
CANADA / JUDGMENT

Dorey v. Havens

2019 BCCA 47

COURT

British Columbia Court of Appeal

DECIDED

6 February 2019

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2019 BCCA 47 Dorey v. Havens

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dorey v. Havens,

2019 BCCA 47

Date: 20190206

Docket: CA45004

Between:

Simon Peter John Dorey

Appellant

(Claimant)

And

Pamela Anne Havens

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2017 (Dorey v. Havens, 2017 BCSC 2206, Vancouver Docket E084211).

Counsel for the Appellant:

M.A. Muirhead

Respondent appearing in person:

P.A. Havens

Place and Date of Hearing:

Vancouver, British Columbia

November 16, 2018

Place and Date of Judgment:

Vancouver, British Columbia

February 6, 2019

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

Summary:

Appeal by father from order dismissing his application for variation of lump sum child support and extraordinary expenses based on material change in circumstances, and granting mother's application to enforce payment and have previous cost orders characterized as "maintenance" which survived the father's bankruptcy. Held: appeal dismissed. The chambers judge properly characterized the previous orders as at least in part related to "maintenance", which to that extent were not extinguished by the father's bankruptcy. It was open to the judge to attribute costs to support even though the orders had been entered. The judge is presumed to know the law and did not err in her assessment of s. 7 expenses. Her finding that the father failed to show a material change in circumstances is supported by the evidence and entitled to deference. Finally, the reasonable apprehension of bias submission is entirely devoid of merit.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] This appeal concerns the effect of a payor's bankruptcy on orders for costs made in a family case; in particular whether the court has jurisdiction, after the order has been entered, to designate a portion of the costs as support-related so that they survive bankruptcy.

Background

- [2] The appellant Simon Peter John Dorey is a chartered accountant. The respondent Pamela Anne Havens is an adult educator with a Masters degree in gerontology. They met in 2000, separated in 2008 and were ultimately divorced in 2015. At the time of trial in 2011, their twin daughters were seven years old. The parties were able to agree on many issues relating to the care of the children, leaving only financial issues to be addressed at trial: division of property, debt, and determination of income and child support.
- [3] Following trial, Madam Justice Russell found Ms. Havens would soon earn \$60,000 per year. She imputed income of \$120,000 to Mr. Dorey. She found his evidence about his earnings to be unreliable, in part because he had sworn a false affidavit and altered an employment document to reflect a lower income in proceedings involving his first wife. She did not accept Mr. Dorey's reported income of \$60,000, finding him to be intentionally under-employed (at para. 54).
- [4] Because Mr. Dorey had not complied with interim pre-trial orders for child support and had failed to pay child support for a child from his previous marriage, Russell J. ordered Mr. Dorey to meet his child support obligations by way of a lump sum payment from his share of the family property. After taking into account the offset to reflect a shared custody arrangement, Mr. Dorey was required to pay \$907 per month until the children turned 19, which amounted to \$130,608. Russell J. discounted that sum to a present value of \$85,835 (at para. 173). She also ordered the parties to share s. 7 expenses in proportion to income: 33.33% payable by Ms. Havens and 66.66% by Mr. Dorey. After reapportioning family property 55% in favour of Ms. Havens and dividing family debt equally, the judge awarded costs to Ms. Havens at Scale B.
- [5] The parties were unable to agree on the terms of the order. It was settled by Master MacNaughton (as she then was) in April 2012 following a three-day hearing. Master MacNaughton reconciled the s. 7 expenses, child support owed to the date of trial, and the allocation of debts and property which were set out in the order in chart form:

Matrimonial Home

Mr. Dorey's equity

\$ 171,454

Romarco settlement

Mr. Dorey owes Ms. Havens

(\$5,746)

Debt Mr. Dorey carried into marriage

Mr. Dorey owes Ms. Havens

(\$10,000)

Romarco legal fees paid by Ms. Havens

(\$7,500)

Retroactive Child Support

(\$9,032)

Child Support owing to Dec. 31, 2011

(8,163)

Lump Sum Child Support

\$907 per month for 11.5 years

(\$107,599.08)

Piano

Ms. Havens owes Mr. Dorey

\$400

Child Support paid by Mr. Dorey

\$1,840

½ Ms. Havens' Third Party Debt

Mr. Dorey owes Ms. Havens

(\$42,824.79)

½ Mr. Dorey's Third Party Debt

Ms. Havens owes Mr. Dorey

\$34,953.26

Child Tax Benefit

Ms. Havens owes Mr. Dorey 1/2 of child tax benefit received to date

\$4,087.30

Bank Balance

Mr. Dorey owes Ms. Havens 1/2 of his bank account balance at separation date

(\$1,666.64)

