The Law Society of Manitoba

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FAMILY LAW

Chapter 5

Discovery, Preparation for Trial and the Trial

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A. INTRODUCTION

Family law is a specialized category of civil litigation.

> All the King's Bench Rules which apply to civil litigation also apply to family law except where there is a conflict with the family law rule (Rule 70), in which case Rule 70 applies.

The materials set forth in the *Civil Procedure* materials are comprehensive and generally applicable to family law proceedings. This chapter identifies the differences that do exist between the practice of civil litigation and that of family law in the areas of pre-trial and trial procedures.

B. DISCOVERY

1. Financial Disclosure

Discovery in the context of family law practice is for the most part the same as discovery in civil litigation practice. This section highlights aspects of discovery procedures which are particularly significant to family law practice. In addition, the sanctions for non-compliance with the procedures are emphasized.

a) Legislative Requirements for Financial Disclosure

There are a number of specific statutory requirements for financial disclosure in family law matters.

> The Rules require that where an issue relating to support or to the division of property is raised, the petitioner/applicant must submit a completed financial statement in Form 70D (Rule 70.05(1)). The statement is sworn, or affirmed, to be accurate. It sets forth the party's monthly income, total gross income for the last calendar year, monthly expenses, and the assets and debts of both parties.

In addition to declaring one's income, including the sources, the form calls for the inclusion of 3 years of "income and deduction" tax information statements (printouts available from CRA or online).

The assets and debts pages call for "market value" figures for all assets on the dates of separation and currently, as well designation of who owns or possesses each item or whether they are jointly held. Debts are similarly identified as to the party who is responsible, or if they are joint.

The parties are required to set out the special and extraordinary expenses of their children where there is a claim for child support.

Despite being sworn or affirmed, many of these forms are often deficient or inaccurate. Some will complete categories by stating "unknown". Motions to the Master or the court at triage or case conference for better disclosure are common.

> Where child support under the *Divorce Act* or *The Family Law Act* is in issue, the financial information required by the *Child Support Guidelines* must also be attached (Rules 70.05(5) and 70.07(8)). See section 21 of the federal *Child Support Guidelines* and the *Child Support Guidelines Regulations* to *The Family Law Act.*

The respondent who files an answer to such claims or who raises an issue relating to support or division of property must file the same type of financial statement (Rule 70.07(4)) and information

In the event that the respondent files an answer with a financial statement where no such statement had been filed by the petitioner, Rule 70.08(2) requires the petitioner to file and serve a financial statement within 20 days. This applies even if the petitioner does not file and serve a reply.

> The Rules respecting disclosure accord with the requirements under *The Family Law Act* (s. 58) for the provision of all of the information required by the *Child Support Guidelines* when child support is at issue, and the provision of financial information when spousal support is in issue (s. 67).

Section 58:

> *58(1) A parent, or another person found by the court to have a duty to provide for a child's support, whose income information is necessary to determine an amount of child support must — at the request of another parent or other person entitled to apply for support — provide them with financial information in accordance with the child support guidelines.*

Section 67(1):

> *67(1) Spouses have the mutual duty to provide each other, on request, with information and accountings respecting the financial affairs of the marriage or common-law relationship and the household relating to it, including, but not limited to,*
> *(a) copies of each other's income tax returns, together with assessment notices;*
> *(b) itemized statements of each other's gross and net earnings, showing all deductions; and*
> *(c) itemized statements of each other's debts and liabilities, if any.*

Each of these sections includes in subsection (2) the possibility of obtaining the necessary information from employers, partners, principals, or any other person who may have the information if the party does not provide it, for penalties for non-compliance and for orders that the information provided be kept confidential and not form part of the public record.

The Family Law Act also specifies in section 6 that parties are obligated to provide information that is complete, accurate and up-to-date.

King's Bench Rules 70.37(4)(5)(6) also require the inclusion of certain specific financial information and the financial information required in Rule 70.05 to be included in the

affidavit in support of any motion or application to vary, rescind or suspend support. This is further discussed in relation to variation of child and spousal support orders in these materials.

> Rule 70.05.1 requires a party serving an initiating pleading or an answer to also serve a demand for financial information in Form 70D.1 on the other party if there is a request for support, a request to vary support or if the other party's income is necessary to determine an amount of support.

The exchange of financial disclosure is one of the pre-requisites for requesting a triage conference. A motion to the master is required if disclosure is not provided. This subject is discussed in the Commencing an Action and Interim Relief chapter.

The Family Property Act contains provisions requiring each party to file a sworn statement with the court, disclosing all assets and debts upon the application of one party for an accounting of assets. The sworn statement is to include all assets and debts, whether or not they may be shareable under the Act.

The respondent must file a similar sworn statement within 14 days of being served with the applicant's statement (s. 18(3) and 18(4)). This sworn statement is to be in the form prescribed in the rules (Form 70D – the same form to be filed with the petition or answer).

> Additionally, a comparative property statement in Form 70D.5 must be filed in order to seek an order for a family property reference and a summary of assets and liabilities in Form 70U must be filed when filing a motion to initiate a reference. The reference must be completed prior to the trial. This subject is discussed in the Property and Pensions chapter.

Part IV of *The Family Property Act* governs applications for equalization of property when a spouse or common law partner has died. This legislation enables either the personal representative of an estate who is continuing an application initiated by the deceased party during life, or the surviving spouse, to request a sworn statement from the other disclosing assets and debts (s. 33).

> For more information about rights on death see the *Wills and Estates* materials on the Law Society of Manitoba's website under Practice Resources, Practice Area Fundamentals.

b) Remedies for Non-Compliance

Where a party has not filed a financial statement as required under the rules regarding family matters, a number of sanctions can be imposed.

Where a statement has not been filed within the prescribed time, Rule 70.09(2) provides that "...the court may, on motion without notice, make an order requiring that the financial information be filed and served within a specified time."

A further remedy is available where the financial statement is insufficiently clear. Rule 70.09(3) provides that 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 guidelines and order that new documents be filed and served within a specified time.*

Sanctions for failure to comply are set out in Rule 70.09(4) which provides that the court may dismiss the party's action or strike out their answer and may make a contempt order against the party.

Masters may order the completion of pre-requisites, and if a party fails to comply, Rule 70.24(21.1) provides that the master may dismiss the party's action or strike out their answer and may make an order for costs.

Pursuant to Rule 70.24(23), a triage judge has all the powers of a case conference judge under Rule 70.24(34) including:

> *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.*

Failure of a party to provide the financial disclosure can result in the court imposing substantial penalties. In addition to any other penalty, this may include making an order that the party pay to the applicant an amount not exceeding $5,000. (*The Family Law Act* ss. 58(2) and 67(2)).

