

**PRACTICE DIRECTION**  
**COURT OF QUEEN’S BENCH OF MANITOBA**  
**RE: COMPREHENSIVE AMENDMENTS TO COURT OF QUEEN’S BENCH RULES**  
**(FAMILY) EFFECTIVE FEBRUARY 1, 2019**

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**RE: COMPREHENSIVE AMENDMENTS TO COURT OF  
QUEEN’S BENCH RULES (FAMILY) EFFECTIVE  
FEBRUARY 1, 2019**

**Introduction**

The Court of Queen’s Bench will be introducing a new model for scheduling and case flow management in respect of non-child protection family proceedings. The implementation date is February 1, 2019. The model is designed to enhance the capacity of all Manitobans to better access justice in the area of family law within a system that will be significantly less complex, less slow and less expensive. The New Model for Scheduling and Case Flow (New FD Model) is expected to achieve that goal by ensuring that those cases that can be resolved will be resolved at the earliest point possible. Where otherwise contested matters cannot be resolved, the New FD Model will ensure that those matters are adjudicated within a predictable and finite period of time, mindful of what will be stable and consistent reference points or “meaningful events”, which events will themselves be governed by clear, identifiable and predictable timelines.

In Manitoba, the expense of protracted family legal proceedings has created a barrier to justice for many families. Delays in obtaining a first case conference date have left some families in distress. Inconsistent case conference processes have resulted in family cases with “no end in sight”. Those who begin a case with legal counsel are often forced, due to financial constraints, to continue the case as self-represented litigants. The current family court system represented a process that was, at times, unnavigable and inaccessible for those who needed meaningful judicial intervention and assistance.

With these concerns in mind, the Court undertook a course of both internal and external consultation with judges, court staff, collateral services and the family Bar in order to address procedural shortcomings and to enhance and revitalize the case conferencing process. The result of these consultations is the New Model for Scheduling and Case Flow of non-child protection Family Division matters (New FD Model).

The reforms to the scheduling and flow of family cases set out in this Practice Direction are part of the ongoing commitment and duty of the Court in ensuring that all Manitobans have access to justice, while ensuring that our court processes and the court’s case flow are, more than ever, judged on a standard of “proportionality”.

This New FD Model in respect of non-child protection family proceedings follows consistently and coherently from this Court’s access to justice initiatives undertaken in the last number of years in other areas of the Court’s jurisdiction. Those initiatives

(encompassing new and comprehensive Practice Directions, rule changes and best practices) have introduced new and transformative models of scheduling and case flow management that have positively impacted the judicial service that this Court provides in the areas of civil litigation, criminal law and child protection. Those new models have correspondently provided new and better evaluative reference points and measurements for how well the Court is providing a service that better facilitates the public's access to justice.

With the New FD Model to be fully implemented commencing **February 1, 2019**, we have already begun transitioning current cases into the New FD Model.

The New FD Model will apply to all judicial centres in the Province, with some adjustments for local resources and practices.

The Court of Queen's Bench Rules related to family proceedings have been amended to reflect and better cohere with some approaches and practices contemplated and/or required under the New FD Model. The new Rules are also meant to enhance the ability of the Court to provide meaningful judicial intervention when required to assist parties in the earliest disposition of their family dispute.

### **Highlights of Changes to Rule 70**

#### **Changes to QBR 70.03:**

- Certain family proceedings listed in s.41 of *The Court of Queen's Bench Act* will now be commenced by way of petition instead of a notice of application [QBR 70.03(2)]
- A new form has been added "Notice of Application for Provisional Order to Vary" [QBR 70.03(9)]

#### **Changes to QBR 70.05, 70.07, 70.08 and 70.09 Financial Disclosure:**

- All parts of Form 70D Financial Statement must be completed where support or property division are at issue [QBR 70.05(1) and 70.07(1) and 70.08(3)]
- Financial disclosure motions are to be determined by the Master and the Master may impose sanctions for failure to provide financial disclosure [QBR 70.09(4)]

#### **Changes to QBR 70.12:**

- Oral hearings for uncontested divorces or final orders will only occur if the Judge reviewing the matter administratively determines that such a hearing shall occur [QBR 70.12]

### **Changes to QBR 70.20:**

- Time limits regarding affidavits in motions brought before a Triage Judge have been modified [QBR 70.20(5.1)]

### **Changes to QBR 70.24:**

- Objectives of the New FD Model set out [QBR 70.24(1)]
- “Applicable prerequisites” defined as the steps that are required to be completed in order to obtain a triage conference date. Prerequisites are specified in a new form “Certificate of Prerequisite Completion” [QBR 70.24(3)]
- Masters will adjudicate any disputes regarding prerequisite completion/satisfaction [QBR 70.24(20)]. Note, however, that Masters shall make no determinations as to whether a matter is emergent [as defined in in QBR 70.24 (12)] so as to exempt a party from the completion of the prerequisites prior to triage. All determinations as to whether a matter is emergent are to be made by a Triage Judge. Separate and apart from the limited and exceptional situation of an emergent hearing as contemplated in QBR 70.24(12), no matter will be referred to a triage conference without the applicable prerequisites having been satisfied.
- Motions and applications prior to triage conference are restricted [QBR 70.24(10)]. **Exceptions** include:
  - application under the Family Homes on Reserve or Rights Act (Canada) for interim order of exclusive occupation sought without notice
  - Motion for an order of reference to the Master to obtain, for later confirmation, a recommendation identifying the dates of cohabitation and/or separation [QBR 70.25(1.1)]
  - Motion for an order of reference to the Master for other family property issues [QBR 70.24(11)(c)]
  - Emergent situations [QBR 70.24(12)]

### **Pre-Triage Screening**

- Triage screening process described [QBR 70.24 (15) to (20)]
- All forms must be served on opposing party fourteen (14) days prior to the proposed triage screening date, unless both parties agree to a shorter period of notice.
- The forms to be filed are:
  - “Request for Triage Conference” form that specifies triage screening date
  - “Certificate of Prerequisite Completion”
  - “Triage Conference Brief”

- The responding party must file and serve forms (Certificate of Prerequisite Completion and Triage Brief) three (3) days (Wednesdays at 2:00 p.m.) prior to triage screening date
- The Triage Conference Brief contents are described in QBR 70.24(17)
- When all the prerequisites are met then the Triage Conference Coordinator **must** set a triage conference date [QBR 70.24(18)]
- If the prerequisites are not satisfied then the Triage Conference Coordinator must advise the parties of the prerequisites that must be satisfied in order for a triage conference date to be set. Parties may return on another date once prerequisites are completed [QBR 70.24(19)]

### **Triage Conference**

- **Role of Triage Judge defined [QBR 24(21)]:**
  - Narrowing the issues in dispute between the parties;
  - Resolving issues that remain in dispute between the parties, where possible; and
  - Determining if there are issues that should, for reasons of practicality or proportionality, be adjudicated before the first case conference and setting a date for a **prioritized hearing** for those issues.
- **Powers of Triage Judge defined [QBR 70.24(22)]:**
  - Has all of the powers of a Case Conference Judge; and
  - May hear a motion or application at a triage conference
  - May hear an appeal from a Master's order, following the completion of the prerequisites, based on evidence that was before the Master, or determine how the appeal is to be addressed

**[NOTE: Any appeal of an order of the Master shall be addressed by a Triage Judge at the triage conference. That appeal will be decided on the basis of the same evidence that was originally before the Master]**

### **Prioritized Hearings**

- If a Triage Judge has determined, for reasons of practicality or proportionality, that a **prioritized hearing is necessary**, then the date for such hearing is set **within 30 days of triage conference** and before the first case conference [QBR 70.24(24)]. The Triage Judge will, concurrently, set a **first case conference date to occur 30 days after prioritized hearing** [QBR 70.24(26)].

