

CANADA / JUDGMENT

Chrysler v. Chrysler

2014 BCSC 2195

COURT

Supreme Court of British Columbia

DECIDED

21 November 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 2195 Chrysler v. Chrysler IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Chrysler v. Chrysler, 2014 BCSC 2195 Date: 20141121 Docket: S081982 Registry: Vancouver Between: Carole Chrysler Claimant And Michael Chrysler Respondent Before: The Honourable Madam Justice Loo Reasons for Judgment Counsel for the Claimant: T. R. Bell Counsel for the Respondent: M. R. Eeles Counsel for the Director of Family Maintenance Enforcement Program: P. S. Hundal Place and Date of Trial/Hearing: Vancouver, B.C. April 8 and September 4, 2014 Place and Date of Judgment: Vancouver, B.C. November 21, 2014 Table of Contents I. INTRODUCTION. 3 II. THE EVIDENCE. 3 A. Separation Agreement dated March 1, 2004. 3 B. Order of Master Taylor dated March 1, 2010. 7 C. Family Maintenance Enforcement Program.. 8 D. Husband's Circumstances and Application to Set Aside or Vary the Order on August 9, 2013. 9 E. Husband's Revised Application on April 8 and September 4, 2014. 11 III. THE APPLICABLE LAW.. 15 A. Special and Extraordinary Expenses. 15 B. Setting Aside an Order 18 IV. ARGUMENT. 18 A. Argument of the Husband. 18

(i) Failure to Attend. 19 (ii) Special or Extraordinary Expenses. 20 B. Argument of the Wife. 23 V. ANALYSIS AND CONCLUSION. 24 I. INTRODUCTION

[1] The respondent (the "Husband") applies for an order setting aside the March 2, 2010 order of Master Taylor (the "Order") that required him to pay the claimant (the "Wife") \$55,613.71 for special or extraordinary expenses; alternatively, he seeks an order reducing or cancelling the arrears. The Wife contends that the Order should not be set aside or varied; alternatively, that the court should order that the parties equitably share all of the expenses she incurred for the children during the period of time addressed in the Order.

[2] The director of the Family Maintenance Enforcement Program ("FMEP") also appeared at the hearing of this application.

[3] The parties married in October 1984 and had two children, Ashley, born January 19, 1984 and Jehna, born August 7, 1986. On July 15, 2003, the parties separated. They began living in separate residences in February 2004 when the former matrimonial home was sold. On March 1, 2004, they entered into a separation agreement. The children were then 17 and 20 years old. II. THE EVIDENCE A. Separation Agreement dated March 1, 2004

- [4] The March 1, 2004 separation agreement (the "Agreement") was prepared with the assistance of counsel and both parties had independent legal advice. The recital to the Agreement provides: C. The Wife is currently 47 years old. D. The Husband is currently 43 years old. E. (1) [T]he Husband is an employee[e] of Molson's Brewery, whose annual income pursuant to ss. 15 to 20 and Schedule III of the Federal and British Columbia Child Support Guidelines was \$78,430.27 in 2002 ("the Husband's Guideline Income").
- (2) [T]he Husband expects to earn a similar income in the future. F. (1) [T]he Wife is a unit coordinator at Surrey Memorial Hospital whose annual income in 2003 was determined i[n] accordance with the requirements of ss. 15 to 20 and the Schedules of the Federal and British Columbia Child Support Guidelines [a]s \$27,000.00 ("the Wife's Guideline Income").
- (2) [T]he Wife expects to earn a similar income in the future; however, there is an indication that her job will be terminated in May, 2004. J. [T]he Wife and the Husband each intend this Agreement to be
- (1) a settlement with respect to guardianship, custody, and support of the Children, and access to them.
- (2) the final settlement of
- (v) adjustments respecting
- a. disabilities or advantages and disadvantages arising out of the marriage or otherwise between the parties, and
- b. the needs of each of them to be and remain economically independent and self-sufficient, and (vi) all issues otherwise arising out of their marriage.
- [5] Clause 3 of the Agreement provides that the parties have joint guardianship and joint custody of the children with ordinary residence being with the Wife, and the Husband having generous access at the children's discretion.
- [6] Clause 4 of the Agreement deals with basic child support and provides that the Husband is to pay the Federal Child Support Guidelines, SOR/91-175 (the "Guidelines") basic table amount of child support for British Columbia of \$1,010 each month. Clause 4 also deals with special and extraordinary expenses and provides:
4. CHILD SUPPORT 4.3 (1) The following are Special or Extraordinary Expenses:
- i. medical and dental expenses, ii. all costs of education except those listed in subclause [6] iii. Expenses arising in the future that qualify as special or extraordinary expenses within the meaning of the Federal and British Columbia Child Support Guidelines (the "Additional Special or Extraordinary Expenses") (the "Special or Extraordinary Expenses")[.]

