IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

KATHRYN MARIE SAWATZKY	)	***J. D. Ramsay***
	)	*for the Appellant*
	)	
(Petitioner) Respondent	)	***A. C. Dodgson*** *and*
	)	***R. J. Hocken***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
RUSSELL WILLIAM SAWATZKY	)	***May 4, 2018***
	)	
	)	*Judgment delivered:*
(Respondent) Appellant	)	***October 9, 2018***

BEARD JA

I. THE ISSUES

[1] The respondent (the father) is appealing a variation order dealing with custody and child support that was granted by a Queen's Bench judge (the motion judge) on April 7, 2017 (the variation order). The father has set out numerous grounds of appeal, the essence of which is as follows:

> (i) Did the case conference judge or the motion judge err in proceeding on the basis of affidavit evidence rather than ordering a *viva voce* hearing?

(ii) Did the motion judge err by hearing the motion himself, rather than having the matter heard by Doyle J, who was seized of the case pursuant to a term of the 2009 consent final order?

(iii) Did the motion judge err in calculating arrears back to 2009, rather than for only three years?

(iv) Did the motion judge err in failing to impute income to the petitioner (the mother)? Did the motion judge insufficiently gross up the mother's income?

(v) If the mother was in contempt of the final order, should she have been given primary care and control of MRS?

(vi) Did the motion judge err in not severing the divorce from the other issues and allowing final relief to be dealt with under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) at a later date?

II. THE FACTS

[2] The parties were married on November 4, 2000. They have two children, MRS born April 6, 2002, (now 16 years old) and JMS born November 2, 2004 (now almost 14 years old). The parties separated on September 1, 2006.

[3] In 2007, the mother filed an initial petition requesting relief under provincial legislation only. She filed a second petition, being a petition for divorce, on April 24, 2009, that included a request for relief under both the *Divorce Act* and provincial legislation. The issues related to the children were resolved by way of a consent final order under *The Family Maintenance Act*,

CCSM c F20, which was granted by Doyle J on June 16, 2009 (the final order). There is no indication in the final order as to which petition is applicable. Further, there is no reference in the final order to relief being granted under the *Divorce Act*.

[4] As the parties had shared custody of the children, there were provisions mandating the exchange of financial information, the payment of net child support under the Manitoba Table of the *Federal Child Support Guidelines*, SOR 97-175 (the Child Support Guidelines) and the sharing of section 7 special expenses. There was, however, no provision setting out a specific amount for ongoing child support.

[5] Following the granting of the final order, there were periodic discussions and motions filed in relation to various issues, including the exchange of financial information and the enforcement of the final order. In 2013, the mother filed a motion for a contempt order, alleging that the father had failed to provide the required financial information (the 2013 contempt motion). In April 2014, Doyle J dismissed that motion with costs to the father. The most recent motions are those that give rise to this appeal, being the father's motion filed on September 21, 2016, for an order of contempt of court related to alleged breaches of the final order (the 2016 contempt motion), and the mother's motion filed on October 14, 2016, for a variation of the final order, asking to vary the periods of care and control and for retroactive and ongoing child support, among other relief (the 2016 variation motion).

[6] Both parties were represented by legal counsel up to the granting of the final order in 2009 and in relation to the mother's 2013 contempt motion. The father represented himself when he filed his 2016 contempt motion. For

the hearing of that motion and the mother's contemporaneous 2016 variation motion, the father continued to represent himself, while the mother had legal counsel. Both parties had legal counsel for the appeal.

[7] The parties attended a case conference on October 24, 2016, whereat the case conference judge gave detailed directions for the completion of a significant number of matters related to the contested issues, which were to be completed prior to the continuation of the case conference on January 17, 2017. Those matters included making a referral to the Brief Consultation Service for a report regarding the care and control of the children and ordering further financial disclosure. The case conference judge indicated that he would give consideration to directing a trial of issues in whole or in part on affidavits.

[8] The Brief Consultation Report was completed and forwarded to the parties on December 21, 2016.

[9] The second case conference was held on January 17, 2017, at which time the case conference judge set the motions for a two-hour contested hearing on March 15, 2017. He gave directions for the father to file a further affidavit, to which the mother could reply. He noted that "[t]here may or may not be cross-examinations." He addressed the father's request for a trial date, indicating his view that the matters may be able to be dealt with on the affidavits but leaving the final decision to the motion judge. Finally, he stated that he was "severing the issue of divorce", and indicated that the divorce could be dealt with as part of the hearing if the required material was filed in advance.

[10] The motions were heard by the motion judge on March 15, 2017. The father asked for an adjournment of the child support motion to file further financial material, which was dismissed by the motion judge on the basis that the father had had sufficient time to gather together any information that he needed. While there was no request to adjourn the proceedings to a trial date or to be given the opportunity to call *viva voce* evidence, the motion judge indicated in his reasons that he was satisfied that the motions could be decided on the affidavits, and he proceeded on that basis.

[11] Subsequent to receiving the motion judge's decision, the father retained counsel and proceeded with this appeal. A number of the issues that are being raised on the appeal were not raised before the motion judge and are being argued for the first time on appeal.

III. STANDARDS OF REVIEW

Custody, Access and Child Support

[12] In *Hickey v Hickey*, [1999] 2 SCR 518, the Supreme Court of Canada set out a very stringent and narrow scope for appellate review of support orders (at para 11):

> Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. . . .

(See also para 12.)

[13] That Court had occasion to again consider the question of the appropriate standard of review in a family matter, this time in relation to a

custody order, in *Van de Perre v Edwards*, 2001 SCC 60. Bastarache J, for the Court, stated (at para 11):

> In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10 and 12:
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> > (Trial judges) must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> > . . .
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> > There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. (Emphasis added.)

[14] Bastarache J explained that the standard of review set out in *Hickey* was not limited to appeals dealing with child support; rather, it applied equally

to appeals dealing with child custody (see paras 12-13). He then explained what would constitute a material error (at para 15):

> . . . [T]he approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[15] Finally, Bastarache J stated, "It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal" (at para 14). This standard of review has been adopted by this Court in a variety of family law cases. For example, Mainella JA adopted this standard of review in *Horch v Horch*, 2017 MBCA 97, a case dealing primarily with the division of marital property (at para 50):

> A family law order is entitled to "considerable deference" on appeal and is to be reviewed only for "material" error (*Hickey v Hickey*, [1999] 2 SCR 581 at para 10; and *Van de Perre v Edwards*, 2001 SCC 60 at para 15). Accordingly, the order appealed will be respected absent an error in principle, a significant misapprehension of the evidence, or where the award is clearly wrong (see *Hickey* at para 11; and *DBS v SRG*; *LJW v TAR*; *Henry v Henry*; *Hiemstra v Hiemstra*, 2006 SCC 37 at para 136). Harmless error will not result in the order being set aside. The

> appellate court also will not reconsider the evidence or interfere with the judge's findings of fact unless the reasons demonstrate palpable and overriding error or an omission that gives rise to a reasoned belief that the judge forgot, ignored or misconceived the evidence in a way that affected the result (see *Van de Perre* at para 15).

