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COURT OF QUEEN'S BENCH OF MANITOBA
(FAMILY DIVISION)

BETWEEN:

MARY NICOLE BRITA KRUK,	)	Dean Kropp
	)	Emily Szeryk
petitioner,	)	for the petitioner,
	)	
-and-	)	
	)	
	)	
ROBERT DALE KRUK,	)	Jamie L. Turner
	)	Opeyemi Akindiose
respondent.	)	for the respondent,
	)	
	)	JUDGMENT DELIVERED:
	)	January 31, 2025

THOMSON J.

INTRODUCTION

[1] This is a case which has taken a very long time to arrive at trial, and is possessed of a number of other quite unusual features, as well.

[2] The parties to this litigation married on December 30, 2002, and separated some nine years and three months later (March 23, 2012), after having three children together, now aged 19, 17 and 13 years. The children have been almost exclusively with the petitioner since the date of separation.

[3] The petitioner is 51 years old, is not employed outside the home, and has had only a single period of remunerated employment since her marriage (a part-time accounting job of about a three-month duration in 2017). She currently is drawing CPP disability insurance benefits, having established her eligibility effective January 2022.

[4] The respondent is 56 years of age, and a medical doctor who has practiced in Carman, Manitoba, since shortly before the parties' marriage. He has throughout maintained a medical corporation, in which he holds all issued shares, Robert Kruk Medical Corporation ("professional corporation" or "medical corporation") and, since 2017, has operated a small "bed and breakfast" in Carman (Kruk Castle Bed and Breakfast).

THE ISSUES

[5] The issues which the parties ask the court to determine are:

(i) partition and sale of the former family home in Carman, Manitoba;

(ii) occupation rent claimed by the petitioner from the respondent respecting that home commencing March 23, 2012 and on-going;

(iii) income of the respondent for support purposes;

(iv) basic child support for the three children adjusted retroactively to December 31, 2017, and on an on-going basis;

(v) sharing of the accumulated s. 7 extraordinary expenses in an agreed-upon quantum, and on-going;

(vi) quantum of the equalization payment due to the petitioner from the respondent, the discrete contest being the appropriate discount to be applied to the medical corporation share valuation for tax purposes;

(vii) income of the petitioner and, incidental to that issue, whether she is and has been disabled from employment;

(viii) spousal support claimed by the petitioner adjusted retroactively from the date of separation, and on-going;

(ix) petitioner's claim to interest on all amounts found to be due to her in this judgment;

(x) security for payment of future support by the respondent through his placement of a contract of life insurance identifying the respondent as beneficiary;

(xi) binding of the respondent's estate to pay the future support ordered; and,

(xii) divorce.

BACKGROUND

[6] After they wed at the end of 2002, the parties lived together in Winnipeg in a house they had purchased together from the petitioner's father on Barker Boulevard, but they soon separated. After an initial period living at his parents' home in Carman (where earlier that year he had established his medical practice), the respondent moved into a house in Carman, purchased in joint title

with the respondent in August 2003 (the former family home). The petitioner joined him there the following fall when it seems they reconciled (and the Barker Boulevard home was sold), but the parties separated again within weeks.

[7] The evidence was less than precise in a number of respects regarding the location of the petitioner's residence and the parties' living arrangements from that point forward. The respective testimony of the parties was frequently inconsistent. It seems for a time from about late September 2004, the petitioner lived in subsidized housing in north Winnipeg, including when she filed her divorce petition in December 2004, and when the parties' first child was born in early 2005.[1]

[8] On July 12, 2005, the petitioner's request for interim relief made its way to the court and an order was pronounced, terms of which obliged the respondent to pay support, both child ($2,136/m) and spousal ($2,000/m), commencing July 15, 2005, based on annual total income of the respondent of $300,000. (The order also addressed parenting time between the parties, which was not an issue in this trial).

[9] After that interim support order was made, in the late summer of 2005, the petitioner moved with the child to a townhouse leased in her father's name in south Winnipeg. It seems that the parties (again) reconciled soon after that, and she moved to Carman and lived with the respondent in what became the former family home. She says she lived there off and on for several years; the

[1] A case conference memorandum dated March 17, 2005, had identified their agreement to DNA testing with respect to that child.

respondent says she resided there with the children for very short spells, and maintained a primary residence with the children elsewhere.

[10] While the evidence I received was somewhat disjointed and murky as regards the parties' various separations and reconciliations, it seems not much turns on it as a hearing before the associate judge proceeded before this trial, and a recommendation was made, and later confirmed, that the date of their final separation, as noted above, was March 23, 2012 (see: Exhibit No. 18 - reasons for decision of the associate judge, dated March 21, 2023, and Exhibit No. 19 - reasons for decision of MacPhail J. at 2024 MBKB 163).

[11] A remarkable feature of this case is that, while the associate judge determined (and I agree) that the parties reconciled sometime after that interim support order of July 12, 2005, the respondent commenced making, and continued to make, support payments under the order for the subsequent 19 years - from July 15, 2005 to date.[2] Each party signed and filed annual income tax returns from 2005 onwards with the corresponding inclusions and deductions from income to account for the support payments, and with declarations as to their marital status (as "separated" or "divorced", in each of the years before they separated finally).

[12] This lengthy episode of misleading the tax authorities reflects poorly on the parties' integrity, and negatively colours my assessment of the credit to be

[2] The petitioner testified it was paid initially through MEP, then by cheque to the petitioner, and later through direct deposits into her personal bank account; the records of MEP (Exhibit No. 26), which I prefer, contradict her, indicating all payments came through MEP).

attached to each party's testimony in this proceeding, where there is an absence of corroborating evidence.

[13] Outside the terms of that interim order, with the birth of their second child in 2007, the respondent then increased the quantum of child support he was paying to the petitioner correspondingly. He did the same in 2010 when their youngest child was born, and says he did this each time on the advice of his then legal counsel.

[14] These peculiar aspects of the parties' conduct (which I re-emphasize have no bearing on the already judicially determined date of separation) is mentioned not simply as a curiosity; it has a bearing on the ultimate quantification of any child and spousal support due from the respondent, and is also a piece of the broader evidence as to the parties' unusual conduct of their marital and financial affairs for the analysis of the spousal support claim.

[15] It is evident that the parties' almost 10-year marital relationship was frequently conflictual and, as noted, there were a number of periods of separation at minimum in the early and middle years, or perhaps throughout - they seem to have adopted a living arrangement which had features of both an unconventional marriage (they purchased and/or maintained separate primary residences, and spent only sporadic periods of time with each other), and a typical "traditional" marriage (the petitioner was near-exclusively responsible for child-rearing, while the respondent generated all of the family income). The evidence is that throughout their marriage they maintained separate bank

accounts. The support payments made by the respondent pursuant to the 2005 interim order (and as later increased by him with the birth of their two other children) were deposited to the petitioner's benefit at her financial institution(s), and she used the funds for herself and the children. In addition, she says (and the respondent did not seriously dispute), from time to time, he paid for meals out, holiday trips, and the like, but otherwise they paid their own daily living expenses.

[16] Each seems to have also shouldered individually the expenses associated with their separate residences and properties. The petitioner bought and paid for a cottage, without the respondent's knowledge, in 2007, during which time it appears they were again separated. And with her father in 2008, unknown to the respondent, the petitioner bought a house on Guildford Street in Winnipeg (where she and the children were residing as at the date of final separation in 2012).[3] She later sold her Guildford Street home, again unknown to the respondent at the time.

