
CANADA / JUDGMENT

L.H.M.K. v. B.P.K.

2012 BCSC 435

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 435 L.H.M.K. v. B.P.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L. H. M. K. v. B. P. K.,

2012 BCSC 435

Date: 20120326

Docket: E061210

Registry: Vancouver

Between:

L. H. M. K.

Plaintiff

And

B. P. K.

Defendant

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

Counsel for Plaintiff:

F. E. Maxwell, Q.C.

Counsel for Defendant:

P. M. Daykin, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

November 1 and 3, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2012

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I. Applications

- [1] There are two sets of applications in these family law proceedings; one filed by the wife, the other by the husband. An overview of the applications and the parties' respective positions on them follows.
- [2] The parties married on September 8, 1990 and separated on February 11, 2006. The parties have three children: (a) a daughter, R. (born March 10, 1992); (b) a son, D. (born May 26, 1995); and (c) another son, W. (born April 27, 1998). Where I refer to D. and W. collectively in these reasons, I do so as "the Boys".
- [3] Although the parties are divorced and no longer husband and wife, I will refer to them that way to make the reasons easier to read, especially given the cross-applications involved. Similarly, when dealing with parenting time (access) issues, I will refer to the parties as the father and the mother.

A. Retroactive child support and child support arrears

- [4] The claimant wife seeks an order for retroactive child support from January 2008 to the present or, in the alternative, the payment of all child support arrears accumulated over the same time period.

- [5] The respondent husband opposes this application. He says he has been paying support based on his income under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and is not in arrears.
- [6] Since October 2010, the husband has been unilaterally reducing his monthly child support payments by approximately one-third because, he says, the wife refuses to contribute anything to the post-secondary costs of the oldest child, R., who studies away from home at the University of Oregon. He has also deducted certain additional amounts from his child support payments to account for the wife's proportionate share of special and extraordinary expenses he says she was obliged to contribute towards but did not.
- [7] When the court turns to deciding retroactive child support or arrears calculation, the wife asks that any award be based on the husband's Guidelines income from January 2008 to the present.

B. Prospective child support

- [8] The wife also seeks prospective child support from the husband based on his current Guidelines income.

C. Special and extraordinary expenses under section 7 of the Guidelines

- [9] The wife seeks an order that until the Boys have completed high school (D. is currently in grade 12 and W. is currently in grade 8), the husband pay all the Boys' tuition fees for the private school they currently attend without contribution from her.
- [10] In addition, the parties listed numerous expenses that they solely incurred on behalf of the children and for which they now seek proportionate reimbursement as special or extraordinary expenses pursuant to s. 7 of the Guidelines. I will address these expenses in detail further on in these reasons.

D. Parenting Time

- [11] Conflict and stress has swirled around parenting time since the parties separated. The wife complains the husband's pattern of exercising parenting time is inconsistent and unpredictable, causing stress for her and the two youngest children, the Boys, who principally reside with her. In reply, the husband points to the nature of his work and complains the wife is often rigid regarding the parenting time schedule and will not respond to what he sees as reasonable requests to alter it. The parties seek modification of the parenting time schedule to address these concerns.

E. Financial Disclosure

- [12] The wife seeks an order requiring the husband to make proper financial disclosure. The husband responds that he made financial disclosure prior to the hearing, but agrees to produce proof of his income information, including, but not limited to, copies of his 2007,

2008, 2009 and 2010 Canadian and U.S. tax returns and notices of assessment. He says this brings him up to date, but he also complains the wife has not made full financial disclosure. I find the husband's disclosure is now adequate; but going forward, both parties shall exchange their income tax returns by the first day of July 2012, and on that date each year following until none of the children are eligible for child support.

F. RRSP and chattels located in the matrimonial home

- [13] The wife asks for a court order that requires the husband, within 30 days of the date of the order, to transfer from his RRSP accounts to her RRSP account securities with a value equal to one-half of the difference between the fair market value of the parties' respective RRSP accounts as at January 16, 2008. She says this will rectify the husband's failure to disclose the \$25,000 he redeemed from his RRSP in September 2007.
- [14] The husband acknowledges the parties agreed to equalize their respective RRSPs. He says that this did not happen because the parties could not agree on the amount to be equalized. He submits, as well, that he withdrew the \$25,000 from his RRSP in September 2007 not for personal benefit, but to pay a family debt for which the parties are equally responsible.
- [15] The husband also says the wife refused to deal with the division of household chattels as the parties had agreed. He seeks an order that the wife compensate him for one-half the value of the household chattels, which he values at \$41,500. He submits, effectively, that once the division of household chattels is properly accounted for, he owes the wife nil, or nearly nil, for RRSP equalization.

II. Background

- [16] By settling a host of outstanding issues that ensued following separation, the parties were able to avoid a ten-day trial set for January 2008. The minutes of the settlement they reached, which contained some creative terms that allowed the parties to move past some of the more difficult issues, were incorporated into a Consent Order approved by Mr. Justice N. Smith on January 16, 2008 (the "Consent Order"). The Consent Order provides for:
- a) joint custody and guardianship of the three children of the marriage;
 - b) parenting time (access);
 - c) the husband to assume responsibility for payment of the children's private school tuition fees until June 2011;
 - d) a prorated formula for special expenses;
 - e) disposition of the matrimonial home;
 - f) an RRSP rollover from the husband to the wife;
 - g) lump sum spousal support;

- h) disposition of a large sea vessel (the Eagle Mar);
- i) disposition of chattels in the matrimonial home; and
- j) further provisions related to the parties' separation.

[17] Since the Consent Order, the parties have experienced considerable conflict, much of it relating, as mentioned earlier, to difficulties scheduling regular parenting time for the husband and the disruption the wife considers this to have caused in her personal life. In summary, the matters in dispute include:

- a) what, if anything, the husband owes the wife for his part of the RRSP rollover;
- b) whether the husband is entitled to a share of chattels that are (or formerly were) located in the matrimonial home;
- c) what the husband's income should be set at under the Guidelines for child support purposes;
- d) how much income should be imputed to the wife under the Guidelines;
- e) responsibility for payment of the private school tuition fees after June 2011, to which date the husband agreed to assume full responsibility;
- f) responsibility for payment of R.'s post-secondary expenses at the University of Oregon; and
- g) retroactive child support and/or child support arrears.

III. RRSP Rollover

A. Overview

[18] The Consent Order confirmed the parties' agreement to equalize their RRSPs through the standard Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) [Income Tax Act], s. 146 tax deferred spousal rollover. By this mechanism, the husband would transfer from his RRSP account to the wife's RRSP account securities equal to one-half of the difference between the fair market value of their respective RRSP accounts as at the "Closing Date", which the Consent Order stipulated would be no later than February 15, 2008.

[19] The rollover has not yet occurred. The wife deposes that around the time the parties entered the Consent Order in mid-January 2008, she discovered that, in September 2007, the husband had redeemed \$25,000 from one of his RRSP accounts. She complains she was prejudiced by this because when the parties settled, she relied on the husband's statement of his financial circumstances, which included the \$25,000 he subsequently removed in September 2007. The husband's disclosure is dated September 12, 2006 and the wife's disclosure is dated February 15, 2007. The wife says the parties based their negotiations on their respective financial disclosure, which encompassed various financial statements and other documents.

- [20] The husband responds that the wife breached the Consent Order by refusing to distribute chattels located in the matrimonial home, the value of which he says exceeds the \$25,000 he redeemed from his RRSP accounts in September 2007. He also maintains he transferred the \$25,000 to discharge a family debt, and that after proper adjustments are made to reflect the parties' equal responsibility for this debt, the amount required to equalize the RRSPs will only be about \$3,000.
- [21] As at February 13, 2008, the value of the husband's RRSP holdings was \$256,394. It is currently valued at \$277,667, inclusive of a \$19,000 RRSP contribution the husband made in February 2008.

B. Failed attempts to resolve the RRSP dispute

- [22] A January 23, 2008 letter written by counsel for the wife to the husband's counsel stated the husband had to account for the \$25,000 withdrawal from his RRSP. This initiated a series of letters and emails between the parties that ultimately failed to resolve their differences over the RRSP withdrawal.
- [23] In a February 6, 2008 letter, husband's counsel replied to the January 23 letter, pointing out the husband had withdrawn \$25,000, \$18,902.85, and \$7,500 after paying withholding tax to satisfy a US and Canadian income tax bill. Citing *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241, 40 R.F.L. (3d) 114 (C.A.) [Mallen], and the fact the parties had been sharing the husband's income during that taxation period, the husband's counsel asserted that the tax liability was a family debt. Counsel for the husband also pointed out the division of chattels issue remained unresolved, the Consent Order having required the parties to attempt to agree on how the chattels would be distributed, with liberty to apply in court if they failed to reach an agreement. As it turned out, the parties did not reach an agreement. Counsel for the husband also reminded counsel for the wife that he had earlier forwarded a list of chattels the husband wished to retain, but which the wife was unwilling, at that time, to part with. He then requested an inventory of the contents in the matrimonial home so that the parties could set about the task of dividing items.
- [24] In a letter dated February 12, 2008, the wife's counsel complained to the husband's counsel that the husband was the only person who knew, at the time of the settlement negotiations, about the \$25,000 redemption from his RRSP; and that the husband had insisted that the Consent Order specify a February 2008 closing date for the valuing of the parties' RRSP accounts. Counsel complained the husband did not advise the wife that he had: (a) redeemed the \$25,000 from his RRSP; (b) used that amount to pay an income tax debt for 2006; or (c) expected the wife to share responsibility for it as a family debt. He pointed to the husband's ongoing obligation to advise the wife of changes in his financial position, which he had failed to do. As for the division of chattels, he advised he would take that issue up once again with the wife.

- [25] On February 13, 2008, the husband's counsel replied in writing to the wife's counsel. He agreed it would have been preferable if the husband had provided the wife with timely information about the \$25,000 RRSP withdrawal and the tax payment. But he deflected the practical significance of this by reiterating that the parties equally shared the tax liability, that chattels in the matrimonial home had not been divided yet; and that, anyway, the net amount in dispute, after deducting the wife's alleged share of the tax liability, was only between \$3,000 to \$5,000.
- [26] On February 19, 2008, the husband's counsel advised he would withhold the RRSP transfer form until the division of chattels occurred and the calculation of the RRSP rollover had been resolved.
- [27] On February 28, 2008, the husband's counsel wrote to the wife's counsel and proposed three alternative resolutions, all of which effectively treated the wife's liability for the tax debt and the husband's \$25,000 RRSP withdrawal as a wash.
- [28] On June 3, 2008, the wife's counsel stated in a letter to the husband's counsel that the \$25,000 should not be an issue at all, but failed to make any further comments on the division of chattels.
- [29] On July 18, 2008, husband's counsel wrote to the wife's counsel, stating that unless he received a specific proposal by August 15, 2008 for division of the contents of the matrimonial home and resolution of the RRSP rollover issue, he would presume the wife wished to retain all the contents of the matrimonial home and that she was prepared to agree that he could waive his claim for a division of the chattels in return for her waiving that he transfer any further RRSP funds.
- [30] Negotiations on the RRSP rollover and division of chattels have proceeded no further since then.
1. Facts on the chattel issue
- [31] Paragraph 30 of the Consent Order states that the "contents of the Matrimonial Home shall be divided by agreement, with liberty to either party to apply for further Orders and directions with respect to same".
- [32] Although the wife's counsel stated in his February 6, 2008 letter that he would discuss the division of chattels with the wife again, it appears the wife has never changed her position from being that the parties have already divided chattels in a manner that satisfies the Consent Order.
- [33] The husband says a division of chattels never occurred; the wife says the husband took what items he wanted and she considered the matter closed when the parties' negotiations merged into the minutes of settlement. In her October 28, 2011 affidavit, she states, at para. 13, that the minutes of settlement did not address the division of chattels at all because, by the time they were finalized, the husband had already left the family home and taken from it

what he wanted. She also asserts he took funds from the parties' joint account to furnish his apartment in Portland, Oregon, where he had moved to take up new employment in February 2008.

- [34] The wife's assertion regarding the withdrawal of funds from a joint account is not correct. I note as well in this regard that, in an email exchange between the parties ending April 7, 2006, the wife stated to the husband that she "realize[d] you have to furnish your apartment etc.", which indicates, at least, that the husband did not have enough furniture from the matrimonial home to furnish an apartment.
- [35] The wife relies on a comment the husband's counsel made in a September 20, 2006 letter written to the wife's counsel referring to storage of "his items". The wife suggested this shows he removed chattels from the matrimonial home. But the comment appears to relate to arrangements the husband had made to move out of his Portland apartment, which by then he had already furnished. I do not see how that comment relates to chattels the husband removed from the matrimonial home, which, by his description, were few. Moreover, the husband's employer provided him a relocation allowance that specifically included \$8,000 to purchase furnishings.
- [36] The husband exhibited a copy of a spreadsheet listing the contents of the matrimonial home that he prepared before the parties agreed to the terms in the Consent Order. It appears both parties were aware of the contents of the list. It details various types of fine china, antique furnishings, paintings, and other miscellaneous items, valued at \$82,704, at least according to the husband's estimate. The wife has never placed any specific value on the listed items and neither party exhibited an independent appraisal.
- [37] Paragraph 11 of the husband's affidavit dated September 14, 2011 describes in considerable detail the items he says were wedding gifts to the parties. In some instances, the parties later purchased additions to wedding gift sets. He also describes paintings, most notably "Crosswalk Spring Morning" by Jack Darcus, which he says he purchased at an auction for between \$4,000 and \$5,000 in the early 1990s. He claims the painting is now valued at between \$9,000 and \$10,000.
- [38] Another piece of artwork in the matrimonial home when the parties separated is a large engraving titled "Goats on the Bluff," which the husband described as a unique piece from the late 1800s that the wife's parents gave to the parties as a gift. He also mentions an antique grandfather clock, which he says the wife's father gave him as a gift. Likewise, he contends the wife's parents gave the parties an antique dining furniture set and sideboard as a gift. He complains, as well, that before the Consent Order was pronounced, the wife removed two of the more valuable chattels on the list, namely the antique sideboard and the "Goats on a Bluff" engraving, and transferred them to her parent's home.

[39] The wife replies, at para. 15 of her fourth affidavit, that the parties divided the contents of the matrimonial home before the Consent Order was finalized. Even so, she states that on January 11, 2008, the husband requested five further items from the matrimonial home; a request she refused.

