PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: NEW FAMILY DIVISION CASE FLOW MODEL

UPDATES AND CLARIFICATIONS

Since the announcement of the New Family Division Case Flow Model (New FD Model) in 2018, a number of Practice Directions have been issued to advise the profession and the public of important changes to rules and procedures. Those Practice Directions were also meant to provide guidance in navigating the New FD Model. The Practice Directions issued to date, are accessible on the Manitoba Courts website (**www.manitobacourts.ca**), under the heading *"Procedure, Rules and Forms".*

The Practice Directions issued to date are:

- **October 4, 2018 – New FD Model** – direction regarding transitioning existing cases into the new case flow
- **December 14, 2018 – Transitional Issues with Respect to FPA References to the Master (Brandon)**
- **December 14, 2018 – Transitional Issues with Respect to FPA References to the Master (Winnipeg)**
- **December 17, 2018 – Comprehensive Amendments to Court of Queen's Bench Rules (Family) effective February 1, 2019**
- **February 28, 2019 – New FD Model Practice before the Masters**
- **June 28, 2019 – Best Practices in Transitional Cases**
- **July 30, 2019 – Recent Amendments to Queen's Bench Rule 70**

Counsel and parties should review these practice directions, and this one, in relation to matters they wish to commence under the New FD Model and in relation to any existing family cases before the Court of Queen's Bench.

This Practice Direction addresses the following areas:

1. **The New FD Model and Access to Justice**
2. **Pre-Triage Emergent Motions Under QBR 70.24(12)**
3. **Reference Orders on Dates of Cohabitation and/or Separation**
4. **Requests to Adjourn the First Case Conference (Post-Triage)**
5. **Change in Legal Representation in Family Division Matters**
6. **New Procedure re: Applications to Set Aside/Vary Protection Orders (Under the Domestic Violence and Stalking Act)**

1. THE NEW FD MODEL AND ACCESS TO JUSTICE

The objectives of the New FD Model are set out below:

- To ensure that all reasonable efforts are made to resolve and/or dispose of family cases at the **earliest opportunity**
- To emphasize and ensure that greater judicial resources are available at the "front end" or "intake stage"
- To provide a regime of **early, active and meaningful judicial intervention** in order to resolve cases at the early stage
- Where cases cannot be resolved, to ensure that once cases reach triage, they flow through the court system within a **predictable and finite time period**

These objectives are reflected implicitly and explicitly in the new Queen's Bench Rules. The rationale and necessity for these objectives have been more fully explained in earlier Practice Directions. The objectives are congruent with the principles of proportionality in family law and the longstanding desire to render family proceedings less adversarial and protracted.

For their part, the new Queen's Bench Rules (see the Practice Direction of July 30, 2019, "Recent Amendments to Queen's Bench **Rule 70**) exist and operate so as to put into practice and effectuate the above objectives. As stated in the rules themselves, the foundational purpose of the rules governing family proceedings is to:

> (a) help parties resolve the legal issues in a family proceeding fairly and in a way that will
>
> > (i) take into account the impact that the conduct of the proceeding may have on a child, and
> >
> > (ii) minimize conflict and promote cooperation between the parties; and
>
> (b) secure the just, most expeditious and least expensive determination of every family proceeding on its merits.

[QBR70.02.1(1)]

It should be noted that the Rules underscore that efforts must be made to secure the just, most expeditious and least expensive determination of every family proceeding on its merits. This must be achieved in ways that take into account proportionality.

[QBR70.02.1(2)]

Both the foundational purpose of the new Rules and the principle of proportionality are meant to ensure a more meaningful access to justice in family matters.

Such a more meaningful access to justice need include a process and case flow which, if properly understood and achieved, will be much faster, less complex, less expensive and in the particular context of family proceedings, potentially less adversarial. The New Family Division Case Flow Model, if properly understood and utilized, provides that more meaningful access to justice.

Despite previous and progressive (and for a time, comparatively successful) approaches in Manitoba, the family court system had degenerated to one that was slow, expensive and difficult to navigate. There were genuine past efforts by the Court to improve the system. Those efforts included addressing delays connected to such things as the failure of parties to provide necessary financial disclosure and the imposition of trial dates after three case conferences. While these were worthy initiatives, they were not successful in achieving a fair and proportionate result for family litigants. Most family proceedings continued to move slowly, without predictable and certain demarcation and timelines representing meaningful events which could signify eventual reference points for anticipating and identifying financial and emotional closure. With this slowness and unpredictability came attendant costs (both financial and emotional) which were significant and indeed, disproportionate. In the result, it was determined, after much consultation with the judiciary, the Family Bar and family law collateral service providers, that more foundational systemic change was required. The New FD Model represents that change.

It must be remembered that the New FD Model, in the context of the earlier-identified objectives, is meant to maximize meaningful access to justice. That may mean, paradoxically, that parties must now spend more time and resources completing pre-hearing prerequisites (prior to appearing before a judge of the Court of Queen's Bench) in a way that heretofore was not insisted upon. Such is the price for more meaningful access to justice that also, and importantly, better ensures a potentially less protracted and adversarial family proceeding.

