

CANADA / JUDGMENT

L.A.M. v. S.C.M.

2020 BCSC 67

COURT

Supreme Court of British Columbia

DECIDED

21 January 2020

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2020 BCSC 67 L.A.M. v. S.C.M. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: L.A.M. v. S.C.M., 2020 BCSC 67 Date: 20200121 Docket: E119219 Registry: Kelowna Between: L.A.M. Claimant And S.C.M. Respondent Before: The Honourable Mr. Justice G.P. Weatherill Reasons for Judgment Counsel for the Claimant: K.B. Greenough Counsel for the Respondent: D.L. Polley Place and Date of Trial/Hearing: Kelowna, B.C. January 9, 2020 Place and Date of Judgment: Kelowna, B.C. January 21, 2020

Introduction

- [1] The claimant seeks an order that expenses relating to the parties' children's 2019 extracurricular and sports activities be considered special or extraordinary expenses pursuant to ss. 7(1) and (1.1) of the Federal Child Support Guidelines ("Guidelines") and that the respondent pay the claimant 82% of those special and extraordinary expenses.
- [2] The claimant also seeks an order that the respondent pay arrears of spousal support for the period of January 2019 through and including April 2019, in the sum of \$4,000.

Background

- [3] The claimant is a self-employed clinical family counsellor in Kelowna. She opened her practise in 2019. Prior to that she was a respiratory therapist. She is 41 years of age.
- [4] The respondent is a vascular surgeon, also practising in Kelowna. He is 47 years of age.
- [5] The parties began cohabiting on August 1, 2005, were married on May 9, 2007, separated on January 30, 2017, and were divorced on July 17, 2019.
- [6] They have three children:
- a) S.M.M., age 11;
 - b) S.A.M., age 9; and
 - c) E.M., age 7.

- [7] After protracted negotiations, the parties entered into a comprehensive "final" separation agreement dated for reference and effect April 20, 2019 ("Separation Agreement") that resolved all outstanding issues between them including parenting of the children, and child and spousal support obligations.
- [8] The parties agreed to shared parenting and currently have a one week on / one week off alternating parenting regime in place.
- [9] For the purposes of calculating child support, the parties agreed that the respondent's income would be \$418,000, the claimant's income would be \$18,000, and that the respondent would pay a net amount of child support to the claimant of \$6,441 per month.
- [10] The parties agreed that they would share the cost of special and extraordinary expenses in proportion to their respective incomes; the claimant would pay 18% of such expenses and the respondent would pay 82%. They also agreed that there would be a review of child support on an annual basis, commencing June 1, 2020.
- [11] They further agreed that retroactive to January 1, 2019 and until further agreement or court order, the respondent would pay the claimant spousal support of \$5,000 per month. Prior to January 1, 2019, the respondent had been paying the claimant \$6,000 per month, but he unilaterally reduced spousal support to \$5,000 per month as of January 1, 2019.
- [12] The Separation Agreement was signed in April 2019 and filed with the court registry on April 25, 2019. Pursuant to s. 44(3) of the Family Law Act, the Separation Agreement is, therefore, enforceable as an order of the Court.
- [13] At para. 43 of the Separation Agreement, the parties agreed as follows:
43. The parties have taken into account:
- (a) the requirements of the Federal Child Support Guidelines;
 - (b) the increased costs of shared custody arrangements including appropriate housing, transportation, and the duplication of equipment and clothes; and
 - (c) the condition, means, needs and other circumstances of [S.M.M.], [S.A.M.] and [E.M.].
- [14] For the purposes of the claimant's application, the relevant portions of the Separation Agreement are:
36. Each parent will: . . .
- (f) consult with the other about important questions of the children's upbringing such as: . . .
 - (iv) recreational activities. . . .
44. The following are special or extraordinary expenses: . . .
- (d) extraordinary expenses for extracurricular activities . . .

