

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Lori T. Spivak
Madam Justice Anne M. E. Turner

BETWEEN:

<i>HEATHER JENINE LADOSKI-KOLBUCK</i>	)	<i>P. J. Bruckshaw</i>
	)	<i>for the Appellant</i>
	)	
<i>(Petitioner) Respondent</i>	)	<i>H. J. Ladoski-Kolbuck</i>
	)	<i>on their own behalf</i>
<i>- and -</i>	)	
	)	<i>Appeals heard:</i>
<i>MICHAEL JOSEPH KOLBUCK</i>	)	<i>June 4, 2025</i>
	)	
<i>(Respondent) Appellant</i>	)	<i>Judgment delivered:</i>
	)	<i>November 14, 2025</i>

SPIVAK JA

[1] This appeal by the respondent husband (the respondent) and cross appeal by the petitioner wife (the petitioner) arises from a variation of a 2014 final order and divorce judgment (the final order) under section 17(1)(a) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) [the *Act*]. Specifically, the appeals relate to the judge's variation of the child support order (the variation order) for the couple's daughter (the daughter), who was seventeen at the time of the variation order. Both appeals include challenges to the process used by the judge in arriving at her decision.

[2] The respondent appeals the provision in the variation order that required him to obtain a life insurance policy of no less than \$150,000 naming

the daughter as beneficiary to secure his child support obligation while she is a child of the marriage (the policy). He submits that the judge had no jurisdiction to make such an order, and that it was made without any evidentiary basis and in the absence of proper pleadings.

[3] The petitioner's cross appeal primarily concerns the judge's imputation of income to the respondent of \$70,000 for the years 2017–2021 for child support purposes. The judge initially rendered a decision imputing income of \$100,000 to the respondent for that time period. However, subsequently, after the respondent retained counsel and before the variation order was signed, the judge revised her decision and imputed income to the respondent in the amount of \$70,000 for those years. The petitioner argues that the judge erred in revisiting this issue and that the process was unfair. The petitioner also challenges some of the judge's determination of her entitlement to extraordinary expenses under section 7(1) (section 7 expenses) of the *Manitoba Child Support Guidelines Regulation*, Man Reg 52/2023 [the *Guidelines*].

[4] For the following reasons, I would allow the respondent's appeal and strike the provision ordering the respondent to obtain the policy from the variation order. I would allow the petitioner's cross appeal as it relates to the judge's imputation of income to the respondent and restore the judge's initial decision to impute income in the amount of \$100,000 for the years 2017–2021. I would dismiss the petitioner's cross appeal in regard to the section 7 expenses.

Background

[5] As the facts and procedural history are relevant to a consideration of

the issues raised on these appeals, some detailed background is required.

[6] The parties were married for approximately nine years and separated in the summer of 2008. The daughter is the only child of the marriage.

[7] On July 18, 2014, after a trial, the final order was pronounced and subsequently filed with the Court on November 25, 2015. The final order required the respondent to pay child support based on imputed income of \$40,000, but did not include any provision requiring life insurance as a form of security for his child support obligations. The petitioner did not seek this form of relief in the original pleadings.

[8] On April 10, 2017, the petitioner filed a notice of motion to vary, which requested fourteen changes to the final order, including a requirement that the respondent obtain a life insurance policy as security for the daughter's child support payments.

[9] Thereafter, between 2017 and 2022, the parties attended five case conferences before a first case conference judge to address the notice of motion to vary, but were unable to agree on a form of order. Trial dates were scheduled for November 7–10, 2023 and, since the first case conference judge had retired, a further case conference was held by another case conference judge (the case conference judge) on October 24, 2023 (the October CC).

[10] At the October CC, the case conference judge, on his own motion, struck out the notice of motion to vary in its entirety, except for paragraph 9, noting that the petitioner had withdrawn eight of her requests and that much of the relief requested was stale-dated, not relevant, or not subject to a variation request. Paragraph 9 requested that the final order be varied to adjust

the respondent's child support obligation to correspond to his updated income on a retroactive and go-forward basis. This was described in the October 24, 2023 case conference memorandum (the October CCM) as "the issue for trial."

[11] The parties had one additional case conference prior to trial before the case conference judge on November 3, 2023 (the November CC). Despite this relief being struck from her notice of motion to vary, the petitioner indicated, in her case management information statement filed on November 2, 2023, that she was still requesting that the Court require the respondent to acquire a life insurance policy for the daughter. In the case conference memorandum dated November 3, 2023 (the November CCM), the case conference judge reiterated that the issue of life insurance, amongst other issues that the petitioner continued to raise, "[e]ll outside the parameters of what remain[ed] of her notice of motion to vary". After noting the decrease in the petitioner's income and increase in the respondent's income, he stated that the focus of the November 7 trial would be "on the resultant impact on child support and the sharing of s. 7 expenses pursuant to the final order."

[12] The trial proceeded on November 7, 2023, with the petitioner and the respondent testifying and representing themselves. The petitioner, who recently went on disability, advised the judge that she was requesting that the respondent's income be imputed at \$200,000 retroactively to 2017 for child support purposes and his contribution to past and future section 7 expenses, in accordance with the income he earned in 2022. She indicated that she was also seeking an order that the child support be a debt of the respondent's estate and secured by the acquisition of a life insurance policy by the respondent. She asserted this was necessary because there had been an underpayment of

support and questions about the respondent's assets upon death, as he had placed some property in his current wife's name.

[13] The petitioner testified that she went on disability in 2021 and that the respondent, a journeyman carpenter who has contract work in northern Manitoba, was making a tax-free income while declaring a minimal salary and living at a level inconsistent with his reported income, given his vehicle purchases and newly purchased home. The respondent's income tax returns from 2017 to 2021 declared income in the range of \$20,000 or less for those years.

[14] The respondent acknowledged that there should be a recalculation of his income for 2022, as he had earned an income of \$200,000 for that year. He claimed that the contract with a northern First Nation, which resulted in that level of earnings, was rare and unusual. He submitted that retroactively his income should not be adjusted from \$40,000 as per the final order. The respondent stated that he was opposed to the order being binding on his estate or secured by a life insurance policy. He advised that the only insurance policy he had was one guaranteeing repayment of his mortgage loan upon his death.

[15] By way of oral reasons for judgment delivered on November 7, 2023, the judge pronounced a variation of the final order in two ways (the November decision).

[16] First, the judge ordered that the respondent's income for the years 2017–2021 be varied from \$40,000 to \$100,000. For 2022–2023 and going forward, she set the respondent's income at \$200,000. In reaching her decision, the judge considered the respondent's education, experience and skill; his lifestyle; how he obtained his work contracts; and his lack of

financial disclosure. She did not believe that all he was able to earn for those years was as declared in his income tax returns.

