

**PRACTICE DIRECTION
COURT OF QUEEN'S BENCH OF MANITOBA
RE: NEW MODEL FOR SCHEDULING AND CASE FLOW
MANAGEMENT
PRACTICE BEFORE THE MASTERS**

Introduction

The new Model for Scheduling and Case Flow Management in respect of family proceedings is scheduled to be implemented as of February 1, 2019. The model includes a number of rules and procedural changes that impact on the involvement of the masters in connection with motions and references. This Practice Direction addresses the specific matters that will be heard by Masters and the process involved with having these matters heard.

Motions before the Master

Under the case management system, the masters heard very few family motions as motions before the master prior to the first case conference were restricted to motions relating to service, withdrawal of counsel, and financial disclosure. In practice, the motions for financial disclosure brought before the master were generally restricted to basic motions brought without notice where the responding party had not complied with the demand for financial disclosure.

Under the new model, there are several types of motions that will be returnable before the master, generally prior to the first case conference. These include:

- (a) Rule 70.09(2) – Where a party fails to file and serve the required financial information within the time prescribed, the court may, on a motion without notice, make an order requiring that the financial information be filed and served within a specified time. **(NO CHANGE)**

- (b) Rule 70.09(3) – Where the financial information provided by a party lacks particularity, the other party may demand particulars. If the particulars are not supplied within seven days, the court may, on such terms as are just,
 - a. Order that particulars be filed and served; or
 - b. Strike out the party's financial statement or the affidavit attaching documents required under section 21 of the *Federal Child Support Guidelines* and order that new documents be filed and served within a specified time. **(NEW IN PRACTICE)**

- (c) Rule 70.09(4) – Where a party fails to comply with an order to file and serve a financial statement, a new financial statement, particulars or other financial information, the court may make
- a. an order dismissing the party's action or striking out the answer;
 - b. an order for costs against the party. **(NEW IN PRACTICE) ***
- (d) Rule 70.24(10) – Subject to subsections (11) and (12), no motions or applications in a family proceeding may be brought before a judge until the triage conference for the family proceeding is held. **(NEW – ALL PRE-TRIAGE MOTIONS WITHIN THE JURISDICTION OF THE MASTER MUST BE HEARD BY A MASTER)**
- (e) Rule 70.24(14) – Nothing in subrule (10) affects the jurisdiction of masters to hear motions prior to a triage conference. Without restricting the scope of their jurisdiction, masters may hear the following motions before a triage conference:
- a. a motion with respect to service, including a motion for substituted service, to validate service or to extend the time for service;
 - b. a motion for financial disclosure;
 - c. a motion to withdraw as counsel;
 - d. a motion to determine whether a party has satisfied all applicable prerequisites in order to obtain a triage conference date;
 - e. a motion to compel a party to complete applicable requisites in order to obtain a triage conference date;
 - f. a motion to appoint a family evaluator under subsection 49(1) of *The Court of Queen's Bench Act*;
 - g. a motion to refer parties to a designated mediator under subsection 47(1) of *The Court of Queen's Bench Act*.

Motions for the appointment of a family evaluator are to be supported by affidavit evidence and brought on notice to the other party. The parties need to satisfy the master that an assessment is required. Generally, the order granted will provide for a general appointment of Family Conciliation to conduct such assessment of the custody, access or related issues as Family Conciliation determines to be appropriate. However, in some cases a more specific type of assessment may be ordered. The parties will be required to complete the standard Assessment Information forms and provide them to Family Conciliation along with a copy of the order and a copy of any affidavits filed in support of the motion within 20 days of pronouncement of the order. The parties should have the Assessment

Information forms completed in advance of the hearing in anticipation of an order being pronounced.

A sample order is attached as Schedule "A" to this Practice Direction. It is important to note that the order is to contain one of the 4 choices provided in section 6.1.

The draft form of order is to be changed to require service/delivery to Family Conciliation within 20 days of signing.

