

CANADA / JUDGMENT

Thompson v. Thompson

2022 BCSC 1431

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Supreme Court of British Columbia

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2022 BCSC 1431 Thompson v. Thompson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thompson v. Thompson,

2022 BCSC 1431

Date: 20220818

Docket: E27919

Registry: Cranbrook

Between:

Darren Dale Thompson

Claimant

And

Heidi Marie Thompson

Respondent

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

D. Collins

Counsel for the Respondent:

S. Bartlett

Place and Date of Trial/Hearing:

Cranbrook, B.C.

July 27, 2022

Place and Date of Judgment:

Cranbrook, B.C.

August 18, 2022

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Background of the Parties and the Litigation

- [1] The parties began a common-law relationship in September 1997, were married on September 16, 2000, and separated on August 4, 2017. They are the parents of two daughters, Grace, born October 7, 2001, and Anna, born December 17, 2005.
- [2] The parties have been engaged in this litigation since December 4, 2017, when Master Keighley granted Mr. Thompson exclusive occupancy of the parties' motel in Radium, B.C., and issued a protection order against Ms. Thompson. Their post-separation interactions have been acrimonious.
- [3] The motel was eventually sold, but due to a dispute over entitlement to the remaining proceeds, the monies were paid into a lawyer's trust account pursuant to Justice Bowden's April 16, 2018 order.
- [4] This matter was scheduled for a summary trial to determine: the outstanding property and debt issues; Mr. Thompson's obligation to contribute to extraordinary expenses for the girls; and Grace's status as a child of the marriage. I signed a consent order resolving all the property and debt issues. The remaining relief sought by Mr. Thompson is:

- a) a declaration that, effective October 7, 2022, Grace is no longer a child of the marriage for child support purposes;
- b) a variation of Justice Donegan's September 28, 2020 child support order, effective October 1, 2022, that Mr. Thompson pay Ms. Thompson child support for Anna based on an annual income of \$65,000. During submissions, Mr. Thompson's counsel agreed that Mr. Thompson's income tax return showed 2021 income for child support purposes of \$74,300 and conceded that this is the income on which child support should be payable;
- c) a dismissal of Ms. Thompson's claim for retroactive payment of extraordinary expenses for both Grace and Anna; and
- d) his costs.

The Parenting and Litigation History

- [5] Both girls reside in Nanaimo with their mother and her new partner. Grace is in full-time attendance at the University of Victoria and, when she is attending classes, lives in Victoria. In the summers, and regularly throughout the school year, she returns to Nanaimo to stay with her mother and her sister. Her mother maintains a bedroom for Grace in her home.
- [6] Mr. Thompson says that prior to separation, and for some time after, he had a close relationship with his daughters.
- [7] After separation, the girls resided with Mr. Thompson in the former family home on the motel premises. Initially, Ms. Thompson had infrequent parenting time with the girls and did not pay child support to Mr. Thompson.
- [8] The parties gradually moved to a shared parenting arrangement. In the fall of 2018, the girls moved in with their mother.
- [9] After the girls began living with their mother, and for a number of months, Mr. Thompson did not pay child support. Instead, he offset his child support obligation against the child support he thought Ms. Thompson should have paid him for the time the girls were with him. It does not appear that Mr. Thompson discussed that he would be doing so with Ms. Thompson. There were no child support orders in place at the time.
- [10] There is no longer any issue about arrears of child support as they were dealt with by Justice Donegan in an order of September 28, 2020.
- [11] In May 2019, Mr. Thompson learned that Ms. Thompson and her new partner might be relocating, with Anna, to Nanaimo. Grace was already planning to attend the University of Victoria that September and the move was, in part, so that they would all be on the Island.

