

## **PRACTICE DIRECTION**

### **COURT OF QUEEN'S BENCH OF MANITOBA**

#### **RE: BEST PRACTICES IN TRANSITIONAL CASES UNDER THE NEW FAMILY DIVISION CASE FLOW MODEL**

The New Family Division Case Flow Model (New FD Model) was designed so that pre-February 1, 2019 cases were transitioned into the new case flow with ease. The transition of these existing "old system" cases has, for the most part, gone relatively smoothly. However, there has been some confusion among judges, court staff, the Family Bar and the public on transitional issues. This memorandum has been prepared to offer some further guidance on best practices in transitional cases.

#### **OCTOBER 4, 2018 PRACTICE DIRECTION – TRANSITIONING INTO THE NEW FD MODEL**

The transition of cases to the New FD Model began with the issuance of a Practice Direction on October 4, 2018. The relevant sections of that Practice Direction are repeated, for ease of reference:

The implementation date of the new FD Case Flow Model will be **February 1, 2019**.

While the new Rules associated with the new FD Case Flow Model will contain provisions addressing transition as of or following February 1, 2019, even earlier transition steps must be taken in anticipation of February 1, 2019. This particular pre-February 1, 2019 part of the transition is in respect of new and ongoing files which would normally be part of the rota leading up to February 1, 2019. To facilitate transition to the new FD Case Flow Model, recognizing the obvious scheduling challenges, we will be implementing the following approach as of **October 5, 2018**:

For those matters where a case conference has been held or a case conference is scheduled under the existing Rules, the case conference judge who presided, or who is scheduled to preside at the case conference, will continue to serve as the case conference judge, and:

- At the next or all case conferences between October 5, 2018, and February 1, 2019, trial dates must be scheduled within 12 to 15 months;

- Any subsequent case conferences before this seized case conference judge will be scheduled for 9:00 a.m. or 1:00 p.m. and only with leave of the judge.

For those matters initiated under the existing Rules, where a judge is scheduled to hear an interim motion after October 5, 2018, but before February 1, 2019, including a summary judgment motion, the transition requires that the following take place:

- At the hearing of the motion, trial dates must be scheduled within 12 to 15 months;

Where, after October 5, 2018, but before February 1, 2019, a motion has already been scheduled, but no further case conference has been scheduled, the motion judge is to serve as the case conference judge. Any subsequent case conferences before this judge will be scheduled for 9:00 a.m. or 1:00 p.m., on or after February 1, 2019, and only with leave of the judge.

In any matter where an initiating pleading or a motion to vary has been filed, but there has been no motion or case conference date set, these cases are now to be considered as in the “pre-triage” stage under the new FD Case Flow Model and:

- The first case conference will be scheduled after February 1, 2019;

## **ENTRY POINTS INTO THE NEW FD MODEL**

Most transitional cases, which were being actively litigated, were caught by the foregoing directions and have transitioned into the New FD Model and trial/hearing dates have been set.

There are some cases that are not being actively litigated and are dormant. Such cases, when they become active, will be subject to the same directions as set out above. When a dormant case becomes active (by the filing of a request for further case conference or motion, as discussed later in this Practice Direction), it is assessed at the Registry stage and discussed with a triage judge to determine the appropriate entry point into the New FD Model. Registry then provides the triage judge’s direction to the parties regarding the proper entry point into the case flow and on the court process to follow to ensure timely engagement with a judge.

## **ATTENDING A CASE CONFERENCE IN A TRANSITIONAL CASE**

All contested family proceedings, including transitional cases, are subject to the New FD Model. Transitional cases are already, or will be, at the case conference stage. The objectives of case management are set out in QBR 70.24(1):

### **Objectives of case management process**

70.24(1) Recognizing the emotional and financial impact family proceedings can have on those involved and consistent with the principle of securing the just, most expeditious and least expensive determination of a family proceeding, the case management process established by this rule has the following objectives:

- (a) facilitating settlement of family proceedings;
- (b) setting early trial or final hearing dates and establishing timelines for the completion of steps in the litigation process;
- (c) identifying and simplifying the issues in dispute between the parties;
- (d) avoiding unnecessary or wasteful steps in the litigation process;
- (e) ensuring 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.

With these objectives in mind, the case conference judge will address transitional case utilizing the considerations and processes set out below.

