

CANADA / JUDGMENT

J.D. v. Y.P.

2015 BCSC 321

COURT

Supreme Court of British Columbia

DECIDED

4 March 2015

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2015 BCSC 321 J.D. v. Y.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.D. v. Y.P.,

2015 BCSC 321

Date: 20150304

Docket: E011396

Registry: New Westminster

Between:

J.E.S.D.

Claimant

And

Y.E.P.

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

The Claimant, J.D.:

In Person

The Respondent, Y.P.:

In Person

Place and Date of Hearing:

New Westminster, B.C.

July 11, 2014

November 7, 2014

Place and Date of Judgment:

New Westminster, B.C.

March 4, 2015

Background

- [1] The history of these parties' dispute concerning their daughter, [S.] has been long and acrimonious. Some of the background is set out in my earlier reasons: J.D. v. Y.P., 2011 BCSC 1237 [2011 Reasons].
- [2] There have been approximately 21 orders made since this proceeding was commenced in 2001. These reasons concern new applications argued in July and November 2014 dealing with child support and parenting issues.
- [3] The respondent seeks a variation of his support obligations that accrued during a time when he was unemployed. He also wishes to pursue earlier orders concerning the child's antipathy toward him, his failed attempts to forge a relationship with her and a supplementary report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The claimant wished to address an earlier order imputing income to her and requiring him to contribute to additional s. 7 expenses.

Issues

- [4] The issues for me to decide are as follows:
 - a) Whether to vary the respondent's child support obligations retroactively from February 2014 (on the basis that there has been a change in circumstances);
 - b) Whether to cancel the respondent's outstanding child support arrears;
 - c) Whether to vary the imputation of the claimant's income from \$18,000 per annum for the purposes of calculating her proportionate contribution to s. 7 expenses;
 - d) Retroactive s. 7 expenses (relating to private school tuition and fees);
 - e) Prospective s. 7 expenses (relating to private school tuition and fees, the Missionary trip, lifeguard certification, cell phone plan);
 - f) Whether the claimant should contribute to the costs associated with Dr. Aube's counselling services;

- g) Whether to vary the order of Ker J. and delete the requirement that there be a s. 15 report directed at the issue of parental alienation;
- h) If I answer (g) in the negative, whether to order the claimant pay her proportionate share of the cost of the s. 15 report and whether to name Dr. Rebecca England as the author;
- i) Whether to place S. on the respondent's wife's medical plan;
- j) The application of the claimant to require the respondent to reimburse her for the costs associated with the May 26, 2014 hearing is adjourned pending assessment of the Bill of Costs by the Registrar;
- k) The application by the claimant to require the respondent to provide a copy of his birth certificate was dismissed in my previous order of September 16, 2011 so it will not be addressed in these reasons;
- l) The order to find the claimant in contempt of court for failing to provide receipts associated with s. 7 expenses is dismissed;
- m) The claimant to draft the order;
- n) Costs; and,
- o) I decline to seize myself of the matter.

Child Support Obligations and Arrears of Child Support

- [5] The respondent currently resides in Maryland in the United States where he is employed as a school teacher. In my 2011 Reasons, I ordered the respondent to increase his child support payments to \$619 per month, based on an income of \$66,200 pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [6] In June 2013, the respondent's employment in New York changed from a full time secure position to that of a substitute teacher. He was advised that he was "placed in excess from our school for next year". Being in excess meant that the respondent's school assignment might change on a weekly basis within his seniority district.
- [7] From September 2013 to December 2013 the respondent worked full-time as a substitute teacher. The respondent contends that by the end of December 2013 he had overpaid his support obligations by \$820 US. By March 31, 2014 the Family Maintenance Enforcement Program [FMEP] advised him he had overpaid \$510.72.
- [8] In the fall of 2013 the respondent's wife and family relocated to Maryland, while the respondent stayed in New York at his teaching position.