[17] Regarding the income of the respondent during the marriage and after separation, the evidence identifies that his total annual income over the years has been generated by both his medical practice and through the return on investments he has made, within his professional corporation.

[3] Which is also shown as her address in a case conference memorandum dated October 31, 2008 (in which it is stated, "The parties would like to reconcile. They agreed that they would explore counseling to move forward on this issue.").

[18] When the parties married, the petitioner had a checkered academic history, and her employment experience seems to have been limited to periods managing her parents' donut shops in northwestern Ontario. After the parties wed, she became a "traditional stay-at-home wife" albeit, as discussed, I find she and the children rarely resided together with the respondent.

[19] The petitioner never worked outside the home (save for a three month period in 2017 mentioned above). In addition to not being employed, she has not since separation taken any further training or educational upgrading nor sought employment in any form, and variously cited in her testimony and in evidence read in from her examination for discovery; her lengthy absence from the job market; the onset of her illness; and, her parenting responsibilities, as the reasons.

[20] Regarding her health, there is no issue but that the petitioner has experienced symptoms associated with a diagnosis of seropositive rheumatoid arthritis since approximately 2006, and side-effects caused by the medications prescribed to treat this condition. She has received treatment from different rheumatologists over the years. The petitioner testified that her condition has worsened incrementally, and certain of the medical records submitted at trial seem to confirm this. She applied for disability benefits through CPP in February 2022, and was ultimately "approved" effective January 2022.

[21] I turn now to my analysis and decision respecting each of the trial issues enumerated at paragraph 5 above.

ANALYSIS AND DECISION

(i) Partition and sale

[22] The petitioner seeks an order for partition and sale of the jointly owned former family home in Carman, in which the respondent resides. The respondent does not object, and there is no dispute between them as to the property's value. He says he has always preferred to purchase the petitioner's equity in the home than for it to be sold, but for reasons beyond my reach they have failed to arrive at an agreement for this to happen. The requested order is granted, and the petitioner shall have carriage of the sale, to be overseen by an associate judge.

(ii) Occupation rent

[23] The petitioner called expert evidence at trial to attempt to bolster her claim to occupation rent from the respondent respecting the jointly owned Carman property. That claim is not made to counter any demand made by him to an accounting and contribution for maintenance of the property, but stands alone. The respondent has continually occupied the former family home since before separation.

[24] The petitioner's request for rent triggers the court's assessment of the sundry considerations in choosing whether to exercise its discretion and grant that relief. In the text *Canadian Family Law*, 8th ed. (Toronto: Irwin Law, 2020), the co-authors Payne and Payne, at pp. 764-765, identify relevant factors

distilled from the case law in determining whether an order for occupation rent is appropriate, which I find helpful:

> - the conduct of the non-occupying spouse, including the failure to pay support;
> - the conduct of the occupying spouse, including the failure to pay support,
> - delay in making the claim;
> - the extent to which the non-occupying spouse has been prevented from having access to his or her equity in the home;
> - whether the non-occupying spouse moved for the sale of the home and, if not, why not;
> - whether the occupying spouse paid the mortgage and other carrying charges of the home;
> - whether the children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support;
> - whether the occupying spouse has increased the selling value of the property; and
> - ouster is not required, as once was thought in some early decisions.
>
> The following factors have been identified by the Ontario Court of Appeal as consistently taken into account where occupation rent is sought:
>
> - the timing of the claim for occupation rent;
> - the duration of the occupancy;
> - the inability of the non-occupying spouse to realize on his or her equity in the property;
> - any reasonable credits to be set off against occupation rent; and
> - any other competing claims in the litigation.

(See also: Johnston J.'s comments in ***England v. Nguyen***, 2013 MBQB 196.)

[25] I decline to make the requested order in the particular circumstances of this case for the following principal reasons.

[26] Often the expenses of maintaining the former family home are presumed to offset any claim to occupation rent. In this case, the respondent has, without any exception, paid every expense associated with his occupation throughout (mortgage instalments, repairs, maintenance and property taxes), and neither

received nor sought contribution from the petitioner. Fundamental to assessing the fairness of her claim, the property has certainly increased in value over the material time period, and the petitioner shall share equally in that appreciation, though having contributed nothing.

[27] In the unique circumstances of this case, the evidence seems clear that the parties also segregated their financial lives before separation, and both enjoyed substantial growth in their respective net worth in the years after, in addition to the increase in value of the former family home.

[28] I believe it also of significance that the petitioner, before separation and after, always maintained her own independent residence with the children, and has been in receipt of substantial child and spousal support from the respondent (albeit, in disputed amounts). Moreover, her connected (and, as will be disclosed herein, successful) claim to retroactive adjustments to that support under the ***Divorce Act***, R.S.C., 1985 c. 3 (2nd Supp.) covers the same period as that for which she asserts entitlement to rent under the provincial statute, and in my view therefore militates further against this claim.

[29] In all these circumstances, that claim is dismissed.

(iii) Income of the respondent for support purposes

[30] Mr. Michael Holmes, CA, CPA, CBV, FRM, was retained by the petitioner to offer expert opinion evidence with regard to this issue, and also to the matter of determination of the quantum of the equalization payment due from the

respondent to the petitioner. He prepared two discrete reports which were filed as exhibits, and he testified at trial.

[31] Respecting his first report of September 9, 2024 (Exhibit No. 7), Mr. Holmes' engagement by the petitioner is stated to:

> … provide assistance in the calculation of the annual income for support purposes ("Guideline Income") of Dr. Robert Kruck ("Dr. Kruck") in an Expert Report ("Report") for the years 2012 to 2023 (the "Period under Review"). This includes a review of financial information relating to the interests held, directly or indirectly, by Dr. Kruk in the Dr. Robert Kruk Medical Corporation ("RKMC") and Kruk Castle Bed and Breakfast ("KCBB" collectively, the "Businesses").

[32] Mr. Holmes' scope of review included discussions with the petitioner, review of the respondent's personal income and corporate tax returns, and the financial statements of the medical corporation. No particular issue is taken by the respondent with the approach or methodology employed by Mr. Holmes.

[33] Mr. Holmes identified that for purposes of his report, "Guideline Income" is determined according to the Federal Child Support Guidelines, SOR/97-175, and outlined the steps taken by him, and the adjustments made, to arrive at his final calculations:

> 29. To calculate Guideline Income pursuant to the guidance provided within the guidelines, we performed the following:
>
> a. Summarized sources of income as reported in the personal income tax returns of Dr. Kruk (Schedule 1) in accordance with Section 16 of the Guidelines;
> b. Made adjustments as appropriate according to Schedule III of the Guidelines; and,
> c. Made adjustments as appropriate according to Section 17 to 20 of the Guidelines (such as considering the pre-tax income of the Business, redundant items, and payments to related parties).

> 30. As they relate to Dr. Kruk's tax return, the sources of income for 2012 to 2023 are summarized in Schedule 1, and consist primarily of employment income and dividends from RKMC.