Some may complain that because the previous easy and unfettered access to the court via the "Tuesday List" is no longer available, "access" to justice is compromised. Such an analysis would be superficial and ignores the serious and persistent deficiencies of the old system – deficiencies which themselves compromised "meaningful" access to justice. The nature of the skirmishes that played out in the interim motions culture over such foundational matters as the production of financial and other information, often carried over and sometimes dominated and infected the case management process and the work of the case management judge. The reality of the previous system was that parties often felt pressured to rush to court in order to gain some advantage over the opposing party. The result was that parties were often unprepared to address their dispute in an informed and meaningful way (often because of incomplete, deficient or obstructed production of important financial and other information). This in turn often resulted in the matter being

adjourned with either no relief or only partial relief for weeks or months before the next (often unproductive and costly) interaction with the Court. So began what often seemed for litigants, like an uncertain, unpredictable and endless cycle of pre-trial jockeying for advantage. It was this jockeying, often involving the opportunistic and previously-identified, incomplete, deficient or obstructed provision of foundational and necessary information, that led to and perpetuated the interim motion culture which was very costly and which discouraged progress and finality. Therein lies the paradox. Previous quick initial access to the court resulted, in fact, in less meaningful and informed appearances and by extension, in a denial of access to justice on a timely and proportionate basis.

Much of the above is addressed with the now-present and rigorously-enforced prerequisites, which are designed - along with the earlier setting of trial dates - to maximize the meaningful and important work of the case management judge which commences, once the matters have been the subject of the triage conference. Prerequisite completion should not be looked upon as a barrier to the court, but, rather, as an opportunity for the parties to prepare their matter (for the eventual appearance before a judge) and to engage in settlement discussions. The parties will have time to consider how their dispute affects their children and themselves. Further, with full disclosure of relevant financial information and the opportunity to consult with legal counsel, parties are better able to assess whether continuing with their legal proceeding makes sense in light of the amount of support and value of property in dispute. Finally, the parties will have had the opportunity to explore out-of-court mediation and settlement options. When the parties have their first interaction with the court they will do so as informed litigants who are seeking the court's assistance in resolving their legal issues. The court in turn - from triage to case management and, if necessary, to trial - will be in a better position to help the parties. This is what is meant by meaningful access to justice.

The new forms developed under the New FD Model, as well as the court processes set out in the rules and practice directions, have created a system that is understandable and navigable by self-represented litigants. In most cases, prerequisite completion can be accomplished within 60 days, assuming the parties are cooperating with one another.

Where one party is delaying completion of prerequisites or refusing to cooperate, court intervention may be necessary. The Masters are **available on a daily basis** to resolve disputes regarding prerequisite completion. Those litigants living outside of judicial centres have access to the Master via telephone.

The New FD Model was designed to assist parties to engage with the Court when the parties were ready to have a meaningful interaction with the Court. This interaction, when it occurs, is to serve the goal of resolving the dispute or narrowing the issues in dispute for final resolution or adjudication within a predictable and finite time period.

There are cases, of course, where circumstances arise that require the Court's immediate intervention before prerequisites are completed. The Court will always be accessible to parties in such circumstances, as detailed below in this Practice Direction.

2. PRE-TRIAGE EMERGENT MOTIONS UNDER QBR 70.24(12)

Under the New FD Model, mindful of the objectives of ensuring that potentially costly and time-consuming appearances before a judge remain "meaningful", motions and applications are restricted prior to the completion of the prerequisites and prior to the appearance at the triage conference. Subject to limited exceptions (see below), motions and application shall not be heard prior to a triage conference. This restriction addresses the need to change the "interim motion" culture that had created a costly, *ad hoc* and unpredictable approach in family cases prior to the implementation of the New FD Model. This previous "interim motion" culture which often dominated a family proceeding, discouraged progress, finality and predictability for litigants who laboured under the emotional and financial costs that accompany a lack of closure.

The rule restricting motions and applications is found under **QBR 70.24(10).** One set of identified exceptions to the restriction is set out in **QBR 70.24(11**), which allows for pre-triage motions and applications for exclusive occupation of a home on a reserve and for references regarding dates of cohabitation and separation, and family property accountings.

The other important exception to the restriction to pre-triage motions and applications, concerns emergent situations that arise in family proceedings. That exception is set out in **QBR 70.24(12):**

> **Exception — emergent situations**
>
> 70.24(12) A judge may hear a motion or application prior to the triage conference for a family proceeding if the motion or application relates to a situation involving one of the following:
>
> (a) an immediate or imminent risk of harm to a party or a child of a party;
>
> (b) the removal of a child from Manitoba;
>
> (c) the loss or destruction of property.
>
> **Request for emergent hearing**
>
> 70.24(13) A party seeking a hearing on a motion or application referred to in subrule (12) must file a request for emergent hearing (Form 70BB)

This Practice Direction will offer guidance on situations that may give rise to an emergent motion, particularly with respect to the "immediate or imminent risk of harm" to a child.

While providing guidance and further clarification, this Practice Direction is not meant to signal an expansion, in an open-ended way, of what, by definition, should be a limited number of emergent scenarios. As part of the guidance provided, this Practice Direction will also clarify the process when requesting an emergent hearing.

