High Court Amendment Rules 2007

Preamble

At Wellington this 23rd day of July 2007

Pursuant to section 51C of the Judicature Act 1908, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court), makes the following rules.

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1 Title

These rules are the High Court Amendment Rules 2007.

2 Commencement

These rules come into force on 24 August 2007.

3 Principal rules amended

These rules amend the High Court Rules set out in Schedule 2 of the Judicature Act 1908.

4 New rule 30 substituted

Rule 30 is revoked and the following rule substituted:

"**30 Cover sheet, numbering, and fastening of document**

"(1) The first sheet of a document is the cover sheet, showing the matters specified in rules 31 and 33.

"(2) The cover sheet is not numbered, even if the heading is continued on another sheet under rule 33(2).

"(3) Each page after the cover sheet must be numbered consecutively, starting with the number 1.

"(4) All sheets of a document must be securely fastened together."

5 Description of document

Rule 31(1) is amended by omitting "first page" and substituting "cover sheet".

6 Format of first page

(1) The heading to rule 33 is amended by omitting "**first page**" and substituting "**cover sheet**".

(2) Rule 33(1) is amended by omitting "first page" and substituting "cover sheet".

7 Subscription at foot of first page

(1) The heading to rule 40 is amended by omitting "**first page**" and substituting "**cover sheet**".

(2) Rule 40(1) is amended by omitting "first page" and substituting "cover sheet".

8 New rules 82 to 86E substituted

Rules 82 to 86 are revoked and the following rules substituted:

"**82 Incapacitated person and minor defined**

For the purposes of these rules,—

"**incapacitated person** means a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

"(a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or

"(b) unable to give sufficient instructions to issue, defend, or compromise proceedings

"**minor** means a person who has not attained the age of 18 years; and a person is of **full age** if he or she has attained the age of 18 years.

"**83 Litigation guardian defined**

For the purposes of these rules, **litigation guardian**—

"(a) means—

"(i) a person who is authorised by or under an enactment to conduct proceedings in the name of, or on behalf of, an incapacitated person or a minor (but only in a proceeding to which the authority extends); or

"(ii) a person who is appointed under rule 86C to conduct a proceeding; and

"(b) has the same meaning as the expression 'guardian *ad litem*'.

"**84 Incapacitated person must be represented by litigation guardian**

"(1) An incapacitated person must have a litigation guardian as his or her representative in any proceeding, unless the Court orders otherwise.

"(2) If a person becomes an incapacitated person during a proceeding, a party must not take any step in the proceeding without the permission of the Court until the incapacitated person has a litigation guardian.

"**85 Minor must be represented by litigation guardian**

"(1) A minor must have a litigation guardian as his or her representative in any proceeding, unless the Court orders otherwise.

"(2) Subclause (1) does not apply to a minor who—

"(a) is required by an enactment to conduct a proceeding without a litigation guardian; or

"(b) is permitted by an enactment to conduct a proceeding without a litigation guardian and elects to do so; or

"(c) is authorised under rule 86 to conduct a proceeding without a litigation guardian.

"**86 Minor may apply to conduct proceeding without litigation guardian**

"(1) This rule applies to a minor who—

"(a) is not required or permitted by an enactment to conduct a proceeding without a litigation guardian; and

"(b) is not prohibited by an enactment from conducting a proceeding without a litigation guardian.

"(2) A minor who wishes to conduct a proceeding in his or her own name may apply to the Court for authorisation to conduct the proceeding without a litigation guardian.

"(3) On an application under subclause (2), the Court may make an order allowing the minor to conduct the proceeding without a litigation guardian if it is satisfied that—

"(a) the minor is capable of making the decisions required or likely to be required in the proceeding; and

"(b) no reason exists that would make it in the interests of the minor to be represented by a litigation guardian.

"**86A Application of rules 86B to 94 to minors**

Rules 86B to 94 apply to a minor to whom rule 85(1) applies, and every reference in those rules to an incapacitated person must be read as if it was also a reference to a minor.

