

CANADA / JUDGMENT

B.S.W. v. W.F.W.

2024 BCSC 849

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 849 B.S.W. v. W.F.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.S.W. v. W.F.W.,

2024 BCSC 849

Date: 20240516

Docket: E213300

Registry: Victoria

Between:

B.S.W. aka B.S.G.

Claimant

And

W.F.W.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Supplementary Reasons to B.S.W. v. W.F.W., 2023 BCSC 1925, and 2024 BCSC 299.

Supplementary Reasons for Judgment re: Retroactive Section 7 Expense Claims of the Claimant

Counsel for the Claimant:

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Counsel for the Respondent:

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Submissions Received from the Respondent:

March 21, 2024

Submissions Received from the Claimant:

April 1, 2024

Place and Date of Judgment:

Victoria, B.C.

May 16, 2024

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I. Introduction

- [1] These reasons for judgment are supplementary to previous reasons for judgment issued in this matter, indexed at 2023 BCSC 1925 ("RFJ #1"), and 2024 BCSC 299 ("RFJ #2"). Specifically, these reasons address the claimant's retroactive s. 7 expense child support claims, discussed at paras. 27 through 41 of RFJ #2.
- [2] Pursuant to the directions I made at para. 39 of RFJ #2, the claimant filed an affidavit March 7, 2024, and the parties filed submissions, concluding with the claimant's reply submissions filed on or about April 1, 2024. Neither party applied for an oral hearing. Accordingly, I am deciding this matter on the basis of the written submissions of the parties and the claimant's affidavit evidence.
- [3] The respondent agrees with a number of the expenses claimed. The disputed amount is \$80,501. Most of this relates to the cost of private schooling for the eldest child, A.

II. Preliminary Issue - Claimant's Affidavit

- [4] In RFJ #2, at para. 38, I directed that the claimant may adduce expense receipts not included in trial Exhibit 49, in order to support the claims set out in Section 7 of that exhibit. I directed that no other additional evidence will be allowed.
- [5] The claimant's affidavit filed March 7, 2024 consists of 44 paragraphs, and attaches 81 pages of receipts. The respondent does not object to the admission of the receipts, but he objects to the evidence in the body of the affidavit. He contends that the paragraphs in the body of the affidavit are "comprised in large part of further evidence and contentions about the children, facts, historical events, reasons for decisions, and so on, all of which were the subject of the trial". The respondent submits that the affidavit should be struck out.
- [6] In response, the claimant submits that her affidavit evidence is consistent with her evidence at the trial, and is nothing more than context for the receipts that are attached.
- [7] It obviously might have been better if the claimant had sought clarification of my directions, or had applied for leave to file an affidavit with a limited scope. On the other hand, it was open to the respondent to provide a responding affidavit to indicate what contradictory evidence if any he might have wished to adduce. However, in my view having regard to the issues in dispute and the circumstances in totality, the respondent is not significantly prejudiced, and further expense and delay is not justified or reasonable in the circumstances. Moreover, as I previously noted (RFJ #2, para. 88), I am concerned about the prolongation of these legal proceedings.

- [8] I agree with the claimant that in general her affidavit merely repeats or summarizes evidence at trial, or provides specific contextual information explaining the attached receipts. Other parts of the affidavit relate to items not in dispute. In my view the affidavit is appropriately limited in scope, is helpful, and does not offend the spirit of my previous directions.
- [9] I am not persuaded that striking the affidavit or any portion thereof is necessary or appropriate.

III. Legal Principles - s. 7 expenses

[10] In *Bodine-Shah v. Shah*, 2014 BCCA 191, the Court stated:

[65] Nor do I find any error in his order for s. 7 Guidelines support at \$300 based on the imputed income of \$90,000, retroactive to January 1, 2011, for that calendar year. Sections 7(1)(a)-(e) list special and extraordinary expenses as: (a) child care expenses incurred by a custodial parent for employment, illness, disability, education or training for employment purposes; (b) the child's portion of medical and dental insurance premiums; (c) health-related expenses; (d) extraordinary expenses for the child's educational needs; (e) expenses for post-secondary education; and (f) extraordinary expenses for extracurricular activities. Section 7(1.1) defines extraordinary expenses, referred to in ss. 7(1)(d) and (f), as:

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table
 - (ii) The nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

[66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and

necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

[11] These principles were reiterated by the Court of Appeal in *Santelli v. Trinetti*, 2019 BCCA 319:

[151] The availability of extraordinary expenses is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature, and number of the activities, any special needs, or talents of the child, and the overall cost of the activities. They must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation: *Bodine-Shah v. Shah*, 2014 BCCA 191 at para. 66.

