



The Co-Occurrence of Parental Alienation Claims and Intimate Partner Violence in Family Court

“Manitoba’s New Family Division Case Flow Model”

**Madam Justice Lore Mirwaldt
Manitoba Court of Queen’s Bench**

**RESOLVE Manitoba Webinar
Family Violence- Family Law Project
March 15, 2022**

ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT



- Every Canadian has the right to a justice system that is fair, timely and accessible. An accessible justice system is one that enables Canadians to obtain the information and assistance they need to help prevent legal issues from arising and help them to resolve these issues efficiently, affordably, and fairly, either through informal resolution mechanisms, where possible, or the formal justice system, when necessary (Department of Justice Canada 2019).

BARRIERS TO JUSTICE IN FAMILY LAW



- In Manitoba, the **expense of protracted family legal proceedings** has created a barrier to justice for many families. **Delays** in obtaining a first case conference date have left some families in distress. Inconsistent case conference processes have resulted in **family cases with “no end in sight”**. Those who begin a case with legal counsel are often forced, due to financial constraints, to continue the case as **self-represented litigants**. The current family court system represented a process that was, at times, **un navigable** and **inaccessible** for those who needed meaningful judicial intervention and assistance.
- *Chief Justice Glenn D. Joyal, Practice Direction, December 17, 2018*

The Need for a “Better Way” in Family Law Disputes

- “In other cases, indeed most, parties should not be required to face the continuing trauma of significant expenses and protracted proceedings at an exceedingly vulnerable and emotionally charged period of their lives, namely, marital and family breakdown. There has to be a better way.”
- Chartier, CJM in *Dunford v Birnboim*, 2017 MBCA 100 (CanLII)

The Impetus for Change in Family Law Proceedings



- Delays in obtaining a mandatory first case conference date left some families in distress
- Inconsistent case conference processes resulted in family cases with “no end in sight”
- An ad hoc system of “urgent motions” had created uncertainty
- Self-represented litigants could not easily navigate the court system
- The expense of protracted proceedings created a barrier to justice for many families
- Delays in family violence determinations created risk to victims



Manitoba Court of Queen's Bench

New Family Division Case Flow Model



Creation of the New FD Model



- Internal and external consultations occurred
- Review of access to justice studies and data
- Judges, court registry personnel, court staff and collateral services were interviewed
- Three consecutive open sessions were held with the legal profession through the Manitoba Bar Association
- We sought input on procedural shortcomings, ways to revitalize and enhance case conferencing, the use of administrative processes to streamline case flow and the navigability of the family court system

The New FD Model Implementation



The New FD Model was fully implemented on February 1, 2019

It applies to all judicial centres in Manitoba

Transitioning of cases began on October 4, 2018



The Court of Queen's Bench Rules (Family) were amended to reflect the new processes

The new Rules were written to provide coherence in approaches and practices contemplated and required for scheduling and case flow management



New judicial powers under the Rules are meant to enhance the ability of the Court to provide meaningful intervention when required to assist parties in the earliest disposition of their family dispute

Objectives of the New FD Model

QBR 70.24(1)

- To ensure that all reasonable efforts are made to resolve and/or dispose of family cases at the earliest opportunity
- To ensure that greater judicial resources are available at the “front end” or “intake stage”
- To provide early and active judicial intervention in order to resolve cases at the early stage
- Where cases cannot be resolved, to ensure cases flow through the court system within a reasonable, predictable and finite time period
- In all cases, the principle of “proportionality” will be applied