(See, as further examples, *Stewart v Stewart*, 2007 MBCA 66 at paras 13-17; *Delichte v Rogers*, 2011 MBCA 50 at para 18; *Couling v Couling*, 2017 MBCA 56 at paras 10-11; and *Dolynchuk v D'Saint*, 2018 MBCA 56 at para 5.)

Procedural and Other Discretionary Decisions

[16] The father has also appealed procedural and other discretionary decisions made by the motion judge, such as whether the motion judge gave adequate assistance, given that he was a self-represented litigant, and whether he erred in proceeding on affidavit evidence instead of ordering *viva voce* evidence.

[17] Procedural decisions are classified as discretionary decisions. What constitutes a discretionary decision is explained in Donald JM Brown & David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2017) (loose-leaf updated April 2018, release 2018-2), vol 2 at 15-24 to 15-25, as follows (at paras 15:2111 to 15:2112):

> "Discretion" in the context of an adjudicative decision suggests a choice between two or more acceptable outcomes, for example, as to the weight to be given to evidence. As one court has said, "(T)o exercise discretion means to choose between two or more reasonable options." It may also mean having a choice as to whether to act or not act. Or it may be characterized as a decision where there is no rule dictating any particular result.

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> A grant of discretionary power is often found where the nature of the problem is "polycentric", that is, where the subject matter requiring resolution consists of several interacting factors. This characteristic has led to the observation that such an issue requires "balancing", or that it is "fact-specific," or that the decision is in the nature of a "judgment call". . . .
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> [footnotes omitted]

[18] The standard of review of pre-trial and interlocutory orders is explained in *Civil Appeals*, vol 2 at 15-34 to 15-36, as follows (at paras 15:3110 to 15:3120):

> Many interlocutory orders, whether made by a Master or Prothonotory, a judge in chambers, a pre-trial judge, or case management judge or Master, or indeed by an appellate judge in chambers, are classified as "discretionary." That characterization may result from permissive language in a Rule of Practice, from the evolution of the common law (such as findings of *forum non conveniens*,) or from a combination of the two. In any event, apart from errors of law, deference will generally be accorded interlocutory orders on appeal, even though such orders may have a final effect. However, where intervention is warranted, and the record is adequate, the usual approach is for the appellate court to simply exercise the discretion anew.
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> . . .
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> . . . In the result, appellate courts faced with interlocutory appeals have stated that the standard of appellate review should be narrow, or that it is "stiff", or that the burden is seen as heavy, although generally speaking, such observations have not resulted in a departure from the standard of reasonableness.
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> [footnotes omitted]

[19] This Court has dealt with the standard of review applicable to discretionary decisions, including those that are interlocutory, on many occasions. The standard of review of discretionary decisions was explained in *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 22-28, and has been summarized in *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61, as follows (at para 13):

> The applicable standard of review with respect to errors of law is correctness. For errors of mixed fact and law, or of fact alone, the standard is palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable legal question: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10, 37. Moreover, the granting or denying of a motion for summary judgment is in a judge's discretion, and that discretion should not be overturned unless the judge has misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375; see also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 at para. 117).

[20] This is the standard of review that is to be applied to the discretionary decision of whether to grant an adjournment of a trial (see *R v Le (TD)*, 2011 MBCA 83 at para 35; *The Director of Child and Family Services v JG and KB*, 2017 MBCA 27 at para 7; and *The Director of Child and Family Services v GMH*, 2018 MBCA 35 at paras 12, 33-34).

[21] The issue of whether to proceed on the basis of affidavit evidence or to require *viva voce* evidence arises under a number of rules, past and present, in the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *Queen's Bench Rules*): r 20.01 regarding a motion for summary judgment; former r 20.06(1)(f) regarding an expedited trial; r 37.10 regarding the disposition of

a motion; and r 38.09 regarding the disposition of an application. While I could not find any cases specifically addressing this issue under r 37.10, the issue has been addressed on many occasions under both rr 20 and 38.09. (As regards r 20, see, for example, this Court's decisions in *Caisse Populaire de la Salle Credit Union Ltd v River Ridge Properties Ltd*, 1997 CarswellMan 67 (CA); *Lenko v The Government of Manitoba et al*, 2016 MBCA 52; and *Heritage Electric Ltd et al v Sterling O & G International Corporation et al*, 2017 MBCA 85. As regards r 38.09, see this Court's decisions in *Garwood v Garwood Estate*, 2007 MBCA 160 at paras 37-39; and *Janz et al v Janz et al*, 2016 MBCA 39 at paras 26-27.)

[22] While those decisions arise in the context of civil, rather than family, proceedings, the issue is the same: whether the affidavit evidence is sufficient to resolve the motion or application, or whether there should be a trial on *viva voce* evidence. Those rules apply to family proceedings, and, in my view, the findings regarding the discretionary nature of the decision as to how to proceed and the application of the standard of review set out in paras 18-19 herein apply equally to the discretionary decisions in this case.

IV. ISSUES RAISED FOR THE FIRST TIME ON APPEAL

[23] Several of the grounds of appeal raise issues that were not raised and determined by the motion judge. As a result, there is no decision for this Court to review. The general rule that is applicable to new issues raised on appeal is set out in *Civil Appeals*, vol 2 at 10-48 (at para 10:4210):

> . . . [T]he general rule is that where a ground of appeal was not raised in the pleadings or considered by the trial judge, it cannot be a ground of appeal. An exception to the general rule may be made, however, if three requisites are met. First and foremost,

> there must be "no doubt" that further evidence would not have been adduced had the new ground been raised below. Second, to permit the new argument must not cause "procedural prejudice" to the opposing party. And third, a refusal to permit the new argument to be raised must not result in an injustice or "undue process". Furthermore, the burden of establishing that these requirements have been met lies with the party seeking leave to raise the new ground of appeal.

(See, for example, *R v Mian*, 2014 SCC 54 at paras 36-52; *Guindon v Canada*, 2015 SCC 41 at paras 19-23; *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 26 at para 27; and *Murray v Director of Employment and Income Assistance (Man)*, 2015 MBCA 66 at para 16.)