Extraordinary Expenses

Mr. Dorey owes 66.66% of Ms. Havens' extraordinary expenses to Dec. 31, 2011

(\$8,773.76)

Extraordinary Expenses

33.33% of Mr. Dorey's extraordinary expenses

\$1,724.01

Costs

Mr. Dorey owes Ms. Havens

(\$41,500)

Total

(\$28,346.70)

- [6] In January 2014, Ms. Havens applied to compel Mr. Dorey to pay the outstanding balance of \$28,346.70 and to address s. 7 expenses. The matter came before Madam Justice Koenigsberg who determined she had insufficient materials to make a decision on most of the issues. She did, however, reduce the amount Mr. Dorey owed by about \$4,000 to reflect his entitlement to one-half of a child tax credit which Ms. Havens had received in full ("Koenigsberg J. Order").
- [7] In January 2015, Mr. Dorey applied to reduce the income imputed to him, vary the lump sum maintenance and retroactively re-apportion s. 7 expenses. Madam Justice Holmes dismissed the applications and awarded lump sum costs to Ms. Havens in the amount of \$2,547.15 ("Holmes J. Order"). One month later, Mr. Dorey filed for bankruptcy. He was discharged from bankruptcy in November 2015.

The hearing below

- [8] In April 2016, Ms. Havens applied to have the Koenisberg J. Order and Holmes J. Order characterized as in relation to maintenance so that they would survive Mr. Dorey's bankruptcy. She also applied to have Mr. Dorey pay his share of s. 7 expenses incurred since the trial, and for interest on the outstanding sums.

- [9] Mr. Dorey opposed the applications, taking the position that the debts had been expunged by his bankruptcy. He applied once again to have his child support obligation reduced and a portion of the lump sum of child-support repaid to him. He also sought orders requiring Ms. Havens to pay child support to him, and to assume responsibility for all s. 7 expenses until the children turned 19.
- [10] The judge concluded the Koenigsberg J. Order and Holmes J. Order survived the bankruptcy to the extent that they had been incurred in relation to support orders. She characterized 65% of the amount outstanding under the Koenigsberg J. Order and 100% of the Holmes J. Order as costs related to support orders. Finally, she awarded a lump sum of \$2,500 to Ms. Havens as costs of the application before her, which she determined to be entirely support-related.
- [11] Addressing the s. 7 expenses sought by Ms. Havens, the judge noted that as of the date of the application, Mr. Dorey had not paid any s. 7 expenses including the children's significant dental, orthodontic and prescription medication expenses. Mr. Dorey submitted that since there was no court order requiring the expenses to be incurred and Ms. Havens chose to incur the expenses without Mr. Dorey having agreed to any of them, Ms. Havens was required to pay for them herself. He also argued he could not afford to pay the expenses due to his low income and debt load.
- [12] The judge observed that Mr. Dorey had raised the same arguments and applications before Holmes J. and Russell J. and had refused to agree to any s. 7 expenses despite Ms. Havens' attempts to consult with him. She ordered Mr. Dorey to pay \$15,505 for his share of the expenses incurred between January 1, 2012 and May 1, 2017. She also confirmed Ms. Havens' proposal to split the expenses on a 50-50 basis thereafter in order to avoid further conflict.
- [13] Turning to Mr. Dorey's submission that the income imputed to him should be decreased significantly and a portion of the lump sum child support repaid to him, the judge found no material change in circumstances to justify such an order. She found Mr. Dorey was attempting, yet again, to relitigate the issue of his imputed income and dismissed the balance of his claims.

On appeal

- [14] The appellant raises 13 issues which can be grouped conveniently into four grounds of appeal:
1. Did the judge err in finding the Koenigsberg J. Order and Holmes J. Order survived bankruptcy?
 2. Did the judge err in assessing s. 7 expenses?
 3. Did the judge err in finding no material change in circumstances justifying a reduction in child support?

4. Did the judge conduct the hearing in a manner giving rise to a reasonable apprehension of bias against the appellant?

I will address each ground of appeal in turn.

1. Did the judge err in deciding the orders survived the bankruptcy?

[15] Section 178(1)(c) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], provides that an order of discharge does not release a bankrupt from any liability under a support or maintenance order:

178(1) An order of discharge does not release the bankrupt from

- (c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common law partner or child living apart from the bankrupt.

At the hearing below, Mr. Dorey, who was then self-represented, argued that the orders in issue were cost orders, not support and maintenance orders, and therefore did not fall within the s. 178(1)(c) "support or maintenance" exception to the rule that all debts are expunged after bankruptcy.

