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CANADA / JUDGMENT

## L.F. v. R.B.

2021 BCSC 464

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COURT

Supreme Court of British Columbia

DECIDED

15 March 2021

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2021 BCSC 464 L.F. v. R.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.F. v. R.B.,

2021 BCSC 464

Date: 20210315

Docket: E51268

Registry: New Westminster

Between:

L.F.

Claimant

And

R.B.

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Claimant, by teleconference:

M.A.J. Smyth

Counsel for the Respondent, by teleconference:

R. Choudhry

Place and Date of Trial/Hearing:

New Westminster, B.C.

July 31, 2020

Place and Date of Judgment:

New Westminster, B.C.

### **March 15, 2021**

- [1] Before the Court are two notices of application filed in this family proceeding, both of which involve applications to amend the consent order of Bernard J. from 2016, relating to prospective and retroactive child support and s. 7 special and extraordinary expenses.
- [2] The claimant mother seeks prospective and retroactive child support and s. 7 special and extraordinary expenses. The respondent father seeks an order that he no longer pay child support for the oldest of his two daughters effective September 1, 2017, or alternatively his child support obligations be reduced, and orders that he has overpaid child support in the past.

### **BACKGROUND**

- [3] The parties were in an 18-year marriage that culminated in the consent order of Bernard J. of September 14, 2016, which was agreed to at a Judicial Case Conference (the "Final Order"). The parties had separated in 2014.
- [4] There were two children of the marriage, K.B., born [D.O.B.], 1999; and J.B., born [D.O.B.], 2000. The order provided that both children would primarily reside with the claimant.
- [5] The clause of the Final Order relevant to the applications for child support is as follows:
  - 7. BY CONSENT, the Respondent will continue to pay to the Claimant the child support pursuant to the Federal Child Support Guidelines, in the amount of \$1,767.00 per month based upon the gross income of \$122,500.00 to be paid on the first of each and every month commencing October 1, 2016, and continuing for as long as the Children are "children of the marriage" as defined by the Divorce Act (Canada) or until further Order of this Court.
- [6] In clause 10 of the Final Order, the parties agreed to proportionately share the cost of a specific list of s. 7 special and extraordinary expenses. The order of Bernard J. included in s. 7 expenses any "expenses for post secondary education that either exceed, or which are not yet covered by the children's RESP fund, including tuition, textbooks, and room and board if residence outside of either parties' home is required, such expense to be agreed upon, such agreement not to be unreasonably withheld, or as determined by this honourable court".

- [7] In clauses 11 and 12, the parties agreed to review child support and s. 7 expenses annually to ensure the amount of support accorded with the requirements of the Federal Child Support Guidelines (the "Guidelines") with the first review to be completed by June 30, 2017.
- [8] The Final Order also granted a divorce to the parties. Since the divorce, the claimant has entered into a relationship with her new partner and is now known as ["L.F."].
- [9] Significantly, there have been no orders since the Final Order, nor have any applications been made to the court respecting child support or any other matter. The parties have exchanged T1 income tax returns, however, no agreement has been reached regarding increases or decreases in the amount of child support.
- [10] K.B. is currently 21 years old, having turned 19 on her birthday on [D.O.B.], 2018. In September 2017, K.B. commenced full-time studies at University of British Columbia Okanagan ("UBCO") and moved into residence at UBCO. K.B. continues to be in residence while attending UBCO and has participated in a meal program paid separately from her residence fee. Her plan is to graduate from a four-year business program in 2021, although the claimant notes that K.B. has accepted a co-op program that may extend her program by another year.
- [11] During the summers, K.B. returns to the Lower Mainland and shares time with her parents but the majority of her time is with her mother, the claimant, although the respondent has deposed that as of the summer break of 2018, K.B. was residing nearly full time with him.
- [12] J.B. turned 20 years of age on [D.O.B.], 2020. In February 2017, J.B. suffered a severe concussion while speed skating. Due to her concussion, J.B. was unable to complete some courses and struggled to complete others. J.B. graduated from high school in June 2018, and commenced studies at Simon Fraser University ("SFU"), in September 2018.
- [13] J.B. suffered a second concussion while snowboarding in December 2018, which has resulted in more pronounced symptoms than her first concussion. In the spring of 2019, J.B. she attempted to attend classes without success and dropped all of her courses. Unfortunately, J.B. has suffered a third concussion as of January 2020 and continues to exhibit concussion symptoms.
- [14] In the summer of 2019 and since, J.B. has been attending SFU, but in the claimants' affidavit of August 6, 2019, she stated J.B. continued to have symptoms from her concussions. J.B. intends to continue her education at SFU for three more years.
- [15] The claimant has filed another affidavit sworn October 23, 2019, in which she deposed in para. 6:
6. [J.B.] obtained the results from her MRI which indicated a spot on the brain consistent with her continued migraines. Her post-concussion condition is gradually improving and is expected to resolve by the summer of 2020.