[17] As for the section 7 expenses, the judge did not indicate in the November decision that she took issue with any of the expenses that the petitioner claimed in her matrix filed at trial save for a potential culinary school program for the daughter. She specifically ordered that the respondent pay his proportionate share of any health, medical and dental expenses that exceeded insurance by \$100 or more (the health expenses).

[18] The second major variation made to the final order was adding a requirement that the respondent secure a life insurance policy for no less than \$150,000 that designated the daughter (then age seventeen) as the beneficiary. The policy was to be in effect until she was no longer a child of the marriage. The judge stated that, as the petitioner would have the policy in place, she was declining to make the child support order binding on the respondent's estate.

[19] Following the November decision, the respondent retained legal counsel who, in correspondence with the Court on February 13, 2024, raised several issues with the proposed variation order and matrix prepared by the petitioner, including that the health expenses ordered were not retroactive as the petitioner contended. On March 14, 2024, the parties appeared before the judge for an appointment "to discuss finalizing the form of the order" (the March hearing). Prior to that time, respondent's counsel filed a brief that reiterated the matters raised in the February correspondence and also challenged the Court's jurisdiction to order the respondent to obtain the policy under *The Family Law Act*, CCSM c F20 [the *FLA*]. He asserted that pursuant to section 74(7) of the *FLA*, the Court could only order that a spouse designate

a support recipient as the beneficiary of *an existing life insurance policy* to secure a child support order.

[20] At the March hearing, the judge ordered that the health expenses be adjusted to reflect that they were only to be paid on a go-forward basis beginning in 2022. She allowed the petitioner time to file subsequent argument to demonstrate that the Court had the jurisdiction to order the respondent to obtain the policy. Thereafter, the petitioner submitted her argument contending that the Court could rely on both sections 74(8) and 74(12) of the *FLA* to order the respondent to obtain the policy. Section 74(8) allows a Court to order a child support obligation to be a debt of the payor's estate and section 74(12) permits a Court to secure a child support order by a charge on property or otherwise.

[21] A hearing initiated by the Court "to settl[e] the terms of the [variation] order" was set for June 14, 2024. On June 10, 2024, the respondent filed a brief raising further challenges to the section 7 expenses set out in the petitioner's matrix. He also asserted that the order to obtain the policy was improperly ordered by the Court, both on jurisdictional grounds, having regard to the limited scope of section 74(7) of the *FLA*, and on the basis that the case conference judge had struck that relief from the notice of motion to vary at the October CC and that it was not properly pleaded. As well, the respondent asserted, for the first time, that there was no basis for the judge's decision to retroactively impute his income to \$100,000 for the years 2017–2021, arguing instead that it should be set at \$40,000 in accordance with the final order. The petitioner reiterated her position that there was jurisdiction to order the respondent to obtain the policy and objected to the respondent's ability to revisit the judge's decision regarding imputation of income.

[22] In further reasons delivered orally on June 20, 2024 (the June decision), the judge maintained her initial order requiring the respondent to obtain the policy. She found that she had jurisdiction to do so under 74(12) of the *FLA*, and that the respondent had sufficient notice at the outset of the trial that this was being requested and had an opportunity to address the issue. On the question of imputation of income, the judge changed the respondent's income for the years 2017–2021 from \$100,000 to \$70,000. In doing so, she indicated that she was placing more weight on the income declared in the respondent's income tax returns, though she was not satisfied that his income should be set at \$40,000 based on his expenses and current lifestyle. She concluded that taking into account all of the evidence, "\$70,000 is justified, \$100,000 is not."

[23] As for the section 7 expenses, the judge agreed with the respondent that the petitioner had failed to prove that the arts and fitness fee of \$1,000 from 2017—originally included in the petitioner's matrix filed at trial—and the driver's license and road test fees, which totalled \$105, were extraordinary, necessary and reasonable.

Standard of Review

[24] As noted by this Court in *Horch v Horch*, 2017 MBCA 97 [*Horch*], a family law order is entitled to considerable deference on appeal and is to be reviewed only for material error in fact or law. Such orders cannot be disturbed absent an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong (see *ibid* at para 50; see also *Van de Perre v Edwards*, 2001 SCC 60 at para 15; *Hickey v Hickey*, 1999 CanLII 691 at para 10 (SCC)).

[25] Issues of procedural fairness are questions of law reviewable for correctness (see *Forsythe v Labossiere*, 2022 MBCA 28 at para 11; *Waraich v Director of Employment Standards*, 2020 MBCA 76 at para 11).

The Respondent's Appeal

Issues

[26] The respondent's appeal raises the following issues:

- i) whether the judge had jurisdiction to require the respondent to obtain the policy to secure his child support obligation;
- ii) if so, whether the judge erred in ordering the respondent to obtain the policy in the absence of sufficient evidence to make such an order; and
- iii) whether the judge erred in granting relief that was struck from the pleadings by the case conference judge and precluded by rule 70.31(3) of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*].

Analysis

Did the Judge Have Jurisdiction to Require the Respondent to Obtain the Policy to Secure His Child Support Obligation?

The Rationale for Life Insurance as a Form of Security for Child Support

[27] Before turning to the applicable legislation, it is useful to recall the

rationale for securing child support payments through life insurance or otherwise.

[28] Courts may secure child support payments in a variety of different ways, including by making certain orders with respect to life insurance. In Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 10th ed (Toronto: Irwin Law, 2024), ch 9 at 436-37, the authors explain that security for child support orders may be justified in several situations. Citing *Yenovkian v Gulian*, 2019 ONSC 7279 at para 133, they indicate that the factors relevant to determining whether security should be required under the *Act* include whether the payor has a history of dissipation or removal of assets, is likely to abscond, has a poor employment history, or has refused to honour a support obligation or other court orders.

[29] Similarly in *Quinton v Kehler*, 2020 BCCA 254 [*Quinton*], the Court noted the jurisprudence where courts have considered whether there was a basis to require life insurance by a spouse as a form of security for a child support order. Relevant factors considered included whether the payor had not complied with support obligations in the past or was in arrears, the payor's health, the age of the children, and the importance of the payor's contribution to their financial well-being (see *ibid* at para 40).

[30] Commentators have noted the benefits of life insurance as a form of security for support, "as it can be designated directly and outside of a party's estate, thus removing concerns regarding the validity of a party's will, strategic or avoidant estate planning, and other creditors on death" (Georgina Carson, "Spousal Entitlement to Employee Related Benefits & RRSPs" (2017) 36 CFLQ 239 at 6, online: (WL Can) Thomson Reuters Canada).

Statutory Authority to Secure Child Support Payments: The Relevant Legislation

[31] Where both spouses are habitually resident in Manitoba at the time an application is made for a child support order or variation of a child support order, courts are empowered to make orders for security for child support under section 15.1(4) of the *Act* and section 12 of the *Guidelines* (which are made applicable by section 2 of the *Act*). This power also exists with respect to both spouses and common-law partners under section 74 of the *FLA* (see also s 63).