[152] Recreational sports and other similar extracurricular activities such as dance lessons, community sports leagues, ski trips etc. will not generally qualify as special or extraordinary expenses unless the child's participation goes beyond that of an ordinary child: *Dorey v. Havens*, 2019 BCCA 47 at para. 44.

[153] I am satisfied that the judge did not err in awarding special and extraordinary expenses to the respondent for the children's summer and spring break camps. These activities clearly fall within the ambit of s. 7(1)(f) of the Child Support Guidelines and accord with the factors listed under s. 7(1.1). The judge considered the parties' respective incomes, the children's best interests and the family's spending pattern with respect to the activities prior to separation to conclude that the appellant was required to pay for the camps as extraordinary expenses. He concluded, at para. 13 of his Supplementary Reasons, that the costs of summer and spring break camps were necessary in view of the respondent's employment and need to make arrangements for the children when they are not in school. In my view, the judge did not commit an error in principle, fail to consider a relevant factor or misdirect himself. It was within the judge's discretion to order these extraordinary expenses.

[154] I come to a similar conclusion with respect to the children's extracurricular sport activities. The judge invited and heard submissions from the parties on the suitability of these expenses as extraordinary. Although the judge did not spend a great deal of time explaining precisely how he arrived at the figure for s. 7 expenses with respect to these activities, the judge is presumed to know the law: Dorey at paras. 43, 51. The judge was clearly of the view that the children's organized sports were extraordinary expenses in the circumstances, and I see no apparent mistake in this conclusion. The appellant has not demonstrated any specific error in the judge's analysis; he simply disagrees with the judge's conclusion on this point. However, given the deferential standard of review applied on this ground of appeal, and absent any articulable error in the judge's reasons, I would not accede to this ground of appeal.

IV. Analysis and Assessment

A. Background

- [12] The respondent does not take issue with the Court making an award for retroactive child support under s. 7 in the circumstances of this case. In RFJ #1, I held that the date of separation was May 1, 2020 (para. 84). At trial, the claimant sought payment of child support including s. 7 expenses from June 1, 2021. In RFJ #1, at para. 376, I held that child support payments are payable retroactively to June 1, 2021.
- [13] The eldest child, A, has primarily resided with the claimant since separation. As noted in RFJ #1, para. 6, A is substantially but not completely estranged from the respondent.
- [14] All three children were in the primary care of the claimant until the parties varied the parenting schedule by agreement after receiving Dr. Korpach's report, dated April 16, 2023. I stated in RFJ #2, para. 58, that parenting of B and C was shared as of June 2023. The submissions of both parties refer to the effective date of shared parenting as being July 1, 2023.
- [15] In RFJ #1, I ordered that on a going forward basis, special and extraordinary expenses are to be paid in proportion to the incomes of the parties, and are the expenses agreed to by them as shareable s. 7 expenses. If necessary the parties will utilize the services of the parenting coordinator to assist in coming to agreement, and in the event that the parties are unable to agree, the parenting coordinator is authorized to make determinations: para. 382. However, I held that retroactive s. 7 expenses are for the Court to deal with.
- [16] The parties both earn high incomes. I set out the incomes of the parties at para. 210 of RFJ #1. Based upon actual evidence as to their incomes for 2023, I determined the incomes of the parties for that year in para. 44 of RFJ #2. For 2023, the claimant's income was held to be \$651,428. The respondent's income was \$217,081.

[17] In RFJ #1, I determined the amount of prospective spousal support as being the sum of \$3,850 per month. In RFJ #2, I ordered that retroactive spousal support payable by the claimant to the respondent would be 88% of the low end of the SSAG range applicable (RFJ #2, para. 55).

