
CANADA / JUDGMENT

R.E.Q. v. G.J.K.

2019 BCSC 1116

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1116 R.E.Q. v. G.J.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.E.Q. v. G.J.K.,

2019 BCSC 1116

Date: 20190709

Docket: E101823

Registry: Vancouver

Between:

R.E.Q.

Claimant

And

G.J.K.

Respondent

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Claimant:

J.E. Davison, Q.C.

Counsel for the Respondent:

D.R. Greig

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 12 and 13, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 9, 2019

I. BACKGROUND

- [1] These are family law proceedings. The parties are not newcomers to this Court. There has been a trial, proceedings in the Court of Appeal, and several applications in this Court.
- [2] The claimant R.E.Q and the respondent G.J.K. are both lawyers. They began to cohabit in May 1992 and were married in September 1993. They separated on February 17, 2008. They were divorced on May 3, 2011.
- [3] The parties practised law together at the same firm in Maple Ridge for approximately 13 years. The respondent moved his litigation practice to a firm in downtown Vancouver in 2008. The claimant's employment with the Maple Ridge firm also terminated at that time. The claimant practises in the area of wills and estates. She obtained employment with another firm in Maple Ridge, but her services were terminated in December 2010 when that firm merged with another Maple Ridge law firm.
- [4] The claimant was unable to find employment in Maple Ridge and eventually found a position in Calgary commencing July 2012.
- [5] The claimant and respondent have two children V.K. (born May 17, 1997) who is now 21 and A.K. (born April 9, 2003) who is 16. V. is in her fourth year of undergraduate studies at the University of Calgary. A. is in grade 10 in Calgary as well.
- [6] Both children lived with their mother from February 2008 until August 2012. From August 2012 to August 2015, the parties had shared parenting on a week on - week off basis. The claimant travelled to Maple Ridge for alternate weeks of parenting.
- [7] From August 2015 to September 2016, V. lived with her mother in Calgary. The claimant continued to commute to Maple Ridge regularly to parent A. on a week on - week off basis.
- [8] Commencing in September 2016, both children lived with their mother in Calgary. The respondent travels to Calgary to have parenting time with the children.
- [9] A trial was conducted in front of Mr. Justice Curtis in 2010. On December 17, 2010, he made an order which dealt with the determination and division of most of the assets. The court reserved judgment on the remaining issues and issued an order and Reasons for Judgment on May 3, 2011.

- [10] Justice Curtis dismissed an application by the claimant to relocate A. and V. to Calgary. He also made an interim order that the children's primary residence remain with the claimant.
- [11] That decision was upheld by the Court of Appeal: *R.E.Q. v. G.J.K.*, 2012 BCCA 146.
- [12] In 2014, the claimant applied to vary the 2011 final order to allow her to relocate their son A. to Calgary. This application came before Madam Justice Fleming in September 2015. She ordered A. to:
- [40] undergo an assessment conducted by a qualified psychologist who will consider his views and wishes, if he agrees to participate. The assessment will examine A.'s views and wishes in relation to the change in his conditions, needs, and circumstances resulting from the claimant's application to relocate him to Calgary, bearing in mind the circumstances that existed at the time of the final order, but also the reality that the parties have had shared equal parenting of A. for the past three years. The assessment will also consider whether A.'s views and wishes have been unduly affected by the claimant. In the event the parties are unable to agree upon a psychologist, they are at liberty to appear before me.

(2015 BCSC 1786 at para. 40)

- [13] In 2015, the parties appeared before Mr. Justice Pearlman. On March 20, 2015, he addressed what he called "the outstanding issues": child support, including special and extraordinary expenses, and the division of the parties' RBC Dominion securities account. Justice Pearlman determined the respondent's 2011, 2012, and 2013 guideline income to be \$202,132.78, \$212,757, and \$239,789 respectively.
- [14] The matter came back before Fleming J. who published her decision on August 17, 2016: *R.E.Q. v. G.J.K.*, 2016 BCSC 1498. Justice Fleming concluded that it was in the best interests of A. that the order be varied to permit him to move to Calgary to live with the claimant. V. was already attending university in Calgary.
- [15] Both children now live with the claimant in Calgary. The respondent travels to Calgary to see them.

II. ISSUES

- [16] I will begin by addressing the respondent's objections to the claimant's affidavits and Amended Notice of Application.
- [17] The next issue is a determination of each party's guideline income for 2014, 2015, 2016 and 2017. I will then consider each of the claimant's applications. She seeks:
1. An order for a contribution by the respondent for expenses incurred by the claimant as a result of the shared parenting arrangement from August 2012 until September 2016;
 2. An order directing the respondent to contribute his proportionate share of section 7 expenses from 2014 to 2017;

3. An order that the respondent require his extended health care provider to provide reimbursement to the claimant directly for the children's healthcare costs;
4. An order directing the respondent to maintain a life insurance policy of \$500,000;
5. An order that the respondent's Canada Pension Plan contributions be divided between the parties; and
6. Special costs.

[18] I note at the outset that the claimant sought many orders but did not mention them all in oral argument. That is no doubt because the vast majority of the trial was devoted to the dispute concerning the respondent's income. While that is understandable, it leaves the Court unable to adjudicate on some of the other issues.

III. OBJECTIONS TO CLAIMANT'S AFFIDAVITS AND PLEADINGS

[19] The respondent objects to two aspects of the claimant's materials. First, he says the affidavit materials are rife with argument, hearsay and irrelevancies. Second, the Amended Notice of Application does not comply with the Supreme Court Family Rules, R. 10-6 and Form F31.

[20] Both objections have considerable merit.

[21] The principal flaw with respect to the claimant's affidavits is that they contain argument and hearsay. Examples of argument are found in the claimant's affidavit filed April 4, 2018:

6. The Respondent has refused to answer why he is leaving significant funds behind in his law corporation and continues to insist that his Guideline Income for the purposes of child is [sic] support is much lower than what is actually available to him
7. The Respondent pays child support in the amount that he "feels" is sufficient despite the fact that the amount he is paying is based on an amount significantly less than what he "claims" his Guideline Income to be
9. When the Respondent provided the 2016 Financial Statements for his Professional Law Corporation in the summer of 2017 it became very apparent that the Respondent had been and was continuing to significantly underpay his child support obligation

[22] There are further examples in the claimant's affidavit filed October 18, 2018:

7. The Respondent continues his refrain that I intentionally earn less than what he does - this is nonsense. It will never be possible for me to earn what the Respondent earns given that, as our daughter said after taking a sociology course at university - "Mom, you got on the 'mommy track' and Dad got on the 'partnership track'".
41. I receive a base salary of \$80,000 with bonus structure once I bill double my salary. That is the difference between being on the "mommy track" and the "partnership track".

45. In 2016 I had allowable moving expenses that were deducted to reduce my income. Something the Respondent is very familiar with.