[32] Section 15.1(4) of the *Act* states:

Terms and conditions

(4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

Modalités

(4) La durée de validité de l'ordonnance ou de l'ordonnance provisoire rendue par le tribunal au titre du présent article peut être déterminée ou indéterminée ou dépendre d'un événement précis; elle peut être assujettie aux modalités ou aux restrictions que le tribunal estime justes et appropriées.

[33] It has been recognized that this discretion, pursuant to the *Act*, to include terms, conditions, or restrictions as it thinks fit and just in a support order is broad and includes the ability to impose terms tailored to secure payment (see *Dagg v Cameron Estate*, 2017 ONCA 366 at para 62 [*Dagg*]; *Katz v Katz*, 2014 ONCA 606 at para 71 [*Katz*]).

[34] Regarding a child support order under the *Act*, section 12 of the *Guidelines* specifically provides that a court may order a spouse to supply security. It states:

Security

12 The court may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order.

Garantie

12 Le tribunal peut exiger dans l'ordonnance alimentaire au profit d'un enfant que le montant de celle-ci soit versé ou garanti, ou versé et garanti, selon les modalités prévues par l'ordonnance.

[35] As for the *FLA*, section 74(7) speaks directly to a court's ability to order life insurance as security for a support order by permitting the court to order that a spouse *who already has a life insurance policy* designate a support recipient as the beneficiary under that policy. Section 74(7) of the *FLA* states:

Matters that may be provided for in support orders

74 In a child support order or a spousal support order, the court may provide for one or more of the following:

7. That a spouse who has a policy of life insurance as defined in *The Insurance Act* designate the other spouse or a child as the beneficiary, either irrevocably or for the period set by the order.

Mesures prévues par les ordonnances alimentaires

74 Le tribunal peut prévoir les mesures suivantes dans le cadre des ordonnances alimentaires qu'il rend au profit d'un enfant ou du conjoint :

7. L'obligation pour le conjoint titulaire d'une police d'assurance-vie au sens de la *Loi sur les assurances* de désigner son conjoint ou un enfant comme bénéficiaire, à titre irrévocable ou pendant la durée fixée dans l'ordonnance.

[36] Section 74(12) (on which the judge relied upon in this case) generally addresses the court's ability to order that payment under a support order be secured by a charge on property or otherwise. It states:

12. That payment under the order be secured by a charge on property or otherwise.

12. L'obligation, pour le débiteur de sommes d'argent au titre de l'ordonnance, d'en garantir le paiement, notamment au moyen de sûretés grevant ses biens.

[37] As I will later explain, also relevant to this analysis is section 74(8), which allows a court to order that the support order be a debt and liability of the payor's estate. It states:

8. That a duty and liability to pay support continue after the death of the person having the duty, and is a debt of the person's estate for the period set by the order.

8. L'obligation de payer des aliments subsiste après le décès du débiteur alimentaire et incombe à sa succession pendant la durée fixée dans l'ordonnance.

[38] The issue here is whether, pursuant to the above statutory provisions, a court can require a spouse to *obtain a new life insurance policy* to secure their child support obligation or whether, as the respondent argues, it is restricted to ordering a spouse who already has *an existing life insurance policy* to designate a support recipient as the beneficiary under that policy.

The Jurisprudence

[39] In Manitoba, there are no Court of King's Bench decisions that have analyzed whether there is statutory authority pursuant to the *Act* or the *FLA* to order a spouse to obtain a new policy of life insurance to secure a support

obligation. Several Manitoba decisions have included such a requirement in an order based on the consent of both parties (see *TDW v SIM*, 2023 MBKB 108; *Anderson v Bernhard*, 2018 MBQB 100; *JSG v MFG*, 2011 MBQB 177).

[40] A case of considerable assistance is *Katz*, where the Ontario Court of Appeal squarely addressed this question. In *Katz*, the appellant sought to enforce the respondent's child support obligation, which required him to obtain a life insurance policy under which the children would be designated as beneficiaries. The appellant sought this relief under section 34(1)(i) of Ontario's *Family Law Act*, RSO 1990, c F3 [the *ONFLA*], which, like section 74(7) of the *FLA*, permits a court to require a spouse who has an existing policy of life insurance to designate a recipient as the beneficiary. While the respondent made reasonable attempts to obtain such a policy, he was prevented from doing so because he was diagnosed with prostate cancer. The appellant's motions were dismissed and she appealed.

[41] On appeal, the respondent relied on *Feinstat v Feinstat*, 2012 ONSC 5339 [*Feinstat*], which held that while section 34(1)(i) of the *ONFLA* gives the court jurisdiction to order a spouse who *has* life insurance to designate a dependant as a beneficiary, there is no jurisdiction to require a spouse to *obtain* life insurance (see para 15). Based on *Feinstat*, the respondent argued that an obligation to obtain life insurance should neither be imposed nor enforced.

[42] The issues pertaining to the request for life insurance were ultimately disposed of by the Court on unrelated grounds. However, the respondent's reliance upon *Feinstat* led Simmons JA "[f]or jurisprudential

reasons” to address the issue of the propriety of a court making an order requiring a spouse to obtain life insurance (*Katz* at para 65).

[43] While acknowledging that section 34(1)(i) of the *ONFLA* is only applicable to existing life insurance policies, Simmons JA held that sections 34(1)(k) and 34(4), when considered together, were broad enough to permit a court to order a spouse to obtain a new life insurance policy to secure payment of the support order following the payor spouse’s death. Section 34(1)(k) of the *ONFLA* allows the court to make an order securing payment of a support order by a charge on property or otherwise. Section 34(4) of the *ONFLA* provides that an order for support binds the estate of the person having the support obligation unless the order provides otherwise. Justice Simmons explained (*Katz* at paras 67-71):

Although there is no specific subsection permitting a court to order a spouse to *obtain* life insurance, s. 34(1)(k) gives a court discretion to make an interim or final order “requiring the securing of payment under the order, by a charge on property or otherwise.”

Under s. 34(4) of the [*ONFLA*], “[a]n order for support binds the estate of the person having the support obligation unless the order provides otherwise.”

Given that a support order under the [*ONFLA*] is binding on a payor spouse’s estate unless the order provides otherwise, on its face, s. 34(1)(k) is broad enough to permit a court to order a spouse to obtain an insurance policy to secure payment of the order following the payor spouse’s death. The concluding words “or otherwise” in s. 34(1)(k) afford the court broad scope for securing the payment of a support order.