Once a triage conference has been held, all motions in a family proceeding are to be heard by the judge presiding at a prioritized hearing or the case conference judge, except a motion to be heard by a master in connection with a reference pursuant to subrule 54.05(1). **(NEW)**

The October 4, 2018 Practice Direction addresses the transition of ongoing files to the new FD Case Flow Model. To provide clarification, on any ongoing file in which there has been a case conference held, whether or not a trial date has been set, no motion may be heard by the master. Counsel must write to the case conference judge and request a date to address any motion that a party wishes to have adjudicated. This does not apply to a new matter such as a variation of a final order however.

- (f) Rule 70.24(20) – A master may hear a motion in relation to a dispute respecting the completion of the applicable prerequisites. In addition, a master may hear a motion to compel a party to complete an applicable prerequisite.
- (g) Rule 70.24.1(20) – the court may deal with a party's failure to attend the For the Sake of the Children program, or to follow any other provision of this rule, by making any order that the court considers appropriate, including any of the following:
- a. requiring the party to attend the program within a specified period of time and in a specified manner;
 - b. ordering costs against a party or a party's lawyer;
 - c. refusing to consider the party's evidence;
 - d. suspending the party's right to submit evidence until the party attends the program,
 - e. adjourning, staying or dismissing the proceeding;
 - f. striking out all or part of a pleading. **(NEW MOTION FOR MASTERS)**

(h) Rule 70.24.1(21) – If an order is made under subrule (20), the party against whom the order is made may bring a motion to set aside or vary the order. **(NEW FOR MASTERS)**

The above noted rules reflect the changes to the matters to be heard by masters in connection with family proceedings. In accordance with current practice, any motion to be heard by a master in Winnipeg shall be made returnable on the masters' daily uncontested list with normal service requirements to be complied with.

Any motion to be heard by the master in Brandon shall be made returnable on the masters' uncontested list with normal service requirements to be complied with.

Any motion to be heard at any other judicial centre where a master presides on a regular basis shall be made returnable on a master's uncontested list on such a day as there is a regular sitting of the master. In the event of some urgency, parties may arrange to have matters made returnable on the masters' list in Winnipeg or Brandon and seek permission to attend the hearing by teleconference.

Any motion to be heard at any other judicial centre where a master does not preside shall be addressed in the following manner:

- matters arising in the Flin Flon Centre shall be placed on the masters' list that will be heard at The Pas Judicial Centre on the same dates that the Child Protection Docket is scheduled.

- matters arising in the Swan River Judicial Centre will be heard by the Queen's Bench Justice sitting at that centre or directed to be placed on a masters' list for hearing at the Dauphin Judicial Centre or the Brandon Judicial Centre.

- matters arising in the Thompson Judicial Centre shall be placed on a masters' list and heard by videoconference on the same dates that the Maintenance Enforcement proceedings are scheduled.

It should be noted that subrule 70.24(6) provides that the Chief Justice may, by practice direction, vary the requirements of this rule in a specified judicial centre in the manner specified in the direction but that the intent is for the model to be applied province wide with the masters hearing the motions and references as outlined in this Practice Direction.

In the event that the motion is to be contested, a contested hearing date will be set from the uncontested list. The rules relating to affidavit evidence and the filing of same, as well as the rules relating to motions briefs are expected to be followed although the master may waive the requirement for a brief in accordance with rule 70.22(5).

References Pursuant to Rule 70.25(1.1)

The new model contemplates a new process for the determination of the date of commencement of cohabitation and/or the date of separation (valuation date) where either of these dates is contested. The process is addressed in rule 70.25(1.1).

Rule 70.25(1.1) – If a party is requesting a reference to allow the party to obtain from the master, for later confirmation, a recommendation identifying the date of cohabitation, the date of separation or both dates, a motion for an order of reference must be brought on those issues alone prior to the triage conference.

Rule 70.25(1.2) – A motion under subrule (1.1) will be considered by a triage judge solely on affidavit evidence, without an oral hearing and without an appearance by the parties or their lawyers. The affidavit must contain the following:

- a. The nature of the dispute – which date or dates are in dispute
- b. The position of the party on the disputed dates
- c. The evidence that supports the party's position

A brief must also be filed that contains an outline of the position of each of the parties and a summary of the evidence that supports each party's position.