- [16] A subsequent affidavit sworn January 29, 2020, includes a further statement by the claimant regarding J.B.'s health:
7. [J.B.] continues to have significant symptoms relating to her post-concussion syndrome and is unable to work to contribute toward her vehicle expenses.
- [17] There is a wide range of positions between the parties regarding arrears of child support. The claimant submits that the respondent owes arrears of child support to July 31, 2020 of \$7,131 and retroactive s. 7 expenses of \$5,442.
- [18] On the other hand, the respondent submits that he has overpaid child support in an amount of \$7,803.72. The respondent denies he is responsible for retroactive s. 7 expenses. He submits that many of the expenses claimed do not qualify as reasonable s. 7 expenses as contemplated by the Guidelines and applicable common law.
- [19] Included in the affidavits before me, including affidavits of the children, are factual disputes including which parent K.B. resided with during each summer or school break. K.B., at first, deposed that she had resided with her father during the summer of 2018, but recanted that position in a subsequent affidavit. The parties are also at odds as to how much of the time was spent with them or the other party.
- [20] As of September 1, 2017, the respondent stopped making child support payments for K.B., who was 18 years of age at the time. Similarly, the respondent stopped making child support payments for J.B. in May of 2018, when J.B. was 17 years of age. As a result, in March 2018, the claimant enrolled in the Family Maintenance Enforcement Program ("FMEP").
- [21] Faced with demands from FMEP on arrears that were owing, on July 24, 2018, the respondent made payments of \$5,715 for arrears relating to J.B.; and on September 5, 2018, paid the arrears for K.B. in an amount of \$5,344, which had accrued between September 2017 and April 2018.
- [22] Payments of arrears exceeding \$10,000 were made by the respondent in 2018, however, the claimant was of the opinion the payments did not reflect the amount of child support that was owing for K.B., which should have been based upon the respondent's income from 2017. The respondent says that FMEP did increase his payments at some point, based on his 2017 income.
- [23] On August 31, 2018, K.B. swore an affidavit in this action which was delivered to counsel for the claimant under cover of a letter of December 27, 2018 from counsel for the respondent. Also enclosed with that letter was an affidavit by the respondent made December 17, 2018.
- [24] K.B.'s affidavit sworn August 31, 2018 included the following statements:
4. In or around September [2017], I moved to Kelowna, British Columbia to pursue post-secondary education in Business Management at UBC Okanagan.

5. I am currently enrolled in a four year Business Management Program. My courses started on September 5, 2017 and I returned back to Surrey in December for Christmas break. I spent my time equally with my mom and dad.
  6. I completed my first year of Business Management in or around April 2018 and I returned to Surrey and commenced residing with my dad. During this summer break, I have primarily resided with my dad from April 2018 to September 1, 2018. I have visited my mom during my stay with my dad from the end of April to September 1, 2018. In addition, I have stayed with my mom 10 days approximately, over the course of summer break from the end of April to end of August 2018.
  9. I have a good relationship with my mom. I had expressed to my mom my desire to reside with my dad during this summer break. However, I have now made a determination that I wish to continue to primarily reside with my dad during my Christmas and summer break from school.
  10. I will primarily be residing with my father for the duration of the entire course which is scheduled to end in April 2021.
- [25] The affidavit of the respondent sworn December 17, 2018 also stated that K.B. was residing primarily with the respondent "since about the fourth week of April 2018", and that during her first year at UBCO, K.B. was "usually staying with me" and he had communicated with the claimant that the Final Order "be varied to reflect this new reality. And I also [am] asking that child support arrangements be varied retroactively to May 1, 2018".
- [26] K.B. swore a further affidavit (filed August 7, 2019) in which she deposed, referring to her previous affidavit of August 31, 2018:
5. My affidavit said that I was going to live with my dad. My dad told me that he was paying child support to my mom and paying the government money as well. He then told me that if I signed something for his lawyer then he wouldn't have to pay. I felt that I was not given much choice in this matter.
  6. The experience of going to my dad's lawyer, being shown part of the court order by his lawyer along with having to move out of my home I grew up in was very upsetting.
  7. My dad and I recently had a conversation where I said that I didn't want this affidavit any more. He said that was fine because he was going to take a different approach to it.
  8. I don't want to be caught in the middle of this. Therefore, I would like to primarily reside with my mom but have unlimited time with my dad.