[16] As the judge pointed out to Mr. Dorey during his submissions, it is well-settled law that costs orders related to claims for support and maintenance survive bankruptcy: *B. (K.J.) v. B. (W.S.)*, 2004 BCSC 837; *S.L.M. v. D.R.M.*, 2003 BCSC 1094 [Manolescu]; *Cain v. Hodgson*, 2013 BCSC 310 (in Chambers); *Sandhu v. Sandhu*, 2012 BCSC 1183. In *Bankruptcy of Patrick Lees*, 2002 BCSC 570 [Re Lees], Mr. Justice Wilson stated the point clearly:

[17] It is beyond dispute that costs incurred in obtaining an order for child support are included in the notion of "any debt or liability under a support order".

[17] On appeal, Mr. Dorey now acknowledges that costs incurred to obtain a child support order survive bankruptcy, but he argues the orders in the present case are not of that kind. He contends the judge made four errors in coming to the contrary conclusion:

- (a) failing to find the \$24,264.52 outstanding from the Koenigsberg J. Order related to property division, not costs;
- (b) failing to recognize she had no jurisdiction to vary the Koenigsberg J. Order and Holmes J. Order to determine the percentage of costs related to support because they had already been entered;
- (c) failing to recognize that even if such jurisdiction exists, it can only be exercised by the judge who made the original order and on the basis of evidence, neither of which occurred in this case; and
- (d) failing to recognize that lump sums costs do not fall within the exception in s. 178(1)(c) of the BIA.

- [18] I turn now to each of these issues.
- (a) Did the judge err in characterizing the outstanding amount due under the Koenigsberg J. Order as consisting of costs due?
- [19] The appellant submits the chambers judge erroneously assumed the amount remaining to be paid under the Koenigsberg J. Order reflected an award of costs. He says this assumption is likely due to a "slip" in the Koenigsberg J. Order which, at para. 7, characterized the \$24,265.52 owing from the respondent to the appellant as "costs payable". The appellant applies to adduce, as fresh evidence on this appeal, the transcript of the hearing before Koenigsberg J. which he obtained after the hearing underlying this appeal. He submits the transcript demonstrates that Koenigsberg J. declined to decide whether the sum due was attributable to costs relating to child support, and questioned whether she had the authority to do so.
- [20] I would not admit the fresh evidence, as it does not meet the due diligence requirement and there is no prospect that it would have changed the outcome of the application below: *Palmer v. Queen*, [1980] 1 S.C.R. 759. That is so because the status of the \$24,264.52 as costs was not an issue in dispute before the judge.
- [21] As I have noted, Mr. Dorey's primary argument below was that the sum due was costs, and costs were not "support or maintenance" that survived bankruptcy. The judge summarized Mr. Dorey's position as follows:
- [38] The Father also argues that he is not required to pay these outstanding court orders due to his bankruptcy. He asserts that the unpaid order of Koenigsberg J. (requiring him to pay \$24,264.52) ought to be attributed entirely to court costs rather than maintenance. That is, he submits that I should assume that the amounts deducted by Master MacNaughton from his equity in the family home, as part of her reconciliation calculations, related entirely to outstanding child support and retroactive child support payments; that is, the amounts that remain unpaid from her reconciliation relate only to court costs and not maintenance. He argues that child support was notionally paid out first and deducted from his equity in the family home. As such, what remains unpaid are court costs, not child support, and are therefore debts that were extinguished as a result of his bankruptcy.
- [22] Having argued his case on that footing, it is not now open to Mr. Dorey to change strategy on appeal and attempt to adduce new evidence to support a contradictory position: *Marsh v. Marsh*, 2006 BCCA 144 at paras. 21-25.
- [23] In my view, even if it were open to Mr. Dorey to change his position on appeal, I would not accede to his argument. It seems to me entirely reasonable to assume that the reconciliation conducted by Master MacNaughton in accordance with the trial judgment addressed payment of outstanding child support, payment of family debt, division of property and then trial costs, such that the outstanding amount related to costs (as argued by Mr. Dorey below).