- **Prioritized hearings will be used for:**

- Protection order variations/set aside application;
- Confirmation of Master's report on dates of cohabitation/ separation
- A summary judgment motion as directed by a Triage Judge
- Matters that should not wait for the first case conference

**[NOTE:** Prior to the setting of a prioritized hearing, the Triage Judge will be mindful of the fact that a case conference will be available within 30 days of the triage conference]

- Triage Judge **must**, at the conclusion of the triage conference, set a date for the first case conference, as well as any prioritized hearing [QBR 70.24(25)]
- Prioritized hearing will occur first (within 30 days of triage conference) and the first case conference will take place within 30 days of prioritized hearing [QBR 70.24(26)]
- Orders of Triage Judge and prioritized hearing judge may be reviewable by Case Conference Judge if indicated [QBR 70.24(27)]
- Confirmation order or set aside/variation order is a **FINAL ORDER** and will not be reviewed by either Case Conference Judge or trial Judge [QBR 70.24(28)]

## **Case Conferences**

- **Role of Case Conference Judge [QBR 70.24(29)]:**

- Responsible for managing the pre-trial conduct of a family proceeding in a manner that will achieve the objectives set out in subrule (1)

- **Case Conference Judge Seized [QBR 70.24(30)]:**

- Case conference judge is seized and must preside at all subsequent case conferences and hear all motions arising in the family proceeding

- **Considerations of a Case Conference Judge [QBR 70.24(31)]:**

- a Case Conference Judge will make orders and give directions that will:
  - further the purpose of the family proceedings; and
  - take into account the principle of proportionality

- Case Conference Judge may, on motion by a party or on own motion, without materials being filed, make any order or give any direction that judge considers necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of a family proceeding [QBR 70.24(32)]

- Examples of the orders and directions available to a Case Conference Judge are listed at QBR 70.24(33)
- New power to make an order against a party who fails to attend the case conference without reasonable excuse [QBR 70.24(33) #1]
- Restricted from adjourning a trial or final hearing [QBR 70.24(41)]
- A trial date or a final hearing date (which includes all variations motions or applications) must be set at the first case conference [QBR 70.24(39)]

### **Trials and Trial Readiness**

- A scheduled trial or final hearing date may only be adjourned by the Chief Justice or his designate on the request of a party [QBR 70.24(41)]
- Each party in a family proceeding must file a Trial Readiness Certificate no later than 45 days before the scheduled trial or final hearing date [QBR 70.24(42)]
- A Case Conference Judge may preside at the trial or final hearing (which includes a variation motion or application) of the matter [current QBR 70.24(44) is repealed]
- If a Case Conference Judge hears a motion for summary judgment then that judge must preside at the trial or final hearing [QBR 70.18.1(5)]

### **Changes to QBR 70.25 FAMILY PROPERTY ACT REFERENCES:**

- Family Property Act References under QBR 70.25 are amended as described below.
- In cases **where dates of cohabitation and/or separation are at issue**, parties are expected to file a motion, on an administrative basis, to a judge seeking an order for a reference to the Master **prior to seeking a triage conference date**, to obtain from the Master, for later confirmation, a recommendation identifying the date of cohabitation, the date of separation or both dates. The motion may be brought without notice [QBR 70.25(1.1)]
- The motion will be considered by a Triage Judge as a desk motion [QBR 70.25(1.2)]
- On **all other family property matters**, if the matter remains outstanding the parties must:
  - File a motion prior to triage conference seeking a consent order for a reference (desk order); or
  - File a motion to be determined at the triage conference [QBR 70.25(1.3)]
- Such a motion must be accompanied by an affidavit containing a Comparative Family Property Statement [QBR 70.25(1.4)]
- New deadline imposed on party to take out the reference order within 15 days of the granting of the order [QBR 70.25(4.1)]
- New deadline imposed on party to file a motion to initiate a reference within 15 days of judge signing the reference order to initiate the reference before the Master [QBR 70.25(5.1)]

- New rule that party who opposes confirmation of Master's report re dates of cohabitation/separation must notify judge at triage conference [QBR 70.25(11.1)]
- New rule that prioritized hearing to be set when a party opposes confirmation of Master's report containing recommendation re dates of cohabitation and/or separation [QBR 70.25(11.2)]
- If a party wishes to oppose a Master's report **on any other family property matter** (e.g. sharing of property, FPA accounting, etc.) they must file a motion [QBR 70.25(11.3)] and it will be heard as part of a broader adjudication by the trial judge [QBR 70.25(11.4)] based on the evidence before the Master [QBR 70.25(11.5)]
- A judge's order respecting confirmation of a Master's report is a **final order** and is not reviewable [QBR 70.25(11.6)]
- Failure to comply with an order or direction of the court in relation to a family property reference will result in sanctions being imposed by the court including dismissing a party's action or striking out an answer and an order of costs [QBR 70.25(13)]

### **Changes to QBR 70.18.1 – Summary Judgment in Family Proceedings**

- The new Rule replaces existing rule for summary judgment in family proceedings.
- Unlike existing rule QBR 70.18.1, the new Rule imports from civil division subrule 20.03(5), (6), and (7): Considerations for judge to decide when motion should proceed, judge's broad powers to make orders and give directions, and judge's discretion to allow oral evidence with or without time limits. This Rule is broadly drafted so it will apply to all family proceedings (including those excluded from the new triage/case management model (e.g. child protection).
- In a case where a party is seeking summary judgment, the party may file a summary judgment motion and proceed to the Tuesday Triage Screening List to obtain a date for a triage conference
- In any and all cases where a party seeks summary judgment (even in those cases where a party is seeking summary judgment for the enforcement of an alleged settlement agreement) the usual prerequisites must be satisfied prior to obtaining a date for triage and prior to the hearing of the summary judgment motion
- A motion for summary judgment, if not adjudicated by the Triage Judge, may be directed to be set down by a Triage Judge as a prioritized hearing along with a first case conference date to be set 30 days after the prioritized hearing (to be cancelled if summary judgment granted)
- If the summary judgment motion is not granted, in whole or in part, by the judge hearing the prioritized motion, that judge shall be the Case Conference Judge and subsequently the trial judge in the matter
- A Triage Judge may also adjourn the summary judgment motion to the first case conference to be addressed by the Case Conference Judge in which instances the Case Conference Judge will hear the summary judgment motion
- If the summary judgment motion is not granted, in whole or in part, by the Case Conference Judge, that judge shall also hear the trial of the matter [QBR70.18.1(5)]

### **Changes to QBR 70.37 – Variation of Final Orders**

- If a respondent wishes to oppose a motion or application to vary, they must file and serve a notice of opposition upon the moving party within the time period prescribed under QBR 18 for filing and serving a statement of defence [QBR 70.37(6.1)]

- If a respondent fails to file a Notice of Opposition in the time period set out in subrule (6.1), then QBR's 70.11 to 70.12.1 and subrule 70.14(1) apply with necessary changes [QBR 70.37(6.2)]
- A notice of motion to vary, notice of application to vary and notice of opposition must all be served in the same manner as a petition under subrule 70.06, unless otherwise ordered by the Court [QBR 70.37(13)]

### **Application of the Rule Changes**

The changes to the Rules address the objectives of the New FD Model and its application to contested family proceedings. The Rules also address the five meaningful events meant to provide structure to the “flow” of a case in any given family proceeding.