[24] The issue of "undue process" was addressed by Rothstein and Cromwell JJ in *Guindon* (at para 36). The case dealt with a taxpayer challenge to a tax assessment, wherein the taxpayer had raised constitutional issues in the courts below but had not given the required notice of a constitutional question to the Attorneys General. She did give the required notice of the proceedings prior to the hearing at the Supreme Court of Canada, and the Attorneys General responded to the constitutional issues. The majority and the minority disagreed as to whether the appeal was properly before the Court and should be permitted to proceed. The minority would have dismissed the appeal on the basis that the required notice had not been given regarding the proceedings in the courts below. The majority was of the view that to refuse to hear the appeal on the basis that the required notice had not been given in the courts below "where, as here, it would serve no purpose to do so constitutes 'undue process' and refusing to address the merits leaves the main issue unresolved after the expense and time devoted to it through three levels of

court" (at para 36). The majority permitted the taxpayer to proceed with her appeal on this issue but ultimately dismissed the appeal.

[25] Where a new issue is raised on appeal, there is obviously no standard of review to apply because there is no decision to be reviewed. If the appellate court agrees to hear the new issue, it is determining that issue as a matter of first instance. As the majority stated in *Guindon*, "[t]he Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties" (at para 23).

V. SELF-REPRESENTED LITIGANTS

[26] The father, through his appellate counsel, argues that the motion judge should have taken certain steps even though not requested by the father because he, "as a self-represented litigant, would not have been alert to this kind of issue." The duty of a judge to a self-represented litigant was recently reviewed by this Court in *Dewing v Kostiuk et al*, 2017 MBCA 22, wherein Monnin JA, for the Court, stated (at paras 18-19, 21-22):

> This Court has recognized that fairness and balance are the touchstones to enable justice to be done for all parties (see *Director of Child and Family Services (Man) v JA et al*, 2004 MBCA 184, 190 ManR (2d) 298 (*JA No 1*); and *Director of Child and Family Services (Man) v JA*, 2006 MBCA 44, 205 ManR (2d) 50 (*JA No 2*)). In *JA No 2*, Hamilton JA reiterated the overriding principles (at paras 20, 32):
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> > The foregoing quotes speak to the obligation of a judge to permit an unrepresented party to present his or her case. This often requires some assistance and accommodation, provided the rights of the other party are not prejudiced.

> As already noted, the trial judge cannot become the advocate for the unrepresented litigant, nor can the judge provide legal advice. However, the judge's challenge is to take pains to ensure that a party's lack of legal training does not unduly prejudice his or her ability to participate meaningfully in the proceeding.
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> A fair opportunity to present a case to the best of his or her ability does not mean that the [self-represented litigant] is to be assisted to present the best possible case (see *Ridout v Ridout*, 2006 MBCA 59, 205 ManR (2d) 146).
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> It also noted that there is a responsibility on self-represented persons to familiarize themselves with the relevant legal practices and procedures pertaining to the case and to "prepare their own case".
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> At the end of the day, however, the procedure that is chosen by a judge and the decision that is made as to the amount or type of assistance to be given is within the discretion of the hearing judge depending on the circumstances of the case (see *Cold Lake First Nations v Alberta (Minister of Tourism, Parks and Recreation) et al*, 2012 ABCA 36, 522 AR 159).
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> [emphasis added]

[27] A judge's decision as to the amount and type of assistance to be given to a self-represented litigant, being a discretionary decision, is to be reviewed on the standard set out in paras 18-19 herein.

VI. THE PROPORTIONALITY OF THE PROCEEDINGS

[28] Although the father has set out a number of grounds of appeal, the overriding issue is that of whether the motion judge should have ordered either a *viva voce* hearing instead of proceeding on affidavit evidence, or adjourned the child support motion to permit the father to file further evidence. These decisions that determine how a matter will proceed, what evidence will be

presented and in what form, all engage the principle of proportionality. The case conference judge referred to proportionality when he concluded that the issues could be disposed of on motion, and the motion judge was dealing with proportionality when he referred to the need to limit court delays by avoiding unnecessary adjournments and splitting cases, and by refusing to admit unnecessary expert evidence.

[29] Problems related to the expense and delay in getting to a final resolution of litigation, in general, have led governments and the courts to place a growing emphasis on reducing both the time and the cost required to get to a final solution. In the context of civil litigation, that has led to the adoption of the principle of proportionality in litigation. This came to the forefront with the decision of the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7. In that case, Karakatsanis J, for the Court, explained the issue as follows (at paras 23-24, 27-29, 31-33):

> . . . Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
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> However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance* [*Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8]) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

This requires a shift in culture. The principle goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. . . . Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

> . . . The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

[30] While *Hryniak* dealt with a motion for summary judgment in a civil proceeding, this Court has recognized that the principle of proportionality set out therein applies equally to family proceedings—see for example, this Court's decisions in *Aquila v Aquila*, 2016 MBCA 33 at para 29; *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 70; and *Horch* at para 147.

[31] The principle of proportionality is now reflected in the Manitoba *Queen's Bench Rules* for family proceedings as follows:

> **Purpose of family proceedings rules**
> **70.02.1(1)** The purpose of this Rule is to
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> (a) help parties resolve the legal issues in a family proceeding fairly and in a way that will
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> (i) take into account the impact that the conduct of the proceeding may have on a child, and
>
> (ii) minimize conflict and promote cooperation between the parties; and
>
> (b) secure the just, most expeditious and least expensive determination of every family proceeding on its merits.
>
> **Proportionality**
> **70.02.1(2)** Securing the just, most expeditious and least expensive determination of a family proceeding on its merits includes, so far as is practicable, conducting the proceeding and allocating appropriate court resources to the proceeding in ways that are proportionate to
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> (a) the interests of any child affected;

(b) the importance of the issues in dispute;

(c) the amount of support and the value of property likely at issue in the proceeding;

(d) the complexity of the proceeding; and

(e) the likely expense of the proceeding to the parties.

Considerations of case conference judge
70.24(28) At a case conference, the case conference judge may make orders and give directions that the judge considers will

(a) further the purpose of the family proceedings rules as set out in subrule 70.02.1(1); and

(b) take into account the principle of proportionality as set out in subrule 70.02.1(2).

VII. GROUNDS OF APPEAL

(i) Did the case conference judge or the motion judge err in proceeding on the basis of affidavit evidence rather than ordering a viva voce hearing?

Request for a New Trial

[32] The father argues that a review of the affidavits filed by the parties discloses several areas where the evidence is inconsistent and raises serious issues of credibility, including whether the mother alienated MRS from the father, whether she failed to facilitate his access with MRS, and whether she had taken unreasonable or false business deductions from her income. He also challenges the findings in the Brief Consultation Report. His position in this Court is that the case conference judge and the motion judge erred by not ordering a trial, so that the affiants and the family conciliation counsellor who

prepared the Brief Consultation Report could be cross-examined to get the full facts and make credibility findings.