- (b) Did the judge have jurisdiction to designate the percentage of the Koenigsberg J. Order and Holmes J. Order as costs orders related to maintenance?
- [24] The appellant submits the judge erred in holding she had jurisdiction to vary the orders after they had been entered. He argues that once an order is entered, the court is functus. He relies on two cases in support of this position: *Re Lees* and *Manolescu*.
- [25] These cases were addressed and conveniently summarized by Fisher J. (as she then was) in *Sandhu*, a case grappling with the same issue:
- [20] *Re Lees* was an application under s. 178(1)(c) of the BIA Act for a declaration that part of a costs judgment awarded in favour of the creditors in a family law proceeding survived any order discharging the debtor from bankruptcy. Both the order and a certificate of costs had been entered. The primary objection to the application was that there was no evidence before the Court to conclude an apportionment. In addressing this, R.D. Wilson J. addressed whether the Court had the power to order an apportionment at that stage of the proceedings. After noting that the BIA Act did not confer any such power, he stated:
- [22] Arguably, Rule 57(15) confers a power on the court to apportion costs between those issues attributable to "maintenance" and those issues not attributable to "maintenance". The rule, however, presupposes that the judge presiding at the hearing will make that order.
- [23] No other authority conferring the power sought to be exercised was cited. The orders in this litigation thus far have been entered. I take the law to be that a judge cannot alter or amend an order after it has been entered, except in limited circumstances; none of which here prevail. In short, I have no jurisdiction to make the order sought, whether upon "evidence", or on the submissions of counsel. [Footnotes omitted.]
- [26] Fisher J. noted that the previous Rule 57(15) and the current version, Rule 16-1(14), permit the court to award costs that relate to particular steps or matters in or related to a family law case. She observed that *Re Lees* was followed "as a matter of comity" in *Manolescu*, a case in which Groberman J. (as he then was) considered an application by a wife in a family law proceeding to renew a costs judgment that had preceded the husband's discharge from bankruptcy. Fisher J. continued:
- [22] [In *Manolescu*] The costs judgment had been made 17 years previously, in 1985, the certificate of costs had been issued in 1991, and the husband had been discharged from bankruptcy in 1993. No evidence was before the Court from which the judge could apportion the assessed costs between support matters and other issues. He considered a submission that where there is no such evidence, no amount could be said to have survived the bankruptcy, and then referred to *Re Lees* (at paras. 26-28):

- [26] An even more stringent approach to mixed awards was taken in *Re Lees*, 2002 BCSC 570, 35 C.B.R. (4th) 150, a case not cited by the parties before me. In that case, R.D. Wilson J. had before him an application to declare that a portion of a costs award in a family matter would survive a bankruptcy. He held that the court lacked jurisdiction to apportion a costs award after the order was entered, even if evidence was put before the court. In the result, relief was refused.
- [27] It is rare for costs in a "mixed issue" family matter to be formally apportioned between maintenance and support matters, on the one hand, and custody and property issues, on the other. Where there is an impending bankruptcy (as was the case in *Ffrench v. Ffrench*, supra), a formal apportionment may well be sought - otherwise, it is unlikely to occur to anyone to do so. If *Re Lees* is good law, the result will be that in most mixed issue cases no part of a costs award will survive bankruptcy.

[Emphasis added.]

- [27] Fisher J. distinguished the case before her on the basis that neither *Re Lees* nor *Manolescu* involved an application to apportion costs before the same judge who had heard the trial and made the costs order. She noted that *Manolescu* involved an application made ten years after bankruptcy, and that *Re Lees* was decided without the benefit of full argument -- apparently because the judge had raised the jurisdictional issue of his own accord: *Sandhu* at para. 25; *Re Lees* at paras. 23-25.
- [28] Fisher J. then reviewed two Ontario Superior Court decisions which held there is jurisdiction to amend costs orders for the purpose of determining the portion of costs attributable to maintenance issues: *Beaumont v. Beaumont*, [2006] O.J. No. 2433 (S.C.J.), and *Philip v. Philip*, 2008 O.J. No. 3067 (S.C.J.). She noted the similarity between the Ontario rule relied on and our Rule 15-1(18) and concluded:
- [38] In my view, there is a limited jurisdiction under Rule 15-1(18) for the judge who made a costs order to subsequently apportion costs to maintenance issues. I say a limited jurisdiction because it should only be exercised in circumstances where, had the court known of the bankruptcy, apportionment would have been determined. [Emphasis added.]
- [29] I agree that a judge has a limited jurisdiction to apportion costs granted in an order preceding a bankruptcy by one of the parties to the family proceeding. As observed in *Manolescu* and *Philip*, prior to a bankruptcy, a judge will not normally apportion costs between maintenance and other issues because to do so would serve no purpose. In those cases in which it becomes an issue due to a subsequent bankruptcy, it is in my view a proper exercise of the authority of the court to address apportionment in hindsight in order to give effect to the intention of Parliament -- expressed in s. 178(1)(c) of the BIA -- that liability for costs relating to child and spousal support should not be extinguished by the bankruptcy of the debtor. In such cases, the substance of the order -- the amount owed -- is not altered. Rather, some or all of the costs are attributed to support-related issues.