### **a. Reviewing the Case at its Current Stage in the Litigation**

As indicated in the October 4<sup>th</sup> Practice Direction, the next meaningful event in an existing case will lead to a case conference. At that case conference, while it is presumed that the parties have met the basic prerequisites to advance the case past the triage stage, the case conference judge will, nevertheless, conduct a case review to ensure that all prerequisites have been met. Such a review will include:

- Review of pleadings to ensure the pleadings are closed and any amendments that are requested or required are addressed;
- Confirmation that all relevant financial disclosure has been exchanged, and if not, to order that same be completed by a specified date;
- Review any outstanding applications to set aside/vary/revoke a Protection Order and to set a prioritized hearing (to be heard within 30 days) to address the application if an agreement cannot be reached;
- Ensure that all services of pleadings on parties and others ( e.g. Director of Assistance, Director of CFS, mortgagee, registered interest holder) have been completed and that proof of same is on the court file;

- Address the discovery of documents and examinations for discovery with the parties and order completion of same by a specified date;
- Address whether cross-examinations on affidavits will be conducted and order that they be completed by a specified date;
- In custody cases, confirm that each party has completed the “For the Sake of the Children” course and each has filed their certificate of completion on the court file;
- In custody cases, confirm that each party has filed a written parenting plan on the court file;
- In custody cases, address whether a custody/access assessment is required and if so, order same;
- In property cases, confirm that a Comparative Family Property Statement has been filed either jointly or separately on the court file;
- In property cases, where there is a dispute as to the date of cohabitation or separation (or both) to order a reference to the Master respecting those dates;
- In property cases, address whether a reference to the Master for an accounting under *The Family Property Act* is required and **to order a focused** accounting, if required;
- If there is a general reference order already existing on the file, then to make a referral to Dueck, J. or Abel, J. as noted later in this Practice Direction;
- Confirmation that necessary documents are on the court file:
  - Marriage certificate (Divorce Act)
  - Central Divorce Registry certificate (Divorce Act)
  - Children’s birth certificates (declaration of parentage)
  - Transcript of JJP proceedings (application to set aside/vary/revoke protection order)
  - Letter from Victim Services (revoke protection order)

The purpose of the case conference judge’s review is to ensure that the parties have provided all the necessary information to assist the case conference judge and, subsequently, the trial judge in addressing the outstanding issues in dispute. There is no avenue to return an existing case to the Triage Conference stage. All momentum in the New FD Model is forward to resolution and, if resolution is not possible, then to adjudication at trial.

#### **b. Narrowing the Issues in Dispute**

In addition to the review, parties can expect the case conference judge to lead them in a discussion of the outstanding issues to assist them in resolving the issues. Where the issues cannot be resolved, they will be discussed, and narrowed, to allow for a focused adjudication of the matter at trial.

In some transitional cases, the parties may get the sense that they are going backwards as the case conference judge will be reviewing the file from the beginning, including existing court orders and past directions of the court. The case conference judge may make directions that re-organize the flow of the case. The case conference judge is responsible for determining which of the outstanding issues require adjudication at a trial and which issues can be resolved through discussions or by other processes, such as summary judgment. The case conference judge will make orders and give directions that the judge considers will help the parties resolve the legal issues fairly, and in a way that will, in accordance with QBR 70.02.1(1):

- a. take into account the impact that the conduct of the proceedings may have on a child; and
- b. minimize conflict and promote cooperation between the parties; and
- c. secure the just, most expeditious and least expensive determination of the proceeding on its merits

When making orders and directions, the case conference judge will invoke the principle of proportionality as set out in QBR 70.02.1(2):

### **Proportionality**

70.02.1(2) Securing the just, most expeditious and least expensive determination of a family proceeding on its merits includes, so far as is practicable, conducting the proceeding and allocating appropriate court resources to the proceeding in ways that are proportionate to

- (a) the interests of any child affected;
- (b) the importance of the issues in dispute;
- (c) the amount of support and the value of property likely at issue in the proceeding;
- (d) the complexity of the proceeding; and
- (e) the likely expense of the proceeding to the parties.

### **c. Motions in Transitional Cases**

Under the New FD Model, a case conference judge is required to hear all motions in a family proceeding:

### **Case conference judge seized**

70.24(31) Unless otherwise directed by the Chief Justice or his or her designate on the request of the case conference judge or a party to the family proceeding, the case conference judge must

- (a) preside at all subsequent case conferences; and
- (b) hear all motions arising in the family proceeding.