[34] Mr. Holmes' final income conclusions are as set out below:

Year	Estimated annualized income for FCSG purposes
2012	$357,000
2013	$787,000
2014	$826,000
2015	$628,000
2016	$772,000
2017	$693,000
2018	$607,000
2019	$504,000
2020	$430,000
2021	$519,000
2022	$387,000
2023	$383,000

[35] The dispute between the parties concerning Mr. Holmes' conclusions respecting the respondent's income for support purposes is quite narrow, and essentially lands on two distinct points:

(i) the adjustment of the pre-tax net income of KCBB by adding back CCA in respect of real property based on Schedule III, paragraph 11 of the Guidelines, for the years 2018 to 2023, inclusive; and

(ii) the adjustment made to exclude the tax benefit for the salary of the respondent's "investment portfolio bookkeeper", who manages his interactive brokerage account, where his investment portfolio is held.

[36] Regarding the first point, the petitioner's submission is that the respondent's operation of KCBB has been and remains a money-losing proposition which she ought not to have to indirectly subsidize, and that his investment in and utilization of the property for KCBB is totally unreasonable.

[37] For his part, the respondent emphasizes that when he purchased the property it was then being utilized to operate a "bed and breakfast" business, and that his continuation of that utilization of the property for that purpose is sensible. He believes a corner towards profitability will be turned by him at some point fairly soon.

[38] While the respondent's original plan to operate a bed and breakfast on the property may have been plausible, the consistent unfolding reality of its year-after-year unprofitability cannot be ignored. His testimony was hopeful, but empty, as regards there being reason to truly believe improvement in the bottom line of the operation is imminent, and I expect he ought to have come to terms with that reality at least a couple of years ago.

[39] The petitioner's request, and the premise upon which Mr. Holmes proceeded, is that the respondent's income be calculated excluding the losses claimed for KCBB in every year since purchase of the property. In the circumstances above, I believe this to be an over-reach. It seems fairer to me that some allowance ought to be afforded the respondent and to his optimistic attitude, at least for a period immediately following purchase of the already operating business. On this point, I so order that the respondent's income be

calculated in accordance with Mr. Holmes' report, subject to those deductions being permitted up to and including 2021, but not thereafter.

[40] Regarding the second point, the significant growth in magnitude of the respondent's investment portfolio was a touchstone for almost all of the petitioner's submissions in this case, and she has shared and, by this decision, shall share further, in that growth. Despite her efforts to diminish the qualifications of the respondent's "investment portfolio bookkeeper", the bookkeeper's business acumen (utilizing software designed by her predecessor account advisor) seems to have been demonstrated by that same growth. I accept the respondent's testimony that he has neither the skill nor the time to manage his accounts; that it was reasonable to engage the bookkeeper, and that he has remunerated the petitioner reasonably.

[41] Therefore, I order that the calculation of his total annual income for support purposes in each requisite year be determined as set out in Mr. Holmes' report, but subject to reversal of the adjustment he made for this expense, and with the further adjustment above regarding the property used for KCBB's operations.

[42] Revising Mr. Holmes' calculations accordingly in these two respects (in the years 2018 to 2023, inclusive), I determine that the respondent's total annual income for support purposes is as follows:

Year	Total Income
2012	$357,000
2013	$787,000
2014	$826,000

2015	$628,000
2016	$772,000
2017	$693,000
2018	**$565,117**
2019	**$396,740**
2020	**$329,140**
2021	**$451,882**
2022	**$348,351**
2023	**$344,245**

[emphasis added]

(iv) Basic child support

[43] It is agreed by the parties that the setting of the respondent's child support obligations under the Child Support Guidelines follows directly from the facts of their historical and current parenting arrangements, and from the judicial determination of his total annual income for support purposes, as set out above.

[44] There is no dispute that all three of their children were and remain "children of the marriage" for support purposes, nor as to the amounts paid to date by the respondent and the credit he ought to be allowed, for purposes of making the appropriate retroactive adjustments now.

[45] The petitioner seeks an order for payment of a lump sum amount to achieve that adjustment of retroactive child support, which is not resisted by the respondent, and which I am prepared to grant, predicated of course on my findings as to his total annual income in each of the requisite years, to the close of 2023, as adjusted by me above. Counsel shall make the final precise calculations, as they agree.

[46] In final submissions, the petitioner strived for the setting of the respondent's income for on-going child support (that is, from January 1, 2024) at about $430,000, being the average of his income for the preceding three years (2021-2023), according to Mr. Holmes' report (before the revisions I have made above). The respondent suggested a more realistic figure based on the evidence presented at trial is about $300,000. These competing income figures render on-going monthly child support payments of about $6,800 or of about $4,900.

[47] This dispute as to the quantum of on-going child support payable by the respondent arises principally from the perceptible, but undramatic, decline in the respondent's income over the last few years, which he attributes (reasonably in my view) to his professional work pace slowing down with age and with minor health issues. I think it fair to set his income at $360,000 (which is only slightly below the three-year income average [2021-2023] of my income findings, at paragraph 42 above), for 2024 and ongoing, and the commensurate Table child support is ordered payable, commencing January 1, 2024, being $5,744 per month.

(v) Sharing of s. 7 extraordinary expenses

[48] There is no issue between the parties concerning their respective contributions to s. 7 extraordinary expenses, nor the total of such expenses in the time period of relevance. There shall, therefore, be a pro-rata sharing of those expenses which are agreed to be outstanding currently ($20,419.67), and on-going (with terms suggested by counsel including that such reasonable

expenses be incurred as they may agree, with the respondent to pay his contribution to same within 30 days of receipt from the petitioner of receipts or statements for same). That proportionate sharing shall be calculated based upon the total income finding for support purposes I have made respecting the respondent above, and for the petitioner, as will follow.

(vi) Quantum of the equalization payment

[49] The parties are agreed respecting the quantum of the equalization payment due from the respondent to the petitioner ($597,867.43), save for an adjustment to the valuation of the medical corporation (effectively, the amount of any discount to be applied for tax purposes). It is also agreed that the total value of the shares in the respondent's professional corporation is notionally equal to the value of the respondent's total investments, contained in his interactive brokerage account.

[50] Mr. Holmes' second report dated September 10, 2024, is stated to have been prepared in response to a request from the petitioner's counsel "to provide a calculation of the latent taxes in Dr. Robert Kruk's Medical corporation (the "Company") as at March 23, 2012 ("Date of Separation")", which he determined to be $8,199. He further indicated:

> Counsel has instructed us to use the following assumptions:
>
> 1. The Company is not expected to be liquidated at the Date of Separation as Dr. Robert Kruk plans to use the Company as a retirement vehicle and draw down the securities from the Company at some point in the future; therefore, we have not determined the taxes on the disposal of the shares of the Company.

> 2. The long-term investment fair market value is based on the statement from the Interactive Brokers Canada Inc.
>
> [emphasis added]

[51] The respondent disputes Mr. Holmes' conclusion and asserts that the fundamental error in his report is his failure to account for the certain tax consequences (sometimes referred to in case law as disposition costs) which will accrue for him upon his withdrawal of funds from his professional corporation upon his retirement from practice.