- (2) The parties will share the costs of Special or Extraordinary Expenses, other than medical and dental expenses, in proportion to their respective Guideline Incomes. Special and Extraordinary Expenses will include the Children's tutoring and extracurricular activities, including sports (fees and equipment); music, dance, art and computer lessons (fees and equipment), not to exceed \$100.00 per month per child[.]
- (3) Medical and Dental expenses not covered by insurance will be shared in proportion to the parties' income.
- (4) If one parent pays an expense for a Child, and the other parent receives reimbursement from his or her insurance plan for the expense, the parent who receives the money must reimburse the other parent fully with the money received by him or her within two weeks of receiving it.
- (5) For the purpose of determining the parties' share of any Special or Extraordinary Expenses, the amount of the expense will be calculated by taking into account any tax benefit or subsidy for, or associated with, the expense.
- (6) The following do not constitute Special or Extraordinary Expenses or Additional Special or Extraordinary Expenses:
 - (a) all customary and recurring expenses, such as for clothing, food, education, gym kit, and transportation to and from school,
 - (b) any school-sponsored excursion costing less than \$50.00, and
 - (c) any athletic or recreational activity that is not school sponsored except as otherwise provided in this Agreement or agreed to by the parties in advance.
- (7) [T]he Husband will
 - (b) pay the Husband's share of the amount of any Special or Extraordinary Expense incurred in the prior month to the Wife within five days of receiving satisfactory proof that the expense was incurred.
- (8) The parties will perform an accounting by May 31st of each year to ensure that each party has paid the appropriate share of the Special or [E]xtraordinary Expenses for the previous year, and the party who had paid less than required will pay the amount of the deficiency to the other party with ten days of the conclusion of the accounting. 4.6 The base child support shall also be reassessed in May of each year, commencing May 1st, 2005. The Husband will provide the Wife with a copy of his full income tax return by May 31st, 2005, and the 31st of May in all subsequent years. If the Husband does not provide the Wife with a copy of his tax return by May 31st, 2005, and May 31st of subsequent years, then there shall be no adjustment until May of the next year (after full financial disclosure), unless the Wife agrees to it. 4.7 Once the financial disclosure is made pursuant to clause 4.6, the Wife and the Husband shall adjust the amount of child maintenance with the assistance of the Federal Child Maintenance Guideline Tables, and will co-operate in filing the necessary documents

to amend the amount of child maintenance payable.

- [7] The Agreement therefore limited special and extraordinary expenses to "\$100.00 per month per child", excluded all customary and recurring expenses such as clothing and food, and limited the children's athletic and recreational activities unless provided for by the Agreement or agreed to by the parties in advance. The Husband was to pay his share of any special or extraordinary expenses incurred in the prior month within five days of receiving, from the Wife, satisfactory proof that the expense was incurred. By implication, the Wife was to provide the Husband each month with satisfactory proof of any claim for special or extraordinary expenses. Expenses in the future that qualified as special or extraordinary expenses under the Guidelines were additional special or extraordinary expenses.
- [8] There is no dispute that in the years 2004 to 2007 the Wife never provided the Husband with any claims for special or extraordinary expenses or proof that she had paid any such expenses. There was also no financial disclosure between the parties (clause 4.6) and they never performed any accounting to ensure that each party had paid his or her appropriate share of the special or extraordinary expenses (clause 4.3(8)). On the Wife's application, on June 16, 2008, Master Donaldson ordered that the Agreement be rectified by altering the name of the Husband's pension plan at clause 16.1 to correct a drafting mistake so that the Husband's pension benefits could be divided in accordance with the Agreement. B. Order of Master Taylor dated March 1, 2010
- [9] On March 1, 2010, fairly shortly after the Husband paid all of the basic child support arrears owing at the time, the Wife filed a notice of motion and a 740-page affidavit in support of an application for an order that he pay her special and extraordinary expenses for the years 2004 to 2007. In her affidavit, she states that the Husband never paid anything towards special or extraordinary expenses, and that the special or extraordinary expenses she incurred were set out in four schedules and supported by copies of receipts as follows: 2004 \$30,411.88 2005 \$35,369.09 2006 \$11,486.10 2007 \$7,510.12 Total \$84,777.19
- [10] The Wife, in her notice of motion, estimated that the application would take "10 minutes" to be heard. Attached to her affidavit were some 730 pages of receipts, interspersed with handwritten schedules for each of the four years 2004 to 2007, plus various handwritten notes taped or marked by "Post-it" onto some receipts indicating amounts for various items listed in her schedules.
- [11] The Husband did not appear at the hearing on March 2, 2010. It was not explained how the hearing occurred the day after the application and affidavit were filed, but the Husband concedes that he was served.
- [12] A day in the life of a master in chambers can be an extremely busy one. A master cannot be expected to review in any detail a 740-page affidavit, and must rely on what he or she is told by a litigant and that the statements are supported by the evidence.