- [12] Mr. Thompson applied for an order preventing the relocation. On June 10, 2019, Justice Saunders prohibited Ms. Thompson from relocating. Justice Saunders also ordered that a s. 211 report be prepared under the Family Law Act, S.B.C. 2000, c. 25. Dr. Elterman was retained to prepare the report. In joint instructions, Dr. Elterman was asked to assess the best parenting arrangement for Anna. Mr. Thompson suggested that Ms. Thompson was alienating Anna from him.
- [13] Dr. Elterman did not find alienation. However, he concluded that an adversarial situation had been created. Anna had become too involved in battling her father on her mother's behalf, "setting up a triangle position where it was mother and daughter against father." He wrote, "[h]ad Mr. Thompson agreed to talk to Anna and discuss and compromise, I think that their relationship would be much better". He recommended that Anna be able to relocate to Nanaimo with Ms. Thompson, on "condition that the relationship between father and daughter is re-established" through counselling.
- [14] After receipt of Dr. Elterman's s. 211 report, and understanding that it had recommended that she be able to relocate to Nanaimo with Anna, Ms. Thompson relocated. Her reasons for doing so were that her new partner had a job in Nanaimo, Grace was attending university in Victoria, and Anna would be closer to Grace. The girls had developed a deep attachment over their parents' separation.
- [15] Mr. Thompson applied to have Ms. Thompson immediately return Anna to the Kootenays. That order was granted by Justice Donegan on April 17, 2020, together with orders that the parties were to be Anna's joint guardians, share parental responsibilities, and share parenting time on a week-on/week-off basis. Anna was to attend counselling with a counsellor chosen by Mr. Thompson, and the parties were to attend counselling as recommended by Anna's counsellor. Anna's counsellor was to prepare a report, on or before August 23, 2020, dealing with, in relevant part, Anna's views of her father and of the parenting schedule recommended by Dr. Elterman if relocation was allowed.
- [16] As ordered, Ms. Thompson and Anna returned to the Kootenays. Grace's in-person classes had been suspended due to Covid-19, and she had been living with her mother and sister in Nanaimo. She too returned to the Kootenays. Ms. Thompson's partner remained in Nanaimo.
- [17] Justice Donegan directed that the parties appear before her to deal with: whether Ms. Thompson should be allowed to relocate with Anna to Nanaimo and if so, the parenting schedule; child support and any arrears; and the remedies being sought by each party for the other's breaches of Justice Saunders' order.
- [18] The forced return, and Mr. Thompson's insistence that the girls, and once Grace refused, Anna alone, abide by week-on/ week-off parenting, further fractured Mr. Thompson's relationship with his daughters. The girls wanted to spend weekdays with Ms. Thompson and weekends with Mr. Thompson. According to Ms. Thompson's affidavit, and what the girls reported to Dr. Elterman, unless the girls, or Anna alone, continued with the ordered

parenting schedule, he did not want to see them. Unfortunately, he left the impression with the girls that seeing them every weekend would interfere with his activities.

- [19] Anna was very angry that Mr. Thompson had forced her to return, and her already strained relationship with him became worse. Anna wanted to live in a larger community than the small towns of Invermere and Radium.
- [20] The parties next appeared before Justice Donegan on September 10, 2020, and on September 28 she ordered that Anna be permitted to relocate to Nanaimo and reside primarily with her mother. Parenting time was to be agreed upon by the parties, in consultation with Anna, but would be no less than one weekend each month and would include shared Christmas, spring and summer holidays. Justice Donegan found that Mr. Thompson's income was \$65,000 for child support purposes and ordered him to pay ongoing child support for two children of \$1,009 a month, commencing October 1, 2020. Child support was to continue for so long as the girls remained children of the marriage. She also ordered Mr. Thompson to pay \$9,438 in retroactive child support.
- [21] Mr. Thompson paid the arrears of child support and has continued to pay child support of \$1,009 per month.
- [22] The parenting time ordered by Justice Donegan never occurred.
- [23] On December 1, 2020, Ms. Thompson sought an order for extraordinary expenses for Anna and Grace, dating back to January 1, 2019. That issue, and the issue of whether Grace remained a child of the marriage for the purposes of child support, were referred to the trial list.
- [24] At the hearing before me, I determined that the parties met the requirements for a divorce which had been sought by Mr. Thompson, and was not opposed by Ms. Thompson. I granted the divorce, to take effect 31 days after my order.
- [25] With respect to the remaining matters, the parties agreed to proceed by way of a summary trial. I am satisfied that I am able to determine the remaining issues by way of a summary trial. The matters in issue do not directly turn on credibility and, to the extent that there are credibility issues, I am able to resolve them on the basis of the materials in the two-volume application record, including the content of Dr. Elterman's report that was put in evidence by Mr. Thompson.

