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Court Compels DNA Testing in Estate Dispute: MBQB

The court has the jurisdiction to make a pre-trial order compelling the provision of a bodily substance for DNA testing of a party to an action either under s. 63 of *The Court of Queen's Bench Act* or inherently according to the judge in [Nandwani v. Nandwani](#), 2011 MBQB 231. The court's inherent jurisdiction to make such orders extends to non-parties (even those who reside outside Canada and have only notionally attorned to the court's jurisdiction) in circumstances in which the administration of justice would suffer if the testing was not ordered. In this case, a protracted estate dispute between the deceased's siblings and the child presumed by law to be his son (all residents of India), the court found there was a proper basis for ordering such testing given the plausible evidence that the presumption of paternity might be rebutted. The advantage of ordering pre-trial DNA testing of both the son and his uncle/stepfather, "is that the results of the testing can be used by the parties in reaching a settlement, which would itself avoid a trial date, or if a trial is needed, enable the parties to have their trial without a lengthy interruption." (para. 38) The court dismissed a secondary application for a DNA order brought under s.21 of *The Family Maintenance Act*, finding that the *FMA* was never intended to be used in such circumstances.

Two Part Test for Specific Performance: MBQB

The court upheld the validity of a 5 year old agreement to sell a property once the purchasers were "able to acquire a mortgage in their own name" in [McDonald v. McDonald](#), 2011 MBQB 241. After signing the agreement the purchaser/defendants moved into the house and took over all payments associated with it, including the mortgage held by the plaintiff. The court dismissed the plaintiff's argument that the contract was void for uncertainty because there was no meeting of the minds regarding price. The real intent of the parties, said the court, was for the defendants to buy the residence for the amount of the outstanding mortgage, and "the promise to purchase for the price of the mortgage is sufficiently discernable to determine the price." The court also found that specific performance was the appropriate remedy to enforce the agreement to sell. Citing a recent Saskatchewan Court of Appeal [decision](#) clarifying the uniqueness analysis set out in [Semelhego](#), the court applied a two-part subjective/objective test for the granting of specific performance. (paras.70-76)

Public Trustee's Fee Fair: MBQB

What constitutes fair and reasonable compensation for the Public Trustee acting as committee of both property and personal care rests very much on the individual facts of each case according to the court in [The Estate of Gertrude Ritchot](#), 2011 MBQB 233. In this case, although the estate was small, the Public Trustee's work consisted of much more than simply managing the deceased's assets, and there was no evidence to suggest that the deceased's family members either shared in or criticized any of the vital services provided.

Real Property Act Changes In Effect December 5, 2011

The final *Real Property Act* [changes](#) arising from the enactment of [The Real Property Amendment Act](#) come into force December 5, 2011. The amendments will have a significant impact on real estate practice, as described in the [explanatory note](#) and [government news release](#) concerning Bill 43. The Law Society has planned a CPD program which will highlight the changes. It will take place November 21, 2011, from 12:00 noon to 2:00 p.m. Further details will be posted soon on the Law Society website.

In Force Amendments

These amendments to real property related legislation will come into force in November:

- Section 2 (insofar as it enacts ss. 92.1 and 92.7(a) of *The Residential Tenancies Act*) and s. 5 of [The Residential Tenancies Amendment Act \(Expanded Grounds for Early Termination\)](#), S.M. 2011, c.46 will come into force November 1, 2011.
- Several sections of [The Residential Tenancies Amendment Act](#), S.M. 2009, c. 10 (assented to June 11, 2009) will come [into force](#) November 1, 2011, as will the following regulations: [55/2011](#), Residential Tenancies Regulation, amendment and [56/2011](#), Residential Rent Regulation, amendment. The Director of Residential Tenancies now has the authority to deal with tenancy agreements that include supplemental services such as meals and housekeeping. New administrative penalties will apply to landlords who fail to comply with orders made under the Act.
- Sections 2 to 5 and 7 to 10 of Schedule B ([The Residential Tenancies Amendment Act](#)) and all of Schedules C ([The Condominium Amendment Act](#)), D ([The Municipal Amendment Act](#)) and E ([The City of Winnipeg Charter Amendment Act](#)) of [The Condominium Act and Amendments Respecting Condominium Conversions \(Various Acts Amended\)](#), S.M. 2011, c. 30 will come into force November 7, 2011.

New at the Property Registry

- The Property Registry's multi-year client service improvement initiative is detailed in this announcement: [Client Service Improvements in the Property Registry](#);
- [Survey Plans online](#) - is a new user guide to survey plans which is updated continuously; and
- The Registry's [2010/2011 Annual Report](#) was posted October 2011.

Recommended Reading

- Ned Brown discusses how s.77 of *The Real Property Act* affects day to day real estate transactions in [Implied covenants arising out of the transfer of land](#), a recent [posting](#) on Pitblawg;
- [Lawyer ordered to give will to prospective trustee](#) - this October 24, 2011 *Law Times* article discusses [Hope v. Martin](#), 2011 ONSC 5447, a case it says provides guidance on how lawyers possessing original wills should handle questions of solicitor-client privilege and the duty of confidentiality;
- [The 'next generation' of conveyancing](#) - this October 7, 2011 *Lawyers Weekly* article discusses the redesign of the software program to access the land registry system in Ontario.

Upcoming CPD Programs: LSM

Watch the LSM website for details of the November 21, 2011 program on the upcoming changes to *The Real Property Act* and register soon for the following informative program:

- [Challenges to Wills & Gifts](#) - Presenters John Poyser and Ralph Neuman will address the grounds for attacking and defending wills, trust settlements, *inter vivos* gifts and other voluntary wealth transfer instruments. It will be held in the Law Society classroom on December 2, 2011, from 1:00 to 4:00 p.m.

MBA/CBA Programs

[Understanding Terms of Art in Real Estate Transactions](#) - this CBA webconference on the correct use of terms of art when drafting contracts and negotiating real estate deals will be held November 1, 2011. [Register online](#).

The CBA is presenting the webconference [Wills and Estates Planning: Top Tips and Traps](#) on December 13, 2011. Topics covered will include using trusts for tax planning, the tips and traps of beneficiary designations, the perils and benefits of jointly-held property and U.S. estate and gift tax, among others. [Register online](#).

Upcoming Step Programs

The Winnipeg branch of STEP, the [Society of Trust and Estate Practitioners](#), is presenting the program [Changes to the CPP and review of the Pension Income Splitting Provisions](#) on November 17, 2011 from 9:30 to 11:30 a.m. Presenters will review the upcoming changes to the Canada Pension Plan and the pension income splitting provisions of the *Income Tax Act* that were enacted in 2007.

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