- [15] Before the parties separated, the children were involved in various recreational activities including dance, Acro lessons, track and field, skiing, diving, and gymnastics. They also participated in tennis and sailing camps. Since separation, the claimant has, for the most part, paid all of the expenses associated with these activities. For 2019, those expenses were: a) dance lessons: \$2,430.00 b) track and field: \$1,794.73 c) skiing lessons: \$3,261.30 d) tennis camp: \$270.00 e) sailing camp: \$460.00 f) gymnastics: \$354.00 g) daycare: \$150.00 Total: \$8,720.03
- [16] She seeks an order that the respondent reimburse her for 82% of these costs (\$7,150.42) and that he be ordered to continue paying 82% of those costs going forward.
- [17] The respondent is opposed to such an order on the basis that these expenses are ordinary expenses payable out of the table child support he is already paying, and not extraordinary expenses within the meaning of either s. 44(d) of the Separation Agreement or s. 7 of the Guidelines. Late Filed Affidavit Material
- [18] At the hearing, the claimant sought to file an affidavit she swore that day, dealing with the issue of whether the children's recreational expenses rose to the level of extraordinary expenses within the meaning of s. 7 of the Guidelines ("Late Affidavit").
- [19] The respondent's counsel objected on the basis that it was woefully late and that he had not had an opportunity of obtaining instructions from the respondent in respect of it because he was out of town on holidays with the children and was unreachable.
- [20] Subject to my comments at para. 41 of this decision, I decline to admit the Late Affidavit on this application because it would be prejudicial to the respondent. Discussion
- [21] I will start with a review of the Guidelines.
- i. Federal Child Support Guidelines
- [22] The relevant portions of ss. 7(1) and 7(1.1) of the Guidelines state 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:
- (f) extraordinary expenses for extracurricular activities. 7(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. ii. The Case Law
- [23] Sections 7(1) and 7(1.1) of the Guidelines have been interpreted a number of times since being implemented.
- [24] In *Clarke v. Clarke*, 2014 BCSC 824, Justice Baird stated the following at paras. 53-54:
- [53] There is no straightforward definition for "extraordinary" although section 7.1, recently added to the Guidelines, provides some guidance; it requires a sort of proportionality inquiry, looking at the nature and number of activities, any special needs or talents of the child, the overall cost of the activities, and any other similar relevant factors.
- [54] Because the tests are fact-specific, I cannot definitively say what types of expenses qualify in every case. But I can say what does not qualify as special or extraordinary: · Expenses such as "entertainment, pets, vacations, school fees, school supplies, children's allowances, meals outside the home, personal grooming, and clothing" are not section 7 expenses. · A home computer and other similar technologies do not qualify as extraordinary as they are "common item[s] found in most homes". · Recreational sports and other similar extracurricular activities -- dance lessons, community sports leagues, ski trips, etcetera -- are generally considered "ordinary." The question is whether the participation goes beyond that of the "average child". [Citations omitted; emphasis in original.]
- [25] In *Abelson v. Mitra*, 2008 BCSC 1197, Justice Brine stated:
- [53] As mentioned, since *McLaughlin* was decided, s. 7(1.1) has been added to the Guidelines. Under s.7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed, or whether it exceeds her or his ability to pay without any consideration of the factors enumerated in s. 7(1.1)(b). If the income cannot cover the expense, it is, in effect, deemed to be extraordinary and the analysis then turns to a consideration of the factors enumerated in s. 7(1) which include the best interests of the children and the necessity and reasonableness of the expense taking into account the parties' means and pre-separation spending pattern.

- [54] If, under s. 7(1.1)(a), the income can reasonably cover the expense, it may still be found to be extraordinary by considering the factors set out in subsection b(i) to (v). The list of factors is not exhaustive: s. 7(1.1)(b)(v). Again, if the expenses are considered extraordinary under s. 7(1.1), the court must then analyse the "best interests," "necessity" and "reasonableness" factors set out ins. 7(1).
- [26] Justice Brine was also asked to determine whether the children's gymnastics and skiing expenses were extraordinary expenses. He concluded that they were not:
- [61] To the extent that it is relevant, I am not able to conclude, on the evidence before me, that Z is likely to become an elite level gymnast. I was provided no independent evidence of either her current ranking, provincially or nationally, or of her potential. There was evidence of a congenital defect that reduces her flexibility and that she requires regular physiotherapy and massage treatment to be able to continue regular participation. As well, she is now experiencing symptoms of an eating disorder as well as nutritionally related health problems. Finally, there was evidence that her schooling is suffering, particularly in mathematics, and that she requires tutoring assistance. . . .
- [65] Although A skied recreationally in Prince George, he neither participated in, nor expressed any particular desire to become involved in ski racing until he moved to Vancouver with the defendant. He joined the ski club at Cypress Mountain and participated in the racing program during the 2006-2007 ski season. The defendant claims in excess of \$9,500 in expenses for this activity. A discontinued his participation once he moved to Victoria in September 2007.
- [66] Once again, to the extent that it is relevant, there was no evidence of A's level of skill, success or potential as a ski racer.
- [27] In *N.A.D. v. S.A.D.*, 2010 BCSC 269, Justice Rogers was asked to deal with a similar issue respecting recreational activities for children and determine whether they constituted extraordinary expenses. He reasoned:
- [17] I note that the plaintiff has not offered evidence in support of the notion that the children have particular talents in bicycle riding, swimming, skating, soccer or martial arts. There is no evidence on which the court could rely to conclude that these activities satisfy any particular need or talent. The expenses for these activities are all quite modest and are easily within the financial capacity of a single parent who earns \$35,000 to \$45,000 per year and receives on child support the order of \$900 per month. In my view, the expenses claimed by the plaintiff for recreational activities such as swimming, soccer, skating and tae kwon do not meet the criteria of special or extraordinary expenses under s. 7 of the Guidelines. Her claim for a contribution from the defendant for those expenses is dismissed.
- [28] In *Piper v. Piper*, 2010 BCSC 1718, Justice Chamberlist also commented on the meaning of s. 7 of the Guidelines. He stated:

- [91] As in [Ableson], the evidence in this case is lacking as to the level of Ezekiel's skill and potential success as a freestyle skier. That evidence must accompany a request that Mr. Piper contribute, especially where the previous history of skiing pre-separation is so different from the skiing that Ezekiel now is involved in. Ms. Piper must appreciate that with respect to the children who remain children of the marriage Mr. Piper is obligated to pay basic child support in accordance with the Guidelines but claims for extraordinary and special expenses should not proceed in the way she has hitherto claimed same. Her claims for extraordinary expenses are based on unilateral decisions that she has made since she and the children relocated to Nanaimo, B.C., and there has been little or no input sought from Mr. Piper. Based on his income, which I have found to be \$75,000 up to the date of hearing, Ms. Piper was not paying attention to his ability to pay for the events she unilaterally enrolled Ezekiel in. . . .
- [93] . . . Under s. 7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed or whether the expense exceeds her ability to pay without any consideration of the factors enumerated in s. 7(1.1)(b). If the income cannot cover the expense, the expense is deemed to be extraordinary and the court's next analysis turns to consideration of the factors enumerated in s. 7(1) which, of course, brings into consideration the parties' means and pre-separation spending pattern. That is essentially the analysis I have performed and according to the financial information of Ms. Piper I have proceeded on the basis that most of the items claimed are extraordinary given her ability to pay for same given her income. The fact is that there is compelling evidence that Ms. Piper has proceeded on the basis that Mr. Piper can afford anything that she has her children involved in, no doubt because of her position throughout that he has an income far in excess of what I have accepted his income to be. Extra-curricular activities are governed entirely by s. 7 of the Guidelines. Ms. Piper, as custodial parent, has the primary obligation to act in the best interest of her children but that mandate also includes reaching agreement with the biological father of the children as to what his financial obligation will be. Only if these negotiations fail should the matter be put before the court and at that time only with respect to the necessary evidence to allow the court to determine if the amounts claimed meet the requirements prescribed by s. 7 of the Guidelines. . . .
- [95] This would seem to be a somewhat complete answer to the position of Ms. Piper that all of the children were involved with skiing when the parties were together. It seems, on a review of the totality of the material, that Ezekiel has demonstrated serious interest in sports and skiing and Ms. Piper has determined to ensure that her youngest son partakes in the sports for which she notes he has aspirations for. However, regretfully, there is nothing in the material other than her assertions to demonstrate that the expenses claimed, particularly for free style coaching in the amount of \$1,750, food costs while attending coaching sessions and ski camp in the amount of \$1,440, and travel costs to coach in ski camp in the amount of \$1,767, should be treated as extraordinary based on demonstrated talent by Ezekiel in those pursuits.

- [96] With respect to these particular pursuits I am left with the conclusion that Ms. Piper, without input from Mr. Piper, or some demonstrated corroboration from others, has determined that they fit the determination of being extraordinary. I am unable to conclude that they are extraordinary expenses to be shared on the basis of the evidence before me.
- [29] The claimant asserts, and I agree, there is a two-pronged approach in assessing whether an expense ought to be considered an extraordinary expense:
- a) First, the court should determine whether the expense claimed under section 7(1)(f) of the Guidelines is an extraordinary expense or extracurricular activity by considering the following factors:
 - i. the combined income of the parties; ii. the nature and amount of the individual expense; iii. the nature and number of the activities; iv. any special needs or talents of the children;
 - v. the overall cost of the activities; and vi. any other similar factor that the court considers relevant.
 - b) Once the court determines that an expense falls within section 7(1)(f) of the Guidelines, a court must then determine whether the expenses are necessary in relation to the child's best interests and reasonable in the circumstances having regard to the following factors:
 - i. the means of the spouses and those of the child; and ii. the family spending pattern prior to separation, (*McLaughlin v. McLaughlin*, [1998] B.C.J. No. 2514 (BCCA) at paras. 81-82; *Bodine-Shah v. Shah*, 2014 BCCA 191 at para. 66; *MacInnis v. MacInnis*, 2018 BCSC 1507 at para. 103).
- [30] To summarize, before a recreational or extracurricular expense will be considered as a s. 7 expense, it must meet the threshold of being necessary, reasonable and affordable. It must be "extraordinary" in the sense that it is over and above what should be considered "ordinary". Then, the court must consider if the recipient of child support can reasonably cover the expense out of income, including table child support. If "yes", it will usually not be considered an extraordinary expense. Nevertheless, it may still be considered an extraordinary expense depending on the amount of the expense in relation to the claimant's income, the kind and number of programs/activities that the children are enrolled in, any special needs or special talents the children have, the overall costs of the programs/activities and other relevant/similar factors. iii. Decision - s. 7 Extraordinary Expenses
- [31] The onus is on the party claiming contribution for what is alleged to be an extraordinary expense to establish both the extraordinary nature of the expense and that it is reasonable and necessary and in the children's best interests (*MacInnis* at para. 106).
- [32] Some expenses that would be extraordinary for a lower income family would not necessarily be extraordinary for a higher income family and the determination of reasonableness and necessity is similarly somewhat dependent on the income levels of the parties (*MacInnis* at para. 106).