Direction Already Provided in Practice Direction of December 17, 2018

In the Practice Direction issued on December 17, 2018, the restrictions on pre-triage motions and applications can be found on pages 21 through 24. In particular, it provided direction on the nature of emergent cases as distinguished from urgent cases. That distinction remains important and relevant for the purpose of understanding the guidance and clarification contained in this Practice Direction. For convenience and to better understand the distinction that continues to have relevance for this Practice Direction in respect of emergent hearings, the following extract is included from the December 17, 2018 Practice Direction:

The Difference Between the Emergent Case and the Urgent Case

"As explained above, the emergent motion or application may be permitted when there is a likelihood of danger to those involved – to either one of the parties or a child, or there is a risk of loss or damage to property. For example, the situation may be considered an emergency if:

- *There is a risk of violence or immediate harm to one of the parties or the child, OR*
- *The child is on the way to the airport and may be taken out of the province, OR*
- *Circumstances exist that would give rise to an order under s. 21 of The Family Property Act*

As set out above, the party/counsel seeking an emergent hearing must contact the Triage Conference Coordinator who will ask a Triage Judge whether the case will be treated as an emergent case. The judge will consider:

- *The seriousness and immediacy of the situation*
- *How long it might take to have the responding party served*
- *How soon the matter can be heard*

In order to make this determination the Court will require information from the party/counsel. A Request for Emergent Hearing form should be completed, providing sufficient information for the judge to determine whether the matter is an emergent case.

If it is an emergent case the judge will give directions as to:

- *The scheduled court date*

- *When the responding party needs to be served or whether the matter can proceed on an ex parte basis*
- *The affidavits or other documentary information to be filed*

If the judge determines that the matter is not an emergent case, then the party will be directed to proceed in the normal course under the New FD Model via the triage court process.

Sometimes a party or their counsel believe that a matter is emergent due to the circumstances but those circumstances do not qualify as emergent under QBR 70.24(12). Such matters, while not emergent, may involve situations that are time-sensitive and which require early resolution. Such cases would include claims for interim custody and child support, interim spousal support or exclusive occupancy of a family home. These cases are not emergent. They may be considered urgent.

In urgent cases, the parties and counsel must move with all due dispatch and diligence to complete the prerequisites and to attend the first available Triage Screening List to obtain a Triage Conference date. They should note in the Triage Brief that they are seeking an interim order for relief to be considered prior to the first case conference and to be determined by the Triage Conference Judge. The motion and supporting affidavits must be filed and served prior to the Triage Conference date.

It should be emphasized that it is incumbent on the party and their counsel to ensure that they plead the relief that they are seeking in their originating application and in the interim motion. They must make all efforts to have the prerequisites satisfied. If there are barriers to completion or disputes regarding the prerequisites the party is expected to move expeditiously to file a motion for determination of the prerequisites to be heard by the Master on the daily list at 9:30 a.m. Once prerequisites are satisfied the Triage Case Coordinator will direct the matter to the first available triage conference court (every Monday in Winnipeg Centre).

At the Triage Conference, the judge will consider the motion for interim relief and may grant the relief sought in addition to setting the matter for a case conference (in the event that final resolution of the case is not reached at the triage conference). Subsequent motions for relief will be heard by the Case Conference Judge."

As suggested in previous Practice Directions and as has been repeated in various outreach to the profession and the public, purposeful efforts at satisfying the prerequisites are expected and required to ensure access to triage and the quick (and informed) relief that the triage forum can provide. While the triage conference is designed to be much more, it is as well, the first forum at which a party can seek relief for a matter that may be urgent but not emergent. In understanding the policy and conceptual distinction (under

the Model) as between "urgent" and "emergent" matters (and how "urgent" motions can and will be dealt with promptly and more meaningfully at the triage conference), it is important to remember what has been put in place to assist parties in the satisfaction of the prerequisites and to assist the parties in a prompt access to the triage conference where an urgent motion may be dealt with.

As has been previously stated, in most cases, completion of the prerequisites can be accomplished within 60 days, assuming the parties are cooperating with each other. Where there is obstruction or purposeful delay by one party or any refusal to cooperate, the masters are available on a daily basis to hear motions and resolve any disputes in respect of prerequisite completion. Accordingly, with diligence, access to triage - where the adjudication of urgent (not emergent) matters may take place - can in most cases, occur within 60 days.

In this connection, it is instructive to note as well, that where the parties purposefully do what they must do to satisfy the prerequisites and thereby move to the triage conference (usually within 60 days), any urgent motion that is pending (one that needs to be heard but did not qualify as emergent) will have been heard and determined at the triage conference in most cases, no later and sometimes sooner than such similar initial "urgent" motions under the old system. That system required, as a general rule, a case conference to occur prior to a motion proceeding. Leading up to the implementation of the New Case Flow Model, case conference dates were being set three to four months away and at times, up to six months into the future. While the old system did allow for a motion to proceed prior to a case conference, leave was required from a judge. In the vast majority of cases, this leave was sought at the "Tuesday list". If granted, those motions were still being set approximately two months into the future, based not only on the court's and counsel's availability but also mindful of the required filing of evidence and service, all of which are now embodied in the prerequisites.

Under the new system, the urgent motion when heard, because of the satisfaction of the prerequisites, will now see the triage judge and indeed, the parties themselves, much more informed and ready for either a resolution or an adjudication of the issue at hand in a timeframe that is virtually identical to the old system.