The Family Law Act, in section 96, also provides for penalties where individuals fail to comply with any of its provisions or any orders pronounced under it. The penalties previously found in *The Family Maintenance Act* (now repealed) have been dramatically increased.

Offence

96 A person who fails to comply with a provision of this Act or a provision of an order made under this Act is guilty of an offence and is liable on conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or both.

Section 18(1) of *The Family Property Act* provides: "…where there is a breach of a provision of this Act…the court may make such order or give such judgment with respect to the application and the costs thereof as it thinks fit…"

There are also penalties provided for non-disclosure pursuant to the *Child Support Guidelines*.

2. Interrogatories

Interrogatories are a form of discovery. They are a series of written questions, which can also require the production of certain documents, filed in court and served on one party by another. The party served is required to file and serve written answers in affidavit form.

Rule 35 prescribes the form for interrogatories and answers to interrogatories, as well as the following sanctions for failure to answer questions in Rule 35.04:

35.04(1) Where an answer is unresponsive or incomplete or suggests a new line of questioning, the examining party may, within 10 days after receiving the answer, serve further interrogatories which shall be answered within 15 days after service.

Court order for further answers

35.04(2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is unresponsive or incomplete, the court may order the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.

Additional sanctions

35.04(3) Where a person refuses or fails to answer a proper question on interrogatories or to produce a document that is required to be produced, the court may, in addition to imposing the sanctions provided in subrule (2),

(a) if the person is a party or a person examined on behalf of a party, dismiss the party's action or strike out the party's defence;

(b) strike out all or part of the person's evidence; and

(c) make such other order including a contempt order as is just.

Interrogatories, generally, and Rule 35, specifically, are discussed in the *Civil Procedure* materials on the Law Society of Manitoba's website under Practice Resources, Practice Area Fundamentals.

3. Oral Examinations for Discovery

Examinations for discovery are explored in detail in the Civil Procedure materials. The topics discussed include:

- the rules governing examinations for discovery;
- preparation for the examination;
- conduct and scope of the examination;
- undertakings;
- the use of transcripts of examinations for discovery.

Rule 31.07(1) deals with the effect of a party's refusal to answer proper questions posed during an examination for discovery and failure to provide a written answer not later than 10 days after the action is set down for trial. The party may not introduce the information refused on discovery at the trial, except with leave of the trial judge. This sanction is in addition to the sanctions for default in examination provided by Rule 34.14.

Rule 34.14 sets out the sanctions for default and misconduct during, among other things, oral examinations, examinations for discovery under Rule 31, cross-examinations on affidavits pursuant to Rule 39.02 and examinations in aid of execution pursuant to Rule 60.17 (examinations of judgment debtors).

Rule 34.14 provides:

> *34.14(1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or subpoena to witness or at the time and place agreed on by the parties, or refuses to take an oath, to make an affirmation, to answer any proper question, to produce a document or thing that the person is required to produce or to comply with an order under rule 34.13, the court may,*
>
> *(a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at the person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;*
>
> *(b) where the person is a party or, on an examination for discovery, a person examined on behalf of a party, dismiss the party's proceeding or strike out the party's defence;*
>
> *(c) strike out all or part of the person's evidence, including any affidavit made by the person; and*
>
> *(d) make such other order as is just.*
>
> ***Contempt order***
>
> *34.14(2) Where a person does not comply with an order under rule 34.13 or subrule (1), a judge may make a contempt order against the person.*

Rule 34.13 deals with court rulings on objections and questions posed during oral examinations.

4. Discovery of Documents

The King's Bench Rules require parties to an action to serve on the other parties an affidavit of documents in Form 30A or 30B within 10 days after the close of pleadings (Rule 30.03(1)).

A document is defined in Rule 30.01(1):

> *In Rules 30.02 to 30.11,*
>
> *(a)* ***"document"*** *includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device;*
> *(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled; and*
> *(c) a relevant document is one which relates to any matter in issue in an action.*

Discovery of documents is discussed fully in the Civil Procedure materials. The issues covered include:

- the scope of documentary discovery;
- the affidavit of documents;
- inspection of documents;
- consequences of failure to disclose or produce documents;
- consequences of a successful or unchallenged claim for privilege;
- production from non-parties.

The effects of failure to disclose or produce documents are set forth in Rule 30.08. Rule 30.08(1) provides that if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge. If the document is not favourable to the party's case, the court may make such order as is just.

If a party fails to serve an affidavit of documents or produce a document for inspection, Rule 30.08(2) provides that the court may revoke or suspend the party's right to initiate or continue an examination for discovery, may dismiss the action or strike out the statement of defence, and make such other order as is just, including a contempt order. Surprisingly, given these potential ramifications, counsel are frequently lax about filing affidavits of documents in a timely way.

C. CROSS-EXAMINATION ON AFFIDAVITS

The rules and practice with respect to cross-examination on affidavits in family law actions are generally the same as those in any other civil action.

There is however one exception, outlined in Rule 70.29.

Rule 70.29 provides as follows:

> *70.29 In a family proceeding, the cross-examination on the affidavit of a party that is conducted before a trial may be used at the trial in the same manner as that party's examination for discovery.*

This means that in a family proceeding the evidence given by a party cross-examined upon their affidavit may be read into evidence at trial, as is normally provided under Rule 31.11(1) for that party's examination for discovery.

Please also see Rules 34 and 39. Under Rule 39.02(4), which outlines the duties of the party conducting the cross-examination, the examining party must:

- order transcripts for the court and the party being examined if a trial or hearing date is set;
- file a copy of the transcript with the court;
- provide the party being examined with a copy of the transcript free of charge; and
- pay the party and party costs of the party being examined in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise (other than on a motion for summary judgment or a contempt order).

Discovery transcripts belong to the examiner and may or may not be used, either in cross-examination at the trial or by individual questions being read in. However, the entirety of cross-examinations on affidavits are evidence in the cause, in theory to be read by the judge hearing the motion. The practice, however, is to attach those portions that are relied upon to the motion briefs.

D. PREPARATION FOR TRIAL

1. The Case Management Process

The case management process is discussed in more detail in the Commencing an Action and Interim Relief chapter, however several sections of Rule 70.24 specifically address trial preparation and orders that may be made. Rule 70.24 (33) states:

> ***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.*

Rule 70.24(34) includes some examples of orders that may be made in relation to trial preparation, such as

> *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.*
>
> *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.*

2. The Case Conference

Except in a child protection (CP or CFS) matter, generally a trial date will be set at the first case conference. The Commencing an Action and Interim Relief chapter discusses the case management system in more detail however many of the principles addressed below should be considered.

