
CANADA / JUDGMENT

Maultsaid v. Blair

2008 BCSC 272

COURT

Supreme Court of British Columbia

DECIDED

31 January 2008

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2008 BCSC 272 Maultsaid v. Blair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maultsaid v. Blair,

2008 BCSC 272

Date: 20080131

Docket: E020267

Registry: Vancouver

Between:

Deidre Lois Maultsaid

Plaintiff

And

Hugh Macdonald Blair

Defendant

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Judgment

January 31, 2008

Counsel for the Plaintiff:

M. Dunnaway

C. Howard

Counsel for the Defendant:

D.H. Unterman

Date and Place of Hearing:

January 8 & 23, 2008

Vancouver, B.C.

[1] THE COURT:

INTRODUCTION

[2] Mr. Blair applies for numerous orders to vary the orders for financial support for the parties' two children, both retroactively and prospectively. Most of his applications are grounded on either or both of two circumstances:

(1) that until recently Mr. Blair earned substantially less than the income imputed to him for child support purposes, and

(2) that an order of this court changed the children's primary residence from Ms. Maultsaid to Mr. Blair in September 2006.

[3] Ms. Maultsaid agrees that Mr. Blair should not be required to pay child support as of September 1, 2006. Also, the parties agree to share equally some upcoming orthodontic expenses.

[4] The main matters for determination are:

1. whether Mr. Blair's earlier (2003-2006) child support obligation should be reduced (or the accumulated arrears cancelled) to reflect his actual income over that period
2. whether, since the September 2006 change of primary residence, the children spend at least forty percent of their time with Ms. Maultsaid, so that the "shared custody" regime for child support in s. 9 of the Child Support Guidelines applies, and
3. if s. 9 applies, what amount of child support, if any, Ms. Maultsaid should pay to Mr. Blair.

BACKGROUND

[5] The parties are in their mid-to-late 40s. They have two children: Connor born August 12, 1991, and Linden born December 22, 1993. The boys are now aged 16 and 14.

[6] The parties began to live together in 1989. They had a commitment ceremony in 1991, and married in October 1998. They separated three years later, in October 2001, and were divorced in November 2002.

- [7] Ms. Maultsaid earned a Master's degree in education early in life, but did not pursue a career outside the home until after the separation. This was in part because Mr. Blair's career as an environmental scientist required the family to make major moves, first to Williams Lake and later, for about two years, to Spain.
- [8] Mr. Blair currently works as a consultant in the field of environmental science, reporting an annual income of \$55,000.
- [9] Ms. Maultsaid works in a contract position at UBC, at \$49,761 per annum. She has also earned extra income (approximately \$9,000 last year) through private tutoring.
- [10] The separation was a troubled one. Associated with the troubles were Mr. Blair's problems with alcoholism at the time, and mental health issues that involved a suicide attempt around the time of the separation.
- [11] Until September 2006, the boys had their primary residence with Ms. Maultsaid. Mr. Blair's access was supervised until - to his credit - he overcame his alcohol problems. Access was then unsupervised, and on a two-week schedule by which the children spent every other weekend with him from Thursdays after school until Monday morning drop-offs at school, and, on the alternate weeks, overnight on Thursdays. Holidays were divided equally between the residences of the parties.
- [12] In January 2006, Mr. Justice Wong reconsidered the matter of primary residence; Dr. Posthuma prepared a report as to the boys' views. Pending determination of the matter, Wong J. ordered that the summer of 2006 be divided equally between the parties. Then, in early September 2006, Wong J. ordered that the boys' primary residence change to Mr. Blair's, with Ms. Maultsaid having access according to the same schedule as had previously governed Mr. Blair's access.
- [13] Court proceedings have since been frequent and acrimonious. Counsel advise that the parties have extraordinary difficulty with constructive communication, and that the parties have almost never reached agreement, even on minor matters, except in court.