- [33] The claimant relies heavily on *Dorey v. Havens*, 2017 BCSC 2206 at paras. 54-59, aff'd 2019 BCCA 47, where the court held that sports related activities such as basketball and soccer activities in which the children had been involved in consistently over the years, and to which the party being asked to pay had not objected to the expenses in principle, were extraordinary expenses pursuant to s. 7(1)(f) of the Guidelines. Also in *A.L.M. v. N.J.O.*, 2015 BCSC 70 at paras. 115-24, the court held that swimming, dance and tennis lessons, as well as various sports programs were extraordinary expenses pursuant to s. 7(1)(f) of the Guidelines.
- [34] The respondent argues that these cases are distinguishable and ought not to be followed on the basis that there was no substantive or fulsome argument raised in those cases on the nature of ordinary expenses versus extraordinary expenses. In other words, they are distinguishable on the facts.
- [35] In *Dorey*, for example, the father was a bankrupt and had a new partner. The mother was constantly trying to get the father's approval for expenses and he was not participating. There was no analysis at all of s. 7(1.1) and the court simply lumped all expenses together. Likewise in *A.L.M. v. N.J.O.*, no analysis of the Guidelines was conducted and it appears there was no real argument provided on the issues. There was just a simple finding that s. 7 expenses as listed were reasonable.
- [36] As mentioned earlier, the parties defined the meaning of special or extraordinary expenses in the Separation Agreement. The wording they chose mirrors the language of s. 7(1)(f) of the Guidelines. This suggests that they intended the definition in the Separation Agreement to have the same meaning as in the Guidelines. Therefore, the word "extraordinary" in the phrase "extraordinary expenses for extracurricular activities" must be given the same meaning as in the case law reviewed above.
- [37] I have been provided with DivorceMate calculations that show the parties' net disposable incomes, after taking into account spousal support and child support, are comparable, indeed with a slight advantage to the claimant. That is, her net disposable income, including spousal and child support, is higher than the respondent's.
- [38] The claimant has not shown that she cannot afford these expenses. Requests made by the respondent's counsel for financial disclosure from the claimant to determine if these expenses are unaffordable, were seemingly ignored by the claimant.
- [39] The claimant has not shown that these expenses are anything more than ordinary expenses related to regular extracurricular activities. She has not shown that the children are at an exceedingly talented level that turns them from ordinary expenses into extraordinary expenses. In my view, amounts sought by the claimant are ordinary expenses and not extraordinary expenses.
- [40] Therefore, the claimant's application as it is presently presented must be dismissed.

- [41] This decision does not change the parties' rights under the Separation Agreement. When child support becomes reviewable as set out in the Separation Agreement, the parties still are at liberty to file affidavit material and the claimant may seek a variation to the Separation Agreement respecting whether the children's recreational activities elevate them from "ordinary" expenses to "extraordinary" expenses. iv. Decision - Spousal Support Arrears
- [42] I have already set out that the parties agreed in the Separation Agreement that, effective January 1, 2019, the respondent's spousal support obligations to the claimant were \$5,000 per month. Prior to January 1, 2019, he had been paying the claimant \$6,000 per month.
- [43] There is no suggestion that the respondent has not met this obligation. Rather, the claimant asserts that because the Separation Agreement was not signed until April 20, 2019, and despite its terms being clear that effective January 1, 2019, spousal support was reduced to \$5,000 per month, she is owed \$1,000 per month from January through April 2019.
- [44] This assertion has no merit. The Separation Agreement is clear on its terms. The claimant agreed that as of January 1, 2019, spousal support was \$5,000 per month.
- [45] This part of the claimant's application is also dismissed. Costs
- [46] The respondent is entitled to costs of the claimant's application. "G.P. Weatherill J."

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