A case conference has two objectives: settlement of some or all of the matters in issue and, if settlement is not possible, then ensuring that the matter is ready for trial.

The parties themselves must be present with their counsel; where one party is subject to a no contact order or is otherwise unable to attend, such attendance may, where authorized by the court, be made by way of telephone conference call (Rule 70.24(37)(38)(39)). Often such orders will provide for the parties to attend, provided they maintain a specified distance and are not alone.

Each of the parties will be expected to file briefs for the case conference, although the form previously used has been abandoned. Typically, parties will modify their triage briefs.

After the case conference, the judge will issue a memorandum that will be sent to the parties or counsel, setting out the results of the case conference including any orders made or directions given, the issues that are agreed or resolved, the issues requiring trial or hearing and the date for the next case conference, if any (Rule 70.24(44)).

Because case conferences are not recorded, except when the judge specifically determines that a part should be recorded (for example, when the parties agree on the terms of a consent order), issues may arise over the specifics of what was decided.

The memorandum is binding, subject to a party who disagrees with the memorandum advising the court and the other party of their objection within 14 days of receipt. The other party must respond within 7 days. The case conference judge may then issue a revised memorandum, confirm the original memorandum or re-open the case conference to address the objection (Rule 70.24(46)(47)).

The trial date will be set at the case conference and can only be adjourned by the Chief Justice or his designate (Rule 70.24(42)). Requests to do so should be made no later than 30 days prior to the scheduled hearing (Rule 70.24(43)).

> The current policy of the court is that trials will not be adjourned without an exceptional reason.

Each party must file a trial readiness certificate (Form 70S.3) no later than 45 days prior to the scheduled trial or final hearing date (Rule 70.24(43)). If a party fails to do so, a trial readiness conference will take place before the case conference judge. The only issue will be costs for failure to file the trial readiness certificate. The case conference judge may hear the trial, and must hear the trial if they heard a summary judgment motion.

3. Family Evaluator

Pursuant to section 49(1) of *The Court of King's Bench Act* a family evaluator may be appointed as discussed earlier in these materials. A family evaluator will interview the parties and other persons as may be appropriate and provide the court with a report containing information and opinion relevant to parenting or any related issue. The specifics of what is required in the report are set out in Rule 70.17.

In the event of a trial, the family evaluator may be called as a witness and may be cross-examined by all parties (s. 50, *The Court of King's Bench Act*). In practice, the family evaluator is the court's witness. At the case conference one counsel will be directed to arrange for appropriate notice and the attendance of the family evaluator. The report is put on the "B" file.

4. Affidavit of Documents

In preparation for a trial, organize the documents upon which you will be relying (which frequently includes many documents provided by the other side) and ensure that all of those documents have been identified, either in the affidavit of documents originally prepared, or in a subsequent one which will include all documents provided as a result of undertakings by either side.

You do not need to use all disclosed documents, as many will be determined to be of no value following examination for discovery because they relate to issues which have been resolved. You may find that few family law lawyers provide an affidavit of documents before discovery, but you should be sure to insist upon it so that your examination is as thorough as possible.

5. Documents

While it may appear to be as advantageous to the other side as to you, prepare a booklet of the documents you intend to use at trial with a clear index and the pages numbered, and include the documents in the order in which you intend to present them. A copy should be available for you, your client, the judge and the other lawyer. Another booklet containing originals or good copies should be available for purposes of filing as exhibits. You do not want to pull documents out of your document book as you will then lose track of what is happening.

Similarly, the judge does not want to end up with an incomplete document booklet as a result of having to hand over their copies of documents. Try to have a copy of the booklet in the other lawyer's hands at least ten days before the trial so that you can deal with any complaints. Your client can mark their booklet with exhibit numbers so that if you lose track, a record is nevertheless available.

It is normally possible to agree to some of the documents, for example, income tax returns of both parties, existing agreements or orders, and so on. These agreed documents may be presented to the court at the commencement of trial, organized in a binder. Some of these matters, including the filing of a trial record, statement of agreed facts, agreed book of documents and briefs of the law, and the exchange of witness lists, expert reports and experts' resumes may have been ordered by the triage or case conference judge (see Rule 70.24(34)20).

6. Statement of Agreed Facts

A statement of agreed facts can be prepared, if it is possible to agree to some of the facts. Although not often used by family law lawyers, a properly prepared statement of agreed facts can considerably reduce the length of time at trial.

7. Preparing Witnesses

When preparing witnesses for trial, review notes from all interviews and information from documents and other sources including discoveries. Prepare an outline of questions you intend to ask and note on that outline what documents you will be tendering as evidence in support of the case. Your document booklet should reflect that stream of questions. This brief should also include the points that you expect each witness to make in response to the questions.

Review the questions you intend to ask with each witness and ensure that the questions will elicit the responses you expect based on your notes and other preparation. This is a very good time to find out whether you and your witnesses understand each other. You do not want any surprises at trial. Sometimes it is useful to give the witness a dry run through both direct and cross-examination. If a proposed witness has filed an affidavit in the proceedings, ensure they have a copy to review and that what they have said previously was then and is still correct.

If you are uncertain as to whether you should subpoena a witness it is always better to err on the side of caution. Some lawyers will take sworn statements from proposed witnesses in advance of their testimony. All witnesses should be advised of the procedure to expect in court, to be clear and concise in their testimony and to be respectful and non-combative.

8. Make an Offer to Settle

From the outset, but more importantly as disclosure has been completed and the matter is readying for trial, it is important to consult with your client and formulate a reasonable offer to settle. Even if offers have been previously made, the client may consider amending their last offer to enable resolution.

If issues cannot be resolved by agreement, a properly timed offer to settle made under Rule 49 can have positive cost consequences to your client if the outcome of the trial is the same or better than the offer made.

The value of an offer increases the earlier it is made. The offer should have an expiry date (usually upon commencement of the trial or motion) failing which it may be open for acceptance after the trial has begun. It may also be useful to craft the offer with a provision for costs at a particular tariff or rate after the closing date for acceptance.

Offers should be in the form provided by Rule 49 but are also effective when made through a "without prejudice save and except as to costs" letter.

E. THE TRIAL

1. Preliminary Matters

Motions are sometimes made by one or both counsel at the beginning of a trial. The case management process should have eliminated the necessity for many of these preliminary motions; however, in final preparation for trial counsel will often determine that in order to properly proceed, certain matters must be dealt with by way of motions before the court. Counsel should be prepared to deal with these matters, even if they cause some embarrassment.

At the commencement of a trial, a motion is usually made to exclude all witnesses until they are called upon to give evidence. Any order subsequently granted to exclude witnesses does not, however, apply to persons who are instructing counsel (see Rule 52.06(1) and Rule 52.06(2)).