[40] She points to an email exchange between counsel dated January 11 and 14, 2008. This email exchange does not assist the wife's position. Part of the exchange, found at p. 31 of the exhibits to her fourth affidavit, appears to be from the husband's counsel to the wife's counsel and states:

I enclose yet another re-draft with those provisions inserted.

Bruce has asked me to resolve the issue of the stuff in the house. We put this in one of our earlier settlement proposals, but it got forgotten. He would like:

1. 1 of the 2 "slipper chandeliers";
2. the Jack Darcus painting;
3. the power tools;
4. the carving set;
5. half of the china and crystal.

Everything else in the house would be retained by Tish.

Could you please approve this version of the Minutes and let me know about the chattels.

...

[41] As mentioned, the wife, maintaining the parties had already executed the division of chattels, rejected this proposal. In her fourth affidavit, at para. 17, she states the division of chattels issue was still unresolved, by which I assume she means the dispute itself, not that a division had yet to occur. Nevertheless, she never states what specific items the husband removed from the matrimonial home, which would support her claim that a division of the chattels already occurred.

[42] As for why the parties included a provision at para. 30 of the Consent Order stipulating that the contents of the matrimonial home would be divided by agreement, the wife states in para. 17 of her fourth affidavit that the parties included it because the five additional items requested by the husband in January 2008 were still unresolved on the eve of trial. She says she understood the provision to refer only to a finite group of chattels, presumably those five, because the parties had already divided chattels in the matrimonial home and, with the exception of those five items, the husband had never raised any further issue regarding the division of chattels.

- [43] I find this explanation unconvincing and nonsensical. It would not be fitting, anyway, for me to look behind the plain language of para. 30 in the Consent Order. If the parties intended para. 30 to refer only to a finite group of chattels, the provision easily could have stated so. And, as the matter now stands, the wife's position contradicts the unqualified language of para. 30 in the Consent Order.
- [44] Further, I cannot see how the husband's offer to settle the division of chattels by requesting the five items means the parties had already divided chattels. Even absent an appraisal, some of the chattels listed in the husband's spreadsheet appear to be of considerable value. Yet, as mentioned, the wife has not listed those items she says the husband already removed from the matrimonial home to satisfy the division of chattels.
- [45] As for the parties' conflicting testimony over whether the grandfather clock and the sideboard engraving, for example, were loaned by the wife's parents to the parties or were wedding gifts, this cannot be resolved on a summary application, at least not based on the evidence presented before the Court. But one can see from the husband's descriptions of the items that he knows a lot about them. At least one of the listed items, the Jack Darcus painting, is a fairly valuable item he purchased, and which remains in the wife's possession. It is difficult to see why the husband, had he truly been given the opportunity, would not have taken that as part of his share of the chattels in the matrimonial home.
- [46] I find, in sum, that the wife's position on the division of chattels lacks logical consistency and appears inconsistent with the probabilities. I accept the husband's evidence that the parties have not completed a division of chattels in the matrimonial home.
- [47] However, the passage of time has affected the husband's position. He states that because of the wife's refusal to divide the chattels in 2008, he has had to replace and purchase his own furnishings and household items. He therefore has no interest in dividing the household contents. He only wishes now to be compensated monetarily for one-half of the value of the household contents, as they were in February 2008, which he conservatively values at approximately \$41,500. Neither party obtained an independent appraisal of the value of the chattels before the Court. The husband's estimates, informed or not, are inherently biased. Further, as mentioned earlier, I cannot resolve the issue of disputed ownership on some chattels. The wife did not provide an affidavit from her parents confirming that certain chattels were loans as opposed to gifts, and the absence of this affidavit correspondingly weakens the wife's position. That said, I do not have to resort to adverse inferences to resolve questions of value.

C. Findings on the RRSP rollover and division of chattels

1. RRSP

- [48] Section 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 [Family Relations Act] states:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[49] Following a determination under s. 65, section 66 outlines a wide range of orders the court can make, including declarations of ownership or right of possession to property under s. 66(2)(a) and ordering a spouse to pay compensation under s. 66(2)(c).

[50] In *Stein v. Stein*, 2008 SCC 35, [2008] 2 S.C.R. 263, at paras. 9-10, the Supreme Court of Canada, recounting what the British Columbia Court of Appeal stated in *Mallen*, affirmed the principle of equal ownership of both assets and debts:

[9] It seems self-evident that, generally speaking, both assets and debts need to be considered in order to ensure fairness upon the breakdown of a marriage. As the British Columbia Court of Appeal noted in *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241:

... the equality of treatment of the spouses as required by the scheme of the Act is intended to be a true equality in real terms, and not an artificial equality reached by ignoring some of the facts and emphasizing others. In order to bring about a true equality it is necessary that debts and other liabilities of the spouses at the time of the triggering event and earlier be examined in a way that will illustrate the true relationship between the debts, on the one hand, and the attainment of equality and fairness, on the other. [para. 5]

[10] Indeed, the term "family debt" has evolved in the jurisprudence out of a recognition that spouses jointly contribute to not only the accumulation of assets, but also debt...The very existence of the term "family debt" underlines the reality that in order to ensure fairness, both debts and assets must be considered after the breakdown of a marriage.

[51] Although I accept the husband's evidence that he applied the \$25,000 he withdrew from his RRSP to satisfy a family debt, i.e. income tax owed on income earned and shared between the parties in 2006, the husband's failure to disclose that debt, or to claim it, as part of the settlement negotiations, is a key consideration. He had a continuing duty to disclose his

assets and debts. Indeed, Rule 5-1(15) of the Supreme Court Family Rules, B.C. Reg. 169/2009, stipulates that information contained in the financial statements disclosed in a family law proceeding must be kept current, and that where a material change of circumstances occurs, a written statement setting out the accurate and complete information, as well as an updated Form F8, must be served on all parties.

- [52] While it might have been reasonable for the husband to assume the income tax liability was so obviously a family debt that the wife invariably would have had little choice but to agree to pay her share of it, he would have still been speculating on this issue without advice of counsel or a ruling of the court. Even if the wife had agreed to pay her share of the tax debt, she was not obligated to satisfy her responsibility for it by taking a lesser amount in the RRSP rollover. Stated differently, the wife could have satisfied her share of the tax debt in another way.
- [53] The wife suggested the husband knew she was unaware of his \$25,000 withdrawal and had accordingly insisted on a specific closing date in the Consent Order to ensure, she argues, that he would not have to account for the \$25,000 withdrawal: absent cross-examination, I am reluctant to make a finding on that point. It is not necessary finding anyway, as the husband's continuing duty to disclose his assets and liabilities gives the Court enough of a basis to dispose of the issue. He should have brought the withdrawal to his counsel's attention; and whether he failed to do so through neglect, carelessness or design makes no difference at this point. In some cases, of course, it would be right to revisit the terms of an order and recast what became for the wife the prejudicial term in the Consent Order, so that it fairly considered the interests of both parties. But in the case at bar, the parties entered into a contract, which affords certain rights and obligations to the wife and the husband as the contracting parties. It is not fitting here to unravel the contract or the parties' expectations, but in this case, the wife reasonably believed the husband had not made any undisclosed withdrawals from his RRSPs since his most recent financial disclosure.

2. Chattels valuation

- [54] As mentioned earlier, I have no independent appraisal upon which to value the individual chattels, and, apart from the five items requested by the husband and subsequently rejected by the wife, I cannot be sure, had the parties divided the chattels, which ones the husband might have chosen as his share. I am satisfied, however, that the value of the share of the chattels to which the husband is entitled would roughly offset the value of the equalizing RRSP rollover due from the husband to the wife if the \$25,000 withdrawal is not accounted for. Accordingly, pursuant to s. 146 of the Income Tax Act, I order the husband to roll over an amount equal to one-half of the difference between the fair market value of the parties' respective RRSP accounts as on February 15, 2008, thus without the need for the husband to account for the \$25,000 withdrawal he made from his RRSP in September 2007.

[55] I find, in summary, that the equalizing RRSP rollover offsets the value of the husband's putative share of the chattels in the matrimonial home; and I also find that upon completion of the rollover, the parties will have executed both paras. 29 and 30 of the Consent Order. By so doing, the husband's claim for a share of the matrimonial home chattels and the wife's claim for an undiluted equalizing RRSP rollover are, in effect, a wash.

IV. The Parties' income for guidelines purposes

[56] The wife claims retroactive child support because she alleges the husband failed to adjust the level of child support he pays to accord with changes to his annual income. In the alternative, the wife claims payment of any child support arrears accumulated since the entry of the Consent Order.

[57] The wife also complains the husband has been unilaterally deducting monthly child support amounts to reflect what he sees as appropriate adjustments to reflect the costs he is solely bearing in relation to the attendance of the parties' daughter, R., at the University of Oregon, as well as the fact she lives away from the wife's residence eight months of the year.

[58] The wife calculated child support arrears based on her interpretation of the income tax returns the husband provided; but the husband's income is actually considerably lower than the figures she has relied on. Even so, the correct figures for the husband's income call for a level of child support under the Guidelines that is greater than what he has paid since 2008.

[59] As for the wife's income, the husband says additional income should be imputed to her under the Guidelines.

A. The husband's income

1. The wife's calculation

[60] The wife calculates child support arrears of \$51,671, inclusive of 2008, based on the husband's following alleged taxable income:

§ 2008: \$315,573

§ 2009: \$316,111

§ 2010: \$231,000

§ 2011: \$287,561

[61] I find the husband's base salary of \$225,000 has not changed since 2008. In addition to his base salary, however, he received bonuses in 2008, 2009 and 2011, plus some taxable benefits:

2008

2009

2010

2011

Base salary

225,000

225,000

225,000

225,000

Bonus

34,194

27,000

0

46,250

Taxable benefits

30,200

24,208

6,332

6,000

Total

289,394

276,208

231,332

277,250

[62] Until January 25, 2008, the husband's base salary was \$175,000 US, earned at a company based in Salt Lake City, Utah. In February 2008, he moved to Portland, Oregon to work for a company that paid him a base salary of \$225,000 US. He states he immediately advised the wife of the increase in his income from \$175,000 to \$225,000; the wife acknowledged she received such notice.

[63] The husband deposes that his base salary with the Portland company has not changed since he started working there.

- [64] The husband continued to pay child support in Canadian dollars based on a Guidelines income of \$225,000, despite the fact that, due to the increase in value of the Canadian dollar in the last two years, the Canadian dollar equivalent of his income has been lower than \$225,000. Thus, he has effectively been paying more in child support than if he had paid it in US dollars.
- [65] He explained in para. 25 of his third affidavit that he negotiated relocation costs covering a two year term after he began working in Portland in 2008. The relocation costs he received in 2008 and 2009 consisted of: (a) BC medical premium payments for him and the children; (b) payment of half of the rent on his home; (c) payment for travel costs to Vancouver (capped at \$750 per month); and (d) payment for some household appliances and furnishings totalling \$8,000.
- [66] The husband deposes that, in 2010, he negotiated the continuation of the payment of relocation costs by his employer, though in a much reduced amount. These costs are comprised of BC medical payments of approximately \$120 per month and his travel costs to Vancouver, which were capped at \$750 monthly.
- [67] In 2008 and 2009, he used employment bonuses to satisfy the debt he incurred from paying for 100% of the children's private school tuition.

B. Finding's on husband's income

[68] I find the husband's income for Guidelines purposes is:

§ 2008: \$281,394

[The reduction of approximately \$8,000 reflects the fact that the husband incurred relocation expenses for his move to Portland and travel expenses to and from Vancouver to enable parenting time, for which his employer provided partial compensation.]

§ 2009: \$273,208

§ 2010: \$228,332

§ 2011: \$274,250 (estimated)

[69] The \$3,000 reduction in 2009, 2010 and 2011 reflects an estimated portion of the taxable benefits the husband receives for medical expenses and travel expenses to and from Vancouver incurred to enable parenting time.

C. Prospective child support

[70] For 2012, I set the husband's Guidelines income at \$275,000 US. Currently, the Canadian and U.S. dollars are close. Beginning in 2012, if the exchange rate results in either an overpayment or underpayment exceeding \$2,000 on an annual basis, the husband may adjust the amount of his monthly child support payment accordingly by supplementing or reducing his monthly support payment each month by the amount of the deficit or excess

paid divided by three, representing a three month period, commencing January 2013, and each year after.

- [71] As mentioned earlier in these reasons, the husband is to provide the wife with his financial information relevant for the purpose of determining his Guidelines table amount income no later than June 1 of each year. The wife shall do likewise.

D. Wife's imputed income

- [72] Before discussing the question of the wife's income and whether more employment income should be imputed to her than the \$25,000 stipulated by the Consent Order, it is first important to understand how the parties arrived at the figure of \$73,000 as the annual income of the wife, which included \$25,000 of imputed employment income. Paragraph 24 of the Consent Order sets out the formula the parties adopted, but it requires some explanation.
- [73] First, the parties agreed to a compromised net value for the matrimonial home of \$1.4 million dollars. The wife was to retain title to the matrimonial home, subject to some future conditions, explained in a moment. On the closing date, the husband would transfer to the wife his half-interest in the matrimonial home, after which the parties agreed the following would occur:
- a) the parties would discharge the \$300,000 line of credit (a substantial portion of which I understand related to private school tuition paid by the parties in previous years), leaving a net equity of \$1.1 million in the matrimonial home;
 - b) after dividing the \$1.1 million in half, thereby leaving \$550,000 for each party, the husband would pay the wife \$300,000 from his amount (\$250,000 as lump sum spousal support and \$50,000 as a prepayment on the wife's quarter interest in the Eagle Mar sea vessel), leaving \$250,000; and
 - c) the husband would pay the remaining \$250,000 to the wife.
- [74] Considering the above explanation of para. 24 in the Consent Order, it appears that, after the husband had transferred his half-interest in the matrimonial home to the wife and advanced further payments to the wife, he ultimately received minimal financial benefit from his half interest in the matrimonial home.
- [75] In consideration of the compromised net value of the matrimonial home and the prepayment of the wife's interest in the Eagle Mar, however, the wife agreed to pay the husband certain percentages of any net proceeds from the sale of the matrimonial home that exceeded its compromised net value. If the wife were to sell the home within certain timeframes, as detailed in the Consent Order, the husband would become entitled to a specific percentage of any net proceeds exceeding \$1.4 million dollars, though this amount was to decline over time to zero. The parties also agreed to somewhat similar provisions for distributing the net proceeds upon the sale of the Eagle Mar. By means of these agreements,

the parties could lay hands on funds and the husband was able to pay the wife \$250,000 in lump sum spousal support.