Is Grace a Child of the Marriage for Child Support Purposes?

- [26] Grace will be 21 years of age on October 7 of this year. The only basis on which she could remain a child of the marriage is that she is a full-time student at the University of Victoria.
- [27] Under s. 15.1(1) of the Divorce Act, R.S.C. 1985, c. 3, as amended [DA], a court may order a spouse to pay for the support of any or all children of the marriage. Under s. 2(1) of the DA, a child of the marriage includes a child who:

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

[Emphasis added.]

[28] In British Columbia, the age of majority is 19.

[29] It is well settled that pursuing education qualifies as an "other cause" for the continuing inability of a child to withdraw from their parents' charge. However, mere attendance at an educational institution is not sufficient. The court must consider all of the surrounding circumstances.

[30] In *Neufeld v. Neufeld*, 2005 BCCA 7, the general proposition was summarized by Justice Levine:

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

[Emphasis added.]

[31] In *Nordeen v. Nordeen*, 2013 BCCA 178, the court discussed the circumstances in which a pursuit of education is a valid reason for continued dependence and adopted what have become to be known as the "Farden" factors that assist in the determination of continuing child support for an adult child pursuing education:

[16] In determining whether pursuit of education is a valid reason for continued dependence, a court must consider two questions. The first is whether, considering all of the child's circumstances, the child's educational pursuits are reasonable. If they are, the court must also consider whether it is appropriate that the pursuits be financed by the parents. These questions can be complex and value-laden. In *Farden v. Farden*, (1993), 48 R.F.L. (3d) 60 at 64-5, Master Joyce (as he then was) set out a list of eight factors that may assist a court in making the determinations:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;

- (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [17] This Court has found the Farden factors to be useful indicators in deciding whether child support should continue to be paid in respect of a child over the age of majority who is attending a post-secondary institution [Citations deleted.] It must be emphasized, however, that the Farden factors are neither a checklist nor a set of statutorily-mandated criteria. Rather, they are considerations for the court in assessing whether the child's situation is consistent with the definition of "child of the marriage" in the Divorce Act.
- [32] During argument, Mr. Thompson conceded that his primary basis for arguing that Grace was no longer a child of the marriage was because she had unilaterally terminated her relationship with him.

Application of the Farden Factors to This Case

- [33] As to the other Farden factors, there is no dispute that Grace is in full-time attendance at the University of Victoria, where she has been enrolled since the fall of 2019. In her affidavit, sworn in May 2022, Grace explains that she had completed three years at the University of Victoria. Her university education has not been delayed.
- [34] Initially, Grace lived on campus in student residence, but in March 2020, after the university closed to in-person attendance due to Covid-19, she returned to Nanaimo to live with her mother and sister. She returned to campus in September 2021 and lived in rented accommodation.
- [35] Grace started in Biology and switched to a Social Science degree after her first year. She is now studying Psychology. Her planned degree was originally a four-year degree. She now expects to graduate in 2024, after completing close to five years at the university. She took summer courses in 2020 (online with Thompson Rivers University) and in 2021.
- [36] In her affidavit, Grace says that after graduation she would like to complete either a Master's degree and/or a post-secondary diploma. She acknowledges that she may need to take time off before doing so in order to pay back some of her student loans and obtain work experience.