Rule 52.07(1) sets out the order of presentation at trial. Prior to commencement of trial counsel should make themselves aware of the rules relating to offers to settle and the costs consequences relating to those rules (See Rule 49).

2. Opening Statement

You should always consider making an opening statement. Some counsel will file a trial brief in addition to making an opening statement, perhaps including not only an outline of the case, but the relevant major case law on which the party will rely. As a responding party you may choose to make your statement at the beginning of your case or at the beginning of the trial.

> If the issues are complex, you may wish for the trial judge to have your position immediately so that they hear the evidence of the petitioner with your position in mind. It is very useful for the judge to have the issues clearly defined and a very brief summary of the evidence you expect to adduce.

3. Direct Evidence

There is no absolute rule against leading questions with respect to preliminary matters and matters not in dispute between the parties (see Rule 53.01(2)). A witness should not be led on matters that are in dispute and are not of a preliminary nature. Ideally, a well-prepared witness should be able to tell the story simply by reference to certain events and thereafter questions such as “and then what happened?” will by and large serve the purpose.

If your witness is a lay person, unaccustomed to giving evidence, explain what the procedure will be and describe the physical layout of the courtroom before the trial starts. Once the witness is on the stand, help them to achieve a comfort level by asking some preliminary innocuous questions (e.g., age, marital status and employment), even though the answers to those questions may not be relevant to any issue at hand.

The witness should have been prepared in advance so that their testimony is given in a straightforward sequential manner. Do not structure your questions in such a way that the witness has to deal with, for example, events in 2006 and then back to 2004 and then forward to 2009. Such an approach, unless absolutely necessary because of the nature of the case, is going to end up confusing you, the witness and the judge.

> If the witness is your client, now is the time to deal with any uncertainties in the evidence that the client gave when examined for discovery. It is also the time to deal candidly with any major flaws that exist in your client's case.

For example, if parenting is an issue and your client on one occasion slapped their spouse in front of the children, you want to deal with this in direct testimony rather than allowing opposing counsel to make hay with it on cross-examination.

In preparing for direct examination and cross-examination, remember that your closing argument must be founded on the facts adduced through the testimony of the witnesses. It makes sense, therefore, to plan the direct and cross-examination backwards; at the end of the day, it is easier to devise the questions to ask from a solid sense of what argument you wish to make. You can then structure the manner in which the testimony is adduced and the facts that you need to get into evidence.

4. Use of Affidavit Evidence

In a family proceeding, affidavit evidence may be presented in lieu of calling a witness at the trial (Rule 70.30). If the affidavit is filed and served at least twenty-one days before the date of trial, the affidavit can be used at trial without an order.

An opposing party who wishes to cross-examine the deponent on the affidavit must give notice of the intent to cross-examine the party filing the affidavit at least ten days before the trial. Where such notice is received the deponent shall attend. If the deponent fails to do so, the affidavit shall not be accepted in evidence unless the court so orders.

There are cost consequences if cross-examination does not materially add to the affidavit evidence. Further, the deponent may not provide any additional evidence except with leave of the court.

5. Use of Notes to Refresh Memory

For the purposes of refreshing their memory, when giving evidence the witness is entitled to use notes they made contemporaneously with the events described in those notes. Opposing counsel is entitled to look at those notes. If opposing counsel, having looked at the notes, then uses them to cross-examine the witness on matters contained in the notes but beyond that portion used to refresh the witness's memory, counsel who called that witness may insist that the notes as a whole be entered as evidence.

6. Expert Witnesses

The duties of an expert witness are discussed by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182. The headnote provides a useful summary:

> *Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her.*

If the opposing party does not oppose the expertise of your witness you may still want to review the *curriculum vitae* with the expert prior to filing it in court as an exhibit. This reinforces the expertise of the witness in the court's mind.

The exchange of expert reports and the expert's resume will likely have been directed by the court well prior to trial. Rule 53.03(1) requires that a copy of an expert's report be included in the pre-trial brief along with that expert's name, address, qualifications and substance of their proposed testimony. The trial readiness certificate (Form 70S.3) contains the statement that all expert reports have been or will be obtained and will be made available to all parties as required by the King's Bench Rules and *The Manitoba Evidence Act*.

Expert evidence is opinion evidence. Counsel calling the expert has a duty, on a *voir dire*, to ask such questions and elicit such answers as will allow the court to determine whether or not the witness is qualified to give the intended opinion evidence. Opposing counsel is entitled to cross-examine and to challenge the witness's competence to give the expert opinion.

The court may choose to limit the expert to a subset of their field or may create an area of expertise that is not usual, the criterion being whether the expert has specialized knowledge

of a field, through training or experience, which will be helpful to the trial judge. It is important to be clear as to the area of expertise in which the witness is being qualified.

Expert witnesses need little in the way of reminders when giving their evidence. Bear in mind that they will likely be asked to produce any notes they have with them and also produce your letter of instruction to them. Typically, the expert witness will be asked to bring their entire file. To avoid embarrassment, ensure that your letter of instruction is objective.

There is no property in witnesses, so witnesses other than your client can be spoken to and even subpoenaed by the other side. Be sure each of your witnesses understands that they are under no obligation to speak with the other lawyer if they do not want to do so.

Prepare your experts. Ensure that any flaws in their potential evidence are discussed with them, so that they will be ready with their response, if the other side asks that crucial and potentially damaging question. Fumbling, embarrassed and ill-prepared witnesses do your case no good.

You will sometimes find it useful to review the other party's expert's report with your own expert, both for the purposes of fully understanding the report and for obtaining assistance in devising the cross-examination.

An expert may be a "participating expert." In *Laing v. Sekundiak*, 2015 MBCA 72, the Court of Appeal discussed the distinction between "litigation experts" and "participant experts". Litigation experts are those who are engaged to provide opinion evidence on behalf of a party.

The Court adopted the comments in *Westerhof v. Gee Estate*, 2015 ONCA 206 with respect to participation experts:

> *... [A] witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:*
>
> - *the opinion to be given is based on the witness's observation of or participation in the events at issue; and*
> - *the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.*

Note that section 25 of *The Manitoba Evidence Act* limits each side to three expert witnesses, subject to the court's discretion to allow more.

7. Cross-Examinations at Trial

Cross-examination is a useful but potentially dangerous tool. Cross-examination can only rarely destroy a witness's credibility. The focus of cross-examination is more usually to place a different perspective on the witness's testimony by having the witness qualify their direct testimony.

It is also useful for the purpose of eliciting evidence from that witness that will be helpful to your case but which was not given in direct testimony. It is a misuse of cross-examination to allow it to be an opportunity for the witness to restate their evidence.