"**86B Court may set aside any step in proceeding**

The Court may set aside a step in a proceeding if an incapacitated person did not have a litigation guardian when that step was taken and the Court considers that the incapacitated person was unfairly prejudiced.

"**86C Appointment of litigation guardian**

"(1) This rule applies if an incapacitated person does not have a litigation guardian within the meaning of rule 83(a)(i).

"(2) The Court may appoint a litigation guardian if it is satisfied that—

"(a) the person for whom the litigation guardian is to be appointed is an incapacitated person; and

"(b) the litigation guardian—

"(i) is able fairly and competently to conduct proceedings on behalf of the incapacitated person; and

"(ii) does not have interests adverse to those of the incapacitated person; and

"(iii) consents to being a litigation guardian.

"(3) In deciding whether to appoint a litigation guardian, the Court may have regard to any matters it considers appropriate,

including the views of the person for whom the litigation guardian is to be appointed.

"(4) The Court may appoint a litigation guardian under this rule at any time—

"(a) on its own initiative; or

"(b) on the application of any person, including a person seeking to be appointed as litigation guardian.

"86D Application to be served on person for whom litigation guardian is to be appointed

"(1) Unless the Court orders otherwise, an application under rule 86C—

"(a) may be made ex parte; and

"(b) must be served on the person for whom the litigation guardian is to be appointed.

"(2) When the person for whom the litigation guardian is to be appointed is a minor,—

"(a) subclause (1)(b) does not apply; and

"(b) unless the Court orders otherwise, the application must be served instead on—

"(i) the minor's parent or guardian; or

"(ii) if there is no parent or guardian, a person of full age who has the care of the minor or with whom the minor lives.

"86E Notification of appointment

"(1) A litigation guardian within the meaning of rule 83(a)(i) must file a copy of the order or other document that empowers him or her to conduct the proceeding, at the same time as the first document relating to the proceeding is filed.

"(2) A person appointed under rule 86C as a litigation guardian of a party to a proceeding must give notice of the appointment to each other party in the proceeding, as soon as practicable after the appointment."

9 New rule 89 substituted

Rule 89 is revoked and the following rule substituted:

"**89 Service of documents**

"(1) A party who knows that an incapacitated person has a litigation guardian must serve any document in a proceeding—

"(a) on the litigation guardian, unless the litigation guardian has filed an address for service:

"(b) where the litigation guardian has filed an address for service, at that address for service.

"(2) Subclause (3) applies to a party who believes on reasonable grounds that a person is an incapacitated person but does not know if that person has a litigation guardian.

"(3) The party—

"(a) may apply to the Court for the appointment of a litigation guardian under rule 86C; and

"(b) may apply for directions as to service; and

"(c) must serve any documents in the proceeding in accordance with any directions as to service."

10 New rules 94 to 94B substituted

Rules 94 to 94B are revoked and the following rules substituted:

"**94 Retirement, removal, or death of litigation guardian**

"(1) A litigation guardian may not retire without the leave of the Court.

"(2) Unless the Court orders otherwise, the appointment of a litigation guardian under rule 86C ends if another person is subsequently authorised by or under an enactment to conduct the proceeding in the name of, or on behalf of, the incapacitated person.

"(3) A litigation guardian may be removed by the Court when it is in the interests of the person he or she represents.

"(4) In the case of retirement, removal, or death of a litigation guardian, no further step may be taken in the proceeding without the leave of the Court until the incapacitated person is represented by another litigation guardian.

"**94A Procedure where person ceases to be incapacitated person**

"(1) The Court must make an order terminating the appointment of a litigation guardian if it is satisfied that the person the litigation guardian represents is no longer an incapacitated person.

"(2) The Court may make an order at any time—

"(a) on its own initiative; or

"(b) on the application of—

"(i) the incapacitated person; or

"(ii) his or her litigation guardian; or

"(iii) a party.