- [9] At the end of 2013 the respondent's principal spoke to him about his plans and it became clear that he intended to relocate to Maryland to be with his family. He did not know when that might occur but it seemed likely he would not be able to complete the school year in New York. Accordingly, the respondent and his principal reached a consensus that he should resign from his position.
- [10] The respondent subsequently relocated to Maryland. From January 2014 until August 2, 2014 the respondent was unemployed but continued to look for full-time secure employment. During this period of unemployment he received benefits totaling \$18,408 per annum. Based on the Guidelines, he believed his child support obligation on this income was to pay \$163.50 per month; he unilaterally reduced his child support payments to that amount.
- [11] The respondent was re-employed on August 14, 2014 in Maryland and currently receives a salary of \$53,000 US. He converted that amount to Canadian funds at 1.048 cents per dollar and said the Canadian equivalent of his current salary is \$55,586. The Guidelines child support amount for that income is \$512.78 per month.
- [12] Between January and April 2014 he paid \$619 towards child support and \$77.50 towards s. 7 expenses. In May he paid \$510.72; June \$157.92; and July \$156.45. The FMEP statement shows arrears of \$3,540 as of October 7, 2014.
- [13] The respondent is currently in arrears \$2,422 plus interest in his support payments.
- [14] He seeks an order to cancel his arrears and reduce his ongoing support payments to \$512.78 per month. A change of circumstances is required before a court can order a variation of a previous child support order.
- [15] A court may also reduce or cancel child support arrears owing pursuant to s. 174 of the FLA:
- 174(1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [16] A change in circumstances, in addition to gross unfairness, is similarly required in order for a court to reduce or cancel child support arrears. This was discussed by Warren J. in *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453:
- [232] In contrast, on an application for the cancellation or reduction of arrears, the applicant must prove, first, a material change in circumstances (defined as one that is significant and long lasting), and, second, that it would be "grossly unfair" not to cancel the arrears: *Beavis v. Beavis*, 2014 BCSC 422, at para. 14. The standard of "grossly unfair" is set out at s. 174 of the Family Law Act (and was previously set out at s. 96(2) of the FRA). The reduction or cancellation of arrears is a form of retroactive variation that imposes a heavy burden on the party seeking the reduction or cancellation: *Earle v. Earle*, 1999 BCSC 283, at paras. 22-23, 46.
- [17] Madam Justice Fenlon in *Lightle v. Kotar*, 2014 BCSC 2181 similarly points to the test in *Earle v. Earle*, 1999 BCSC 283 [Earle] in describing the circumstances that must exist to reduce or cancel arrears:
- [43] On an application of this kind, the Court must consider the factors in ss. 17(4) and (4.1) of the Divorce Act described in the preceding section. In addition to the statutory requirement of a material change in circumstances, the common law has imported the test developed in relation to what is now the Family Law Act, *S.B.C. 2011, c. 25: S.A.R. v. L.G.R.*, 2011 BCSC 712 (CanLII), at para. 45; *Lewis v. Lewis* (1999), 1999 CanLII 5273 (BC SC), 2 R.F.L. (5th) 417, 92 A.C.W.S. (3d) 656 (B.C.S.C.) at para. 16. Under that test, arrears of support will be reduced or cancelled if it is grossly unfair not to do so in the circumstances.
- [44] The test to be applied is set out more fully in *Earle v. Earle*, 1999 CanLII 6914 (BC SC), 1999 BCSC 283, 86 A.C.W.S. (3d) 764 at para. 27:
- [27] [Payors] can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:
- i. the change was significant and long lasting and
 - ii. the change was real and not one of choice and
 - iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [18] In my view, the respondent has not given persuasive evidence that meets the gross unfairness test sufficient to establish that maintaining the child support arrears is so unfair that to enforce payment of the arrears would be unjust to the respondent.

- [19] In considering the respondent's circumstances from the perspective of the Earle test, the evidence must establish that the change in circumstances was real and not one of choice. The change in circumstances is the respondent's relocation to Maryland where he was unemployed for seven months and then obtained full-time employment at a salary of \$53,000 US.
- [20] Before that, he was employed full-time as a teacher in New York. The respondent provided very sparse evidence of his reasons for leaving New York and moving to Maryland, but it is clear that the respondent's family made a conscious decision to relocate to the state of Maryland.
- [21] The respondent deposes that, although his employment status changed in June 2013, the work available to him was not interrupted between September and December. In December 2013, he elected to leave his position in New York albeit after consulting with his supervisor. Nonetheless, there was no evidence that he could not have remained employed and receiving a full income after January 2014 but for his decision to leave the state of New York. This is a somewhat unusual situation in so far as the respondent's teaching position in New York was changing but was not eliminated. Thus, I cannot conclude that the interruption in the respondent's income after January 1, 2014 came about for a reason other than his decision to relocate with his family.
- [22] For the respondent to succeed, he must also establish that the change in his circumstances was significant and long-standing. In my view, the six-month employment hiatus for the respondent following his resignation was not so significant and long-standing as to warrant a variation in his support obligations during those months.
- [23] I accept that the respondent made considerable effort in finding a new position and I accept that he was not dilatory in his efforts to find new work. However, in the end, I am unable to conclude that the arrears of support accruing from January 2014 to August 4, 2014 were long-lasting and not brought about at least, in part, by his choice. Although the interruption in the respondent's income was significant, I am of the view that gross unfairness means more than something that is a significant financial burden resulting from the accrual of his support obligations during a time of temporary unemployment.
- [24] It would not be grossly unfair to require the respondent to meet his support obligations at the prescribed rate from February 2014. Thus I will refuse his application for cancellation of his outstanding arrears owing.
- [25] In order to ameliorate the impact of an immediate payment of his arrears of any amounts owing to the present, I order that arrears will be payable at the rate of \$200 per month until the full amount of his outstanding arrears are paid. The claimant will not take any enforcement proceedings for the collection of arrears except to enforce payment of the \$200 on account of arrears.