DETAILS OF THE PRESENT APPLICATION

- [14] Mr. Blair now seeks orders concerning child support, past and ongoing, and their arrears to provide as follows:
- (a) to rescind Mr. Blair's obligation to pay child support, as of July 1, 2006 (after which date the children spent equal time with each parent during the summer, and then changed their primary residence to Mr. Blair's)
 - (b) to require Ms. Maultsaid to pay child support (basic and her proportionate share of extraordinary expenses) as of, and retroactive to, September 1, 2006, when the boys' primary residence changed to Mr. Blair's

- (c) to retroactively reduce Mr. Blair's monthly child support obligation between 2003 and 2006 to accord with his actual income over that period
 - (d) alternatively to retroactive variation, to cancel all arrears of child and spousal support, together with any interest or penalties accrued or charged
 - (e) to require Ms. Maultsaid to repay to Mr. Blair the amounts of child support overpaid to her under the existing orders before variation as sought above, and
 - (f) in the calculation of that overpayment, to review and adjust the amounts Ms. Maultsaid claims to have paid for child care expenses, as s. 7 extraordinary expenses, to her actual reasonable and necessary expenses.
- [15] I identified above the main questions underlying these applications, and I will address them in turn, before briefly addressing some related or consequential issues.
1. SHOULD CHILD SUPPORT BE RETROACTIVELY REDUCED TO REFLECT MR. BLAIR'S ACTUAL INCOME?

Background

- [16] Mr. Blair asks for "recalculation" of his child obligation, for the period between 2003 and 2006 when the children lived primarily with Ms. Maultsaid. He agrees that this amounts to an application for retroactive variation of the child support order.
- [17] He seeks in the alternative an order cancelling the arrears of child support that have accrued in relation to that period, to the extent that the arrears reflect an obligation greater than would have been required according to his actual income.
- [18] Mr. Blair bases each iteration of this application on the fact that his actual income, as earned over the 2003-2006 period, was less than the \$60,000 income Madam Justice Morrison imputed to him, as of January 1, 2003. By Morrison J.'s order, Mr. Blair was required to pay basic child support of \$816, and extraordinary expenses of \$600 per month. There was subsequent modification, which I will address later.
- [19] Mr. Blair says that his actual income since Morrison J.'s order was as follows:
- | |
|----------|
| 2003 |
| \$12,919 |
| 2004 |
| \$38,189 |
| 2005 |
| \$43,171 |
| 2006 |

\$55,000

[20] Arrears now stand at approximately \$14,000.

Discussion

[21] Mr. Blair submits that because his earning was less successful than anticipated, a retroactive variation is supported by a material change in circumstances.

[22] However, in my view, this position cannot succeed for several reasons.

[23] First, there is no material change in circumstances since Morrison J. made her order. By her order, she did not attempt to estimate Mr. Blair's actual income, for the ensuing period 2003 and onwards. Rather, she imputed to him an income based on her assessment of his ability to earn. This is clear from her reasons at 2003 BCSC 136, ¶32-33:

As for the amount of maintenance, that must depend upon the husband's earning ability. In 1999, the husband's income was \$72,785. In 2000, \$46,050 and in 2001, \$63,070. That would average out to \$66,000 a year over the past three years.

Counsel for the defendant suggests that an income of \$50,000 would be appropriate to impute to the husband under his present working conditions. Counsel for the wife suggests that \$70,000 would be a more appropriate figure. I am going to impute an income of \$60,000 for the defendant, for purposes of establishing spousal maintenance as well as child maintenance under the Guidelines, having regard to his past earning ability and present qualifications.

[24] In arriving at that determination, Morrison J. had before her evidence of Mr. Blair's difficulties with alcoholism and depression, and his position that it would be unwise for him to work full time, because of these and other difficulties. She also considered his position that he wished to reduce his workload to stay out of the mainstream and other high-stress work, and to allow himself sufficient opportunity to commit himself to high quality parenting. As Ms. Dunnaway submits, to now retroactively adjust Mr. Blair's child support obligation would be to substitute a different conclusion from that which Morrison J. reached, on substantially the same facts as those on which Mr. Blair now relies.

[25] Second, Mr. Blair did not seek variation of Morrison J.'s order at the first reasonable opportunity, as the law requires. He made no such application until bringing the present application by way of notice of motion dated June 13, 2007 and, it appears, filed on November 14, 2007.

[26] In August 2003, Mr. Blair applied before Mr. Justice Holmes for variation of Morrison J.'s order in several respects (including as to his proportionate share of the children's extraordinary expenses), but did not seek variation of his basic child support obligation.

[27] I would dismiss Mr. Blair's application for retroactive variation of the child support order relating to 2003 through September 2006 on these bases alone.