Thus, in transitional cases, where parties previously may have had one judge hearing a motion on a specific issue and another judge conducting the case conference, the parties will now deal with one judge for both motions and case management. The case conference judge is in the best position to adjudicate pre-trial motions, as this judge will be most familiar with the parties, their issues, and what is at stake in the proceedings.

Motions and applications may be brought only after obtaining the permission of the case conference judge. This restriction will prevent the previous practice of countless motions and counter-motions dominating a file and delaying its final adjudication at trial.

#### **d. Family Property Disputes in Transitional Cases**

In many transitional files, the family property issues have either been left for further discussions or they have not been pursued. As stated previously, the case conference judge is required to review all outstanding prerequisites and to direct that Comparative Family Property Statements be filed (preferably a joint statement) and, if necessary, the judge will make a focused reference order for an accounting to the Master. Sometimes in a transitional case, there are existing family property reference orders that have not been taken out, nor acted upon.

In December 2018, two Practice Directions issued on the transition of cases with outstanding Family Property Act References; one for Winnipeg Centre and one for Brandon Centre:

##### **Winnipeg Centre:**

Under the New Case Flow Model in the Family Division, the Offices of the Master will have an enhanced role at the beginning of the case. That enhanced role will deal with custody assessments, any issues involving pre-requisites and family property references, including dates of cohabitation and separation.

Efforts are required in order to ensure sufficient resources are available from the Offices of the Master to deal with this new enhanced role.

As part of the New Model, when parties are seeking a reference to the Master, they will be required to provide the Court with a Comparative Property Analysis (which can be found at the following link:

<http://www.manitobacourts.mb.ca/court-of-queens-bench/procedure-rules-and->

forms/forms/). This document will assist the Court in ordering a *focused* reference to the Master.

Currently, there are a number of previously-pronounced property reference orders that are all inclusive and generic in nature, often referring to the valuation of “the assets and liabilities” of the parties. More particularly, those orders that utilized clause SB-1 of Version 5 of the Standardized Court Order clauses.

If you have such a generic all-inclusive reference Order and HAVE NOT had your first appearance before the Master, you will now be required to IMMEDIATELY do the following:

1. File a Comparative Property Analysis; and
2. Schedule an appointment, in chambers, to attend with the Honourable Mr. Justice Dueck.

Please contact Sharon Phillips at 204-945-8697 to schedule your appointment (**counsel only are required to attend**).

### **Brandon Centre:**

If you have such a generic all-inclusive reference Order and HAVE NOT had your first appearance before the Master, you will now be required to IMMEDIATELY do the following:

1. File a Comparative Property Analysis; and
2. Schedule an appointment, in chambers, to attend with the Honourable Mr. Justice Abel.

Please contact Michelle Brown at 204-726-7430 to schedule your appointment (**counsel only are required to attend**).

### **In Centres Outside Winnipeg and Brandon:**

In all other Centres, counsel or the parties should contact the Deputy Registrar in that Centre to obtain direction. The sitting circuit judge will require parties to file a Comparative Property Statement and will then review the reference with the parties and focus the reference before being sent to the Master.

## **In Cases Where There is No Existing Reference Order**

In transitional cases where no reference order has been made but one is needed, the case conference judge will address the matter and will issue a **focused reference order**. The case conference judge will do so as soon as possible to ensure that the Master will have sufficient time to address the reference before the trial date. Trial dates will not be adjourned due only to an outstanding reference to the Master.

**\*\*\*The Masters issued a Practice Direction on February 28, 2019. This practice direction can be accessed at [www.manitobacourts.ca](http://www.manitobacourts.ca)**

### **e. Orders and Directions at a Case Conference**

Under the New FD Model, the case conference judge may make orders and directions as follows:

#### **Orders and directions at a case conference**

70.24(33) The case conference judge may, on motion by any party or on his or her own motion, without materials being filed, make any order or give any direction that he or she considers necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of a family proceeding.