- [26] On the issue of ongoing child support, the respondent's new employment salary is \$53,000 US. The parties did not adduce evidence of the current exchange rate between United States and Canadian currency. The parties are anxious to have this matter resolved and it would be counterproductive to require them to engage in a further procedure to accurately determine the exact rate. Based on information generally available concerning currency differences, it is my view that the respondent's income is the equivalent of \$66,250 CDN because of the decline in the value of the Canadian dollar. Based on the Guidelines calculations, the respondent's ongoing child support obligations will be \$617 per month effective September 1, 2014.
- [27] Fluctuations in foreign currency exchange can lead to a distortion in the amount payable for child support when the payor earns an income in another currency. This issue was addressed by Warren J. in *K.V.D.P. v. T.E.*, 2004 BCSC 537. He said:
- [33] Section 20 of the Guidelines requires that a non-resident payor's annual income must be determined as though he or she were a resident of Canada; and the foreign income must be converted into Canadian dollars: see *Garrison v. Garrison* (1998), 1998 CanLII 14877 (ON SC), 38 R.F.L. (4th) 435, [1998] O.J. No. 2029 (Q.L.)(Gen. Div.) at ¶16. Any inequities arising from the conversion can be dealt with under the Guidelines.
- [34] In terms of the appropriate exchange rate to be applied, I found in *Ward v. Ward*, 2001 BCSC 847 (CanLII), 19 R.F.L. (5th) 232 at ¶ 34-37, that the rate of exchange of foreign currency should be calculated by averaging the Bank of Canada rate over the 12 months preceding the hearing date. For the months of December 2002 to November 2003, I calculate the average Bank of Canada exchange rate as 1.4216 Canadian dollars per US dollar: Bank of Canada website <http://www.bankofcanada.ca/en/exchange.htm#> Applying that exchange rate to Mr. T.E.' imputed income, I find that he has an annual Canadian income for child support purposes of \$355,400.
- [28] In my view, the respondent should be able to seek a recalculation of the amount of child support in Canadian dollars. Accordingly, the respondent or claimant will have leave to apply for a variation in the amount of child support payable due to currency fluctuations after the 30th day of June and 31st day of December of each year.

Overpayment of Support

- [29] If the respondent had succeeded in reducing his support obligations from January 2014, he contends he would have overpaid his support for the early months of 2014 by \$1,033. He claimed that some of his salary was garnished by the State of New York at the same time he made separate payments for support.

- [30] The respondent was not able to clearly explain the source of this \$1,033 overpayment. However, the records he provided from FMEP are sufficient to enable me to deal with the question of child support arrears without rationalizing the respondent's belief that he had overpaid by \$1,033.
- [31] Given that the respondent's claim for cancellation of his support arrears and readjustment of his support obligation has been rejected, there has been no overpayment of his support obligation.

Section 7 Expenses

Variation of Claimant's Income

- [32] The order of Schultes J. on July 2, 2010 imputed an income of \$18,000 to the claimant and found the respondent's Guidelines income to be \$29,132. The claimant's income has not been varied since that time. The order also provided that s. 7 expenses would be shared between the parties, with 62% of expenses attributed to the respondent and 38% attributed to the claimant. This division is proportionate to the incomes that were imputed to the parties in the order.
- [33] The claimant seeks an order varying the imputation of her income at \$18,000 per annum for the purposes of determining the measure of her obligation for s. 7 expenses.
- [34] The claimant gave birth to a third child which resulted in her taking maternity leave from her work. She received benefits until February 2014 and deposes that she is unable to return to work full-time because of the young age of her second child. The claimant's line 150 income for 2013 was \$19,835. This is the last year for which income information is available and it is more than the amount imputed to her by Schultes J.
- [35] The claimant said that she is looking for part-time work, between 8 and 16 hours per week to supplement her family income. She said that her income is limited to a GST refund and child support payments for her three children. Her child support totals \$2,643. She said she lives in subsidized rental premises; she pays only \$249 per month.
- [36] She recently lost her part-time job because the work conflicted with her attendance at church on Sundays. She carried on a jewelry business that involved attending parties at other people's homes; her income from this effort was nominal.
- [37] She did not explain adequately her reasons for not pursuing full-time employment and engaging child care arrangements to enable her to become employed full-time. The respondent suggested that the claimant has qualifications in the computer field.
- [38] She submits that the amount of her imputed Guidelines income should be reduced to reflect her current family circumstances.

- [39] While there may well have been a change in the claimant's circumstances sufficient to merit a variation of the claimant's imputed income, I am not satisfied that the claimant has adduced sufficient evidence in this regard.
- [40] Neither party filed a F8 financial statement in this proceeding. The evidence does not fully disclose the claimant's current living arrangements or her total monthly expenses. She receives her monthly income from the fathers of her three children and GST refunds. She deposes to being currently unemployed and choosing to remain at home with her children.
- [41] The evidence does not persuade me on the balance of probabilities that I should vary Mr. Justice Schultes's order imputing income to the claimant of \$18,000 per year. Therefore, the claimant's imputed income will remain fixed at \$18,000.

Section 7 Expenses

- [42] The claimant seeks contribution from the respondent for a proportion of s. 7 expenses with respect to costs associated with the following:
- a) S.'s attendance at White Rock Christian Academy (the "Academy");
 - b) the Missionary class trip;
 - c) swim instructor and life guard certification courses; and,
 - d) cell phone plan.
- [43] The claimant also seeks to recover retroactive s. 7 expenses for a proportion of the tuition fees for the Academy from September 2013 - June 2014 and for ongoing tuition and school expenses.
- [44] The claimant deposes that every year the Grade 11 class goes on a Missionary trip over spring break for two weeks and that S. would like to experience with the rest of her classmates. She points out that the cost of this trip may not be overly burdensome if student fundraising efforts are successful. She did not indicate where the class would travel nor did she reveal much about the activity involved. She believes this is a useful activity for S. but she did not describe the impact it might have on her academic performance. Based on the title, a "Missionary program" I presume it involves a religious component of the Academy goals and is part of some spiritual program for the students. This class trip will cost \$2,500 but may cost as little as \$500 - \$800 depending on student fundraising.
- [45] The claimant wishes to include in the s. 7 expenses to be shared by the respondent, costs to pursue swim instructor and lifeguard certification courses. S. has been involved in swimming programs and Mr. Justice Schultes addressed the claimant's request for piano and swimming costs totaling \$3,437 per year. He allowed \$1,500 per year to be utilized for piano or swimming and required the respondent to pay \$77.50 per month.