[33] At the hearing before us, counsel for the father argued that the decision to proceed on the affidavits was based on pressure within the courts to get files closed at the expense of a fair hearing for the father. He stated that the father was representing himself, so the courts should have been more sympathetic to his position and not insist that he "dot the Is and cross the Ts" but, rather, should have ordered that the issues be referred to a trial.

[34] A review of the record shows that the issue of having a trial was addressed by the case conference judge on two occasions. At the case conference on October 24, 2016, he specifically stated that the Court "may give consideration to directing trials of issues in whole or in part on affidavits." The case conference judge referenced this issue again at the case conference on January 17, 2017, stating:

> [The father] seeks a trial date. [The mother] is opposed to the matter proceeding by way of trial. Proportionality would suggest that such of the issues as are now before the Court be disposed of on motion if the hearing Judge is satisfied that determinations on some or all of those issues can be reached.

[35] To the extent that these directions were a decision on this issue, they were not determinative; rather, his decision was to defer that issue for determination by the motion judge. This was a discretionary decision, and I can see no error in the case conference judge so doing. Thus, I would dismiss this ground of appeal as it relates to the case conference judge's decision.

[36] As regards the decision of the motion judge to proceed on affidavit evidence, the fact is that the father did not ever ask or suggest to the motion judge that he order a trial on *viva voce* evidence or state that he wanted to cross-examine anyone. The issue of conducting cross-examinations was discussed at the second case conference and noted in the case conference memorandum. There was no explanation offered for the decision not to do so.

[37] In accordance with the case conference memorandum, the motion judge, on his own initiative, indicated in his reasons that he was satisfied that the outstanding issues could be determined on the basis of the affidavits, and, with the exception of the father's request for an adjournment of the child support issues, the father took no issue with the matter proceeding. Thus, the motion judge did not address this issue in detail in his reasons, and the father is raising this matter for the first time on appeal.

[38] Counsel for the father argued at the appeal hearing that the father's failure to raise this issue with the motion judge should be excused on the basis that he was representing himself. It is clear, however, that the father was aware that he had the right to ask for a trial because he raised that issue with the case conference judge. It was also clear from the case conference memorandum that the father could pursue that issue with the motion judge. Further, the father's request to adjourn only the child support portion of the motion indicates that he was prepared to proceed with the remaining issues on the affidavits. In fact, when the motion judge stated to him that it would be difficult to prove contempt on affidavit evidence, the father replied, "I'm confident I can get there."

[39] I am satisfied that the father was aware of his right to ask for a trial and he chose not to do so, and I would not accept that his failure to ask for a trial was due to his inexperience as a self-represented litigant. In my view, there would be no injustice to the father in refusing to hear this ground of appeal because the father has not demonstrated that this is one of those exceptional cases where this Court should exercise its discretion and hear this issue for the first time on appeal. Thus, I would dismiss this ground of appeal.

Request for an Adjournment

[40] The father did ask the motion judge at the commencement of the hearing to adjourn the child support motion so that he could file further financial evidence. While he was not clear as to what evidence he would file, it appears that he was talking about evidence related to the mother's earning potential, and his cancelled cheques regarding the section 7 expenses that he said that he had paid. He later asked to have the mother's business expenses reviewed by an accountant.

[41] The motion judge noted that the child support motion had been filed six months earlier, although the evidence showed that the mother's ongoing income had changed more recently. He was clearly of the view that the father had had adequate time to gather together the evidence required to address the issues related to child support.

[42] This issue was raised again during the father's reply, when the motion judge considered the possibility of an adjournment to deal with child support if the father could point to a specific issue in the mother's recent financial material to which he needed time to reply. The father was not able to identify any such issue, so the motion judge refused the adjournment.

[43] The decision to grant or refuse an adjournment is discretionary. The motion judge was clearly of the view that the financial issues were not complicated and that the father had had sufficient time to gather together financial information to both respond to the mother's claims and to provide proof of his income and expenses. He stated that granting an adjournment other than to respond to a new and unanticipated fact would be an unnecessary delay. I will deal with the father's request for an adjournment in more detail later in these reasons.

(ii) Did the motion judge err by hearing the motion himself, rather than having the matter heard by Doyle J, who was seized of the case pursuant to a term of the 2009 consent final order?

[44] The final order contains a provision that Doyle J is seized of the case. This issue was never raised with either the case conference judge or the motion judge—it is being raised for the first time on appeal. The issue for this Court, in my view, is whether the father should be permitted to raise this new ground of appeal.

[45] The father argues, first, that Doyle J is seized of the file and should have determined these motions and, second, that it is the practice of the court that a contempt motion be heard by the judge who granted the underlying order.

[46] The mother argues that the final order was a consent order, so Doyle J's involvement was minimal. She states that he did not hear any evidence or adjudicate any issues, so he did not have any particular familiarity with the file. She further states that his second involvement was in early 2014, when he heard and dismissed the mother's 2013 contempt motion, which

occurred three years before the present motions were heard and determined. She argues that there was no prejudice to the father in having the matter proceed before a different judge.

[47] I agree that Doyle J did not have any extensive involvement with the file or the parties. He granted the final order, but this was granted by consent, based on minutes of settlement negotiated between the parties, while earlier proceedings took place before other judges. Doyle J heard a motion by the mother in early 2014, which he dismissed, but it was a very limited motion that did not require his repeated involvement with the file or the parties. He had no further involvement with the file or the parties between that matter and these motions, a period of three years.

[48] This ground of appeal can be resolved by asking whether a refusal to permit this new argument to be raised would result in an injustice or impose undue process on the parties. In my view, refusing to permit this ground of appeal to be raised would not result in an injustice to the father. Given Doyle J's very limited involvement with the file, it cannot be said that he was familiar with the case or the issues between the parties—in fact, it is likely that he would have little or no recollection of the matter by 2017. The procedural efficiency that would result from having one judge take charge of a file is simply not present on the facts of this case. In fact, in my view, granting the appeal on this basis would be imposing an undue process on the parties, as it would make no sense to send the matter back for a hearing before Doyle J in these circumstances.

[49] Thus, I would conclude that a refusal to permit this new argument to be raised would neither result in an injustice to the father nor delay the matter

by imposing an undue process on the parties, and I would dismiss this ground of appeal.

(iii) Did the motion judge err in calculating arrears back to 2009, rather than for only three years?

[50] This ground of appeal raises another issue that was not raised with and adjudicated by the motion judge; thus, there is no applicable standard of review.

The Parties' Positions

[51] The father argues that the motion judge erred by failing to apply the principles set out in *DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37, and limiting the arrears to those arising in the prior three years. He argued at the hearing that, while this limitation may not apply if the payor has behaved in a blameworthy manner, his behaviour was not blameworthy, and the mother should not be allowed to "sit in the grass" for years and then make a claim for arrears that allegedly accumulated over many years.