[18] Leaving aside some items of property to be dealt with at a registrar's hearing, the net property to be divided between the parties is \$628,694, not including pensions. On that basis, the claimant is required to make an equalization payment to the respondent of \$216,347 (RFJ #1, para. 170). The parties do not have much in the way of other valuable property.

[19] At para. 169, I noted that the claimant had carried the vast majority of the household and children's expenses, and that:

The children's expenses are high, due to spending on such things as private schools, nannies, and many costly extracurricular activities, including [] music and dance lessons, sailing, golf, skiing archery and summer camps.

[20] The total amount of retroactive expenses that the claimant asserts are payable under s. 7 is as follows:

Child

2021

2022

2023

Total

A

15,980

33,622

32,424

82,026

B

4,971

9,100

10,288

24,359

C

9,459

4,749

8,502

22,710

Total

30,410

47,471

51,214

\$129,095

[21] Of the claims, the respondent agrees with items that total: Child A \$15,038; Child B \$15,369; and Child C \$18,187, for total of \$48,594.

[22] Therefore, the amount in issue is \$80,501.

[23] Of this, \$58,722 (approximately 73%) is one item: the cost of private schooling for A.

[24] Of course, s. 7 expenses are to be shared in proportion to incomes, so the respondent's share of s. 7 expenses will be much smaller than that of the claimant, due to his lower income.

[25] The respondent notes that an increase in child support by way of s. 7 expenses has the effect of reducing his spousal support, because payment of child support is prioritized in law.

B. Items in Dispute

1. Private School Expenses for A

[26] Historically, and prior to separation, the children attended private Catholic schools. When the parties separated in May 2020, the children were aged 10, 7 and 3, respectively. A and B were enrolled in St. Patrick's, a co-educational Catholic school. C later was enrolled at St. Patrick's when she started school.

[27] As reflected in RFJ #1, decisions about schooling became a major issue between the parties after their separation. Without consulting the respondent, as of September 2021, the claimant enrolled A in St. Margaret's, a private, independent, non-religious school for girls only: RFJ #1, para. 304.

[28] That decision, and the overall question of control and decision-making over the children's schooling, were major issues at the trial. I ordered that the claimant would have final decision-making authority over A's schooling, that the respondent have final decision-making authority over schooling with respect to B, and that C's schooling would be decided by the respondent, through to Grade 5, and thereafter, jointly.

- [29] The cost of attendance at St. Patrick's Elementary School is not included in the claimant's s. 7 claim, as the parties have already jointly contributed to these expenses.
- [30] Dr. Korpach noted that A appears to be academically gifted, with a high achievement orientation, and has interests in multiple areas. Further, A is highly accomplished in academic, social, and activity areas. Dr. Korpach also referred to other aspects of A's circumstances, which are relevant to the schooling issue. A told Dr. Korpach that she "loves" attending St. Margaret's school. Dr. Korpach observed that A was well placed at St. Margaret's school, and that the school appeared to meet her needs for academic stimulation, activities, and consideration of her unique learning needs.
- [31] The respondent submits that the tuition expense for St. Margaret's school should be considered to fall within s. 7, as an extraordinary expense under s. 7(1)(d) but that, in the circumstances of this case, the respondent should not be required to contribute to the expense retroactively, that is, prior to the date of judgment in RFJ #1. In short, he submits that this should be a shared expense on a going forward basis only.
- [32] The respondent notes that the claimant unilaterally decided to transfer A from St. Patrick's to St. Margaret's. He submits that while the law does not require the other parent's agreement for an expense to fall within s. 7, it is unreasonable for a parent to incur significant expense without agreement, and then seek recovery from the other parent: *Younger v. Younger*, 2017 BCSC 363 at para. 50.
- [33] Indeed, this is a factor the judge can take into account when exercising the court's discretion: *Delichte v. Rogers*, 2013 MBCA 106 at para. 44; *Bodine-Shah* at para. 66, citing *Delichte*. However lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.
- [34] The respondent argues that the claimant ought to have consulted him about the decision, and that if she had applied to court for an order that A attend St. Margaret's school prior to unilaterally enrolling her there, that application might well have been denied. He argues that enrolling A at St. Margaret's school unilaterally, in the context of the family dynamics, including alienation of A from the respondent, was contrary to her best interests. He recognizes the reality that A is doing well at St. Margaret's presently.
- [35] In *Shih v. Shih*, 2021 BCSC 1129, Justice Forth stated:
- [77] Expenses for primary and secondary school education and for any education programs that meet the child's specific needs are generally considered s. 7 expenses, although the court must take into account the parties' combined incomes. Private school tuition, for example, will not always be a s. 7 expense: *L. H. M. K. v. B. P.K.*, 2012 BCSC 435 at para. 128. The exact scope of s. 7 expenses depends on the particular circumstances of the parties.
- [36] In *L.H.M.K. v. B.P.K.*, 2012 BCSC 435, Justice N. Brown stated:

- [128] Private school fees are generally considered extraordinary educational expenses under s. 7(1)(d) of the Guidelines: *Crofton v. Sturko*, [1998] B.C.J. No. 38 (S.C.). In *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434 (B.C.C.A.), the Court considered the following factors to determine whether or not to allow private schooling fees as extraordinary expenses: (a) the parents' history of private schooling; (b) the children's history of private pre-schooling; and (c) the ability of the non-custodial parent to pay for the expense.
- [37] As noted by Justice Gibb-Carsley in *R.A.G. v. T.A.I.D.*, 2023 BCSC 179, s. 7(1) of the Guidelines requires that a court take into account the best interests of the child when assessing the validity of a special or extraordinary expense: at para. 134.
- [38] I acknowledge the validity of the respondent's point that the claimant's unilateral decision to enroll A at St. Margaret's was damaging to the family dynamic, and in particular to A's relationship to the respondent, and created unhealthy conflict and mistrust between the parties. However, I am not persuaded that the fact that the claimant unilaterally enrolled A at St. Margaret's, or that A might not have been enrolled there if the claimant had consulted the respondent (as she ought to have), or that, speculatively, the court might have denied an application for A to be enrolled there, are sufficient considerations to deny the expense. The weightiest consideration is that, no matter how the decision came about, A has been very happy at St. Margaret's school, and she was, as Dr. Korpach noted, "well placed at St. Margaret's". I accept as does the respondent that the school meets her unique needs. The overriding consideration is the question of A's best interests. In retrospect, A's best interests have been well-served by placement at St. Margaret's.
- [39] The expense of attending St. Margaret's is large, but so are the parties' incomes. The combined income of the parties over the years in question (2021 through 2023) exceeds \$2 million. The respondent does not object to the cost of private schooling, or specifically to the cost of A attending St. Margaret's school, in principle. Affordability is not a substantial factor in the analysis.
- [40] In summary, I am not persuaded that the respondent should be relieved of the obligation to contribute retroactively to the cost of A's St. Margaret's private school tuition.
- [41] The respondent further argues that ancillary costs for A to attend St. Margaret's, such as the cost of school uniforms and meals, should not be included as part of the s. 7 expense. I am not persuaded that the expense should be parsed in this way. In submissions, the claimant advises that school uniforms and meal plans are mandatory at St. Margaret's. Uniforms are also mandatory at St. Patrick's. As these additional costs are not optional, they should be considered part of the overall cost of A's attendance at St. Margaret's school.
2. Queenswood Montessori
- [42] The parties agree that the cost of C's preschool at Queenswood Montessori for 2021 in the amount of \$3,215 is a divisible s. 7 expense.

3. Childcare

[43] The respondent agrees that childcare expenses paid to Ms. Hutson should be shared, but notes that the expenses are tax deductible and the software must be directed to allow for this.

4. Summer Camps

[44] The respondent agrees with the claim for summer camp expenses for the children, but notes that the expenses are tax deductible as childcare. In submissions, he states that B did not attend the second week of an overnight camp in 2023, and so \$913 should be deducted. In reply submissions, the claimant states that B decided after the first week of camp that he would not attend the second week of camp, but by then it was too late to obtain a refund. This is persuasive, so the expense should be included in full.

5. Orthodontic Care Expense For A

[45] This \$1,200 expense was not reimbursed to the claimant through insurance. The respondent does not oppose the amount, on that basis.

6. Prescription cost

[46] The respondent questions a \$32 prescription cost for A. The claimant's affidavit includes an extended health summary showing that the expense was not paid by the insurer, therefore the claim is valid.