Everyone has a different cross-examination style, but it might be useful to remember that honey usually catches more flies than vinegar. It is not helpful to be sarcastic or hostile in your approach. The old adage, that you should not ask a question of a witness unless you know the answer, is worth remembering.

Be mindful of the rule in *Browne v. Dunn*: if you wish to impeach the credibility of a witness by calling independent evidence, then the witness must be confronted with this evidence in cross-examination. The failure to do that may preclude you from calling that independent evidence. For example, if you intend to call a teacher to say that the husband has never attended a parent/teacher meeting, then you must put that allegation to the husband in cross-examination if he gives evidence before the teacher.

8. Use of Transcripts of Prior Cross-Examinations on Affidavits

Rule 70.29, which is peculiar to family law proceedings, has been referenced earlier in this chapter. The significance of this rule is that cross-examinations are generally conducted with particular focus and restricted in latitude. The rule enables counsel to read in admissions from the cross-examination as part of their own case at trial as they can with discoveries, without adopting the entire cross-examination as their own evidence. Therefore, counsel cross-examining must consider the dual role of this transcript and focus their examinations accordingly.

9. Use of Transcripts of Examinations for Discovery

Counsel who did the discovery may read in portions of their examination for discovery of the other party. Care has to be exercised in doing this because the portions read in are treated as forming part of your case. If you have clear and relevant answers in the discovery, then there is little purpose in eliciting the same answers in cross-examination; it is usually more efficient to merely read in the answers from the discovery.

Prior to reading in the questions and answers that you have selected from the discovery, you should read in the style of cause and appearance for the record and once you have finished reading in the questions and answers you should read in the Special Examiner's certificate. Often the court will take those as having been read upon a request. You should also provide the judge with a copy of the transcript so that they can follow the read-in. The best way to read in is to refer firstly to the page number and then to the question number.

Do not enter the transcript of the examination for discovery as an exhibit; technically you will have entered the totality of the evidence contained in the transcript as part of your own case.

10. Use of Prior Inconsistent Statements

You can use a prior inconsistent statement to impeach the credibility of a witness. That prior inconsistent statement will most usually be found in the cross-examination or discovery of the party, or in an affidavit previously sworn by the party. The circumstances in which that prior inconsistent statement was made must be carefully put to the witness prior to the witness being challenged with the inconsistent statement. Only if the witness denies making the statement does the document then go into evidence. (See ss. 20 and 21 of *The Manitoba Evidence Act*).

11. Redirect Evidence

You are entitled to re-examine your client, or any other witness you have called, if any matters arise which you cannot have been expected to cover in direct examination. This is clean-up time. Try to use this opportunity to straighten things out, but counsel opposite or the court will likely seek to limit this second kick at the can.

12. Case Law

It is not necessary to quote every case on any point when arguing. More recent cases tend to allow you to point to a new trend in the case law and if this trend suits you encourage your judge to carry on with it.

If you are referring to case law it is appropriate to file a casebook, at the commencement of trial, indexed and tabbed, or before you start your oral argument, providing counsel opposite with the cases to which you will refer.

Prepare your argument before trial. If you cannot do this, you are likely not ready for trial. There should be no surprises at trial, thus you will be able to have your summary ready and slide right into it as soon as your cross-examination of the other side is complete. You may shore it up with direct quotes from the other side's evidence. Be very careful that your quotes are accurate.

After a complex or lengthy case, the trial judge may reserve their decision, and may ask for written argument. You may wish to order a transcript in that case. Nonetheless, after argument, you should be ready to make your pitch on costs. It is helpful to have run a tariff calculation in advance.

F. ORDERS

1. Content of the Order

Rule 59 does not apply to family proceeding orders. The form of the court order in a family proceeding is dictated by Rule 70.31. Rule 70.31(7) lists the acceptable titles for orders.

Rule 70.31(9) provides that an order shall:

- be in Form 70O (divorce judgment) or 70N (order);
- shall include the name of the pronouncing judge;
- the date pronounced;
- a preamble setting out the particulars necessary to understand the order;
- the statutory provisions or rules under which the relief is granted;
- the names of persons to be served; and
- the manner of service.

The body of the order will contain consecutively numbered paragraphs setting out:

- the relief which the court has pronounced; and
- the relevant legislation under which the relief is granted.

It is important for the purposes of enforcement that the order be clear and unequivocal.

The Family Division requires the use of standardized clauses for court orders as set out in Rule 70.31(11). The court has specified the form and content of typical clauses. Generally, the clauses are useful for all commonly ordered terms. It is possible for non-specified clauses to be used if no standard clauses are appropriate. The wording of the order should conform as much as possible to the closest applicable standard clause. Rule 70.31(13) requires an explanatory note (Form 70V) to be filed.

The closing of the order will show the date of signing. The order might be signed by the judge or master who granted it, or by the deputy registrar upon the judge's fiat. Beneath the court's signature will appear the approvals of counsel as to the "form" or the "form and content" of the order.

> Version 6 of the standard clauses has been required since March 1, 2021 and may be found on the court *website*. Standard clauses for The *Family Maintenance Act* will continue to be used for orders pronounced under that Act before July 1, 2023. Version 6 is also to be used for orders made under *The Family Law Act* and *The Family Support Enforcement Act* as of July 1, 2023, pending the completion of Version 7 Standard Clauses. (See the *May 30, 2023 Practice Direction*,)

2. Effectiveness of Court Orders

A court order is effective from pronouncement unless it provides otherwise (Rule 70.31(2)). On a practical level, however, it is difficult to enforce, appeal, or otherwise deal with an unsigned order. Because an order can effectively be changed by the judge prior to signing, an unsigned order represents uncertainty. Wording in the clerk's notes, the judge's notes, the disposition sheet or even a written decision, can be ambiguous or capable of differing interpretations. It is of utmost importance to get an order signed as soon after pronouncement as possible.

3. Settlement, Reconsideration, Rectification of Terms

a) Approval as to Form and Content

Once the order has been pronounced, the successful party usually will (although any interested party may) draft the order. Prior to submission to the court for signing, the order must be submitted to the lawyer for the other party (or the other party, if self-represented), unless dispensed with by the court, for "approval of its form or content or both" (Rule 70.33(3)(4)).

Where the order has gone by consent this approval will be "as to form and content." Where only some of the relief is by consent the standard preamble clause, specifying which paragraphs of the order are consented to, should be used.

Only slightly less important than ensuring the content's accuracy is the endorsement of that approval. Counsel should be cautious, for they will be bound by their endorsement. There is no appeal of a consent order without leave, and variation of a consent order might be more difficult than one which was opposed.

