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Non-Party Cannot be Compelled to Submit to DNA Testing: MBCA

The court can compel a party to an estate dispute to undergo DNA testing pursuant to s. 63(2) of *The Court of Queen's Bench Act*, but has no inherent jurisdiction to make such an order against a non-party according to the Court of Appeal in [*Nandwani v. Nandwani et al.*](#), 2013 MBCA 12. This is the case involving a dispute between a Manitoba deceased's putative son and the deceased's siblings (all residents of India), over who is entitled to inherit the residue of the estate. The court upheld the motion judge's order that the son undergo DNA testing, but rendered it futile by setting aside the order against the son's stepfather/uncle (a non-party who the siblings believe to be the son's biological father). Given the novel nature of the case (which raises questions of jurisdiction *simpliciter*, *forum non conveniens*, the presumption of paternity, DNA testing, intrusion into privacy, applications under s.20 of *The Family Maintenance Act*, and the exercise of inherent jurisdiction) the court ordered that there be no costs in either court.

Court of Appeal to Consider Discretionary Trusts

The Court of Appeal will decide the important issue of what constitutes an absolute discretionary trust following the granting of leave to appeal in [*Thomas v. Director, Employment and*](#), 2013 MBCA 16. The appeal concerns a decision by the Social Services Appeal Board to uphold the termination of income assistance to a dependant adult who inherited a trust fund from his father. The court will determine whether the Social Services Appeal Board erred in finding that the trust clause in the father's will did not constitute an absolute discretionary trust and thus was a financial resource to be included in the calculation of the son's eligibility for income assistance.

Oral Lease Agreement Upheld: MBCA

In [*Canadian National Railway Co. v. Huntingdon*](#), 2013 MBCA 3 the court upheld the lower court decision awarding damages against the owners of Cityplace for breach of an oral agreement to continue a lease on agreed terms, but overturned the award of compensatory damages against the third defendant, the owner's asset manager. The asset manager was not a landlord at common law or under *The Landlord and Tenant Act*, nor was there evidence it was privy to the oral lease. The court did uphold the award of punitive damages against the asset manager, however, for acting as agent in the wrongful distraint of the tenant's property.

Commission Decision on Definition of "Rental Unit" Upheld: MBCA

In [*Miller v. Spencer*](#), 2013 MBCA 9, the Court of Appeal found no basis for granting leave to appeal a decision of the Residential Tenancies Commission that a furnished room/bathroom rental was a "rental unit" under *The Residential Tenancies Act* and therefore subject to the provisions of the Act.

Substantial Legal Costs in Estate Accounting Unnecessary: MBQB

A beneficiary who brought a court application questioning the actions of his executrix sister ended up owing his father's estate \$11,023.28 in [*The Estate of Jan Jaszcza*](#), 2012 MBQB 328. The court found "absolutely nothing" to confirm the son's suspicions that his father's property had not been accounted for properly. On the contrary, there was "a very real possibility that he has in fact received substantially more than his father intended him to receive," said the court. The executrix, who the court found acted with outstanding speed, was awarded \$5000.00 compensation for her efforts and her court costs were to be paid by the estate and her brother.

Legislative Update

Sections 7, 12, 15, 16(2) and (3), 18, 19, and 29(3) of [*The Residential Tenancies Amendment Act*](#), S.M. 2012, c. 30 will come into force March 1, 2013, clarifying the rights and obligations of tenants and landlords concerning termination, rent increases, and rehabilitation. The [explanatory note](#) to Bill 28 and this government [news release](#) discuss the changes in more detail.

Sections 1 to 46, 47(2), 47(7) (insofar as it enacts s. 25.3 of *The Vulnerable Persons Living with a Mental Disability Act*), 47(11) and 48 of [*The Adult Abuse Registry Act and Amendments to The Vulnerable Persons Living with a Mental Disability Act*](#), S.M. 2011, c. 26 came into force January 15, 2013. The related Adult Abuse Registry Regulation, Man [Reg 164/2012](#), was registered December 17, 2012. Manitoba now has the first [adult abuse registry](#) in Canada.

Property Registry Appointment

As announced in this [notice](#) from the Property Registry, Nancy Anderson has been appointed by order in council to the position of District Registrar for the Winnipeg Land Titles Office and Deputy Registrar-General, effective November 17, 2012.