"(3) From the date of the order,—

"(a) all subsequent steps in the proceeding must be carried on by the person formerly represented by the litigation guardian; and

"(b) the person formerly represented by the litigation guardian is liable for all the costs of the proceeding (including solicitor and client costs) in the same manner as if he or she had commenced the proceeding or had become a party to the proceeding when he or she was not an incapacitated person.

"**94B Procedure where minor attains full age**

"(1) A minor who attains full age must file and serve an affidavit confirming that he or she is no longer a minor.

"(2) Unless the Court orders otherwise, from the date a minor attains full age—

"(a) the appointment of his or her litigation guardian ends; and

"(b) all subsequent steps in the proceeding must be carried on by that person; and

"(c) that person is liable for all the costs of the proceeding (including solicitor and client costs) in the same manner as if he or she had commenced the proceeding or had become a party to the proceeding when he or she was not a minor."

11 Additional jurisdiction of certain Registrars

Rule 271 is amended by revoking paragraph (d) and substituting the following paragraph:

"(d) rule 86C(2), but only in respect of an application for the appointment of a litigation guardian for a minor for the purposes of the Administration Act 1969:"

12 Who may swear affidavit verifying statement in answer to interrogatories

Rule 286(1) is amended by revoking paragraph (b) and substituting the following paragraph:

"(b) by the person's litigation guardian if the person required to make the statement is—

"(i) a minor, except a minor to whom rule 85(2) applies; or

"(ii) an incapacitated person:"

13 Manner of payment

Rule 346E is amended by revoking subclause (2) and substituting the following subclause:

"(2) Where a minor, except a minor to whom rule 85(2) applies, or an incapacitated person is or may be entitled to an interim payment, or to part of an interim payment, under these rules,—

"(a) acceptance of that payment is subject to the approval of the Court; and

"(b) payment out of Court must not be made without the leave of the Court."

14 Allocation of hearing dates and setting down dates

Rule 434(5)(a) is amended by omitting "40" and substituting "60".

15 Directions as to service

Rule 451(5) is amended by—

(a) inserting "or minors" after "incapacitated persons" ; and

(b) omitting "85(3)" and substituting "86C".

16 Form and contents of affidavits

Rule 510(3A) is amended by inserting ", except the cover sheet," after "each page" in each place where it appears.

17 Powers of certain Registrars to make grant, etc

Rule 651(1) is amended by omitting "the Deputy Registrar who is for the time being designated as the Senior Deputy Registrar at the registry of Auckland," and substituting "any Deputy Registrar who is for the time being designated as a Senior Deputy Registrar at the Auckland registry,".

Rebecca Kitteridge,

for Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on 24 August 2007, amend the High Court Rules. In general terms, the amendments—

- •• change the name given to the first sheet of all documents presented for filing and how documents must be numbered (rules *4 to 7* and *16*):
- •• change the definitions of incapacitated person and minor, and substitute new rules for the conduct of proceedings involving these persons (rules *8 to 11*):
- •• make consequential amendments to rules relating to persons who may swear an affidavit verifying a statement in answer to interrogatories, and how interim payments must be dealt with in particular cases (rules *12* and *13*):
- •• change the first reference date in rule 434(5) for determining the setting down date for a proceeding (rule *14*):
- •• provide for more than one designated Senior Deputy Registrar at the Auckland registry to exercise jurisdiction under rule 651(1), which relates to probate and administration applications and related matters (rule *17*).

Rule *4* substitutes new rule 30, which relates to the first sheet of a document filed in Court, page numbering, and document fastening. Under existing rules 30, 31, and 33, the first sheet of a document is referred to as the first page and all pages of the document are numbered consecutively. Under the new rule, the first sheet, showing the document's description required by rule 31, and the heading and further information required by rule 33, will be referred to as the cover

sheet. The cover sheet will not be numbered even if the heading continues on another sheet. All subsequent pages will be numbered consecutively, starting at 1.

Rules *5 to 7* and *16* consequentially amend rules 31, 33, 40, and 510.