CLARIFICATION AND GUIDANCE ON "IMMEDIATE OR IMMINENT RISK OF HARM TO A PARTY OR CHILD"

Since the implementation of the New FD Model, a number of requests for emergent hearings have been received in which a party pleads that either a change in, or restriction to, or a denial of a parent's access to a child constitutes an "immediate or imminent risk of harm" to the child. Subject to the exceptions discussed below, most such requests will not be received as or adjudicated to be emergent. The "emergent" exceptions will include situations which involve cases of immediate or imminent risk of literal or physical harm to the child. Additionally, however, an emergent request and emergent relief may be justified in situations **where one parent has abruptly, unilaterally and without**

explanation or apparent justification, completely cut or has "virtually eliminated" all access and/or contact between the other parent and a child or children. These more stark situations may result in a judge permitting a hearing to be convened to address whether such action constitutes an "immediate or imminent risk of harm" to the child and requires court intervention. Be forewarned, however, that such situations of "constructive", non-literal harm to the child (if they are to constitute an emergent situation) must involve a virtual elimination of access/contact that is abrupt, unilateral and unexplained.

The distinction between an emergent and urgent matter is meant to be a principled one. Apart from those emergent situations involving an imminent and immediate risk of physical harm to a child, the emergent nature of those cases involving imminent and immediate "constructive harm" to a child is rooted in those extreme and stark situations where there has been a unilateral, abrupt and apparently unjustified elimination or virtual elimination of access and custody. In such cases, where the emergent nature of the situation is "construed" from the circumstances, it is reasonable to assume that the elimination or virtual elimination of access and custody will risk having, even in the short-term before triage, an imminent and immediate, harmful impact. The construed harm in such a situation is based on the foundational premises underlying the attachment theory. While it is acknowledged that any change or disruption surrounding the issue of access or custody is potentially a matter of significance and concern for a court (given the potential harm to the child in the long-term), not every such disruption or change poses the sort of risk of imminent and immediate constructive harm so as to be characterized as emergent. Those cases of unilateral, abrupt and apparently unjustified elimination or virtual elimination of access and/or custody, will be so characterized.

It should go without saying that parties should bear in mind that rarely will situations involving disputes over the terms of care and control of children, lead to a permitted emergent hearing. If one parent unilaterally changes a care and control schedule such that the other parent's time is reduced, even significantly, this will not result in an emergent hearing. Such a matter is urgent, not emergent, and should be dealt with, if necessary, at the triage conference which, based on the processes of the model, can be accessed within a 60-day period (upon the satisfaction of the prerequisites) following the commencement of a proceeding.

In identifying other examples and instances of urgent but not emergent issues, the scenario where one party abruptly, unilaterally and without notice changes the school at which the child or children attend, should also be noted. Such a change in relation to a school, however unjustified and requiring eventual redress, will not, by itself, absent the accompanying fact of an elimination or virtual elimination of access or custody for a party, be the beneficiary of the emergent exception. Similarly, situations of relocation within the Province of Manitoba will also not, by itself, in most cases, result in an emergent hearing unless access and contact to the children has been eliminated or virtually eliminated in an abrupt way without explanation or apparent justification.

Parties must avail themselves of resources to assist them in coming to an agreement regarding the care and control of their children. Emergent hearings should not be sought, and will not be convened as a form of settlement conference for parents who are entrenched in their respective positions, in an effort to force one side or the other to submit.

Parties and counsel should be reminded that in cases where permission for an emergent motion is granted, if at the hearing it becomes apparent that the facts do not support a finding that the matter was emergent, the judge may dismiss the motion and consider costs against the party who requested the emergent hearing.

Parties are required to move with dispatch and diligence to complete prerequisites in order to obtain a Triage Conference date at which triage conference the custody and other disputes can be addressed by the triage judge. The delay created by a party's failure to avail themselves of the available resources and court processes to ensure prerequisite completion and thus a triage date, should not itself create an emergent situation and neither will it be viewed as justification for an emergent hearing.

Each request for an emergent hearing will be assessed on the particular facts of the case. In some circumstances, a potential emergent situation may be addressed more proportionately at what may be a more proximate triage conference. A rigorous and consistent application of the test for an emergent hearing and relief will be enforced and, as noted in the December 17, 2018 Practice Direction, all requests for emergent hearings will receive judicial consideration mindful of the following:

- The seriousness and immediacy of the situation
- How long it might take to have the responding party served
- How soon the matter can be heard

THE EMERGENT MATTER – CASE FLOW and PROCEDURE

The following steps must be followed in **all** requests for emergent hearings:

STEP 1 – Contacting the Triage Conference Coordinator

a. Counsel for the moving party (the person seeking the emergent relief) must contact the Triage Conference Coordinator via telephone.
   - In Winnipeg Centre, the telephone number is **204-945-4209.**
   - In all other Judicial Centres, contact the local Court Office and ask for the Triage Conference Coordinator

b. Counsel will advise the Triage Conference Coordinator that circumstances exist [in accordance with QBR 70.24(12)] and that an emergent hearing date is being requested

c. The Triage Conference Coordinator will search the Court Register to determine whether the matter is a new file, an existing and on-going file, or a closed file where a Final Order has already been granted

d. If the matter is an existing and on-going file, the matter will be referred to the assigned case conference judge to request permission to file a motion using Form 70DD

e. If the matter is a **new file** (no Triage Conference has occurred) or a matter where a Final Order is granted and a variation is being sought, then the Triage Conference Coordinator shall advise the party that **a pleading must be filed** in order for the matter to be heard

f. The Triage Conference Coordinator shall also direct that the moving party then proceed to Step 2 – requesting the emergent hearing

STEP 2 – Requesting the Emergent Hearing

70.24(13) A party seeking a hearing on a motion or application referred to in subrule (12) must file a request for emergent hearing (Form 70BB).