7. Counselling For A

[47] The respondent agrees that counselling expenses paid to Ms. Toews are s. 7 expenses, but questions "administrative expense" of \$696. However, on the documents and information provided, it appears to me that the \$696 amount was part and parcel of the services provided to A. Therefore, the entire amount of Ms. Toews' invoice should be shared by the parties.

8. Counselling with Kat Bellamano

[48] On the basis of the affidavit and submissions, I am satisfied that the claimant paid a retainer of \$1,000 and \$224 in fees. This is a shareable s. 7 expense.

9. Golf, Skiing and Sailing

[49] The claimant claims expenses in the amount of \$17,670 in relation to golf, skiing, and sailing expenses. The breakdown is as follows: Child A, \$6,568; Child B, \$8,990; and Child C, \$2,112, for a total of \$17,670.

[50] Collectively, these are the other major items in dispute. The claims are \$4,888 for golf, \$6,927 for skiing, and \$5,855 for sailing.

- [51] Most of the golf expenses are for lessons. There is also some equipment expense. Most of the ski expenses are for equipment. The claimant does not claim for the cost of lift tickets, or season passes, or related expenses of ski trips. Sailing costs are for lessons or participation, and some equipment.
- [52] I am not satisfied that the golf, skiing or sailing expenses should qualify as extraordinary expenses pursuant to s. 7(1)(f), retroactively, and having regard to the considerations in ss. 7(1) and 7(1.1).
- [53] Section 7(1) directs the court to take into account the necessity of the expense in relation to the child's best interests as well as the reasonableness of the expense in relation to the means of the spouses and those of the child, and to the family's spending pattern prior to separation.
- [54] Golf, skiing and sailing expenses fall under s. 7(1)(f) as extraordinary expenses for extracurricular activities. Given the claimant's income these are not expenses that she cannot reasonably cover, within the meaning of s. 7(1.1)(a), therefore section 7(1.1)(b) applies. That subsection is as follows:
- (b) expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.
- [55] The claimant receives base child support for all three children. The claimant can afford to pay the cost of these expenses.
- [56] There is no evidence of special needs or talents of the children in these areas. I accept that it is beneficial for children to be involved in a rich variety of extracurricular activities, as these children are. They are fortunate in that respect. As noted, historically the children have been involved in many extracurricular activities.
- [57] However I am not persuaded that the expenses are reasonable and necessary within the meaning of s. 7, and taking into consideration the factors set out in s. 7(1.1)(b).

- [58] The claimant can afford the cost of the activities. The respondent is not involved in these activities, and had no role in enrolling the children in these activities, or participating with them in these activities. He involved the children in other activities such as hunting, camping, and fishing, and incurs expenses in relation to these pastimes, for which he has not made a claim under s. 7.
- [59] There are all moderately costly activities, certainly when looked at collectively. The children are all enrolled in private schools, the cost of which is high. The respondent does not object to other expenses, such as swimming lessons, music lessons and instrument costs, or dance lessons for C.
- [60] In summary, I am not persuaded that these expenses have been shown to be extraordinary expenses within the meaning of the Guidelines, in all of the circumstances.

V. Conclusions

- [61] The claimant's retroactive s. 7 claims are allowed, or denied, in accordance with these reasons.
- [62] The parties provided me with specific DivorceMate calculations applicable to various outcomes. These examples have been helpful in relation to assessing the overall effect of the claimant's retroactive s. 7 claims. The parties provided schedules showing the net amount due for retroactive spousal support, child support, and s. 7 child support, depending on the Court's decision. These calculations will have to be revised to reflect the outcome in these reasons. I leave that to the parties to do. Once again, if the parties are unable to agree, they will have to apply to the Court to resolve any issues in this respect.
- [63] In RFJ #2, I concluded that the respondent should be awarded costs of the proceedings, generally. I ordered that each party bear their own costs with respect to the claimant's application resulting in RFJ #2. I indicated that the assessment of the claimant's retroactive s. 7 expense claims would be the subject of a separate order for costs (para. 86, RFJ #2).
- [64] The claimant has been substantially successful on this assessment. As noted, the largest item in issue was the cost for A's private school tuition and related expense. More broadly, she succeeded in establishing a large proportion of her overall claim of \$129,095.

"Verhoeven J."

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