- [27] The claimant agreed that by December 1, 2018, the respondent was current in his child support payments save for the fact that FMEP had collected based upon the child support payments ordered in the Final Order, and that the respondent's obligation for child support should have been based upon his changing incomes since the date of the Final Order, which, according to the claimant, would have been greater due to the respondent's increases in income.
- [28] The claimant and respondent respectively are both principals in the elementary and secondary school system of a local school district. Their incomes between 2016 and 2019 have been very similar. Specifically, the incomes of the parties have been as follows:

Year

Claimant

Respondent

2016

\$113,039

\$128,996

2017

\$128,246

\$138,194

2018

\$134,445

\$132,346

2019

\$147,153

\$139,403

- [29] Regarding the claims of the claimant for s. 7 special and extraordinary expenses, in particular relating to K.B., there is a considerable dispute as to which items of expense qualify as s. 7 expenses. The claimant has submitted claims for items such as the cost of a vehicle, fuel, vehicle insurance costs, restaurant meals and many other items which will be referred to below, the entitlement to which need be determined by reference to the Final Order, the Guidelines, and the authorities that have considered the issue.

## ISSUES

- [30] I have identified the following issues to be addressed in these reasons:

1. Nature of reviews and retroactive variation;
2. Findings on income of parties;
3. Child Support for K.B.;
  - a) K.B. as child of marriage;
  - b) K.B.'s education and living situation;
  - c) K.B.'s income and expenses;
4. Child support for J.B.;
  - a) J.B. as child of the marriage;
  - b) J.B.'s medical, education, and living situation; and
5. Costs.

## REVIEW

- [31] The parties' Final Order states that child support and s. 7 expenses are to be reviewed annually to ensure the payments accord with the Federal Child Support Guidelines. Clauses 11 and 12(c) state:
11. BY CONSENT, the parties will review the child support and, if necessary, revise it to ensure that it accords with the requirements of the Federal Child Support Guidelines by June 30th of each year, with the first review to be completed by June 30, 2017.
  12. BY CONSENT
- (c) If the parties are unable to agree upon the amount of child support payable and the parties' proportionate shares of the Children's Section 7 Expenses, the amount of proportions will continue at the pre-existing amount subject to retroactive variation by the Court determined by its findings of the parties' incomes.
- [32] In my reading of the Final Order and the above mentioned provisions, I conclude that the requirements as set out in the Final Order have been met in order to allow for the review of child support. The parties are in disagreement as to the amount of support payable for each child, especially as relates to the s. 7 expenses. The parties are in disagreement regarding what the child support obligations should have been following the beginning of K.B.'s post-secondary attendance as of September 1, 2017. Regarding J.B., the parties are in disagreement about a number of her s. 7 expenses, starting at about that time, but especially considering her health struggles relating to her series of concussions and since she has begun her university program at SFU in September 2018.

- [33] In giving effect to the parties' intentions, I agree it is appropriate to conduct this application as a review of child support from September 2017. On a review of child support, the Court must approach the question of child support as though it is an application de novo, a fresh application.

## RETROACTIVE VARIATION

- [34] Nonetheless, I am being asked to vary the Final Order of Justice Bernard, dated September 14, 2016 retroactively to 2017. In case I am wrong about the provisions authorizing a review, I find that a material change of circumstances occurred.
- [35] Section 17(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act] lists the requirements on an application to vary a child support order. Section 14 of the Guidelines provides:
14. For the purposes of subsection 17(4) of the [Divorce] Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
    - (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
    - (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support.
- [36] As may be seen from s. 17(4) of the Divorce Act, there must be a change of circumstances since the previous order, in the case at bar, the Final Order of Justice Bernard. The change in circumstances must be a material and long-lasting: *Bockhold v. Bockhold*, 2006 BCCA 472 at para. 34.
- [37] The leading authority with respect to the issue of retroactive child support is the decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.]. In *D.B.S.*, the Court reviewed the key principles to be applied in considering claims for retroactive child support. While the decision to order retroactive support is discretionary, the Court endorsed the notion that retroactive awards should not be regarded as exceptional. The core principle is that parents have a joint financial obligation to support their children commensurate with their income and those support obligations should fluctuate with a payor parent's income.
- [38] The Court in *D.B.S.* identified four factors that a court should consider before making any retroactive award:
- (i) whether there was a reasonable excuse for the recipient parent failing to make an earlier request for support;

- (ii) the conduct of the payor parent;
- (iii) the circumstances of the children; and
- (iv) any hardship occasioned by a retroactive award.