[52] Petitioner's counsel defends Mr. Holmes' report and argues that as it is not known when the respondent will retire and begin to draw down funds from the corporation, no account whatsoever ought to be taken of the disposition costs. He argues that this categorical and inflexible approach is supported by his interpretation of the principles set out in appellate case law. I observe that this type of submission is most often made by counsel in circumstances involving businesses operated through an incorporated entity where it is not necessary to dispose of the shares or assets in order to satisfy an equalization payment, as was the case in ***Rick v. Brandsema***, 2009 SCC 10:

> [55] In my view, the trial judge was entitled to exercise his discretion by not making the deduction. In circumstances where it is not clear when, if ever, a property will be sold and taxes incurred, courts have held that entirely speculative disposition costs need not be taken into account in calculating an equalization payment. This was explained by Davies J. in *Russell v. Russell*, 2002 BCSC 1233, [2002] B.C.J. No. 1983 (QL), at para. 107: "[A spouse] should not suffer a present diminution of [his or] her asset base in circumstances where [the other spouse] may never suffer a corresponding and quantifiable loss" (see also *Dowling v. Dowling* (1997), 43 B.C.L.R. (3d) 59 (C.A.); *Starkman v. Starkman* (1990), 75 O.R. (2d) 19 (C.A.); *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.)).
>
> [emphasis added]

[53] My understanding of the direction given by the Supreme Court in ***Rick***, however, departs from that of petitioner's counsel. I believe the principles in play are not to be wielded as blunt instruments, but require the court to engage in a contextual analysis, having regard to the specific evidence received by it.

[54] In that regard, in the Ontario appellate decision in ***Sengmueller v. Sengmueller***, 1994 CanLII 8711 (On CA), cited above by the Supreme Court in ***Rick***, McKinlay J.A. stated for the court:

> From the *McPherson* [*McPherson v. McPherson*, (1988), 13 RFL(3rd) 1 (Ont CA)] case I glean three rules to apply in all cases:
>
> (1) Apply the overriding principle of fairness, i.e., that costs of disposition as well as benefits should be shared equally;
>
> (2) Deal with each case on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day; and
>
> (3) Deduct disposition costs before arriving at the equalization payment, except in the situation where "it is not clear when, if ever" there will be a realization of the property.
>
> [emphasis added]

[55] Before me, the respondent testified, without serious challenge from petitioner's counsel in cross-examination, and as explicitly acknowledged by Mr. Holmes in his report, that the medical corporation's overarching purpose from its inception to date, is to perform its role as a tax vehicle for his retirement planning. The use of such professional corporations for this purpose is commonplace with individual practicing doctors, dentists and lawyers.

[56] Mr. Holmes agreed in cross-examination that the respondent would be unable to withdraw funds from his professional corporation upon retirement without attracting tax consequences (except, perhaps, some relatively small amount from his "capital dividend account", a subject to which I will shortly return).

[57] As such, the respondent asserts his holdings in his corporation are analogous to funds held in an RRSP or other similar retirement fund (which I understand are routinely agreed to be discounted by 30 per cent in Manitoba Family Division property proceedings – and which discount was actually applied by the parties here to the benefit of the petitioner on her RRSP investments), and will attract taxation when withdrawn. The respondent testified in what I found to be a candid and credible fashion in this area; he has no fixed retirement date in mind at 56 years of age, but says his stamina and health are in decline, and his job as a rural physician is extremely demanding. Leaving practice is an inevitability, he says, and is not speculative; it ought properly to be accounted for in valuing the corporation in these proceedings.

[58] Counsel were both unable to direct the court to any Manitoba case law addressing this discrete type of dispute. However, the dicta I have noted above and the evidence I received (about the nature of the utilization of the professional corporation of the respondent before and after separation, and what is planned when the respondent leaves practice), tend to support his submission.

[59] That we are dealing here with a professional or medical corporation of a physician being utilized for retirement planning and tax purposes, and not shares in a more common-place business operation, is consequential in my view. To address the particular statutory regime in the Province of New Brunswick (which distinguishes non-marital business assets from marital property), their Court of Appeal adopted a "two-step approach" in ***Milton v. Milton***, 2008 NBCA 87, for the "classification" of a professional corporation. As in the case before me, the party there was a medical doctor, and the court's analysis in step one determined that the corporation:

> [27] … in this case is not used principally in the course of a business since there is no entrepreneurial aspect to it; it is used to defer the payment of income tax and is, therefore, like a first cousin of the RRSP. Having regard to the intention, statements, and actions of the parties it has been established, and the trial judge so found, that the retained earnings were used or enjoyed for shelter or transportation or for household, educational, recreational, social or aesthetic purposes by both spouses or one or more of their children while the spouses were cohabiting. Therefore, the professional corporation is a family asset and, consequently, marital property subject to an equal division. In light of this determination, there is no need to proceed to the second step of the analysis.
>
> [emphasis added]

[60] The respondent urges upon me the adoption of a like analysis; that the court conclude similarly here that the bulk of the evidence supports the characterization of close affinity between an RRSP (being valued with a 30 per cent tax discount, as is typical in Manitoba cases) and the shares in the respondent's professional corporation.

[61] I am prepared to accept that submission, and reject that aspect of the analysis of Mr. Holmes, but with a proviso. The evidence to which I am attentive

arose in Mr. Holmes' cross-examination, and relates to the possibility that the respondent may have some amount of funds in future available to him which he may withdraw from his professional corporation without tax liability, depending on the then balance in his capital dividend account.

[62] The existence of that account and the ability to withdraw funds in this manner are not speculative concepts; the respondent has done so in the past, prior to separation. His capital dividend account, as at the end of 2012 (the year of separation) was about $2,000, and had grown to $34,000 by the end of 2023. I received no evidence (expert or otherwise) from him as to what that account balance may be in future, in order to more precisely calculate the benefit of such withdrawal.

[63] However, judging from the circumstances of his prior withdrawal and the testimony of Mr. Holmes, the shift in the balance in the last 12 years, and his age, I doubt it will form a significant amount relative to his total holdings, or gain him any substantial tax benefit. However, I will still account for it (as I believe it is fair to do so), and in so doing err in the petitioner's favour (again, as fairness, and the respondent's onus, require) by reducing the applicable discount from 30 per cent to 20 per cent. The equalization payment due to the petitioner shall be adjusted accordingly.

(vii) Income of the petitioner/disability

[64] The foundational issue in determination of the petitioner's income (for proportionate sharing of s. 7 expenses, and as an aspect of the adjudication of

her spousal support claim) arises from her indisputable medical condition, summarily described earlier in these reasons. The petitioner bears the onus to establish, as she claims, that she is and has been for years totally disabled from any form of remunerative employment. When pressed, she took the position at trial that her total disability commenced January 1, 2010.

[65] The petitioner testified at trial as to her illness and the physical limitations she has experienced over time, and she filed voluminous medical, hospital and CPP records. Still, there is no definitive medical report, even from her personal doctors, opining that she is totally disabled from all forms of employment now, much less one identifying when this status might have crystallized. Indeed, in a letter to her counsel dated August 28, 2024 (Exhibit No. 1, Vol. I, Tab "G", para. 6), her current rheumatologist stated, "It is beyond the scope of my office assessment to determine the ability to maintain gainful full time employment." The doctor offered to make a referral to facilitate "a full functional capacity evaluation …", which seems not to have been pursued by the petitioner.