- [30] I emphasize, however, that the jurisdiction to characterize all or part of an entered costs award as support-related does not mean that the jurisdiction should always be exercised. There may be reasons, such as the passage of time alluded to in *Manolescu*, or an absence of evidence upon which to base an apportionment, for a judge to decide that it is not in the interests of justice to grant the order sought. This leads to the next issue to be addressed.
- (c) Did the judge fail to recognize that only the judge making the original costs order may allocate costs and only on evidence?
- [31] The appellant argues that only the judge making the original cost order has the jurisdiction to apportion costs retrospectively, and that any apportionment must be based on evidence as to the time spent on the support-related issues.
- [32] In my view, these two points are aspects of the central submission that a judge apportioning costs must do so based on an understanding of what transpired at trial and the extent to which the parties' efforts and the court's resources were expended on support as opposed to other issues. It is evident that, in general, it will be preferable for the judge who made the costs order to hear an application for apportionment of those costs. But that will not always be possible or practical -- judges retire, succumb to illness, have scheduling conflicts, and so on. I see no reason why another judge of the court may not hear an application in such circumstances, as long as some evidence is presented to permit that judge to make an informed decision.
- [33] In the present case, Mr. Dorey says there was no evidence before the judge to support her apportionment of 65% of the costs ordered by Russell J. to support-related issues. I would not agree with that position. Ms. Havens provided the judge with a table entitled "Financial Disclosure Summary" which had been prepared by Mr. Dorey to address which issues were support-related and which were not. Ms. Havens opposed his approach to apportionment, submitting that it would be fairer to look at time spent on child related issues which she put at 80% of the trial. Further, Mr. Dorey argued that 52.5% of the issues addressed at trial were not child related, and 47.5% were. The judge also had before her the reasons for judgment of Russell J.
- [34] In addressing this issue, the chambers judge said:
- [34] The Father argues that only a small proportion of the issues dealt with by Russell J. at Trial related to the maintenance of the Children, and that Koenigsberg J.'s order ought not be characterized as maintenance. I find however, that a significant proportion of the issues before both Russell J. and Koenigsberg J. were intertwined with the issue of child support.
- [35] I accept the Mother's submissions that much of the evidence and issues before Russell J. related to the issues of child support including, for example, the assessment of the parties' respective Guideline incomes, the Father's earning capacity, and the justification for a lump sum maintenance award based on the Father's equity in the matrimonial home. In addition, the evidence at Trial concerned whether various assets and liabilities of the parties were to

be characterized as family assets and deducted or added to the Father's portion of the matrimonial home. These assessments were an integral part of Russell J.'s determination of the appropriate lump sum child maintenance award ordered in favour of the Mother. That assessment included a consideration of a financial settlement the Father received during the marriage from a former employer (the Romarco settlement); the significant sums of money advanced by the Father's family and received by the parties during the marriage; and the debt the Father carried into the marriage. The issue of child maintenance clearly permeated many issues before the court at Trial. Having reviewed and considered the matter carefully, I am satisfied that at least 65% of Koenigsberg J.'s judgment of \$24,264.52, that is, \$15,771.94, falls within the meaning of maintenance in ss. 1(1) of the FMEA.

[Emphasis added.]

[35] In relation to the cost order of Holmes J. the judge said:

[37] With regard to the costs awarded by Holmes J., I am of the view that these may be entirely characterized as maintenance. The primary focus of this application related to the Father's attempt to vary the lump sum maintenance award of Russell J., entailing a review of evidence and arguments relating, for example, to the Father's imputed income and his efforts to find work. Accordingly, I order that the sum of \$2,547.15 constitutes maintenance under the FMEA.

[36] In my view, the judge had before her enough evidence to apportion costs as she did. As is often the case with self-represented litigants in family cases, judges must do their best with a record that is less than ideal. As long as there is some evidence to support a determination of the time spent on support-related issues, that finding will be entitled to appellate deference.

[37] Ms. Havens sought a reapportionment of costs within five months of Mr. Dorey's discharge from bankruptcy. Although the original order of Russell J., varied by the Koenigsberg J. Order, had been made in 2011, four and one-half years earlier, the respondent's efforts to collect the debt had been ongoing, resulting in applications before the same court in 2012, 2014 and 2016. In these circumstances, I am of the view that the judge did not err in attributing a portion of the costs to support-related issues.

(d) Did the chambers judge err by finding lump sum cost orders survive bankruptcy?

[38] Mr. Dorey argues the judge erred in finding that un-taxed costs meet the definition of "maintenance" in s. 1(1) of the Family Maintenance Enforcement Act. That section provides:

"maintenance" means maintenance, support or alimony, whether payable

- (a) periodically, annually or otherwise,
- (b) for an indefinite or limited period or until the happening of a specified event, or
- (c) as a lump sum,

and includes

- (d) expenses arising from and incidental to
 - (i) the prenatal care of the mother or child, or
 - (ii) the birth of a child,
- (d.1) the cost of tests for paternity,
- (e) an amount payable under section 14 (1) (b) or 22 (2) (a),
- (f) fixed costs awarded under the regulations in favour of the director or a creditor,
- (g) taxed costs awarded in relation to anything that comes within this definition,
- (h) prescribed fees or expenses.