[39] The Court directed trial judges to adopt a broad and holistic approach and underscored that none of the four relevant factors are determinative. At para. 105, Mr. Justice Bastarache stated that in determining the appropriate balance between certainty and flexibility in any given case, the Court should consider each parent's behaviour. Each case must be decided on the basis of its particular factual matrix.

[40] On the facts of this case, it is clear that the parties intended for the child support obligations to be adjusted to coincide with the respondents' income. Beginning in 2017, the year where K.B. entered her university program, it is clear that both parties were on notice that there was a dispute as to what was owed. The respondent attempted to cease payments, and following an application to FMEP, promptly caught up. I do not believe that either party will suffer a hardship from a retroactive variation of support owed. In fact, in accordance with the Final Order, the parties are simply seeking a determination as to what the appropriate amounts of support are with regards to the Guidelines.

[41] I am satisfied that K.B. and J.B. entering into their university programs, and J.B.'s continuing health problems constituted a material change in circumstances warranting a variation and a determination on issues of income, child support, and s. 7 expenses from September 2017 to present.

#### INCOME OF THE PARTIES

[42] As stated above, I find the incomes of the parties have been as follows:

Year

Claimant

Respondent

2016

\$113,039

\$128,996

2017

\$128,246

\$138,194

2018

\$134,445

\$132,346

2019

\$147,153

\$139,403

[43] Any of the subsequent orders for child support between 2017-2020 are to be based on these amounts.

#### CHILD SUPPORT FOR K.B.

Is K.B. a "Child of the Marriage"?

[44] The evidence is clear that in the September following her graduation from secondary school, she began to attend UBCO in the Business Management Program with the intention of completing that 4-year program and was continuing with that goal as of the hearing of this matter. The authorities are also clear that a child who passes the age of majority and continues into post-secondary education on a full-time basis can remain a "child of the marriage". The most quoted authority on that point is the decision of the late Master Joyce, as he then was, in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) [Farden], which sets out several criteria for consideration as to whether a child over the-age of majority can remain a "child of the marriage". Those factors are:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

- [45] Considering the circumstances of K.B. and the criteria set out in Farden, I find that K.B. continues to be a child of the marriage.
- [46] K.B. is attending full-time undergraduate business studies at UBCO. Her program range begins in September 2017 and her end date is currently unknown. She has accepted a role in a co-op program that will extend the time her program takes to complete. She has successfully applied for some scholarships, but it is not clear how much she has received or how it was applied. After graduation, she plans to go on to another post-graduate degree in business or law.
- [47] During the summer of 2018, K.B. held a part-time job in May and June as a concession stand worker, and a job in July and August as a camp counsellor. In summer 2019, K.B. worked part-time for a grocery store and for a local municipality. She has taken care to save some of her earnings to use while at school, or while away on her semester-long university exchange in spring 2020.
- [48] It is clear that both of the parties intended for their children to be well-educated and put savings away into an RESP for that purpose. There have been no objections to the path K.B. has chosen regarding her courses or her grades. She has a good relationship with both parents, who have participated in transporting her to and from the UBCO campus.
- [49] For the foregoing reasons, I conclude that K.B. remains a child of the marriage until the completion of her undergraduate degree, but without prejudice to a further order or agreement that she continues to remain a child of the marriage should she attend for a second degree.