Because a support payor’s estate is bound by a support order following the payor’s death, the court making a support order is entitled to secure the payments to be made in the event of the payor’s death by requiring the payor to obtain and maintain life insurance for a specified beneficiary while the support order is in

force and to give directions concerning the extent to which the payout of the insurance proceeds will discharge the support obligation: see *Laczko v. Laczko* (1999), 176 D.L.R. (4th) 507 (Ont. S.C.), at pp. 511-12.

[emphasis in original]

[44] Justice Simmons reached the same conclusion regarding the court's jurisdiction to make such an order under the *Act*. She noted that it was generally accepted that the broad discretion created by section 15.1(4) of the *Act* empowers a court to impose terms aimed at securing payment of a support order (see *Katz* at para 71). Further, section 12 of the *Federal Child Support Guidelines*, SOR/97-175 (similar to section 12 of the *Guidelines*), expressly authorizes a court to order a spouse to supply security for a child support order. She also considered that while there was no provision in the *Act* equivalent to section 34(4) of the *ONFLA* presuming a support order to be binding on a spouse's estate (and the support obligation under divorce legislation would otherwise end when the spouse dies), the court has the power with explicit language to so order. Accordingly, she reasoned that the same power that exists under the *ONFLA* to secure support payments that are binding on the spouse's estate by the acquisition of life insurance also exists under the *Act* (see *Katz* at para 73). She noted that when proceeding under the *Act*, the court should first order that the support obligation is binding on the estate (see *Katz* at para 74).

[45] The principles in *Katz* were more recently cited with approval by the Ontario Court of Appeal in *Dagg* at paras 57-60.

[46] In New Brunswick, where there is provincial legislation with analogous provisions to the above-noted sections of the *ONFLA* (see *Family*

Law Act, SNB 2020, c 23, s 21(2)), courts have also held that there is jurisdiction to order a spouse to obtain life insurance to secure support in accordance with *Katz* (see e.g. *BKWR v NVR*, 2023 NBKB 17; *Taddeo v Cacciaccarro*, 2017 NBQB 91). In Nova Scotia and British Columbia, courts have recognized that there is authority to direct a spouse to obtain a life insurance policy under section 15.1(4) of the *Act* (see *JL v AH*, 2024 NSSC 96 at paras 51-53; *Quinton* at para 40).

[47] I turn to Manitoba.

The FLA and the Act Are Broad Enough to Permit a Court to Order a Spouse to Obtain Life Insurance to Secure Support Payments That Are Binding on the Spouse's Estate

[48] Based on the reasoning in *Katz*, in my view, there is jurisdiction under either section 74(12) of the *FLA* or section 15.1(4) of the *Act* to order a spouse to obtain a new life insurance policy to secure their support obligation when combined with an order providing that the duty and liability to pay support continues after the spouse's death and will be binding on their estate. I will explain why an order binding the estate is required under both the *FLA* and the *Act*.

[49] While section 34(1)(k) of the *ONFLA* and section 74(12) of the *FLA* are virtually identical, as they both allow support to be secured by a charge on property or otherwise, section 34(4) of the *ONFLA* and section 74(8) of the *FLA* are somewhat different. Section 34(4) of the *ONFLA* creates a presumption that an order of support is binding on a payor's estate unless the order provides otherwise. By contrast, section 74(8) of the *FLA* empowers the court to make an order binding the payor's estate. This is significant as, in the

absence of such an order, the ongoing payment of support is not binding on the estate since the obligation is personal and ends on the payor's death (thus, there would be no ongoing obligation to secure) (see *Gorrie Estate v Gorrie*, 2017 MBQB 74 at para 60).

[50] Importantly, in *Katz*, it was both the presumption created by section 34(4) of the *ONFLA* and the language in section 34(1)(k) that gives the court its broad scope to secure support payments that are binding on the spouse's estate by the purchase of a life insurance policy. Therefore, consistent with *Katz*, pursuant to the *FLA*, so long as the court orders that the child support order binds the estate as per section 74(8) of the *FLA*, it can require a life insurance policy as a means of ensuring the support obligation continues to be met if the spouse dies.

[51] Similarly, I agree with *Katz* that, pursuant to section 15.1(4) of the *Act*, a court can order a spouse to obtain an insurance policy to secure a support obligation provided the court also explicitly orders the support obligation to be binding on the spouse's estate. In Manitoba, consistent with the Ontario authorities noted in *Katz*, it has also been accepted that a court has the power under the *Act* to make a support order binding on the spouse's estate (see *Katz v Katz and Scott* (1983), 21 Man R (2d) 1 at para 24, 1983 CanLII 3679 (MBCA); *Huff v Huff* (1971), 16 DLR (3d) 584, 1971 CanLII 1060 (MBCA)).

The Legality of the Judge's Order

[52] In the present case, as already mentioned, the judge ordered the respondent to acquire the policy only on the basis of section 74(12) of the *FLA*, which generally allowed her to secure an order by a charge on property

or otherwise. However, she specifically declined to make the support order binding on the respondent's estate pursuant to section 74(8). Therefore, while it was legally available for her to require the respondent to obtain the policy to secure his support obligation if it was ordered to continue after death, the failure to make an order binding his estate precluded her from ordering the policy as security in this case.

[53] While it is open to this Court to uphold the judge's order requiring the policy as security by ordering the support payments binding on the respondent's estate, as I will now elaborate, there are more fundamental problems with the judge's order that necessitate this Court's intervention with this provision.

Was There a Sufficient Evidentiary Basis to Order the Respondent to Obtain the Policy?

[54] Significantly in *Katz*, courts were cautioned to proceed carefully in requiring a support spouse to obtain a life insurance policy and ensure that there is sufficient evidence to justify such an order. In *Katz*, the Court highlighted that it should have evidence of the spouse's insurability and the amount and cost of the available insurance (see para 74). Further, the amount and type of life insurance ordered should be tailored to the total amount of support and its duration, reflecting the total support likely to be payable over the duration of the order and should not exceed that amount. Justice Simmons emphasized (*ibid* at para 74):

[W]here there is no existing policy in place, a court should proceed carefully in requiring a payor spouse to obtain insurance. This case demonstrates the desirability of having evidence of the payor's insurability and of the amount and cost of the available insurance.

Careful consideration should be given to the amount of insurance that is appropriate. It should not exceed the total amount of support likely to be payable over the duration of the support award. Moreover, the required insurance should generally be somewhat less than the total support anticipated where the court determines that the recipient will be able to invest the proceeds of an insurance payout. Further, the amount of insurance to be maintained should decline over time as the total amount of support payable over the duration of the award diminishes. The obligation to maintain insurance should end when the support obligation ceases – and provision should be made to allow the payor spouse to deal with the policy at that time. Finally, when proceeding under the *Divorce Act*, the court should first order that the support obligation is binding on the payor's estate.