#### **Examples of orders and directions**

70.24(34) Without restricting the generality of subrule (33), the case conference judge may do any of the following:

##### *Substantive Matters*

1. Make an order against a party on any issue in the family proceeding, with or without notice to the non-attending party, if the party fails to attend the case conference without reasonable excuse.
2. Order a party to pay child support on an interim basis, that is reviewable on motion to the case conference judge, taking into account the current annual income of the party with the obligation to pay child support and the applicable table of the guidelines, provided the amount of child support ordered does not exceed the applicable table amount for an annual income of \$150,000.
3. Impute income to a party on an interim basis, that is reviewable on motion to the case conference judge, for the purposes of making an order under paragraph 2 if the party has failed to disclose financial information when under an obligation to do so.



4. Order that the enforcement of support or arrears be suspended in accordance with section 61.2 of *The Family Maintenance Act*.
5. Vary a protection order or prevention order under *The Domestic Violence and Stalking Act*, with or without conditions, to permit a party to attend a proceeding and communicate with another party at the proceeding.
6. Vary an order under clause 10(1)(j) of *The Family Maintenance Act*, with or without conditions, to permit a party to attend a proceeding and communicate with another party at the proceeding.
7. Order that child support be recalculated in accordance with section 24.3 of the guidelines.

#### *Procedural Matters*

8. Adjourn a case conference or any hearing in the proceeding, other than the trial or final hearing date.
9. Direct the parties to attend a further case conference.
10. Direct a party to bring a motion for summary judgment.
11. Order that a pleading be amended or specifying the time when pleadings are closed under the rules.
12. Direct a party who intends to file a motion to do so within a specified time.
13. Order that procedures for discovery of documents and examination of parties be dispensed with or limited.
14. Direct, in accordance with rule 70.30, that at the trial the evidence be adduced, in whole or in part, by affidavit.
15. Direct that a case conference, or a portion of a case conference, be recorded.
16. If a proceeding to strike or expunge all or part of a pleading or document has been or will be commenced, provide directions respecting the proceeding, including that the proceeding be limited or dismissed.
17. Order that one or more matters in issue be severed and proceed to a final hearing.
18. Order that two or more proceedings be heard at the same time or consolidated in accordance with Rule 6.
19. Direct that a party file and serve written material and specify the time for doing so.
20. Order that within specified time periods, specified actions in the proceeding be taken, including
  - (a) filing trial records, agreed statements of facts, agreed books of documents and briefs of the law; and

- (b) exchanging documents, including exchanging
  - (i) witness lists,
  - (ii) experts' reports, and
  - (iii) resumes of experts.

21. Give directions as to the preparation and entry of an order.

### **HOW TO BOOK A SUBSEQUENT CASE CONFERENCE**

In most transitional cases, the parties have already attended at least one case conference. The file may then have become inactive or dormant. If one or both of the parties wish to re-activate the file and book another case conference, they must first obtain the permission of the case conference judge. They may do so in the Winnipeg Centre, by contacting the Case Conference Coordinator, Ms. S. Wolbaum, at 204-945-7853. In other Centres, parties should contact the Deputy Registrar of the Centre.

The Coordinator/Deputy Registrar will be able to review the file and to advise the party(ies)/counsel to write to the assigned case conference judge seeking permission to book a subsequent case conference. Sometimes, due to retirements or scheduling issues, the previous case conference judge will not be available to continue managing the file. In those cases, the Coordinator/Deputy Registrar will advise the party(ies)/counsel of the name of the newly-assigned judge.

In transitional cases that are active, parties will still need to make a request for a subsequent case conference to the case conference judge, unless the judge has already booked a date for the next case conference.

It is recommended that counsel discuss with one another both the need for a subsequent case conference and the issues that are to be addressed by the case conference judge.

A request form for subsequent case conferences and motions before a case conference judge will issue in the coming weeks to assist parties in making the request for a subsequent case conference or motion. In the interim, the parties should contact the Case Conference Coordinator (Winnipeg Centre) or Deputy Registrar to forward a request to the case conference judge.

### **HOW TO OBTAIN PERMISSION TO BOOK A MOTION**

As stated above, under the New FD Model, the case conference judge must hear all motions prior to the trial of the matter [QBR70.24(31)].

If a party wishes to file a motion seeking interim relief that cannot wait until the trial, the party must first obtain the case conference judge's permission to do so. The moving party should contact the Case Conference Coordinator (Winnipeg Centre) or Deputy Registrar (Judicial Centres outside Winnipeg) to facilitate the request to the case conference judge.