- [28] But in any event, Mr. Blair fails to meet his heavy burden to establish that to fail to adjust the arrears would be grossly unfair.
- [29] I note in this regard that Mr. Unterman was unable to advise the court whether the application is brought under the Divorce Act, or, rather, the Family Relations Act. However, he submits that the governing principles are identical.
- [30] Madam Justice Newbury for the Court of Appeal in *Luney v. Luney*, 2007 BCCA 567, at ¶47 indicated that the legal test governing retroactive variation of a child support order is likely the same as set out in s. 96 of the Family Relations Act for the reduction or cancellation of accumulated child support arrears:

Mr. Luney sought a retroactive variation, however. If successful, such an application would presumably result in a reduction of his arrears. Although it appears that maintenance may be awarded retroactively under s. 93(5) of the Act (see also the dicta at paras 40-81 of *L.S. v. E.P.* 1999 BCCA 393 (decided prior to the amendment to s. 93(5) enacted effective January 31, 2003 by the Interjurisdictional Support Orders Act, SBC 2002, c. 49)), I doubt very much that a court may reduce maintenance retroactively under s. 96(1) without meeting the standard of gross unfairness that applies under s. 96(2) to the reduction of arrears. Of course, a court may order a prospective reduction if the required change in circumstances is shown.

[Emphasis in original]

- [31] Section 96 provides that a court may cancel or reduce arrears of support, but only if satisfied that not to do so would be grossly unfair:

96 (2) 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.

- [32] In the determination of whether to not reduce or cancel the arrears would be grossly unfair, several types of factors apply:

96(3) For the purpose of subsection (2), the court may take into consideration

- (a) the efforts the applicant has made to comply with the maintenance order
- (b) the applicant's explanation for any delay in applying for variation of the maintenance order, and
- (c) any special circumstances that the court considers relevant.

- [33] Mr. Justice Hall in *Jones v. Anhorn*, 2000 BCCA 213 at ¶13, remarked on the scope and breadth of the factors in subsection (3), and noted that paragraph (c) may include a myriad of circumstances.

- [34] However, the only circumstance offered by Mr. Blair (other than that his actual income was far less than the income Morrison J. imputed to him) is that he has accumulated substantial debts (notably for income taxes), as well as child support arrears, as a result of the order.
- [35] To now reduce or cancel child support arrears would, in my view, undermine the intent of Morrison J's order imputing to Mr. Blair an income higher than he at the time considered himself willing or able to earn; clearly, Morrison J. took a different view of his earning ability. As I have already noted, Mr. Blair offers no significant new evidence concerning his earning ability during the period in question.
- [36] Furthermore, to maintain the arrears of child support would be far from "grossly unfair" in the parties' present circumstances, for numerous reasons.
- [37] First, and as I will discuss in more detail later, the evidence to support Mr. Blair's present income is incomplete. Mr. Blair reports an income of \$55,000 per annum, as a self-employed consultant. He acknowledges that the income he reports reflects the deduction of business expenses. However, he has provided no accounting, records, or even description of any such expenses, despite numerous requests.
- [38] A complete financial picture is all the more important, because Mr. Blair's present application is based on the difference between the income Morrison J. imputed to him, and the income Mr. Blair says he actually received.
- [39] Second, Ms. Maultsaid has suffered both direct and indirect financial effects of Mr. Blair's failure to pay child support as ordered.
- [40] After the separation, Ms. Maultsaid took retraining for less lucrative positions than those for which her education qualified her because the retraining was short and she needed to start earning as quickly as possible in the circumstances (including Mr. Blair's defaults). During the years when Mr. Blair failed to pay the ordered amounts of child support, Ms. Maultsaid worked in at least two jobs to support the children. Her earning power was and continues to be lower than it otherwise would have been.
- [41] Third, the division of the parties' modest assets favoured Mr. Blair so that he could provide ongoing support to Ms. Maultsaid and the children. Mr. Blair was allocated the family home (from which he realized about \$20,000), in recognition of his financial situation and in the expectation that this would assist him in making his child support payments to Ms. Maultsaid. However, he made at most two payments, until the Family Maintenance and Enforcement Program interceded, and was successful in obtaining payment of some further amounts.