Request for Emergent Hearing

Form 70BB

The moving party must forward the completed *Request for Emergent Hearing* to the Triage Conference Coordinator via facsimile at a number provided by the Coordinator.

STEP 3 – A Judge Will Consider the Request

a. The Triage Conference Coordinator will confer with the Triage Duty Judge who will review the *Request for Emergent Hearing* and will determine whether an emergent hearing is required.

b. The Triage Judge will issue a **Memorandum of Direction Regarding Emergent Hearing**, which will set out the Judge's determination regarding whether an emergent hearing will be held. If the request is rejected, the Triage Judge will provide a reason for the rejection. If the request is granted, a hearing date will be authorized and directions with respect to the filing a service of the motion and supporting affidavits will be set out in the Memorandum.

c. If the request for hearing is granted, the Triage Judge who determined the request will hear the matter unless that Judge is not available. Outside the Winnipeg Centre, the local Triage Conference Coordinator will check with the Triage Duty Judge and that Judge will hear the matter unless otherwise directed.

STEP 4 – Preparing for the Emergent Hearing

The Triage Conference Coordinator will advise the moving party of the Triage Judge's determination and will provide the **Memorandum of Direction Regarding Emergent Hearing** to the moving party.

If an emergent hearing is granted, the Triage Conference Coordinator will provide a hearing date and will direct that the moving party proceed to file at the Court counter the following documents:

1. Request for Emergent Hearing – Form 70BB [as the request had only been faxed previously];

2. Notice of Motion, returnable on date set for hearing and setting out emergent relief sought pursuant to QBR 70.24(12);
3. Affidavit of moving party in support of the motion

4. Any other documents directed by the Triage Judge

[PLEASE NOTE that the Notice of Motion and supporting documentations will NOT be accepted for filing unless and until the Triage Judge has directed they be filed. These documents should not be attached to the Request for Emergent Hearing when initially presented.]

The directions of the Triage Judge with respect to service of the motion and any other directions contained in the **Memorandum of Direction Regarding Emergent Hearing** must be followed.

STEP 5 – The Emergent Hearing

The emergent hearing will be conducted by a Triage Judge. The Judge may consider evidence in addition to the affidavit evidence and may allow for cross-examination on any affidavits offered into evidence. The Judge may also consider *viva voce* evidence, if the Judge determines that it is appropriate and necessary to do so in the circumstances.

If an order is granted, the party(ies) will be directed that they must still complete all prerequisites before the case can advance further into the FD Case Flow.

If an order is not granted (or emergent hearing is refused) the party(ies) are directed that they must still complete all prerequisites before the case can advance further into the FD Case Flow **[QBR70.24(14)].**

3. Reference Orders on Dates of Cohabitation and/or Separation - QBR 70.24(11) (b) and QBR 70.25(1.1)

As noted above, a motion for a reference to the Master regarding dates of cohabitation and/or separation is an exception to the restriction on motions prior to triage. Counsel and parties must follow the rules respecting such a reference:

> **Timing of motion on reference re dates of cohabitation and separation**
>
> 70.25(1.1) If a party is requesting a reference to allow the party to obtain from the master, for later confirmation, a recommendation identifying the date of cohabitation, the date of separation or both dates, **a motion for an order of reference must be brought on those issues alone prior to the triage conference.** The motion may be made without notice to the other party.
>
> **Conduct of motion for reference re dates of cohabitation and separation**
>
> 70.25(1.2) A motion under subrule (1.1) will be considered by a triage judge solely on affidavit evidence, without an oral hearing and without an appearance by the parties or their lawyers.

All such motions, accompanied by an affidavit in support of the motion, should be filed to the attention of the Triage Conference Coordinator, who will forward the motion and affidavit to the Triage Duty Judge for consideration. A draft reference order must be tendered to the designated judge at the time of the request.

The following form of Order shall be used for such references:

File No. FD 19-01-00000

THE QUEEN'S BENCH (FAMILY DIVISION)

_____ **Centre**

THE HONOURABLE)
) _____day, the _____ day of _____,2019
JUSTICE)

BETWEEN:

JANE DOE,

Petitioner,

- and –

JOHN DOE,

Respondent.

ORDER

1.0 This matter having proceeded at (specify Court address), at the request of (Jane Doe and/or John Doe);

2.0 This matter being a motion for a reference to the Master for a report with recommendations respecting determination of (the date cohabitation commenced, the date cohabitation ceased or the dates of cohabitation);

3.0 **Option**: This matter shall proceed without notice; **OR** Paragraph 5.0 include reference to means of service

4.0 No one appearing for either party on this matter;

5.0 The following documents and evidence having been filed in support of this matter:

5.1 Affidavit of (specify party name) (sworn/affirmed) the ____ day of _____, 20___;

5.2 the motion brief of (specify party name);

6.0 THIS COURT ORDERS pursuant to *The Court of Queen's Bench Act* and Rules that:

6.1 There shall be a reference to the Master of this Court for a report on the (date or dates) (Jane Doe and John Doe):

(**choose one**)

a) commenced cohabiting with one another;
b) separated and ceased cohabiting with one another;
c) commenced cohabiting with one another, and separated and ceased cohabiting with one another.

6.2 The Master shall make such inquiries, hear such evidence, employ such experts as shall be deemed necessary or desirable for the purposes of the reference, assess such costs as may be appropriate and shall make a report to this Court with a recommended determination of the (date or dates) referred to in paragraph 6.1 (for later confirmation).