- [13] The transcript discloses that the Wife told the court that the divorce came as a huge shock to her, and she had to take a leave of absence from work. She stated that the Husband had agreed to contribute to their daughters' education, but he contributed nothing. She said that she ran out of money in 2006, but the Husband "opposed none of these charges or expenses."
- [14] The transcript provides that Master Taylor stated, "Just because he's here [sic] doesn't mean that everything that's claims is correct." I take that to mean just because the Husband was not there, does not mean that everything the Wife was claiming was correct. He then asked the Wife if \$84,777.19 was the total of all of the special and extraordinary expenses she paid, and she replied that it was. He then referred to clause 4.3(2) of the Agreement, and, based on their respective incomes, ordered that the Husband was to pay 65.6% of the expenses or \$55,613.71 plus costs of \$1,500, for a total of \$57,113.71. C. Family Maintenance Enforcement Program
- [15] The Wife initially enrolled with the FMEP in November 2004. The director of the FMEP collected only child support because the Agreement was not specific enough for the director to determine what special expenses were payable by the Husband. After May 2008, the director stopped recording ongoing child support as the younger daughter, Jehna, had completed her post-secondary education. In January 2010, the Husband paid off his child support arrears based on the figure of \$1,010 per month as set out in clause 4.2 of the separation agreement, and the director closed his file. The Wife re-enrolled with the FMEP on June 4, 2010 for arrears of child support in the amount of \$57,613.71 as per the Order.
- [16] On July 5, 2010, the director of the FMEP issued a notice of attachment to Her Majesty the Queen in Right of Canada, and has received five payments from the federal government from February and March 2013 totalling \$1,731.50. On July 13, 2010, the director filed a support order against property owned by the Husband, which he purchased with funds borrowed from his mother. On November 4, 2010, the director gave notice to the Insurance Corporation of British Columbia, and, as a consequence, the Husband is prevented from renewing or replacing his driver's licence. On November 29, 2010, the director issued a federal licence denial, which prevents the Husband from obtaining a passport.
- [17] On June 12, 2012, the director commenced a provincial court default hearing against the Husband. The Husband failed to attend court on at least three occasions when he was required to, and he has been picked up and arrested on at least two bench warrants in October and November 2012. On November 21, 2012, he was released to appear and directed to bring his financial information to the next court date. Following an adjournment to give him an additional time, the Husband provided his financial information on February 2013 and a default hearing was set for August 26, 2013. However, by that date, the Husband had his application in this Court, and the default hearing remains adjourned pending this Court's determination. D. Husband's Circumstances and Application to Set Aside or Vary the Order on August 9, 2013

- [18] On June 7, 2013, the Husband filed a notice of application and affidavit to set aside the Order. He was self-represented. On August 9, 2013, his application was heard by Master Taylor who asked the Husband why he failed to appear in court on March 2, 2010: MR. CHRYSLER: It's a bit of a chain of events, was I was under the impression that the family maintenance order and -- was all said and done. I had paid all my arrears, I had heard nothing for a good portion of time, and I was also involved in drugs and alcohol at the time. I just figured it -- and I was very frustrated with the whole situation, the way it was -- had been going. It just seemed to go on and on forever, and I -- when I noticed the -- in the papers that I was served by my wife, the -- some of the things that she was claiming as extraordinary expenses were just absurd stuff. I figured that -- I had no idea of court proceedings and I -- at that time. I still don't, really. But I figured that they would be looked at and seen -- saw if they were -- fit the criteria or not, which I didn't think they did, that the judgment would be pretty much not in her favour. THE COURT: I see. So you left it up to somebody else to take care of, not yourself? MR. CHRYSLER: Pretty much, yeah.
- [19] The transcript of the remainder of the proceedings shows that the Husband was unable to adequately represent himself, and Master Taylor adjourned the application.
- [20] There is no dispute that the Husband experienced drug and alcohol problems. The Wife, in her response to the Husband's initial application, complains that he "chose to buy drugs and alcohol over financially supporting his children" and refers to "his drug/alcohol induced instability" and substance abuse.
- [21] Around the end of 2004 or beginning of 2005, Molson's Brewery (the Husband's former employer) made arrangements for him to attend residential treatment. He completed a six week program, but relapsed shortly afterwards. He returned to work, failed his first required drug test and his employment with Molson's Brewery was terminated. His line 150 income is as follows: 2004 \$71,216.61 2005 \$86,449.00 2006 \$29,966.00 2007 \$11,718.00 2008 \$12,605.00 2009 \$4,288.03 2010 \$4,600.00 2011 \$5,320.00
- [22] While his 2005 income tax return shows earnings of \$86,446, he cashed in RRSPs of \$16,399, and \$67,106, which was largely from disability benefits paid by, or on behalf of, Molson's Brewery. In order to pay the \$1,010 monthly child support payments under the Agreement, he cashed in his RRSPs and borrowed money from his mother.
- [23] The Husband's drug and alcohol issues persisted until December 4, 2012, when he entered treatment at a recovery house in Surrey where he resided until May 8, 2013. He then moved to a more structured program that provides a return to work element. As of July 2013, when he swore his second affidavit, he was attending a second stage recovery house day program. E. Husband's Revised Application on April 8 and September 4, 2014
- [24] After his application was adjourned by Master Taylor on August 9, 2013, the Husband retained counsel and the application was reset for a hearing date in November 2013. However, the matter was adjourned by consent to December 18, 2013 so that the Wife could obtain counsel, but the December 18 date was also adjourned to enable the Wife to obtain

counsel. On March 20, 2014, at the request of the Wife's counsel, the Husband filed a further or revised notice of application setting out the applicable provisions of the Family Law Act, S.B.C. 2011, c. 25.