47.

iii. The Respondent states that my Notice of Application is deficient but does not state in what regard.

iv. The letter from the Respondent's expert, attached as Exhibit "I" to his affidavit dated May 30, 2018 states on page 2 at paragraph 4, that "a review of the financial statements of the corporation in this case shows that there is no excess money retained at the end of any given year." The Financial Statements for the Respondent's Law Corporation show clearly that the retained earnings in his law corporation increased year over year as follows over the past 4 years since Justice Pearlman's decision:

55. With respect to the Respondent's claims for section 7 expenses I state as follows:

i. With respect to 2014, should the Respondent not be required to contribute to clothing expenses incurred for [V.], then the same should apply to myself;

[23] An affidavit must only include content that the affiant would be permitted to state as evidence in trial: Supreme Court Family Rules, R. 10-4(12). Argument is not evidence. It is not admissible in an affidavit.

[24] I will not consider the portions of the affidavits that amount to argument. I note that argument in affidavits can also have cost consequences: The Sovereign General Insurance Co. v. McNeill, 2007 BCSC 988 at paras. 17-19, 21.

[25] I turn to the notice of application. Rule 10-6(3) of the Supreme Court Family Rules provides:

Contents of notice of application

(3)A notice of application must be in Form F31 and must

- (a) set out the orders sought or attach a draft of the order sought,
- (b) briefly summarize the factual basis for the application,
- (c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted,
- (d) list the affidavits and other documents on which the applicant intends to rely at the hearing of the application,
- (e) set out the applicant's estimate of the time the application will take for hearing,
- (f) subject to subrules (4) and (5), set out the date and time of the hearing of the application,
- (g) set out the place for the hearing of the application in accordance with Rule 10-2, and
- (h) provide the data collection information required in the appendix to the form,

and the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length.

[Emphasis added.]

- [26] The claimant's Amended Notice of Application falls far short of compliance. In "Part 1: Orders Sought" the claimant sets out 14 orders which she seeks. I have summarized them above in paragraph 17 of these reasons.
- [27] "Part 2: Factual Basis" sets out the background facts in 20 paragraphs. However there are no "facts supporting" the extended health benefit claims, the life insurance relief, the Canada Pension Plan relief or special costs.
- [28] Under "Part 3: Legal Basis" the claimant sets out a summary of the legal argument concerning the respondent's income and child support obligations. It is a perfectly adequate summary with citation of applicable cases.
- [29] There is one paragraph of argument concerning life insurance. There is one paragraph regarding the respondent's health care provider reimbursing the claimant directly:
15. The Respondent has extended benefits available to the children however as the children are primarily in the Claimant's care she is the one who pays for the various expenses, including eyeglass prescriptions, speech therapy, chiropractic, massage and physiotherapy for the children. The Respondent has made it a practice to retain the reimbursement of these costs provided by his extended benefits provider notwithstanding that they were paid by the Claimant and should properly be reimbursed to her.
- [30] This paragraph clearly belongs in "Part 2: Factual Basis". These are "facts supporting the application". There is no legal argument.
- [31] There is nothing in "Part 3: Legal Basis" for the Canada Pension Plan claim.
- [32] Finally, and significantly, there is an extensive claim for section 7 expenses but there is no mention of this claim in either Part 2 or Part 3 of the Amended Notice of Application.
- [33] The importance of complying with these procedural rules is discussed in *Zecher v. Josh*, 2011 BCSC 311; *Dupre v. Patterson*, 2013 BCSC 1561; and *Yake v. Chamberlain*, 2014 BCSC 1582. In *Dupre*, Madam Justice Adair set out the concerns relating to deficient application materials:
- [44] Before concluding, I wish to say a few words about the material filed.
- [45] The defendant's notice of application filed July 3, 2013, did not comply with the Supreme Court Civil Rules. The complete "Factual Basis" for the summary trial was set out on about three pages, double spaced. The "Legal Basis" section said in its entirety:

1. Rule 9-7

2. Rule 14-1(12) - costs
 3. Motor Vehicle Act, RSBC1996, c. 318, Part 3, section 183(2)(c).
- [46] There was not even a brief statement to the effect of "The court should dismiss the action because" and then setting out the reason or reasons why, in the defendant's submission, that should be the result.
- [47] In *Zecher v. Josh*, 2011 BCSC 311, Master Bouck was faced with a similar situation, where the Legal Basis section in particular of the notice of application was wholly inadequate. Master Bouck described what was required in order to comply with the Rules and said:
- [29] The defendants' application for production of wage loss particulars and a calculation of any wage loss claim was dismissed due to the inadequacy of the material and argument presented. Both the factual and legal basis for the application are wanting.
- [30] Form 32 of the SCCR [Supreme Court Civil Rules] lends itself to providing both the opposing party and the court with full disclosure of the argument to be made in chambers. Parties should put in as much thought to the necessary content of that Form as is done when preparing the supporting affidavits. When a party is represented, responsibility for that content lies with counsel.
- [31] No doubt the Lieutenant Governor-in-Council intended Part 3 of Form 32 to contain more than a cursory listing of the Rules that might support the particular application. For example, common law authorities can and should be included as well as a brief legal analysis. Such an analysis is particularly helpful given that parties are not able to present a separate written argument in civil chambers unless the application is scheduled to take two hours or more of court time.
- [32] In my experience and observation, a comprehensive legal analysis can easily be included in a 10-page notice of application. As well, Rule 8-1(4) allows the parties to include a list of authorities in the application record.
- [33] By providing an effective analysis of the legal basis for (or against) making the order, the parties may well be able to resolve the application without attending court.
- [34] As an aside, I should note that the sparse content of this particular notice of application is unfortunately not unique; many such inadequate notices have been presented in chambers.
- [48] I agree with and adopt Master Bouck's comments concerning what a notice of application must contain. The same will apply with respect to an application response (Form 33), and the notice of application and application response under the Supreme Court Family Rules (Forms F31 and F32).

- [49] In Fraser, Horn and Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (Markham: LexisNexis, 2007) one of the leading texts on practice and procedure, the authors say this concerning the "Legal Basis" section of a notice of application, at p. 32-3 [notes omitted]:

The notice must set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the order sought should be granted (Rule 8-1(4)(c)). If appropriate, applicable cases may be cited. The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

- [50] The requirements under the current Rules represent a fundamental change from the practice under the former Rules of Court. Under the former Rules, Rule 44(3) and Form 55 (the form of notice of motion) only required a bare statement of the Rule or enactment relied upon. An outline (see Form 125 and former Rule 51A(12)), outlining the legal arguments to be made, was then delivered later in the exchange of motion materials and prior to the hearing. That is not the practice under the current Rules.
- [51] If a notice of application does not contain the information now required under the Rules, the party filing it has failed to give proper notice - to the opposing party and to the court - of the nature of the application. However, all too frequently, counsel in both civil and family cases are signing and filing inadequate notices of application and application responses. The notice of application filed in this case was not at all unique. However, such documents do not comply with the Rules.
- [52] In contrast to the bare-bones notice of application filed on behalf of Ms. Patterson, the application response was comprehensive and, in the page limit allowed under the Rules, set out both a detailed summary of the facts and an analysis of the legal basis on which the plaintiff said the court should find the defendant liable. It represents the standard expected by the court.
- [53] In this case, the inadequacy of the notice of application was compounded by defendant's counsel tendering a 14-page written submission at the hearing. Since the hearing was estimated and set for 90 minutes, this was in breach of Rule 8-1(16).
- [54] Rarely will a judge or master refuse to receive a written argument from counsel, provided it is not being used to "sandbag" or take the opposition by surprise. However, tendering a written argument at the hearing is neither an alternative to, nor a substitute for, setting out the "Legal Basis" in a notice of application or an application response in accordance with what the Rules and the case law require.