[66] The absence of any persuasive medical evidence in support, and the fact of her actual engagement in employment in 2017 (more or less coinciding with the start of attendance of all three of her children at school on a full-time basis), have led me to find that she has not established on a balance of probabilities that she was disabled from employment as of January 2010, or as of 2017 either. Perhaps she was partially disabled from employment by 2017 or soon thereafter (she first claimed the disability tax credit in her income tax return in

2017), but beyond her bare assertion there is no adequate medical evidence establishing this to be the case, nor any other affirmatory evidence sufficient to satisfy the burden she bears, in that discrete time period.

[67] Nonetheless, I am satisfied on the balance of the evidence in the subsequent timeframe taken as a whole that her condition progressed to total disability from employment by the end of 2021, which is also the effective date for commencement of her receipt of disability benefits from CPP. For purposes of s. 7 expense sharing and for the spousal support analysis which follows, there shall be no imputation of employment income to her from 2022 forward.

[68] I also observe that, given her limited education and absence of training and work experience in the preceding timeframe, any income she might have, or ought to have generated, would have been at a minimum wage level. This of course does not necessarily mean that she ought to have been employed outside the home for purposes of imputing income to her, at least when the youngest of the children was of pre-school age (before 2017), nor that her entitlement to on-going spousal support from the respondent now is axiomatic.

(viii) Spousal support

- the law

[69] The foundational principles and considerations to which the court is bound in assessing a claim to spousal support are well-known and were obviously accepted by the parties' counsel in the submissions they have made to the court.

[70] The pertinent provisions of the ***Divorce Act***, of which I must be mindful are:

> **Spousal support order**
> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> . . . . .
>
> **Terms and conditions**
> (3) 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 as it thinks fit and just.
>
> **Factors**
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
> (b) the functions performed by each spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> . . . . .
>
> **Objectives of spousal support order**
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[71] In ***Hykle v. Hykle***, 2007 MBQB 243, Yard J. helpfully elaborated upon the application of these statutory provisions, while referencing *dicta* of the Supreme Court of Canada:

> [19] The Supreme Court of Canada has made it clear that the spousal support provisions of the *Act* are intended to deal with the economic consequences of marriage and its breakdown. The purpose of spousal support is to relieve economic as opposed to social, emotional or other hardship resulting from marriage breakdown: *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813; 43 R.F.L. (3d) 345 at para. 42 and 43. To this the Supreme Court of Canada has recently added that the emotional consequences of marriage breakdown, whatever the reason for that marriage breakdown, are a consideration which is relevant to spousal support determination, where those emotional consequences have economic impact: *Leskun v. Leskun*, *supra*, @ para. 21.
>
> [20] Moreover all four of the s. 15.2(6) objectives must receive the consideration of the Court in the unique circumstances of each case with no single objective being entitled to paramountcy. Satisfaction of one of the objectives does not permit the matter to be disposed of without giving full consideration to the remaining objectives: *Moge supra*, para. 52. In addition the statute requires the court, in the context of each case, to give consideration to each of the factors set out in s. 15.2(4): *Moge, supra*, para. 50: *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 (S.C.C.) at para. 36.
>
> [21] The Manitoba Court of Appeal has pointed out that the Supreme Court of Canada in *Bracklow, supra*, clarified that in totality all of these objectives and factors spell out three bases upon which spousal support may be grounded, namely contract, compensation for disadvantage arising from the marriage or its breakdown, or support required to relieve economic hardship arising from marriage breakdown: *Gabb v. Gabb* (2001), 2001 MBCA 19 (CanLII), 13 R.F.L. (5th) 391 (M.B.C.A.) at para. 10.
>
> [emphasis added]

[72] The petitioner submitted various scenarios calculating what is advocated for her in the way of quantum and duration of support under the Spousal Support Advisory Guidelines. I note that (Payne and Payne, p. 335):

> The Guidelines are informal, voluntary and advisory. They have not been legislatively endorsed and are not legally binding.

[73] Having said that, I do consider the Guidelines a "check" in assessing the arguments of the parties, and also an analytical structure for adjudication. And the Revised User's Guide ("RUG")[4] helpfully outlines the principles applicable to each category of entitlement:

> **Compensatory claims** are based either on the recipient's economic loss or disadvantage as a result of the roles adopted during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation.
>
> **Common markers of compensatory claims** include: being home with children full-time or part-time, being a "secondary earner", having primary care of children *after* separation, moving for the payor's career, supporting the payor's education or training; and working primarily in a family business.
>
> **Non-compensatory claims** involve claims based on need. "Need" can mean an inability to meet basic needs, but it has also generally been interpreted to cover a significant decline in standard of living from the marital standard. Non-compensatory support reflects the economic interdependency that develops as a result of a shared life, including significant elements of reliance and expectation, summed up in the phrase "merger over time".
>
> **Common markers of non-compensatory claims** include: the length of the relationship, the drop in standard of living for the claimant after separation, and economic hardship experienced by the claimant
>
> **Contractual claims**, which covers not only formal domestic contracts but also implied or informal agreements.

- the parties' respective positions at trial

[74] The petitioner asserts entitlement to spousal support in the past and on-going, on both compensatory and non-compensatory bases.

[4] Spousal Support Advisory Guidelines: The Revised User's Guide" (Department of Justice: Professor Carol Rogerson and Professor Rollie Thompson: April 2016)(online: Department of Justice <url> http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/PDF/ug_a1-gu_a1.pdf)

[75] In summary, the petitioner's position in her counsel's final submissions was that she is entitled to an adjustment to retroactive spousal support (payable in a lump sum amount), premised upon Mr. Holmes' analysis of the respondent's total income for support purposes in each year post-separation (see the matrix at paragraph 42, above), and to ongoing spousal support on imputed annual income of the respondent. All ought properly, her counsel argued at trial, to be assessed at the high-end range under the Spousal Support Advisory Guidelines, and payable for an indefinite period of time. His calculations indicated a lump sum retroactive adjustment of about $1.7 million, and monthly ongoing spousal support of $8,711 (in addition to a lump sum adjustment of retroactive child support of over $190,000, and to the ongoing monthly child support she sought, then relying on Mr. Holmes' testimony, of about $6,800).

[76] If nothing else, the petitioner's position at trial, as I have just set out, can be described as bold (as were other of her counsel's submissions, including for a Bank of Canada interest rate, compounded annually [meaning an award of more than $1,000,000], discussed below; and, the assertion above, of a total disability date effective January 10, 2010 – some seven years prior to her actually being employed at an accounting firm).

[77] At trial, the respondent's position regarding spousal support was, figuratively, an ocean's distance away; distilled to its essence, he argues that the petitioner's entitlement to ongoing spousal support in an under-10-year marriage is exhausted (and was some time ago), and that the payments already made by

him since separation over the last 12-plus years, when the overall financial situation of the petitioner is considered, satisfy any and all of his obligations; he argues no adjustments to retroactive spousal support are necessary. Alternatively, he suggests the court simply order continuation of the $2,000 per month spousal support payments he has been making under the 2005 interim order, but for only two more years.

[78] Of course, my consideration of the parties' respective submissions at trial on the spousal support issue must be retailored somewhat to account for the findings I have now made here respecting the respondent's quanta of income in certain of the years (reduced from what the petitioner had asserted), and the date of commencement of the petitioner's disability from employment (the existence of which had been denied altogether by the respondent and, according to the petitioner, started more than 14 years ago).