- [76] As set out at para. 20 of the Consent Order, the parties agreed to annualize the \$250,000 lump sum for spousal support at \$48,000 annually and thus \$4,000 monthly. Based on this figure, plus the \$25,000 in annual employment income the parties agreed to impute to the wife, the wife's annual income became \$73,000. Based on this figure and the husband's then annual income of \$197,300, the parties agreed to prorate their contributions to special expenses of the children "other than the [private school] tuition and fees, so long as such special expenses have been approved and agreed to in advance by the parties." The proration was set at 67% to the husband and 33% to the wife.
- [77] Counsel for the husband submitted the parties' settlement was, in its essence, a child centred one. It would permit the children to continue attending private school for at least another two years and allow the family to maintain some semblance of their lifestyle at the time, so far as was possible.
- [78] At present, the husband submits the Court should impute greater employment income than \$25,000 to the wife. He says the wife is capable of earning more income than \$25,000, which would then enable her to contribute more to the needs of the children. He relies on the fact that from the early 1980s until 2002, the wife ran a successful clothing business and she was a 25% owner and operating manager of another successful business. He states that her income through the 1980s and into the early 1990s was over \$125,000 annually. He acknowledges that from 1995 to 2002, she reduced her responsibilities so that she could be more available to the children. Even so, he says, her income remained in the \$60,000 to \$80,000 range. The husband refers as well to the fact that, in 1998, the wife chaired the Retail Merchants' Association of British Columbia, and to her service on a hospital board and other business experiences, which he says cumulatively confirm her business acumen and earning capacity. He complains, however, that since the separation, she has made no effort to obtain employment, despite what he maintains is her clear competence and capacity to do so.
- [79] The wife counters that between 1983 and 1992, when she worked full time at her business until R. was born, her income peaked. For the next 10 years, she explains she had three children to care for and, while she continued to work, because she had to hire more support staff, she actually earned less income. She further replies at para. 48 of her fourth affidavit that by about 1999, the parties agreed it was no longer feasible for her to work full time while raising the three children. She says the parties agreed she needed to stay home in order for the husband to "seriously apply himself toward a higher level of employment". She asserts that had both parties been working while raising the children, the husband could not have advanced his career to the extent he has. In sum, she says she devoted her time and energy to the children and the household and supported the husband while he devoted himself to his career.

- [80] At para. 49 of her fourth affidavit, the wife explains how she supports the children by volunteering at their private school, which she states is expected of parents, and by being involved in their extracurricular activities.
- [81] She further states that the Boys have "documented learning issues". She asserts they are accustomed to having her at home and rely on her for help and direction with their studies. No details of the learning issues or the specific nature of the help she gives the Boys was provided.
- [82] At para. 51 of her fourth affidavit, the wife explains her efforts to earn income since separation through "entrepreneurial self-employment." She acknowledges she is qualified and has experience that would permit her to work either in a bar or restaurant or in retail sales, but maintains that working evenings and weekends would be detrimental to her ability to care for the children. I note the Boys are now in their teens.
- [83] The wife states that in 2011 she started a home based business that markets health and wellness products. This did not require a significant start up investment. She expects it to become successful over time. I did not hear any details about this business, such as its income prospects, timelines, and the required time investment.
1. Review of imputed income to the wife for s. 7 expenses
- [84] I note the Consent Order does not provide a review date for the wife's income as it pertains to determining her proportionate responsibility for payment of the children's special and extraordinary expenses under s. 7 of the Guidelines. Section 7(2) of the Guidelines states that, in general, parents should contribute to s. 7 expenses in proportion to their incomes. In certain circumstances, such as where a spouse is intentionally unemployed or underemployed, the court can impute income to that spouse under s. 19 of the Guidelines. The wife's obligation to contribute to the financial support of the children is a continuing one: *S.G. v. G.W.*, 2006 BCSC 991, at para. 20; and *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.), at paras. 16-18 [Earle]. Given four years have passed since entry of the Consent Order, it is fitting to consider what level of income ought to be imputed to the wife for the purposes of calculating her responsibility vis-à-vis the husband for special and extraordinary expenses.
- [85] At this point in time, however, I am not convinced there should be any immediate change in the \$25,000 of income imputed to the wife under the Consent Order. But as D. will graduate in June 2013, and given the wife's impressive business experience and her current business venture, which she anticipates should produce income, I find it would be fitting in nine months time to review her employment income. The ultimate purpose of this review will be to calculate the wife's proportionate responsibility, vis-à-vis the husband, for special and extraordinary expenses. Should this review occur, it will focus on whether the level of employment income imputed to the wife in the Consent Order should be modified under s. 19 of the Guidelines. Thus, for the time being, the question of how much employment income the Court ought to impute to the wife is adjourned. The parties may apply for a review of the wife's imputed income nine months from the date of these reasons.

2. The wife's \$75,000 dividend income

- [86] The husband pointed as well to the wife's 2010 income tax and benefit return, which shows receipt of \$75,000 in taxable dividends, which he submits ought to be added to her total imputed income. He states he was unaware of this income until fairly recently and that the wife has not explained her receipt of it. At the hearing, counsel for the wife stated she understood the \$75,000 was not actually dividend income in the wife's hands, but she did not have sufficient information to explain it adequately. Accordingly, to give the wife an opportunity to fully explain the nature of the dividend and to show why the Court should not see it as income in her hands, I granted the wife leave to file an accountant's explanation of it.
- [87] The nature of the \$75,000 dividend is explained in a memorandum dated November 4, 2011, prepared by Hugh Woolley of the accounting firm Lewis & Company. In it, Mr. Woolley states that the wife's mother and brother visited his office in 2009. The brother was concerned about the financial situation of the wife's parents, and particularly the fact that they were retired with a large mortgage on their home. The brother felt it was inappropriate that the family's holding company, wherefrom the dividend was eventually derived, had a stock portfolio approximately equal in value to the amount of the parents' mortgage, given that the income from the stock portfolio was taxable but the interest payable on the mortgage was not tax deductible. Therefore, the brother felt it was in the parents' best interests to sell the stock portfolio and use the proceeds to discharge the mortgage on their property.
- [88] As the family's holding company, not the wife's parents, owned the stock portfolio, achieving the brother's wish would not be as simple as liquidating the portfolio and paying off the mortgage. Instead, the funds derived from liquidating the portfolio would have to be paid into the company, and then withdrawn from it.
- [89] The wife's parents originally owned the family's holding company, but at some point in time the parents entered into an "estate freeze" transaction, which involved the reorganization of the share capital of the company to transfer the future growth in the corporation to the next generation. Though Mr. Woolley characterized this as "a laudable objective, over the years this transaction had the effect of divesting [the] parents' interest in the company in favour of the [wife] and [the wife's] siblings to the point that [the] parents had deprived themselves of most of their assets."
- [90] The wife's brother thought their parents' financial situation was inappropriate and believed the siblings "should remove the funds received by the company on liquidation of the stock portfolio and gift this amount back to [the] parents to enable them to pay off their mortgage." Mr. Woolley understood that all of the siblings, including the wife, agreed this was the proper course of action.

- [91] Accordingly, in the fall of 2009, the company sold the stock portfolio and distributed the majority of the proceeds to the wife and her siblings as dividends. To spread the income tax liability over two years, the dividends were structured so they would be paid in late 2009 and early 2010. Mr. Woolley explains the wife and her siblings agreed they "would each retain a portion of the cash received from the corporation on the payment of these dividends sufficient to pay the tax liability associated with the receipt of the dividends" and that "[t]he balance of the amounts received would be gifted to [the] parents."
- [92] In light of the foregoing information, I find the \$75,000 dividend should not be included in the wife's income for 2009 or 2010. I order, however, that the wife provide an annual accounting of any future benefits she receives, either in income or in some other form, directly or indirectly, to the husband.
- [93] I note in passing that para. 35 of the Consent Order states "any undisclosed assets, except for any inter vivos or testamentary provisions that may have been made [by] the parents of each of the parties in their favour, shall be held as tenants in common". Depending on the circumstances of the issuance of a dividend or other financial benefit to the wife, para. 35 of the Consent Order might well exclude its inclusion in the wife's income. I make no finding on that point either way, but simply note that a provision in the Consent Order rules out "any inter vivos or testamentary provisions made [by] the parents of each party in their favour" as forming part of the parties' income.

V. Extraordinary and special (s. 7 Guidelines) expenses

A. Legal principles

[94] Section 7(1) of the Guidelines provides the following:

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.

[95] Parliament subsequently added s. 7(1.1) to clarify "extraordinary expenses":

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

[96] The approach to assessing extraordinary and special expenses was reviewed by Chamberlist J. in *Piper v. Piper*, 2010 BCSC 1718, at para. 92-93:

[92] In a very early decision dealing with the Guidelines and extraordinary expenses, our Court of Appeal, in *McLaughlin v. McLaughlin*, (1998), 167 D.L.R. (4th) 39, 57 B.C.L.R. (3d) 186 (B.C.C.A.), considered the meaning of "extraordinary" and set out a two-stage enquiry for the court to undertake when considering whether to award an amount under s. 7. Prowse J.A. said this at paras. 81-82:

[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), 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.
- [93] The McLaughlin case was decided before s. 7(1.1) was 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 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. ...
- [97] Section 7(2) of the Guidelines stipulates that expenses allowed under s. 7(1) are generally to be shared by the parents in proportion to their incomes, after first deducting the child's contribution, if any. However, the court retains the discretion to divide the parents' obligation other than in proportion to their incomes: *Zarins v. Cochrane*, [1998] B.C.J. No. 2116 (S.C.), varied [1999] B.C.J. No. 2876 (S.C.), supplementary judgment [1999] B.C.J. No. 2450 (S.C.). For example, in *Ebrahim v. Ebrahim*, [1997] B.C.J. No. 2039 (S.C.) [Ebrahim], the Court considered the following factors pertaining to the spouse claiming the expense when deciding whether or not to follow the guiding principle in s. 7(2) of the Guidelines: (a) adequacy of their financial disclosure; (b) the nature of their employment; and (c) the availability of financial contribution from their family.
- [98] Where an expense is found to be special or extraordinary, but the reasonableness of the expense is in issue, "the court can look beyond the respective incomes of the parties and consider their overall means, including income from other sources, such as family income": *Pearse v. Pearse*, 2010 BCSC 117, at para. 44 (also see *Baum v. Baum*, 2000 BCSC 1835, at para. 9). The corollary is that where the reasonableness of the expense is not in issue, the broader means of the parties outside of their income levels should not be considered: *J.P.S. v. C.G.W.*, 2003 BCSC 968, at para. 15. Ultimately, where the expense is not within the "means" of the parties, depending on how broadly that term is treated for the given expense, the court may limit or deny the amount: see *Ebrahim*; and *Miller v. Miller*, [1997] B.C.J. No. 1322 (S.C.).

- [99] The expense must also be necessary or advisable, and this element is not demonstrated "by the simple fact of the expense being incurred": *Thomas v. Thomas*, 2000 BCSC 585, at para. 24 [Thomas].

B. Factual background on s. 7 expenses

- [100] Section 7 expenses are probably the most contentious issue dividing the parties. These expenditures include, among others, \$33,000 in annual tuition fees for the private school the Boys have attended since the primary grades, various related extra-curricular school expenses, and the approximately \$21,000 in annual post-secondary expenses for the parties' daughter, R., who has attended the University of Oregon since September 2010.
- [101] So far, the husband has been paying R.'s tuition, residence costs and other post-secondary expenses, with no contribution from the wife. There are also about a dozen or so other s. 7 expenses the parties disagree over. For some of those items, the question is whether the wife should have paid the expenses out of the monthly child support she received from the husband. The husband also has incurred other significant expenses without contribution from the wife. Most of these expenses are not large in isolation, but they combine to form a significant total.
- [102] I note at this point that unless stated otherwise, any expenses I find to be special or extraordinary under s. 7 of the Guidelines will be shared on a 78/22 proportion between the husband and wife according to their respective incomes. This figure is derived from the husband's average income for 2008-2011 and the wife's \$73,000 income. In my view, this is consistent with para. 20 of the Consent Order, which provides that the parties will share s. 7 expenses in proportion to their incomes.

C. The Boys' private school tuition

- [103] The Boys' ongoing private school tuition is the largest of the contentious s. 7 expenses. The parties agreed, as stated in para. 16 of the Consent Order, that until June 2011, the husband would bear this cost alone. For the period after June 2011, the Consent Order is silent about responsibility for private school tuition and the children's schooling in general.
- [104] The husband asserts that after June 2011, the wife should contribute proportionately to this expense; the wife says she cannot afford to do so, and that, if the husband insists on the Boys' continued attendance at the school, he will have to continue to pay their tuition without contribution from her. The parties also diverge on the question of how truly imperative it is for the Boys to attend their current private school as opposed to a public school.
- [105] The husband explained that he has been able to pay the private school tuition in previous years through exhausting his savings, borrowing and, in those years where he received a large enough bonus, using it to pay off the amounts borrowed.

- [106] In her May 10, 2011 affidavit, the wife states she advised the husband in December 2007 that she did not think the parties could afford to keep the children in private school. Her counsel wrote the husband's counsel on December 14, 2007 and stated that the wife was "not agreeable that the children continue at [the private school] as the parties simply cannot afford it going forward."
- [107] The wife states that by virtue of this correspondence, the husband effectively agreed to assume sole responsibility for the children's "tuition and fees", as found in the Consent Order.
- [108] After entry of the Consent Order, the parties also could not agree on what items constituted "tuition and fees". The husband outlined his position on this issue in a January 15, 2008 letter written by his counsel to the wife's counsel. In it, the husband's counsel stated the husband had assumed responsibility for "tuition fees" or "tuition and fees" as they are described interchangeably on the private school's website, which included "the cost of field trips, work books, text book rentals and other activities and materials that supplement the educational program". Counsel for the husband asserted the parties were to share any other expenses related to the private school proportionately.
- [109] I should parenthetically note here that the wife points out that the logic of the husband's position on the private school tuition runs counter to the logic of his refusal to contribute proportionately to the Boys' private tutoring costs. I will discuss this matter later in these reasons.
- [110] As the June 2011 date approached, marking the end of husband's obligation to pay the full amount of private school tuition, email and various other correspondences ensued between the parties.
- [111] On January 28, 2011, the husband wrote the wife, asking her to confirm whether she intended to continue residing in Vancouver, as she was no longer obligated to do so after June 11, 2011. The wife responded by questioning the husband as to whether he intended to continue paying the Boys' private school tuition. I will not clutter these reasons with the somewhat opaque communications that took place between the parties on the simple question of whether or not the wife intended to contribute proportionately to the Boys' tuition. Suffice to say the wife did not simply state yes or no, and as the husband pressed her for a response regarding what her intentions were, she continued to respond by asking the husband what his intentions were. This communication is emblematic of what has occurred since separation on some other issues. The husband should have simply stated he wished the Boys to continue attending the private school and advised that he would look to the wife to pay her proportionate share. Even so, the husband's position regarding this expense was obvious enough. And, if the wife did not wish to contribute anything to the private school tuition, she should have simply stated so, in addition to expressing her opinion that the Boys should attend public school.