After February 1, 2019, certain Family Division court lists will no longer exist. Those lists are:

- **Tuesday FD List:** has been replaced by Pre-Triage Screening List
- **FD Motions List:** motions in a family proceeding (other than motions that ought to be dealt with by the Master) will be heard in the triage conference and in the case conference
- **Uncontested Guardianship List:** all guardianships will now proceed through the CP Intake process
- **Uncontested FD Hearings List:** all uncontested or consent matters will be handled by judges on an administrative basis. If a judge is not satisfied with the evidence, a judge may convene a hearing of the matter at either 9:00 a.m. or 1:00 p.m.
- **Oral Divorce/Final Hearing List:** such matters will be handled by judges on an administrative basis. If a judge is not satisfied with the evidence, a judge may convene a hearing of the matter at either 9:00 a.m. or 1:00 p.m.
- **FD Protection Order Set Aside List:** applications to set aside/vary/revoke protection orders that have a concurrent or anticipated FD proceeding will be considered pre-triage and must proceed through pre-triage screening to a triage conference

Every effort is being made during the transitional period to ensure that the exiting cases are either determined or moved to the next step in the litigation process.

### **THE NEW FD CASE FLOW MODEL:**

#### **Objectives of the New FD Model [QBR 70.24(1)]**

- To facilitate settlement of family proceedings

- To set early trial or final hearing dates and establish times for the completion of steps in the litigation process
- To identify and simplify the issues in dispute between the parties
- To avoid unnecessary or wasteful steps in the litigation process
- To ensure that a family proceeding is ready for trial or final hearing by making orders and giving directions respecting substantive and procedural issues in the proceeding

The proposed New FD Model has been designed to, and will be implemented to, ensure that all reasonable efforts are made to resolve and/or dispose of those family disputes that can be resolved and are disposed of, as soon as possible, without the delays, complexity and costs associated with the current model of scheduling. It is believed that this objective can be realized with a greater emphasis on, and investment in, judicial resources at the “front end” or “intake stage”. At this stage, under the New FD Model, following the much more consistent and closely-monitored screening process (where prerequisites to triage must be met), a Triage Judge (and/or eventually, a Case Conference Judge) will be even better-positioned to take a more informed, active and interventionist approach with both counsel and the parties themselves.

#### **Application of the New FD Model [QBR 70.24(4)] to Certain Family Proceedings**

- Certain cases will **not** enter the FD Case Flow Model:
  - Affidavit divorces\*
  - Final Orders (FMA) by default or consent\*
  - Variation Orders by default or consent
  - Uncontested guardianships (will be dealt with administratively)
  - Adoptions\*
  - Child Protection matters (CP Intake Model)
  - Contested guardianships and grandparent access – will enter into Child Protection Intake Model [as discussed later in this Practice Direction]
  - ISO\*
  - Hague Convention/Child Custody Enforcement applications\*
  - Child Support Recalculation\*
  - Set Aside Protection applications with no related FD proceeding (to be heard by General Division judge)

*[\* No change from current practices]*

## **Other Family Proceedings**

There are also matters defined as “family proceedings” pursuant to s.41 of *The Court of Queen’s Bench Act*, which will **not** enter the New FD Model. In those applications, the practice will be to have the notice of application returnable at first instance before the Master on their daily 9:30 a.m. list to determine if services have been completed, and, if so, to then determine if the matter is contested. If it is not a contested matter then the Master will direct the applicant to file a consent order for consideration by the Duty Judge. If the matter is being contested, the Master will adjourn the matter to a date provided by the Trial and Motion Coordinator to be heard by a Judge. That Judge will be seized of the matter and may dispose of it by hearing it or determining that the matter requires a case conference and then a contested hearing.

## **All Other Contested Matters Must Enter the New FD Model**

- All other **contested** matters **MUST** enter through the FD Case Flow Model
  - Petition for Divorce
  - Petition (FMA)
  - Notice of Application
  - Notice of Application to Vary
  - Notice of Motion to Vary Final Order
  - Statement of Claim
  - Notice of Application to Set Aside Protection Order filed in connection with FD pleading

## **The FD Case Flow:**

Any efficient model of case flow scheduling must be able to identify the “meaningful events” which provide structure to the “flow” of a case in any given system. These meaningful events provide identifiable, predictable reference points which occur at different stages during a finite period of time. “Meaningful events” are those events during the life of the case that contribute substantially to the resolution of the case, even if, despite best efforts, the ultimate resolution requires an adjudication. Uncertainty as to whether or when court events will occur, the failure of counsel to adhere to basic procedural prerequisites and preconditions, aimless appearances before judges on whom counsel rely for a form of judicial babysitting, counsel’s reliance upon adjournments that enable late or limited preparation and the general disregard for the potential of pre-trial resolution events, are all examples of a case flow scheduling system that has

inadequately identified, inadequately monitored or inadequately normalized meaningful court events. The New FD Model is, as explained in this practice direction and, as reflected in the new Rules, intended to address many of the deficiencies that had been normalized in the previous “working culture” which had come to define many family proceedings.

### **The End of Adjournments Sine Die**

Under the New FD Model, after the parties have arrived at triage (following the satisfaction of the prerequisites) and going forward from triage, no adjournments *sine die* will be permitted. Such adjournments are inconsistent with the premises of the New FD Model.

To the extent that such adjournments *sine die* have taken place in the past pursuant to Queen’s Bench Rule 70.31(3), it should be noted that that Rule has now been amended to eliminate such adjournments once a matter is scheduled for triage. Separate and apart from QBR 70.31(3), under no circumstances, should any proceeding—or issue that has been pled in connection to that proceeding—be placed into abeyance by way of a motion like a motion to adjourn *sine die*, or by a final order containing provisions that adjourn *sine die* a pled item of relief.

It should be understood that under the New FD Model, from the point of setting the triage date onwards, there is always movement forward to an appearance at an identified event, and an identified date leading up to and including the trial date, which trial date will be scheduled at the first case conference, to take place 30-60 days following the triage conference.

Under the New FD Model, the objective and the requirement that all issues pled in any proceeding be completed (with a final order) either through a resolution or an adjudication by an identifiable date (no later than the completion of the trial scheduled 12-15 months from the first case conference), are meant to bring a level of closure to the litigants by ensuring a certain clarity, consistency and predictability within the finite period of time envisioned by the New FD Model. It follows from the foundational premises of the New FD Model, that all issues pled must be either resolved by agreement before trial or, alternatively, determined by adjudication, either on a dispositive motion before trial or following the completion of the trial scheduled within 12-15 months of the first case conference. Put simply, there are to be no remaining or dangling issues (adjourned *sine die* or otherwise) that have not been resolved or determined by a final order granted no later than by the completion of the trial in cases where a trial was necessary.

All of the above means that no issue is to be left unresolved or undetermined and/or put into some sort of abeyance on the conjectural or speculative basis that circumstances surrounding a particular issue are still fluid and might change. It is readily acknowledged that, in many cases, circumstances will be fluid and they could, in fact, change. That said, in most instances, “when” and “how” such changes will occur remain uncertain. Accordingly, under this New FD Model, following the parties’ appearance at a triage

conference, and consistent with the relevant and governing law (see *Messier v. Delage*, [1983] 2 S.C.R. 401 at pp. 415-16; *Grandbois v. Grandbois*, 1998 CanLII 17794 (MB CA), 131 Man R (2d) 110 at para. 7; *Graham v. Graham*, 2013 MBCA 66 at paras. 14-15), determinations on all issues pled are to be made at the time of any scheduled specific adjudication (i.e., on a motion or trial) based on the actual facts and circumstances established (or not established) at the time of the adjudication. If the consequent orders do not properly reflect the state of things following any eventual change, modifications by variation can be sought.