[Emphasis added.]

[39] The appellant contends that since the FMEA expressly provides that "maintenance" includes taxed costs, lump-sum awards of costs such as those made by Holmes J. and by the chambers judge are excluded from the definition. Mr. Dorey argues that if the legislature had intended lump-sum awards of costs to be included in the definition, the more general word "costs" rather than the more specific term "taxed costs" would have been used.

[40] As the chambers judge noted, there is conflicting jurisprudence on whether lump sum costs ordered by a judge fall within the definition of "taxed costs" in subsection 1(1) of the FMEA: see *C.L.M. v. M.J.S.*, 2017 BCSC 1517; *Olsen v. Chinniah*, 2012 BCSC 624; *Sandhu v. Sandhu*, 2012 BCSC 1183; *British Columbia (Attorney General) v. Houle* (1994), 1 B.C.L.R. (3d) 215 (S.C.) (in Chambers); *MacKenzie v. MacKenzie*, 2011 BCSC 1652. The judge addressed the issue, saying:

[27] It is significant that the definition of "maintenance" is inclusive and expressly includes "lump sum" awards and "taxed costs awarded in relation to anything that comes within this definition". The word "includes" expands the definition such that the words described as being included in the definition are not exhaustive or prescriptive but, rather, are in addition to, and not in limitation of, any words that have not been listed in the definition: see *Ruth Sullivan*, *Statutory Interpretation*, 3d ed. (Toronto: Irwin Law, 2016) at 79-81; *R. v. McLeod*, [1950] 2 W.W.R. 456 (B.C.C.A.); and *Pacific Abrasives & Supply, Inc. v. British Columbia (Revenue)*, 2010 BCCA 369 at para. 18. As such, I am of the view that the definition of "maintenance" under ss. 1(1) is broad in scope and includes not only "taxed costs" relating to child support, but also those costs awarded by way of a lump sum to a spouse seeking to obtain or enforce a maintenance order.

[31] A purposive approach would treat awards relating to maintenance proceedings uniformly, whether they are awarded as taxed costs after assessment by a Registrar or Master, or costs assessed as a fixed, lump sum award by a judge. A legislative interpretation that treats a

lump sum maintenance award or a related lump sum award of costs, differently than taxed costs related to a maintenance proceedings would be at odds with the purpose of the legislation. Such a result would be inconsistent with the legislative intent to simplify the enforcement of maintenance payments. If a lump sum costs award could not be characterized as maintenance under ss. 1(1) of the FMEA, a payee spouse would have to pursue his or her costs related to such a maintenance order without the benefit of the FMEP's enforcement mechanisms; yet, a payee spouse who was awarded taxed costs in relation to a maintenance order would receive that benefit. Such disparate treatment of the two types of costs awards makes little sense and would defeat the purpose of the legislation. Given this particular legislative context, and the issues and circumstances before me, there is no meaningful difference between a spouse whose costs are taxed by the Registrar after a court has ordered costs in regard to a maintenance proceeding, as compared to a spouse whose costs are assessed as a lump sum award of costs by the court at such a proceeding.

[Emphasis added.]

[41] I would substantially adopt this reasoning. It seems to me that the reference to taxed costs signals the intention of the legislature to distinguish between claimed costs and fixed costs. Both taxed costs and lump sum costs are fixed costs. In that sense, they stand on an equal footing and should be treated the same way for the purposes of the FMEA and the exception carved out by s. 178(1)(c) of the BIA.

2. Did the judge err in assessing s. 7 expenses?

[42] In the court below, Ms. Havens sought payment of \$16,875 representing Mr. Dorey's 66% share of s. 7 expenses incurred between January 1, 2012 (following the trial before Russell J.) to May 1, 2017. The judge ordered Mr. Dorey to pay \$15,505 (at para. 86), approximately \$1,400 less than the sum sought. The judge did not in her reasons for judgment explain how she arrived at that number. She stated:

[57] I have reviewed the receipts, emails, submissions and materials both parties have provided to me. I accept the Mother's evidence that she has not claimed expenses such as clothing, haircuts and gas as part of her s. 7 claim. The s. 7 expenses the Mother has incurred, which the Father has refused to pay, are proper s. 7 expenses. They relate to medical and dental care, education, and extra-curricular activities.