[112] Because payment deadlines were approaching when the husband wrote the wife, he needed to know her position rather quickly. Tuition fees had to be paid or else the Boys would lose their place at the school. Referring to what he describes as his unsuccessful attempts to communicate directly with the wife and her refusal to engage in discussions with him, he requested and obtained from the school an extension of the deadline for payment of tuition. At para. 46 of his affidavit, he states:

... Efforts to resolve the issue through the [wife's] and my counsel were unsuccessful, and the [wife] refused to engage in discussions with me. I note the [wife] has not expressed any disagreement as to the boys' continued attendance at [the school].

[Emphasis in original.]

[113] Finally, the husband paid the tuition and enrolled the Boys in the private school for the 2011-2012 school year. He paid the Boys' tuition throughout 2011, and, I assume, will do so for the balance of the school year in 2012, without any proportionate contribution from the wife.

[114] If, when the husband asked the wife the first time what her intentions were after June 11, 2011, the wife had simply stated she did not intend to contribute anything to the private school tuition and had stated her opinion that the Boys should be enrolled in public school, this would at least have cleared the air. It would also have avoided considerable frustration and at least allowed the husband more time to weigh his own options before the payment deadline. It was clear the husband was looking to the wife for a contribution towards the tuition fees going forward, and the wife could surely see her willingness to contribute her proportionate share or not would likely influence the decision of the husband, who would, in any event, bear the far greater burden in paying the fees.

[115] As for agreements the parties made before their separation regarding the children's education, the husband states the parties had agreed it was in the children's best interests to attend the private school. R. started attending the private school in grade 4 and the Boys have been attending since kindergarten. The daughter graduated from the school in June 2010; the eldest boy is currently in grade 11 and the youngest boy is currently in grade 8. The family, therefore, has a long tradition of their children attending the same private school.

[116] The wife's position, however, is that the children attended the school only at the husband's insistence. She stated that during the marriage the parties incurred considerable debt to pay the private school tuition and had to borrow from her parents to pay it. I do not know how much the wife's parents contributed or how I should consider this in light of the wife's evidence that a substantial portion of the \$300,000 line of credit related to tuition fees. I accept, however, that private school tuition and related expenses became a fairly heavy yoke around family income. Even so, the wife maintains at para. 52 of her fourth affidavit "that it was an unnecessary expense." Whether the wife expressed this view to the husband at the time of the children's initial enrolment or in years afterwards was not clear.

- [117] The husband explains he agreed to assume sole responsibility for the children's tuition and fees for a three-year period, as detailed in the Consent Order, because he felt this continuity was important for their stability. He further explains the children's need for stability was what led him to also insist on a term in the Consent Order to prohibit the wife from changing the children's permanent residence until June 2011. The wife, in reply to this assertion, states that she had no intention of moving away and that this was an unnecessary term.
- [118] Since assuming sole responsibility for the children's tuition fees, bearing in mind that all three children attended the private school until June 2010, the husband has incurred significant debt, as mentioned earlier. To pay off these debts, he used bonuses he received in 2008 and 2009. But because he did not receive a bonus for 2010, he exhausted his savings to pay the private school tuition for that year.
- [119] Despite the costs involved, he continues to believe it is in the best interests of the Boys to continue at the school. He is no longer prepared, however, to bear the entire cost and seeks a proportionate contribution from the wife.
- [120] He believes the Boys have "benefitted immensely" from their attendance at the school. He states the oldest boy, D., is very involved in the athletics program and is one of the top athletes in his class. He states "[a] move to another school would, in my view, be destabilizing to [D.] and he would likely struggle academically."
- [121] As for the younger boy, W., who the husband describes as quiet, artistic, and currently benefitting from the structure and supportive environment of the school, the husband says he has "an innocent nature" and that he "would be concerned about the possibility of [him] being bullied" if moved to a public school.
- [122] He says the Boys have expressed to him a very strong desire to remain at the private school.
- [123] Therefore, he explains, "[g]iven the [wife's] refusal to deal with the issue, and based on my own views and expressed wishes of the boys, I decided to remit the required payment of \$2,406 per child (\$4,812) to [the private school] to secure their spots, and I did so on August 19, 2011."
- [124] On August 17, 2011, husband's counsel wrote counsel for the wife stating:
- [The husband] has maintained that it is clearly in the boys' best interests to remain at [the private school]. Apparently, [the wife] agrees as she has, at no time, indicated a desire to withdraw the children from [the private school].
- [125] Whatever ambiguities there might once have been regarding the wife's position on the private school tuition, she has now made it clear that she cannot afford to pay any portion of the Boys' private school tuition.

- [126] As for educational advantages the private school might afford the Boys, the wife states the parties attended public school and she "was of the opinion that the children would benefit more from less financial stress on the family." After the Boys began attending the private school, she says it became apparent "the school fees were a burden. Our family was constantly under financial pressure."
- [127] Regarding the husband's concerns about transferring the Boys to another school, she describes W., the youngest child, as "a confident, well-liked and adventurous child. He is not at all a candidate for bullying and has many friends in the public system." She states she has discussed the financial realities with the Boys, who, she states, appear to be open to the idea of switching from their current private school to a public school.

D. Discussion on private school tuition

- [128] Private school fees are generally considered extraordinary educational expenses under s. 7(1)(d) of the Guidelines: *Crofton v. Sturko*, [1998] B.C.J. No. 38 (S.C.). In *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434 (B.C.C.A.), the Court considered the following factors to determine whether or not to allow private schooling fees as extraordinary expenses: (a) the parents' history of private schooling; (b) the children's history of private pre-schooling; and (c) the ability of the non-custodial parent to pay for the expense.
- [129] In *Van Deventer v. Van Deventer*, 2000 BCCA 9, the Court allowed private school fees under s. 7 because the parent opposing the expenses was content to have the child attend private school when the parties were together, and there was no change in circumstances to which the opposing parent could point to establish that the expense was no longer necessary or reasonable.
- [130] I find both parties agreed before their separation that the Boys' attendance at the school benefitted them. Prior to the parties' separation, the Boys were progressing very well at the school. They continue to do so, and this is likely to be the case moving forward. Even so, such decisions become, as do so many in a family's life, a question of balance and proportion. The husband's zeal to see the best possible education for the Boys is commendable, as are the financial sacrifices he has made to allow their continued attendance. That said, \$33,000 in annual private school tuition fees for 2011-2012, and an even greater amount when all three children were attending the school, can produce detrimental effects on a family's financial well being. This could also indirectly impact the children in a negative fashion, a consideration that in some circumstances could outweigh the educational benefits received from their continued attendance at the private school.
- [131] Further, D. will soon need to start planning his post-secondary education and the parties will then need to assemble whatever resources they have to support him. I gather W. will likely pursue post-secondary education not long after his older brother. Meanwhile, the daughter currently requires ongoing financial assistance from her parents as she completes her university studies.

- [132] One can readily empathize with the disappointment D., who is currently in grade 11, would feel if he were unable to graduate next year from the private school. But such disappointment is not sufficient reason to require the wife to contribute to the cost of private school tuition, particularly where she does not agree the Boys' attendance is essential, and the evidence does not show that public school alternatives are unavailable or unsatisfactory. As for W., if he were to transfer to a public school, September 2012 would be a good time for him to do so, as this would enable him to complete his three remaining high school years at a public school. I understand both Boys already have friends in the public school system.
- [133] If justifiable concerns were to surface about the Boys' academic performance in the public school, the parties, then freed of the burden of paying private school tuition fees, could easily afford to hire tutors for them.
- [134] The wife's concerns in this regard deserve equal weight with those of the husband. While it is true academic performance of private school students often appears to rank ahead of students attending most public schools, this is not always so, and depending on the particular public school, the differences are sometimes unremarkable.
- [135] I expect the parents would likely find a suitable public school in the area in which the Boys live, at which they could start attending in September 2012.
- [136] This is, however, a difficult decision that involves a weighing of competing factors. Factors I have considered, in addition to the ones just mentioned, include:
- 1) The longstanding family tradition of the children's attendance at the school, particularly the Boy's attendance since kindergarten.
 - 2) The fact the Boys have thrived at the school. There is a risk that the loss of academic continuity, relationships with fellow students and teachers could be detrimental to the Boys' academic and social development.
 - 3) Despite the wife's hearsay assertion that the Boys told her they were fine with switching schools, and accepting they said this to her, that does not necessarily represent their true feelings. Most children are well tuned to their parent's feelings and may not want to offend them. Furthermore, despite what the wife alleges the Boys told her, it is not a stretch to imagine that being forced to switch schools due to the parties' inability to reach agreement could inadvertently breed resentment within the Boys towards one or both of the parents.
 - 4) The parties could cut expenses related to private tutoring and release those funds for payment of the private school tuition. And, given the level of the tuition fees, teachers at the private school surely avail themselves outside school hours to assist students.
 - 5) R. may be ineligible for student loans, but if she is eligible, there is no reason why she should not bear part of the cost of her post-secondary education in this way.

- 6) While I have adjourned further consideration of the wife's imputed income for nine months, her curriculum vitae demonstrates she has the experience and talent to actually earn \$25,000 or more in employment income, as opposed to merely seeing this amount imputed to her under the Guidelines. She should be able to actually earn this amount, and defray the outlay required of her, without unduly disrupting the support she gives to the Boys.
- 7) It remains an option for R. to complete her education locally to ease the educational costs of the Boys.
- 8) The wife's proportionate share is not unduly onerous (33% under the Consent Order and 22% based on the husband's average income for 2008-2011). The value of her net assets, which includes her Kitsilano-Point Grey property, is much greater than those of the husband.
- [137] Considering all of these circumstances, I find that, on balance, it remains in the Boys' best interests to complete their high school education at the private school, although whether this ultimately occurs will depend on the husband's ability and willingness to continue funding a significant portion of the private school tuition. I also find the private school tuition is an extraordinary expense under the Guidelines.
- [138] For now, I find the Boys should remain at the private school until at least the end of the 2011-2012 academic year. For 2012-2013, assuming the husband is willing and able to bear his proportionate share of 78% for all expenses that fall within the definition of "tuition fees" or "tuition and fees" on the school website, the wife will contribute her proportionate share of 22%. Assuming the husband continues to pay his share of the private school tuition until both of the Boys graduate from the private school, the wife will continue to pay her proportionate share as well.
- [139] With respect to all school and extra-curricular expenses not included in "tuition fees" or "tuition and fees," as defined on the private school's website, the wife will pay 15% of these expenses and the husband will pay 85%. I have reduced the wife's share from 22% to 15% for these expenses because she performs some volunteer work at the school, some of which may be unavoidable given school policies, and her time spent volunteering somewhat reduces time available to her for work. This 85/15 split will continue to be in place until both of the Boys have graduated from the private school.
- [140] For 2012-2013, if the husband indeed elects to continue paying the private school tuition, it would be sensible for the parties to confer before the Boys re-enroll for September 2012 and consider steps and alternatives that would help them collectively reduce their educational outlay, such as eliminating or reducing tutoring expenses, or having R. complete her studies at UBC. The husband shall inform the wife of his intentions in this regard no later than June 1, 2012.

- [141] Ultimately, the husband will have to decide if he can indeed afford to continue paying for 78% of the Boys' private school tuition at the same time as 78% of R.'s post-secondary expenses, given that I find the latter also constitutes an extraordinary expense under the Guidelines. In my view, the parties can manage these expenditures, but it will require some financial sacrifices by both of them.
- [142] Further, an order granting either party leave to apply for a review of s. 7 expenses after D. graduates from grade 12 will give them an opportunity to have the Court reconsider their means and circumstances at that time, in light of their experiences dealing with financing the children's education until then. At that time, W. will still have three years of high school remaining before he graduates, so a transfer to a public school remains an option for the parties to consider.

E. R.'s post-secondary expenses at the University of Oregon

- [143] Since the 2010-2011 academic years, the husband has paid R.'s post-secondary education expenses. R. is enrolled in the kinesiology program at the University of Oregon. Her post-secondary expenses, including living expenses, currently stand at approximately \$17,500, but will likely rise to over \$20,000 in 2012.
- [144] The wife's position is that the husband agreed to pay for all of R.'s university expenses, particularly tuition and residency fees, but failed to consult with her about R. attending the University of Oregon. She says she never agreed to contribute to these costs.
- [145] Further, she complains the husband has been unilaterally deducting amounts from child support payments, representing what he says are the amounts the wife should be paying toward R.'s post-secondary expenses. Parties in family law proceedings cannot unilaterally alter their support obligations without mutual consent, however sensible and fair this might seem to the payor when circumstances have clearly changed. If the recipient parent unreasonably refuses to contribute to an expense the payor parent believes the recipient is obligated to contribute to, the payor parent should apply for an order to vary their child support obligation. This is because child support is a right of the child and an obligation of the parent; thus it is not open to the parent to interfere with the child's right to support by unilaterally reducing child support payments: see Earle at para. 16-18.
- [146] The husband says the wife should contribute proportionately to R.'s university expenses. In response, the wife says at para. 35 of her third affidavit that the husband proposed to R. that if she decided to attend University of Oregon, he would pay for her university expenses. The wife asserts the husband agreed to assume responsibility for all costs associated with R. attending the University of Oregon. In support of her position, she refers to a September 15, 2010 letter the husband wrote to a representative of the university, stating,

I am [R.'s] father and I pledge to fully support [R.] financially during her time at the University of Oregon. I reside in Portland Oregon and I am employed ... I have attached a letter from [my employer] confirming my continued employment and annual salary as proof of my ability to support [R.'s] educational costs.

[147] The husband contends, however, that the wife obtained the letter from R. and is distorting its object and intent to support her position. He states the letter is a standard form document that university administrators require of applicants before they can obtain a "payment account." He submits the letter has nothing to do with the parties' respective obligations as parents.