- [25] The revised application first came on for hearing before me on April 8, 2014. I adjourned the application so that the parties could determine which of the expenses claimed were properly section 7 or extraordinary expenses, particularly those for post-secondary education, because clearly most of the expenses did not fall under s. 7 or extraordinary expenses within the meaning of the Guidelines. For example, in 2004, the Wife lists expenses that include the following items: clothes, gifts, groceries, entertainment, miscellaneous, gas, parking, storage, internet, and cell phones. The monthly totals for seven of the months are between \$2,319 and \$3,527, and the bulk of the expenses appear to be for clothes and groceries, expenses that are clearly not special or extraordinary expenses under the Agreement or under the Guidelines. A separate column indicates that \$7,893 was for Jehna's tuition, but the amount is not fully supported by receipts. The items listed for 2005 are similar and a separate column claims tuition amounts of \$4,309.31 and \$10,243, but, again, these amounts are not fully supported by receipts or other documents.
- [26] On my initial review of the first 50 pages of the receipts, I found that it was difficult, if not impossible, to easily or reasonably relate the expenses claimed with the handwritten notes or the receipts, many of which are illegible. Within the bundle of receipts for 2004, there are receipts for items incurred prior to the making of the Agreement, including \$411.02 for "grad apparel" in January and February 2004. What is noted as "entertainment" is generally for eating at sushi or pizza restaurants. An item listed as "miscellaneous" includes \$437.39 paid on April 30, 2004 for custom framing two Thai prints. The year 2005 was not much different, with the bulk of the expenses being for groceries, miscellaneous, entertainment, gifts, and ordinary housewares items, including cat food.
- [27] The application came back before me on September 4, 2014.
- [28] The Wife filed a second affidavit on September 2, 2014. It is 434 pages in length and is comprised primarily of receipts, bank statements, and cancelled cheques. The Wife is unable to state to what extent the receipts attached to her second affidavit are different from the receipts she attached to her first affidavit. However, she has reorganized her claim, excluded expenses for groceries, but continues to claim expenses that she earlier claimed in her first affidavit, plus an additional claim for equestrian riding expenses for Jehna of approximately \$5,000 a year.
- [29] The Wife also provided for the first time, her T1 general income tax returns for 2004 to 2007 which disclose the following line 150 total income: 2004 \$14,346.84 2005 \$3,046.27 2006 \$30,951.91 2007 \$23,446.00

- [30] While there is no explanation in the Wife's affidavits why her income in 2004 or 2005 was at variance with the \$27,000 income attributed to her in the Agreement, the transcript of the March 2, 2010 proceedings discloses that she told the court that she had worked as a Surrey Memorial Hospital unit clerk for over 20 years, working with professionals in health care, and she took a leave of absence from work because "it was time for me to look after my health".
- [31] A summary of her new itemized claims may be tabulated as follows: Items 2004 2005 2006
2007 Parking \$70.00 \$21.00 -0- -0- Gas \$856.94 \$110.86 \$180.81 \$445.00 School Supplies
\$435.60 \$96.88 \$87.76 \$127.17 Internet \$473.16 \$246.69 \$141.54 -0- Cell Phone \$829.44 \$699.19
\$1,374.36 \$915.18 Ashley's School Expenses \$403.18 \$325.94 -0- -0- Ashley's 21st Birthday
Party Expenses -0- \$487.64 -0- -0- Jehna's Expenses \$368.42 \$782.18 \$4,676.86 -0- Jehna's Grade
12 Graduation \$786.35 -0- -0- -0- Medical Expenses -0- \$69.50 \$7.50 -0- Storage -0- -0- \$935.20
\$1,216.80 Spending on Bank Statements \$9,824.83 \$12,336.00 \$5,275.54 \$34.46 Additional
School Tuition for Jehna -0- \$1,967.98 \$2,026.00 \$2,967.25 Ashley's Kwantlen Tuition
\$1,942.00 \$3,630.00 -0- -0- TOTAL: \$15,989.92 \$20,773.86 \$14,705.57 \$5,705.86
- [32] The Wife claims parking expenses for Ashley, who, she claims, drove between the Kwantlen Surrey and Kwantlen Langley campuses; and for Jehna who drove to her riding lessons and equestrian events. The Wife says that they only had one vehicle and that she either drove her daughters to where they were going, or they borrowed her car, but she paid for all of the gas. She claims the cost of gas as a special or extraordinary expense.
- [33] The Wife says that Jehna took a post-secondary course in advertising, design, and art history, and needed to purchase a great deal of supplies, which she claims as a special or extraordinary expense. She also claims for the cost of a high-speed internet bundle for their home computer, cell phones for both daughters, and claims not only the cost for the initial purchase price of these items, but also the monthly fees.
- [34] The Wife makes claims for "Jehna's expenses", which include driving school lessons, equestrian expenses, and tuition and related fees at Langara College. She claims that Jehna rode competitively until around 2005 when she began riding less frequently. Jehna would inform her how much she needed to pay for fees, equipment, grooming, entry fees, and full-leasing a horse and the Wife gave her cash. The Wife no longer has any receipts, but claims that it costs approximately \$600 a month for the full-leasing of a horse and approximately \$5,000 a year for competition, equipment, and related costs.
- [35] The Wife also claims storage costs for renting a storage unit at Maple Leaf Storage Inc. after she and the children moved in or around 2005 and there was not enough space in their new premises to store all of their belongings. Both children had a large number of personal belongings such as bedroom furniture, riding gear, and books that they wanted to keep for their future homes.