[58] I also accept the Mother's evidence that she has made repeated efforts to consult with the Father, before incurring the s. 7 expenses. The materials before me establish that, since this Court's last reconciliation of outstanding s. 7 expenses, the Mother has continued to pay most of the s. 7 expenses, and has done so by a large margin. Taking into account the Father's contributions towards these expenses, and after reviewing the Mother's calculations, I find that as of May 1, 2017, the Father owed her \$15,504.99, based on the two-thirds proportional share of s. 7 expenses, as ordered by Russell J.

[Emphasis added.]

- [43] Mr. Dorey argues the judge erred in her s. 7 analysis, submitting she did "not apply the law on s. 7 expenses, [because she did] not cite any case law on what constitutes a proper s. 7 expense." I would not accede to this argument. The judge is presumed to know the law. It is not necessary for a judge to expressly set out a test. The question on appeal is whether the test was applied.
- [44] The appellant does not dispute that the medical, dental and health-related claims are properly characterized as s. 7 expenses, and that they amounted to \$12,267 for the period in issue. However, he denies that any of the children's extracurricular activities are proper s. 7 expenses, citing *Clarke v. Clarke*, 2014 BCSC 824 at paras. 48-54. There, the court summarized the law on s. 7 expenses and concluded that 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.
- [45] Mr. Dorey submits that the only activity which possibly meets the definition of a s. 7 expense is the high-level competitive basketball his children engaged in, which cost \$5,491. He points out that the expenses claimed by the respondent such as school field trips, school supplies, film festivals, music festivals, first aid courses, summer activities, passports, hair supplies and curriculum workbooks are covered by basic child support.
- [46] He also submits that in any event he is not required under the terms of Russell J.'s order to pay for extra-curricular activities he did not agree to, noting Ms. Havens did not apply to court for approval of those activities as anticipated by the order. In making this submission, the appellant relies on *Muller v. Muller*, 2015 BCSC 370. That case dealt with a similar order. The court held that the agreement of the parties was a prerequisite for the other party to have a right to claim for contribution to an extracurricular expense incurred. Because the father had presented no evidence that the mother agreed to enroll the children in any of the activities he claimed compensation for, the mother was not required to contribute to those expenses.
- [47] In my view, the judge did not err in finding that Mr. Dorey was obligated to contribute to s. 7 expenses for which he had refused to pay. Ms. Havens presented evidence of her repeated efforts to consult Mr. Dorey. Further, as the judge observed at para. 54 of her reasons, Mr. Dorey had not objected to the activities in principle, "recognizing their benefit to the Children, but [declining] to pay for most of the associated expenses." The record demonstrates that the father consistently took the position that he could not afford to pay for the activities due to his low level of income -- an income which the court had found represented intentional under-employment.

[48] There is no doubt the mother's original claim included items that are not properly characterized as s. 7 expenses, such as school supplies, community sports and haircuts. However, over the course of the five-day hearing Ms. Havens revised the charts she had prepared documenting s. 7 expenses to remove those items. The judge was satisfied that as a result, the mother had not claimed "everyday expenses" as s. 7 expenses (at para. 55).

[49] The judge's reasons for judgment on this issue must be considered in context. On the last day of the hearing, the parties informed the judge that they had gone over the summaries to sort out what expenses could be agreed to. Mr. Dorey said:

[P]retty much I'm in agreement with all of it. So the MSP, I -- I figured it out and came up with the same calculations.

After some discussion about whether the chart was entirely up to date, the following exchange occurred:

THE COURT: If I may, it sounds to me like you're very close to agreeing on what the section [] 7 expenses ought --

MS. HAVENS: Right.

THE COURT: -- to be, and I commend both of you for that, truly. So if -- and I -- and I take your point that you have a document at tab 24 of your binder that's an updated version of section 7 and that we should be using the most up to date figures. You have agreed in principle on what ought to be considered as an appropriate or proper section 7 expense and what isn't, so it shouldn't be a problem going to tab 24 and just updating the list.

MS. HAVENS: Right.

THE COURT: And what would be very helpful is if the two of you could get together when we're done today and in within whatever time frame you think is reasonable and send me a -- a table that you both agree to on the section 7 expenses.

MS. HAVENS: Okay.

MR. DOREY: I'm sorry, a table being?

THE COURT: Just like this --

MS. HAVENS: Just with numbers.

THE COURT: -- just like what you have provided but up to date, completely up to date.

MR. DOREY: And I'm not sure what -- I'm missing what's not up to date with this.

THE COURT: So can I make a note that the parties agree that they'll send me an updated list of section 7 expenses?

MS. HAVENS: Yeah.

THE COURT: Are you fine with that, Mr. Dorey?