A request form for subsequent case conferences and motions before a case conference judge will issue in the coming weeks to assist parties in making the request for a subsequent case conference or motion. In the interim, the parties should contact the Case Conference Coordinator (Winnipeg Centre) or Deputy Registrar to forward a request to the case conference judge.

## **EMERGENT HEARINGS IN TRANSITIONAL CASES**

Under the New FD Model, filing of a motion for emergent relief is an exception to the restriction on filing motions prior to the Triage Conference. Sometimes there are situations that arise in transitional cases, which may be considered emergent. In such cases, the test for emergent hearing is the same as 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.

In order to obtain a hearing in an emergent situation for a transitional case, the moving party should contact the Case Conference Coordinator (Winnipeg Center) or Deputy Registrar (Judicial Centres outside Winnipeg) to facilitate the request with the case conference judge. If the case conference judge is not available, the matter may be referred to the triage duty judge who will provide directions regarding the filing of documents and the hearing of the motion. After the hearing of the emergent motion, the matter will continue to be managed by the case conference judge.

## **VARIATIONS IN TRANSITIONAL CASES**

If a party is seeking a variation of a Final Order that proceeding is a "new" matter under the New FD Model and the process for variations is set out under QBR 70.37 and described in the December 2018 Practice Direction:

## 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 motions 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. Every effort will be made to return such variation applications to the previous case conference judge.

## Variation of Final Orders - Process

- 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

## **Variation of Interim Orders**

If a Final Order has NOT been pronounced in a transitional case, then the process under QBR 70.37 is **not** available as the litigation has not been concluded. If a party is seeking to vary an Interim Order in the transitional case, they must seek the permission of the case conference judge, as with any other motion, using the process described earlier in this Practice Direction.

## **USE OF CASE MANAGEMENT INFORMATION STATEMENT (CMIS) IN TRANSITIONAL CASES**

In cases that existed prior to February 1, 2019, the Case Management Information Statement (CMIS) was required to be filed by each party for each case conference. The CMIS was eliminated as a form under Regulation 170/2018. The intention was that we would be using a Triage Brief as the case conference brief in the New FD Model. **The Triage Brief must be used in all cases proceeding through the triage process.**

Counsel and FD Judges have requested that in transitional cases, parties will be allowed to continue using the CMIS. **The use of the CMIS is, therefore, permitted and limited to transitional cases in which case conferences occurred prior to February 1, 2019.**

## **ADJOURNING TRIAL DATES IN TRANSITIONAL CASES**

It is incumbent upon the case conference judge to manage the case up to the trial date. Once a trial date is set, the judge and the parties must use the time prior to trial to resolve as many issues as can be resolved and to ready the remaining issues for adjudication at trial. In transitional cases, this can be challenging, especially when some issues have been adjudicated on an interim basis and other issues are still pending before the Master or awaiting an assessment report.

Parties may have to attend a number of case conferences between the conference at which the trial date is set and the trial itself. Each party must file a Trial Readiness Certificate at least 45 days in advance of the trial. If the certificate is not filed, then the parties and their counsel must attend before the case conference judge to explain why the certificate is outstanding. Parties may be subject to a costs order for failure to file the certificate.

Trial Readiness Certificates are required in transitional cases. Sometimes, it is discovered during the preparation of this certificate that the matter is not ready for trial.

Counsel should seek a further case conference with the judge to address the outstanding item and obtain direction with respect to completing the outstanding item.

Under the New FD Model, a case conference judge may change the length of a trial (by reducing or adding days) but cannot adjourn the trial. If there are exigent circumstances that counsel believe require adjournment of a trial, the request for an adjournment is sent to the Chief Justice. Exigent circumstances will vary from case to case. However, it is safe to assume that changing counsel or having counsel withdraw, will not, in the ordinary course, lead to an adjournment of a trial.

### **CANCELLING TRIAL DATES IN TRANSITIONAL CASES – SETTLEMENT OF CASE**

Most cases resolve before the trial date thus prompting the cancellation of the trial. The Practice Direction issued on the New FD Model set out the process for trial cancellations when settlement is reached:

- 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. In cases where a Final Order under The Family Maintenance Act is sought, an affidavit of the Petitioner's evidence is required.
- 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.**

**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: JUNE 28, 2019**