Conclusions

- [42] For all these reasons, Mr. Blair's application for retroactive reduction (by way of variation) of his child support obligation for the period January 1, 2003 through September 2006, is denied.
- [43] However, as Ms. Maultsaid agrees, the order requiring him to pay child support is varied to terminate that obligation as of September 1, 2006.
- [44] Mr. Blair's alternative application for cancellation or reduction of child support arrears relating to that period is also denied, except that, as Ms. Maultsaid agrees, and for clarity, no arrears arise in respect of the month of September 2006.
- [45] The same conclusions apply to Mr. Blair's application concerning interest on the child support arrears.

Related Or Consequential Issues

Child Support for July and August 2006

- [46] Mr. Blair asks also that his child support obligation for the months of July and August 2006, be rescinded, because during those months the children spent equal time with each parent under Wong J's order pending his determination in September 2006, that their primary residence should change to Mr. Blair's. However, Wong J.'s order was effective as of September 5, 2006, when it was made. Mr. Blair made no application at the time - or later, until this application - for variation of the child support order relating to July and August 2006.
- [47] Mr. Blair's obligation to pay child support to Ms. Maultsaid terminates as of September 2006.

Pre-September 2006 Extraordinary Expenses

- [48] In a related application, Mr. Blair also challenges the amounts due to Ms. Maultsaid for extraordinary expenses under the order of Mr. Justice Holmes in August 2003.
- [49] With the parties' consent, Mr. Justice Holmes varied the governing order concerning extraordinary expenses, so that, as of May 1, 2003, Mr. Blair was to pay \$375 of the extraordinary costs, which were identified as being after school costs, and Ms. Maultsaid was to pay the remaining \$225.
- [50] Mr. Blair now submits that the extraordinary expenses Ms. Maultsaid claims to have spent in relation to after school care were, over certain periods of time covered by the order, excessive, unnecessary, or not properly characterized as child care expenses, as contrasted with housekeeping expenses. He submits that the amounts she attributes to after school care should be retroactively adjusted to reflect her reasonable and necessary child care expenses.

- [51] These applications also cannot succeed, for many - though not all - of the reasons that Mr. Blair's applications in relation to his past obligations to pay basic child support cannot succeed.
- [52] The challenged expenses date back to as far as 2003. If Mr. Blair was minded to challenge them as inappropriate, he should have done so at a time when Ms. Maultsaid would have been in a better position to explain or justify them.
- [53] That a challenge arises now - indeed, that it arises at all - underscores the wisdom in the consent order by which each party was to pay a fixed dollar amount toward Ms. Maultsaid's expenses for after school care for the children. To now permit retrospective scrutiny of those expenses, from a great distance, would encourage the parties in ongoing disharmony and mutual distrust.
2. ARE THE CHILDREN IN MS. MAULTSAID'S CARE AT LEAST 40% OF THEIR TIME?

The Parties' Positions

- [54] Mr. Blair seeks an order requiring Ms. Maultsaid to pay child support to him, as of September 2006 when the children's primary residence moved from Ms. Maultsaid's home to Mr. Blair's home.
- [55] He submits that the situation is a straightforward one, in which the children live primarily with him and Ms. Maultsaid should pay child support on the basis of her Guidelines income. He submits that her Guidelines income should include her contract income from UBC (now \$49,761), as well as her additional income from tutoring, for a total annual income of \$58,530. He submits that Ms. Maultsaid should therefore pay basic child support of \$885 per month, and half of the children's extraordinary expenses (which Mr. Blair estimates at about \$2,700 per year total or \$112 per month for each of the two parties).
- [56] Ms. Maultsaid responds that the children are with her for at least 40% of the time, and therefore any child support she must pay should be determined according to the more comprehensive approach in s. 9 of the Guidelines, which takes into account factors additional to the paying party's Guidelines income. She submits that in all the circumstances, neither party should pay child support to the other.