- [46] In submissions the claimant said that S. requires new eyeglasses at a cost of \$533. She said that S. would benefit by having a cell phone and that the cost of a phone plan will be approximately \$35 monthly. She contends that tuition charges and other costs at the Academy are \$7,476 per year, which is composed of monthly tuition of \$552, \$335 mandatory items, a \$600 uniform, school supplies of \$150 and \$250 to be on the volleyball team. She estimates the total monthly cost over 12 months is \$583 although it is \$623 based on her estimate given during her submissions that the costs were \$7,476 per year.
- [47] The claimant deposes that S.'s attendance at the Academy is reasonable and necessary. She describes the child as extremely gifted. The claimant homeschooled S. during elementary school until September 2012 when S. was enrolled in a public school with a gifted resource teacher. She excelled academically in the public school. Socially, the public school was less successful and she was socially isolated because of the predominance of an immigrant population at the school and the fact that she was 2 - 3 years younger than her classmates.
- [48] As a result of the unsatisfactory public school experience, the claimant enrolled S. at the Academy. The social atmosphere and inclusiveness at the Academy made S. happy.
- [49] She expressed a desire to graduate with her peers at the Academy. She is on the volleyball team, received a Scholar Athlete Award and was selected for the Student Leadership Program at the Academy.
- [50] The claimant claims s. 7 expenses for the swim instructor and lifeguarding courses. She contends that because S. has been a competitive and casual swimmer since age 3, she hopes to become a certified teacher and lifeguard. If she achieves her qualifications she will be able to subsidize her own expenses after graduation and when attending university.
- [51] The claimant also seeks a contribution so the child can obtain a cell phone plan for her safety and convenience.
- [52] Section 7(1) and (1.1) of the Guidelines provide as follows:
- 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:
- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
 - (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.

(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.

[53] Expenses incurred for secondary school education and extracurricular activities must meet the definition of "extraordinary" as set out in s. 7(1.1). The Court of Appeal in *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.) [McLaughlin] discussed the approach to be taken to determining first whether an expense is extraordinary and second if it is necessary and reasonable:

[81] In the result, I conclude that, in deciding whether an expense, or the totality of expenses claimed on behalf of children under s. 7(1)(f) are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities. This list is not intended to be exhaustive, as considerations may arise in other cases which may also be relevant. I note that in the only

other decision of this Court dealing with s. 7(1)(f), *Cochrane v. Zarins* (1998), 1998 CanLII 4270 (BC CA), 36 R.F.L. (4th) 434, the Court concluded that a particular child's talents are a relevant factor in determining whether an expense for an extracurricular activity is extraordinary.

- [82] As earlier stated, once an expense or expenses are found to be extraordinary it is necessary for the court to proceed to determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. There appears to be a consensus in the authorities dealing with s. 7(1)(f) that those questions do not need to be addressed until the expense or expenses in question have been found to be extraordinary. That would also be true of "extraordinary" educational expenses under s. 7(1)(d). With respect to the other expenses included under s. 7(1), which fit under the rubric of "special" expenses as that word is used in the heading of the section, the expenses need not be extraordinary, but they must meet the tests of necessity and reasonableness.
- [54] It is necessary for the recipient spouse to submit evidence of the entire financial picture of the parties so that the court can determine the reasonableness of the expense: *Scott v. Scott*, 2000 BCSC 844 at para. 14.
- [55] Private school tuition fees generally meet the definition of extraordinary educational expenses: *Crofton v. Sturko*, [1998] B.C.J. No. 38 (QL) (S.C.). The Court of Appeal in *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434 (B.C.C.A.) held that the court should consider factors such as the child and parents' history of private schooling, the child's talents, and the ability of the payor parent to pay when determining whether to allow private school fees.
- [56] There must be evidence beyond just the belief of the recipient parent or the child that private school tuition is a necessary expense. In *Dick v. Dick*, 2000 BCSC 780, the plaintiff's application for a proportionate share of private school tuition expenses was dismissed because there was no evidence of the child's performance in public school against which to measure the change to private school.
- [57] With regards to the tuition expenses for the Academy sought by the claimant, it is clear that on consideration of the combined income of the parties and the nature and amount of the expenses this qualifies as an extraordinary expense.
- [58] I am also satisfied by the evidence that the tuition expenses are necessary. Though neither the parents, nor S., have a history of private schooling, she was homeschooled for all of elementary school. It is clear that after homeschooling the child did not integrate well into the public system, which prompted the change to private school.
- [59] I am troubled by the lack of evidence that the claimant consulted with the respondent in making this decision but this is not determinative in my analysis.