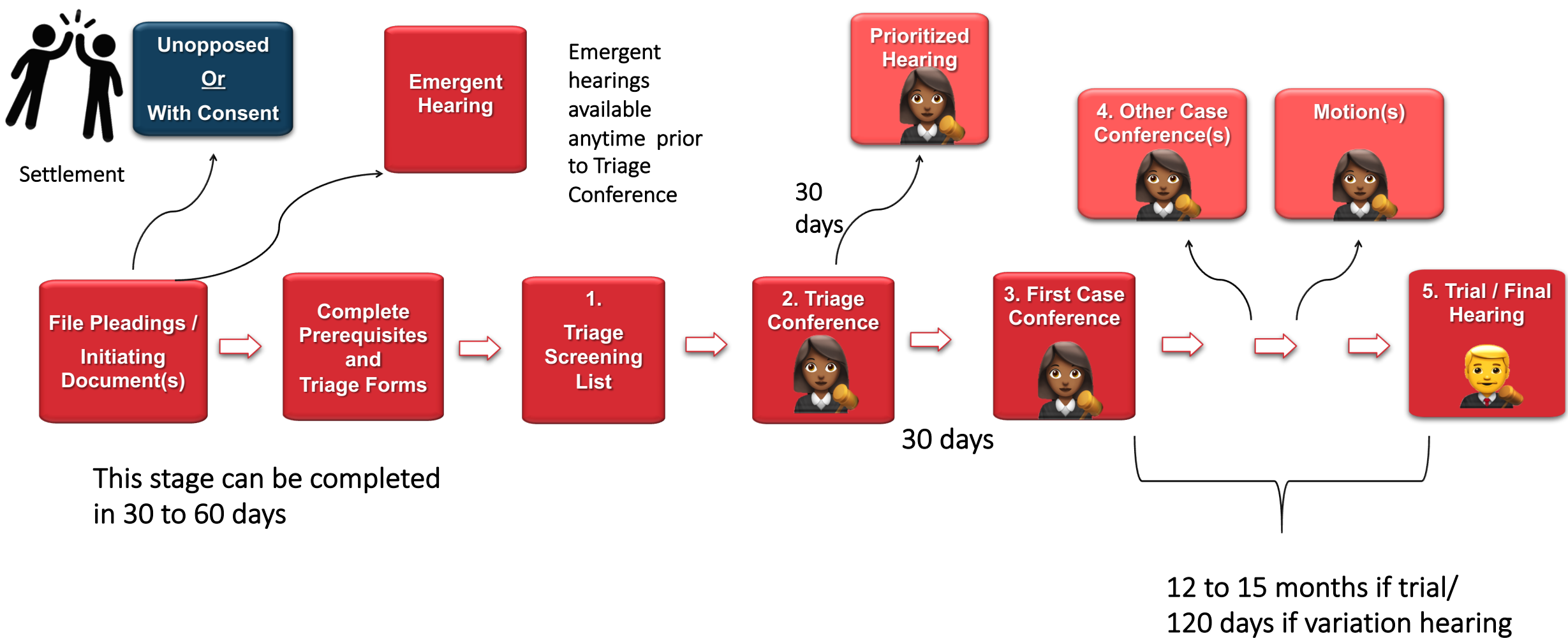




Five Meaningful Events

1. Obtaining a date for a Triage Conference
2. The Triage Conference Appearance
3. The Attendance at the First Case Conference
4. The Certification for Trial Readiness
5. The Trial/Final Hearing





FD MODEL CASE FLOW - EARLY RESOLUTION AND TIMELY ADJUDICATIONS

Highlights of the FD Model

- 1. ACCESSIBILITY – mandatory early exchange of information aids parties in resolving disputes
- 2. NAVIGABILITY – forms are accessible and use a checklist format
- 3. TIME LIMITED – strict time lines imposed so that every case has a defined and foreseeable end date. Trials cannot be adjourned without Chief Justice's permission
- 4. EARLY AND EFFECTIVE JUDICIAL INTERVENTION – emergent hearings to address family violence and denial of access to children are available with duty judges
- 5. TRIAGE CONFERENCES – early opportunity to discuss the dispute with a judge with a view to resolution



Highlights of the FD Model



- 6. ONE JUDGE MODEL – Triage conference judge will be the case conference judge
- 7. EFFECTIVE CASE MANAGEMENT – each case conference must result in a meaningful step towards resolution or preparation for trial
- 8. THE END OF LITIGATION ABUSE – motions may only be filed with the permission of the case conference judge. No adjournments.
- 9. PRIORITIZATION OF FAMILY VIOLENCE/ PARENTAL ALIENATION ISSUES – heard at the outset of the case, not at the end

Province- Wide Application of the New FD Model



- The New FD Model has province-wide application
- This is important as court processes should be applied consistently throughout the Province
- The full benefit of triaging and case conferencing is now available outside the Winnipeg Centre
- Adjustments have been made to some processes due to limited resources in some judicial centres [QBR 70.24(6)]
- Masters sit in person or via Telelink in all centres to ensure that parties have access to pre-triage processes
- In 2020 and continuing, the pandemic resulted in restricted access to courts but created opportunities for the Court to improve remote access to justice for Manitobans no matter where they live

ADDRESSING FAMILY VIOLENCE UNDER THE FD MODEL

- PROTECTION ORDERS (*THE DOMESTIC VIOLENCE AND STALKING ACT*)
 - Process to obtain a Protection Order has remained unchanged
 - Process for and Application to Set Aside/Vary/ Revoke Protection Order has been modified:
 - All applications appear on a List every second Wednesday
 - An objective of the List is to attempt to resolve as many matters as possible on a consent basis or by adjudicating the matter on a summary basis (confirm, set aside or vary).
 - If existing FD matter and triage conference or case conference date then matter sent to that date to be addressed by the judge. Prioritized hearing date if matter unresolved.
 - With this approach, it is anticipated that those set aside/vary applications with related Divorce Act or Family Maintenance Act **proceedings will have the necessary determinations of fact regarding the issue of family violence made in a timely manner for the purpose of the court addressing any ongoing or eventual custody, access, and property issues**

FOUR TYPES OF FAMILY VIOLENCE

- 1. Coercive controlling violence or intimate terrorism
- 2. Violent resistance
- 3. Situational (or common) couple violence
- 4. Separation-instigated violence

Why are these distinctions important?