Discussion

- [57] Section 9 of the Guidelines provides as follows:

Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and

- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [58] The parties disagree as to whether s. 9 of the Guidelines comes into play, because they disagree as to whether the children are in Ms. Maultsaid's care for more than 40% of their time.
- [59] Ms. Maultsaid calculates that according to the access schedule in Wong J.'s order of September 2006, the boys are with her 150 days per year, or 41% of the time.
- [60] She deposes that, in accordance with the terms of Wong J.'s order, she sees the boys on some additional weeknights, feeding them dinner and driving them to activities. Her evidence on this point is no more specific than that.
- [61] Mr. Blair calculates that he has the care of the boys for 63.9% of their time, and therefore Ms. Maultsaid has their care for only 36.1% of their time.
- [62] Most of the discrepancy between the parties' respective calculations is attributable to how they allocate the time when the boys are in school on days when the boys go to school from one home and leave school for the other home.
- [63] Mr. Unterman submits that the applicable case authorities make clear that "in school" time is to be attributed to the primary residence parent, in part because that parent will be responsible if the child is, for example because of illness, unable to go to school. He refers, for example, to *Mador v. Kelly*, 2000 BCSC 872, where Low J. (as he then was) rejected Dr. Mador's contention that he exercised access for 46% of the children's time, because that calculation included school hours, and the evidence established that if problems arose at school, the school almost always contacted Dr. Kelly at work, and not Dr. Mador. Low J. agreed with the reasoning of Master Horn in *de Goede v. de Goede*, [1999] B.C.J. No. 330 (S.C.) that school time does not accrue to the benefit of the non-custodial parent.
- [64] In *de Goede v. de Goede*, Master Horn conducted an extensive review of the authorities concerning how children's time in school should bear on determination of whether the 40% "threshold" for s. 9 is met. He concluded that the weight of authority favours the conclusion that "the time in which the children are in school does not accrue to the benefit of the non-custodial parent". Mr. de Goede was therefore, from that perspective, a "non-custodial parent" (at ¶13).
- [65] The situation here is different in several ways from the situation in *de Goede*.
- [66] First, the present situation comes close to the 40% threshold, whether or not school time is included. Mr. de Goede's time with his children, without school time included, would not have reached the 40% threshold "whether hours, days or weeks are counted" (¶14).

- [67] Second, in *de Goede*, the wife had custody of the children, whereas here the parties have joint custody and joint guardianship according to a model that takes care to ensure the neither party has greater decision-making authority than the other. Although the primary residence and access provisions specify where the boys will spend their time as between the two residences, they do not alter the ongoing responsibility of each of the parties at all times for their custody and guardianship.
- [68] Third - and this is a related factor - the order of *Wong J.*, as I understand its overall intent, does not "carve out" access for Ms. Maultsaid, with the balance accruing to Mr. Blair, as he suggests. Rather, I view the drop-off and pick-up times as merely specifying for certainty and convenience the days on which the boys are to travel from one home to the other. From that perspective, school time does not default to Mr. Blair but is neutral in the balance: both parents remain responsible throughout as joint custodians and joint guardians.
- [69] Moreover, with the boys now well into their teenaged years and moving toward independence, the actual demands on a custodial parent during school hours will necessarily diminish.
- [70] The age of the children also distinguishes the present case from *Mador v. Kelly*, where the children were only 10 and 12 years of age. Also, the decision in *Mador v. Kelly* was, as I have noted above, based on evidence concerning actual contact from the school.
- [71] In *Berry v. Hart*, 2003 BCCA 659, Madam Justice Saunders, writing for the court, addressed how the 40% threshold is to be identified, and the degree of exactitude required. Mr. Berry there alleged that the children were with him for 41% of the time, but Ms. Hart alleged that that time amounted to 39.37%.
- [72] Saunders J.A. concluded that determination of the 40% threshold in s. 9 is a matter of judgment, based on the broader context of the parenting arrangement, and is not a time-accounting exercise (at ¶10):

In my view, the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement.