- [36] The claim for "Jehna's graduation expenses" of \$786.35 in June 2004 includes clothes, a graduation gift, dinner, party, and tickets to the grad ceremony at a hotel.
- [37] The Wife also claims \$487 that she spent for Ashley's 21st birthday party in 2005. She states that she told Ashley that the Husband paid for half of everything for her birthday.
- [38] The largest items relate to the Wife's "spending on bank statements" totalling \$27,470.83 to show that she incurred "additional" special and extraordinary expenses. She claims for the cumulative amount on various bank statements and cancelled cheques on the basis that she no longer has receipts for certain purchases. The Wife has put a dot next to the entry on the bank statement or cancelled cheque for the following expenses: gas, school expenses, school supplies, Jehna's travel to Europe for school, Jehna's equestrian supplies, cheques to Jehna and Ashley for payment of their expenses, Jehna's graduation expenses, Jehna's driver training, payments to Coast Visa (an account that was only used to pay for the girls' expenses), RSP withdrawal of \$1,547.69 for Ashley's school fees, and direct transfers to the girls to pay for their school and books.
- [39] By way of example, I list some of the cheques and bank statements withdrawals: CHEQUES WRITTEN BY WIFE Date To Amount January 16, 2004 Jehna \$250.00 April 8, 2004 Ashley 400.00 April 8, 2004 Jehna 50.00 April 28, 2004 Linda Smith 175.00 April 30, 2004 Ashley 300.00 May 3, 2004 Ashley 50.00 May 3, 2004 Jehna 400.00 June 14, 2004 Ashley 100.00 June 14, 2004 Jehna 400.00 June 23, 2014 Ashley 500.00 July 15, 2014 Ashley 450.00 August 7, 2004 Jehna 683.20 September 24, 2004 Ashley 100.00 October 14, 2004 Ashley 120.00 October 14, 2014 Ashley 100.00 October 19, 2004 Jehna 400.00
- [40] There is no indication on any of the cheques as to why, or for what purpose, they were issued, except for a \$250 November 12, 2004 cheque that appears to have been made out to Kwantlen University (the stamp is almost illegible) and noted in the "memo" portion of the cheque as "registration fee". Yet the same day, the wife wrote a cheque dated November 12, 2004 to Jehna for \$250 and the "memo" portion of the cheque is also noted as "registration fee".
- [41] The Wife states that Linda Smith was the farrier for Jehna's horse. That means that the cheque dated April 28, 2004 to Linda Smith, the farrier for Jehna's horse, was for Jehna's riding or equestrian expenses that were incurred not long after the parties entered into the Agreement (where equestrian expenses were not considered to be a special or extraordinary expense). III. THE APPLICABLE LAW A. Special and Extraordinary Expenses
- [42] The presumptive rule regarding the Guidelines table amount is s. 3 which provides:
3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

- (b) the amount, if any, determined under section 7.

[43] Section 7 of the Guidelines deals with special or extraordinary expenses: Special or extraordinary expenses

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and 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 the separation:

- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities. Definition of "extraordinary expenses" (1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means
 - (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 or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
 - (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 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. Sharing of expense
 - (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child. Subsidies, tax deductions, etc.
 - (3) Subject to subsection (4) [universal child care benefit], in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
- [44] In *Bodine-Shah v. Shah*, 2014 BCCA 191, Madam Justice Smith for the Court of Appeal discussed the difference between listed s. 7 special expenses and extraordinary expenses. She stated at para. 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. [Emphasis added]. B. Setting Aside an Order
- [45] Rules 10-3(2) and (3) of the BC Supreme Court Family Rules provide:
- (2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Family Rules to do so, and may require evidence of service it considers appropriate.
 - (3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