- An understanding of the different types of violence is an important factor for a court to consider
- Not all family violence fits neatly into these categories
- The response of a court may vary depending on which court is adjudicating on the facts

Parallel Judicial Processes

Criminal Court

- Protecting safety of persons and property
- Ensuring rights

Child Protection Court

- Protection of vulnerable children
- Ensuring minimum standard of care

Family Court

- Regulate rights and responsibilities on family breakdown
- Resolution of disputes between parties

- Objectives and processes of each court are different
- Timing varies wildly
- Outcomes are not coordinated and can lead to inconsistent outcomes

Differing Judicial Objectives

- “Criminal courts order no contact, child protection authorities say the children will be apprehended if there is contact and family court focuses on the view that contact is in the best interests of the child and grants unsupervised access.”
- The Honourable Donna Martinson, *British Columbia Community Consultation Report* (National Judicial Institute, April 2012) at 5, online: <<http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-B.C.-Community-Consultations-on-Family-Violence-Report.pdf>>.

The Emergent Case

QBR 70.24(12)

- Emergent hearings are available on a limited and defined basis
- May be heard prior to Triage and without the requirement of prerequisite completion
- A judge may hear a motion or application prior to the triage conference for a family proceeding **if** the motion or application relates to a situation involving one or more of the following:
 - (a) an immediate or imminent risk of harm to a party or a child;
 - (b) the removal of a child from Manitoba;
 - (c) the loss or destruction of property
- Prerequisites must still be completed after the emergent hearing and the case will flow in the ordinary course



© Can Stock Photo

The Emergent Case

QBR 70.24(12)

- December 17, 2018 Practice Direction set out the difference between an emergent case and an urgent case
- February 13, 2020 Practice Direction provided an update regarding procedure on emergent motions and also provided clarification and guidance on the meaning of “immediate or imminent risk of harm to a child”
- *“The “emergent” exceptions will include situations which involve cases of immediate or imminent risk of literal or physical harm to the child. Additionally, however, an emergent request and emergent relief may be justified in situations where one parent has abruptly, unilaterally and without explanation or apparent justification, completely cut or has “virtually eliminated” all access and/or contact between the other parent and a child or children. These more stark situations may result in a judge permitting a hearing to be convened to address whether such action constitutes an “immediate or imminent risk of harm” to the child and requires court intervention. Be forewarned, however, that such situations of “constructive”, non-literal harm to the child (if they are to constitute an emergent situation) must involve a virtual elimination of access/contact that is abrupt, unilateral and unexplained.”*

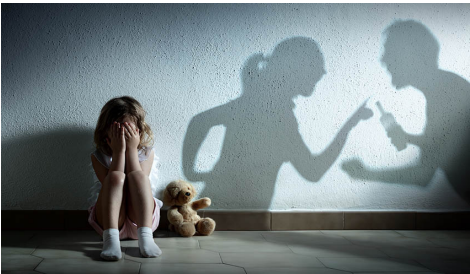
The Prioritized Hearing

QBR 70.24(25) to (28)

- If a Triage Judge has determined, for reasons of practicality or proportionality, that a prioritized hearing is necessary, then the date for such hearing is set within 30 days of Triage Conference and before the first case conference. The Triage Judge will, concurrently, set a first case conference date to occur 30 days after prioritized hearing
- Prioritized hearings will be used for:
 - Protection order variations/set aside applications
 - Confirmation of Master's report on dates of cohabitation/separation
 - A summary judgment motion as directed by the Triage Judge
 - Hearings on matters that should not wait for the first case conference – including interim custody and support

PRIORITY

Divorce Act (Canada) Amendments



- Amendments came into force on March 1, 2021
- Rules and forms have been amended (see Practice Directions – February 12, 2021 and June 15, 2021) to include new terminology and duties
- The FD Model was been designed to meet the new statutory duties imposed by the amendments to the *Divorce Act (Canada)*:
- Section 7.8 imposes a duty on the court to consider the impact of family violence before making a determination of custody.
- The Model requires that issues of family violence be addressed at the Triage Conference and, if not resolved, then a prioritized hearing date must be set within 30 days. Determinations of facts related to family violence are made early in the case. Those facts inform the judge hearing the custody matter.
- New notice provisions on change of residence and relocation

The FD Model and the Future

- The foundational principles of the FD Model have allowed our Family Court to react and adapt to statutory changes and situational challenges in delivery of judicial services
- The result has been a nimble, cost-effective, efficient and navigable family court process
- Vast majority of cases resolve at triage or first case conference
- *The Family Law Modernization Act* recognizes that cases where emergent motions and applications are necessary should continue through the Court
- Enhanced administrative powers for Maintenance Enforcement has reduced the frequency of variation applications and motions
- Family Resolution Services continues to provide assessments as ordered by the court
- The role of the Family Division in relation to confirmation of recommended orders will not affect the Model



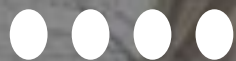
Where to Find Information About Family Law and the New FD Model - Court Processes and Procedures



- Manitoba Courts website is a good place to start – www.manitobacourts.mb.ca
- The Court regularly issues Practice Directions and Notices regarding court rules and procedures
- Webinars
- Legal Help Centre – legalhelpcentre.ca
- Legal Aid Manitoba – www.legalaid.mb.ca
- Justice Canada – www.justice.gc.ca
- Manitoba Justice – www.gov.mb.ca



THANK YOU



Manitoba Court of Queen's Bench FD Implementation Committee



www.manitobacourts.mb.ca