[55] The need for careful scrutiny of the evidentiary foundation for an order of this kind was also highlighted in *Milton v Milton*, 2008 NBCA 87 at para 36 [*Milton*], which reviewed a trial judge's decision to order an existing life insurance policy as security for support:

Trial judges should pay close attention to the evidentiary foundation in support of this type of order securing payment of spousal support. They should consider the following: is the amount of the policy sufficient to secure the support order or is it excessive? In relation to the amount of the spousal support payment, is the amount of the premium reasonable or excessive? If the support order is time limited, then the period of security should be limited "for as long as support continues to be paid" or "while the appellant has an obligation to contribute to his or her [spouse's] support".

[56] A number of courts have declined to order that a spouse obtain a life insurance policy because of insufficient evidence regarding whether an insurance policy already existed, whether the spouse could obtain insurance and at what cost, and/or the appropriate quantum of insurance to order (see e.g. *Kruk v Kruk*, 2025 MBKB 17 at paras 121-22; *Lagtapon v Lagtapon*, 2024

ONSC 5092 at para 291; *Switzer v Switzer*, 2022 ONSC 1149 at para 59; *Tonogai v Tonogai*, 2021 ONSC 2366 at paras 52, 54; *Climans v Latner*, 2019 ONSC 1311 at para 204).

[57] I would endorse the caution and guidance stressed in *Katz* and *Milton*. As the Court is ordering a spouse to enter into a contract with a third party (the insurer), the need for such an order and its practical and logistical implications must be fully considered, and a complete evidentiary basis is essential. For example (and this is not intended to be a complete list), judges may wish to consider whether more suitable means are available to secure the support order, having regard to the nature of the spouse's estate and assets; whether an order binding the estate would be sufficient; and whether life insurance is necessary, considering such factors as the expected duration of the order, the age of the child and spouse, and other factors akin to those reviewed in *Quinton*. Also important is evidence relating to the spouse's insurability, the amount of insurance necessary to secure the support order, the duration and the type of insurance (term or permanent), and its cost.

[58] In this case, the judge had little, if any, evidence to support an order requiring the respondent to obtain the policy. There was essentially no evidence beyond the respondent's age (fifty-eight) and the fact that he had a mortgage with related death benefits payable to the mortgagee. Furthermore, the daughter was age seventeen at the time and the policy was not to provide for her generally but only to be in effect while she was a child of the marriage to secure the respondent's support obligation. Therefore, appropriate insurance for that purpose would be short term.

[59] In my view, it was an error to compel the respondent to obtain the policy without a sufficient evidentiary basis to do so. The order was made in the absence of evidence that the respondent qualified for the policy; the cost of the policy over the entire anticipated period of support; whether it was reasonable and affordable for the respondent; and the amount, type and duration of the policy that would be appropriate to order in this case. There was no evidence as to whether insurance in the amount of \$150,000 (the amount suggested by the petitioner) was proper, having regard to the anticipated future support obligations respecting the daughter.

[60] Though this error is sufficient to allow the respondent's appeal, given the importance of the case conference regime and pleadings, I will address the respondent's final ground of appeal related to these issues.

Did the Judge Err in Granting Relief That Was Struck From the Pleadings by the Case Conference Judge and Precluded by Rule 70.31(3) of the *KB Rules*?

[61] The respondent argues that the judge erred when she imposed an obligation on the respondent to secure the policy when the issue was not properly before the Court and when he had no opportunity to adequately respond to the claim.

[62] This ground of appeal must be understood in the context of two fundamental principles that are engaged: the integrity of the family division case flow model and the significance of pleadings to a fair process.

The Case Flow Model

[63] In February 2019, Manitoba introduced a new case flow model in respect of non-child-protection-related family proceedings¹. Rule 70.24(1) of the *KB Rules* sets out the objectives of the case management process. It states:

Objectives of case management process

70.24(1) Recognizing the emotional and financial impact family proceedings can have on those involved and consistent with the principle of securing the just, most expeditious and least expensive determination of a family proceeding, the case management process established by this rule has the following objectives:

- (a) facilitating settlement of family proceedings;
- (b) setting early trial or final hearing dates and establishing timelines for the completion of steps in the litigation process;
- (c) identifying and simplifying the issues in dispute between the parties;
- (d) avoiding unnecessary or wasteful steps in the litigation process;

Objectifs de la procédure de gestion des causes

70.24(1) La procédure de gestion des causes vise les objectifs qui suivent, lesquels sont fondés sur la nécessité de reconnaître le fait que les instances en matière familiale peuvent avoir des conséquences émotionnelles et financières sur les personnes concernées et de respecter le principe selon lequel il importe d'atteindre une décision juste sur le fond qui soit la plus expéditive et économique possible :

- a) la facilitation du règlement des instances en matière familiale;
- b) la fixation d'une date rapprochée pour la tenue du procès ou celle de l'audience finale, et la détermination des délais applicables à l'instance;

¹ See Court of Queen's Bench of Manitoba, "Practice Direction/Notice: "New Family Division Case Flow Model" (4 October 2018), online <manitobacourts.mb.ca/site/assets/files/1152/practice_direction_notice_-_new_family_division_case_flow_model.pdf>.

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| (e) ensuring that a family proceeding is ready for trial or final hearing by making orders and giving directions respecting substantive and procedural issues in the proceeding. | c) la détermination et la simplification des points en litige; |
| | d) l'élimination des procédures préparatoires inutiles ou qui nécessiteraient une affectation injustifiée des ressources; |
| | e) la préparation de l'instance en vue du procès ou de l'audience finale, par des ordonnances et des directives portant sur le fond et sur la procédure |

[64] Case conference judges are responsible for managing pre-trial conduct of family proceedings in a manner that will achieve these objectives (see *ibid*, r 70.24(30)).

[65] The case flow model provides for an enhanced role of the case conference judge. In addition to helping the parties reach agreements and narrow and resolve issues in dispute outside of a formal hearing, rule 70.24(33) allows case conference judges to make orders and directions on motion by any party or on their own motion. It states:

Orders and directions at a case conference

70.24(33) The case conference judge may, on motion by any party or on his or her own motion, without materials being filed, make any order or give any direction that he or she considers necessary or

Pouvoirs

70.24(33) Le juge chargé de la conférence de cause peut, de sa propre initiative ou à la demande d'une partie et sans que des documents soient déposés, rendre les ordonnances et donner les directives qu'il juge

advisable to facilitate the just, most expeditious and least expensive determination or disposition of a family proceeding.	nécessaires ou souhaitables pour faciliter la détermination juste de l'instance en matière familiale, de la façon la plus rapide et la plus économique.
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[66] These orders and directions may be substantive or procedural. Rule 70.24(34) outlines a non-exhaustive list that includes the ability to order that a pleading be amended (see *ibid*, r 70.24(34)(11)).