MR. DOREY: Oh, yes. Sorry, My Lady, yeah,

[50] The parties provided further written submissions, as the judge noted in the portion of her reasons for judgment quoted above.

[51] In these circumstances, it is not surprising that the judge did not spend a great deal of time explaining precisely how she arrived at the figure for s. 7 expenses. Mr. Dorey has not demonstrated any error in the judge's analysis or order. I would accordingly defer to her finding on the outstanding sum due.

3. Did the judge err in not finding a material change in circumstances?

[52] In the court below, Mr. Dorey sought to establish a material change in circumstances based on his income falling below the income imputed to him of \$120,000, and Ms. Haven's income increasing from \$60,000 at trial to \$73,750 in 2016. He argued that the differences in income compelled a recalculation of child support, a corresponding refund of part of the lump sum he paid to Ms. Havens, and reassessment of his proportionate share of s. 7 expenses. Further, he argued that as a result of the material change in the parties' income, Ms. Havens should be ordered to pay him child support and should be responsible for all s. 7 expenses.

[53] In my view, this ground of appeal can be dealt with summarily. I see no error in the judge's conclusion that Mr. Dorey failed to prove a material change of circumstances. She began by reviewing the evidence, including Mr. Dorey's claim that his self-employment as an accountant yielded a gross income of \$14,000 before expenses. She was not satisfied that the income reported by Mr. Dorey was reliable, and saw no basis to change the level of income imputed to him by Russell J.

[54] Turning to the increase in Ms. Havens' income from \$60,000 at the time of Russell J.'s order in 2011, to \$73,746 in 2016, the judge applied a contextual analysis. She recognized that the change relied on must be a material change in circumstances, that if known at the time would have resulted in different terms: *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688. She reasoned that it was foreseeable that the parties' income could change to some degree over time given that the lump sum was awarded when the children were seven years old and it was intended to cover child support until they reached their 19th birthdays (at para. 68).

[55] Further, the judge noted that the appellant had previously made the same application before Holmes J. That application was dismissed and, like the order after trial by Russell J., was not appealed (at para. 78). The judge nonetheless considered the new evidence the appellant sought to rely on to support his application. She too found that Mr. Dorey's earning capacity far exceeded his stated earnings (at para. 79). That finding of fact is entitled to deference on appeal. I would accordingly not accede to this ground of appeal.

4. Did the judge demonstrate bias warranting a new trial?

- [56] Mr. Dorey contends this Court should consider ordering a new hearing on the basis that the judge demonstrated bias. He points to a number of occasions when the judge interrupted his submissions to explain a point of law, or to inform him that his application could not succeed. He submits her comments indicate that she had already made up her mind on a point of law before hearing his submissions, and that she stepped into the role of advocate for the respondent.
- [57] Counsel for Mr. Dorey wisely did not press this point in oral argument. Having reviewed the transcript, and in particular each of the 16 passages said by Mr. Dorey to demonstrate bias, it is evident that this ground of appeal is entirely devoid of merit.
- [58] The only point made by Mr. Dorey with any substance relates to the judge deciding a minor issue as to the procedure to be followed when the parties travelled with their children -- an application she had directed the parties to reset in chambers before her because they had run out of time to hear full submissions that day. Although the judge mistakenly decided that issue in her reasons, no doubt due to the passage of time necessitated by the parties' subsequent written submissions, the mistake is minor -- indeed it is not raised as a ground of appeal -- and can hardly be described as demonstrating bias.
- [59] To the contrary, it is clear from the transcript that the judge demonstrated extraordinary patience and equanimity throughout the protracted hearing, striving to assist both parties as they navigated complex issues without the assistance of counsel. Her efforts to convey to Mr. Dorey that costs incurred in relation to support fall within the exception in s. 178(1)(c) and survive bankruptcy did not amount to "prejudging an issue". The judge was, rather, informing Mr. Dorey of well-settled law.
- [60] Mr. Dorey's assertion on appeal that the judge demonstrated bias is belied by his closing exchange with the court:

THE COURT: Okay. Well, I want to thank both of you. This has obviously been a very taxing and labour intensive exercise, and I want to thank you very much for the work that you have put into it. And we are adjourned and I will await for your submissions. All right?

MS. HAVENS: Thank you.

MR. DOREY: I would like to say it was a pleasure.

THE COURT: Well, hopefully in the future these sort of issues can be addressed more readily and you can move forward and close some old chapters in your lives. All right. Thank you.

- [61] Bias on the part of a judge will not lightly be found, and should not lightly be alleged. In this case it was advanced on the flimsiest of pretenses.

Disposition

- [62] In the result, I would dismiss the appeal with costs to the respondent.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Fitch"

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