- [55] When counsel come to court with inadequate materials, which fail to comply with the Rules, judges and masters are placed in a very difficult position. What often happens is that, to avoid the inconvenience and expense of an adjournment, matters proceed despite the inadequate materials, and judges and masters do the best they can in the circumstances. But inadequate motion materials, which fail to comply with the Rules, are incompatible with the efficient and timely disposition of applications.
- [56] If counsel are coming to court with inadequate material that clearly fails to comply with the Rules, and counting on being heard, they are misguided. Judges and masters are entitled to expect that counsel will prepare application materials (including affidavits) that comply with the Rules, and do no less than this. Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed.
- [34] The respondent's objections to argument in the affidavits and to non-compliance with Rule 10-6(3) are interrelated. As can be seen from the above examples of argument in the claimant's affidavits, the process has been almost turned on its head. The affidavits contain extensive argument. The Amended Notice of Application does not set out the factual or legal basis in respect of several of the orders sought.

IV. RESPONDENT'S GUIDELINE INCOME

- [35] The claimant's case is based on two well accepted principles:
1. A payor spouse has an obligation to increase the amount of child support he pays in accordance with increases in his income year-over-year, in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines] and if he fails to do so, he has not fulfilled his obligation to the children of the marriage as set out in *D.B.S. v. S.R.G.*, 2006 SCC 37; and
 2. Spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation: *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 39.
- [36] The challenge in this case is a determination of the respondent's guideline income for each of 2014, 2015, 2016, and 2017.
- [37] The respondent is a partner in the Vancouver law firm MacKenzie Fujisawa LLP. He is also a director of MFB Management Ltd., the management company through which MacKenzie Fujisawa manages the partnership. His income is earned through his professional services corporation, (the "Law Corporation").
- [38] Both parties adduced expert evidence on the proper calculation of the respondent's income.

A. Positions of the Parties

- [39] The parties' positions respecting the four years from 2014 to 2017 are as follows:

2014

[40] The claimant argues that the share of partnership income allocated to the Law Corporation is \$326,688. The claimant is entitled to deduct accounting fees (\$2,987) and bank and interest charges (\$3,175). The income available to him was therefore \$320,526.

[41] The respondent's position is that his 2014 income was \$207,000.

2015

[42] The claimant points to the partnership income allocated to the Law Corporation of \$419,622 plus interest income of \$486, less accounting (\$2,625) and interest and banking charges (\$3,106). The income available to him was therefore \$414,377.

[43] The respondent states his income for 2015 was \$275,000.

2016

[44] The claimant points to the partnership income allocated to the Law Corporation of \$599,891 plus interest income of \$195 less accounting fees (\$2,730) and bank and interest charges (\$3,396) so the income available to him is \$593,960.

[45] The respondent says his income for 2016 was \$396,000.

2017

[46] The claimant points to the partnership income allocated to the Law Corporation of \$562,276 plus \$409 in interest income, less accounting fees of \$3,203 and interest and banking expenses of \$3,154. Thus, the income available to him is \$556,328.

[47] The respondent's position is that his 2017 income was \$452,000.

[48] To summarize, the claimant's position is that the respondent's income for the applicable years is as follows:

2014

\$320,526

2015

\$414,377

2016

\$593,960

2017

\$556,328

[49] The respondent asserts his income for those years is as follows:

2014

\$207,000

2015

\$275,000

2016

\$396,000

2017

\$452,000

B. The Law

[50] A determination of guideline income requires a consideration of ss. 16 to 20 of the Guidelines.

[51] In *Brown v. Brown*, 2014 BCCA 152, Mr. Justice Groberman described the legislative scheme succinctly at para. 16:

[16] The legislative scheme for determining Guideline income is fairly straightforward. A court begins, under s. 16 of the Guidelines, with the "total income" from the payor parent's tax return and then makes specified adjustments. Next, the court is entitled to take further specific considerations into account under ss. 17-20 of the Guidelines to determine Guideline income. This Court outlined the steps in *Vincent v. Vincent*, 2012 BCCA 186:

[35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.

[52] The court in *Brown* underlined the importance of the objectives set out in s. 1 of the Guidelines:

[23] Sections 17-20 of the Guidelines allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the Guidelines. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the Guidelines with a view to advancing the objectives set out in s. 1.

[53] In *Vincent v. Vincent*, 2012 BCCA 186, the court discussed the application of the exceptions listed in ss. 17 to 19 of the Guidelines and how they may further apply to determine guideline income:

- [36] Section 17 gives the court discretion to deal with the problem of an income which fluctuates from year to year and with non-recurring income or losses such that the determination of a spouse's income under s. 16 is not the fairest determination of that income. As it relates to this case, this provision permits the inclusion of non-recurring capital gains and the exclusion of non-recurring dividends.
- [37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.
- [38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.
- [54] The point is to ensure that a payor's guideline income reflects the money reasonably available for child support purposes: see *Richardson v. Richardson*, 2013 BCCA 378 at paras. 54-55; and *Andreassen v. Andreassen*, 2016 BCSC 1196 at para. 62.
- [55] Section 18 of the Guidelines states:

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[56] Madam Justice Huddart set out the proper approach to s.18 in *Kowalewich v. Kowalewich*, 2001 BCCA 450. At para. 28, she quoted from *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) where Justice Martinson explained the purpose of s. 18 as follows:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. [Citations omitted.]

[57] The court should consider the legitimate business needs in determining what portion of the corporation's pre-tax income should be included for calculating support: *Kowalewich* at para. 59. This includes a consideration of "the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business": *Kowalewich* at para. 58. However, "[a] court's effort to ensure fairness does not require a court to second-guess business decisions": *Kowalewich* at para. 44.

[58] The court has cautioned that "[m]onies needed to maintain the value of the business as a viable going concern will not be available for support purposes": *Kowalewich* at para. 58. In other words, the court should avoid "killing the goose who lays the golden eggs": *Kowalewich* at para. 58.

[59] I will begin by considering whether money is being kept in the respondent's Law Corporation that should be included in his guideline income for the purposes of child support. I will then consider whether any of the corporate expenses should be added back into the respondent's guideline income.

[60] As discussed further below, the respondent bares the onus on both of these issues.

C. Is Money Being Kept in the Law Corporation that Should Be Included in the Respondent's Guideline Income?

[61] Under s. 18, the onus is on the respondent to provide evidence that some of the Law Corporation's pre-tax income must be kept in the company for valid business reasons, and is therefore not available for support: *Lupien v. LeBlanc*, 2019 BCSC 431 at para. 85; *Worsfold v. Worsfold*, 2018 BCSC 45 at para. 71; *Ursel v. Ursel*, 2014 BCSC 1219 at para. 25; *Richardson v. Richardson*, 2013 BCCA 378 at para. 34; *Hadjioannou v. Hadjioannou*, 2013 BCSC 43 at para. 67; *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51, 52.