[67] A case conference judge is required to issue a case conference memorandum setting out the results of the case conference, including any orders or directions, the issues resolved and matters agreed to by the parties, and the issues requiring a trial or hearing (see *ibid*, r 70.24(44)(a)-(c)). A case conference memorandum is binding on the parties, subject to any objections that a party may raise with respect to the accuracy of its contents (see *ibid*, rr 70.24(46)-(47)).

The Importance of Pleadings

[68] As noted by Mainella JA in *Horch*: “While there is greater informality as to the nature of pleadings in family proceedings, that does not mean that a certain and meaningful legal basis for relief sought should not be set out” (at para 122). The importance of pleadings to a fair process has been repeatedly emphasized by this Court in several family law decisions. It is enshrined in rule 70.31(3)(b) of the *KB Rules*, which provides that a judge can only grant relief that has been claimed in a pleading. It states:

Relief to be claimed

70.31(3) A court shall grant only relief that has been

Mesures de redressement

70.31(3) Le tribunal ne peut accorder que les mesures de

claimed in a pleading and shall deal with each claim for relief.	redressement qui ont été demandées dans un acte de procédure et rend l'une des ordonnances suivantes à l'égard de chaque demande de mesures de redressement :
(b) in the case of a family proceeding in which a triage conference has been scheduled or held, by granting an order	b) si la conférence de triage dans une instance en matière familiale a eu lieu ou si sa date a été fixée :
(i) for the relief claimed, or	(i) il accorde les mesures de redressement demandées,
(ii) dismissing the claim for relief.	(ii) il rejette la demande.

[69] Granting relief not sought by a pleading may contravene the principle of natural justice that a party has the right to adequate notice and an opportunity to be heard (see *Aquila v Aquila*, 2016 MBCA 33 at para 27).

[70] More recently, this was reiterated by Rivoalen CJA in *Asiwaju v Adetoro*, 2024 MBCA 47 at paras 24-25:

[Rule] 70.31(3)(b) of the *KB Rules* sets out the permissible grounds for a judge of the Court of King's Bench to grant relief in family proceedings; namely, a judge can only grant relief that has been claimed in a pleading. In the case of a family proceeding in which a triage conference has been scheduled or held, a judge can only grant an order for the relief claimed or dismiss the claim for relief.

The Court has a duty to ensure procedural fairness. It contravenes principles of natural justice to grant relief not sought in this case based on matters not in evidence without giving the [respondent] adequate notice and an opportunity to be heard.

[citation omitted]

The Judge's Decision to Order the Respondent to Obtain the Policy Contravened the Integrity of the Case Flow Model and the Principles of Natural Justice

[71] Regrettably, the judge's decision to proceed in light of the case conference judge's order striking that relief from the notice of motion to vary is inconsistent with the above-noted principles.

[72] As earlier noted, at the October CC, the case conference judge struck out each paragraph of the notice of motion to vary except for paragraph 9, in which she requested that the final order be varied to adjust the respondent's child support obligations to correspond to his updated income on a retroactive and go-forward basis. According to the October CCM, this was the only remaining issue for trial. This was reiterated in the November CCM wherein the case conference judge indicated that other issues raised by the petitioner, which included the issue of life insurance, were outside of the parameters of what remained in her notice of motion to vary.

[73] While I appreciate that no order was filed and there is no indication that its requirement was ever waived (see *KB Rules*, r 70.24(36)(a)), it is clear that as a result of the case conference process, there was an order by the case conference judge striking the notice of motion to vary such that the claim for insurance relief was removed and no longer before the Court.

[74] Unfortunately, at the November trial, the judge does not appear to have considered that the request to obtain the policy was struck from the pleadings by the case conference judge. No reference was made to this during the trial, in November 2023, or in the November decision. Rather, at the outset of the trial, the judge invited the petitioner to advise what order she was

seeking from the Court and, upon indication that the petitioner was seeking the policy as security, it was ordered without reference to what had previously transpired during the case conference process or the state of the pleadings.

[75] To be fair, in her June decision, the judge acknowledged that the notice of motion to vary did not include a request for the policy and had been struck from the pleadings. In her view, she was justified nonetheless in proceeding, as she clarified with the respondent at the outset of the trial that this relief would be dealt with and gave him an opportunity to address the issue. She noted that the respondent did not provide information that he would be uninsurable due to his age or health. However, there is no indication that she addressed the propriety of allowing the petitioner to request relief specifically removed by order of the case conference judge, or why, despite this, it was appropriate to entertain the issue without an amendment to the pleading and in light of rule 70.31(3).

[76] The respondent was self-represented. Given what had occurred at the October CC and the November CC, he could reasonably expect that the issue of life insurance would not be dealt with at trial and that it was unnecessary to present evidence in this regard. I am sympathetic to his position that, had he known that the request for the policy was before the Court, he might have prepared for trial differently, marshalled evidence in advance regarding his health and insurability, and retained counsel. In my view, he should not be expected to deal with the issue on the spot or assumed to know to ask for an adjournment to do so.

[77] By stepping outside of the pleadings and ordering relief that had been removed by the case conference judge, the case conference regime was

undermined and the fairness of the process was compromised. It was an error to impose an obligation to secure the policy when that relief had been struck from the pleadings, contrary to rule 70.31(3), and when the respondent had an inadequate opportunity to prepare or adequately respond. The order requiring the respondent to obtain the policy cannot stand on this ground as well.

[78] For all of these reasons, I would allow the respondent's appeal and remove the provision requiring him to obtain the policy from the variation order.

[79] One final matter on the respondent's appeal. At the appeal hearing, the respondent indicated that, while he was opposed to the requirement that he obtain the policy, he was agreeable to having the child support order bind his estate for so long as the daughter is a child of the marriage. On this basis, I would add a provision, pursuant to section 74(8) of the *FLA*, that the duty and liability to pay support continue after his death and is a debt of his estate for so long as the period set by the order.

The Petitioner's Cross Appeal

[80] The petitioner's cross appeal raises the following issues:

- i) whether the judge erred in reconsidering her initial decision and changing the respondent's imputed income for the years 2017–2021 from \$100,000 to \$70,000; and
- ii) whether the judge erred in her award of section 7 expenses.

Did the Judge Err in Changing the Respondent's Income for the Years 2017-2021 from \$100,000 to \$70,000?

The Scope of a Judge's Discretion to Reopen and Reconsider an Unentered Order or Judgment

[81] While rule 70.31(2) of the *KB Rules* states that an order in a family proceeding is effective from the date on which it is pronounced, unless it provides otherwise, it is beyond dispute that judges are not *functus officio* or without further authority to change an order until the order is signed or entered. However, once an order is signed, there are limited circumstances in which it may be altered, including, for example, when there are errors from accidental slips or omissions or fraud (see *KB Rules*, rr 59.06(1)-(2), 70.34(1)-(2)); *Lantin v Seven Oaks General Hospital*, 2019 MBCA 115 at paras 22-27).