[148] The wife also refuses to contribute to R.'s expenses because she believes that R. could have attended university in Vancouver or somewhere else in Canada. If that had occurred, she contends, R.'s post-secondary expenses would then be much lower.

[149] In response, at para. 6 of his third affidavit, the husband points out the fact that R. applied to and was accepted at several universities, including four in Canada. Among these four, R. was accepted at the University of British Columbia. He denies having any specific discussion with R. about where she should attend university. He states R. expressed interest in pursuing a degree in kinesiology, and he understood the University of Oregon offered one of the top programs in that field. He believes this was the reason she chose to attend the University of Oregon.

[150] The husband denies he agreed to assume sole responsibility for R.'s university expenses. He says he told R. that financial arrangements for her post-secondary education were being handled between him and the wife and that he "did not want her to worry about money. Rather, [he] wanted her to focus on school and enjoy her university years."

[151] The husband states that as soon as he knew of R.'s University of Oregon costs, he provided the information to the wife in an email dated September 1, 2010:

We need to talk through [R.'s] university costs - how we will share proportionately the costs as well as the impact on Child Support payments.

I have attached a screen shot to the U of Oregon budget calculator to give you an idea of the costs.

...

As of September, I will be deducting the costs of [R.'s] university housing costs from the child support payments.

...

[152] He then sets out an example for September 2010 of what the wife's contribution might be and concludes the e-mail by saying:

Please let me know the percentage that you are contributing to [R.'s] tuition and other costs.

- [153] The husband maintains that at no time did the wife reject the idea of R. going to university or object to her going away for school.
- [154] The husband complains that before R. entered into an off-campus housing arrangement that would include him guaranteeing R.'s \$599 monthly portion of the rent, he sought the wife's explicit confirmation as to whether or not she agreed to R.'s off-campus housing plans. He says that rather than simply confirming whether she was agreeable to R.'s housing arrangement, "the [wife's] reply email seeks a financial commitment from me." He also points out the wife never raised any objection to R.'s housing plans for 2011-2012.
- [155] The husband says the wife should contribute on a proportionate basis to R.'s post-secondary education expenses, as it was always the expectation "that the children would attend university."
- [156] R. is an A+ student and received a \$1,000 scholarship at the University of Oregon. She made the Dean's list in her first year of university.
- [157] As for extra costs incurred by R. attending the University of Oregon as opposed to studying locally at UBC, the husband maintains the costs of studying in Oregon are quite comparable to the costs of attending the Canadian universities to which she was accepted, the exception being UBC because she would live at home and thus would not have to incur housing costs. He summarized information he found on the websites of the University of Western Ontario, Waterloo, McMaster and UBC. Including tuition, residency, food, housing and travel costs, the cost of attending the University of Oregon is lower than the three out-of-province Canadian universities and slightly less than double the cost of attending UBC, the difference being attributable to housing costs.
- [158] Without going into detail, I will simply note I have not overlooked that the wife denies the husband ever consulted her about R.'s university expenses; that she says R. advised her she decided to go to University of Oregon because the husband wanted her to be close to him and because he said he would "pay for everything". She maintains UBC is the better and more cost-effective choice. In short, the parties disagree on virtually all the points at issue. I have no affidavit from R. to resolve conflicts in the evidence, but our courts prefer to see children kept out of this type of disagreement, and family litigation generally, unless it is absolutely necessary.
- [159] I will decide the issues without making any definitive findings on discussions or agreements between the parties. Before proceeding further, it must first be determined whether R. is still a child of the marriage and, if so, how child support for R. is to be calculated under the Guidelines.
1. Is R. still a "child of the marriage"?
- [160] Section 2(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [Divorce Act], defines a "child of the marriage" as follows:

"child 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;

[161] For the purposes of R., the definition under (b) requires consideration, and particularly whether R.'s pursuit of post-secondary education falls under the category of an "other cause" that renders R. unable to withdraw from the charge of her parents or obtain the necessities of life.

[162] In *W.P.N. v. B.J.N.*, 2005 BCCA 7 [W.P.N.], the Court said at para. 18:

[18] The pursuit of education necessary to equip a child with a career qualifies as "other cause" for continuing dependence of a child of or over the age of majority: *Martin v. Martin* (1988), 26 B.C.L.R. (2d) 390 at 393 (C.A.). In determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient: *Ciardullo v. Ciardullo* (1995), 15 R.F.L. (4th) 121 at para. 17 (B.C.S.C.).

[163] In *W.P.N.*, the Court noted the factors that Master Joyce (as he then was) formulated in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.), at para. 15 [Farden], to assist the Court in assessing whether a child who is pursuing post-secondary education remains a "child of the marriage." Not all of the factors need to be present to establish a child remains a "child of the marriage"; neither is the list exhaustive. The Farden factors, reproduced at para. 20 of *W.P.N.*, 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.

[164] All of the Farden factors, except the last one, apply in the case at bar.

[165] Applying the Farden factors, I note R. is in her early twenties, enrolled in full-time studies, achieves good grades (she made the Dean's list and earned a \$1,000 scholarship), and she is engaged in a course of studies that should equip her for future employment. I see no evidence that reveals she contributes to her expenses through part-time employment, but neither party raised this as an issue.

[166] Regarding the seventh factor, i.e. what plans the parties had made for furthering her education, I find that while both the parents might not agree on R.'s current choice of university, there is no question they both support R.'s continuing with post-secondary education. This is commensurate with the parties' expectations before their separation.

[167] Considering, therefore, the Farden circumstances and the parties' financial circumstances, I find R. remains a child of the marriage.

2. How should child support be determined for R.?

[168] Having found R. remains a child of the marriage, the next question is how child support for R. should be determined. Section 3(2) of the Guidelines provides two ways to determine the amount of child support for a child of the marriage who is of or over the age of majority:

- (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.

[169] As in W.P.N., s. 7 is also relevant in the case at bar with respect to determining the amount of child support for the child who is of or over the age of majority. This is because s. 7 provides that a child support order may include provision for "special and extraordinary expenses", including, pursuant to s. 7(1)(e), "expenses for post-secondary education." As already discussed, the Court has to assess 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 parties. Generally speaking, expenses allowed under s. 7 are to be shared proportionately by the parties in relation to their respective incomes.

- [170] There is a certain amount of interplay between s. 3(2) and s. 7(1)(e) of the Guidelines. Attendance at a post-secondary institution may entitle a child of or over the age of majority to child support under s. 3(2), but that same child may not receive an additional award for "expenses for post-secondary education" under s. 7(1)(e) if the means of the spouses and the earnings of the child are of a certain level. In *M.H. v. W.D.H.*, 2003 BCSC 838, Dorgan J. explained the relationship between the two provisions as follows:
- [18] With respect to the quantum of support, the court has a flexibility under section 3(2) of the Guidelines that it does not have under section 3(1). Section 3(2)(b) allows the court to award an amount the court considers "appropriate" if the court considers that the application of the Guidelines under section 3(2)(a) would be inappropriate in the circumstances, and to consider the circumstances of the child as well as the circumstances of the parent in making such an award. The onus is on the party seeking to exclude the application of s. 3(2)(a) to establish that the application of this section is inappropriate: *Glen v. Glen*, (1997), 34 R.F.L. (4th) 13 (B.C.S.C.).
- [19] Even where section 3(2)(a) applies, however, the court may refuse to award s. 7 expenses based on the means of the spouses and the earnings of the child. In *Glen*, supra, the court held that there was insufficient evidence to exclude the application of section 3(2)(a), but denied post-secondary expenses on the basis that the adult child in question was capable of paying her own expenses through her earnings. Similarly, in *von Sturmer v. von Sturmer*, [1998] Civ. L.D. 656 (B.C.S.C.), the court denied post-secondary expenses where the child had part-time earnings and scholarship funds, and the payor spouse had made previous contributions to an education fund. In *Giebelhaus v. Bell*, [1998] Civ. L.D. 263 (B.C.S.C.), the court denied post-secondary expenses on the basis that the payor spouse did not have the means to pay them.
- [171] In *W.P.N.*, the Court noted that the jurisprudence in British Columbia and elsewhere has trended towards the following principle regarding which of s. 3(2)(a) or (b) should apply when dealing with a child pursuing post-secondary education away from home:
- [35] ... where an adult student is living away from home, determining child support by using the "table amount" and adding "special and extraordinary expenses", as directed by s. 3(1) of the Guidelines for children under the age of majority is, in principle, "inappropriate". In those cases, child support has instead been determined by applying s. 3(2)(b).
- [172] After reviewing the aforementioned jurisprudence in greater detail, Levine J.A., writing the Court in *W.P.N.*, came to the following conclusions:
- [42] In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). ...
- [43] None of the cases I have reviewed considered the interaction among s. 3(2)(b), s. 7 and a separation agreement.

...

[45] In my view, child support determined under s. 3(2)(b) does not necessarily preclude a specific award for "special and extraordinary expenses" under s. 7, where appropriate. The existence of a separation agreement that expressly deals with specific expenses may lead to such an approach.

[173] I note that the Consent Order in the case at bar stipulates that "the parties will share, proportionate to their respective incomes, the special expenses of the children other than the [private school] tuition and fees, so long as such special expenses have been approved and agreed to in advance by the parties."

[174] Counsel for the husband relies on W.P.N. for the proposition that where s. 3(2)(b) of the Guidelines is applied in relation to a child of or over the age of majority who is living away from home for the purpose of attending university, courts generally order suspension of child support for that child and require each party to pay their proportionate share of the broader class of educational expenses for the child, including tuition and residency fees.

3. Finding on how child support is to be determined for R.

[175] In keeping with W.P.N., I will apply s. 3(2)(b) of the Guidelines in the case at bar to determine the amount of child support to which R. is entitled. Thus, I must determine an appropriate amount, "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".

[176] In the circumstances, while R. is at university and thus away from home, the husband shall reduce child support payments to the wife from 3 to 2 children to reflect the number of children living at home. Based on R.'s university schedule thus far, it appears that this will have the effect of requiring the husband to pay for two children 8 months of the year and for three children four months of the year.

[177] For 2010 and 2011, the husband's child support payments will be retroactively calculated in the same way.

F. Are R.'s post-secondary expenses allowed under s. 7 of the Guidelines?

[178] This Court has found post-secondary tuition and residence fees to constitute extraordinary expenses under s. 7 of the Guidelines: *Thomson v. Thomson*, 2006 BCSC 581 [Thomson]. In *Thomson*, Goepel J. stated the following at para. 35:

[35] Prior decisions have recognized the importance of post-secondary education and have held that there is an obligation on both parents to assist their children, to the extent they are able, with the reasonable and necessary expense of such an education: *Carr v. Wilson*, 2005 BCSC 1495; *Daicar-Gendron v. Gendron*, (2004), 35 B.C.L.R. (4th) 326 (S.C.). The opportunity to pursue post-secondary education is however a privilege not a right: *Whitley v. Whitley*, [1997] B.C.J. No. 3116 (QL) (S.C.). Children cannot assume that their parents will pay the cost

of their university education. In considering an application under s. 7 of the Guidelines to pay for post-secondary education, the court should not forget that absent separation, parents have no legal obligation to pay for their children's education. Many children have to fund their own education with limited or no parental support even in situations where the parents can afford to do more.

- [179] While the yearly costs of attending the University of Oregon are \$8,200 higher than those of UBC, primarily due to residency fees, I do not find this difference so extravagant or unreasonable, or R.'s attendance at the University of Oregon so ill-considered, to conclude R.'s residency expenses should not be allowed as an extraordinary expense under s. 7 of the Guidelines. I note the husband will bear, by far, the greater share of this expense anyway, in light of the current 78/22 proportionate split between the parties.
- [180] While attending the University of Oregon entails housing expenses she could avoid if she attended UBC, considering the means and circumstances of the parties, including their assets, I do not find those expenses to be so disproportionate as to excuse either party from contributing their proportionate share towards them.
- [181] In the circumstances, I find R.'s tuition and residency costs at the University of Oregon are s. 7 expenses. W.P.N. makes clear that I am not precluded from treating such expenses under s. 7 where child support for R. is being determined under s. 3(2)(b).
- [182] Accordingly, the parties are obligated to contribute to R.'s past and future tuition and residency expenses according to their proportionate shares, which currently stand at 78/22.
- [183] I note that for the 2011-2012 academic year, the husband anticipates expenses of \$20,648 for R.'s tuition, housing, food and cell phone costs.

G. Other expenses claimed under s. 7 of the Guidelines

- [184] The parties disagreed over whether proportionate responsibility should be taken for many additional expenses each has respectively incurred. The wife explained at para. 83 of her fourth affidavit that if the husband had disclosed his financial situation in a fair manner, and paid proper amounts of child support, she "would not be so concerned about a detailed accounting of s. 7 expenses."
1. The Boys' private tutoring
- [185] The wife has paid the following tutoring expenses: \$5,274.50 in 2007; \$5,787.50 in 2008; and at least \$6,374 in 2009 and 2010, inclusive of \$1,184 for courses R. took to increase her chances of gaining acceptance into university.
- [186] Currently, the wife continues to pay tutoring expenses for D. and W. in the amount of about \$1,500 yearly for each child. She states she has asked the husband to contribute his proportionate share to these expenses, but he has refused to do so. In reply, the husband relies on the Consent Order, which requires the parties to agree in advance before they

incur any s. 7 expenses. He says the wife has been disregarding this term of the Consent Order by simply incurring expenses either without consulting him or without his agreement, and then expects him to contribute his share to such expenses.