6.3 The first hearing for directions shall be held on Tuesday, _____, at _____a.m.

6.4 (Specify responding party Jane Doe or John Doe) shall file (his/her) affidavit and brief no later than the Thursday prior to the date of the first hearing for directions.

6.5 A copy of this Order shall be served on _____, counsel for (specify party name) by facsimile transmission or e-mail (Specify e-mail address?) forthwith or in any event within three (3) days of the date of signing.

_____, 2019 _____

Judge

APPROVED AS TO FORM (AND CONTENT):

Per: _____
Jack Flash
Lawyer for Jane Doe

APPROVED AS TO FORM (AND CONTENT):

Per: _____
Mary Smith
Lawyer for John Doe

Once the Order is signed, the reference will proceed under QBR 70.25(1.3):

> **Initiating a reference re dates of cohabitation and separation**
>
> **70.25(1.3)** Rule 55 applies, with necessary changes, to the procedure for initiating a reference respecting the date of cohabitation, the date of separation or both dates. Subrules (6) to (11) do not apply to such references.

4. REQUESTS TO ADJOURN THE FIRST CASE CONFERENCE

Under The New FD Case Flow Model, where a matter does not resolve entirely at the Triage Conference, the triage judge is required to set a case conference date to occur 30 days after the triage conference, or 60 days where there is a prioritized hearing date set. Given the efficiencies of the case flow, all requests to adjourn the first case conference will be refused.

The first case conference is a meaningful event in the case flow. It is an opportunity for the parties and their counsel to have a fulsome discussion of the outstanding issues. As well, the case conference judge must set a trial date at the first case conference if the case is not resolved. The setting of trial dates within 12 to 15 months of the first case conference is a hallmark of the New FD Model. Allowing an adjournment of the first case conference would create an unacceptable delay and interruption in the case flow.

After a trial date has been set at the first case conference, case conference judges may permit adjournments of subsequent case conferences, as they deem appropriate.

5. CHANGE IN REPRESENTATION IN FAMILY DIVISION MATTERS

This portion of the Practice Direction addresses the process for change in representation in Family Division matters, including those matters under the New FD Model. Parties and counsel are reminded that Queen's Bench Rule 15 applies to Family Division matters [see QBR70.02].

Application of Queen's Bench Rule 15:

Rule 15 is repeated here:

RULE 15

REPRESENTATION BY LAWYER

WHERE LAWYER IS REQUIRED

Party under disability

15.01(1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer.

Corporation

15.01(2) A corporation which is a party to a proceeding may be represented by a duly authorized officer of that corporation resident in Manitoba or by a lawyer.

Other parties

15.01(3) Any other party to a proceeding may act in person or be represented by a lawyer.

LIMITED RETAINER

Retaining lawyer for limited purpose

15.01.1(1) If a party to a proceeding who is acting in person or a lawyer of record retains a lawyer to appear before the court for a particular purpose, the lawyer appearing must inform the court of the nature of the appearance before the appearance by filing the terms of the retainer, other than terms related to fees and disbursements.

Duty to appear

15.01.1(2) If a party to a proceeding who is acting in person retains a lawyer for a particular purpose, the party must attend the hearing or proceeding for which the lawyer is retained unless the court orders otherwise.

CHANGE IN REPRESENTATION BY PARTY BEFORE TRIAL DATE SET

Notice of change of lawyer

15.02(1) Before a trial date has been set, a party represented by a lawyer in a proceeding may change lawyers by serving on the lawyer, and on every other party, a notice of change of lawyer (Form 15A) giving the name, address and telephone number of the new lawyer.

Notice of appointment of lawyer

15.02(2) Before a trial date has been set, a party acting in person may elect to be represented by a lawyer in a proceeding by serving on every other party a notice of appointment of lawyer (Form 15B) giving the name, address and telephone number of the lawyer.

Notice of intention to act in person

15.02(3) Subject to subrule 15.01(1), before a trial date has been set, a party represented by a lawyer in a proceeding may elect to act in person by serving on the lawyer, and on every other party, a notice of intention to act in person (Form 15C) giving the address for service and telephone number of the party acting in person.

Notice to be filed

15.02(4) A notice under this rule shall, together with proof of service, be filed without delay.

CHANGE IN REPRESENTATION BY PARTY AFTER TRIAL DATE SET

Motion to change representation

15.02.1(1) After a trial date has been set, a party who wishes to

(a) change his or her lawyer;

(b) be represented by a lawyer, if the party had previously acted in person; or

(c) act in person, if the party had previously been represented by a lawyer;

shall, by motion to a judge, request an order permitting the party to change representation.

Motion before pre-trial judge

15.02.1(2) A motion under subrule (1) shall be heard by the judge who presided at the pre-trial conference, unless the pre-trial judge is not available in which case another judge may hear the motion.

Service of motion

15.02.1(3) The motion under subrule (1) shall be served personally or by an alternative to personal service under rule 16.03 on

(a) every other party; and

(b) where a party is seeking to change lawyers or act in person if the party had previously been represented by a lawyer, the lawyer of record for the party.

Contents of order

15.02.1(4) The order permitting a party to change representation shall set out the name, address and telephone number of

(a) the new lawyer for the party, if the order permits the party to appoint a new lawyer; or

(b) the party, if the order permits the party to act in person.