- [46] It is agreed that the court must not reconsider the Order unless it is satisfied that the Husband was not guilty of wilful delay or default; and even if he was guilty of delay or default, the court must consider whether there will be a serious miscarriage of justice if the Order is not set aside: *Zhang v. Ton*, 2014 BCSC 122 at paras. 35-38, 40. IV. ARGUMENT A. Argument of the Husband
- [47] The Husband relies on his problems with drugs and alcohol to argue that there was no wilful default on his part; and even if the court should find that there was a wilful default on his part, the failure to set aside or modify the Order will give rise to a miscarriage of justice. It would leave the Wife with an unfair benefit or advantage at his expense. A reasonable person would regard it as shocking and unconscionable that the Order requires him to pay exorbitant special or extraordinary expenses that are clearly not special or extraordinary expenses as specifically defined in the Agreement, or under s. 7 of the Guidelines.
- (i) Failure to Attend
- [48] According to his unchallenged affidavit filed June 4, 2013 where he was unrepresented, when the parties first separated, he gave the Wife cash, and once gave her \$2,000 in cash, which she later denied receiving. At one point, he gave each of their children \$3,000 in cash, and was told those amounts would not be considered child support and he had to pay again. He became increasingly frustrated with the issues surrounding separation, he became a drug addict, and he stopped paying child support. In 2004 - the year the parties separated - he purchased a condominium in Burnaby with the help of his mother who provided the mortgage funds, and he was to make the monthly mortgage payments to her. For the past several years, he has been living off the rental income from the condominium, and casual labour jobs, but he has been unable to hold down a job as a result of his drug addiction, and he has been unable to pay his mother who has been paying the taxes, utilities, strata fees, insurance, and the mortgage associated with the condominium. All of the funds that his mother has advanced on his behalf are a loan, and they have agreed that he will transfer the condo to her, but he is unable to do so at this time because of the steps taken by the FMEP against the property.
- [49] The Husband states that he was surprised when he was notified by the FMEP in 2010 but he was still frustrated and overwhelmed with the whole process and did nothing right away. He moved into a recovery house in December 2012, and has been clean and sober since January 19, 2013. On May 8, 2013, he went into a residential rehabilitation facility and he hopes to find work and obtain retraining assistance. He is currently in receipt of income assistance benefits.
- [50] In his affidavit filed July 15, 2013, the Husband reiterates much of what he stated in his earlier affidavit. In addition, he notes that it was after he entered treatment and gained considerable recovery from his drug and alcohol issues, that he realized that he had to deal with the Order. He apologizes to the court for his failure to attend. (ii) Special or Extraordinary Expenses

- [51] The Husband argues that the Agreement defines special and extraordinary expenses (clause 4.3) to include medical and dental costs; all costs of education, except those listed in 4.3(6); and future special and extraordinary expenses that qualify within the meaning of the Guidelines. They specifically included tutoring and sports (fees and equipment); and music, dance, art and computer lessons (fees and equipment), not to exceed \$100 per month per child. Medical and dental expenses not covered by insurance were to be shared in proportion to the parties' income. Special and extraordinary expenses or additional special or extraordinary expenses specifically excluded (clause 4.3(6)) are listed as all customary and recurring expenses, such as clothing, food, education, gym kit, and transportation to and from school; any school-sponsored excursion costing less than \$50, and any athletic or recreational activity that is not school sponsored except as otherwise provided in the Agreement or agreed to be the parties in advance.
- [52] Further, the Husband was to pay within five days of receiving satisfactory proof the expense was incurred (clause 4.3(7)) and there was to be an annual accounting by May 31 of each year to ensure each party paid its proportionate share, with any deficiency to be made up within 10 days (clause 4.3(8)). The Husband failed to provide the Wife with an accounting in any of the years for which she now claims a contribution. Her 2010 and 2014 affidavits are not a proper accounting and she never provided him with any receipts for any expenses before she filed her March 2010 affidavit.
- [53] Ashley turned 19 years old in January 2003 - before the parties entered into the Agreement - and Jehna turned 19 years old in August 2005. There is no evidence or insufficient evidence to determine when and what post-secondary institutions they attended, what employment income they earned, and the extent to which they could contribute to their own expenses. The Husband has recently been informed by Jehna that she paid for part of her own education and borrowed money from her boyfriend for her education. In other words, the Wife has failed to satisfy what are commonly referred to as the Farden factors used to determine whether a child is still a "child of the marriage" as set out by Master Joyce (as he then was) in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at 64-65 (B.C.S.C.).
- [54] The Wife's evidence about the cost of post-secondary tuition is unreliable. In her 2010 affidavit, she claims tuition costs as follows: 2004 \$7,176 (Ashley - no receipt), and \$717 (Jehna - no receipt) 2005 \$4,509 (Jehna - handwritten fee payment form only) 2006 no tuition in the spreadsheet 2007 no tuition in the spreadsheet
- [55] In the Wife's 2014 affidavit, she claims tuition on the basis of the following receipts: 2004 \$1,942 (Ashley) 2005 \$1,013 (Ashley) 2006 \$2,026 (Jehna) 2007 \$2,967 (Jehna)
- [56] The Wife complains that now, in 2014, she no longer has some of the receipts in support of the expenses she claims, and that it is the Husband's fault for bringing his application so late. Yet, the Husband argues that she never provided him with the receipts at the time the expense was incurred and, at the very least, she ought to have provided the receipts when she first brought her claim in March 2010, if indeed the receipts ever existed.