- [73] Saunders J.A. concluded that the situation there engaged s. 9 because one child spent well over 40% of her time with Mr. Berry. However, even apart from that feature of the case, s. 9 was engaged as a result of the tenor of the custody and access order, the order for joint custody, the nearness to 40% of Mr. Berry's access time, the stated wish of one child to spend more time with him, and the desirability of Mr. Berry's parental time being flexible to accommodate opportunities and the children's wishes.
- [74] Similar considerations apply here.
- [75] In reaching her conclusion that whether s. 9 applies is a matter of judgment, not accounting, Saunders J.A. noted the potential for a party to manipulate time for financial reasons, and warned against allowing "a slavish accounting of small units of time" to aggravate "both the s. 9 financial incentive and financial disincentive inherent in an increase of a child's time with the minority-time parent" (at ¶6).
- [76] The dangers to which Saunders J.A. alluded, are, in my view, all the worse where, as here, the children are teenagers who themselves have had, and will continue to have, significant input into both long-term and day-to-day decisions as to where their time is spent. It would not be in the boys' best interests that they fear that significant financial consequences, for their parents, will attach to those decisions.
- [77] Also, a meticulous accounting of the boys' time with each parent, for the purpose of determining child support, would in my view run counter to the underlying intent of the order. As I assess the circumstances that led to Wong J. making the order changing the boys' primary residence, the intent of that order was, to some extent, to diminish Ms. Maultsaid's direct control of the boys' daily lives, while also promoting the continuation of her strong and valuable relationship with them. I conclude that it is not in the boys' best interests that the child support order create a disincentive to Ms. Maultsaid to allow the boys to experience some independence, at home and at school, as they grow and mature.
- [78] Under Wong J.'s order, Ms. Maultsaid's time with the boys, however that time is measured, is very close to forty percent, and it may increase according to the boys' wishes.
- [79] Taking a broad view of the order, it provides for the boys to spend most, but not all, of their time during the week (three of the four school nights) with Mr. Blair, and to divide weekends and all holiday time equally between the two residences. In the particular circumstances of this case, I view the order as providing for the boys to spend somewhat more than the majority of their time with Mr. Blair. To the extent that one can apply a percentage to that assessment, 60% is apt.
- [80] In making that assessment, I rely on the particular circumstances of this case, including the following: the boys' ages (16 and 14); the fact that for many years they lived primarily with Ms. Maultsaid, and thus have an established home with her to and from which they can comfortably move as they wish; that the order takes care to recognize entirely equal responsibility in each parent for the boys' guardianship and custody; and that the parties'

unfortunate mutual distrust and competition for control suggests that a child support order that rests on a meticulous accounting (whether to include or exclude the application of s. 9 would run counter to the boys' best interests.

3. HOW MUCH CHILD SUPPORT SHOULD MS. MAULTSAID PAY?

[81] Basic child support is therefore to be determined according to s. 9 of the Guidelines, and the factors it describes. These are:

- (a) the amounts set out in the applicable tables for each of the spouses
- (b) the increased costs of shared custody arrangements, and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[82] In submitting that she should pay no child support to Mr. Blair, Ms. Maultsaid essentially asks for a "set-off" approach to the application of s. 9, by which the parties' respective table amounts are off-set.

[83] In *Contino v. Leonelli-Contino*, 2005 SCC 63, the Supreme Court of Canada gave extensive consideration to the calculation of child support according to the three factors set out in s. 9, and emphasized that a set-off approach may serve as a starting point, but cannot be the end of the inquiry. The court must exercise its discretion, with regard to "the overall situation of the parents (conditions and means) and the needs of the children"; "the weight of each factor under s. 9 will vary according to the particular facts of each case" (at ¶39).

[84] The court noted in particular (at ¶48) that the set-off approach assumes that each parent bears an equal share of the children's variable expenses; that approach "does not take into account actual spending patterns as they relate to variable costs, or the fact that fixed costs of the recipient parent are not reduced by the increased spending of the payor parent".

[85] Thus, the court retains a discretion to modify the set-off amounts, where considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to the other (at ¶51):

one of the overall objectives of the Guidelines is, to the extent possible, to avoid great disparities between households. It is also necessary to compare the situation of the parents while living under one roof with the situation that avails for each of them when the order pursuant to s. 9 is sought. As far as possible, the child should not suffer a noticeable decline in his or her standard of living. Still, it is not a discretion that is meant to set aside all rules and predictability. The court must not return to a time when there was no real method for determining child support (*Paras v. Paras*, [1971] 1 O.R. 130 (C.A.)).

