution of Will or Codicil) contains similar amended clauses designed to get information about the marital or common-law status of the deceased. For example, with respect to Form 74A (Request for Probate of Will), there will be boxes for the applicant to check off and paragraphs 2 and 3 now are as follows:

2. THAT at the time of (his/her) death, the deceased [choose all statements below that apply]

- had never married
- was married to: _____ (name) _____
- was divorced from: _____ (name) _____
- was predeceased by (his/her) spouse: _____ (name) _____.

(Note: complete paragraph 3 only if the deceased died on or after June 30, 2004.)

3. THAT at the time of (his/her) death, the deceased [read the explanatory notes following paragraph 3, then choose all statements below that apply]

- had never cohabited with a common-law partner
- was cohabiting with (his/her) common-law partner: _____ (name) _____
- was separated from (his/her) common-law partner, _____ (name) _____, but their relationship had not been terminated
- had a common-law relationship with _____ (name) _____ that had been terminated
- was predeceased by (his/her) common-law partner: _____ (name) _____.

NOTE: For the purposes of this Form,

“common-law partner” of a deceased person means

(a) a person who, with the deceased, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, or

(b) a person who, not being married to the deceased, cohabited with him or her in a conjugal relationship

(i) for a period of at least three years, or

(ii) for a period of at least one year and they are together the parents of a child.

“termination of a common-law relationship” means

(a) where the common-law relationship was registered with Vital Statistics (under section 13.1 of *The Vital Statistics Act*), the dissolution of the relationship has been registered with Vital Statistics; or

(b) where the common-law relationship was not registered with Vital Statistics, the parties to the common-law relationship have lived separate and apart for a period of at least three years.

Form 74F (Affidavit of Execution of Will or Codicil) is amended to indicate that neither witness was the common-law partner (as defined in subsection 12(1) of *The Wills Act*) of a beneficiary and for reference purposes reproduces that subsection. It is of importance to note that the definition of a “common-law partner” under *The Wills Act* is somewhat different in that it refers to a person who is cohabiting in a conjugal relationship “of some permanence”. In addition, the definition refers to a registered common-law relationship.

Clause 2(3)(e) of Tariff “A” is amended by striking out “marital property” and substituting “family property”.

Amendments to Rule 74 Not Related to *THE COMMON-LAW PARTNERS’ PROPERTY AND RELATED AMENDMENTS ACT*

Form 74V (Application to Pass Accounts) is amended by substituting a new paragraph 9 to make more explicit those persons under disability who are interested in the estate and who should be served with the application and describing more fully the persons who should be served on their behalf. For example, the Surrogate Court Practice Committee was of the view that the application ought to be served upon the guardian of the estate of a person under disability (as opposed to the guardian of the person) and that this should be specified in the application in order to avoid confusion. This led to a redrafting of paragraph 9.

Form 74X (Appointment to Pass Accounts) was amended to reflect the changes in paragraph 9 of the application and now specifies the exact place where the hearing to pass the accounts is to occur and gives direction as to the persons upon whom the appointment is to be served.

Form 74BB (Request for Summary Administration under Section 47 of *The Surrogate Court Practice Act*) and Form 74CC (the order) have been amended to make it clear that any realty referred to also includes any interest of the deceased in a real property mortgage and requiring that the lands and premises be described. This amendment was prompted by an opinion from the deputy district registrar of the Land Titles’ Office that the mere vesting of personalty by a section 47 order is not sufficient to allow the administrator to deal with a mortgage registered in the Land Titles’ Office.

Form 74B (Inventory and Valuation of the Property of the Deceased) has also been amended accordingly to make it clear that the “description of immovable property” includes any interest in a real property mortgage.