Once the approval of the opposing lawyer is endorsed on the order, it is submitted to the court along with a completed Form 70W recalculation and enforcement information form if the order is to be enforced by Maintenance Enforcement and recalculated by the Child Support Service. If the order is not going to be enforced Form 70X is required.

The order at this stage is vetted by the registrar. The order might be rejected, requiring counsel to submit a redraft. Eventually it will reach the judge who retains final say in the matter of the order's form and content. Even an order approved by the deputy registrar might still be turned back by the judge.

Once the order is signed and filed, court staff will photocopy and return a "true copy" to counsel and, if applicable, provide true copies to Maintenance Enforcement and the Child Support Service.

b) Settling the Order

In the event that both counsel are unable to agree on the proper form, the first step is to obtain a copy of the disposition sheet, which may clear up the uncertainty. If not, then obtain a copy of the transcript. If counsel still cannot agree on the wording, then either may schedule an appointment before the judge to settle the order and have it signed by the judge who made it (Rule 70.33(12)).

Either party may write the court to set an appointment to settle the order, explaining the reasons for the inability to agree. It is better if counsel agree on a joint approach to the court. If the judge determines a hearing should be had, counsel will contact the appropriate coordinator.

Where the order has followed a motion, the hearing date is arranged by the motions coordinator. Where the order is the result of a trial, the hearing is arranged by the trial coordinator. The terms of an order can also be settled by way of telephone conference call. In urgent cases, Rule 70.33(13) allows the judge to sign the order without the consent of all parties.

This process is capable of being abused. It works best when each counsel attends with the transcript and their proposed form of order in hand, from which the judge can choose. It is not an opportunity for re-argument of portions of the case, although the judge is not *functus* until the order is signed. Ideally, the judge should only have to choose between the competing wordings, or to clarify what was meant if there is ambiguity.

Some counsel, failing reasonable cooperation from the other side in finalizing the terms of the order, will forward the order to the court with a note, copied to the other side, explaining why the opposing lawyer's approval is not endorsed upon it. Sometimes the court will sign an order under such circumstances, but usually will want input from opposing counsel.

> It is mandatory that counsel be circumspect in such *ex parte* communications and only undertake them reluctantly.

c) Slip Rule

In situations of mistakes, slips and the like, the court, on motion, retains jurisdiction to make corrections (Rule 70.34(1)), or to set aside an order, where it has been obtained by fraud (Rule 70.34(2)). This power extends to amendment of a particular on which the court did not adjudicate, or to grant relief other than originally awarded.

d) Scheduling Conflicts

In order to preserve judicial resources and acknowledging that the majority of trials set at the first case conference may collapse, the court books multiple trials relative to the number of judges available. The court also expects counsel to book more than one trial in a given time period.

If it becomes apparent that more than one trial will proceed, counsel should contact the trial coordinator to arrange a telephone appointment for both counsel with the Chief Justice or his designate. This should be scheduled as soon as possible and no later than one week prior to the trial date. The Chief or his designate will use their discretion to determine which trial will proceed and the new date for the trial which is being adjourned.

Considerations will include the length of the trial, availability of alternate dates, importance of issues being determined, prejudice to parties, impact of delay on witnesses and quality of evidence.

When the court advises that a trial must be adjourned due to a lack of judges, similar considerations will apply.

The adjournment of a trial may mean costs thrown away when counsel has begun to prepare for a trial that is adjourned and then must prepare afresh for the new date. Clients should be aware of the potential that their trial will not proceed when scheduled and the attendant delay and extra costs they may accordingly incur.

> Counsel's obligations under the *Code of Professional Conduct* are further discussed in Law Society of Manitoba's *Communique May 2018*.

G. PRECEDENTS

1. Demand for Financial Information

File No. FD_____

THE KING'S BENCH (FAMILY DIVISION)
Winnipeg Centre

BETWEEN

JANE SMITH

petitioner/applicant

- and –

JOHN SMITH

respondent

DEMAND FOR FINANCIAL INFORMATION

TO RESPONDENT: JOHN SMITH

JANE SMITH demands that you provide the information required in paragraphs 1 to 3 below.

IF YOU FAIL TO PROVIDE THE INFORMATION REQUIRED OF YOU WITHIN THE REQUIRED TIME PERIOD, THE COURT MAY MAKE ONE OR BOTH OF THE FOLLOWING ORDERS **WITHOUT FURTHER NOTICE TO YOU:**

- an order based on assumptions about your financial situation
- an order of financial disclosure

NOTE: FAILURE TO PROVIDE THE REQUESTED INFORMATION MAY ALSO RESULT IN ONE OR BOTH OF THE FOLLOWING ORDERS BEING MADE:

- an order requiring you to pay costs to the other party to this litigation or penalty of up to $5,000
- an order preventing you from pursuing all or part of your case

YOU MUST:

1. Within [X] 30 days *(select 30 days where the party who is to provide the information lives in Canada or, in a Divorce Act (Canada) proceeding, lives in the United States);*

[ ] 60 days *(select 60 days in all other instances).*

2. *(Check all applicable boxes)*

[X] provide the information requested in paragraph 3 to the other party, or their lawyer if they have one;

[ ] provide the information requested in paragraph 3 to the other party, or their lawyer if they have one, in a sworn affidavit;

[ ] file the information requested in paragraph 3 with the Court, in a sworn affidavit.

3. The following information *(check all applicable boxes)*:

[X] a prepared and sworn financial statement in accordance with Rule 70.05, 70.07 or 70.08 in Form 70D of the *Court of King's Bench Rules,* including:

[X] Part 1 – Annual Income

[X] Part 2 – Monthly Expenses

[X] Part 3 – Assets of Both Parties

[X] Part 4 – Debts of Both Parties

[ ] copies of your Canada Revenue Agency income and deduction computer printouts showing your income as assessed by the Canada Revenue Agency for each of the three most recent taxation years in which you filed a tax return;

[X] a copy of every personal income tax return filed by you for each of the three most recent taxation years;

[X] a copy of every notice of assessment and reassessment issued to you for each of the three most recent taxation years;

<u>Additional information applicable to employees:</u>

[X] your most recent statement of earnings (pay stub) indicating the total earnings paid to you in the year to date, including overtime or, if such a statement is not provided by your employer, a letter from your employer

setting out that information including your rate or annual salary or remuneration;

Additional information applicable to self-employed individuals:

[ ] the financial statement of your business or professional practice, other than a partnership, for the three most recent taxation years;

[ ] a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom you do not deal at arm's length, for the three most recent taxation years;

Additional information applicable to partners in a partnership:

[ ] confirmation of your income and draw from, and capital in, the partnership for its three most recent taxation years;

Additional information from those who control a corporation:

[ ] the financial statements of the corporation and its subsidiaries for its three most recent taxation years;

[ ] a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length for its three most recent taxation years;

Additional information from beneficiaries under a trust:

[ ] a copy of the trust settlement agreement;

[ ] copies of the trust's three most recent financial statements;

Additional information from those who receive income from any other source (for example, employment insurance, social assistance, a pension, workers compensation, disability payments):

[ ] the most recent statement of income indicating the total amount of income from the applicable source during the current year or, if such a statement is not provided, a letter from the appropriate authority stating the required information;

Other *(specify)* _____

_____

_____

Date: January 15, 20__

WHITE & JONES
Barristers and Solicitors
1104 - 411 St. Mary Avenue
Solicitors for the Petitioner, Jane Smith

TO: John Smith
123 Any Place
Winnipeg, Manitoba
R3C 1X5
The above named Respondent

2. Questions on Interrogatories – Form 35A

File No. FD_____

THE KING'S BENCH (FAMILY DIVISION)
Winnipeg Centre

BETWEEN:

JANE SMITH,

Petitioner,

- and -

JOHN SMITH,

Respondent.

QUESTIONS ON INTERROGATORIES

The petitioner, Jane Smith, requires that the following questions be answered by affidavit in Form 35B prescribed by the King's Bench Rules, served within 15 days after service of these questions.

1. Are you presently employed, and if so, what is your employer's name and address?

2. What is your position with your employer and how long have you been employed by your present employer?

3. What is your gross and net salary and how are you paid: weekly, bi-weekly or monthly?

4. Do you have or can you obtain your last three salary stubs, showing your gross and net salary? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

5. Do you have any part-time employment in addition to your regular employment and if so, what are your earnings from that source?

6. Do you receive any benefits from employment, such as commission, bonuses or use of an automobile, traveling expense, and if so, set out that amount for each and every pay period?

7. If you are unemployed, when did your employment cease?

8. If you are unemployed, are you receiving Unemployment Insurance benefits, and if so, how much?

9. Do you have or can you obtain your last three statements from Unemployment Insurance benefits? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

10. Do you have any other source of income? If so, please identify them and provide the details of same as in question 4.

11. Do you have a Pension Plan, and if so, what is the total amount of your contributions to date?

12. If you have a Pension Plan, would you produce a copy of the Pension Plan, and your last annual Pension Statement?

13. Do you have a Registered Retirement Savings Plan, and if so, what is the name of the Company it is with and what is the total amount paid in contributions to date?

14. Do you have any Bank Accounts or accounts with a Credit Union or other Savings and Loan Associations?

15. Do you have or can you obtain the name and address of the Bank or Credit Union, the account number of the savings or current accounts and the amounts in the said accounts to date? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

16. Do you own stocks, bonds, term deposits or any other type of security, or any other asset of a similar nature?

17. If you do own any securities, do you have or can you obtain a list of the securities or assets, the names of the companies they are with and their present values to date? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

18. Are any persons, corporations, businesses or governments indebted to you, and if so, what are the names of the persons or corporations which are indebted to you and the amounts in which they are indebted to you?

19. Are you the owner of an automobile or any other motor vehicle, including motorized recreational vehicles, boats, airplanes, and if so what are the models, registration numbers, year and value of each and every one of these vehicles?

20. What are the encumbrances, if any, against any of these vehicles and will you provide the amount outstanding as a result of any of the encumbrances to date?

21. Do you own any real property, and if so, what is the common address and legal address of each separate piece of real property and:

(a) What is the present market value of each piece of property?
(b) What price was paid for each property?
(c) What date was the property purchased?
(d) Are there any encumbrances owing and if so, how much?

22. Did you file an Income Tax Return for the three immediately preceding calendar years and if so, would you provide copies of the Income Tax Returns, with all schedules and information slips, together with Notices of Assessment and re-assessment?

23. Have you received a T-4 statement for 202_, and if so, will you provide a copy of the T-4 statement, and of your 202_ Income Tax Return?

24. What are your actual monthly living expenses, and will you provide a schedule of your expenses?

25. Do you have any debts, and if so to whom or to which institution and in what amount and what are your installments or payments?

26. Do you have any Life Insurance and if so, what is the paid up value and/or the cash surrender value of the policy?

27. If you have a Life Insurance policy, who are the owners and who are the beneficiaries of these policies, and would you produce copies of these policies?

28. Do you have any other assets which exceed in value the sum of $200.00 and if so, list them with their respective and approximate values?

29. Are you now the beneficiary of or do you expect to receive the benefits of any estate, inheritance or legacy?

30. Have you transferred any gifts to any person within the last year in excess of $200.00?

31. Did you take a vacation in the last year, and if so, where did you go?

32. If you answered “yes” to the question above, would you estimate the cost of this vacation and, would you provide the cost of the airline tickets?

33. If you did take a vacation in the last year, how was it paid for?

34. Have you transferred any personal or real property or any chattels, or furniture to any person in the last year, and if you have, to whom did you transfer those items and for what amounts of money?

35. Do you have any other assets or investments of any nature or kind, and if so, would you list them?

36. Are you at present purchasing for yourself any investments by way of payroll deductions?

37. Do you have or can you obtain a list of furniture, fixtures and chattels in your possession and the approximate value of those items? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

38. Do you have any shares in a business, and if so, what is the value of those shares?

39. If you are involved in the ownership of a business, would you provide Financial Statements and Income Tax any Statements for the last three consecutive years, and an up-to-date statement for the year that you have filed an Income Tax Return?

40. Do you own any jewelry having a value greater than $500.00, and if so, would you provide a list of it?

41. Do you have a safety deposit box and if so, where is the safety deposit box located, including the street address and city, and the name of the bank or institution?

42. What are the contents of the safety deposit box?

43. Will you be receiving a refund on your Income Tax Return this year?

44. Is any person, institution or corporation holding any real or personal property, chattels, furniture, stocks or bonds or any other assets in trust for you?

45. Do you have or can you obtain a photocopy of the monthly statements or bank book of each bank account, credit union account or any other financial institution commencing from today's date back for a period of twelve months? If not, please explain why not. If yes, please attach them to your affidavit as exhibits.

_____, 20__

WHITE & JONES
Barristers and Solicitors
1104 - 411 St. Mary Avenue
Solicitors for the Petitioner, Jane Smith

TO: John Smith
123 Any Place
Winnipeg, Manitoba
R3C 1X5
The above named Respondent

3. Request to Inspect Documents – Form 30C

File No. FD _____

THE KING'S BENCH (Family Division)
Winnipeg Centre

BETWEEN:

petitioner,

- and -

respondent.