MOTION BY LAWYER FOR REMOVAL

Motion for removal as lawyer of record

15.03(1) A lawyer may by motion request an order removing him or her as the lawyer of record in a proceeding.

Timing of motion

15.03(1.1) A motion under subrule (1) shall be made

(a) to the court, if the motion is brought before a trial date is set; or

(b) to the judge who presided at the pre-trial conference, unless the pre-trial judge is not available in which case another judge may hear the motion, if the motion is brought after a trial date has been set but before the trial starts.

Service of motion

15.03(2) The motion under subrule (1) shall be served on the client and on every other party personally or by an alternative to personal service under rule 16.03 and, where the client's whereabouts are unknown, service upon the client may be effected by mailing a copy to the client at the client's last known address.

Party under disability

15.03(3) Where the party represented by the lawyer is under disability, the notice of motion shall be served on the party's litigation guardian, committee or substitute decision maker.

Order to contain client's address

15.03(4) The order removing a lawyer from the record shall, unless otherwise ordered, set out the party's last known address.

DUTY OF LAWYER TO CONTINUE

15.04 A lawyer of record shall continue to represent a party in a proceeding until

(a) the party serves a notice in accordance with rule 15.02;

(b) an order permitting the party to change representation is made under rule 15.02.1; or

(c) an order removing the lawyer from the record is made under rule 15.03.

WHERE LAWYER HAS CEASED TO PRACTISE

15.05 Where a lawyer representing a party in a proceeding has ceased to practice law and,

(a) the party serves a notice in accordance with rule 15.02;

(b) an order permitting the party to change representation is made under rule 15.02.1; or

(c) an order removing the lawyer from the record is made under rule 15.03;

any other party may serve a document on the party in the manner prescribed under subrule 16.01(4)(b) or may by motion seek directions from the court.

PROCEDURE FOR CHANGE IN REPRESENTATION – PRIOR TO SETTING OF TRIAL DATE

As indicated in Rule 15, the procedure utilized depends upon the stage of the litigation.

Any change in representation **up to the date that a trial date is set** is governed by QBR 15.02. The form used depends upon the circumstances of the representation.

Where a party is changing lawyers a **Notice of Change of Lawyer (Form 15A)** must be filed and served on all parties.

Where a formerly self-represented party has retained counsel, a **Notice of Appointment of Lawyer (Form 15B)** must be filed and served on all parties.

Where a party, formerly represented by counsel, determines to act in person, a **Notice of Intention to Act in Person (Form 15C)** must be filed and served on all parties.

PROCEDURE FOR CHANGE IN REPRESENTATION –AFTER SETTING OF TRIAL DATE.

Once a trial date is set (at CP Intake Court, or by a case conference judge at the first case conference) a change in representation requires a motion to the pre-trial judge (in child protection or guardianship cases) or the case conference judge in all other family cases.

Please note that once a trial date is set, the Deputy Registrars will reject the filing of forms under QBR 15.02.

A motion under QBR 15.03 must be filed and served.

HOW TO OBTAIN PERMISSION TO BOOK A MOTION FOR CHANGE OF REPRESENTATION – NEW FD MODEL

Under the New FD Model, the case conference judge must hear all motions prior to the trial of the matter [QBR 70.24(31)].

If a party/counsel wishes to file a motion for change of representation, the party must **first** obtain the case conference judge's permission to do so. A new Rule governing motions before the case conference judge came into effect on August 1, 2019:

Request for motion or subsequent case conference

70.24(31.1) If, after the first case conference has been held, a party seeks

(a) to bring a motion that has not already been scheduled by the case conference judge or for which leave has not previously been granted by the case conference judge; or

(b) another case conference to be held

(i) before the date of the next case conference that had been scheduled by the case conference judge, or

(ii) when the case conference judge has not scheduled the next case conference;

the party must file a request for motion or subsequent case conference (Form 70DD) and comply with the process set out in a practice direction issued by the Chief Justice.

Parties/counsel should follow these steps:

STEP 1: Completing the Request (Form 70DD)

a. the party seeking to bring a motion must indicate the reasons that a motion is necessary. Set out the reasons in concise number paragraphs;
b. the consent of the other party is not necessary but is preferred;
c. if an appearance by telephone is required then this must also be indicated on the form

STEP 2: Filing the Request

a. In Winnipeg Centre, the request form is filed at the front counter and then it is referred to the Family Case Conference Coordinator, Ms. Sharon Wolbaum;
b. In other Centres, the request form is filed and referred to the Deputy Registrar;

STEP 3: Obtaining a Response to the Request

a. The Case Conference Coordinator/DR will forward the Request to the assigned case conference judge who will review the request and determine whether to grant permission to hear the motion;

b. If the permission to hear the motion is granted, then the judge will specify which documents are to be filed, provide deadlines for filing and direct the manner of service of the documents. The case conference judge will complete and sign the Form 70DD Request which will contain the judge's directions. The Case Conference Coordinator/DR will provide the moving party with a date for the motion. A copy of the completed Request form is provided to the moving party for service on the responding party.

c. If the permission to bring the motion is **not** granted, then the judge will provide written reasons on Form 70DD and will sign the form. A copy of the completed form will be provided to the moving party for service on the responding party.

It is imperative that all parties and counsel appear before the case conference judge as the representation of a party at trial and any necessary adjustments to the litigation schedule must be discussed. Such a discussion is necessary even where there is agreement on the motion.

Failure to attend before the case conference judge may result in an order of costs against the non-appearing party/counsel being considered by the case conference judge.