### **K.B.'s education and living situation**

- [50] Once a determination is made that K.B. is a child of the marriage, it is necessary to consider the Guidelines and authorities to determine what amount the payor parent should pay as child support. For a child over the age of majority it is possible to depart from the usual Guidelines approach per s. 3(2):
- 3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
  - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [51] In *McClement v. McClement*, 2017 BCCA 416, the Court of Appeal discusses the application of the two sections under s. 3(2) and the framework for the analysis of same that had been established in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435, 88 A.C.W.S. (3d) 1209 (B.C.S.C.). In *McClement*, Mr. Justice Harris summarizes the advancements to the law since *Wesemann* and concludes:
- [12] In sum, the choice between the two sections is discretionary and determined by the particular circumstances of each case and there is no specific requirement formally to challenge relying on s. 3(2)(a) before a judge can consider whether it is inappropriate to apply that subsection rather than s. 3(2)(b) and or vice versa. The view taken by this Court is that the burden of proof rests with each party in the ordinary manner to persuade the court which of the two sections is the appropriate one to apply in the particular circumstances before the court. There are of course factors that tend to support the appropriateness of relying on one section rather than another and which guide the exercise of a judge's discretion. For example, the more closely the circumstances of the adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2)(a) will be determined to be inappropriate. Each case will depend on its facts. In the result, the appellant has not demonstrated any error in principle in the judge's exercise of discretion to make an order under s. 3(2)(b).
- [52] I understand from the father's submissions that he would like the Court to consider the impact of K.B.'s full-time residence at UBCO, and the payment of tuition, books, and room and board from an RESP, or as s. 7 expenses by the parties. By contrast, the mother submits that she continues to support K.B. even while she is away at university, by providing her with groceries, laundry money, taxi money, and the like.
- [53] In many cases, the fact that the child is living away at university is a factor which mitigates toward a finding that the usual Guidelines approach may be inappropriate. On this basis, I refer to the decision of Mr. Justice Ball in *Mohamed v. Martone*, 2019 BCSC 38, where he says at paras. 32-33:
- [32] Having regard to the particular facts of the case at bar, I conclude that s. 3(2)(b) of the Guidelines applies (in conjunction with s. 4). Generally, s. 3(2)(b) applies in the case of "an adult child attending a post-secondary institution and living away from home": *M.(P.R.) v. M. (B.J.)*, 2012 BCSC 1795 at para. 120 [P.R.M.], *aff'd* 2013 BCCA 327; *W.P.N. v. B.J.N.*, 2005 BCCA 7 at para. 42 [W.P.N.]; see also *De Beck v. De Beck*, 2012 BCCA 465 at paras. 55 and 56. Those are the circumstances here. E.M.'s circumstances do not resemble those of a minor child living at home. To apply s. 3(2)(a) of the Guidelines would thus be "inappropriate" in the circumstances.

- [33] Accordingly, child support is to be determined according to "the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child". This includes consideration of the child's potential contribution, "which is an important factor in considering the amount of support a student requires": W.P.N. at para. 42.
- [54] Therefore, I must consider the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child, as well as the child's contribution.
- [55] Further referring to the reasoning in *Hamilton v. Popp*, 2014 BCSC 506 and *H.M.K. v. B.P.K.*, 2012 BCSC 435, particularly regarding the duplication of efforts where the parties have contributed to RESPs for the child, are paying s. 7 tuition and living expenses for the child's education, and would otherwise be required to continue to pay child support, Ball J. concludes it would be inappropriate and thus reduces the child support from 12 months to four months per annum.
- [56] I agree with the father's submissions that it would be appropriate to similarly reduce his child support obligation to the table amount of support for the four summer months that K.B. is home from school. However, I believe that the circumstances of this case also require some measure of support from him towards K.B.'s expenses during the school year beyond that covered by her s. 7 expenses and RESP. I will discuss this further below.
- [57] Further, it is disputed where K.B. has resided for the summers and holidays when she was home from school. In particular, it is submitted by the father that K.B. spent much of the summer of 2018 at his residence, and therefore he should be entitled to a cancellation of arrears or a credit for those months. Having reviewed the evidence, it does appear that K.B. did spend a number of weeks with him, however I do not believe it warrants a variation of child support. That K.B. spent some extra time with the respondent for a matter of weeks over a summer holiday does not rise to the level of a material and long-lasting change such to warrant a reduction in child support owing for that time: see *Earle v. Earle*, 1999 BCSC 283.
- [58] Therefore, I will not be making an adjustment for the summer of 2018 and the weeks that K.B. spent at the respondent's home.

### **K.B.'s income and expenses**

- [59] The parties have submitted evidence regarding K.B.'s financial situation. K.B.'s yearly tuition, residence, books, and parking at school total \$15,350 a year, and are paid from K.B.'s RESP. Her transport to and from campus has been split by the parties in the past (such as for flights to and from Kelowna), but is now covered by the vehicle they have purchased for K.B.