- [60] It appears that her academic performance remains excellent at private school. In addition, the difference in her age, relative to the other students, has created some social difficulties that it appears, are to some extent, made easier in the private system. Not only has S. expressed a desire to graduate with her peers from the Academy, she appears to have been the recipient of an athlete award, is involved in the volleyball team at school, and has been selected for the school's Student Leadership Program.
- [61] In my view, the child is thriving in her current environment and it is in her best interests to continue attending this school. Thus, the tuition expense for S.'s private school is an extraordinary expense under s. 7(1)(f) and 7(1)(d) after taking into account the combined incomes of the parties, the amount of the expense, the nature and level of activity in the school, and the overall success she has achieved in the social environment.
- [62] The claimant's concerns that the cultural environment and diversity in the public school did not work well for S. is a concern. She did well academically in the public school but was socially unable to engage with other students. Nonetheless, I accept that attendance at the Academy has been positive for her social and educational development.
- [63] Although I have concluded that the tuition expense is an extraordinary expense, I do not accept that the Missionary trip expense falls into the same category. Taking into account the potential cost of \$2500, and considering the combined incomes of the parties along with S.'s special needs or talents, this expense is not reasonable or necessary and is not to be included under s. 7(1)(f).
- [64] In *McLachlan* the court directs that once an expense is found to be extraordinary, the court must proceed to consider if it is "necessary in relation to the child's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation".
- [65] I am concerned about the reasonableness of these expenses compared to the financial resources of the family. The respondent deposes that he requested information about S.'s education in September 2013 and in particular whether she was attending a public or private school. He was not informed of her attendance at the Academy until February 2014. The claimant did not address her reasons for not telling the respondent about registering S. in a private school for several months after his written request for the information.
- [66] As noted above the claimant did not provide a full financial picture to the Court in the form of an F8 financial statement or any other evidence under oath. She said that her income is limited to a GST refund and child support payments for her three children. Her child support totals \$2,643. She said she lived in subsidized rental premises; she and pays \$249 per month.

- [67] She also testified that she owes money on two credit cards, incurs car insurance costs and pays for utility expenses. Except the information provided in her argument, her financial circumstances were not set out in a fulsome or satisfactory way. It is clear that the claimant remains at home to care for her youngest child but she did not inform the Court of detailed efforts to find employment, except for part-time work, as a means of supporting her family.
- [68] The respondent has a child from his current marriage and resides in Maryland. One question on this application is whether his income, \$ 66,250 CDN per year, is sufficient to require him to pay 79% of S.'s private school education in BC.
- [69] Based on the respondent's Guidelines income, his annual child support payments will be \$7,404. The portion of the respondent's contribution to private school costs would be in the order of \$6000. In my view, the respondent would be called upon to pay \$14,000 net from a gross income of \$ 66,250. In my view, the additional \$6,000 per year is simply unreasonable in all the circumstances.
- [70] It may be that the claimant can obtain some subsidy to assist S. remain at the Academy. However, the claimant chose to register S. in that school without consulting the respondent or seeking his consent.
- [71] I do not accept that the inquiry made by the respondent into Montessori schooling when S. was young, is any indication that the parties had planned or agreed upon expensive private schooling for her. There has been no consensus or agreement, either before or after separation, concerning private schooling.
- [72] In *J.L.T. v. J.D.N.T.*, 2009 BCSC 780 this Court said:
- [51] No evidence has been led before me that would demonstrate the necessity of the children attending private schools. The fact that they may be exceptionally bright or that they might have certain problems does not lead inexorably to the conclusion that they must attend private schools. I have not been asked to take judicial notice of the proposition that private schools should be considered superior to public schools, and in any event it would be incorrect to do so. The decision whether to send one's children to public schools or private schools is a decision for individual parents to make. In the absence of evidence of special circumstances, a parent cannot be faulted for deciding that public schools are the right choice for their children.
- [73] In assessing the circumstances, I have taken judicial notice of the geographical differences between White Rock and North Surrey. If S. is able to attend a private school in White Rock BC, I do not understand why or how S. is unable to attend a public school in that community where she might find greater social and cultural affinity with her classmates. The North Surrey public school may have been an unfortunate fit for S.; it is clear that other alternatives that might meet her needs are available in the public system. In any event, I am not satisfied that this expense is necessary or reasonable when measured against the economic resources available and the possibility of other alternatives that would meet her

needs.

Missionary Trip

- [74] The same principles apply to the claimant's request that the respondent fund the 2016 class trip at a cost of \$2,500. There was a paucity of detail to inform the Court on the reasonableness or necessity of this trip. Taking into account the financial resources available to the respondent in the absence of compelling evidence that this would be a reasonable or necessary expense, I decline to order the respondent to contribute to that cost.

Swimming Courses

- [75] Although S. has been engaged in swimming since the parties separated, it is reasonable and appropriate that she engage in the process to become a life guard and swimming teacher. It appears she has not yet taken any courses towards her goals but the initial expense will be \$300. I expect that the objective of becoming a life guard and teacher requires a layer of courses that are completed over time; on this application I am considering only one fee. I consider this expense to be a common extracurricular activity for a child of this age. The total amount associated with S.'s swimming activity is not high at \$300 per year. This expense should be included in the amount of maintenance he is paying under the basic table for child support.

Cell Phone

- [76] A cell phone plan does not fall within any of the categories set out in s. 7 and I will not award it: *Lee v. Chung*, 2011 BCSC 404 at para. 42.