The parties may, of course, resolve issues at any point during the litigation. For example, parties may resolve issues prior to seeking a triage conference date and may enter into a separation agreement and/or seek a final order pursuant to QBR 70.12 (via affidavit). If, at this pre-triage stage, the parties agree to postpone the final resolution of a pled item of relief, there is nothing under the New FD Model that would prevent them from doing so. The parties would simply not enter the New FD Model or attend at the triage conference. The requirement to address all items of relief pled will only be applicable in cases that have entered the New FD Model, that is, after the parties have arrived at the triage conference. That said, there should be no ambiguity or question that a final order (pre-triage or post-triage) can be granted on the resolution or determination of an issue where there nonetheless remain other issues still to be resolved or determined. But to repeat, once an issue has been pled and the parties have arrived at the triage conference, while some issues may very well be resolved or adjudicated before trial (for which a final order may be granted), all remaining issues pled must be finalized with a final order by the completion of that trial. It is in that connection that it is stipulated that no adjournments *sine die* are to take place at or following the triage conference (for example, in the course of the case conferences) or at trial.

If, prior to arriving at triage, the parties in a proceeding identify an issue that needs to be resolved, but the parties do not want (for whatever reason) that issue formally determined by a judge as quickly as the New FD Model's timeline would dictate, that issue should not be pled prior to the triage conference and the parties should not take that issue to the triage conference or beyond.

Following the granting of a final order, if there is indeed an alleged material change of circumstances applicable to an issue that was decided on the basis of the actual and existing facts at the time of the earlier determination of the issue, that material change will be addressed in the context of a variation motion which, as contemplated by the New FD Model, will be treated as a new matter that proceeds anew through the triage process. That variation matter will be dealt with within 120 days.

## **The Five Meaningful Events**

### **1. Obtaining a Date for a Triage Conference**

There is no court-imposed rush to obtain a Triage Conference date. Indeed, prior to engaging in their first interaction with a judge, the parties are encouraged and expected to take the available steps to attempt resolution; and if resolution is not possible, to ready the matter for a meaningful first interaction with a Triage Judge. Parties should not seek a date until they have determined that the matter cannot be resolved and that all applicable prerequisites have been satisfied. They will then be in a position to have a meaningful interaction with a judge at the Triage Conference.

If the parties wish to enter the FD Model, they must:

- complete necessary prerequisites (in accordance with relief sought in pleadings) as described later in this practice direction
- file a *Request for Triage Conference* which specifies the Triage Screening List date
- complete the *Certification of Completion of Prerequisites*
- complete the *Triage Conference Brief*
- serve these documents on the other party (14 days before Triage Screening List for the initiating party and 3 days for the responding party, or such other period as both parties may agree)
- attend the Triage Screening List on the date set out in the Request for Triage Conference

### **The Triage Screening List**

- A Triage Screening List will occur in **Winnipeg Centre every Tuesday commencing at 9:00 a.m.** (and on other dates as set out in the court schedule in judicial centres outside of Winnipeg)
- The Triage Conference Coordinator, Ms. A. Tkachuk, will review the Certification of Prerequisites filed by each party, and if all relevant prerequisites are met then a Triage Conference Date is set
- If the relevant prerequisites are not satisfied then the Triage Conference Coordinator must advise the parties of the prerequisites that must be completed before a Triage Conference date can be set. The parties will be requested to return to the Triage Screening List once the missing prerequisites are satisfied.
- In judicial centres outside of Winnipeg, the Deputy Registrar or his/her designate will act as the Triage Conference Coordinator

### **The Triage Process – Pre-Screening**

- No matter can proceed to a triage conference without first being screened for the completion of prerequisites [QBR 70.24 (18) and (19)]

- All disputes regarding the completion of prerequisites or to compel the completion of prerequisites are to be determined by the Master [QBR70.24(20)]

### **Prerequisites**

- All litigants wishing to proceed in **contested** matters must complete prerequisites **prior to obtaining a triage conference date**
- Prerequisites are also dependent upon the matters at issue
- For example, if there are no issues regarding the custody of children then there is no need to complete those prerequisites
- All litigants must file and serve on the opposite party a **certification** that the prerequisites relevant to the issues before the Court have been satisfied [QBR 70.24(15)]
- If and when a matter proceeds to triage and beyond and a party has failed to certify a relevant issue and has failed to satisfy the connected prerequisites, that party should expect cost consequences

### **Prerequisite List (as set out in Certification of Prerequisite Completion Form)**

1. Confirmation that parties have attempted to resolve the matter prior to judicial intervention
2. If one (or both) of the parties are under a criminal court order prohibiting contact, confirmation that the party has sought a variation to allow the party to participate in family court proceedings
3. Pleadings must be closed
4. Confirmation that parties have either completed, or are undertaking document discovery and/or examinations for discovery
5. Marriage certificate if seeking divorce
6. Birth certificate(s) if parentage is at issue
7. Affidavits of Service (or substituted service) of all documents on the other party
8. Affidavit of Service on the Director of CFS in case of declaration of parentage
9. Affidavit of Service on the Director of Assistance in case of variation of child and/or spousal support
10. Affidavit(s) of Service on mortgagee and any other persons with a registered interest in land where an order for partition or sale is sought
11. Certificate of Attendance at “For the Sake of the Children”

12. If parties sought mediation then either:
  - Report from the mediator; or
  - Letter from mediator advising of outcome of mediation
13. If custody/access assessment completed then a copy of the report
14. If custody/access assessment underway then anticipated date of completion
15. Written parenting plan
16. Form 70D Financial Statement
17. Comparative Family Property Accounting
18. Master's Report for Confirmation regarding disputed dates of cohabitation/separation [see later, *Where Dates of Cohabitation/Separation are in Dispute*]
19. Triage Conference Brief
20. Copy of any other court order (e.g., protection order, recognizance, bail order, child protection order) that may be relevant to the family proceeding

#### **PREREQUISITES BY CATEGORY**

- **PRE-COURT RESOLUTIONS**

- All litigants must certify that they have attempted resolution prior to seeking a Triage Conference date and that resolution was not reached:
  - 4-way meeting (lawyers and parties); or
  - Meeting of the parties if self-represented; or
  - Mediation; or
  - Alternative dispute resolution

- **EXCEPTION**

- ***In cases where contact between the parties is prohibited by a criminal court order or protection order and the variation of the no-contact provision has been refused, then this prerequisite may be waived.***

- **PLEADINGS**

- All litigants must certify that the pleadings are closed and that no further amendments or replies are necessary or sought by either party

- In variation of final order cases, the “pleadings” consist of:
  - Notice of Motion to Vary or Notice of Application to Vary and the supporting affidavit
  - Notice of Opposition and responding affidavit
  - Any reply affidavit of moving party
- DISCOVERY
  - Litigants must certify that examinations for discovery and/or discovery of documents are either not necessary or have been completed or have been undertaken
  - If litigants cannot agree on discovery issues, they are expected to seek orders with respect to these issues before the Master prior to seeking a Triage Conference date
  - In variation of final order cases, if cross-examinations are sought then party must certify that the notice to cross-examine has been served
- DOCUMENTS
  - Marriage certificate
  - If marriage certificate is unavailable at time of filing then a written undertaking to file same will be accepted
  - Birth certificates of children (where parentage is in dispute)
  - If certificates are unavailable at time of filing then a written undertaking to file same will be accepted
- SERVICE OF DOCUMENTS
  - Affidavits of Service (or substituted service) of all documents on the other party
  - Affidavit of Service on the Director of CFS in case of declaration of parentage
  - Affidavit of Service on the Director of Assistance in case of variation of child and/or spousal support
  - Affidavit of Service on mortgagee and any other person with a registered interest in land where partition or sale is sought
  - If there are issues with respect to service, a party may file a motion before the Master to obtain an order of substituted service