- [86] Mr. Blair indicates his own income from self-employment to be approximately \$55,000 per year. However, as I indicated earlier, his financial information is incomplete and unsatisfactory in the circumstances. In any event, as I discussed earlier, Morrison J. imputed to Mr. Blair an annual income of \$60,000, based on his qualifications and his earning ability, and Mr. Blair has not established a sufficient basis for variation of that order; indeed, his difficulties with alcohol and depression are, happily, well behind him.
- [87] For the purposes of the analysis under s. 9, Mr. Blair's income will therefore be treated as \$60,000 per year.
- [88] Ms. Maultsaid's income is less, if based only on her income from UBC (now \$49,761), and is about the same, if it also includes her income from tutoring. By an ordinary set-off approach, she would pay no child support to Mr. Blair.
- [89] That conclusion is fortified by the recognition, in s. 9, that the total costs of raising children in shared custody situations may be greater than where there is sole custody: *Contino v. Leonelli-Contino* at ¶52. Ms. Maultsaid provided the children's primary residence for several years after the separation, with little assistance from Mr. Blair. Only in approximately January 2006 did Mr. Blair seek a change in the children's primary residence, which Wong J. ordered as of September 2006. In the circumstances, including the ages of the boys, it was - and remains - reasonable and in the boys' best interests for Ms. Maultsaid to maintain her present or a similar home where they each have a bedroom.
- [90] The parties here each claim to pay numerous expenses on the boys' behalf. Mr. Blair asks for an order that Ms. Maultsaid contribute to the boys' extraordinary expenses. Ms. Maultsaid maintains that she already does so, by paying expenses (such as for tutoring or driving instruction) that Mr. Blair fails to recognize as necessary.
- [91] The court in *Contino v. Leonelli-Contino* at ¶71 noted that the breadth of s. 9 allow for the examination of extraordinary (or s. 7) expenses, as part of the children's overall financial support:
- given the broad discretion of the court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines can be examined directly in s. 9 with consideration of all the other factors. Section 9(c) is conspicuously broader than s. 7.
- [92] In the circumstances, I conclude that the application of s. 9 should include a consideration of the children's extraordinary expenses.
- [93] Although the parties dispute whether the various expenses they each pay are properly characterized as extraordinary expenses, and, as to some expenses, whether they are reasonable and necessary, the various expenses, even in the aggregate, are not significantly out of line with the parties' means. It appears that, at present, Ms. Maultsaid pays slightly more for such expenses than does Mr. Blair; however, some of the expenses Ms. Maultsaid pays will likely be required only over the short-term.

[94] In all the circumstances, I conclude that Ms. Maultsaid should pay to Mr. Blair roughly one half of the extraordinary expenses he identifies as amounting to approximately \$2,700 per year total, and should also pay the costs of any academic tutoring and the boys' driving instruction, should they learn to drive. Ms. Maultsaid's fixed monthly contribution will be \$125, and will not vary with changes in the types of activities or endeavours the boys undertake, unless the changes are substantial (such as for attending university). The additional costs of private tutoring and of driving instruction will be Ms. Maultsaid's sole responsibility.

[95] There will be no basic child support payable as between the parties on their present table incomes.

4. SHOULD MS. MAULTSAID BE REQUIRED TO PAY CHILD SUPPORT RETROACTIVELY TO SEPTEMBER 2006?

[96] The child support order I have made under s. 9 is intended largely to reflect the reality that has existed since the boys changed their primary residence in September 2006. It follows, and accords with the principles governing retroactive applications for child support, as discussed in *D.B.S. v. S.R.G.*, [2006] S.C.R. 231, that the order should apply as of that time. I so conclude despite Mr. Blair's delay in making application.

[97] To be clear, the order will apply retroactively to September 2006 to require Ms. Maultsaid to pay to Mr. Blair \$125 per month. Those amounts may be paid by way of deduction from the outstanding arrears due to Ms. Maultsaid.

[98] As to any other extraordinary expenses the parties may have paid between September 2006 and the present, no retroactive order is made.

SUMMARY OF CONCLUSIONS

[99] The order requiring Mr. Blair to pay child support is varied to terminate that obligation as of September 1, 2006.

[100] Mr. Blair's application for retroactive reduction (by way of variation) of his child support obligation for the period January 1, 2003 through September, 2006, is denied.

[101] Mr. Blair's alternative application for cancellation or reduction of child support arrears relating to that period, and interest on the arrears, is also denied, except that, as Ms. Maultsaid agrees, and for clarity, no arrears arise in respect of the month of September, 2006.

[102] There will be no basic child support payable as between the parties on their present table incomes.