- [57] In her 2010 affidavit, the Wife claimed over \$80,000 in special or extraordinary expenses. In her most recent 2014 affidavit, she now claims \$57,175.21.
- [58] The Husband says that listed items such as "spending on bank statements" and "Jehna's expenses" are simply not special or extraordinary expenses. Gas, internet, cell phone costs, and storage costs are not listed in the Agreement as special expenses, and they are not special or extraordinary expenses under the Guidelines. The costs of the cell phones and the internet are not broken down between the Wife's portion and the children's portion because the monthly bills are in the Wife's name only. It is reasonable to assume that the costs claimed actually include her own cell phone, internet, and gas costs. There is no doubt that with one vehicle, the Wife used the car for her own purposes, but she is seeking to claim all of the gas costs as a special expense.
- [59] The \$5,705.96 listed by the Wife as expenses for 2007 is nearly half of the Husband's income for that year. Similarly, the \$14,705.57 claimed by the Wife for 2006 is nearly half of the Husband's income for that year, and I note, nearly half of the Wife's income for that year. In order to stand in accordance with the Guidelines, the expenses claimed must not only be properly special or extraordinary expenses, they must be reasonable and necessary taking into account the income and means of the parties. In the circumstances, equestrian expenses of \$5,000 a year are not reasonable or necessary.
- [60] The table amount of child support paid by the Husband exceeded his actual Guidelines incomes by \$18,962 from March 2004 to the end of 2007. He seeks credit for his overpayment. He argues that the Order fixes on him \$55,613 of special or extraordinary expenses, most of which are not special or extraordinary under the Agreement or under the Guidelines. The Wife must have been aware at the time she advanced her claim in March 2010 that most of the items she was claiming were for groceries and clothing and specifically excluded under the Agreement.
- [61] Despite not knowing whether his daughters attended school full-time or part-time, how they did academically, whether they contributed to their own education, or any of the other Farden factors, the Husband is willing to pay his proportionate share under the Agreement for those tuition and education expenses, as well as the medical expenses that are supported by receipts. The total tuition receipts are \$7,948, the total school supplies are \$1,150, and the total medical expenses are \$78 for a total of \$9,176. Based on the incomes set out in the Agreement, the Husband's share of these expenses is 74%, or \$6,790, but he submits that he has overpaid monthly child support by \$18,962 based on his actual income over the years. B. Argument of the Wife
- [62] The Wife argues that the shocking and unconscionable test goes both ways. She says that a reasonable person would find it shocking and unconscionable that the Husband did not attend the hearing on March 2, 2010 and then delayed until three years later - only after the FMEP had taken steps he found uncomfortable- before applying to set aside the Order.

- [63] She argues that the Husband should not be able to rely on his addiction problems as an excuse. She says it was a deliberate decision not to attend the hearing. For the courts to credit such an excuse would "open the floodgates" for other addicts or persons who have substance abuse problems.
- [64] The Wife also argues that if the court sets aside the Order, it should take a wide and expansive view of the s. 7 expenses (because she had the children 100% of the time) and determine what the pro-rata sharing of those expenses is based on their respective incomes. However, the Wife readily concedes that in taking this approach, she is asking the court to ignore the terms of the Agreement or to set aside the Agreement.
- [65] The Wife complains that, as a result of the Husband's delay, she has been prejudiced and relief that was available to her in 2010 is no longer available. In 2010, she could have sought to set aside the Agreement and replace it with an order under the applicable legislation at the time. That remedy is no longer available to her because the children are adults or no longer children of the marriage, and the court no longer holds jurisdiction on the issue: *Semancik v. Saunders*, 2011 BCCA 264 at paras. 60-70.
- [66] Finally, the Wife complains that the Husband has not produced his source documents that support his Canada Revenue Notices of Assessment or income tax returns, so that his disclosure is insufficient to assess his income. However, on February 13, 2013, the Husband produced the financial information sought by the FMEP in the default hearings brought against him in provincial court indicating that he filed his delinquent tax returns in 2013. There is no suggestion that the Husband is hiding income or has earned more than he claims he has earned, and the Wife herself only recently disclosed her income tax returns.
- V. ANALYSIS AND CONCLUSION
- [67] I conclude that the Husband failed to attend the hearing on March 2, 2010 for a number of reasons but that he did not wilfully fail to attend. I base this conclusion on the following evidence: he had paid all of the basic Guidelines child support and any arrears that he was required to pay under the Agreement, despite having lost his job at Molson's Brewery and not earning anywhere close to his Guidelines income of \$78,430.27 as set out in the Agreement; he "had no idea of court proceedings"; he noticed on reviewing the papers that were served on him that some of the expenses that the Wife was claiming as extraordinary expenses "were just absurd stuff"; and he "figured that they would be looked at", the court would determine whether they fit the criteria, and "that the judgment would be pretty much not in her favour". In other words, he left the court to determine the matter without him being present in court. In that sense, it cannot be said that the Husband was guilty of wilful default.
- [68] I do not accept the Wife's argument that finding the Husband did not wilfully fail to attend the March 2, 2010 hearing will open the floodgates to similar addiction-based attendance excuses.