- [187] The husband states that on February 8, 2009, he made it clear in an email to the wife that he would not cover any future tutoring or other related expenses if he had not agreed to it beforehand. At least as of February 8, 2009, therefore, he says the wife had clear notice of his position on this topic. He states he made it clear he could not afford both the full cost of private school tuition as well as his share of the children's tutoring expenses. He maintains, as well, that the wife can and should satisfy such expenses from child support payments, particularly in light of the amount of child support she has been receiving. He points out he has been paying over \$45,000 yearly towards the children's educational expenses, in addition to \$30,000 annually for child support, and thus he cannot afford to pay for additional tutoring expenses.
- [188] This Court has allowed tutoring expenses under s. 7 of the Guidelines: *Hosseini v. Kazemi*, 2010 BCSC 666 [Hosseini]; and *D.L.G. v. R.A.G.*, 2011 BCSC 608 [D.L.G.]. In *D.L.G.*, the Court held at para. 15 that the tutoring expenses at issue fell under s. 7(1)(d) of the Guidelines, which provides for "extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs".
- [189] In *Hosseini*, the parties' son received tutoring for math, Farsi and French, and the parties' daughter also received tutoring for Farsi and French. The total costs associated with tutoring were \$3,810 as of trial. The defendant father agreed with the children receiving the tutoring (except for French lessons), but disagreed that the expenses were "extraordinary" under s. 7 of the Guidelines. After expressing some doubts as to whether the mother's income and means permitted her to cover these expenses on her own, as required by s. 7(1.1)(b)(i) of the Guidelines, Boyd J. held the following at para. 22-23:
- [22] ... In my view none of the expenses is unreasonable, particularly given the background of these parties. In this regard it is worthwhile noting that both these parents have completed university graduate and post-graduate educational programs. They both care deeply about their children's education and undoubtedly have high expectations for them. As I have already noted, the father supports both the Farsi and the Math tutoring the plaintiff has arranged. He only disputes the continuation of the French tutoring. A further factor which must be considered is the father's ongoing contributions to an RESP account for the children, for a total of \$400 per month of which I assume \$200 is the contribution on Keeyan's behalf. While this is not an off-setting item, it is a factor for consideration under s. 7(1.1)(b)(v).
- [23] In light of all these factors, I conclude that these tutoring costs are indeed extraordinary expenses and ought to be shared or divided 70/30 between the parties.

- [190] Applying the reasoning in Hosseini to the case at bar, I find the tutoring expenses claimed are extraordinary expenses under s. 7 of the Guidelines, and should be shared between the parties in proportion to their respective incomes. In this regard, I should further point out that the husband's email to the wife dated March 6, 2008 states "[w]e share 67/33 on special expenses only, such as tutor expenses. On those, please provide me with a spreadsheet of expenses". From this email, the wife could reasonably conclude the husband acknowledged tutoring was a reasonable special expense the parties would share the cost of on a pro rata basis.
- [191] As for the reasonableness of the tutoring expense, it is easy to say, on a common sense basis, that private tutoring benefits anyone who needs it, but both necessity and reasonableness of the expense must be proven, and this is not established by virtue of the fact the expense was incurred: Thomas, at para. 24. The wife did not provide an affidavit from the tutors demonstrating the Boys' learning difficulties or setting out the likelihood of diminished performance the Boys might experience without tutoring. I gather the academic regimen at the private school is demanding; but at the same time, I see D., the eldest of the Boys, is fully involved in athletic activities and the Boys appear engaged in a wide variety of extra-curricular activities. Indeed, in *McCrea v. McRea* (1999), 1 R.F.L. (5th) 320 (B.C.S.C.) [McRea], the \$3,220 in tutoring expenses incurred for the parties' daughter arose after the mother retained the services of an educational specialist who tested the daughter and recommended tutoring to address her learning difficulties in school. At para. 74, the Court concluded the tutoring expenses were extraordinary and, in addition, "clearly reasonable and necessary".
- [192] There is an overriding consideration too, namely the respective means and circumstances of the parties.
- [193] That said, however, I find, despite the somewhat weak evidentiary support for the need of tutoring, that the husband should pay his proportionate share of the tutoring expenses already incurred by the wife that are claimed in her affidavit. Nevertheless, I caution the wife that in the future, she will need to prove the need for tutors through, for example, a letter from a qualified specialist who has assessed the Boys. This is an area where it is important the wife provide the husband with independent supporting documents and obtain his prior approval. Should the husband agree to the tutoring and waive the requirement for the wife to prove its necessity, the wife will not be required to tender such documentation.

2. 2004 Honda Civic

[194] The wife claims \$618 for new tires and \$900 for brake repairs on a 2004 Honda Civic given to R. by her grandparents. The husband refused to pay for the tires, stating this was an expense the wife should bear. The wife's parents are still the registered owners and R. did not take the Civic with her to university. The husband further states "it is the [wife] who has used the car far more in the last year than [R.]". I find the wife should bear these expenses alone.

3. Driving lessons

[195] The wife paid approximately \$1,370 for driving lessons for R. in 2009-2010. The husband should contribute his pro rata share for these expenses. I find they are appropriate s. 7 expenses.

4. Royal Vancouver Yacht Club Junior Memberships

[196] The wife claims \$129.08 she pays each month to keep the Royal Vancouver Yacht Club membership current, which allows the children to maintain their junior memberships at an annual cost of \$173. The husband says the wife has not sought his approval to contribute to these costs and states that, to the best of his knowledge, the children are not enrolled in any activities there and rarely spend time there unless they are dining with the wife. I find the wife has not proven that these expenses qualify under s. 7 of the Guidelines.

5. Physiotherapy Expenses

[197] Each party claims compensation for physiotherapy treatments they have respectively paid. I understand that a large portion of these expenses were recovered, at least in the husband's case, from his medical plan, leaving unrecovered expenses for physiotherapy in his case of \$1,819. The \$173 in physiotherapy expenses paid by the wife should be deducted from this amount and the set-off paid by the parties on a pro-rata basis.

6. Orthotics for D.

[198] The husband claims an orthotics expense he incurred for D. in September 2008 for \$92.96, and for which the wife has yet to reimburse him according to her proportionate share. The wife is to contribute her proportionate share for this expense. This is allowed as a s. 7 expense.

7. Vaccinations for R.

[199] The \$460 the wife paid for R.'s vaccinations from June 8, 2010 to December 13, 2010 are s. 7 expenses to which the husband should contribute his proportionate share.

8. Counselling for D. in December 2008 and 2009

[200] The wife claims counselling expenses for D. of \$1,050 for February to March 2009 and \$525 for December 2010. The husband says the wife never consulted with him regarding counselling for D. until he read about it in the wife's affidavit. The wife says the husband was aware, but did not produce any documentation evidencing his alleged awareness.

[201] There is of course no question that, at the very least, the wife should have advised the husband D. was receiving counselling. He also should have been receiving a consultation report of some kind from the counsellor.

[202] This is one of the categories of s. 7 expenses where the lack of consultation with the other parent and the absence of their prior approval stands clearly against the requesting spouse receiving any reimbursement. Even so, in the circumstances, I order the wife to provide the counsellor's contact information to the husband, and the husband shall speak to the counsellor to obtain further information. If the husband's medical plan covers counselling, he should submit it to the plan and, assuming the administrator approves it, reimburse the wife for her pro rata share. Otherwise, the wife must bear the entire expense.

9. D.'s tuxedo

[203] So that D. could accompany his sister to her graduation dinner suitably attired, the wife spent \$203.24 for a graduation tuxedo and also incurred the cost of the dinner tickets (\$125 each). With respect, claims such as this are a very poor use of the Court's limited time and resources, as well as those of the parties, and counsel should discourage their advancement. That said, the wife explained D. did not have a suit or a tuxedo and that without one he would have had to attend the dinner in his school uniform. This would not do for an important occasion such as his sister's high school graduation dinner, and I sympathetically see it would be no small matter for D. or his sister. But this is an expense the wife should have paid out of the monthly child support she receives. It is not allowed under s. 7 of the Guidelines. The same applies to the cost of the dinner tickets.

10. Glasses for R. and W.

[204] In the fall of 2009, the wife paid \$175 for glasses for R. and \$175 for glasses for W. and claims those amounts. The husband states he offered to submit the receipt for R.'s glasses to his extended health plan, which covers such expenses, but the wife rejected his offer. As for W.'s glasses, he states that it was he who paid this amount, not the wife. It appears the wife mistakenly attached a receipt for her own eye exam and glasses to her affidavit. The husband attached a true copy of the optometry expenses he has incurred and paid on behalf of the children, which amounts to \$256. I reject the claim for W.'s glasses and order the husband submit the payment for R.'s glasses to his medical plan, if this is still possible. If the plan administrator approves this expense, the husband will reimburse the wife for her proportionate share. Otherwise, the wife will bear the entire cost.

11. Various sports and extra-curricular expenses

- [205] The wife claims \$130 for W.'s soccer enrollment, sports gear of approximately \$375 annually and his cello rental of \$300 annually.
- [206] The husband responds by saying he paid the children's out of school soccer enrollment fees and for various other equipment until 2011, when, he asserts, the wife elected to pay them without any discussion with him.
- [207] He seeks a pro-rata contribution from the wife for soccer enrollment and equipment purchases he has made, amounting to approximately \$2,755. He states he frequently buys the children sports equipment but is not seeking reimbursement for those expenses.
- [208] I find the parties should each bear the sports and extra-curricular expenses they have already respectively paid and do the same for any further expenses of this kind for the remainder of 2012. Starting in 2013, the parties shall proportionately share any sports and extra-curricular expenses for activities in which the children were enrolled beforehand. If the children, after January 1, 2013, seek enrolment in any new activity, the parties shall consult one another in writing regarding the costs of the activity and seek agreement on sharing the cost of it according to their income levels. If both parties approve the activity, including reaching agreement on which parent shall bear initial responsibility for its associated costs, both parents shall contribute proportionately to the costs of the activity. Every six months, i.e. June 1 and December 1, the parent bearing initial responsibility for the costs of the activity shall forward receipts to the other parent. Within two months of receiving the receipts, the other parent shall forward their proportionate contribution to the parent who bore initial responsibility for the costs of the activity.

12. Babysitting expenses

- [209] The wife claims a babysitting fee of \$500 for a babysitter whose care was required due to last minute changes as necessitated by the husband's schedule. The \$500 also includes funds the babysitter loaned to D. so he could participate in paintball game. The wife had made plans for a visit to Arizona with her mother at the time and had little alternative to hiring a babysitter. The husband acknowledges this expense, but states he paid it with a cheque of \$569. It appears the wife erred in this regard and her claim for this expense is disallowed.

13. R.'s post-secondary expenses claimed by the wife

- [210] The wife claims \$810 for R.'s travel expenses to the University of Oregon. She is entitled to proportionate contribution for this amount from the husband, and likewise for the approximately \$514 she expended for R.'s residence supplies. As for the \$14 monthly cost of a phone line feature that allows the daughter to phone her Vancouver home, the mother should bear that cost.

14. Private school invoices

- [211] The husband claims the wife should be solely responsible for a variety of items contained in invoices from the Boys' private school, marked as Exhibit "N" to the husband's third affidavit. Most of these items are not s. 7 expenses.
- [212] Among the expenses listed in Exhibit "N", the husband claimed costs incurred for violin lessons. In her fourth affidavit, at para. 59, the wife deposes that her mother paid for the violin lessons, "but the school misallocated her payment and it went toward school fees", which the wife says the husband was obliged to pay. That expense should be shared proportionately, as should basketball expenses of \$44.74 and \$49.65, and golf lessons of \$150. All of the other items, totalling \$2290.59, are ones the wife should have paid out of monthly child support and the husband is to receive credit for these expenses against his child support arrears.
15. Additional expenses paid by the husband
- [213] Exhibit "BB" sets out a list of expenses from March 2008 to August 2011, totalling \$5,470.81, including bike repairs, school lunches, school supplies, violin lessons, the junior golf program, and other expenses. Exhibit "CC" summarizes further expenses of this nature, covering the period from March 2008 to September 2010, but also includes expenses up to August 2011 relating to R.'s attendance at the University of Oregon. These total \$29,954.85. The husband presumably listed some items because he sees them as expenses the wife should have paid from monthly child support she receives. These expenses are relevant to the issue of how child support arrears should be calculated.
- [214] I note that the private school invoices attached to the husband's third affidavit in Exhibit "N" appear to be listed in the spreadsheets found in Exhibit "BB" and "CC" of the same affidavit.
- [215] The husband accordingly points out that over the last three years he has paid a total of \$37,244.66 in unreimbursed expenses. He adds that this amount does not include the approximately \$45,000 he paid in private school fees from 2008 to 2011 and the child support payments he has made to the wife over the past few years.
- [216] As the husband will presumably continue to fund the Boys' attendance at the private school to June 2012, the total will be considerably larger.
- [217] Because I should consider the parties' respective claims for special and extraordinary expenses within the context of other issues, particularly child support arrears, I will dispose of them at the conclusion of these reasons.
- [218] I note the parties should have prepared a combined "Scott Schedule" to avoid the considerable time required to jump back and forth between several affidavits and exhibits to make sense of what, in some instances, are not significant issues or amounts.
- [219] Finally, for clarity's sake, I note again that, based on the husband's average income from 2008-2011, the proportionate shares for already incurred s. 7 expenses that I have allowed is 78% for the husband and 22% for the wife.

VI. THE EAGLE MAR

- [220] As mentioned earlier, the husband advanced \$50,000 to the wife, pursuant to the Consent Order, representing the putative value of her one-quarter interest in the Eagle Mar sea vessel.
- [221] During the hearing, there was considerable discussion about whether the Court ought to give directions for the sale of the Eagle Mar. Paragraph 27 of the Consent Order provides for its sale, with the parties and the wife's parents sharing conduct of the sale. It also sets out the distribution formula, at least insofar as it affects the parties.
- [222] Unfortunately, the vessel remains unsold and has been deteriorating. I reviewed photographs indicating signs of decay, and the expertise of a marine engineer is not needed to see the vessel requires considerable maintenance, which for some time now has been deferred. The wife's parents had the vessel towed to Salt Spring Island, which is where they live. They are elderly and unable to carry out any maintenance themselves.
- [223] The wife deposes at para. 84 of her fourth affidavit that her parents "have incurred considerable expense with respect to the Eagle Mar." She says that moorage of the vessel at the Vancouver Yacht Club cost her parents over \$800 per month, and that they moved the vessel to Salt Spring Island because the moorage fees are considerably cheaper at \$350 per month.
- [224] The parties were unable to come to any agreement following the hearing as to how they should proceed with the sale. The real issue is who should put up the money for the repairs, and, in addition, pay for the monthly docking fees of approximately \$350 per month and any ongoing maintenance pending sale.
- [225] The husband complains that by moving the Eagle Mar to Salt Spring Island, the wife's parents have blocked his use of and access to it. He says that despite his requests, the wife's parents have not permitted him to have access to it. Regarding his assertion that the wife's parents have inhibited his access to the Eagle Mar, e-mail correspondence between the husband and the wife's parents from January 2010 suggests otherwise. In an e-mail dated January 18, 2010, the husband e-mailed the wife's parents indicating his desire to see the sale of the vessel move along. In that e-mail, the husband informed the wife's parents that he would be in Vancouver during the week of January 25, 2010, and floated the possibility of meeting with them to discuss the state of the vessel, what needed to be done to prepare it for sale and any other items the wife's parents wished to address.
- [226] In a reply e-mail to the husband dated January 24, 2010, the wife's mother informed the husband that she and the wife's father would not be in Vancouver during the week of January 25, 2010. However, she noted the parties could have a discussion about the Eagle Mar via e-mail. The wife's mother provided some details on the state of the vessel as of that date and what had been done to keep it seaworthy. She concluded her e-mail by telling the husband that he is "welcome to come over and use the boat at any time."