Division of s. 7 Expenses

- [77] Respecting the proportion by which s. 7 expenses will be divided, it is necessary to vary the 62%-38% split attributed to the respondent and the claimant, respectively, in the order of *Schultes J.* given that the income of the respondent has changed since the making of that order. Based on the respondent's income of \$66,250 and the claimant's income of \$18,000, in the future s. 7 expenses will be attributed 79% to the respondent and 21% to the claimant.
- [78] In the overall process of ensuring that a child is properly supported in activities and other extraordinary needs, the respondent remains obliged to pay his portion of the burden. The parties have been far too frequently settling differences in court because of an inability to compromise. In the future, if an appropriate expense should be funded by the respondent, then the full details of that expense should be provided to him and he should pay the appropriate amount. The result of the failure to exercise good judgment or reason on these issues, is that the unsuccessful party will bear the costs of court proceedings. It appears to be that neither party can afford this type of litigious dispute resolution. I will encourage the parties to attempt to find an independent parenting coordinator or similarly qualified

person to manage their disagreements to an effort to save the stress and cost of court applications.

Dr. Aube Expenses

- [79] In 2010, the parties engaged Dr. Aube to provide psychological services to the family and to provide a critique of a s. 15 report prepared by a Ms. Fenton. In an order of August 21, 2009, Ker J. directed that the respondent contribute to the cost of the expenses affiliated with the counselling treatments through his extended health insurance provider and any balance for his share was to be apportioned from the current \$207 payable monthly for his share of s. 7 expenses. If his financial circumstances changed, his contribution could be increased if necessary.
- [80] Brown J. later ordered the respondent to pay for Dr. Aube's services and allowed him to make application for partial reimbursement from the claimant. The terms of Brown J.'s order in this regard were:
1. There should be three counselling sessions with Dr. Aube to prepare [S.] for her trip to New York. If counselling cannot be provided, the parties shall agree to an alternate therapist upon Dr. Aube's recommendation.
 2. Respondent will bear the costs of counselling sessions with liberty to apply for reimbursement.
- [81] Dr. Aube did provide counselling services, for which the respondent paid \$900, though he said he was unemployed at the time of Brown J.'s order. Dr. Aube also prepared a report critiquing Ms. Fenton's s. 15 report, for which the respondent paid \$1000. The claimant did not contribute to any of these expenses. Dr. Aube provided other reports, including an August 2009 report which was paid for by each of the parties equally.
- [82] The respondent argues that the order of Schultes J. apportioning s. 7 expenses at 68% and 32% to the respondent and claimant, respectively, should prevail and that the claimant should pay 32% of the total \$1,900 the respondent expended for Dr. Aube's services. The respondent thus seeks contribution from the claimant at \$722.
- [83] The claimant is mystified by the request that she share a portion of these expenses.
- [84] In my 2011 Reasons, I adjourned the respondent's application for reimbursement of \$1,900 USD for Dr. Aube's services until the respondent filed the information necessary to support his application.
- [85] I note that both the order of Ker J. and the order of Brown J. dealt only with the apportionment of expenses for the counselling services; the orders did not address the preparation of the report critiquing the s. 15 report of Ms. Fenton. I observe from Dr. Aube's invoices that she charged \$900 for the counselling sessions. I infer from Dr. Aube's invoices that the \$900 is the only amount that relates to the services ordered by Brown J.

[86] Without having better evidence concerning the breakdown of these charges, I order that the claimant reimburse the respondent \$288 as her portion of the counselling services referred to by Brown J.

S. 15/S. 211 Report

[87] On August 21, 2009, Ker J. ordered pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 that a report be prepared to "explore the possibility or not of parental alienation playing any role in this matter." I dealt with this issue again in my 2011 Reasons when the claimant made an application to vary the February 2006 order of Crawford J. with respect to parenting arrangements; I adjourned that application until Ker J.'s order to produce a s. 15 report had been complied with. The report has still not been produced. The Ker J. order said:

4. That a Custody and Access Report be prepared by the Ministry of Children and Families in accordance with the section 15 of the Family Relations Act (the "Section 15 report") for [S.] and that the author explore the possibility or not of parental alienation playing any role in this matter. This report is to be completed on an expedited basis:

Claimant's Submissions

[88] On this application, the claimant seeks to vary the order of Ker J. and delete the requirement for a s. 15 report (now a s. 211 report under the FLA) directed at the issue of parental alienation. She contends that to embark on a further examination of the reasons S. is disinterested in a relationship with her father and fearful of him would be intrusive and upsetting to her. She described S. as a normal, well-adjusted student who is performing well in school and has no obvious issues. She contends that the respondent has failed to provide the support or make sufficient efforts to contact the child and it is simply too late to think that a new psychological assessment will be beneficial. She submits that my interim access order contained in the 2011 Reasons is working and should remain in effect, and the parties should jointly refocus their attentions on Dr. Aube's April 2009 report wherein she set out recommendations that might operate to improve the respondent's relationship with S.

[89] The claimant also points out that S. does not want the report completed. The claimant argued that the views of the child ought to be respected in this matter and if she does not want to be involved in a s. 211 report it would be wrong to force the process forward. She cites *Symington v. Simor*, [2000] BCJ No. 2688 and *D.S. v. E.P.S.*, 2011 BCSC 1102, [D.S.] for this submission.