The moving party must also file a form of a reference order to be considered by the triage judge.

The triage judge will consider the motion solely on the affidavit evidence and without requiring the attendance of the parties or their lawyers, but will reserve the right to request evidence from the other party or an attendance in the appropriate circumstances.

In considering the evidence and the request for a reference order, the triage judge will apply principles of proportionality and may determine the dispute without making a reference order, or determine that the reference is not supported by the evidence and/or is not proportionate to the issues in dispute, in which case the motion for the reference order shall be dismissed, or adjourned to a hearing before the triage judge who rejected the order.

If the triage judge determines that the reference is supported by the evidence and that it is proportionate, a reference order shall be made and shall include the following:

- a. A reference to the master to determine the date or dates in dispute, i.e. commencement of cohabitation, separation date, or both.

- b. A provision requiring the responding party's affidavit and brief to be filed and served prior to the return date before the master, unless filed at the request of the triage judge before the order was made.
- c. The return date before the master, which return date shall constitute the first hearing for directions and in the Winnipeg Judicial Centre shall be the second Tuesday after the date of the order, at a time to be assigned (either 10:30 a.m., 11:00 a.m. or 11:30 a.m.). In the event that there is no time available on the second Tuesday the matter will be assigned on the following Tuesday.
- d. Directions as determined by the triage judge regarding service of the order on the responding party. In this regard counsel is expected to canvass with the opposing party or counsel appropriate dates and times as well as methods of service.
- e. Any other provision that the triage judge considers appropriate to be contained in the reference order.

The moving party is responsible for ensuring the reference order is served upon the opposing party as directed by the triage judge and shall file an affidavit proving service in advance of the hearing for directions.

In the event that the responding party did not file an affidavit or brief prior to the order being obtained, such affidavit and brief shall be filed with the court no later than 2:00 p.m. on a date that is not less than two court days before the return date for the first hearing for directions.

Both parties and their counsel must appear before the master on the date and time set for the first hearing for directions, subject to the waiver of a party's appearance where that party's counsel is in attendance and counsel can reach the party if necessary during the scheduled hearing. Failure to appear without reasonable explanation where there has been proper service may result in the master issuing a report setting out the master's recommendation regarding the dates in dispute, without further notice.

At the first hearing for directions a determination will be made as to the manner in which the reference will be heard and how the evidence will be presented. The master may restrict the number of third party affidavits to be filed (if any) and determine whether cross-examination on affidavits will take place prior to or at the formal hearing. The master will determine whether the hearing will be a viva voce hearing or restricted to

cross-examination on affidavits or simply by argument based on affidavits filed and cross examinations held prior to the formal hearing. In making these determinations the master will consider the most expeditious and least expensive process, taking into account the financial amount that may be at issue and other pending issues in the matter that are awaiting a triage conference.

At the first hearing for directions the master shall set a date for the formal hearing with the intent that the hearing be considered a prioritized hearing to be held within 30 days or as soon thereafter as the master's schedule will allow.

The formal hearing may or may not be heard by the master presiding at the first hearing for directions.

The general reference rules apply except for the rules relating to confirmation and except as modified by this Practice Direction. The new procedure as to confirmation of a Report issued pursuant to a reference directed under rule 70.25(1.1) is addressed in rule 70.25(11.1).

Rule 70.02.1(2) will also be applied in determining how the reference shall proceed, both in the Winnipeg Judicial Centre and any other Judicial Centre. That rule provides as follows:

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

.....

(b) the importance of the issues in dispute;

.....

(d) the complexity of the proceeding; and

(e) the likely expense of the proceeding to the parties.

Rule 70.25(11.1) provides that if a party opposes confirmation of a master's report that deals with the determination of the date of cohabitation, the separation date, or both of those dates, that party must notify the judge presiding at the triage conference for the proceeding.

Rule 70.25(11.2) provides that upon being advised of a party's opposition under subrule (11.1), the triage judge must set a prioritized hearing date to deal with the opposition to the confirmation of the master's report at the same time as he or she schedules the case

conference for the family proceeding. Until the prioritized hearing takes place, the master's report cannot be confirmed.