- WHERE CUSTODY/ACCESS AT ISSUE
- Certificate of Attendance at “For the Sake of the Children”
- If parties sought mediation then either:
  - Report from the mediator; or
  - Letter from mediator advising of outcome of mediation
- Assessments

In cases where one or both parties are of the view that an assessment with respect to custody (care and control), access or a related family matter is necessary, the parties are expected to address this issue as early as possible in the legal proceedings. Parties may wish to engage the services of a private assessor or they may seek a referral to Family Conciliation Services for the preparation of the assessment. Most of the services offered by Family Conciliation are only accessible through a court-ordered referral. An assessment report is one such service that requires a court order. The assessment process can take some months and there may be a lengthy waiting period before the assessment process can begin.

Thus, it is very important that the parties consider whether an assessment is needed prior to proceeding to a triage conference.

In cases where an assessment is required, the following prerequisites must be satisfied:

- In all cases, (whether or not the parties consent) the process to obtain an assessment requires the filing of a Notice of Motion returnable before a Master. The Notice of Motion must include affidavit evidence setting out why an assessment is necessary. As the Masters will be making a determination whether an assessment or referral to Family Conciliation Services is appropriate, the affidavit (or affidavits) should indicate why an assessment is necessary and whether or not the parties consent.
- If the custody/access assessment (either private assessment or Family Conciliation report) is complete, then a copy of the report must be attached to the Triage Brief
- If custody/access assessment is **underway** then anticipated date of completion must be included in the Triage Brief

***[NOTE: The orders referring parties to Family Conciliation Services (not private assessors) will now be a generic referral to the Service’s triage process and they will determine what form of assessment or service is appropriate (i.e. First Choice, Brief Consultation, Focused Assessment or full custody/access assessment). At the suggestion of Family Conciliation Services, the First Choice report will no longer be prepared on a “without prejudice” basis and the***

**reports will be forwarded to the Court and placed on the “B” file in the same way as is the current practice with court-ordered assessment reports.]**

- Where custody/access is in issue then each parent **MUST** file a **written parenting plan**
  - Need not be written by a professional
  - Should set out in detail the parent’s plan for the child(ren)’s residence, schooling, contact with other parent and family members, and any other concerns or special needs of the child(ren)
  
- **FINANCIAL DISCLOSURE**
  - Fully completed Form 70D Financial Statement with attached income tax returns and proof of year-to-date income if child support or spousal support and/or family property is at issue
  - ***NOTE: Where demands for financial disclosure are not being answered and/or satisfied, it is incumbent on the litigant seeking the disclosure to make a motion before the Master to address the demand and seek an order that the financial disclosure be made***
  
- **FAMILY PROPERTY ACT CLAIMS AND REFERENCES**
  - Where family property/liability sharing is in dispute then each party must file a ***Comparative Family Property Accounting***
  - If parties are able to agree on terms of a reference to the Master for a family property accounting then they should seek an administrative order from a Triage Judge prior to setting a Triage Conference date
  - Triage Judge will deal with this administratively – each party will file their materials (affidavit and brief and comparative family property accounting must be filed)
  - If one or both parties are seeking a reference to the Master for a family property accounting, and are unable to agree on terms, then they must indicate on the prerequisite certification that they wish the Triage Judge to address the necessity of the accounting and to set the terms of the reference. The reference, if found by the Triage Judge to be necessary, will be ordered by the Triage Judge at the triage conference.

- WHERE DATES OF COHABITATION AND/OR SEPARATION ARE IN DISPUTE

- Where parties cannot agree on the date of cohabitation and/or separation, the parties must seek an order from a Triage Judge to refer this issue to the Master **prior to seeking a Triage Conference date**
- Triage Judge will deal with this **administratively** – each party will file their materials (affidavit and brief)
- If the reference order is granted then the moving party will file the order and seek an appointment
- Master will set out the process for the reference
- Once the reference is determined then **a report will issue with a recommendation for confirmation**
- Parties may agree on the confirmation or may contest it
- If contested, the Triage Judge **must** be so advised at the Triage Conference date at which time a prioritized hearing will be set within 30 days of the triage conference to address the Master's recommendation regarding dates of cohabitation and/or separation. If the Master's earlier report is agreed upon, the Triage Judge may issue order of confirmation. This is a final order.

- VARIATION OF FINAL ORDERS

- A motion or application to vary must be accompanied by a supporting affidavit [QBR 70.37]
- Affidavit of personal service of motion or application on the other party
- If opposing the motion or application a **Notice of Opposition** must be filed and served along with the **affidavit in reply** [QBR 70.37(6.1 and (7))]
- Moving party may file a responding affidavit
- Parties must provide the financial information set out in QBR 70.37 depending on the type of support variation sought
- If cross-examination on the affidavits is sought then party must certify that the notice to cross-examine has been served
- Once all affidavits are filed and financial information is exchanged then the matter is ready for a triage conference

- TRIAGE CONFERENCE BRIEF

- A Triage Conference Brief setting out the contested issues in the three main areas:

- Custody/care and control of children [attaching written parenting plans proposed by each party]
- Support of children and/or spouse [attaching calculations under the Child Support Guidelines and/or SSAG]
- Sharing of property [attaching new form – Comparative Family Property Accounting]

### **EXCEPTION TO THE PREREQUISITES – THE EMERGENT CASE [QBR 70.24(12)]**

- The “emergent case” contemplates those situations, prior to the satisfaction of prerequisites, where a party requires immediate relief in relation to risk of immediate harm to the party or a child, the removal of a child, or loss or destruction of property.
- 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 or more of the following:
  - (a) an immediate or imminent risk of harm to a party or a child;
  - (b) the removal of a child from Manitoba;
  - (c) the loss or destruction of property
- In a purportedly emergent case, counsel will contact the Triage Conference Coordinator and the matter will be referred to a Triage Judge to determine if an emergent hearing is to be held. Any determination as to whether a matter is emergent pursuant to QBR 70.24(12) must be made by a Triage Judge and never a Master.
- A party seeking an emergent hearing must complete a Request for Emergent Hearing form [QBR 70.23(12.1)]
- Where an emergent hearing has been granted, a judge at an emergent hearing shall be seized if the order made is returnable for further determination. Such matters will be heard, with the judge’s permission, at either 9:00 a.m. or 1:00 p.m. or such other time as the judge may direct.
- Once the emergent hearing is completed then any other further contested matters in that family proceeding may only proceed following the completion of the prerequisites and the attendance at a triage conference.

### **The Difference Between the Emergent Case and the Urgent Case**

As explained above, the emergent motion or application may be filed when there is a likelihood of danger to those involved – 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 filled out, 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:

- When the court date will be
- 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.