- [227] The husband replied to the January 24, 2010 e-mail of the wife's mother on January 30, 2010, stating that he would "dig in and get the boat listed and sold". He said he would contact an individual "and see what shape the mechanics are in as well as plan a weekend to come over and get it ready for sea trials."
- [228] Based on the foregoing correspondence, I do not find the wife's parents have prevented the husband's access to the Eagle Mar.
- [229] The husband agrees to an order for sale of the Eagle Mar and that the wife's parents have sole conduct of it, so long as the other provisions of the Consent Order relating to the Eagle Mar remain in full force and effect. Alternatively, he is prepared to release his interest in it upon repayment to him by the wife of the \$50,000 that he advanced to her pursuant to the Consent Order.
- [230] I agree with the husband's counsel that the Consent Order makes clear provision for sale of the Eagle Mar. Given the vessel's location near to where the wife's parents live, it is appropriate that they have conduct of the sale.
- [231] Any costs that the wife's parents have already incurred in relation to restoration, maintenance, insurance and docking would become, upon its sale, first charges after any liens relating to costs of restoration on the vessel.
- [232] As I suggested during the hearing, the first logical step is for the party having conduct of sale to retain the services of a marine engineer, who would prepare a report on the cost of restoration, with their recommendations as to what is essential and as to what is needed to make the vessel fully seaworthy and marketable. The wife's parents are not parties to this case and so it is not appropriate for me to make any further order, except to confirm that the wife and husband agree the wife's parents should have conduct of sale of the Eagle Mar. The husband and wife shall each contribute 25% towards any future costs of restoring the vessel in preparation for its sale, a percentage that represents their respective ownership interests in the Eagle Mar. As 50% owners, the wife's parents will presumably contribute 50%.
- [233] The parties have liberty to apply to deal with any matters that require the assistance of the Court regarding the sale of the Eagle Mar. If the parties wish to proceed with restorations and their individual contributions to the cost of repair become an issue, I suggest the parties consider the sensible approach of raising a loan to pay for the costs of restoration, with their respective responsibilities shared between themselves in proportion to their ownership interests in the vessel. Should they follow this approach, they need only pay interest costs pending sale. Otherwise, apart from an order approving sale, I question what further assistance the Court can lend to what ultimately becomes the need of the parties to act in their own combined financial interests and to dispose of the asset in the most commercially advantageous way possible.

VII. the Wife's claim for child support arrears

A. The husband's unilateral deductions from monthly child support payments

1. Children's clothing and school supplies

[234] Regarding the wife's complaint about the husband's unilateral deduction of \$565.75 from his child support payment in September 2008, he states in para. 30 of his third affidavit that the wife had asked him to purchase the children's school clothes and supplies when they were with him because she told him she had not yet been able to do so. When she refused to reimburse him, he deducted these amounts from monthly child support as he saw these expenditures as ones she ought to have satisfied from child support payments. He explained his reasons for the deduction in an email to the wife dated September 1, 2008.

2. Monthly underpayment of \$38

[235] Regarding the wife's complaint that the husband has been underpaying her \$38 monthly, he acknowledged the error and characterized it as "an honest error that neither of us caught." The husband acknowledged the wife is entitled for credit of \$38 per month from February 2008 through August 2010 (i.e. 32 months, in the sum of \$1,216).

3. R.'s university expenses

[236] The husband explained his rationale for deducting \$422 in September 2010, and \$1,267 each month thereafter from child support payments. He explains that in September 2010, he began paying the entire cost of R.'s tuition, residence and school fees. He explained his reasons to the wife in an email dated September 1, 2010. In it, he states that between September 2010 and May 2011, the expenses would amount to \$17,500. I have already commented on the fact that the husband was not entitled to deduct unilaterally what he considered to be the wife's proportionate share of R.'s university expenses, or any other supposed s. 7 expense for that matter. I appreciate his rationale is not capricious and I agree with him that the wife should have paid for items such as the children's clothing and school supplies from monthly child support.

[237] But as for R.'s university expenses, he should have sought the direction of the Court instead of unilaterally deciding that the wife was obligated to pay her proportionate share of these expenses. Reducing the amount of child support would have been a convenient way to account for the wife's obligation, should the Court have found for the husband, but he was obligated to seek such a finding from the Court instead of deciding for himself that such a ruling would be inevitable. Therefore, all of the child support amounts the husband has deducted constitute arrears. As discussed and calculated later, however, the husband is entitled to an adjustment of the arrears to reflect any expenses, such as R.'s post-secondary expenses, that the husband has solely incurred and which I have allowed under s. 7 of the Guidelines.

B. Arrears calculation

[238] The Consent Order essentially endorses the agreement reached by the parties on the husband's child support obligations. Paragraph 18 of the Consent Order provided that the husband would pay child support to the wife according to the Guidelines table amount "that corresponds to his income", which I have seen fit to adjust slightly, as discussed earlier.

[239] The wife's imputed income remains at \$73,000, at least until a possible review in nine month's time. I see no reason to depart from this basic approach the parties agreed to.

[240] Section 4 of the Guidelines addresses how child support is to be calculated where the income of a spouse exceeds \$150,000, which applies to the husband in the case at bar:

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
 - (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

[241] I will first calculate how much the husband is in arrears based on the following income imputed to the husband:

§ 2008: \$281,394

§ 2009: \$273,208

§ 2010: \$228,332

§ 2011: \$274,250 (estimated)

[242] I assume the wife's imputed income remains at \$73,000. Thus, the calculation of child support arrears is as follows:

1. In 2008, three children resided with the wife for the 11 months of 2008 and the husband paid \$41,234. The husband should have paid \$51,895 in 2008. Therefore, the husband is in arrears of \$10,661 for 2008.

.2. In 2009, three children resided with the wife for 12 months and the husband paid \$45,600. The husband should have paid \$55,080 in 2009. Therefore, the husband is in arrears of \$9,480 for 2009.

3. In 2010, three children resided with the wife for 4 months and two children resided with the wife for 8 months, and the husband paid support of \$41,377. The husband should have paid \$39,693 in 2010. Therefore, the husband has overpaid child support in the amount of \$1,684 for 2010.

4. In 2011, three children resided with the wife for 4 months and two children resided with the wife for 8 months, and the husband paid support of \$22,797 to the end of October 2011, and an estimated \$27,357 to the end of 2011 (based on his average payment for January 2011 to October 2011). The husband should have paid \$47,040 in 2011. Therefore, the husband is in arrears of \$19,683 for 2011.

[243] The total arrears are therefore \$38,140.

[244] Prior to considering whether the child support arrears that the husband owes the wife should be reduced or cancelled, I will first outline what amounts the parties owe one another in light of the s. 7 expenses I have allowed in these reasons:

Table A: Section 7 Expenses

Past and Future Section 7 Expenses

Amount

W's prop. share

H's prop. share

Paid by W

Paid by H

Private school tuition (2011-2012) [H]

33,000.00

0.22

0.78

-

33,000.00

YR 2 University fees for R. (2011-2012) [H]

21,000.00

0.22

0.78

-

21,000.00

Tutoring fees (2008-2010) [W]

17,436.00

0.22

0.78

17,436.00

-

Driving lessons [W]

1,370.00

0.22

0.78

1,370.00

-

Physiotherapy expenses [H]

1,646.00

0.22

0.78

1,646.00

Orthotics for D. [H]

92.96

0.22

0.78

92.96

Vaccination expenses [W]

460.00

0.22

0.78

460.00

-

R.'s travel expenses/school supplies [W]

1,324.00

0.22

0.78

1,324.00

-

Exhibit N (private school invoices) [H]

244.39

0.22

0.78

-

244.39

Exhibit BB and CC expenses [H]

32,890.68

0.22

0.78

-

32,890.68

Counselling expenses [W]

1,575.00

Glasses for R. [W]

175.00

TOTALS:

109,464.03

24,082.09

85,381.94

20,590.00

88,874.03

Amount owing by W to H for s. 7 expenses

3,492.09

Table B: Child Support Arrears

Year

Amount Owed

Amount Paid

Arrears

2008 (income of \$281,394)

51,895

41,234

10,661

2009 (income of \$273,208)

55,080

45,600

9,480

2010 (income of \$228,332)

39,693

41,377

- 1,684

2011 (estimated income of \$274,250)

47,040

27,357

19,683

Total:

193,708

155,568

38,140

Child support arrears less W's amount owing to H for s. 7 expenses (\$3,492.09)

\$34,648

Child support arrears less private school expenses paid by H that should have been paid by W from child support (\$2,290.59)

\$32,357

[245] The notations [H] and [W] in Table denote that that party has already paid for the listed expense. With respect to the last two items, i.e. counselling expenses and glasses for R., should the husband's medical plan approve these expenses, the wife is entitled to receive reimbursement for her proportionate share. s. If they are not approved by the medical plan, the wife is to bear the expense on her own. I note the amounts listed to the right of these expenses do not form part of the \$109,464.03 total.

[246] Based on the above, the husband's child support arrears stand at \$32,357.

C. Legal principles governing child support arrears

[247] With respect to how the outstanding amount of child support owed by the husband from 2008 to 2011 should be addressed, counsel cited D.B.S. as the applicable authority. D.B.S., however, applies to retroactive awards of child support; it does not apply to child support arrears accumulated over time. Bastarache J., writing for the majority in D.B.S., stated the following at para. 98:

[98] Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases.

[248] One of the most common situations in which D.B.S. will apply is where a court order for a static amount of child support is already in place and there has been "an increase in the payor parent's income that is not reflected by an increase in the amount of child support paid": D.B.S., at para. 62. This scenario could also arise where the parties entered into a separation agreement that provided for child support.

[249] In the case at bar, the Consent Order provided that the husband would pay the wife child support according to his Guidelines table amount. Other than in 2010, between 2008 and 2011, the husband paid less child support than the Guidelines required of him, and he has thus cumulatively fallen into arrears. Therefore, D.B.S. does not apply in the case at bar. The proper avenue for the husband would have been to make an application under s. 96(2) of the Family Relations Act to reduce or cancel arrears.

[250] The Court in *Semancik v. Saunders*, 2011 BCCA 264 [Semancik], explained this procedure and the considerations that govern such an application:

[24] Section 96(2) of the Family Relations Act ... governs the court's response to an application to reduce or cancel arrears of child support:

If an application is made to reduce or cancel arrears under a maintenance order, the court may reduce or cancel the arrears but only if it is satisfied that it would be grossly unfair not to do so.

[25] In *Earle*, Madam Justice Martinson reviewed the principles that apply in determining whether arrears of child support should be reduced or cancelled, concluding that there are two requirements for a successful application to reduce or cancel arrears. The applicant must prove a material (which Martinson J. defined as a "significant and long lasting") change in circumstances and that it would be grossly unfair not to cancel the arrears. Generally, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future."

...

[30] The father's complaint of "unfairness" in the different treatment of applications to cancel arrears as compared with applications to vary child support retroactively may arise from a misunderstanding of the legal tests applicable to the two kinds of orders.

...

[33] In order to succeed on his application to reduce or cancel arrears, the father had to meet the higher threshold of s. 96(2), as outlined in *Earle*. As noted by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231 at para. 98, arrears and retroactive child support orders are based on different considerations ...

[251] Thus, in short, there are two requirements for a successful application to reduce or cancel arrears: (a) there must be a material change in circumstances that is significant and long lasting; and (b) it must be grossly unfair not to reduce or cancel the arrears. Generally, the Court will cancel arrears only where the payor parent is unable to pay now and in the future.

1. Has there been a material change in circumstances that is significant and long lasting?

[252] There are two major changes in circumstances that I find have created significant and long-lasting effects.

- [253] First, the parties' daughter started attending the University of Oregon in September 2010. The costs associated with her attendance at university are approximately \$20,000 per year, which to date, have been shouldered by the husband alone. It appears the parties' daughter will complete the two remaining years in her program at the University of Oregon. Assuming the associated costs remain static, she will require additional funding of \$40,000.
- [254] Second, because the wife refused to contribute to the Boy's private school after June 2011, the husband bore the entire cost. I mentioned earlier in these reasons that the wife failed to give a direct answer to the husband's question of whether she intended to contribute to the private school tuition. He obtained an extension to the payment deadline, but ultimately had to secure the Boys' place in the school for the fall term. For 2011-2012, the basic tuition fees are \$33,000. Assuming the tuition fees remain the same going forward, and the Boys continue attending the private school until graduation, an additional \$82,800 will be required.
- [255] It is true the husband facilitated the payment of R.'s post-secondary costs, which I have classified as extraordinary expenses, by unilaterally reducing his monthly child support payments to the wife; but I find these deductions did not fully neutralize the financial burden the husband bore for the benefit of the children.
- [256] The husband's payment of these expenses has caused him significant financial and personal stress. I also note, as I have already in these reasons, that the husband made the deductions to monthly child support in good faith and for the best possible reasons. I say this not to condone his actions; child support is a right of the child and an obligation of the payor parent. Even so, in my view, it would be unreasonable to ignore the fact that the majority of the deducted amounts found their way into the hands of the children and directly benefitted them. In the case at bar, the far greater portion of the arrears accumulated as a result of the husband's singlehanded payment of educational expenses for the children and his corresponding deduction from monthly child support to account for the wife's refusal to contribute to these expenses, which I have found are extraordinary expenses.
2. Is it grossly unfair not to reduce or cancel the arrears?
- [257] To pay approximately \$45,000 for the Boys private school tuition fees between 2008 and 2011, the husband exhausted his savings. This is in addition to funding he provided to R. during her attendance at the University of Oregon, and payment of a variety of other expenses, as set out at Exhibit "BB" and "CC" of his third affidavit, which total approximately \$37,000, all of which he has incurred since 2008 without proportionate reimbursement from the wife. I accept the husband's evidence on this point, in addition to his evidence that because he received no bonus in 2010 to help pay for educational expenses, he had to borrow to pay for the Boys tuition.