- [69] I am satisfied that the Husband was not guilty of wilful delay by reason of his drug and alcohol addiction problems. However, if I am wrong, I conclude that there would be a miscarriage of justice in any event if the Order is not set aside.
- [70] I cannot help but conclude that the Wife knew, based on the terms of the Agreement, that most of the expenses she claimed as special or extraordinary expenses, including the groceries, household items, clothing, pizza and sushi, were not special or extraordinary expenses. Except for the medical expenses and the post-secondary expenses, the Wife has failed to establish - and cannot establish - that the expenses she now claims in her affidavit filed September 2, 2014 are special expenses within the meaning of the Guidelines, or extraordinary expenses, or that the children's extracurricular activities meet the tests of necessity and reasonableness.
- [71] What the Wife initially sought, and continues to seek, is for the Husband to contribute to all, or nearly all of her expenses on the basis that the children resided with her following separation and there was no shared parenting arrangement. However, she readily concedes that in doing so, she is asking the court to ignore or set aside the Agreement.
- [72] It seems to me, without deciding the issue as it was not raised by the Husband, both children were adults or no longer children of the marriage at the time the Wife filed her application on March 1, 2004. It is now also too late for her to set aside or vary the Agreement to seek what she contends should be an expansive view of the s. 7 expenses on the basis that there was no shared parenting arrangement between them.
- [73] It is not the function of this Court on this application to vary the Agreement or to set it aside. Moreover, the Agreement took into account the fact that the children primarily resided with the Wife, and the Husband would have generous access to the children at the discretion of the children. There is no suggestion that the Agreement was not fairly negotiated.
- [74] I have difficulty with the Wife's argument that, due to the Husband's delay in applying to set aside the Order, she no longer has all of the receipts for the children's post-secondary expenses. She was required under the terms of the Agreement to provide the Husband with proof that any special or extraordinary expense was incurred. By implication, she was to provide proof of the expense within a month or a reasonable time after the expense was incurred. She failed to do so. Common sense suggests that she would have kept the receipts knowing that she could be reimbursed under the terms of the Agreement and to the extent provided by the Agreement. It may have been that the children contributed to their own educational expenses, or borrowed funds to do so, but I do not know and the Husband does not know because the evidence in support of the Wife's claim for the costs of post-secondary education for the children is sparse and lacking. On the evidence, it is not possible to determine when and what colleges or universities the children attended, whether they attended full-time or part-time, how they did academically, and to what extent the adult children (Ashley turned 19 in January 2003 and Jehna in August 2005) had incomes and could contribute to their expenses and extracurricular activities.

- [75] However, as discussed above, despite no evidence or insufficient evidence, the Husband is willing to pay for the costs of tuition supported by receipts, and medical expenses. The only tuition receipts provided are: 2004 Ashley \$1,942 2005 Ashley \$1,013 2006 Jehna \$2,026 2007 Jehna \$2,967 Total \$7,948
- [76] Including the medical receipts of \$78, the total of the medical expenses and post-secondary education - that is, the expenses that are properly s. 7 special expenses - is $(7948 + 78 =)$ \$8,026.
- [77] I do not think that the Husband should be responsible for \$1,150 representing the receipts for school supplies. Given the ages of the children at the time the expenses were incurred, and the lack of evidence, in my view, they should be responsible to at least some extent for the cost of their education.
- [78] I do not accept the Wife's argument that the Husband's financial disclosure is insufficient to assess his income.
- [79] Using the incomes set out in the Agreement, the Husband's proportionate share of \$8,026, or 74%, that he is required to pay to the Wife is $(8026 \times 74\% =)$ \$5,939.24.
- [80] The Order is set aside and the Husband is ordered to pay to the Wife \$5,939.24. However, he must be given credit for the amounts already credited to him by the FMEP attachment proceedings.
- [81] I do not propose to credit the Husband for what he says is an overpayment of monthly support of \$18,962. He was required to pay that amount under the terms of the Agreement, he paid it, he never applied to vary the Agreement, he never provided his tax returns each year as he was required to do under the Agreement, and it would be substantially unfair to the Wife to now advance a claim for an overpayment of support.
- [82] The Husband was successful on this application and he is entitled to his costs. "Loo J."

The Honourable Madam Justice Loo

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/21/2014BCSC2195.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/chrysler-v-chrysler-2014>

Prepared on 29 October 2026 · Esheria