## **RESTRICTION OF MOTIONS AND APPLICATIONS PRIOR TO TRIAGE CONFERENCE [QBR 70.24(10)]**

- Motions and applications are restricted and may not be brought prior to a triage conference
- This represents a change in the current “interim motion” culture that has created an ad hoc and uncertain approach in family cases
- The completion of prerequisites and obtaining of a triage conference date at which substantive issues can be discussed and resolved can be accomplished in as little as 30 days if parties and counsel are proactive.
- The identified exceptions are for exclusive occupation of home on reserve and emergent cases [QBR 70.24(11)]

## **2. ATTENDING A TRIAGE CONFERENCE**

### **TRIAGE COURT**

- Once parties have completed pre-screening, they are ready to attend a triage conference
- In Winnipeg Centre, **4 lists** running concurrently every **Monday**
- In other Centres the Triage List will replace the current Family Division Motions and Hearings lists
- Court begins at **9:00 a.m.** and at **1:00 p.m.**
- Matters addressed in order of seniority of counsel
- Each matter to be set for **45-minute appearance**
- **Role of the Triage Judge [QBR 70.24(21)]**
  - Responsible to narrow the issues in dispute between the parties
  - To resolve issues that remain in dispute between the parties, where possible, and
  - To determine if there are issues which should be adjudicated before the first case conference because early determination of those issues will facilitate the case conference process
- **Powers of the Triage Judge [QBR 70.24(22)]**
  - has the same powers as a Case Conference Judge
  - may hear and make a decision regarding a motion or application at the triage conference
- If matter is resolved then the Triage Judge may grant Final Order/Judgment
- If matter not resolved then a case conference date is to occur **30 days after triage conference** [QBR 70.24(26)]

- Triage Judge may also make interim orders, FPA reference order, confirmation order, and set a prioritized hearing in addition to setting case conference date

### PRIORITIZED HEARINGS [QBR 70.24(24) to (26)]

There may be circumstances in a case that will prompt the Triage Judge to set a prioritized hearing to be heard prior to the case conference. The prioritized hearing will be set to occur within 30 days of the triage conference. When a prioritized hearing date is set, the Triage Judge shall also set a case conference date to occur no later than 30 days after the prioritized hearing.

Four types of prioritized hearings:

- a. Adjudication of an application to set aside/vary a protection order;
- b. Confirmation hearing of a Master's recommendation regarding dates of cohabitation and/or separation;
- c. Adjudication of issues that the Triage Judge has determined should be addressed before the first case conference
- d. A summary judgment motion as directed by a Triage Judge

### APPEALS OF A MASTER'S ORDER [QBR 70.24(22)]

- If a party wishes to appeal the order of a Master in relation to the prerequisites or any other order of a Master, the party must do so at the Triage Conference
- The party should identify such an appeal in the Triage Brief
- The party should, in addition to filing the Triage Brief, also file the motion appealing the Master's order and provide evidence to support the motion
- The Triage Judge may hear the appeal at the triage conference, or may set a date for the hearing of the appeal or may refer the appeal to the Case Conference Judge for determination
- The evidence on the appeal will be the same evidence that was before the Master

### **3. ATTENDING A CASE CONFERENCE**

- The case management system which has been used exclusively in the Winnipeg Centre will now be expanded to all judicial centres in Manitoba
- Unless all matters are resolved at the first case conference, a trial date **MUST** be set
- Trial dates will be within 12 to 15 months of the first case conference
- Hearing dates on variation motions will be within 120 days of first case conference
- The setting of a trial date at the first case conference is **not** negotiable

**[NOTE: In order to permit the scheduling of trials within the required time frame of 12 or 15 months or earlier, the Court will be booking multiple trials relative to the number of judges available. For their part, counsel are also generally expected to book more than one trial in a given time period. “Overbooking of the Court and Counsel” is discussed in more detail later in this practice direction.]**

- There can be subsequent case conferences with leave of the Case Conference Judge, but all must occur within the 12 to 15-month period prior to trial
- The first case conference will be scheduled as part of the Court’s Rota but any and all subsequent case conferences (scheduled with leave of the Case Conference Judge) will be scheduled at either 9:00 a.m. or 1:00 p.m. (except in centres outside Winnipeg in which case that subsequent case conference will be set at the direction of the Case Conference Judge)
- The role of the Case Conference Judge has been expanded to allow that judge to hear all motions in the action

#### Role of the Case Conference Judge [QBR 70.24(29)]

- Responsible for managing the pre-trial conduct of a family proceeding in a manner that will achieve the objectives of the New FD Model
- Responsible to preside at all subsequent case conferences
- Responsible to hear all motions arising in the action including summary judgment motions
- A Case Conference Judge may make orders and give directions that the judge considers will further the purpose of the family proceedings and will take into account the principle of proportionality

#### Powers of the Case Conference Judge [QBR 70.24(32) and (33)]

- Orders and directions of a Case Conference Judge are changed substantially under the New FD Model and now more closely mirror those of pre-trial judges under QBR 50. In addition to the powers that a Case Conference Judge currently has, the following powers have been added:
  - A Case Conference Judge may make an order respecting any issue in the family proceeding
  - Orders made by a Case Conference Judge (if specifically made reviewable) are only reviewable on motion to the same Case Conference Judge
  - A Case Conference Judge may make an order against a party, with or without notice, if the party fails to attend the case conference without reasonable excuse

#### Extended Case Conferences

- Under the New FD Model, extended case conferences (ECC) will still be available
- Parties may ask the Case Conference Judge to schedule an ECC and if the judge is agreeable then he or she will schedule the ECC

- If the matter remains unresolved after the ECC, the Case Conference Judge remains seized of the matter
- As an alternative to the above, there will be no change to the existing practice of a joint request being made by the parties to the Chief Justice or the Associate Chief Justice to have one of at least 3 judges (other than the Case Conference Judge) whom the parties agree would be acceptable to conduct a judicially assisted dispute resolution (JADR)

#### 4. **Certification of Trial Readiness**

- Trial Readiness Certificate to be filed by each party no later than **45 days before the scheduled trial or final hearing date** [QBR 70.24(42)]
- If no certification filed then parties will be directed by the Court to book a further Trial Readiness Conference with the Case Conference Judge at which parties must attend
- Trial Readiness Conference will be 30 minutes only and the only issue to be discussed will be the issue of **costs for failure to file the Trial Readiness Certificate**

#### **Cancelling Trial Dates – Settlement of Cases**

- In the event that the parties reach an agreement in a case where a trial has been set and the parties wish to obtain **a Final Order before trial**, the trial **cannot** be cancelled unless and until the Court has received a requisition requesting the cancellation of the trial and a Final Order dealing with all relief contained in the pleadings which order has been signed by both parties or their respective counsel. In the event that the matter involves a divorce, the affidavit of petitioner's evidence and the notice withdrawing opposition to divorce must also be provided, along with the divorce judgment and envelopes.
- The trial will only be cancelled upon the signing of the Final Order (and Divorce Judgment) by a judge. In most cases the matter will be considered by the seized Case Conference Judge but where he or she is not available due to Rota constraints, the matter will be considered by another judge.
- In the event that a settlement has been reached but a Final Order has not been signed, the parties must attend before the trial judge and place the terms of the settlement on the record to be pronounced under a court order and in the event that the parties are seeking a divorce, oral evidence must be heard for the pronouncement of the divorce. In such cases, the counsel/party will be required to bring to court the divorce judgment and envelopes. The trial will only be cancelled upon the pronouncement of the order (and divorce) by the trial judge.

**[NOTE: \*\* In cases where a divorce is sought and the grounds under s.8 (2) of the *Divorce Act (Canada)* have been satisfied, the parties shall, when attending triage or any case conference, bring the divorce judgment (3 copies) and envelopes to the court.]**

## 5. The Trial

- No trial dates will be **adjourned** without the express permission of the Chief Justice
- Accordingly, any requests prior to the commencement of the trial are to be addressed to the Chief Justice or his designate
- Most trials will commence on Tuesdays and run in segments of 4-day or 8-day periods depending on time requirements
- If and when a trial has been adjourned following its commencement but prior to its completion, counsel are required within 48 hours to advise the Chief Justice of the adjournment and the reasons for it

## **NEW PRESCRIBED COURT FORMS**

As referenced throughout this Practice Direction, there are a number of new forms as well as changes to current prescribed forms. The changes to the Rules and copies of the new forms are pursuant QB Regulation 170/2018, which will come into effect on February 1, 2019.