HOW TO OBTAIN PERMISSION TO BOOK A MOTION FOR CHANGE OF REPRESENTATION – CHILD PROTECTION/PRIVATE GUARDIANSHIP MATTERS

Under the Child Protection Case Flow, trial dates are set at the CP Intake Court. Thus, Rule 15 is engaged. A pre-trial conference date is also set at the Intake Court. The period between the Intake Court and the pre-trial conference and subsequent trial can be as little as three months. Further, in child protection and private guardianship matters there is usually only one pre-trial conference. Given the expedited nature of the child protection case flow, a requirement to seek the permission of the pre-trial judge to file a motion would not be proportionate. Therefore, if a motion for change of representation is required, the party/counsel should file that motion as soon as possible prior to the pre-trial conference date and serve the other parties. The pre-trial judge will address the motion. If the need for the motion arises between the pre-trial conference and the trial, the pre-trial judge shall hear the motion. In such instances, counsel are directed to contact Ms. Tkachuk to book a time with the pre-trial judge.

CHANGES IN PROCEDURE RE: PROCEEDINGS UNDER *THE DOMESTIC VIOLENCE AND STALKING ACT* – APPLICATIONS TO SET ASIDE/VARY A PROTECTION ORDER (GENERAL AND FAMILY DIVISIONS)

WINNIPEG JUDICIAL CENTRE

EFFECTIVE IMMEDIATELY

What follows below are changes in procedure which will also be announced in an identical Practice Direction released concurrently with this one and circulated to members of the profession who practice outside of the area of family law.

Applications to set aside/vary protection orders under ***The Domestic Violence and Stalking Act*** will now be dealt with differently from the procedure that was described in the Practice Direction dated December 19, 2018 "Re: Comprehensive Amendments to Court of Queen's Bench Rules (Family) Effective February 1, 2019" (page 29). That earlier-described procedure will no longer apply. Effective immediately, the following procedure will govern such applications in both the General and Family Divisions:

- All types of set aside/vary applications, whether stand-alone applications or ones that are filed concurrently or subsequently and included as part of a family court proceeding commenced by the filing of initiating pleadings (Petition, Petition for Divorce, Notice of Application to Vary, Notice of Motion to Vary, Notice of Application, or Statement of Claim) or those family proceedings already subject to case management, will be subject to the same procedure. The fact that the applicant and respondent may be or may have been in a conjugal relationship does not require that the protection order matter be adjudicated in the Family Division.

- Applications to set aside or vary a protection order granted by a Judicial Justice of the Peace will be set down on the Protection Order Hearing List. The purpose of the List is to sensibly and proportionately manage the disposition of set aside/vary applications.

- The List will continue to be held every second Wednesday at 2:00 p.m.

- The court requires a transcript of the protection hearing before the Judicial Justice of the Peace and affidavit materials to be filed prior to the first court appearance date on the List.

- An objective of the List is to attempt to resolve as many matters as possible on a consent basis or by adjudicating the matter on a summary basis (confirm, set aside or vary). Those matters that can be resolved will be brought to a timely resolution while contested matters will be managed so that the contested hearing will proceed as expeditiously as possible.

- Where matters cannot be resolved by consent or adjudication on the List, the matter will be pre-tried so as to ready it for a contested hearing. Efforts will be made to narrow the issues and discuss procedure so as to ensure that the adjudication is complete within the limited timeframe that is set for the contested hearing.

- Accordingly, when matters appear on the List, **it is required that counsel and the parties attend** and will be prepared to address resolution of the matter and to address contentious issues on a summary basis. If the matter cannot be resolved, those in attendance should be prepared to engage in a meaningful discussion as to how to narrow and streamline the issues for hearing and to address other pre-hearing issues, similar to the case conference and pre-trial process employed by the court with respect to other civil and family matters.

- Where a matter requires the setting of a contested hearing date, the Judge presiding over the List will set this hearing date. Hearing dates will generally be set within 30 to 60 days. Given the nature of the governing test for set aside/vary applications, considerations of proportionality and the comparatively more informal approach that should be taken in those hearings, contested hearings will be set for one-half day and in the most exceptional cases for a maximum of one day.

- With this approach, it is anticipated that those set aside/vary applications with related ***Divorce Act*** or ***Family Maintenance Act*** proceedings will have the necessary determinations of fact regarding the issue of family violence made in a timely manner for the purpose of the court addressing any ongoing or eventual custody, access, and property issues. However, to be clear, it is not a pre-requisite that any such set aside/vary applications be determined prior to a Triage Conference appearance, nor is the procedure outlined herein a limitation on a triage Judge setting a prioritized hearing of a set aside/vary application. In cases where the family proceeding is already subject to case management or has a Triage Conference scheduled, the application will be adjourned to a case management conference date or to the scheduled Triage Conference.

- The Judge presiding over the List may make referrals to Victim Services for safety planning and counselling awaiting the hearing.

- It is to be understood that Judges of both the General Division and the Family Division may preside over the List and hear any set aside/vary applications,

- regardless of whether there are related ***Divorce Act*** or ***Family Maintenance Act*** proceedings.

Coming into effect

This Practice Direction comes into effect immediately.

ISSUED BY:

"Original signed by Chief Justice Joyal"

_____

The Honourable Chief Justice Glenn D. Joyal
Court of Queen's Bench (Manitoba)

Date: February 13, 2020