[52] The father further argues that the mother suggested that his conduct was blameworthy because he failed to comply with the financial disclosure requirements of the final order. He says that this was the issue that she argued in her 2013 contempt motion, which was dismissed by Doyle J. His position is that Doyle J's decision amounted to a finding that his conduct was not blameworthy, and that the finding by the motion judge that arrears were owing for more than the past three years had the effect of overriding Doyle J's decision and finding that his behaviour was, in fact, blameworthy, which is an abuse of process.

[53] The mother's position is that this was not an order for the payment of retroactive child support, to which the three-year limit in *DBS* would apply. She states that the motion judge was simply enforcing the payment of arrears, to which *DBS* does not apply.

Analysis

[54] Bastarache J, for the majority in *DBS*, explained the issue before the Court as follows (at para 1):

> The present appeals involve the parental obligation to support one's children, and the question of whether this obligation compels parents to make child support payments for periods of time when the responsibility to do so was never identified, much less enforced. This question will arise when the parent receiving child support (the "recipient parent") determines that (s)he should have been paid greater amounts than (s)he actually received, despite the fact that no court order or separation agreement provided for these higher payments. These appeals do not concern the non-payment of arrears; they concern the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due.

[55] Dealing specifically with arrears, he stated (at para 98):

> Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases.

[56] The determination of whether the requested payments are properly classified as arrears or retroactive support is a complex analysis, as there are many different factual scenarios that can arise. For example, an order or agreement may contain a fixed monthly support payment, a fixed monthly support payment together with a formula for adjusting the payments based on changes in parental incomes, or a formula for adjusting the payments without fixing any monthly support payments. Alternatively, it could leave the support issues to be addressed at a fixed or undetermined future time, or it could be silent on the issue of child support. In other cases, there may be no order or agreement in place at all, and a parent may be applying for the first time for child support payments that relate to a significant number of years in the past.

[57] Bastarache J emphasised the importance that the factual context plays in the analysis, stating, "[a] modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances" (at para 5) and, "[i]t is only after a detailed examination of the facts in a particular case that the appropriateness of a retroactive award can be evaluated" (at para 6).

[58] With the enactment of child support guidelines, many orders and agreements now make the regular disclosure of income mandatory and provide a mechanism for adjusting child support payments. This raises the question of when *DBS* applies to the retroactive payments and when the payment provision constitutes arrears, to which *DBS* does not apply. There is jurisprudence from other jurisdictions that discusses the application of *DBS*; however, this issue has not yet been considered by this Court. (See, for example, *Goulding v Keck*, 2014 ABCA 138 at paras 20-34; *Meyer v Content*,

2014 ONSC 6001 at paras 56-62; and *Hnidy v Hnidy*, 2017 SKCA 44 at paras 106-110.)

[59] This factual difference arises in the present case. In this case, the final order required both parents to provide financial disclosure on an annual basis and to adjust the child support according to their incomes (see paras 2.22 and 2.23 of the final order). Thus, there was a process set out to determine the amount of the support payments, but no specific amount was ever ordered to be paid for the period after June 30, 2009. In *DBS* (which actually dealt with four appeals), two of the cases dealt with the situation where no support payments had ever been paid, while the other two asked for an increase in the original awards, those original awards being set out in orders/agreements. They were all silent regarding ongoing disclosure and setting/varying the support in the future, leaving it to the parties to apply for any adjustments.

[60] Given that this question is complex and raises questions of law as to the interpretation and application of the principles in *DBS* that have not been settled in Manitoba, and the fact that it was not raised before the motion judge or argued fully, in my view, it would not be appropriate to deal with it for the first time in this appeal.

[61] This raises the question of whether there is an injustice to the father by not dealing with this issue, so, without making any finding as to the applicability of *DBS*, I will address the outcome from applying *DBS* in this case.

[62] The factors set out in *DBS* for determining whether to make a retroactive child support payment were summarized by Steel JA in *Johnson v Mayer*, 2016 MBCA 41, as follows (at para 14):

> The award of retroactive child support involves a consideration of a number of factors unique to the circumstances of the particular case. In *DBS*, the Court identified four basic considerations with respect to retroactive child support orders, namely:
>
> 1. Whether the recipient parent has supplied a reasonable excuse for the delay [see also *DBS* at paras 100-104];
>
> 2. The conduct of the payor parent [see also *DBS* at paras 105-109];
>
> 3. The circumstances of the children [see also *DBS* at paras 110-13]; and
>
> 4. The hardship the retroactive award might entail [see also *DBS* at paras 114-16].

[63] The first factor deals with whether the mother has a reasonable excuse for the delay in setting child support payments following the final order. The mother set out, in her affidavit of October 18, 2016, her efforts to obtain financial disclosure from the father and the problems that she experienced with several of the lawyers whom she retained. For example, one of her lawyers was disbarred, another left the practice to run for political office, another was suspended from practice, and it transpired that there was a conflict within the office of yet another lawyer, such that she had to find a new lawyer at a different firm. This led to confusion as to what disclosure the father and/or his lawyers had sent to the mother's prior lawyers, and documents alleged to have been disclosed that were not forwarded to the mother or to her new lawyer.

[64] In my view, the mother has provided a reasonable excuse for the delay in taking steps to set a specific amount for child support.

[65] The second factor looks at the conduct of the payor—here, the father. While there have been disputes between the parties as to their respective incomes, it appears from the father's affidavit that he has provided disclosure of his income to his lawyers and, through them, to the mother's various lawyers. I would not find that his conduct was blameworthy in the sense set out in *DBS*.

[66] The third factor addresses the circumstances of the children. The children are still dependent on the parents for support. They are young enough that they will benefit from a retroactive payment in that they are still in school and are involved in many activities that require the expenditure of funds. The amount that was found to be owing is not so significant as to constitute a windfall for the mother.

[67] The fourth factor is that of whether the ordering of a retroactive payment will cause a hardship to the father. The evidence does not indicate that this will be the case. The amount, while not insignificant, is not overwhelming, and the motion judge addressed this issue by ordering that it be paid in reasonable monthly payments.

[68] In *DBS*, Bastarache J directs judges as follows (at para 99):

> . . . None of these factors is decisive. For instance, it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct. Thus, the British Columbia Court of Appeal has ordered retroactive support where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made: see *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600. At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix.