- [60] K.B. earns some income over the summers, including \$6,871 in 2018, \$9,481 in 2019, and has accrued some savings over her life in the range of about \$11,000. I understand that she took a university exchange program in the spring of 2020 and was likely to deplete her savings at that time. The claimant suggests that K.B. contributed approximately \$500 towards her expenses each month for the school year in 2018, and could contribute nearly \$1,000 per month toward her expenses for the school year in 2019-2020.
- [61] The claimant submits that K.B.'s expenses surpass \$970 per month while she attends university, as well as \$7,202 per year in vehicle costs, including insurance, repairs, BCAA membership, and fuel since 2018. She wishes to include the cost of K.B.'s vehicle as a s. 7 expense to be shared between the parties. The mother also claims to have given K.B. cash whenever she needs it, saying she has given her over \$6,000 in cash since school began in 2017.
- [62] The respondent submits that K.B.'s monthly expenses are very high for someone of her age and lifestyle, and were not supported by sufficient evidence. He argues that the vehicle costs are not appropriate s. 7 expenses.
- [63] I agree. The Guidelines provide an exhaustive list of s. 7 expenses. Even where an item is covered by the list, it must further be reasonable and necessary. What is a proper s. 7 expense and what is more accurately characterized as a day-to-day expense was discussed by Mr. Justice Baird in *Clarke v. Clarke*, 2014 BCSC 824 at paras. 47-53:
- [47] It appears that the parties do not agree as to what qualifies as a "special or extraordinary expense". In order to guide them in the future I am going to briefly comment on the legal meaning of that phrase. I note that there is a similar summary in *MacDonald v. Pink*, 2011 NSSC 421 at para. 55, which may also be helpful.
- [48] Section 7 of the Federal Child Support Guidelines gives the court the discretion to order payment of an amount over and above the regular table amount. However, in order to qualify for a s. 7 order, the expenses must be proven to be "special" or "extraordinary" in some way.
- [49] This is because the basic table amounts of child support are designed to cover all the "ordinary" costs of raising a child: *D.M.C.T. v. L.K.S.*, 2008 NSCA 61 at para. 25. Food, shelter, clothing and other necessities are all ordinary, as are many educational, extracurricular and recreational expenses: *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.).
- [50] So when does an expense qualify as special or extraordinary? First, it must fit within one of the categories of expenses listed in section 7, as follows:
- (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.

[51] That list is exhaustive. If the claimed expense does not fit into any of those categories, it cannot be a special or extraordinary expense: *Kase v. Bazinet*, 2011 ONCJ 718 at para. 39.

[52] Even where an expense fits into one of the listed categories, that is not the end of the story. The expenses must be both "necessary" - as defined in relation to the child's best interests - and "reasonable," as measured against the combined financial means of the parents (and, where appropriate, the child) as well as the family's spending patterns prior to separation: see section 7(1) and *Yensen v. Yensen*, 2003 BCSC 1372 at para. 8. In addition if the expense is one listed under subsection (d) or (f) - educational programs or extracurricular activities - the party claiming the expense must prove that they are "extraordinary."

[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: see *D.M.C.T.* at para. 32..

[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: *Mertler v. Kardynal* (1997), 35 R.F.L. (4th) 72 (Sask. Q.B.).

- A home computer and other similar technologies do not qualify as extraordinary as they are "common item[s] found in most homes": *Yensen* at para. 18.

- 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": *D.L.C. v. F.M.C.*, 2010 BCSC 1312 at para. 67.

- [64] I would note that many of the expenses claimed by the claimant fall into the realm of the 'ordinary'. Providing their adult children with clothing, shoes, decorations for their rooms, spending money, meals out, boat cruises, bedding, birthday parties, laundry, etc. are not properly considered s. 7 expenses. Further, I agree with the respondent that the notes provided to him by the claimant are not sufficient - per the Final Order, the parties must exchange receipts and the expenses must be agreed upon in advance.
- [65] As stated by Mr. Justice Kent in *Weibe v Treissman*, 2017 BCSC 1523 at para. 124, the cost of owning and operating a vehicle for the children does not qualify as a special or extraordinary expense for the children. In that case, the father had unilaterally purchased a vehicle for their 17-year-old child. The court found that it was not an appropriate expectation to order the mother to contribute as though it was a s. 7 expense.
- [66] There is no doubt that having a vehicle is convenient for K.B., nor that the claimant and respondent jointly purchased the vehicle for K.B. The university parking fees are paid out of her RESP. The claimant submits that the yearly car insurance (\$4,600) and fuel costs (\$2,000) ought to be treated as s. 7 expenses and that having a car is important for K.B. while she is away at school. I agree that both parties must have found it important for K.B. to have a car while she is away at school, however, I find the vehicle costs (totalling about \$7,200) to be ordinary expenses for which K.B. and both her parents must contribute as part of her general living expenses.
- [67] This approach was supported in *Cole v. Cole*, 2016 BCSC 716, where the court said that a child's expenses incurred during the pursuit of post-secondary education may form the basis for an order for child support, s. 7 expenses, or both: *Cole* at paras. 145 and 146. Under s. 3(2) (b), the Court has a broad discretion to determine what order is fair and just in all the circumstances: *Hamilton* at para. 35; *Hausmann v. Klukas*, 2016 BCSC 853 at para. 99. Therefore, I find that K.B.'s monthly vehicle expenses comprise ordinary expenses relating to her university education that K.B. is also responsible for covering.
- [68] Taking a look at K.B.'s monthly expenses of \$970, the respondent submits that it would be appropriate for him to pay \$300 monthly towards K.B.'s expenses, assuming the claimant pays a similar amount (given their nearly equal incomes), and K.B. pays the remainder from her part-time income. The claimant submits that a similar approach would be appropriate for K.B. from 2020 onward, and that the respective amounts should be \$500 from each parent, and the remainder coming from K.B.
- [69] In K.B.'s first year of university (Sept 2017 - Apr 2018), she was still under the age of majority and she did not have a car, nor had she worked a part-time job to help off-set her costs of living. For the summer of 2018, although it is clear that K.B. spent some significant time at the respondent's home, as mentioned above, I refuse to alter payment on that basis. She continued to be primarily resident at her mother's despite her freedom to choose which parent she would like to spend time with at a given point. Therefore, for that school year and the summer of 2018, I would leave the regular table amount as paid by the respondent in