- [258] The husband says he has no funds to pay the sizeable amount of arrears claimed by the wife and also says he has no further borrowing ability. His Form F8 financial statement indicates he has little equity in his Portland residence at this time. His counsel points out, as well, that because of the way the settlement was structured, the wife retained the matrimonial home and received both lump sum spousal support and pre-payment of her interest in the Eagle Mar, which reduced the amount of the payment she had to make to pay out the husband's interest in the matrimonial home. As a result, he submits, the wife's net assets are far greater than his, as summarized in an aide-memoire prepared by counsel, which posits the wife's net worth at roughly \$575,000 or more.
- [259] He also submits that upholding the arrears would ultimately impact the children in a negative way, as he would no longer be able to afford private school tuition for the Boys.
- [260] I also note a factor mentioned earlier in these reasons, namely that the husband paid child support in Canadian dollars based on a Guidelines income of \$225,000, despite the fact that, due to the increase in value of the Canadian dollar in the last two years, the Canadian dollar equivalent of his US income has been lower than \$225,000.
- [261] Given the foregoing considerations, I find it would be grossly unfair not to reduce the child support arrears owed by the husband. Given a large portion of the arrears accumulated because he was paying such large amounts for the children's educational expenses and decided to deduct what he thought were amounts proportionate to what he saw as the wife's share of the expenses he had borne, to then ignore his financial sacrifices for the children's benefit would be, in my view, perverse, as it would ignore the financial sacrifices the husband has made for the children's benefit.
- [262] Therefore, I order reduction of the arrears from \$32,357 to \$20,000. The husband may pay this amount over 48 months, together with simple interest of 3%, calculated every six months, not in advance.

VIII. Parenting Time

- [263] The Consent Order contains the following terms on parenting time.
7. [S]o long as the [husband] is employed outside the Greater Vancouver area, the parties shall continue to adopt the following schedule for the care of the Children:
 - a. the primary residence of the Children shall be with the [wife];
 - b. the [husband] will care for the Children for one week plus adjoining weekends, for a total of approximately ten days in each four week rotation; and
 - c. the parties will establish the schedule of the care of the Children on a quarterly basis throughout the year, to permit each of them to plan their respective schedules;
 8. the Children's school holidays shall be shared equally, on the schedule described in this Order;

9. the annual Christmas school vacation shall be allocated as follows:
 - a. in 2008 and even-numbered years thereafter, the Children shall be in the care of the [wife] for two out of the three weeks, which shall be selected by the [wife], and in the care of the [husband] for the remaining week of the Christmas school vacation; and
 - b. in 2009 and odd-numbered years thereafter, the Children shall be in the care of the [husband] for two out of the three weeks, which shall be selected by the [husband], and in the care of the [wife] for the remaining week of the Christmas school vacation;
10. the annual Spring Break vacation shall be allocated as follows:
 - a. in 2008 and in even-numbered years thereafter, the Children shall be in the care of the [wife] for Spring Break; and
 - b. in 2009 and in odd-numbered years thereafter, the Children shall be in the care of the [husband] for Spring Break, provided that if the [husband] is not able to care for the children for the entire period, he shall advise the [wife] of that part of the Spring Break that he is not able to care for the Children, and the [wife] will do so during that time;
11. unless the parties agree otherwise, each party shall care for the Children for one month during the Children's' summer school vacation;
12. if the [husband] returns to Vancouver for permanent employment, there shall be a review of the parenting plan, without prejudice to the rights of either party in the determination of the principal residence of the Children;
13. the [wife] and [husband] will have unfettered access to the children during periods when the children are in residence with the other parent, and neither parent who has principal care of the children during such time, shall restrict the other parent's contact with the children by telephone, computer, or other means;
14. if the [husband] is in Vancouver during the [wife's] residential time with the children, the [husband] may, on appropriate advance notice and with the [wife's] consent, which shall not be unreasonably withheld, meet with the children, provided that such a meeting does not interfere with a previously scheduled school or extra-curricular activity;
15. if either party is not available to look after the Children during that party's parenting time:
 - a. he or she shall first consult the other parent before arranging third party caregivers and shall give to the other parent the opportunity to care for the Children;
 - b. [their] parenting time shall be forfeited by the parent who is not able to care for the Children during his or her time, and unless the parties agree, there shall be no duty on the part of the other parent to make up lost time with the Children; and
 - c. any child care expense shall be incurred by the parent who is not able to care for the Children during his or her parenting time.

[264] Despite the comprehensive nature of these terms, they have become a source of considerable conflict between the parties. The wife seeks amendment of the parenting time schedule as set out in para. 75 of her third affidavit:

75. The [husband] shall have access to the boys as follows:

- (i) The last weekend of every month. The [husband] shall pick the boys up from school on Friday and return them to school the following Monday morning. If the [husband] wishes to switch a weekend, he may do so by notifying the [wife] three months in advance;
- (ii) The week of Christmas, from the end of the school term until January 2: The [husband] shall have the children for Christmas 2011 and odd years thereafter.
- (iii) Spring Break: On even years, the [husband] shall have the boys for the entire Spring Break. If the [husband] is not able to care for the boys for the entire Spring Break, he shall advise the [wife] on three months' notice;
- (iv) Two weeks each summer. These dates shall be determined by the end of Spring Break;
- (v) Any other times as agreed by the [wife];
- (vi) If the [husband] is unable to have the children for any of the above times, that access period is forfeited.

[265] The wife complains the husband never strictly adhered to the terms of the parenting time schedule outlined in the Consent Order. And, therein, perhaps, lies the heart of the problem. The husband's often unpredictable work schedule and distant Oregon residence renders strict adherence to a parenting time schedule a very difficult goal to achieve.

[266] The wife complains at para. 63 of her third affidavit that while the husband has tried to see the children once a month when his work schedule allows it, these times and dates, she says,

... are very sporadic and often not confirmed until the last minute. Though I try to accommodate, it is difficult because of the [husband's] high-handed manner when discussing his access dates.

[267] The wife says at para. 64 of her third affidavit that this has caused undue stress to the family because she is "currently only able to make tentative plans, subject to the [husband's] access, which is generally unknown to [her] and subject to last-minute changes."

[268] She complains the husband becomes difficult, and at times verbally abusive, in email exchanges. She exhibited various email exchanges. I could not say, in fairness to the husband, that he was being verbally abusive, although he is sometimes strident.

[269] The husband's work is very demanding, and those demands sometimes shift, or are unpredictable. He then has to request a change in parenting times. On occasion, the wife will have already made plans that are difficult or sometimes even impossible for her to alter. Sometimes, the husband becomes insistent and demanding about his requests;

sometimes, the wife seems to focus on unimportant details or minor impediments and becomes uncompromising. I emphasise these are impressions arrived at without the benefit of the background to or context of these communications between the parties in some instances. But in summary, the parties at times seem to have become unduly focused on collateral details instead of focusing on a solution.

- [270] Going forward, the husband has to make planning workable arrangements for parenting time a major priority and the wife has to accept that, given the demands of the husband's work, "strict adherence" to a parenting time schedule is not achievable. Attaching oneself to such an unattainable objective at all times in the circumstances of these parties is bound to induce stress and conflict. Before long, anyway, given the age of the children, the parties will no longer need to concern themselves with organizing parenting time.
- [271] On a more positive note, I see that at various times the parties are trying their utmost to be cordial and supportive of one another; but when something unexpected unsettles their expectations or plans, matters often descend into conflict and quibbling over what seem to be surmountable challenges.
- [272] While I am sympathetic to the wife's frustrations over the husband's unpredictable schedule and, at times, his unrealistic expectation that she should always accommodate him, her desire for three months notice in advance of parenting time by the husband is neither realistic nor practical. Neither is her request that he provide her three months notice if he is unable to have the Boys for the entire spring break.
- [273] The husband, for his part, acknowledges that communication between the parties is poor. He complains the wife is simply unresponsive, that she leaves the children in the care of others without giving him notice and that she impedes direct communication between him and the Boys.
- [274] He says both parties desire a more clearly defined parenting time schedule. The husband proposes the following:
9. The [husband] shall have the care of the children for a minimum of one extended weekend (from Thursday after school until Monday evening) to a maximum of one full week with "bookend" weekends, each month.
 10. Unless arranged otherwise, the [husband's] access will take place on the first weekend of each month and unless arranged otherwise, it shall be one extended weekend instead of an extended week.
 11. The [husband] will confirm the length of time 60 days in advance of the first day, and in the event that the [husband] wishes to change the allocation of his time with the boys, he will be required to provide to the [wife] a minimum of 30 days advance notice of that change. The [wife] would be free to reject any request made less than 30 days from the first day of the proposed access period.

12. Each parent will have the opportunity to have one on one time with each child, of up to two periods consisting of no more than three days on each occasion, per year. Each parent will provide to the other parent no less than 30 days notice of the one on one times.
13. The children's Spring Break will be shared equally, with each parent spending one half of the Spring Break with the boys, unless otherwise agreed. The [husband] will have the choice of schedule in even years and the [wife] will have the choice of schedule in odd years.
14. The Christmas school vacation will also be shared equally, with each parent spending one half of the Christmas break with the boys, unless otherwise agreed. The [husband] will have the choice of schedule in even years and the [wife] will have the choice of schedule in odd years;
15. The [wife] will ensure the boys' passports are provided for all travel by the boys to places outside Canada.

[275] I have considered both of the parties' proposals on parenting time, and attempting to respond to the concerns of both parties and build on what they have in common, I order the following modifications to parenting time (since I am dealing solely with parenting matters at this stage of the reasons, I will refer to the parties as the "father" and the "mother"):

1. The father shall have care of the Boys a minimum of one weekend each month, defined as Thursday after school, when the father shall pick the children up, until Monday evening at 8 p.m. The default weekend when parenting time shall occur shall be the first weekend of each month. If the father wishes to change the default weekend to another weekend in a month, he shall provide the mother with a minimum of 30 days notice of the proposed parenting time weekend. The mother is free to reject any request made less than 30 days before the first day of the proposed parenting time weekend (i.e. the Thursday of the proposed parenting time weekend). If, however, the mother has given the father more than 30 days written notice before the default parenting time weekend (i.e. the first weekend of the month) of plans that she has made for that weekend that she will not be able to alter, she will be free to reject the father's request for extended parenting time.
2. If the father wishes to extend weekend parenting time to a full week, defined as Thursday after school until Sunday at 4 p.m. the following weekend, the father shall provide the mother with notice, together with confirmation of the exact number of additional parenting time days, 60 days in advance of the first day for the extended week. The mother will be free to reject any such request made less than 60 days before the first day of the extended parenting time proposed by the father (i.e. the Thursday of the proposed parenting time week). If the mother has, however, given the father more than 30 days written notice before the proposed parenting time week of plans that she has made for that week that she will not be able to alter, she will be free to reject the father's request for extended parenting time.

3. Each parent will have the opportunity to have one on one time with each child, for two time periods, consisting of no more than three days on each occasion, yearly. Each parent will provide to the other parent no less than 30 days notice of the one on one parenting time period they wish to have.
4. Parenting time for the Boys' spring break will be shared equally between the parents this way:
 - (a) In year one, commencing 2013, each parent will spend one-half of the spring break with the Boys, unless otherwise agreed. The father will have the Boys for the first half of spring break and the mother will have the Boys for the second half of spring break.
 - (b) With respect to (a), the father will have the choice of schedule in even years and the mother will have the choice of schedule in odd years.
 - (c) In the second year, the father shall have the Boys for the entire spring break.
 - (d) In the third year, the mother shall have the Boys for the entire spring break.
 - (d) In the fourth year, the cycle commences again as detailed at (a), with the parties sharing the parenting time equally during spring break.
 - (e) If a parent makes personal plans for spring break and cannot take care of the Boys for the period of time prescribed by the foregoing schedule, that parent shall provide the other parent with two months notice, failing which the parent will be obligated to abide by the parenting time prescribed for that year.
5. The Christmas vacation is defined as the end of the school term until January 2 of the following year. The Christmas vacation shall be shared equally, each parent spending one-half of the Christmas break with the Boys, unless otherwise agreed, and the father will have the choice of scheduling in even years and the mother in odd years. If a parent makes personal plans for Christmas and cannot take care of the Boys according to this schedule, that parent shall provide the other parent with two months notice, failing which the parent will be obligated to abide by the parenting time prescribed for that year.
6. When the Boys are in the mother's care, the father shall have unrestricted access to the Boys by telephone, email or Skype between 7 p.m. and 9 p.m. on school nights.
7. The father shall have a further two weeks of parenting time collectively with the Boys each summer. He shall provide the dates for parenting time to the mother by June 1 of each year. If the father has not given notice of the two weeks he wishes to exercise as summer parenting time with the Boys, he remains entitled to two weeks of parenting time during the summer (i.e. the end of the school year until Labour Day), but he will have to exercise parenting time on dates that do not interfere with plans the mother has already made.
8. The father is entitled to parenting time with the Boys at such other additional times as the mother agrees to, with the best interests of the Boys being the guiding principle.

9. If the father is unable to exercise the parenting time provided to him herein, that parenting time allowance is forfeited, unless otherwise provided, but with 60 days notice to the mother, he may make up a maximum of two weeks of parenting time at another period outside of spring break and Christmas vacation.
 10. The parenting time will not be affected by statutory holidays or school holidays.
 11. The parties shall do their utmost to be mindful of the duties, burdens of work and other responsibilities of the other party and be as flexible as possible, with a view of maximizing the father's parenting time with the Boys, as is consistent with their best interests and to the maximum extent that is reasonably possible.
 12. During their respective parenting times, either parent may take the Boys out of school for up to two days for any trip outside of Vancouver.
 13. The mother shall provide the father with the Boys' passports and written permission for the Boys to travel to the United States to visit the father within 48 hours of any such request made by the father.
- [276] Apart from the modifications above, the other terms for parenting time remain as set out in the Consent Order. I note the ages of the children suggest the parties will not be relying on the parenting time schedule much longer. Indeed, the schedule already does not govern parenting time with R., and when W. graduates from high school next year, the schedule will no longer govern parenting time with him. Given this, it is regrettable the parties could not reach agreement on the issue of parenting time. But given how contentious scheduling parenting time has become for the parents, I trust the detailed provisions stated here will allow the parents to enjoy conflict-free time with the Boys in the time remaining.

IX. Conclusion

- [277] If the parties note any errors in the calculations I have arrived at in these reasons, they can amend the amount by consent, or if unavoidable, apply to the Court. As I suspect that any errors discovered will be insubstantial in the grand scheme of things, my finding that the husband's arrears are reduced to \$20,000 will not be affected.
- [278] I also note that the Consent Order survives these reasons, except where I have explicitly varied any of its terms.

X. Costs

- [279] Success is close enough to evenly divided to warrant an order that each party bear their own costs.

"N. Brown J."

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