- <u>prominent considerations in this case</u>

[79] Amongst the most obvious considerations in this case in determining the petitioner's claim to spousal support are the following:

(i) the duration of the marriage: nine years and three months;

(ii) that the parties separated over 12 years ago;

(iii) the parenting arrangements before and after separation, and going forward (the petitioner has and continues to be virtually exclusively responsible);

(iv) the ages of the children at separation (7, 5 and 2 years) and now (19, 17 and 13 years), and the child support already paid to date, (including the lump sum adjustment), and to be paid ongoing;

(v) the family income-earning history, and the highly disparate incomes of the parties before and since their separation;

(vi) the unusual character of the parties' financial affairs during the marriage;

(vii) the current ages of the parties;

(viii) the petitioner's limited educational background, and almost non-existent work history; and,

(ix) the petitioner's illness and, since January 2022, total disability from employment.

[80] Each party, in the final submissions their counsel made, emphasized those points above most helpful to the case pursued by them.

[81] For the court, the Herculean task is now directed at assessing the totality of the evidence, including but extending beyond those points in paragraph 79 above ("the unique circumstances of each case"), while considering all four of the s. 15.2(6) objectives ("with no single objective being entitled to paramountcy"), as well as each of the factors set out in s. 15.2(4), to arrive at a just result. It is the petitioner who bears the onus to establish her entitlement to the retroactive adjustment she seeks to spousal support paid to date, and to ongoing support.

- analysis

[82] I begin with a short comment about the petitioner's claim to a retroactive adjustment of spousal support paid to date by the respondent (ostensibly under the 2005 interim order, which was originally stated to be premised upon the respondent's total income of $300,000, and payable along with child support for their then single child). Despite counsel to the respondent's contrary submission, an upward adjustment is, in my view, easily justified by the increasing level of the respondent's income in the post-separation years, as these reasons have determined. The parties acknowledge that such adjustment, if so ordered, is to be paid as a lump sum, and subject to a 50 per cent tax discount.

[83] However, the determination of that precise quantum of retroactive adjustment, in the context of the petitioner's claim to a high-end range SSAG calculation of that and of on-going support, makes a broader and conflated analysis of the underlying principles and of the evidence seem appropriate to pursue here.

[84] At nine years and three months, this is indisputably not a long-term marriage. That fact, and the payment already of some 12-plus years of periodic support (admittedly, in a disputed amount which appears somewhat low), have a very significant, but not determinative, impact on the assessment of at least the question of the petitioner's continued entitlement.

[85] There can be limits on the weight to be attached to traditional marital roles played by parties in these types of cases, but here the petitioner and

respondent clearly agreed that the respondent would dedicate himself to his medical practice and earn all of the family income, and that the petitioner would assume, virtually entirely, responsibility for parenting the children, and there was no expectation she would ever work outside the home.

[86] However, the respondent's professional status and the commencement of his medical career were both established by him alone, before the marriage. There is here no sacrifice made by the petitioner associated with these foundational achievements of the respondent. This is not to say that the respondent's career was not benefited by the features of their marital arrangement, where the petitioner's care of the children permitted his mostly unfettered attention to his professional work. That said, the petitioner also shared in the fruits of his material success, during the marriage and after separation.

[87] The respondent rightly sought to emphasize certain of these favourable points (as well as the relative brevity of the marriage), but also those unusual features of their "independent" economic and living arrangements during the marriage. He suggested that what was absent, and diminished the petitioner's case for support, was that the parties did not "integrate their personal and economic lives" in the marital relationship. All these submissions, says the respondent, support the suggestion that the petitioner's compensatory claim has been extinguished.

[88] The petitioner's submission, of course, is that regardless of the disposition of her compensatory claim, she has financial need and possesses a meritorious claim to non-compensatory spousal support.

[89] I will proceed now to break out the two bases of compensatory and non-compensatory claims to support under separate sub-headings; but, of course, the evidence I review under each bleeds from one section into the other as relevance dictates, and as the admonitions in the appellate case law demand a comprehensive analysis of those factors and consideration contained in s. 15.2 of the ***Divorce Act***.

- compensatory claim

[90] In terms of any compensatory claim to spousal support from the current vantage point (that view is much elevated by the effluxion of 12-plus years of time post-separation), it is difficult to find reason to conclude that the petitioner was seriously disadvantaged by this less than 10-year marriage or, at minimum, that any such disadvantage now persists so as to ground entitlement to continued support.

[91] She entered the marriage with no assets, very little post-secondary education, and a scant employment record. She finds herself now (in part, as a result of these reasons for decision) with an equalization payment in excess of $500,000, and with her half of the equity in the former family home. She has been receiving $5,041 per month in periodic child support ($7,041 per month, in cumulative child and spousal support), in addition to a lump sum child support

amount paid in 2022/23 of $372,000. Child support retroactive to 2012 has been further adjusted upwards by this decision (by a total of approximately $70,000), and increased to $5,744 per month on-going.

[92] The petitioner's net self-worth increased between the date of separation and March 2023 by $567,504 (as she both acquired assets which have appreciated in value, and paid down debt). She owns two houses: the Assiniboine Avenue home where she lives with the children, which she values at $600,000 (purchased by her after separation, in 2016 – that is, six years before the $372,000 lump sum child support payment); and the house on Overdale Street (which she bought in or about that same year, for $310,000) - currently occupied by her sister (rent-free). Each has a modest mortgage balance and, as will be discussed, comprise the only indebtedness clearly quantified by her. Since 2022, and for what appears will be indefinitely, she has been in receipt of CPP benefits for herself and her eligible children.

[93] She may point to her absence from the job market as a negative economic consequence of the marriage and the marital roles they played within it, but this plea resonates less with the court as in the salient timeframe, between the attendance of all of her children at school full-time and the onset of her disability, there is no evidence of any effort to find and secure employment, in the pursuit of self-sufficiency. To her credit she did take a part-time job (offered to her without her application), but she left it very soon after starting, and never thereafter sought any form of employment, or made any enquiry

about retraining or upgrading her skills. Given the relative temporal closeness of these events and the onset of her disability, however, they are *de minimis* factors in my ultimate conclusions regarding any compensatory claim, even were I to impute income to her (at a minimum wage level) between 2017 and 2022.

[94] She has what I believe is a sound argument for a retroactive upward adjustment of spousal support paid (which shall be provided in a discounted lump sum by these reasons), based principally on the increased income of the respondent in certain of the post-separation years, but not at the exquisite level she seeks.

[95] I believe this is a logical point to pivot from her claim to compensatory support, and from the actual quantification of the adjustment of retroactive support, and shift the focus to the question of entitlement to ongoing support on a non-compensatory basis, and then thereafter to arrive at a holistic conclusion of the issues around spousal support.

- non-compensatory claim

[96] Having noted various factors and circumstances diminishing the petitioner's compensatory claim to ongoing support, the basic reality is that all family income was generated by the respondent during the marriage, and that the petitioner has been unable to work since 2022. So, what have been/are her needs? When addressing a marriage of less than 10 years, where the recipient has become disabled from employment 10 years after separation, what is the duration of the payor's obligation, and how is it impacted here by the relatively

positive unfolding financial circumstances of the petitioner in the last several years?