- [90] In the event that I do not vary the order of Ker J. and a report is necessary, the claimant would prefer Dr. Aube to complete the report. She also says she cannot afford to contribute to the exorbitant expense of the report if ordered. The respondent said he will pay for the new report at first instance. In any event, the claimant would like the report to be prepared during the summer months so as not to interfere with the child's current schedule and academic performance.

Respondent's Submissions

- [91] The respondent seeks that the order of Ker J. be enforced and not varied. He points out that the claimant has ignored two court orders that the s. 211 report be prepared. He believes S. needs counselling to resolve dysfunctional aspects in her relationship with him which may also affect her relationships with other people. If there is a confirmation of parental alienation from the claimant in the report, then changes could be mandated in the child's current environment that could improve her future prospects.
- [92] The respondent does not seek custody or dramatically increased parenting time with S. at this time. He would like to establish a healthier relationship with her and believes the animus towards him evident in the child's behaviour might be corrected if the claimant's behaviour changed.
- [93] The respondent has contacted Dr. Rebecca England, a psychologist skilled in custody and access assessment who indicated an interest in assisting the respondent in the preparation of a s. 211 report. The respondent seeks an order appointing Dr. England as author of the report.
- [94] The respondent also recognizes that the cost of this report might be in the range of \$10,000 and he is committed to paying the upfront cost of this report. However he seeks an order requiring the claimant to contribute her proportionate share of the cost of the report.

Child's Relationship with the Respondent

- [95] The child's relationship with the respondent is undoubtedly broken.
- [96] The respondent chronicles an extensive effort at establishing contact with his daughter. He has attempted to use email, Facebook and Skype without significant success. The claimant similarly directed my attention to various emails where she had suggested activities and means by which the respondent could connect with S. There was a plan for the respondent to set up a Facebook account so he could communicate with the child; the respondent was uncomfortable with the public aspect of Facebook and preferred Skype but S. refused to have Skype communication with the respondent. In the end they did not get connected with one another and the claimant said S. "became disinterested if [the respondent] was not ready to act when she was ready to receive information from him".

- [97] His efforts at personal contact with his daughter have also failed. The respondent reported that as late as September 2014 and July 2014 he attempted to exercise three hours of access with his daughter without significant success. She would meet him at the front door and refuse to speak with him or spend time with him. The respondent saw S. on June 23, 2014; prior to that he had not seen or visited with the child since September 2011. In July 2014 the respondent had a conversation with her which appears to have been cordial but not warm.
- [98] The respondent also cited a recent incident when he was told that S. needed a new computer. He asked to speak to her to elicit some information about what she needed. The child refused to speak to him. He eventually sent some money for her. She called him and told him that he was a liar because he had not sent the money. The funds arrived the very next day.
- [99] I heard further evidence of an attempt by the respondent to engage S. in a mall near their home. She ran off and locked herself in a bathroom and would not speak to the respondent.
- [100] The claimant gave a chronicle of the respondent's failure to engage in a reconciliation process in a respectful and responsible way. She said that the respondent does not send pictures or films of his family and has made no effort to foster a relationship with S. The claimant said that she had invited the respondent's son to visit in Vancouver and stay in her home so she would have a chance to get to know him. She said the respondent did not embrace this idea. In reply, the respondent said that he has sent cards and photos of his family to S. but she has never acknowledged receiving these items.
- [101] The claimant argued vigorously that the respondent has failed to take up the suggestions made by Dr. Aube and that this failure is evidence of his inability or unwillingness to work genuinely to establish his relationship with S. He has taken a passive approach to his relationship with her. The claimant also believes the respondent has harassed her in so far as he blames her for the breakdown in this relationship with her.
- [102] The respondent, in contrast, says that he wants more involvement in his child's life. He wants to communicate with her teachers and her doctors but he believes that her attitude to him has been poisoned by the claimant; hence his desire to have the s. 211 report on parental alienation executed.

Discussion

- [103] At this stage, it is very hard to know where the truth rests in this disagreement. It is not possible to assess the credibility or reliability of the parties' evidence on the issues relating to their child's access to the respondent.
- [104] The question as to whether a s. 211 report should be ordered involves a balancing of the disruption in S.'s life against the potential benefit in uncovering a need not being met by the custodial parent or in cases where the custodial parent is guilty of some misconduct.

[105] In D.S., Arnold-Bailey J. discussed the use of these reports as follows:

[55] In Ms. DS v. Mr. PS, 2005 BCSC 1047 (CanLII), Allan J., in the context of litigation that appeared to be having a detrimental effect on the well being of the child, considered the best interests of the child and whether the report would provide assistance. With reference to Symington, she declined to order a s. 15 report:

[23] The purpose of such a report is to provide the Court with useful information about custody and access issues prepared by a qualified and neutral person. The onus is on the person seeking the assessment to satisfy the Court that it should be ordered. The Court must consider whether a s. 15 Report would be in the best interests of the child in the particular circumstances of the case.

[24] As Mr. Justice Preston stated in Symington v. Simor [2000] BCJ No. 2688 at para. 12:

The ordering of a Custody and Access Report must be approached with caution and must be ordered only when necessary and in the best interests of the child. The caution arises, as the cases make it clear, from the fact that a psychological assessment of a child is an intrusive process.

[25] An order for a s. 15 Report is discretionary. In the highly unusual circumstances of this case, I do not believe that such a report is necessary or that it would be in the best interests of FS. It is also difficult to see how a s. 15 Report would assist either the parties or the Court. ...