place, subject to any adjustments due to his actual income as found above.

- [70] K.B. got her car in 2018. Her vehicle costs are stated to be \$7,202 per year, or \$600 per month. The claimant says that K.B.'s monthly personal expenses were \$970 per month. As stated, the respondent finds \$970 to be excessive and with little supporting evidence. I agree - the evidence supports that K.B. needs a budget for groceries and laundry, and as I have stated, her vehicle. A number of K.B.'s expenses, such as school and dorm supplies, may be more appropriately paid from her RESP. It may be that the claimant chooses to provide over and above those reasonable necessities. That is her choice. Therefore, I would set K.B.'s expenses for groceries and laundry at \$600 per month, and add her vehicle costs of \$600 per month. I would also note that the respondent pays her cell phone bill, at about \$100 monthly.
- [71] On the question of the RESP, the claimant previously suggested, but seemed to later resile from, the position that a portion K.B.'s RESP should be kept aside in case K.B. wishes to pursue a post-graduate degree. With regard to the Final Order, there is no suggestion in that order to split the RESP up for various levels of education. In fact, there is a clause which requires any funds in the RESPs remaining at K.B.'s 25th birthday to be removed and split between the children equally, incurring the tax consequences. Further, I would add that the possibility of K.B. completing a second degree should not take precedence over the confirmed reality that she will need more funds to support herself through the remainder of her first degree. The RESP funds should not be withheld to cover further education at the cost of her current education.
- [72] Where legitimate university related expenses cannot be covered by the RESP, perhaps due to a lack of funds in the RESP, then those expenses will be s. 7 expenses. This includes tuition, textbooks, residence fees, parking fees, school supplies and dorm supplies. As set out in the Final Order, the parties will seek agreement and exchange receipts on these expenses, and share them in proportion to their incomes.
- [73] In considering the means, needs, and circumstances of the parties and the ability of K.B. to contribute herself, I make the following assessments of child support owing for K.B.'s second year of university to the completion of her degree:
- a) For K.B.'s second year of university (Sept 2018 - Apr 2019), K.B. had saved enough to pay \$500 per month toward her expenses. As stated, her reasonable expenses are \$1,200 per month while she is at school. Therefore, for K.B.'s second year at school, I would set the respondent's contribution to the care of K.B. at one-half the difference of her expenses and her income, which is \$350 per month.
  - b) For K.B.'s third year of university (Sept 2019 - April 2020), K.B. had enough saved to pay \$1,000 per month toward her expenses. The claimant submits that for K.B.'s university exchange in spring 2020, the parties should treat her exchange expenses as s. 7 expenses to be shared equally. She estimates the costs of the trip to be \$14,100, and notes that \$7,000 of that will come from the RESP. I would note that \$5,000 of that is her estimate for "meals"

over five months. Considering K.B.'s savings and the exceptional nature of a university exchange, I would not order the parties to pay more than their regular support for K.B. during that time. She has made a decision to go travelling, and she has the savings and resources to do so. However, in recognition of her increased expenses and that she earned more in the summer of 2019 to help offset her travel costs, I would leave the contribution from the respondent for the support of K.B. at \$350 per month.