[62] The Court of Appeal has held that "in the absence of clear evidence to the contrary, the pre-tax income of a corporation controlled by a payor will be assumed to be available for child support purposes": *Richardson* at para. 56.

[63] In "Lifting the Corporate Veil: Income Determinations for Shareholders, Directors and Officers Under Section 18 of the Federal Child Support Guidelines" (2012) 31 C.F.L.Q. 1, Dinyar Marzban, Q.C., and Jamie Wood observe that "[p]lacing this reverse onus on the

payor parent realistically addresses the fact that the shareholder, director or officer is typically more knowledgeable about the business than the support recipient. Consequently, the payor parent is usually better positioned than the support recipient to explain to a court why some or all of the company's pre-tax income is not available for support" (p. 4).

[64] For professional services corporations (such as the respondent's Law Corporation), the onus may be heavier to show why some of the company's net pre-tax income is not available for support purposes. In *A.R.J. v. Z.S.J.*, 2009 BCSC 1662, Mr. Justice Savage (as he then was) explained at paras. 21-22 that personal services corporations generally do not require significant injections of capital from time to time and thus, absent evidence of legitimate calls, the pre-tax income should be used to calculate support. Other cases have made similar observations about professional services corporations: *M.S. v. M.M.*, 2015 BCSC 1599 at paras. 251-253, rev'd on other grounds 2017 BCCA 155; *Krupa v. Krupa*, 2010 BCSC 1400 at paras. 77-84; *Teja v. Dhanda*, 2009 BCCA 198 at para. 13.

[65] I will consider the expert evidence adduced by both parties with these principles in mind.

i. Evidence of Mr. Michael Nice

[66] The claimant presented a report from Mr. Nice, a Chartered Professional Accountant who is also qualified as a "Certified Divorce Financial Analyst". This is a designation Mr. Nice obtained quite recently. He testified that it is a product of an online course in the United States and that it has a Canadian "component". Mr. Nice has not testified as an expert before.

[67] I am satisfied that he is qualified to give expert opinion as a Chartered Professional Accountant about the respondent's financial statements.

[68] Mr. Nice reviewed the Law Corporation's financial statements and income tax returns as well as the respondent's personal income tax returns. He provided calculations of the respondent's guideline income under both s. 16 and s. 18 for each year as follows:

Section 16

1. \$451,923 for the year 2017.
2. \$396,264 for the year 2016.
3. \$275,483 for the year 2015.
4. \$206,376 for the year 2014;

Section 18

1. \$535,273 for the year 2017.
2. \$572,915 for the year 2016.
3. \$398,519 for the year 2015.

4. \$307,587 for the year 2014.

[69] Although Mr. Nice calculated guideline income based on s. 18, he provided no opinion on the pivotal question under that section. Section 18 only comes into play where the court "is of the opinion that the amount of the Spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support".

[70] As discussed below, this was the subject of the expert opinion of Ken Bulthuis.

ii. Evidence of Mr. Ken Bulthuis

[71] Mr. Bulthuis is a Chartered Professional Accountant who prepared the financial statements for the Law Corporation and the respondent. He states in his report:

Further, as noted, section 18 suggests that it could apply if annual income under Section 16 "does not fairly reflect all the money available". A review of the financial statements of the corporation in this case shows that there is no excess money retained at the end of any given year. Rather, the financial statements reflect that [the respondent] withdrew all available cash money in each year, whether by salary or by taxable dividends. Absent certain timing differences between the reporting date of December 31 and the actual cash flows, this is evident from the financial statements, as well as the personal income tax returns which were used to calculate Guideline income under Section 16.

Given that [the respondent] continues to regularly withdraw all available cash, after payment of corporate income taxes, from his corporation, and uses a substantial amount of that cash to ensure his personal taxes are also paid each year, the continuing use of the Section 16 approach to calculating Guideline income, as adopted by the court in 2015, appears to be fair and reasonable.

[72] Mr. Bulthuis was cross-examined at length.

[73] The claimant's counsel took particular exception to the 2017 year. Counsel pointed to the drawing from the partnership to the Law Corporation of \$669,974.

[74] However, Mr. Bulthuis pointed out that in 2016, the Law Corporation's financial statements show that the liabilities exceeded the assets by \$115,000. Part of the large draw in 2017 serves to regularize that shortfall.

[75] Counsel for the claimant also pointed to the fact that at December 31, 2017, the Law Corporation's statements show cash of \$155,583. It was suggested to Mr. Bulthuis that surely money was available and those were excess funds.

[76] Mr. Bulthuis disagreed. He explained that the figure of \$155,583 was arrived at by making adjustments after the year end. But he also explained that the corporation had liabilities of \$149,078. He continued to maintain that there was no excess money as, he said, assets are needed to cover liabilities.

[77] Mr. Bulthuis also explained that the 2017 net earnings of the Law Corporation of \$306,039 were virtually the same as the dividends paid out: \$305,500. So, Mr. Bulthuis maintained there was no excess. There is no cash being dammed up in the corporation. The retained earnings only went up by \$500 in 2017.

[78] At no time in cross-examination did Mr. Bulthuis resile from his evidence that "there was no excess money retained at the end of any of the four years."

iii. Analysis

[79] Mr. Bulthuis is a senior, accomplished accountant. He is very familiar with the respondent's financial statements. His evidence was straightforward and persuasive. He gave clear explanations for any apparent discrepancies between the corporation's net pre-tax income and the amounts paid out to the respondent in the applicable years.

[80] Significantly, Mr. Bulthuis' evidence is also uncontradicted. Mr. Nice had not considered whether s. 18 was or was not engaged. That was not part of the terms of his engagement.

[81] The uncontradicted expert evidence on this point persuades me that the respondent is not keeping funds in the Law Corporation that should be made available for support.

[82] However, that does not end the matter. I must still consider whether any corporate expenses should be added back into the respondent's guideline income.

D. Deductions for Corporate Expenses

[83] For a spouse who earns income through a corporation, the court can add back corporate expenses under either s. 18(2) or s. 19(1)(g) of the Guidelines: Lupien at para. 85.

[84] Under s. 18(2), any payments or benefits to non-arm's length persons must be added back into the corporation's net income unless the spouse establishes the payments were reasonable. As set out by Mr. Justice Armstrong in *Schneiders v. Owers*, 2019 BCSC 528 at para. 467, this includes corporate expenses that have a personal component or are part of the spouse's ordinary living expenses. The fact that an expense is deductible for income tax purposes does not mean it will be reasonable for child support purposes:

[467] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. Under section 18 of the CSG, the onus is on the payor to provide evidence that some or all of the corporation's pre-tax income is not available to the payor for the purposes of support. Deductions from corporate income must be reasonable and for legitimate business purposes - per s. 18(2) of the CSG, where deductions include expenses which provide a personal benefit or constitute ordinary living expenses of a shareholder, officer or director, those expenses should also be added back to the pre-tax corporate income that thus becomes available for support purposes. Per section 19(2) of the CSG, the reasonableness of an expense deduction is not solely governed by whether the

deduction is permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) See D.M.B. at para 150, citing Ursel v. Ursel, 2014 BCSC 1219.