[82] In *Ridout v Ridout*, 2003 MBCA 61 at para 12 [*Ridout*], this Court, after noting the limited circumstances in which a signed order can be changed, went on to distinguish a judge's discretion to change an unentered order or judgment, stating that:

It is a different matter, however, where the judgment or order has been pronounced, but not signed and filed. Until the judgment or order has been formalized, the judge who pronounced it can hear further evidence and argument and change his or her mind as expressed in the earlier pronouncement. The limited circumstances permitting change, as envisioned by Rule 59.06, are not applicable to an application for rescission before the judgment or order is signed and filed[.]

[citations omitted]

[83] While *Ridout* held that a judge has the discretion to reconsider a matter after an order or judgment has been pronounced but before it has been signed, the extent or nature of this discretion—and when it should be appropriately exercised—was not examined in any detail. As I will shortly explain, relevant to this analysis are the common law principles this Court has outlined regarding whether to reopen an appeal once a decision has been rendered but before it has been formally entered.

[84] As Freedman JA outlined in *Willman v Ducks Unlimited (Canada)*, 2005 MBCA 13 [*Willman*], the rehearing of an appeal under rule 46.2(1) of the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, is to be “granted only in exceptional circumstances, where the interests of justice manifestly compel such a course of action” (at para 9). Examples of such circumstances meeting this heavy burden include where (*ibid* at para 10):

- 1) there is a patent error on a material point on the face of the reasons;
- 2) the appeal was decided on a point of law that counsel had no opportunity to address, and which point could not have reasonably been foreseen and dealt with at the hearing; or
- 3) the court has clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice.

[85] *Willman* continues to guide this Court on the high threshold for the rehearing of appeals given the public interest in the finality of litigation (see *Schrof v Schrof*, 2025 MBCA 71 at para 7; *7602678 Manitoba Ltd v 6399500 Manitoba Ltd*, 2025 MBCA 60 at para 9).

[86] Trial courts in Manitoba have applied this appellate standard to determine whether they should exercise their discretion to reopen and revisit a case before an order or judgment should be entered.

[87] In *Ostrowski v Weinstein*, 2022 MBKB 227 [*Ostrowski*], the plaintiff sought to reopen a motion for summary judgment awarded to the defendants to advance a new legal argument. Referencing *Ridout*, Greenberg J acknowledged that she had the jurisdiction to reconsider her decision but applied *Willman* in denying the request, finding that the motion to reopen to advance a new argument was akin to reopening an appeal. She stated (*Ostrowski* at para 9):

[T]he plaintiff on this motion to re-open is not seeking to introduce new evidence. Rather he is seeking to advance a new legal argument. So decisions of our Court of Appeal as to when it is appropriate to re-open an appeal are apt. Those decisions make it clear that a re-hearing will be granted only in exceptional circumstances where the interests of justice manifestly require it. In *Willman v. Ducks Unlimited (Canada)*, 2005 MBCA 13 (CanLII), Freedman J.A. provided some examples of such circumstances (at para. 10)[.]

[88] Ultimately, Greenberg J held that the plaintiff failed to meet the significant standard for proving a miscarriage of justice as described by this Court in *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 53 [*Samborski*], i.e., that a “miscarriage of justice connotes a result that is perverse and fundamentally wrong” (at para 23, citing with approval *Rémillard v Rémillard*, 2015 MBCA 42 at para 22; see also *College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 94 at para 15).

[89] More recently in *Campbell v Brar*, 2024 MBKB 149 [*Campbell*], prior to the entering of an order, one of the defendants requested the Court to reopen and reconsider a decision ordering him to pay costs. In denying the motion, Edmond JA (*ex officio*) adopted the approach taken in *Ostrowski* and relied on this Court's decision in *Abraham v Wingate Properties Limited*, [1986] 2 WWR 568, 1985 CanLII 3680 (MBCA) [*Abraham*] and *Willman* to guide his analysis. In *Abraham* at 569-70, this Court stated:

[T]his court will not in the ordinary course grant an application for reconsideration unless there is a patent error on the face of the reasons delivered or a point for argument not raised at the hearing of the appeal and which arises out of the judgment delivered, which point could not reasonably have been foreseen and dealt with at the original hearing.

[90] In *Campbell*, Edmond JA denied the defendant's request, finding that he did not demonstrate any of the circumstances described in *Abraham* or *Willman* to justify a reopening and reconsideration.

[91] While there are variations in how other appellate courts have specifically articulated the scope of a trial judge's discretion to reconsider an unentered order or judgment, similar themes are invoked. While the judge's discretion is broad, it must be exercised sparingly and only in rare or exceptional circumstances where it is required in the interests of justice.

[92] In *Bajwa v Habib*, 2020 BCCA 230, the British Columbia Court of Appeal described this discretion as broad, to be exercised rarely and only where the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice. Examples include where the original judgment contains material errors, evidence has been overlooked or

misconstrued, the law has been misapplied, or the reasons for judgment failed to address an argument advanced at trial (see *ibid* at para 48).

[93] In *SS&C Technologies Canada Corp v The Bank of New York Mellon Corporation*, 2024 ONCA 675 [SS&C], leave to appeal to the SCC granted on an unrelated issue, 41543 (24 April 2025), the Ontario Court of Appeal addressed a trial judge's discretion to reconsider and change a judgment before it has been formally entered. On the applicant's motion to reconsider, the trial judge altered his unentered judgment on the basis that he had overlooked the applicant's claim against the respondent BNY and corrected his judgment to find BNY liable (see paras 68-78).

[94] Relying on its previous decision in *Montague v Bank of Nova Scotia*, 2004 CanLII 27211 (ONCA), the Court held that trial courts have a broad discretion to rectify outcome-determinative mistakes that have been made in their order before they are entered where making such changes would better serve the ends of justice. The Court stated (SS&C at para 70):

Montague permits trial judges to change their orders if they overlook outcome-determinative matters: at paras. 21, 38. By focusing on whether trial judges have overlooked a point of law, argument, or fact, this test discourages litigants from rearguing points the trial judge considered and rejected or raising new arguments or facts that they could have raised earlier: *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 942, 6 C.P.C. (8th) 33, at para. 8, leave to appeal refused, [2016] S.C.C.A. No. 173; *Mujagic v. Kamps*, 2015 ONCA 360, 125 O.R. (3d) 715, at para. 13, leave to appeal refused, [2015] S.C.C.A. No. 330. Likewise, because the overlooked point must be outcome-determinative, this test deters litigants from focusing on lesser errors that would not change the result: *First Elgin Mills Developments Inc. v. Romandale Farms Ltd.*, 2015 ONCA 54, 381 D.L.R. (4th) 114, at para. 9, leave to appeal refused, [2014] S.C.C.A. No. 442.