[69] In keeping with that statement, while I would not find that the father failed to provide financial disclosure or was otherwise blameworthy, that does not necessarily mean that the three-year limitation should apply. The concern of the majority in *DBS* related to orders of retroactive support payments is that there is an unfairness to the payor, who should be able to rely on the certainty that comes with complying with an order to pay support, so that he/she can order his/her own financial affairs accordingly (see *DBS*, at paras 95-96). In this case, the final order expressly provided that the child support would vary with the parties' incomes and would be subject to adjustment on a regular basis. To the father's knowledge, the mother had been attempting, albeit not very effectively, to obtain an adjustment for many years. Thus, having an accounting of incomes and an adjustment of child support in accordance with the provisions of the final order cannot be said to come as a surprise to the father.

[70] Taking that holistic view of this case in the context of the principles set out in *DBS*, and although I would not find that the father was blameworthy in causing a delay in the setting of support payments, I am of the view that the facts in this case, including the terms of the final order to which the father consented, would support the granting of an adjustment that is retroactive to June 30, 2009, as was ordered by the motion judge.

[71] Thus, I would find that there is no injustice to the father in refusing to determine whether *DBS* is applicable, and I would dismiss this ground of appeal.

(iv) Did the motion judge err in failing to impute income to the mother? Did the motion judge insufficiently gross up the mother's income?

Facts

[72] The mother has a four-year degree in physical education from the University of Manitoba. She worked for CN Rail as an employee fitness coordinator for 14 years, and, in 2009, she entered into a contract with MPI to operate a fitness centre. She operated the fitness centre as an independent business from 2009-2016, receiving a gross income pursuant to the contract from which she was required to pay business expenses, such as salaries to subcontractors, cell phone charges, advertising fees, uniforms, training costs, vehicle expenses and fitness equipment. This left her with a net annual income, according to her tax returns, that varied between a high of $72,228 and a low of $44,119, with the average annual income during those years of approximately $63,000.

[73] In September 2016, the mother received notice that her contract would not be renewed, the fitness centre would be closed at the end of 2016, and she would be paid to the end of February 2017. She applied for a number of jobs in the fitness/wellness industry, including hiring an employment recruiter to assist in the search for employment. When she was unsuccessful, she decided to borrow some money and start her own fitness centre, which opened on January 2, 2017. Because the mother had just opened a new business, her income for 2017 was based on projections, rather than on actual income and expenses. She estimated that her income, after business deductions, would be between $20,000-$25,000.

[74] The father provided his income tax returns, which disclosed that he received employment income between 2009 and 2016 that varied from a high of $95,233 to a low of $60,914, for an average annual income of $82,494.25.

The Motion Judge's Decision

[75] The motion judge noted the father's argument questioning the mother's business deductions; however, he found that they were legitimate. He did agree with the mother's submission at the hearing that some of the business expenses also provided a personal benefit to her and that her income should be grossed up to reflect those benefits. She suggested that 25 per cent of certain of her business expenses should be added back to her income (the gross-up) to account for this benefit, and the father did not disagree or suggest another amount. The motion judge accepted this argument and applied this gross-up to the mother's income from her income tax returns for the years 2009-2016, to arrive at her annual income for those years (the grossed-up income).

[76] The motion judge accepted the father's income as set out in his income tax returns. Using those amounts for the father's income and the grossed-up income for the mother's income, the motion judge calculated the child support that each would owe to the other, according to the terms of the final order, to the end of June 2016, and determined that the father would owe the mother the total sum of $10,674. He ordered that custody of MRS be varied as of July 1, 2016, which resulted in a variation in the child support payments under the child support guidelines. He calculated the child support owing by the father to be $4,800 from July 1, 2016 to December 31, 2016, for

a total amount for support from July 1, 2009 to December 31, 2016, of $15,474.

[77] The motion judge also dealt with the mother's claim for section 7 special expenses. The mother filed detailed information, including receipts, as to the exact amount that she had spent, while the father argued that he needed an adjournment to get his information together. He produced some receipts, but claimed that he had spent much more, and gave a general description of those expenses. The motion judge declined to grant an adjournment, stating that the evidence "was not as thorough as one would have liked. I am not convinced that an oral hearing, however, would have appreciably helped matters." He accepted that the father had spent a greater amount than the $1,215 for which he had receipts, but he found that the mother had paid the majority of these expenses. He arbitrarily assigned the sum of $4,000 as a global figure for the father's expenses, which left a net shareable amount of $20,231. Based on the parties' average incomes, he determined that the father's share was 55 per cent, for a total owing to the mother of $11,127.05.

[78] The total amount owing by the father to December 31, 2016, was $25,589.50. The motion judge ordered that this amount be paid by monthly payments of $125 commencing May 1, 2017, and by the application of his income tax refund in each year, until paid in full.

[79] For the year 2017, the motion judge did not accept the mother's estimate of her 2017 income; rather, he set it at $40,000. He stated that it was not uncommon for business owners to underestimate their income following a business interruption. He also indicated that, if the business income was as

low as the mother was estimating, he would expect her to obtain alternative employment in order to make a reasonable contribution to the child support, stating that it was not reasonable for her to earn $20,000, given her child support obligation.

[80] The motion judge then set the father's income at $68,000, taking into account the fact that he was unemployed at the date of the hearing but was likely to return to his employment. He did provide that, if the father did not return to work as anticipated, he could apply to vary the support based on a material change in circumstances.

The Parties' Positions

[81] The father argues that the motion judge erred by not expressing a rational basis for using 25 per cent as the basis to calculate the gross-up, rather than some other percentage like 33 per cent or 50 per cent, and that he did not express a rational basis for not imputing income to the mother.

[82] The father's position regarding the mother's business expenses is that she had deducted non-legitimate expenses, and that the motion judge erred in finding that they were reasonable. In his factum, he argues:

> [A] gross-up could only be calculated after a detailed analysis of the business expenses had specified which expenses were not allowed, and only then would the gross-up have been calculated according to the marginal tax rate of the new before-taxes income. The Learned Motion Judge failed to analyse the mother's business deductions and he incorrectly grossed up her income by 25 percent. He provided no explanation as to the numbers he used to gross up her income.

[83] In his oral argument requesting an adjournment, the father indicated to the motion judge that he wanted to take the mother's financial information to an accountant to get an expert opinion regarding her business expenses.

[84] The mother argues that the position that the father took, being that the only legitimate business expense was the cost to the mother of maintaining her professional accreditation, was patently unreasonable and therefore did not raise any credibility questions. Her position is that the motion judge was able and entitled to review her expenses and to make the finding that they were reasonable, as was his decision to gross up her income by 25 per cent of some of her business expenses to account for the personal benefits from those expenses.

[85] The mother argues that there was no failure to impute income. She points out that the motion judge imputed income to her by way of the gross-up in her income—an amount, she notes, that the father did not challenge during argument on the motion. Further, she notes that the motion judge increased her estimated 2017 income of $25,000 to $40,000, imputing additional income of $15,000 for that year.