[97] Illness or even disability does not equate to never-ending support entitlement. McLachlin J. stated in ***Bracklow v. Bracklow***, [1999] 1 SCR 420:

> 53 Both these arguments miss the mark in that they fix on one factor to the exclusion of others. The short answer to Mrs. Bracklow's argument is that need is but one of a number of factors that the judge must consider. Similarly, the short answer to Mr. Bracklow's contention is that the length of the marital relationship is only one of a number of factors that may be relevant. While some factors may be more important than others in particular cases, the judge cannot proceed at the outset by fixing on only one variable. The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases. Limited means of the supporting spouse may dictate a reduction. So may obligations arising from new relationships in so far as they have an impact on means. Factors within the marriage itself may affect the quantum of a non-compensatory support obligation. For example, it may be difficult to make a case for a full obligation and expectation of mutual support in a very short marriage. (Section 15.2(4) (*a*) of the *Divorce Act* requires the court to consider the length of time the parties cohabited.) Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support. To repeat, it is not the act of saying "I do", but the marital relationship between the parties that may generate the obligation of non-compensatory support pursuant to the Act. It follows that diverse aspects of that marital relationship may be relevant to the quantum of such support. As stated in *Moge*, "[a]t the end of the day ..., courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act" (p. 866).
>
> 54 Fixing on one factor to the exclusion of others leads Mrs. Bracklow to an artificial distinction between amount and duration. The two interrelate: a modest support order of indefinite duration could be collapsed into a more substantial lump-sum payment. It also leads her to the false premise that if need is the basis of the entitlement to the support award, then the quantum of the award must meet the total amount of the need. It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need. Nothing in either the *Family Relations Act* or the *Divorce Act* forecloses an order for support of a portion of the claimant's need, whether viewed in terms of periodic amount or duration. Need is but one factor to be considered. This is consistent with the modern recognition, captured by the

> statutes, of the variety of marital relationships in modern society. A spouse who becomes disabled toward the end of a very short marriage may well be entitled to support by virtue of her need, but it may be unfair, under the circumstances, to order the full payment of that need by the supporting spouse for the indefinite future.
>
> [emphasis in original]

[98] As touched upon already in this unusual case, we are afforded the benefit of a view of the economic landscape of the petitioner, and of her health status, which is much broader and more elongated than typical (or which might have been available, say, if this case had proceeded to trial in 2014, as originally scheduled). But the attention in this section of my reasons still remains squarely on that issue of need, and demands close scrutiny of all of the evidence made available to the court, and ought not to be neglected, or pursued superficially, out of sympathy to the petitioner's disability.

[99] I recognize that adducing evidence to identify and quantify the economic consequences of marriage or of marriage breakdown can be a challenging task for any litigant. But for what her counsel acknowledged is a primarily needs-based claim to ongoing high-end range spousal support (where the onus is hers to discharge), the petitioner demonstrated a casual attitude to the currency and detail of both the evidence she called, and of her financial disclosure.

[100] Her most recent sworn financial statement filed at trial was deposed on March 22, 2023 (Exhibit 10), some 18 months prior to the commencement of trial. It failed to disclose her CPP income, which she testified she received in 2022, 2023 and 2024. It identified rental income, which she testified she no

longer receives from her sister who occupies one of the houses she owns. In addition to these anomalies, that statement disclosed no material details concerning her assertions, made prominently at trial, of hundreds of thousands of dollars in debts - to her lawyers and to her father.

[101] Her testimony regarding both those debts (unsupported as it was by either confirmatory documentation or testimony), and about the use to which past and ongoing child support has been put (which is a factor I believe in assessing her needs-based claim) was vague, unpersuasive and periodically strained credulity.

[102] In cross-examination about tracing the expenditure of virtually the entire $372,000 lump sum amount received by her in 2022/23 (of which she said only $20,000 remains), she testified that, specific to the children, three laptops were purchased, and trips made with them to Fargo and to the mall. Otherwise, she was only able to recall that $60,000 (or perhaps $80,000 - she said she could not remember for sure) was used to pay down both a mortgage (on one of her two houses) and a "huge line of credit" (she later acknowledged it was only $20,000).

[103] This is but one of the problematic aspects of her claim to continuing needs-based spousal support, in the context of her simultaneous accumulation of assets and reduction of (properly disclosed) debts, and given the court's central task to craft a support order which seeks not to equalize parties' incomes but

arrive at an equitable sharing of the economic consequences of the marriage and its breakdown (see: ***Aquila v. Aquila***, 2016 MBCA 33).

[104] The petitioner and the respondent seemed to have lived relatively modestly during their marriage and, I observe, continued to do so after separation. More important, I can find no evidence of any disparity in their respective, post-separation lifestyles, or standards of living (or that of the children).

[105] Proceeding on the premise that I am also making an upward retroactive adjustment to spousal support paid to date in a significant lump sum amount, and taken together with the other amounts she will receive under this judgment, the distortion of the petitioner's plea based on need becomes more pronounced. The suggestion of any ongoing support (much less high-end range) would constitute the transfer of capital to be further accumulated by her.

[106] Here, I conclude, after accounting for the petitioner's healthy financial situation and the further enriching components of this judgment, the petitioner has not established need sufficient to warrant an award of continuing spousal support by the court, or that the obligation of the respondent after a nine year and three month marriage ought to extend beyond 12-plus years of spousal support.

- <u>conclusion</u>

[107] The foregoing determination is arrived at, mindful of the lump sum retroactive adjustment to that spousal support already paid I shall now specify.

[108] I have identified that a high-end range adjustment is unwarranted on the evidence. Neither do I subscribe to the view that mid-level range spousal support is, or ought to be, a default position adopted (see: the comments of Abel J. in ***James v. James***, 2020 MBQB 6, at paras. 113-117). The petitioner's calculations at these ranges result in after-tax discount lump sum amounts payable to her of between $700,000 to $850,000 (Exhibits Nos. 5 and 8). The adjustment which I conclude is appropriate on the evidence received, and consistent with the factors and considerations under s. 15.2, is nearer the low-end range, which I here fix at $500,000. That lump sum amount is ordered payable to the petitioner by the respondent to properly adjust the spousal support paid from separation to date. No ongoing support is ordered.

(ix) Petitioner's claim to interest

[109]The petitioner seeks an order that the respondent pay pre-judgment interest to her respecting all amounts found to be due to her as specified in this judgment (her share of the equity in the family home, the equalization payment, the short-paid child support and the short-paid spousal support). The claim is made by her alternatively; that the respondent pay interest as prescribed by the Bank of Canada in the relevant time periods, or pursuant to ***The Court of King's Bench Act***, C.C.S.M. c. C280, s. 80, and on an either simple or compounded basis.