A copy of the Queen's Bench Regulation 170/2018 made be found:

**<http://web2.gov.mb.ca/laws/regs/annual/2018/170.pdf>**

## **CERTAIN PROCEEDINGS**

### **Variation of Final Orders – Motions and Applications**

- In those cases where a party is seeking a variation of a Final Order, the contested variation will be treated as a new matter and it is understood that the motion/application to vary, if still contested after the triage conference, will be addressed **within 120 days** of the first case conference.
- Parties in contested variation matters are expected to proceed to the triage conference in the ordinary course after satisfying the relevant prerequisites and then following the triage conference have the matter addressed by what will now potentially be a “new” Case Conference Judge who will adjudicate all motion including the motion/application to vary.
- The previous Case Conference Judge (in cases where there were previous contested proceedings) will be unseized of the matter. Due to practicalities and court Rota constraints, the previous Case Conference Judge involved in the matter prior to the implementation of the New FD Model may or may not be the Case Conference Judge once the motion/application to vary enters the triage case flow. In this sense, the matter will be dealt with as a “new matter” and not a matter that must be addressed by the previous Case Conference Judge.

## **Proceedings under *The Domestic Violence and Stalking Act***

- As stated earlier in this practice direction, applications to set aside/vary protection orders under *The Domestic Violence and Stalking Act* will now be dealt with differently.
- There are two types of set aside applications: the ones that are stand-alone applications and the ones that are filed concurrently or subsequently and included as part of a family court proceeding begun by a Petition or Petition for Divorce. Both require Notices of Application.
- In cases where the Notice of Application to Set Aside is the only matter before the Court (no attached family proceedings), those applications are to be dealt with by the General Division, using the process already established in that Division. The fact that the applicant and respondent may be or may have been in a conjugal relationship does not automatically require that the protection order matter be adjudicated in the Family Division.
- In cases where the Notice of Application to Set Aside is filed in tandem with *Divorce Act* or *Family Maintenance Act* proceedings, those cases will be dealt with at the Triage Conference. In those cases, it would seem both logical and important that determinations of fact with respect to the issue of family violence be made early in the process and that they be made before the court addresses custody, access and property issues. Accordingly, when the protection matter comes to triage, if the Triage Judge cannot resolve the matter, then a prioritized hearing of the Notice of Application to Set Aside/Vary must be set to occur within 30 days of the appearance at triage. The Triage Judge will engage actively with the parties in an effort to resolve the matter. Before setting the matter down, the Triage Judge will also conduct an expedited but focused pre-trial.
- The prioritized hearings will be set for no more than one day. Given the nature of the governing test for Protection Order Set Aside Applications, considerations of proportionality and the comparatively more informal approach that should be taken in those hearings, a hearing of more than one day should be scheduled in only the most exceptional cases.
- When addressing Protection Order matters, the Triage Judge may also make referrals to Victim Services for safety planning and counselling awaiting the hearing.

## **Private Guardianship Matters**

- Respecting Guardianship Proceedings, all private Guardianship Applications shall be dealt with in the Child Protection Intake Court stream. That is, the matter will appear on the Master's docket for up to 60 days to deal with the service and document issues. The matter will then be sent to the CP Intake for a judge to review and if it is uncontested, then the CP judge could pronounce the Guardianship Order at the Intake List. If the matter was contested, then a trial date would be set and the matter would

proceed to a pre-trial and then a trial following the case flow of the CP model. Most guardianships come about due to a family's involvement with CFS. Most of the applicants are grandparents, extended family or foster parents. Thus, it would seem to make sense that such applications be dealt with in the CP Intake Court stream. Currently, the practice is for those matters to appear in the Master's Court on a Tuesday List and then set a case conference date. If there is already a CFS matter underway, the guardianship is tagged onto the CFS matter. But if the CFS matter is resolved, the guardianship is then loose and is dealt with at a case conference and then sent over for either a contested hearing on the monthly Uncontested Guardianship Docket or a trial date is set. Under the New FD Model, all private Guardianship Applications are to be dealt with in the CP Intake Court stream. Consequently, the Uncontested Guardianship List is **no longer necessary.**

### **The Scheduling of Family Trial Dates within 12 - 15 months and the Overbooking of the Court and Counsel**

As earlier discussed in connection to the meaningful event captioned as "The Attendance at the First Case Conference", it should be clear that trial dates must be set (prior to the conclusion of that first case conference) no later than 12 - 15 months from that first case conference.

The setting of timely trial dates and the identification of some sort of conclusion to a proceeding is of foundational importance to the preservation of public confidence in the administration of justice in any and all areas of a court's jurisdictional ambit.

The task of scheduling trial dates in a manner consistent with transcendent access to justice objectives is complicated in that it requires a court to balance its resources (judges and courtrooms, etc.) with the undeniable reality that a disproportionately high number of scheduled cases collapse.

Despite all best attempts at the time of scheduling to plan for and factor in such a collapse rate, the phenomenon of a disproportionate collapse rate creates not only the erroneous impression that there are not or will not be available "earlier dates", it also results in a tremendous amount of wasted scheduling space and a corresponding misallocation of precious judicial resources. The failure to address more realistically this disproportionate collapse rate has had a detrimental effect on Manitobans seeking a better access to justice within a system that is less slow and less expensive.

In order to permit scheduling of trials within the required timeframe, the Court, for its part, will be booking multiple trials relative to the number of judges available. For their part, counsel are generally expected to book more than one trial in a given time period.

To reflect counsel's professional obligation owed to his or her clients in individual cases while also maintaining the objectives of timely and affordable access to justice by litigants,

the Court, having discussed this issue in some detail with representatives from the Law Society, sets out the following direction:

Where counsel has booked more than one trial for the same time period, and if, as the trial dates approach, it is apparent to counsel that more than one of these trials is in fact proceeding, counsel must make an appointment with the Chief Justice or his designate (as directed by the Trial Coordinator at the time that the appointment is made) at least one week prior the scheduled trial dates to identify the fact that more than one of these trials is in fact proceeding. This appointment should include all counsel involved in these trials. The appointment will take place by telephone conference, unless otherwise directed by the Chief Justice or his designate. While the latest that this appointment should take place is one week prior to the scheduled trial dates, it may be scheduled as early as the circumstances reasonably dictate. The determination of which trial will proceed and the adjournment date of the trial that is not proceeding will be determined by the Chief Justice or his designate, based in part on inquiries made of counsel and specifically, having regard to the background and nature of the cases and the impact of additional delay. For the sake of predictability and consistency, a determination of which trial will proceed and the determination of the adjournment date of the trial that is not proceeding, are determinations that will be made, like any discretionary determination, based on such considerations and factors that are relevant and which will include:

- Generally, priority will be given to those trials that were scheduled prior to February 1, 2019, given that those actions would not have benefitted from the New FD Model (in effect as of February 1, 2019) when initially set down.
- Availability of alternative trial dates.
- Trial length.
- Prejudice to the parties if the trial is delayed. For example:
  - What is the importance of the issues being determined?
    - Does the case involve a claim for damages or is other relief sought, such as a permanent injunction or other forms of relief that may require interlocutory orders being amended or continued?
  - What are the legal costs incurred and potentially thrown away if the trial is adjourned?
  - How soon before the trial date did counsel who is double-booked make an appointment to address the issue in light of the desirability of minimizing unnecessary trial preparation costs incurred by opposing counsel?
- Impact of delay on the quality of the evidence. For example:

- Is the anticipated salient evidence largely based on records and documents or based on witness memories?
- Are there aging witnesses?
- Impact of delay on the witnesses. For example:
  - How many witnesses are being subpoenaed?
  - What is the availability of the witnesses if the trial is rescheduled?
  - Are there expert witnesses?
  - Are any witnesses from out of town?
    - Have they made travel arrangements?
- Impact of delay on counsel. For example:
  - How many counsel are involved?
  - Is counsel from out of town?
  - What is counsel's availability for alternative trial dates?