Rules *8 to 10* substitute new rules 82 to 86E, 89, and 94 to 94B, which relate to the conduct of proceedings involving incapacitated persons and minors. These changes reflect a number of recent decisions on capacity to conduct proceedings, including *Masterman-Lister v Brutton and Co* [2003] 3 All ER 162 and *Dalle-Molle (By His Next Friend Public Trustee) v Manos and Anor* [2004] SASC 102, and are consistent with procedural provisions that now apply in England and a number of Australian States. Equivalent changes are made to the District Courts Rules 1992 by the District Courts Amendment Rules 2007. Key features of the new rules include—

- an incapacitated person is defined by reference to a person's capability to understand issues on which his or her decision would be required as a litigant conducting proceedings or to give sufficient instructions for the purposes of proceedings:
- a minor is defined as a person under 18 years of age:
- separate rules apply to proceedings involving incapacitated persons and those involving minors:
- an incapacitated person must have a litigation guardian as his or her representative in a proceeding, unless the Court orders otherwise:
- a minor must also be represented by a litigation guardian in a proceeding, unless an enactment requires or permits the proceeding to be conducted without a litigation guardian. However, a minor may apply for an order allowing conduct of the proceeding in his or her own name:
- if an incapacitated person does not have a litigation guardian, one may be appointed by the Court, on its own initiative or on the application of any person. This rule, and subsequent rules concerning proceedings where a person is represented by a litigation guardian, apply equally to a minor who does not conduct proceedings in his or her own name:
- if a person becomes incapacitated during a proceeding, no party can take a further step in the proceeding without the Court's permission until the person has a litigation guardian:

- the Court may set aside a step taken in a proceeding if an incapacitated person did not have a litigation guardian when the step was taken and the Court considers that the person was unfairly prejudiced:
- the Court may make an order ending the appointment of a litigation guardian if it is satisfied that a person is no longer an incapacitated person. From that date, the person formerly represented must take all steps in the proceeding and is liable for all costs:
- a minor who turns 18 must file an affidavit confirming that he or she is no longer a minor. From that date, unless the Court orders otherwise, the appointment of the minor's litigation guardian ends, all steps must be carried on by that person, and he or she is liable for all costs.

Rule *11* substitutes new rule 271(d), which relates to the power of Registrars in the main centres to appoint a litigation guardian under rule 86C(2). The power conferred is limited to applications for the appointment of a litigation guardian for a minor for the purposes of the Administration Act 1969.

Rule *12* consequentially amends rule 286, which sets out who may swear an affidavit verifying a statement in answer to interrogatories. A statement by a minor who is not within rule 85(2) or an incapacitated person must be verified by an affidavit made by his or her litigation guardian.

Rule *13* consequentially amends rule 346E, which relates to the manner in which an interim payment ordered to be made to a plaintiff under rules 346C or 346D must be made. New subclause (2) provides that in the case of an interim payment to a minor who is not within rule 85(2) or an incapacitated person, acceptance of an interim payment must be approved by the Court and payment out cannot be made without the leave of the Court.

Rule *14* amends rule 434(5)(a), which relates to determining the setting down date for a proceeding when the Court has not given a direction fixing that date. The setting down date is now the date that is 60 days before the hearing (changed from the existing 40 days), or the date on which the hearing date for the proceeding is allocated, whichever is the later. The purpose of the rule change is to address problems that result from the loss of court fixtures due to the late

filing of interlocutory applications. A consequential amendment is made to regulation 11(1)(b) of the High Court Fees Regulations 2001 by the High Court Fees Amendment Regulations 2007. Under the amendment, the fee is payable by the earlier of the working day before commencement of the proceeding or the thirtieth day (changed from the existing tenth day) after the setting down date of the proceeding.

Rule *15* amends rule 451(5), which relates to directions as to service or representation. This is consequential on new rules 82 to 86E, 89, and 94 to 94B, which treat minors and incapacitated persons separately. The effect of the amendment is to provide that the Court may make an order for the representation of a minor or incapacitated person without the appointment of a litigation guardian under new rule 86C.

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