OTHER RULE CHANGES

Rule 1

Rule 1 (Citation, Application and Interpretation) has been amended by expanding Rule 1.03 (Definitions) in relation to “judgment” to the effect that a “judgment” means a decision that finally disposes of an application or action either in whole or in part. This now explicitly provides for the granting of a judgment for part only of the relief claimed with the right of the party to later return for judgment with respect to other items claimed. [For example, Rule 19 (Signing Default Judgment) provides that there may be default judgment for a debt or liquidated demand in money, the recovery of possession of land or personal property, and the foreclosure, sale or redemption of a mortgage and a party may now get judgment for the debt only without also getting judgment for the other heads of relief with the right to apply later for judgment with respect to one or more of those.] This was probably contemplated by the Rules but there was an argument that the former definition of judgment was an impediment to this procedure and that perceived obstacle has now been removed by the amendment.

Rule 4

Rule 4 (Court Documents) has been amended to add Rule 4.09(1) providing for the establishment of a “B” file whereby any document filed or deposited with the court for a pre-trial conference, case conference, case management conference or a judicially assisted dispute resolution conference must be kept in a separate court file known as a “B” file with access restricted to the parties and their lawyers and not open to the public generally.

The view of the court administration was and is that these documents should be kept private because the purpose of filing is to facilitate settlement discussions which might be compromised if the documents were open to public view. The court has a long-established practice of maintaining “B” files but this was called into question by the Court of Appeal which pointed out that there was no basis either in the *Queen’s Bench Act* or the Rules for maintaining these files. The Legislature recently amended *The Court of Queen’s Bench Act* to provide that the Statutory Rules Committee could make rules restricting access in respect of documents filed in connection with pre-trial procedures intended to settle any or all of the issues in dispute. On the authority of that amendment, the Rules Committee amended Rule 4 accordingly.

Rule 67

Rule 67 (proceedings under *The Infants' Estates Act*) has been reorganized and there have been changes to Form 67A (Affidavit in Support of Application for Guardianship) and Form 67D (Order of Guardianship). Form 67A now calls for more detail specifically as to the reasons why the appointment is being sought and the facts relied upon to justify the appointment as well as any investment planned for the minor's property and the facts relied upon if it is desired to resort to the property for some special purpose. This change was enacted in response to concerns that some applicants were following the rule too literally and were not giving the court all of the information necessary for a proper adjudication.

Rule 70

Form 70 (Affidavit of Service in Family Proceedings) has been amended to require that where there has been an acknowledgment of service, the original of the acknowledgment and not just a copy should be attached to the affidavit. This was done at the request of the Family Division in response to cases where parties were filing an affidavit of service and attaching only a copy of the acknowledgment; it was felt that the best evidence was the original and not the copy.

Rule 73

Rule 73 (Payment into and out of Court) has been amended by adding subrule 73.02(1.1) requiring a party seeking payment of money out of court to file an affidavit stating whether the party has knowledge of third party claims. This had been the practice in the past but it was lost sight of when the current rules were enacted without reference to such a requirement.

These rule changes have been encapsulated in regulations which have now been gazetted as follows:

1. ***Court of Queen's Bench Rules, amendment – M.R. 104/2004***
(re: Common-Law Partners' Property and Related Amendments Act and Surrogate Matters)

This regulation was registered on June 9, 2004, as Manitoba Regulation 104/2004 and will be published in *The Manitoba Gazette* on June 26, 2004.

THIS REGULATION WILL COME INTO FORCE ON JUNE 30, 2004.

2. ***Court of Queen's Bench Rules, amendment – M.R. 106/2004***
(re: Rule 4 – “B” files)

This regulation was registered on June 11, 2004, as Manitoba Regulation 106/2004 and will be published in *The Manitoba Gazette* on June 26, 2004.

THIS REGULATION WILL COME INTO FORCE ON JUNE 11, 2004.

3. ***Court of Queen's Bench Rules, amendment – M.R. 120/2004***
(re Rule 1.03, Rule 67 and Rule 73)

This regulation was registered on June 17, 2004, as Manitoba Regulation 120/2004 and will be published in *The Manitoba Gazette* on July 3, 2004.

THIS REGULATION WILL COME INTO FORCE ON OCTOBER 1, 2004.

ISSUED BY:

The Honourable Mr. Justice G.O. Jewers
Chairperson, Queen's Bench Rules Committee
(Manitoba)

DATE: JUNE 2004