[86] Finally, she argues that the father had all of her financial information before the hearing, but he chose not to cross-examine or to refute her evidence in his affidavit of January 2017.

Analysis

[87] The father's arguments raise issues related to both the process that the motion judge followed and the substantive decisions that he made. In this case, a review of those decisions raises significant proportionality issues—do

the matters at issue, in the circumstances of this case, justify the cost and delay occasioned by the procedure proposed by the father?

[88] To return to the Supreme Court of Canada's decision in *Hryniak*, the following statements are instructive (at paras 2, 4):

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect the modern reality and recognize that new models of adjudication can be fair and just.
>
> In interpreting these provisions [regarding summary judgment], the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

- *Procedural Issues*

[89] First, I will deal with the father's request for an adjournment. It is clear that the father could ill afford to incur further legal costs. In his affidavit of January 31, 2017, the father stated that he had been paying his lawyer $300 per hour, and he very poignantly explained his position as follows (at para 4):

> I am reluctantly self-represented and am overwhelmed with the timeline of this affidavit since the setting of the March 15, 2017

> hearing. The cost of a lawyer with my current finances will significantly impact and jeopardize my current residence.

[90] The father also explained how time-consuming and daunting it had been for him to deal with these matters and to prepare and file material in court.

[91] The mother was in a similar position. In her affidavit of February 10, 2017, she stated as follows (at para 25):

> Unable to secure paid employment, I decided to open my own fitness centre. . . . I borrowed over $20,000 for start-up costs and the centre opened on January 2, 2017. Currently, all income is going back into the business to pay for rent and equipment and I do not know when I will be able to make a profit and draw a salary. To cut back on expenses, I have downsized my vehicle and instead of paying a monthly lease of $739 I am now paying $379 a month for a Nissan Rogue. In addition, I can no longer contribute $200 a month to my RRSP, I have stopped dining out and cannot even afford to buy [JMS] contact lenses that she needs. Jayson and I will likely have to refinance our mortgage to cover costs of daily living until my business becomes profitable.

[92] In my view, it was incumbent on the motion judge to consider the issue of proportionality by taking a serious look at the issues to be determined, the evidence that had been provided, the amounts at issue and the procedures taken and/or available—including the probable financial, emotional and other costs of past and future procedures in relation to the potential benefits from an adjournment—in his determination of what procedures would be fair and just to both parties.

[93] I will next address the father's request for an adjournment to obtain an accountant's report. When the father argued that he wanted to get an expert to review the mother's expenses, the motion judge's response was as follows:

> What is an expert, what is an adjournment going to tell you, with an expert, going to tell you about these expenses? What, what am I going to see from an expert that I can't see on the face of this?

[94] In effect, the motion judge found that the proposed accounting evidence was not necessary and he determined, in advance, that the father would not be permitted to submit expert evidence—in effect, that it was not admissible.

[95] The law is clear that expert evidence is only admissible if it meets the criteria for admissibility set out in *R v Mohan*, [1994] 2 SCR 9, summarized at p 20. One of the criteria requires that the expert evidence be necessary in assisting the trier of fact, which Sopinka J, for the Court, explained as follows (at p 23):

> . . . What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". . . .

[96] Major J, for the majority in *R v DD*, 2000 SCC 43, further explained this criterion (at paras 46-47):

> The second requirement of the Mohan analysis exists to ensure that the dangers associated with expert evidence are not lightly tolerated. Mere relevance or "helpfulness" is not enough. The evidence must also be necessary.
>
> . . . *Mohan* expressly states that mere helpfulness is too low a standard to warrant accepting the dangers inherent in the admission of expert evidence. *A fortiori*, a finding that some aspects of the evidence "might reasonably have assisted the jury" is not enough. As stated by J. Sopinka, S.N. Lederman and A.W. Bryant,
>
> > expert evidence must be necessary in order to allow the fact finder: (1) to appreciate the facts due to their technical nature, or: (2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.
> >
> > (*The Law of Evidence in Canada* (2nd ed. 1999), at p. 620, citing *Mohan*, *supra*, at p. 23.)

(See also *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at paras 75-77; *R v Pearce (ML)*, 2014 MBCA 70 at paras 66, 89, 95; *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 42; and *G (JD) v G (SL)*, 2017 MBCA 117 at paras 37-38.)

[97] Proportionality is clearly a factor when determining whether to permit expert evidence to be presented. In considering the dangers of admitting such evidence, Major J stated in *DD* (at para 56):

> Finally, expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties

> and the resulting strain upon judicial resources cannot be overstated. . . .

(See, also, *Masterpiece Inc* at para 76.)

[98] The decision to admit or exclude evidence, including expert evidence, is a discretionary decision that is reviewed on the standard set out in paras 18-19 herein (see *DD* at paras 13, 47; *R v Woodard*, 2009 MBCA 42 at para 14; and *Pearce* at para 74).

[99] In my view, the motion judge did not err in determining that expert accounting evidence reviewing the mother's expenses was not necessary in this case. Thus, he did not err in refusing an adjournment to give the father further time to obtain that evidence.

[100] While the father argues that he should have had the opportunity to produce further evidence regarding the mother's income and expenses, the proportionality question is: when does an adjournment to produce further evidence and analysis to get a "full appreciation of the evidence" become too expensive and unrealistic?

[101] In this case, there was a significant amount of detailed financial evidence before the court regarding the parties' income and expenses for the years 2009-2016. The affidavits were lengthy, and both parties filed comprehensive responding affidavits. Each provided financial statements and copies of all of their income tax returns. The father set out in a clear and detailed manner his concerns with the mother's income information and her employment situation, which were all before the motion judge.

[102] Further, the financial circumstances of both parties were not complex. The father was an employee and received employment income that was disclosed in his income tax returns. The mother operated a small, unincorporated business. The expenses, which were disclosed in her personal income tax returns, were those that one would expect to find in a small business and were similar and consistent over the years. Overall, the evidence provided a relatively clear picture of the parties' respective financial situations during that period of time

[103] The mother's income for 2017 was based on estimates, as she had just started a new business; because of that, cross-examinations would have been of little substantive effect. The motion judge accepted that the mother had a greater obligation to contribute to the children's support and imputed a greater income to her. The issue of her actual income in 2017 will be more effectively addressed at little or no cost by the father receiving her income tax returns, which will disclose her actual income. If the father still questions her actual expenses or if her actual income is materially greater than anticipated, he can apply for a variation based on those known numbers.