[110]I accept it is always appropriate to consider an award of interest in family proceedings where monies are found to be due to a party and, in a particularly

compelling case, where the evidence supports it, an award at elevated rates of interest (see: ***Stambuski v. Stambuski***, 2018 MBAB 141 at para. 207). Respecting the petitioner's claim to an equalization payment under ***The Family Property Act***, C.C.S.M. c. F25, s. 20(3) of that legislation provides that the court may order interest "if satisfied that it is equitable under the circumstances" (see: ***Ali v. Ali***, 2024 MBKB 172, and Mirwaldt J.'s review of Manitoba case law in that regard). I also have no doubt that the discretion I possess in that regard, and more generally, is broad, in that:

> [26] The philosophic rationale for judgment interest (both pre and postjudgment) is to compensate a party for the time value of money that has been withheld from it. It is not intended to punish the party who has been ordered to pay damages or other compensation (see *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para 36; *Dinney v Great-West Life et al*, 2007 MBQB 76 at para 2; and *Manufacturers Life Insurance Co v Pitblado & Hoskin et al*, 2009 MBCA 83 at paras 126-50).
>
> [27] The entitlement to prejudgment interest is provided in section 80(1) of *The Court of Queen's Bench Act*, CCSM c C280 (the *QB Act*) which states, "Subject to sections 81 and 82, an order shall include an award of interest at the prejudgment rate on the principal sum calculated".
>
> [28] Section 81(1) of the *QB Act* provides that, "Where a judge considers it just to do so, the judge may (a) disallow interest under section 80" or allow interest at a rate higher or lower than the prescribed prejudgment interest rate. Section 81(2) lists the factors that the judge shall have regard to in making such a decision, namely: "(a) changes in the quarterly interest rate; (b) the circumstances of the case; and (c) the conduct of the proceedings."
>
> [29] The effect of the *QB Act* provisions is that a successful plaintiff has a prima facie right to prejudgment interest (see *Yukon Helicopters Ltd v Zoochkan*, 1994 CarswellMan 447 at para 171 (QB); and *Trippel et al v Parker et al*, 2004 MBCA 72 at para 24). The onus is on the party seeking a higher or lower rate to justify a deviation from the presumptive rate.

(***63833 Manitoba Corporation v. Cosman's Furniture (1972) Ltd. et al***, 2018 MBCA 72)

[111]Here, it seems to me quite appropriate to require the respondent to pay simple pre-judgment interest for the requisite, and quite lengthy, periods of time applicable, on all amounts found due to the petitioner, at what are described as the "KB Rates", as set out in the detailed calculations contained in Exhibit No. 11, which document was filed by consent. The petitioner has been deprived of the use of those funds (as were the children), and it is fundamentally fair that the respondent pay interest on the monies he has maintained in his possession to his benefit.

[112]But the petitioner wishes the court to go much further. She asserts that this case is exceptional in that the respondent has deprived her of the use of her money over the many years of this litigation because he has "dragged out" the proceedings through "delay tactics", including the advancing of spurious claims and positions, which created "severe financial hardship" for her and the children. She says he then utilized that money withheld from her to amass "a fortune" in investments, justifying a very substantial interest award on the funds owed her, well beyond the statutory rate. To put meat on the bones, her preferred calculations under the compounded Bank of Canada rates (premised on the court's acceptance of the entirety of Mr. Holmes' calculations, and the payment of the high-end range of spousal support) would result in a pre-judgment interest award in excess of $1.0 million (Exhibit No. 12).

[113]In that regard, the petitioner relies upon a body of case law which tends to focus on delay of litigation attributable to one of the parties. Extraordinariness

and blameworthiness are the focal points (see: ***Watts v. Watts***, 1983 CanLII 4461 (MB CA); ***Gates v. Hrynkiw***, 2005 MBQB 123).

[114]However, a thorough consideration of all of the evidence heard at this particular trial tends to undercut the petitioner's submissions that we are dealing with an extraordinary case, or that the respondent bears responsibility for delays in the proceedings, or that she has been caused severe financial hardship as claimed.

[115]I note first that trial dates were, on three previous occasions, set and cancelled. In 2014, the petitioner's then counsel took ill and the trial dates were adjourned by agreement. For reasons unclear to me, and there is no evidence that the respondent was to blame for this any more than the petitioner, new trial dates were not set until a 2022 case conference continuation. Those dates in 2023, as well as a further set of trial dates that same year, were also cancelled, first at her subsequent counsel's request (seemingly owing to delay in the advancement of the ***FPA*** accounting by him, and by his limited retainer), and later her then-new counsel (jointly with respondent's counsel) wrote the Associate Chief Judge requesting a further adjournment (which was granted). At the case conference continuation on June 28, 2023, both counsel (not the petitioner's trial counsel) discussed "the anticipated involvement of a number of experts" at, and the filing of various motions before, trial; it was at that conference that the trial I ultimately heard was set. I find no disproportionate fault with either party for these various delays in the proceedings.

[116] Second, regarding the petitioner's allegation that the respondent took unreasonable, meritless positions, which delayed the case reaching trial, I see no persuasive evidence to distinguish this case from any other in the Family Division. By way of example, the "trust claim" apparently first raised by the respondent to meet the petitioner's earlier motion for (severance of issues) partition and sale (abandoned formally at trial) could have then been litigated separately. The petitioner chose not to.

[117] Other positions taken by the respondent (contesting the level of income imputation, the extent of his past and on-going support obligations, the quantum of the equalization payment, and the petitioner's claim to occupation rent) have all been at least partially validated by these reasons. The disputes over the fullness or timeliness of the respondent's disclosure along the way do not strike me as extraordinary, and could have been, and in some instances were, addressed through interim costs awards.

[118] Third, in terms of the financial hardship the petitioner claims she was forced to endure, I observe that her testimony was wanting in terms of detail and substance. In the timeframe after the final separation, she of course was receiving spousal and child support payments. The evidence shows that her net worth increased in the post-separation years, and she acquired real property, as already described. And the interim support order was adjusted in October 2022, by an increase to the on-going child support quantum (to $5,041 per month), and by payment of two further lump sum amounts to her (within one year)

totaling close to $400,000, none of which of course attract(ed) any taxes. Here I do not mean to suggest that there is praise due the respondent for his largesse. Far from it; he had been underpaying support previously, and owed the money. Rather, I emphasize these points to dispel the suggestion that the petitioner experienced severe financial hardship during the course of this litigation, of the extreme sort justifying her preferred interest claim.

[119] There are then no extraordinary or even particular circumstances of this case, nor sufficient evidence led by the petitioner, to justify imposition of what would be a punitive Bank of Canada, much less a compounded, rate of interest.

[120]The claim to interest by the petitioner is ordered, but only as detailed in paragraph 111, above.

(x) Security for payment of future support – life insurance

[121] Citing the history of short payment of support by the petitioner and concerns that their future receipt under the support orders be protected, the petitioner seeks an order including certain terms in the support orders made, pursuant to s. 74 of the ***Family Law Act***, C.C.S.M. c. F20, or under ss. 15 and 16 of the ***Divorce Act***.

[122] Specific to her request that the respondent forthwith secure life insurance coverage identifying the petitioner as beneficiary, I note the virtual absence of trial evidence supplied to the court in support of the request. Read-ins from the respondent's discovery confirm, at least at that time, that he possesses no life insurance coverage, and is uncertain as to his ability to secure such coverage. I

do not know if he is currently able, given his testimony as to health issues and his age, nor at what cost. I decline to grant this relief to the petitioner.

(xi) Binding of the respondent's estate

[123] I am prepared, however, to order that the respondent's duty and liability to pay support continue after his death, and that it constitutes a debt of his estate.

(xii) Divorce

[124] As the statutory requirements have been met, I pronounce a divorce judgment.

COSTS

[125] Failing agreement, time may be set for counsel to address the issue of costs.

_____J.