See also: Ursel at para. 26; Stevens v. Stevens, 2012 BCSC 1698 at para. 16.

[85] The payor has the onus of proving the reasonableness of expenses deducted from his or her income, whether through a corporation or self-employment: Schneiders at para. 467; Lupien at para. 85.

[86] In 2015, Pearlman J. did not add back any corporate expenses except amortization (which was agreed to by the parties) and a portion of the 2014 rental expense. That history does not obviate the need for the court to consider the expense deductions for the fiscal years at issue in the present litigation, nor does it affect the respondent's onus under s. 18(2).

[87] There are various expenses claimed for income tax purposes which must be examined for determining guideline income.

2017

2016

2015

2014

Accounting Fees

3,203

2,730

2,625

2,987

Interest and Bank Charges

3,154

3,396

3,106

3,175

Meals & Entertainment

5,842

4,963

3,234

2,061

Office

353

137

281

126

Rental

5,540

4,529

4,476

4,479

Travel

745

3,597

605

167

Vehicle Expenses

8,189

7,489

6,931

5,698

[88] The reasonableness of corporate expenses is raised in both parties' pleadings. However, at hearing, counsel did not lead evidence or make submissions on whether corporate expenses should be added back into the company's net income for the purposes of calculating the respondent's guideline income.

[89] The claimant's statements regarding corporate expenses at pages 19-20 and 27 of her October 17, 2018 affidavit and page 4 of her April 4, 2018 affidavit contains impermissible argument. It is not proper affidavit evidence. The respondent provided some evidence about the nature of the corporation's expenses on pp. 11-12 of his May 30, 2018 affidavit:

[90] With respect to the rental expense, he deposed:

I do have a very active and useful home office (at both Maple Ridge, and Vancouver), and I do often prepare for trial at both venues, take calls there and often see clients and consult there. I store files there and keep research materials on hand.

[91] With respect to the deduction for meals and entertainment, he deposed:

I am responsible for my own client recruitment. In order to keep and maintain a successful practice, I regularly pursue several referral sources, colleagues, and marketing resources which respond favourably to my efforts.

[92] Finally, he addressed the deduction for vehicle expenses as follows:

I use both my truck and my car for commuting to work, to my home based office, and for interviewing witnesses, traveling to Bar Association meetings and accident venues, to courthouses outside the downtown core, and seeing doctors, experts, and others in the course of my practice. [V.] also has the use of my truck when she is here.

[93] In Mr. Bulthuis's letter of December 21, 2015, he explained how the home office rental expense is calculated:

Rent expense of \$4,479.33 for 2014 was calculated on a pro rata basis, based on the amount of square footage of his Maple Ridge home used for office and storage space (500) divided by the total square footage of the home (2,700) multiplied by the various expenses for the home. We suggest this amount is reasonable in the circumstances and no adjustment should be made to his Guideline income for rent.

[94] The same approach is taken in respect of the rent expense for 2015 and 2016 in Mr. Bulthuis's letter of July 17, 2017, and for 2018 in Mr. Bulthuis's letter of May 3, 2018.

[95] On cross-examination, Mr. Bulthuis said he did not do an analysis of the expenses because that was outside the scope of his engagement. He said he could appreciate the distinction between expenses that are deductible for tax purposes and those that are deductible for child support purposes but he was not familiar with it.

[96] I find that a portion of the meals and entertainment expense and the vehicle expense are personal in nature. I will add back those expenses at 50%.

[97] The rental expense is money paid to the respondent by the Law Corporation for use of his home office. Based on Mr. Bulthuis' evidence above, I find this rental expense effectively reimburses the respondent for a portion of his ordinary household expenses. While such a deduction may be reasonable for income tax purposes, it should be added back under s. 18(2) of the Guidelines. This conclusion is consistent with this Court's decisions in C.J.B. v. A.R.B., 2017 BCSC 1682 at para. 475 and Hadjioannou at para. 62 where rental expenses for the business use of a home office were also added back. I will add back the rental expense in full.

[98] Thus, I calculate the respondent's guideline income as follows:

2017

2016

2015

2014

Meals & Entertainment Add-Back

2,921

2,481.5

1,617

1,030.5

Rental Add-Back

5,540

4,529

4,476

4,479

Vehicle Expenses Add-Back

4,094.5

3,744.5

3,465.5

2,849

Total Add-Back

12,556

10,755

9,559

8,358.50

Guideline Income Under s. 16 as Calculated by Mr. Nice

451,923

396,264

275,483

206,376

Total Guideline Income

464,479

407,019

285,042

214,735

V. CLAIMANT'S GUIDELINE INCOME

[99] The claimant's initial position in these proceedings was that her income should not be considered because there was no application by the respondent to impute income to her. She is correct that there is no such application. However, in his application response Form F32, the respondent argued that it would be reasonable to impute income to the claimant in the amount of:

2014 \$135,000

2015 \$170,000

2016 \$210,000

2017 \$390,000

[100] The claimant, then, was not taken by surprise. There was a discussion about the alternative of the respondent bringing a new application and convening a new hearing. Determination of the claimant's income is necessary for determining child support for periods up to September 2016 and for sharing of section 7 expenses. In light of that, the parties agreed that I should determine the claimant's guideline income.

[101] The claimant says her employment income for the applicable years is:

2014 \$48,000

2015 \$61,467.11

2016 \$74,544.68

2017 \$82,700.46

[102] In addition to the claimant's employment income, she had a capital gain in 2017. She did not receive any funds. She sold her home in Maple Ridge and her rental property in Calgary became her residence. That brought about a deemed disposition of the Calgary property. The capital gain (presumably the difference between the acquisition price and the 2017 market value) was taxable. She did not sell the property and received no proceeds. That "income" should have no bearing on the claimant's guideline income.