Similar considerations to those above will be relevant when the Court has advised counsel that it does not expect to have a sufficient number of judges available to hear all the trials scheduled to proceed and the Court is determining which trial(s) will be adjourned.

In the foregoing situations, it is expected that counsel will provide the background and information relevant to these considerations.

It should be understood that, as it relates to the above considerations and factors governing determinations respecting adjournments or adjournment dates, a body of jurisprudence and/or institutional experience is expected to evolve to bring future clarity.

It should also be noted that on the subject of counsel overbooking, the Law Society of Manitoba—in a Communiqué (2.0) dated May 2018—addressed counsel's obligations (under the Code of Professional Conduct) owed to clients and counsel's concurrent obligation to maintain the objectives of timely and affordable access to justice to litigants.

In a thoughtful and nuanced fashion, the Communiqué reconciles and endorses the requirement to overbook with the precautions that need be put in place in order to discharge counsel's professional and ethical responsibilities. It is expected that a similar communiqué will be issued in respect of the New FD Model.

For your convenience, I attach a copy of the above-mentioned May 2018 Communiqué (2.0).

**Coming into effect**

This Practice Direction comes into effect immediately.

**ISSUED BY:**

*“Original signed by Chief Justice Joyal”*

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

**DATE: December 17, 2018**

# **Civil Trial Scheduling Conflicts**

## **The New Queen's Bench Rules,**

### **Practice Directions from the Court of Queen's Bench and**

### **Your Obligations Under the Code of Professional Conduct**

Darcia Senft - General Counsel, Director of Policy and Ethics

In a Practice Direction dated November 7, 2017, the Court of Queen's Bench addressed comprehensive amendments to the Court of Queen's Bench Rules (Civil). The Practice Direction advised that in order to permit scheduling of trials within the required timeframe, the court will be booking multiple trials relative to the number of judges available. Similarly, it set out the general expectation that counsel would on occasion be required to overbook and schedule trials for the same time period. As a trial date approaches and it becomes apparent that more than one trial will be ready to proceed, counsel were advised of the requirement to make a motion in order to adjourn a conflicting trial.

In order to recognize the professional obligations that lawyers owe to clients while also maintaining the objectives of timely and affordable access to justice by litigants, the Practice Direction was modified on March 14, 2018 as follows:

*Where counsel has booked more than one trial for the same time period, and as the trial dates approach, it is apparent to counsel that more than one of these trials is in fact proceeding, counsel must make an appointment with the Chief Justice or his designate (as directed by the Trial Coordinator at the time that the appointment is made) at least one week prior the scheduled trial dates to identify the fact that more than one of these trials is in fact proceeding. This appointment should include all counsel involved in these trials. The appointment will take place by telephone conference, unless otherwise directed by the judge.*

In addressing when the referenced appointment should take place, the Practice Direction states:

*While the latest that this appointment should take place is one week prior to the scheduled trial dates, **it may be scheduled as early as the circumstances reasonably dictate.***

Pursuant to the modified Practice Direction, the court will determine which trial will proceed as well as the adjournment date of the trial that is not proceeding. This determination will be based, in part, on inquiries made of counsel and having regard to the background and nature of the actions and the impact of additional delay. Examples of the factors that may be considered are set out in some detail in the modification notice that came out on March 14, 2018.

#### **A. Lawyers and the Administration of Justice**

The objectives of timely and affordable access to justice and the principle of proportionality are behind the court's recent and comprehensive amendments to the Queen's Bench Rules, including the rules relating to civil trial scheduling. Improving timely and affordable access to justice will inevitably improve the administration of justice in Manitoba.

Under Rule 5.6-1 of the *Code of Professional Conduct* (the "Code"), lawyers have a professional obligation to encourage public respect for the administration of justice. The rule goes further and sets out that lawyers must also try to improve the administration of justice. There are various ways that lawyers can fulfil their

ethical obligations. For example, when communicating with clients about the civil trial scheduling process, lawyers should explain the rationale behind the process and the ultimate objective to improve timely and affordable access to justice in the public interest.

## **B. Manage Client Expectations**

In light of the two new Practice Directions related to the scheduling of civil trials, lawyers will need to manage client expectations. Clients should be told that the court, for its part, will be overbooking trials having regard to the number of judges who are available to hear trials. As well, lawyers need to advise their clients of the court's expectation that lawyers are also expected to overbook trials. Therefore, lawyers will need to advise clients that if the client's matter is scheduled for trial, it may not actually proceed on the scheduled trial date. With respect to new client matters, this conversation should take place at the outset.

Lawyers will need to ensure that clients appreciate it may be unavoidable for trials to be adjourned.

Lawyers will also need to explain that if a client's matter has been set for trial and it is then re-scheduled, there may be additional fees if the lawyer started trial preparation but will need to revisit that trial preparation at a later date. It should be made clear to clients that they may be billed for legal services rendered even where a trial does not proceed as originally scheduled. The additional legal fees would reflect counsel's need to get back "up to speed" on the file and prepare for trial.

Lawyers owe a duty, under Rule 3.2-1 of the *Code* to "provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil." However, lawyers also owe duties to the court, as officers of the court and, so, as part of managing the expectations of clients, it is important to explain that lawyers must also follow directions established by the court and that they will generally be expected to overbook trial matters. When lawyers do become overbooked, they should advise all affected clients of the conflicting trial dates so that clients are aware of the possibility that their matter may not proceed.

The modification to the Practice Direction sets out that lawyers must schedule an appointment with the court at least one week prior to conflicting trials, but it also specifically states that the required appointment **may be scheduled as early as the circumstances reasonably dictate**. The Law Society encourages counsel to schedule the necessary appointments with the court as soon as it is reasonably apparent that the conflicting matters will not resolve in advance of the scheduled trial dates.

## **C. Duties to Other Lawyers and Others**

In addition to duties owed to clients and the courts, pursuant to Rule 7.2-1 of the *Code*, a lawyer owes responsibilities to lawyers and others with whom the lawyer has dealings to be courteous and civil and to act in good faith.

When lawyers are overbooked for upcoming conflicting trials, in addition to contacting their affected clients, they should, as soon as possible, contact counsel for the opposing parties in the matters (or the parties directly if they are self-represented) to advise of the fact that two trials are scheduled to proceed on the same dates and alert them to the possibility that an adjournment may occur.

Similarly, it would be advisable to inform potential witnesses of the fact that an adjournment may be unavoidable.

The Law Society encourages lawyers to become familiar with the new Court of Queen's Bench Rules and the related Practice Directions. Lawyers must be familiar with expectations of the court and expectations relating to conduct as set out in the *Code*. It would be prudent for lawyers and firms to review existing retainer agreement precedents and other standard client communications and revise them in accordance with their professional obligations as articulated by the court and as contained within the *Code*.