[106] In this case, I am not asked to order a s. 211 report; rather I am being asked to vary the order of Ker J. requiring that a s. 15 (now s. 211) report be produced. As such, pursuant to s. 211 of the FLA, I must find that there has been a change in the circumstances since that order was made sufficient to warrant a variation.

[107] It is clear that the fact that the father resides on the east side of the United States has been a factor limiting the contact between father and daughter. However, the visceral response of S. to her father is so unusual that Ker J. found it reasonable to order a report to investigate the effect of parental alienation.

[108] It has been three and a half years since I addressed the importance of a s. 211 report in my 2011 Reasons; it is possible that the child's circumstances have changed through the effluxion of time to such an extent that continuation of the inquiry into parental alienation would be more detrimental than helpful. However, I conclude that the underlying reasons considered by Ker J. have not been successfully challenged by the claimant. Pointing to the possible disruption the preparation of the report could cause or the fact that it is "too late" is not sufficient to warrant a variation of Ker J.'s order. In my view, there continues to be a significant risk that S.'s relationship with her father is in serious jeopardy if not already injured beyond recovery. Ker J. had the same concerns. Though I take into consideration S.'s views that the report not be conducted, it is precisely the genesis of these views that the report will address critically. It continues to be in her best interest to have the report conducted; therefore at this point I am not prepared to vary either order.

[109] In my view, the parties must collaborate on choosing a qualified person to conduct the s. 211 investigation. If the parties have not agreed on the appointment of that person within 30 days of these reasons, then Dr. Rebecca England will be the person authorized and directed by the Court to prepare the s. 211 report, with a specific emphasis on the possibility that parental alienation has or continues to influence the relationship between S. and the respondent.

[110] The costs of this report will be costs in the cause.

Other Orders Sought

Medical Plan

[111] The claimant asked for an order requiring the respondent's new spouse to add S. to her medical insurance plan in Maryland. I was not provided with a copy of the insurance plan nor do I know if the plan would permit the addition of her spouse's child from a previous marriage to be insured under that health plan in the US.

[112] The respondent's spouse is not a party in this proceeding and I can see no basis for making such an order. This application is dismissed.

Birth Certificate

[113] The claimant seeks an order for production of the respondent's birth certificate so she and S. can obtain "U.S. status" that might broaden S.'s opportunities to obtain U.S. scholarships. This application was made earlier in 2011 and dismissed. I will not revisit that decision.

Costs

[114] The claimant seeks costs against the respondent to reimburse her for the costs associated with the May 26, 2014 hearing that was lost because the respondent did not file a proper binder. I will not make an order concerning those costs at this time. They will be addressed at the conclusion of these applications.

Contempt

[115] The respondent asks for an order finding the claimant in contempt for failing to provide him receipts for s. 7 expenses incurred by her towards swimming or piano which was provided for in the order of Schultes J.

[116] It was apparent from the submissions of the claimant that she had provided a number of the receipts mentioned in the Schultes J. order but not all. The order provided that:

the claimant [J.D.] will provide the respondent on a bi monthly basis with copies of the receipts for the extraordinary expenses that she incurs with respect to this order.

- [117] The order stipulated that expenses for piano and swimming would be limited to \$1500 per year and that the respondent pay the sum of \$77.50 per month as his share of the extraordinary expense commencing the month of July 2010.
- [118] This application was filed October 15, 2014 and came on for hearing November 7, 2014. Rule 21-7 (11) requires the applicant for contempt to serve the alleged contempt or the notice of application and all filed affidavits seven days before the hearing of the application.
- [119] It was clear to me that the claimant was never personally served with the application for contempt. However on October 22, 2014 she filed a response to the application.
- [120] The evidence tendered by the respondent did not prove beyond a reasonable doubt that the claimant had purposefully failed to provide receipts in accordance with the order. It may be that the respondent paid monies for expenses that were not incurred and thus receipts may not be available. However, he did not provide proof of each payment.
- [121] The claimant remains bound by the order of Schultes J. and is obliged to forward copies of all of the receipts for expenses she claims under section 7 are to be reimbursed by the respondent.
- [122] The sum of \$77.50 for extraordinary expenses was directly related to piano and swimming costs. The respondent was obliged to pay up to \$150 per year for medical, dental and eye glasses and prescription goggles for swimming. There is no evidence that those expenses were incurred by her or that he was asked to pay for those expenses.
- [123] Second, the claimant was required to produce receipts only for expenses she incurs with respect to the order and, the burden of proof is on the respondent to demonstrate that she incurred expenses with regard to swimming, piano, medical, dental, eye glasses, and prescriptions.
- [124] In the final analysis, the burden of proof is on the respondent to prove beyond a reasonable doubt a breach of the court order. I am not satisfied he has met that burden and dismiss the contempt application.

Costs

- [125] I will invite the parties to make submissions on the issue of costs of this application after receipt of the s. 211 report. If that report is not received by April 30, 2015 then the claimant may make written submissions on the question of costs by May 15, 2015 and the respondent may make his submissions by May 30, 2015. In the absence of submissions being received by either party on those dates, I will proceed to decide the question based on submissions made by May 30, 2015.

"The Honourable Mr. Justice Armstrong"

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