- c) For K.B.'s next year or two in her undergraduate education, there is no reason to assume that she would not have the same success in saving up over the summer to support herself for the following year. I would continue the contribution from the respondent for the support of K.B. at \$350 per month while she attends her program.
- [74] For the summers of 2018, 2019, 2020, and possibly 2021 (provided K.B. is returning to full-time education in the fall of 2022), I would set the child support payable to the claimant at the table amount adjusted for the actual incomes of the respondent.
- [75] Should K.B. require support thereafter, it is open to the parties' agreement or further court order to set child support for K.B. following completion of her degree.
- [76] Considering the means, needs, and circumstances of the parties, as well as those of K.B. to support herself through her education through her earnings and her RESP, I find that this level of support for her second, third, fourth, and possibly fifth year of her degree is appropriate and fair.
- [77] These payments are to continue to pass from the respondent to the claimant for two reasons. The first, is that the respondent fell into arrears which were only corrected at the insistence of FMEP. The claimant submits, and I agree, that without the force of FMEP the respondent may fall into arrears again. The second, is that the respondent has some sway with K.B., and I am concerned by the affidavit she swore where she says she felt 'forced' to help out her dad's financial situation. I would be concerned that he would put that sort of pressure on K.B. again to excuse a delay or absence in his support.

#### CHILD SUPPORT FOR J.B.

Is J.B. a "Child of the Marriage"?

- [78] J.B.'s situation has been complicated by the effect of three concussions on her ability to continue with her education or to work even a part-time job. Like K.B., her intention was to attend full-time at a post-secondary institution, in her case being SFU.
- [79] Her situation is thus captured in s. 2(1) of the Divorce Act:
- [C]hild of the marriage means a child of two spouses or former spouses who, at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge, or

- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life; (enfant à charge).

[80] It is not disputed between the parties that J.B. remains a child of the marriage until she completes her undergraduate degree.

### **J.B.'s medical, education, and living situation**

- [81] J.B. resides with the claimant and visits with the respondent when she chooses to do so. As mentioned, she is slowly working on obtaining her degree from SFU, but is having trouble doing so because of her several concussions and the lasting symptoms.
- [82] In accordance with the authorities regarding s. 3(a) of the Guidelines, J.B.'s situation is very alike to that of a child under the age of majority. She is wholly reliant on her parents for support, and has high needs during her time of recovery from her injuries, including multiple doctors' appointments. The respondent will continue to pay Table child support to the claimant for J.B., adjusted to account for the actual incomes of the respondent set out above.
- [83] Regarding her education, I understand J.B. has RESPs available to cover her tuition and textbooks at SFU. As with K.B., any university related expenses for J.B.'s first degree that are not covered by the RESP (perhaps due to a lack of funds) should be shared as s. 7 expenses, subject to the process set out in the Final Order regarding agreement and receipts.
- [84] The claimant submits that she is currently covering the cost of J.B.'s transportation to and from school, by way of a car that she owns and is insuring and providing fuel for, so that J.B. may attend her classes. She submits that J.B. is unable to work and unable to take the bus due to her injuries, and thus the costs of her vehicle need to be covered as an expense related to her attendance at her university program. The respondent submits that the vehicle, insurance, and fuel costs would be too much for him to afford, and should not be s. 7 expenses.
- [85] As mentioned, s. 7 expenses must account for what is both "necessary" - as defined in relation to the child's best interests - and "reasonable," as measured against the combined financial means of the parents (and, where appropriate, the child).
- [86] Much as I have found K.B.'s vehicle expenses to be ordinary in nature, I too believe that J.B.'s need for a vehicle is not special or extraordinary. As J.B. does not have many classes, and is not working part-time, insuring and providing a vehicle for her use at all times is not necessary or reasonable. Further, the evidence that J.B. is unable to take transit or find an alternate route to school (such as a carpool) was not sufficient for me to make such an order; I do not understand what the difference is in terms of her health when one compares taking a bus to school or driving to school.

[87] If the claimant wishes to provide J.B. with a vehicle to improve her comfort and feeling of a sense of equality between her and K.B., then it is up to the claimant to choose to do so. I therefore decline to order any of J.B.'s vehicle expenses to be paid as s. 7 expenses.

[88] I would note that if J.B. decides to pay for a vehicle for herself, either by way of a part-time job or through her RESPs, or some combination thereof, it would remain open to the parties to do so by agreement. I will not order the respondent to be responsible for the cost of J.B.'s vehicle, but I am unaware of whether he is against J.B. using her RESP savings to do so.

[89] Similarly, I do not find the costs of a cell phone to fit within the enumerated s. 7 expenses.

#### COSTS

[90] There has been mixed success on this application, and as such I make no order as to costs.

"Jenkins J."

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