- [103] The claimant's guideline income for 2011, 2012 and 2013 was determined by Pearlman J. in his decision of March 20, 2015. He was faced with essentially the same position taken by the respondent in the proceedings before me:
- [24] I begin with the claimant's Guideline income. The respondent says that the claimant, as a lawyer who has practised for over 20 years, is intentionally underemployed; that she has the capacity to earn substantially more employment income than she is declared; and that the court should impute employment income to her of up to \$200,000. On the hearing of this application, counsel for the respondent referred to Counsel Network surveys reporting that the average income of lawyers with seven years' call is \$152,000 in Vancouver and \$200,000 in Calgary. The respondent says that claimant's declared employment income, which in 2013 was approximately \$60,000, is less than that of the first year call. In support of that position, respondent's counsel again referred to the Counsel Network survey information showing first year call salaries at \$66,000-\$79,000.
- [104] There was similar evidence put before me. Justice Pearlman reached the following conclusions for 2011, 2012 and 2013:
- [27] For 2011, the claimant has a line 150 income of \$63,742. For that year in my view it is appropriate to apply the same imputation of employment income as did Mr. Justice Curtis in his decision of May 18, 2012, for the 2010 year. Accordingly, there should be added to the claimant's declared line 150 income of \$63,742, the difference, if any, between her actual employment earnings for 2011 and \$55,000.
- [28] For 2012 I fixed the claimant's Guideline income in the amount of her line 150 income, \$106,453. I find her line 150 income to be a fair measure of her income for child support purposes.
- [29] For 2013, I note that the claimant was in her second year of practice in Calgary. The claimant is an experienced solicitor and undoubtedly has the capacity to earn employment income from the practice of law well in excess of \$60,000. However, in light of the circumstances of already touched upon, I accept it will take her some time to do so. I am not persuaded that I should impute any additional income to the claimant for the year 2013, and accordingly fix her Guideline income for 2013 in the amount of \$120,387.67.
- [105] In the years following 2013, the claimant's employment income actually declined.
- [106] The claimant's explanation for this is found in her affidavit filed October 18, 2018. The affidavit is highly argumentative but I will glean what facts I can from it.
- [107] In July 2012, she obtained employment with Fleming LLP in Calgary. On August 1, 2012 she began a shared parenting arrangement. She travelled from Calgary to Maple Ridge one weekend and back to Calgary the following weekend. That remained the case until August 2015 when the parties' daughter V. moved to Calgary to attend university. So from August 2015 on, V. lived with her full-time and A. lived with her every other week in Maple Ridge.

- [108] In August 2016, Fleming J. decided it was in A.'s best interests to move to Calgary. His primary residence is with his mother (see: 2016 BCSC 1498).
- [109] In 2014, the respondent entered into a consulting contract with Miles Davison LLP. She is presently employed full-time with that firm.
- [110] The claimant deposed that her practice is exclusively wills and estates. She receives a base salary of \$80,000 plus a bonus based on what she bills in excess of \$160,000.
- [111] As Pearlman J. noted, the respondent is a very experienced solicitor. I accept that she is working full-time in an area that is not highly remunerative. She will not earn anything like what the respondent earns. But there is no reason to expect her income should be any less than it was in 2013. I conclude that her employment income for 2014 to 2017 is imputed to be \$120,000 per year.
- [112] I note that in some years, the claimant's total income reported at line 150 includes income from sources other than employment (for example, dividends). The parties made no submissions as to whether or not there is any source of income other than employment that should be included in the claimant's guideline income. I have found above that the 2017 capital gain should not be included. I leave it to the parties to determine whether any of the other sources of income reported by the claimant for income tax purposes should also be included for the purposes of calculating support in any of the relevant years.

VI. EXPENSES ARISING FROM SHARED PARENTING

[113] This claim is described in the Amended Notice of Application as follows:

9. An order directing that the Respondent provide the Claimant with a contribution towards the costs incurred by the Claimant to implement the shared parenting arrangement from August of 2012 until September of 2016 in accordance with section 9(b) of the Federal Child Support Guidelines.

[114] In "Part 2: Factual Basis" of the Amended Notice of Application, the only reference to this claim is as follows:

13. From September of 2012 until August of 2016, the Claimant incurred significant costs to implement the shared parenting arrangement, including weekly airfare to travel between Calgary and Maple Ridge.
14. In 2014 the Claimant incurred approximately \$8,465 in travel costs to implement the shared parenting arrangements.
15. In 2015 the Claimant incurred approximately \$10,307 in travel and additional home maintenance costs to implement the shared parenting arrangements.
16. In 2016 the Claimant incurred approximately \$15,409 in travel and additional home maintenance costs to implement the shared parenting arrangements.

[115] In "Part 3: Legal Basis", the claimant says this with respect to the s. 9(b) claim:

6. With respect to the parties' respective child support obligations for 2014, when the children were in a shared parenting arrangement for the entire year, the parties' respective child support obligations should be determined in accordance with section 9 of the Federal Child Support Guidelines which provides that the amount of the child support order must be determined by taking into account (a) the amount set out in the applicable tables for each spouse; (b) the increased costs of sharing custody arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
7. It is the position that a consideration of s. 9(b) should include and reflect that the Claimant paid the bulk of the children's expenses in addition to the travel costs incurred to implement the shared parenting arrangement notwithstanding that the children were in a shared parenting arrangement. *Contino v. Leonelli-Contino*, 2005 SCC 63.

[116] The respondent argues that s. 9(b) of the Guidelines:

allows the court to adjust child support in circumstances where there is a significant difference in the standard of living in the homes of the two parents, and that difference creates an unfairness or hardship for the children: *Walling v. Holosney*, 2011 BCSC 104, and *Contino* 2005 SCC 63. But this claim is poorly described in the Application, pleaded "very late", and requires this Court to now go back in time, behind Justice Pearlman's March 2015 Order, and tinker with history. We say this relief is too little, too late, and it's too far-fetched: there is no proof anywhere of hardship or suffering by the children. This must be dismissed.

[117] Counsel for the claimant mentioned the s. 9(b) claim in describing the issues between the parties at the beginning of his submissions. He made no further reference to it.

[118] Section 9 of the Guidelines reads:

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent 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.

[119] The position of the claimant appears to be that child support should be determined having in mind that she was put to considerable travel and other expenses during the period there was shared custody, between August 2012 and August 2016.

[120] The Supreme Court of Canada analysed s. 9 carefully in *Contino v. Leonelli-Contino*, 2005 SCC 63. The Court noted at para. 23 that s. 9 "expressly provides for a particular regime in cases of shared custody". The Court held that once the threshold of 40% has been met, s. 9 warrants emphasis on flexibility and fairness. The decision states at para. 52:

2.2.2 Section 9(b) -- Increased Costs of Shared Custody Arrangements

52 What should the courts examine under this heading? Section 9(b) does not refer merely to the expenses assumed by the payor parent as a result of the increase in access time from less than 40 percent to more than 40 percent, as argued in this Court. This cannot be for at least two reasons. First, it would be irreconcilable with the fact that some applications under s. 9 are not meant to obtain a variation of a support order, but constitute a first order (see *Payne*, at p. 261). Second, as mentioned earlier, the Table amounts in the Guidelines do not assume that the payor parent pays for the housing, food, or any other expense for the child. The Tables are based on the amount needed to provide a reasonable standard of living for a single custodial parent (see *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report*, at p. 2). This Court cannot be blind to this reality and must simply conclude that s. 9(b) recognizes that the total cost of raising children in shared custody situations may be greater than in situations where there is sole custody: *Slade v. Slade*, at para. 17; see also *Colman*, at pp. 71-74; *Wensley*, at pp. 83-85. Consequently, all of the payor parent's costs should be considered under s. 9(b). This does not mean that the payor parent is in effect spending more money on the child than he or she was before shared custody was accomplished. As I discuss later in these reasons, it means that the court will generally be called upon to examine the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes.

[121] I have not had the benefit of real argument about this. There was no reliance on s. 9(b), as far as I can see, in the proceedings before Pearlman J. That is despite the fact that for the periods August 2012 to December 2013, there was shared custody. Moreover there were no specifics to the claim before me. It was simply not addressed. Neither has there been mention of why the period from January 2014 to August 2016 should be addressed differently from the period of August 2012 to December 2013.