[104] If the father had concerns about the accuracy or legitimacy of the mother's disclosure, he could and should have conducted cross-examinations: he did not. Further, a review of the transcript shows that the motion judge provided assistance to the father in arguing his position. For example, when the mother's lawyer was making submissions regarding child support, the motion judge stated, "in light of the fact that [the father] isn't represented by counsel, I typically, in these types of cases, like to look at the material maybe with a more critical eye than I would otherwise." He permitted the father to make a full and complete argument regarding his position on the issues, asked

a number of questions to clarify the father's position, and extended the father's submissions in reply beyond what would normally be allowed to ensure that he had the opportunity to fully explain his position.

[105] In my view, the motion judge's decisions to proceed on the affidavits, to address the father's concerns by imputing additional income to the mother and to give the father credit for undocumented section 7 expenses was a proportional response that led to a fair and just determination of the issues. While a full trial may, or may not, have changed some of the information, in my view any difference in outcome would not have justified the likely cost of the additional proceedings, both in terms of money and delay.

[106] This was the conclusion of the motion judge, which was a discretionary decision. While another judge may have come to a different conclusion and granted an adjournment of the motion for child support, I would not find that the motion judge erred in refusing the adjournment and proceeding on the evidence that was before him.

- *Substantive Issues*

[107] The next issue relates to the motion judge's substantive decisions. The father's position is that the motion judge erred by choosing an arbitrary percentage for the calculation of the gross-up of the mother's income and an arbitrary amount for his claim for section 7 expenses, both amounts being without any rational basis.

[108] The mother acknowledged to the motion judge that the 25 per cent used to calculate the personal benefit from her business expenses was

arbitrary, and the motion judge stated that the increase in the father's section 7 expenses from $1,215 to $4,000 was also arbitrary.

[109] The proportion of the business expenses that provided a benefit to the mother related to expenses like personal use of a vehicle, a cell phone, clothing, etc. Even with cross-examination, this would be an imprecise calculation. The mother advised the motion judge that, by applying this adjustment to her income, the arrears in child support from 2009-2016 were reduced by $7,000. While a full hearing with cross-examination and expert evidence may have produced a somewhat different result, that is far from certain. What is certain is that it would have resulted in a significant delay in the proceeding and an increase in expenses for both parties. The motion judge accepted this calculation as a reasonable adjustment and, taking all of these factors into consideration, in my view, that conclusion was open to him.

[110] As regards the increase in the father's section 7 expenses, it was clear that, despite having received the mother's list of expenses and copies of all of her receipts in October 2016, he had gathered together only minimal information as to the expenses that he had incurred, even though he had six months in which to do so, and notwithstanding the requirement in para 2.26 of the final order that the parties exchange receipts every three months.

[111] The motion judge had several choices. He could have granted the father an adjournment and more time to look for receipts; he could have proceeded on the information that the father produced; or, he could have given the father an increased credit based on the finding that he had incurred some additional undocumented expenses.

[112] The motion judge found that, while he accepted that the father had incurred expenses for which he had no receipts, the mother had paid the majority of the expenses. In this case, an adjournment to permit the father to look for more precise evidence would have resulted in increased costs for both parties, with an uncertain outcome. While the amount of the credit to the father for section 7 expenses was somewhat arbitrary, I would find that, in the circumstances of this case and after taking into consideration the need for proportionality related to the cost of a more lengthy process, the motion judge did not err in his decision to set those expenses at $4,000.

[113] Having found that the motion judge did not err either by imputing income to the mother or by insufficiently grossing up the mother's income, I would dismiss these grounds of appeal.

(v) If the mother was in contempt of the final order, should she have been given primary care and control of MRS?

[114] This is another issue that has been raised for the first time on appeal. If the father were successful in his appeal and obtained an order for a trial, this issue could be argued at that time, and that would be the appropriate time to determine that issue. In this case, the father has not appealed the dismissal of his 2016 contempt motion, so the question of what effect a contempt finding against the mother would have on an order granting her care and control of their son is hypothetical.

[115] The general policy is that a court may decline to decide an issue which raises merely a hypothetical question, as in the situation where the decision would have no practical effect on the rights of the parties. While a court has the discretion to address a hypothetical issue if the circumstances

warrant, the onus rests on the party seeking a determination of the issue to demonstrate that there is reason to depart from the general rule against determining such issues. (See *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353; *Woods et al v Canada (Attorney General)*, 2005 MBCA 24 at paras 14-18; *Ludlow v Ludlow*, 2011 MBCA 29 at paras 13-16; and *JG and KB* at paras 8-10.)

[116] In my view, the circumstances in this case do not warrant this Court exercising its discretion and deciding what is clearly a hypothetical question. I would, therefore, dismiss this ground of appeal.

(vi) Did the motion judge err in not severing the divorce from the other issues and allowing final relief to be dealt with under the Divorce Act at a later date?

[117] The variation order that was signed by the motion judge indicates that the relief set out in para 6.0, being that related to the mother's 2016 variation motion, was granted pursuant to the *Divorce Act* and *The Family Maintenance Act*. In this ground of appeal, the father is questioning the inclusion of corollary relief under the *Divorce Act*.

[118] In my view, a review of the record shows that the inclusion of the reference to corollary relief being granted under the *Divorce Act* is an error.

[119] The mother's variation motion requested an order severing the divorce from the remaining issues and determining that issue separately. The case conference judge noted in his case conference memorandum of January 17, 2017, that he was "severing the issue of divorce", although there does not appear to be any order on the file in that regard. In his reasons, the motion judge dealt with this issue as follows:

> At that time [being the hearing on March 15, 2017] I had inquired of the parties if they wanted to proceed with their divorce as it was referenced in the case management memorandum of [the case conference judge], and I was assured by the parties that they did wish to. I am accordingly signing the divorce judgment effective today. The marriage will dissolve 31 days from today.

[120] As regards the issues related to the children, he described the proceeding in the following words:

> . . . [I]f this were a hearing of the first instance under the Divorce Act -- and I note that it is not as the parties have chosen to vary the final order which was ordered under The Family Maintenance Act rather than seek a fresh determination under the Divorce Act -- . . .

[121] Finally, a review of the terms of the variation order shows that it is not a complete order but, rather, a variation of specific provisions of the final order, and it only makes sense if it is read in conjunction with the final order. As noted earlier, the final order was granted pursuant to only provincial legislation.

[122] Thus, in my view, the reference to relief under the *Divorce Act* in para 6.0 of the variation order is an error and should be deleted, as the motion judge did not order any corollary relief pursuant to the *Divorce Act*. Thus, I would grant this ground of appeal.

VIII. CONCLUSION

[123] For the reasons set out above, I would dismiss the appeal, with the exception of the last ground. I would vary the variation order to remove the reference to the *Divorce Act* in para 6.0 of that order.

[124] As the mother was successful on all of the grounds of appeal except one, I would grant her costs on the appeal under the tariff.

Beard JA

I agree: Pfuetzner JA

I agree: leMaistre JA