References pursuant to Rule 70.25(1.3)

The rules relating to orders made pursuant to rule 70.25(1.3) for *Family Property Act* accounting references are not substantially changed other than with respect to timing. However, the new model is predicated on a premise that reference orders under these rules are to be targeted and relate only to specific assets and liabilities, the values of which are in dispute. If orders are made that do not reflect this premise it is unlikely that references will be able to be completed in the timeframes required by the new model.

Transition

In addition to the new orders that will be made once the new model is implemented, there are many existing orders that have been made for which references have not been completed, and others that have not commenced.

For those orders where there have been recent hearings for directions, the masters will endeavor to complete the references unless trial dates are set without sufficient time for the reference to be completed.

For those orders where there has been no hearing for directions held, or held recently, the order is referred back to a family division judge for review and determination whether a reference under the provisions of the new rules is warranted or whether the property issues are to be addressed at the triage conference. The parties must in all of these cases complete the Comparative Family Property Statement (Form 70D.5). A Practice Direction has been issued to address the procedure applicable to such reference orders made or dealt with at the Winnipeg Centre. It is dated December 14, 2018 and is **Re: TRANSITIONAL ISSUES WITH RESPECT TO FAMILY PROPERTY REFERENCES TO THE MASTER**. It directs parties with such an order to file a Comparative Property Analysis and schedule an appointment in chambers with Dueck J. by contacting Sharon Phillips at 204-945-8697. Counsel are to attend without their clients.

A similar Practice Direction has been issued for the Brandon Centre and requires counsel to schedule an appointment with Abel J. by contacting Michelle Brown at 204-726-7430. Where Abel J. has a conflict the appointment will be with Cummings J.

Rule 70.25(1.3) provides that a motion for an order of reference for the determination of any family property matter other than the dates set out in subrule (1.1) may be brought by a party

- (a) prior to the triage conference, with the consent of both parties; or
- (b) at the triage conference, for determination by the triage judge.

Rule 70.25(1.4) provides that a motion under subrule (1.3) must be supported by an affidavit that includes a Comparative Family Property Statement (Form 70D.5). **THIS IS A NEW REQUIREMENT AND A NEW FORM**

Rule 70.25(1.5) provides that a motion under clause (1.3)(a) will be considered by a triage judge solely on affidavit evidence, without an oral hearing and without an appearance by the parties or their lawyers.

As stated above the new rules introduce deadlines for taking out a reference order made pursuant to rule 70.25(1.3) and for filing a motion to initiate a reference. There is also a deadline with respect to the return date for such a motion. The master will not permit an adjournment of a motion to initiate the reference without an appearance.

Rule 70.25(4.1) – Within 15 days after the granting of an order of reference, the moving party must take the steps required under rule 70.33 to have the order prepared, signed and filed, unless all applicable issues between the parties in relation to the reference have been resolved.

Rule 70.25(5.1) A motion to initiate a reference must be filed within 15 days after the order of reference has been signed by the judge, unless all applicable issues between the parties in relation to the reference have been resolved.

The new rules do not alter the requirement for filing a completed Form 70U notwithstanding the stated intention to have focused reference orders.

The new model provides that trial dates are to be assigned within 12 to 15 months of the first case conference. Any reference made pursuant to rule 70.25(1.3) will need to be concluded and the Master's Report completed approximately 60 to 45 days prior to the trial dates. Masters' Reports will have to be concise and procedures under the reference will need to be streamlined to have any possibility of meeting these timeframes. In keeping with the general reference rules that are applicable as well as rule 70.02.1(2), the following expectations, requirements and procedures will be implemented:

- A) Failure to file proper summaries and responses or to provide proper disclosure within specified timeframes may lead to significant cost consequences.
- B) A first hearing for directions will be set at the motion to initiate the reference and all efforts will be made to set the date within approximately 30 to 60 days.