- [103] For the boys' extraordinary expenses, Ms. Maultsaid will pay Mr. Blair \$125 each month, and will also have sole responsibility for any costs of academic tutoring or driving instruction. The fixed monthly amount will not vary with changes in the boys' activities, unless the changes are substantial.
- [104] The order requiring Ms. Maultsaid to pay \$125 per month applies retroactively to September 2006, and may be paid by way of deduction from the outstanding arrears due to Ms. Maultsaid.
- [105] As to any other extraordinary expenses the parties may have paid between September 2006 and the present, no retroactive order is made.
- [106] The parties also agree that they will share equally upcoming orthodontic expenses. Those expenses will consist of any amounts payable after any coverage by Ms. Maultsaid's extended health and dental plan.
- [107] Those are my reasons. Does anything require clarification?
- [108] MR. UNTERMAN: I don't remember the motion, My Lady, but my client is going to have a problem because he is going to, under this order, not only have to pay all of his share of expenses for the children but, effectively, there's going to be support payable the other way. He is -- although she only has the children 40% of the time, is going to have to be paying all those arrears of support to Ms. Maultsaid. It seems to me that at the very least there should be a stay of those payments or else the balance is not going to be what's contemplated by your order.
- [109] THE COURT: I do not believe I have a motion for a stay of the arrears. I believe I have a motion for a cancellation or a reduction. So you can raise it with me if you wish, but I can look in the chambers record if you wish. Do you have your copy with you?
- [110] MR. UNTERMAN: I don't have it with me, sorry. My friend has a copy. Yes.
- [111] THE COURT: Yes, actually, you are right.
- [112] MR. UNTERMAN: "Alternatively the payment of an enforcement of payment be suspended" and "no further accumulation of interest."
- [113] THE COURT: Well --
- [114] MR. UNTERMAN: Because in these circumstances what it means is there is that debt and, in addition, the Revenue Canada debt. He has no -- although he has the children 60 percent of the time, he has no basic support coming. The incomes are the same.
- [115] THE COURT: You are quite right that that request is there in the notice of motion. I do not remember hearing submissions as to the eventuality that if my orders were as they now are I do not remember anything specifically on suspension. Ms. Howard, are you in a position to respond?

- [116] MS. HOWARD: No, sorry, I'm not.
- [117] THE COURT: So I do not know what to suggest, Mr. Unterman.
- [118] MR. UNTERMAN: Well, I'm in your hands, My Lady. It seems quite --
- [119] THE COURT: What are you proposing?
- [120] MR. UNTERMAN: That the balance -- if what is to be achieved is a balance that nobody pays anybody anything except for the \$125 towards extraordinary expenses --
- [121] THE COURT: No, no, the first considerable part of my reasons was addressed to denying the application to retroactively reduce the arrears. I am well aware that those arrears are there. If you have a specific suggestion as to suspension for a period of time to permit a payment plan, I will certainly hear it, subject to a proper opportunity for a response, obviously.
- [122] MR. UNTERMAN: Well, then, I guess what we need to do is set a date. I don't know what else to say.
- [123] THE COURT: I am going to be unavailable for a period of time. You will not be able to get back in front of me for at least a month. So what I will do is add to today's order that the requirement on Mr. Blair to pay the arrears of child support is suspended for six weeks with the exception of \$500 which should in any event be paid -- I do not want to simply put the entirety of the matter on hold -- and Mr. Blair's application for further suspension of the arrears is adjourned with liberty to set it down for argument before me. Does that answer the difficulty to some extent?
- [124] MR. UNTERMAN: If we can get to appear in front of you in the six-week period, yes.
- [125] THE COURT: It should not be too difficult. If need be, I could hear the matter by telephone if I am out of town.
- [126] MR. UNTERMAN: I just don't know what my learned friend's availability is.
- [127] MS. HOWARD: I don't, either, sorry.
- [128] THE COURT: Well, if for some reason Ms. Dunnaway is completely unavailable, you can certainly, even by telephone, arrange to seek a further adjournment.
- [129] MR. UNTERMAN: All right.
- [130] THE COURT: All right. Thank you.
- [131] MR. UNTERMAN: Thank you.
- [132] THE CLERK: Order in chambers. Chambers is adjourned.
- [133] MR. UNTERMAN: Oh, costs?
- [134] THE COURT: I am not going to make an order as to costs. Each party will bear their own.

[135] The other thing I will say is that I will order a transcript of these reasons so that they are available. The parties will not need to do that. They will not likely be finalized for about a month, so do not be surprised if you have not received them before then. However, the process will be underway and they will be produced.

"H. Holmes, J."

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