[122] Counsel for the respondent argues there is no proof anywhere of hardship or suffering by the children. That is not an element of s. 9(b) necessarily.

[123] I conclude that there is not sufficient material before me to adjudicate with respect to the effect of s. 9(b) on child support. As I did with the section 7 claims below, I am referring this back to the parties. If upon further discussion they wish to provide more argument, I will deal with it at that time.

VII. SECTION 7 EXPENSES

- [124] The claimant has presented a claim for section 7 expenses for the years 2014 to 2017. For 2014, the claimant put forward, by my count, 43 items totalling \$10,395.80.
- [125] For 2015, there are 14 items totalling \$6,225.76. For 2016, there are 27 items totalling \$8,320.48. For 2017, there are 24 items totalling \$9,584.05.
- [126] Some of the claims likely have merit. But many are simply not "special or extraordinary" expenses. In the course of argument, the parties agreed that the law is correctly stated by Mr. Justice Baird in *Clarke v. Clarke*, 2014 BCSC 824 at paras. 47-54:
- [47] It appears that the parties do not agree as to what qualifies as a "special or extraordinary expense". In order to guide them in the future I am going to briefly comment on the legal meaning of that phrase. I note that there is a similar summary in *MacDonald v. Pink*, 2011 NSSC 421 at para. 55, which may also be helpful.
- [48] Section 7 of the Federal Child Support Guidelines gives the court the discretion to order payment of an amount over and above the regular table amount. However, in order to qualify for a s. 7 order, the expenses must be proven to be "special" or "extraordinary" in some way.
- [49] This is because the basic table amounts of child support are designed to cover all the "ordinary" costs of raising a child: *D.M.C.T. v. L.K.S.*, 2008 NSCA 61 at para. 25. Food, shelter, clothing and other necessities are all ordinary, as are many educational, extracurricular and recreational expenses: *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.).
- [50] So when does an expense qualify as special or extraordinary? First, it must fit within one of the categories of expenses listed in section 7, as follows:
- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
 - (b) that portion of the medical and dental insurance premiums attributable to the child;
 - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
 - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
 - (e) expenses for post-secondary education; and
 - (f) extraordinary expenses for extracurricular activities.

- [51] That list is exhaustive. If the claimed expense does not fit into any of those categories, it cannot be a special or extraordinary expense: *Kase v. Bazinet*, 2011 ONCJ 718 at para. 39.
- [52] Even where an expense fits into one of the listed categories, that is not the end of the story. The expenses must be both "necessary" -- as defined in relation to the child's best interests -- and "reasonable," as measured against the combined financial means of the parents (and, where appropriate, the child) as well as the family's spending patterns prior to separation: see section 7(1) and *Yensen v. Yensen*, 2003 BCSC 1372 at para. 8. In addition if the expense is one listed under subsection (d) or (f) -- educational programs or extracurricular activities -- the party claiming the expense must prove that they are "extraordinary."
- [53] There is no straightforward definition for "extraordinary" although section 7.1, recently added to the Guidelines, provides some guidance; it requires a sort of proportionality inquiry, looking at the nature and number of activities, any special needs or talents of the child, the overall cost of the activities, and any other similar relevant factors: see *D.M.C.T.* at para. 32.
- [54] Because the tests are fact-specific, I cannot definitively say what types of expenses qualify in every case. But I can say what does not qualify as special or extraordinary:
- Expenses such as "entertainment, pets, vacations, school fees, school supplies, children's allowances, meals outside the home, personal grooming, and clothing" are not section 7 expenses: *Mertler v. Kardynal* (1997), 35 R.F.L. (4th) 72 (Sask. Q.B.).
 - A home computer and other similar technologies do not qualify as extraordinary as they are "common item[s] found in most homes": *Yensen* at para. 18.
 - Recreational sports and other similar extracurricular activities -- dance lessons, community sports leagues, ski trips, etcetera -- are generally considered "ordinary." The question is whether the participation goes beyond that of the "average child": *D.L.C. v. F.M.C.*, 2010 BCSC 1312 at para. 67.
- [127] Once agreement was reached on this, counsel for the claimant had to concede that a very substantial number of items claimed had no merit.
- [128] There appears to have been no discussion between counsel about the merits of these section 7 expenses. They are not addressed in the Amended Notice of Application, in either Part 2 or Part 3. They were addressed briefly by counsel at the end of a two-day application. As noted, the hearing was almost entirely focussed on the respondent's income.
- [129] Without proper submissions and evidence on this, the court cannot make determinations about, for example, whether certain expenses are "necessary" in respect of the child's best interests.

[130] In the circumstances, I am referring these matters back to the parties for discussion in accordance with the principles in Clarke. If the parties cannot agree on any particular item, they may return to court to have it adjudicated. But it is not reasonable to ask the court to adjudicate items where there is no merit to a substantial number of them, and when they are not mentioned in the Amended Notice of Application.

VIII. DIRECT REIMBURSEMENT FROM EXTENDED HEALTH CARE PROVIDER

[131] In the Amended Notice of Application, "Part 2: Factual Basis", paras. 18 to 21 read as follows:

18. The Respondent has extended medical and dental benefits available to the children through his partnership at MacKenzie Fijisawa and as a director of MFB Management Ltd., the management company that operates the MacKenzie Fujisawa partnership.
19. The Claimant paid for and continues to pay for all of the children's extended health care costs including but not limited to, eyeglass prescriptions for [V.] and [A.], speech therapy for [A.], chiropractic, massage and physiotherapy for [V.]. Because the Claimant's birthday is in the first of the year, all claims must first be submitted to her extended benefits provider. For those benefits are depleted, the Claimant then provides the claims for reimbursement to the Respondent to then be claimed to the Respondent's extended health care provider.
20. In the past, the Respondent has submitted the expenses paid for by the Claimant to his extended health benefit provider, as receipt reimbursement for those expenses and Respondent has subsequently refused to provide the reimbursement funds he has received to the Claimant despite being requested to do so by the Claimant.
21. The Respondent's extended benefits provider has advised that an order directing them to provide the reimbursement directly to the Claimant would allow them to provide the Claimant with reimbursement directly rather than having to go through the Respondent.

[132] There is no mention of this aspect of the application in "Part 3: Legal Basis". Moreover, this claim was not mentioned in oral submissions by counsel for the claimant except at the beginning of his submissions when he listed the orders sought.

[133] In these circumstances, I dismiss this aspect of the claimant's application.

IX. LIFE INSURANCE OF \$500,000

[134] The applicant seeks an order directing the respondent to obtain and maintain a life insurance policy of \$500,000 with the claimant as the irrevocable beneficiary for so long as the respondent is required to pay child support.

[135] The applicant argues that the respondent has few assets and little equity in his home.