REQUEST TO INSPECT DOCUMENTS

You are requested to produce for inspection all the documents listed in Schedule A of your Affidavit of Documents.

August, 20__

Carol McPhillips
McPhillips, MacAdam
150-1345 Main St.
Winnipeg, Manitoba
R3C 4C1
204-789-1234

TO: Mr. John Doe
White & Jones

4. Affidavit of Documents – Form 30A

File No. FD _____

THE KING'S BENCH (Family Division)
Winnipeg Centre

BETWEEN:

petitioner,

- and -

respondent.

AFFIDAVIT OF DOCUMENTS

1. I have conducted a diligent search of my records and have made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relating to any matter in issue in this action that are or have been in my possession, control or power.

2. I have listed in Schedule "A" those documents that are in my possession, control or power, and I do not object to producing them for inspection.

3. I have listed in Schedule "B" those documents that are or were in my possession, control or power, and I object to producing them because I claim they are privileged, and I have stated in Schedule "B" the grounds for each such claim.

4. I have listed in Schedule "C" those documents that were formerly in my possession, control or power but are no longer in my possession, control or power, and I have stated in Schedule "C" when and how I lost my possession, control or power over them and their present location.

5. I have never had in my possession, control or power any documents relating to any matter in issue in this action other than those listed in Schedules "A," "B," and "C."

SWORN before me in the City)
of Winnipeg, in the Province of)
Manitoba, this day of ,)
20__.) _____

_____
A barrister and solicitor entitled to
practice law in and for the Province of Manitoba.

CERTIFICATE OF LAWYER

I certify that I have explained to the deponent the necessity of making full disclosure of all relevant documents.

_____, 20___

_____
ALICE CARLTON

SCHEDULE "A"

Documents in my possession, control or power that I do not object to producing for inspection.

1. The pleadings and other court documents herein.

SCHEDULE "B"

Documents that are or were in my possession, control or power that I object to producing on the grounds of privilege.

1. Communications between the petitioner and its counsel and other memoranda, material and reports which have come into existence or were made, after the litigation hearing was contemplated, for the purpose of obtaining information for the use of the petitioner's solicitors to enable them to conduct the prosecution of this action.

2. All communications made expressly or impliedly on a "without prejudice" basis between the parties or counsel to this litigation.

NOTE: It is arguable that every document in the control or power of the petitioner/respondent, with respect to which an objection to production on the grounds of privilege is being made, should be listed on Schedule "B" (as opposed to the general paragraph above).

SCHEDULE "C"

Documents that were formerly in my possession, control or power, but are no longer in my possession, control or power.

1. The originals of letters, documents and invoices referred to in Schedule "A," which were sent, on or about the dates shown respectively thereon, to the addressees.

5. Notice of Examination (on an Affidavit) – Form 34A

File No. FD _____

THE KING'S BENCH (FAMILY DIVISION)
Winnipeg Centre

BETWEEN:

petitioner,

- and -

respondent.

NOTICE OF EXAMINATION

TO:

YOU ARE REQUIRED TO ATTEND FOR AN EXAMINATION on your affidavit dated _____ on _____, 20__ , at _____, at the office of _____.

YOU ARE REQUIRED TO BRING WITH YOU and produce at the Examination the documents mentioned in subrule 30.04(4) of the King's Bench Rules, and the following documents and things:

YOU ARE REQUIRED TO BRING WITH YOU and produce at the Examination the following documents and things:

Douglas McDonald, of the firm
MCDONALD PARKER
202-2600 Portage Avenue
Winnipeg, Manitoba
R3D 3L5
Telephone: 204-788-4567

TO:

6. Notice of Satisfaction – Form 70Y

File No. FD _____

THE KING'S BENCH (FAMILY DIVISION)
Winnipeg Centre

BETWEEN:

petitioner,

- and -

respondent.

NOTICE OF SATISFACTION

I am the person (or, the lawyer for the person) entitled to the benefit of the order in this proceeding made on _____ by _____.
(date) (judge)

I acknowledge that the order for (specify relief satisfied) as set out in the following clause(s) has been fully satisfied. (Insert clause(s) as set out in the order).

"4.1 A.B. pay to C.D. costs for the Motions heard by the Honourable Mr. Justice Dueck on September 15, 20xx in the amount of $6,800.00 including disbursements and taxes."

_____
(Date)

_____ _____
Witness (signature) Respondent (signature)

7. Bill of Costs – Tariff "A" and Tariff "B" Costs

File No. FD_____

THE KING'S BENCH (FAMILY DIVISION)
Winnipeg Centre

BETWEEN:

Petitioner,

- and -

Respondent.

BILL OF COSTS

		Fees (Class 2)	Disbursements
5(2)(a)	Consideration, preparation and service before pleadings; preparation of pleadings; consideration of pleadings of other party	$ 1,000.00	
(b)	Amendment of Petitioner's pleadings to add a claim under *The Family Property Act*;	$ 250.00	
(d)	Discovery of documents particularly relating to proof of values of assets and debts for both parties	$ 500.00	
(h)	Consideration, preparation and service of materials in response to a motion to sever divorce from other issues	$ 1,000.00	
(m)	Preparation for trial of action (full day)	$ 500.00	
(q)	Counsel fee at Case Conference:		
	May 1, 20__	$ 500.00	
	June 5, 20__	$ 500.00	
	August 6, 20__	$ 500.00	
(r)	Counsel fee for full day trial	$ 1,000.00	
(t)	Assessment of costs	$ 500.00	

		Fees (Class 2)	Disbursements
Proceedings in Master's Office			
3(3)	Attending before the Master on August 10, 20__ for an adjournment	$ 75.00	
Filing Answer			$ 30.00
Filing Notice of Hearing			$ 30.00
Fees paid for Quick Law			$ 68.89
Fees paid for Priority Courier			$ 77.86
Fees paid to Deliveries			$ 34.50
Fees paid for Faxing			$177.75
Fees paid for long distance telephone calls			$108.16
Fees paid for Court search (copy of letter Court received from the Petitioner)			$ 0.50
Fees paid to Postage			$ 9.35
Fees paid to Photocopying		_____	$224.20
SUBTOTAL		$ 6,325.00	$760.71
G.S.T. ON DISBURSEMENTS:			$ 38.04
G.S.T. ON FEES:		$ 316.25	$_____
TOTAL:		$ 6,641.25	$798.75

FEES:	$6,641.25
DISBURSEMENTS:	$ 798.75
TOTAL FEES AND DISBURSEMENTS:	**$7,440.00**

_____, 20____

A LAW FIRM

PER:

_____

A. LAWYER
Solicitors for the Respondent,

TAXED OFF:

TAXED and allowed at _____, this ____ day of _____, 20__.

_____

Taxing Officer