Real Property Comparison Tables: CBA

The National Real Property section of the Canadian Bar Association is in the process of compiling [comparison tables](#) to aid its members in working with the varying real property laws across Canada. Various provinces, including Manitoba, have posted tables answering questions on such topics as possessory title, title searches, the agreement, surveys, the registration process, and land transfer taxes. [Manitoba's table](#) was contributed by Edward Brown.

Recent Publications on Property and Succession Topics

- [*The Last Word*](#) - the January 2013 edition of the CBA's National Wills, Estates and Trusts section newsletter contains articles on estate bonding, fraudulent conveyances, and insurance options in estate planning.
- Condominium law is the focus of the February 2013 edition of the CBA's [National Real Property section newsletter](#). In addition to articles on condominium corporation fraud and on dealing with asbestos in condominiums, the newsletter contains an [article on the \(as yet to be proclaimed\) changes to Manitoba's Condominium Act](#) written by Albina Moran.
- [*Teranet on a roll with legal, business successes*](#) - this *Law Times* article discusses the successes of Teranet, the company which was recently granted the exclusive rights to Manitoba's property registry system as noted in last month's eLaw.

- [New Year's resolutions for a healthier law practice and a new you](#) - Real estate claims comprise 30% of Ontario insurance claims and wills and estates matters comprise 7% according to this LAWPRO magazine article, which suggests ways to improve in different practice areas. This [Slaw article](#) summaries the resolutions pertaining to real estate practice.
- [High stakes](#) - this *InHouse* article discusses the risks of claiming specific performance without mitigating damages following the Supreme Court of Canada's decision in [Southcott Estates Inc. v. Toronto Catholic District School Board](#), 2012 SCC 51.
- [Power of attorney on the other side of your real estate transaction? Your cue to pay special attention](#) - this AvoidAClaim blog post discusses how to recognize, limit, and protect yourself from the risk of fraud when powers of attorney are used in real estate transactions.
- [Wills, powers of attorney and the elderly: a practitioner's perspective](#) - this LAWPRO magazine article from 2007 gives practical advice to address the challenges in preparing wills and powers of attorney for elderly clients.

Upcoming CPD Programs: LSM

- [Annual Hot Topics in Real Estate](#) is currently sold out, but a [wait list](#) is being maintained for the program. An experienced panel of practitioners will review the latest developments in real estate practice, including new LTO forms, condominium issues under the new Act, and farmland assessments. The program takes place March 20, 2013, from 1:00 to 4:00 p.m. at the Law Society classroom.
- [The Leadership Challenge: Skill-Sets and Mind-Sets for Leading People](#) - this day-long workshop will improve your ability to lead others through change. It takes place on April 30, 2013 at the Law Society classroom. Presenter Simon D'Arcy of Frank Sanitate Associates is also presenting the workshop [Dealing with Difficult People: Leading Edge Communication Skills for Lawyers](#), which takes place May 1, 2013, from 9:00 a.m. to 4:30 p.m. Save money by [registering](#) for both programs or by submitting your form before March 20, 2013.

MBA Programs

- The Real Property Law section of the Manitoba Bar Association will host two upcoming meetings from 5:00 to 6:30 p.m. at the offices of Pitblado LLP, 360 Main Street. The first program, [Interests in realty and personalty and dealings with same in First Nations urban economic zones created within cities](#), is a joint presentation with the Aboriginal Law section and will be held March 13, 2013. Presenters Brad Regehr and Brenda Johnston will explain the basics of establishing and operating reserve land enclaves and discuss acting for parties with dealings within or overlapping the boundaries between such enclaves and lands not so designated.
- The second program, [Remote registration of conveyancing instruments in the Manitoba Land Titles system](#), takes place April 17, 2013. Two lawyers who practise real estate law in both Ontario and Manitoba will provide an overview of the remote registration system now in use in Ontario and expected to be adopted in Manitoba.

Society of Trust and Estate Practitioners (STEP) Programs

Upcoming [STEP](#) programs in Winnipeg include: [Planning for the Capital Gains Exemption: A Lawyer's Perspective](#) on March 19, 2013, with presenter Paul Prendergast; and a CRA Roundtable and reception on May 14, 2013. See the STEP website for further details on these programs and other STEP initiatives.

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