[95] In my view, where a motion to reopen does not involve a motion for fresh evidence, the exercise of a trial judge's discretion to reconsider and change an unentered order or judgment should be assessed according to the standard set by this Court for reopening an appeal. To reiterate, as outlined in *Willman* and applied in the jurisprudence that followed, a rehearing should only be granted in exceptional circumstances where the interests of justice manifestly compel such a course of action. This standard is similar to that used by other appellate courts in reviewing a trial judge's discretion to reconsider an unentered order or judgment and, therefore, can be appropriately applied in the lower court context. As well, its suitability is bolstered by the fact that Manitoba trial courts are already applying that standard when addressing this issue. However, to clarify, where the motion to reconsider an order or judgment seeks to admit new evidence, additional considerations relating to the assessment of the evidence, its impact on the result and due diligence will apply (see *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2021 MBQB 101 at para 53; *Alberta (Child, Youth and Family Enhancement, Director) v BM*, 2009 ABCA 258 at paras 11-12; *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at para 61). Since a motion of this kind is not the subject of this appeal, no further elaboration is necessary and it is better left for another day.

Application to This Case

[96] Here, under the rubric of “settling the terms of an order”, the judge allowed the respondent to re-argue that her initial decision to impute income at \$100,000 should be revisited and she changed her decision as a result.

[97] To recap, the issue of revisiting the judge's previous decision regarding the imputation of the income first appears in a motion brief filed by the respondent's lawyer on June 10, 2024, for a hearing set for June 14 to settle the terms of the order. In that brief, the respondent argued that there was no basis for the judge's decision imputing income of \$100,000. At the June hearing, the judge described the matter before the Court as "settling the terms of the order".

[98] To begin with, the respondent's request that the judge revisit her decision regarding the imputation of income was not the settlement of the terms of an order but rather a request to reopen and reconsider a decision made after full submissions by both parties, but before the order was finalized. Unfortunately, there was no motion to reopen by the respondent and the fact that this was such a request was not appreciated by the judge. As a result, she allowed further argument on the issue and changed her decision without addressing whether it was appropriate to do so. She did not consider that a reopening is exceptional and meant to remedy what might otherwise be an injustice. It is not an opportunity to re-argue a case (see *Hancock v College of Registered Nurses of Manitoba*, 2021 MBCA 59 at para 14).

[99] In my view, the judge erred in law by failing to consider whether a reopening was justified in the circumstances and exercising her discretion without regard to proper legal principles.

[100] Had she applied the correct standard—reconsideration only in exceptional circumstances where the interests of justice require it—it is difficult to see how the reopening could be justified. The respondent's brief, in which he asserted that the November decision regarding the imputation of

income should be changed, was comprised largely of re-argument about the evidence the petitioner presented at the November trial and criticism of the quality of that evidence. It was essentially an attempt to recast the points already made at the November hearing as to why the evidence was insufficient to establish any imputation beyond the \$40,000 in the final order.

[101] While I appreciate that, upon reflection, the judge believed her revised decision was more justifiable, her reason for changing her decision is not really explained. In any event, there was no patent error regarding the imputation of the respondent's income on the face of the judge's November reasons, nor was the respondent deprived of the opportunity to address the issue. The judge did not clearly overlook or misapprehend any aspect of the evidence or the law surrounding the imputation of income in a significant respect so as to risk a miscarriage of justice (see *Willman* at para 10). Having regard to the meaning of miscarriage of justice, as noted in *Samborski*, that threshold is not met. The reduction made to the respondent's income was not warranted according to this test.

[102] The effect of, in essence, permitting the respondent to argue his case twice distorted the trial process. Furthermore, the fairness of the process was additionally compromised as the petitioner had inadequate notice and only a few days to respond and address this issue.

[103] As this was a material error that caused a substantial wrong or miscarriage of justice, the judge's decision imputing the respondent's income at \$70,000, arrived at erroneously through a flawed process, cannot stand. I would therefore restore the judge's initial order imputing the respondent's retroactive income for the years 2017–2021 to \$100,000. To be clear, in doing

so, I am not reviewing the judge's decision to impute income at \$100,000 on its merits. Such a review would require applying the narrow scope of appellate review of support and custody orders (see *Horbas v Horbas*, 2020 MBCA 34 at para 15) and properly be the subject of a different proceeding. This is not the subject of the cross appeal, which concerns whether the judge was entitled to change her decision.

Section 7 Expenses

[104] The petitioner takes issue with the judge's order relating to section 7 expenses in several respects: failing to include the 2017 fitness and arts expense of \$1,000 and the 2023 \$105 for the daughter's driver's license and road test fees as shareable expenses, and only awarding the retroactive shareable health expenses from 2022 and not from 2017.

[105] In my view, there is no basis for appellate intervention.

[106] As for the fitness and arts expense of \$1,000, the judge originally included this expense in the variation order and then removed it after it was challenged by the respondent. She ultimately accepted the respondent's position that the petitioner had failed to prove that this expense was extraordinary, necessary and reasonable. It is true that the judge similarly reconsidered this issue under the rubric of settling the terms of an order without regard to principles that govern her discretion to revisit a decision. However, had she applied the proper standard, she would have been justified in removing this section 7 expense. This is because, when she first accepted this expense, it was simply based on the petitioner's indication that this was a line item on her income tax return, without any evidence that this expense was extraordinary, necessary or reasonable as required (see the *Guidelines*, s 7(1)).

Therefore, this could be characterized as an exceptional circumstance in which the interests of justice would manifestly require reconsideration (i.e., overlooking the law in a significant respect with a serious risk of a miscarriage of justice).

[107] Regarding the respondent's contribution to health expenses, at the March hearing, the judge clarified that this was to be on a go-forward basis beginning from 2022 and not retroactive to 2017. It was open to her to award the respondent's contribution to these expenses in that way. I am not persuaded that there is any basis for interference.

[108] Similarly, the judge was entitled to view the driver's license and road test fees totalling \$105 (essentially added by the petitioner to her matrix after trial) as not extraordinary, necessary, and reasonable, and therefore not shareable.

[109] Therefore, I would dismiss the cross appeal as it relates to the section 7 expenses.

Conclusion

[110] In summary, I would allow the respondent's appeal and strike the provision in the variation order requiring him to obtain the policy and add a provision making the child support order binding on his estate pursuant to section 74(8) of the *FLA*. I would allow the petitioner's cross appeal regarding the judge's imputation of the respondent's retroactive income from 2017 to 2021 and restore the judge's initial decision, which imputed income at \$100,000 for those years. I would dismiss the petitioner's cross appeal of the judge's decision in relation to the section 7 expenses.

[111] As there is divided success in these appeals, each party should bear their own costs.

Spivak JA

I agree: _____ Mainella JA

I agree: _____ Turner JA