- [136] I am satisfied that I have jurisdiction to make such an order. Section 12 of the Guidelines provides that the court may order child support be secured in a manner specified in the order. There is also authority for security for child support in s. 15.1(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), which provides that in making an order for child support, the court may impose terms, conditions or restrictions in connection with the order as it thinks fit and just: *Pearce v. Pearce* (1999), 1 R.F.L. (5th) 402 (B.C.S.C.) at para. 47.
- [137] Section 170(e) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], permits the court to order that a person who already has a life insurance policy designate his/her spouse or child as the irrevocable beneficiary for a period designated by the court.
- [138] I note that s. 170 only authorizes the court to order that a spouse maintain an existing life insurance policy and designate his or her spouse or child as beneficiary. It does not permit the court to impose an obligation on the payor to obtain new or additional coverage: *R.M. v. N.M.*, 2014 BCSC 1755 at paras. 213-214 and *M.S. v. M.M.* at para. 392.
- [139] Counsel did not refer me to any case explicitly considering whether s. 12 of the Guidelines or s. 15.1(4) of the Divorce Act authorize the court to order a payor to obtain new or additional life insurance coverage. However, that seems to come within the broad language of those provisions. I am prepared to consider that s. 12 of the Guidelines and s. 15.1(4) of the Divorce Act give me jurisdiction to include an order to obtain life insurance.
- [140] The decision to require a payor to maintain a life insurance policy as security for child support is discretionary.
- [141] The court has held that security for support obligations should only be ordered "on the basis of evidence showing them to be necessary due to factors such as the recipient's 'extremely necessitous circumstances' or the payor's ill-health": *Sarro v. Sarro*, 2011 BCSC 1010 at para. 50.
- [142] More recently, the court has articulated a more flexible approach to this issue. In *Kooner v. Kooner*, 2015 BCSC 1880, Madam Justice Bruce held that evidence of delinquency is not required for the court to make an order under s. 170(e) of the FLA. However, there must be a basis in the evidence for such an order:
- [45] In my view, the court may make an order under s. 170(e) of the Family Law Act even if there is no evidence of any delinquency regarding the payment of child support. However, there must be a reasonable connection between Mr. Kooner's obligations under the Act to support the child and such an order before the court may exercise its discretion to make an order under s. 170(e). The court must consider best interests of the child but there must be a rationale for such an order based on the evidence before the court.
- [143] Relevant factors include whether the payor has complied with court orders in the past, whether the payor is presently in arrears, and the payor's health: *D.P.R. v. L.L.R.*, 2015 BCSC 2317 at paras. 68-69, 159; *E.D.A. v. M.A.A.*, 2014 BCSC 1084 at paras. 90, 125, 135; *Buck v. Buck*, 2013 BCSC 449 at paras. 6, 8, 42; *McIntosh v. McIntosh*, 2007 BCSC 1331 at paras.

100-102; *Milligan v. Milligan*, 2001 BCSC 1059 at paras. 74, 189; *Greenwood v. Greenwood* (1998), 37 R.F.L. (4th) 422 (B.C.S.C.) at para. 45; *Kemp v. Kemp*, 2018 BCSC 381 at para. 62; *Sarro* at para. 50; *R.A.C. v. V.L.C.*, 2009 BCSC 1417 at para. 42.

- [144] The court has ordered the payor to maintain a life insurance policy and name the child or spouse as the sole beneficiary in cases where the payor had not complied with support obligations in the past or was in arrears: *D.P.R.* at paras. 68-69, 159; *E.D.A.* at paras. 90, 125, 135; *Buck* at paras. 6, 8; *McIntosh* at paras. 100-102; *Milligan* at paras. 74, 189; *Kooner* at paras. 46-47; *K.A.P. v. K.A.M.P.*, 2012 BCSC 811. However, security is not necessarily required in those circumstances. In *Pearce*, the payor had failed to comply with the interim spousal and child support order and was in arrears. The court stated that these were relevant considerations but was nonetheless satisfied that the child support obligations were a priority to the payor and that the actions of the Family Maintenance Enforcement Program were adequate to ensure that payments were made (paras. 47-49).
- [145] The court has declined to order security through a life insurance policy when the payor has a record of complying with his or her support obligations: *K.R. v. J.D.*, 2017 BCSC 182 at paras. 60-61, *aff'd* 2018 BCCA 232; *M.S. v. M.M.* at para. 396; *H.P. v. C.T.P.*, 2014 BCSC 2024 at para. 190; *Greenwood* at para. 45.
- [146] The age of the children and the importance of the payor's contribution to their financial well-being may also be relevant considerations: *K.A.P.* at para. 54.
- [147] Finally, the recipient spouse's own circumstances may be relevant. In *Kemp*, the court declined to order that support be secured by a life insurance policy on the basis that the payor was in good health and the recipient spouse was capable of supporting herself without the support payments. The court held at para. 62, "[i]f the [claimant] seeks the peace of mind that would come with coverage being in place, she can purchase a policy on his life at her own expense. That is not a cost that should be borne by the respondent."
- [148] In this case it is noteworthy that there are no existing arrears; the respondent has complied with his support obligations in the past; and there is no evidence that he is in poor health.
- [149] I agree with the claimant that the respondent does not have a lot of equity in his assets. However, that does not constitute a sufficient basis for the order sought.
- [150] The application for life insurance is dismissed.

X. CANADA PENSION PLAN

- [151] The claimant seeks a division of the parties' respective Canada Pension Plan accounts. Although this is listed in her Amended Notice of Application as an order sought, there is nothing in "Part 2 Factual Basis" or "Part 3 Legal Basis" that addresses it. This is sufficient to dismiss the application.

[152] In any event, I conclude the claimant has made this request in the wrong forum. As I understand it, following divorce, a spouse can apply to the Minister to divide CPP credits in accordance with the Canada Pension Plan, R.S.C., 1985, c. C-8. The relevant form would likely be submitted through Service Canada. A court order is not required.

[153] This aspect of the application is dismissed.

XI. SPECIAL COSTS

[154] There is no justification for an award of special costs. This aspect of the claimant's application is dismissed.

XII. OTHER ISSUES

[155] The respondent claims an overpayment of child support for 2012 and 2013 totalling some \$18,000 on the basis of payments calculated as if the children were with the claimant 100% of the time. He also claims interest owing on funds paid under the Pearlman Order of March 20, 2015. Neither of these claims was the subject of argument. If the parties cannot resolve this issue, they may return to this Court.

XIII. SUMMARY

1. The respondent's guideline income for 2014 to 2017 is: \$214,735, \$285,042, \$407,019, \$464,479. The claimant's employment income for those years is \$120,000 for each year;
2. The issue of expenses arising from shared parenting is referred back to the parties;
3. Section 7 expenses from 2014 to 2017 are referred back to the parties;
4. The application for direct reimbursement from the extended health provider is dismissed;
5. The application for an order requiring the respondent to maintain a policy of life insurance is dismissed;
6. The application to divide Canada Pension Plan credits is dismissed; and
7. The application for special costs is dismissed.

XIV. COSTS

[156] The respondent has been substantially successful. Even if success had been divided, the amount of argument in the claimant's affidavits and the failure to comply with the Supreme Court Family Rules have cost consequences. The respondent is entitled to his costs at Scale B.

"Kelleher J."

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