- C) At the first hearing for directions the positions, and evidence of the parties to support their positions will be reviewed. Orders will be made for any outstanding production of documents with strict timelines for compliance, as well as for any appraisals that have not been obtained.
- D) A date for a formal hearing will be set which will need to be early enough to ensure the hearing is completed and the master's report released well in advance of trial dates. The same master that presides at the hearing(s) for directions will preside at the formal hearing. The parties will be expected to attend a second hearing for directions that will be conducted as a pre-trial conference approximately 45 to 60 days before the formal hearing.
- E) In appropriate cases, a settlement conference may be requested and scheduled to be heard by another master approximately one month before the formal hearing date.
- F) References to value household contents are to be discouraged on the application of principles of proportionality and on the basis of an argument that household contents are jointly owned and therefore not to be valued as family property. However if reference orders are made requiring household items to be valued, the parties will be required to have detailed lists of the items in their respective possession at the time of separation and will be required to have a joint appraisal completed which will be binding on the parties, or they will have to arrange their own separate appraisals for all the items.
- G) If the value of a residential property is in issue the parties will be required to obtain a joint appraisal that is binding on the parties, or to each obtain a certified appraisal or two opinions of value.
- H) If the value of a commercial property is in issue the parties will be required to obtain a joint appraisal that is binding on the parties, or to each obtain a certified appraisal.
- I) For automobiles and other vehicles such as boats, ATVs and trailers, as well as farm equipment and any other heavy equipment, the parties will be required to obtain a joint appraisal which is binding, or to each obtain an independent appraisal.
- J) In each of the situations presented in F) to I) above, where the parties do not obtain a joint appraisal, it will be the initial responsibility of the party who owns the asset to obtain the independent appraisal, and only if the other party disputes that value will the other party be required to obtain his or her own appraisal. To the extent possible, all appraisals should be obtained prior to the first hearing for directions, and if they have not, the parties should expect these will be ordered at the first hearing for directions.

- K) In connection with securities, bank accounts, etc. in issue, the parties will be required to obtain statements that include the date of separation, and the date of cohabitation, if applicable, in advance of the first hearing for directions, and if they have not obtained them by that time, they may be ordered to provide an authorization to the other party and pay any cost of the other party obtaining such documents.
- L) Masters may limit the use of viva voce evidence in conducting a reference and may require evidence to be placed before the court in affidavits.

Rule 70.25(13) provides for sanctions for failure to comply with the rules or directions given at a reference as follows:

....the court may make an order

- (a) Dismissing the party's action or striking out the party's answer; and
- (b) An order for costs against the party.

General Reference Rules

The general reference rules that will be applied to references pursuant to rule 70.25(1.1) and 70.25(1.3) include the following:

- a) Rule 55.01(1) - A master shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,
 - a. give such directions as are necessary; and
 - b. dispense with any procedure ordinarily taken that the master considers to be unnecessary, or adopt a procedure different from that ordinarily taken.
- b) Rule 55.02(3) – At the hearing for directions, the master shall give such directions for the conduct of the reference as are just, including,
 - a. the time and place at which the reference is to proceed;
 - b. any special directions concerning the parties who are to attend; and
 - c. any special directions concerning what evidence is to be received and how documents are to be proved.
- c) Rule 55.02(7) – A party who is served with notice of a reference under subrule (2) or (5) and does not appear in response to the notice is not entitled to notice of any step in the reference and need not be served with any document in the reference, unless the master orders otherwise.

- d) Rule 55.02(12) – The following rules apply, with necessary changes, to the conduct of a reference:
- a. Rule 30.1 (deemed undertaking);
 - b. Rule 52 (trial procedure), other than rules 52.08, 52.09 and 52.11;
 - c. Rule 53 (evidence at trial), other than rule 53.08.
- e) Rule 55.02(14) – The master may require any party to be examined and to produce such documents as the master thinks fit and may give directions for their inspection by any other party.

ISSUED BY:

“ORIGINAL SIGNED BY SENIOR MASTER LEE”

Senior Master F. A. Lee
Court of Queen’s Bench (Manitoba)

DATE: February 28, 2019