- [37] It is not unusual for university students to change the direction of their studies in the first few years of their undergraduate education. It is also not unusual for a first degree to take more than four years.
- [38] Grace is now accessing student loans and grants to complete her education. She is also withdrawing from a RESP with Canadian Scholarship Trust that her parents funded during their relationship. She says it provides one payment a year for four years with proof of registration at a post-secondary institution. She used the first three payments to help with tuition and expects one further payment in her fourth year.
- [39] In addition, during the summer of 2019, Grace worked as a program counsellor at a camp in the Kootenay Valley. According to the notice of assessment attached to her affidavit, she earned \$7,885 in 2019.
- [40] Grace explains that during the 2020 school year, after her return to the Kootenays with her mother and Anna, they lived in a travel trailer that summer and she was unable to find employment. During the summer of 2021, she worked at the Nanaimo Science Camp and made approximately \$5,100. Due to Covid-19, she continued to live in Nanaimo with her mother as opposed to living on campus. I have no evidence about whether Grace worked this summer.
- [41] On the evidence, I am satisfied that Grace has a plan for her future and is not going to university because she has nothing better to do. She is still relatively young and, as is the case for so many students of her age, her university studies have been significantly affected by Covid-19. Nonetheless, she has persevered.
- [42] Although I do not have information about Grace's academic performance, she has been attending steadily, and there is no evidence that she is not doing well.
- [43] Both parties clearly anticipated that their daughters would pursue post-secondary education as they established RESPs for each of them. Grace's RESP has been signed over to her, and, as set out, she is accessing it.

Has Grace Unilaterally Terminated Her Relationship with Her Father?

- [44] Turning to the key issue in this case, whether Grace has unilaterally terminated her relationship with her father, I conclude that while they do not currently have a relationship, Mr. Thompson shares responsibility for the current state of affairs and that their relationship was not unilaterally terminated by Grace.
- [45] The parties' separation, and its aftermath, was difficult for the girls. Mr. Thompson arranged counselling for them. The girls became closer than they had ever been.

- [46] Once Mr. Thompson began paying child support, he suddenly stopped paying for Grace and Anna's cell phones. Although he warned Ms. Thompson that he would do so, it shocked the girls. In today's world, most young people rely heavily on cell phones for communication and other purposes.
- [47] Mr. Thompson was unhappy when the girls chose to live with Ms. Thompson, and he was disparaging of her and her new partner. Both girls told Dr. Elterman that their father was drinking too much. In his affidavits, Mr. Thompson seems insensitive to Grace and Anna's close relationship, blaming Grace for negatively influencing Anna's memories of their lives before separation. He tried to continue his relationship with Anna alone as, by all accounts, he had been closest to her. They shared a number of common interests, and he resented that she no longer wished to go mountain biking or golfing with him.
- [48] In Mr. Thompson's words, he hoped to re-establish a relationship with Anna first and then work on his relationship with Grace. He says that each time he saw a "softening" in Anna, Grace's influence came into play.
- [49] Although he was not invited, Mr. Thompson attended Grace's high school graduation. When he spoke to Grace, she said that she was glad he came, and Mr. Thompson took a picture of Grace in her graduation gown. His attempts to interact with Anna were less successful.
- [50] Grace's and Mr. Thompson's affidavits are not reconcilable on the extent to which Mr. Thompson attempted to reach out to Grace. Grace said that he did not do so and did not ask her mother for her phone number. In contrast, Mr. Thompson said he reached out on a number of occasions. He attached messages to his 7th affidavit. There were only four messages, two in late 2020 and two in the spring of 2021.
- [51] Mr. Thompson also blames Ms. Thompson for obstructing his contact with the girls, but, objectively, there is no evidence of any obstruction on her part, and Dr. Elterman concluded that she had not engaged in alienating behaviour. Dr. Elterman commented on Mr. Thompson's rigid reaction to what the girls said they wanted with respect to parenting time. As Anna described it to Dr. Elterman, her father kicked her and Grace out after rejecting their suggestion that they spend weekends with him. He would not let them stay in the house until their mother picked them up. Dr. Elterman said that Mr. Thompson's reaction was a mistake.
- [52] There is other evidence of Mr. Thompson's rigid approach to the girls. He would not let them take their bikes to their mother's home because they were family assets and had to remain with him. He insisted that a Father's Day dinner occur at the golf course where he worked because that was what he discussed with the girls. They preferred a different restaurant, and, because no compromise was reached, he did not see the girls that Father's Day.
- [53] Assessing the affidavits as a whole, and considering the arguments, I conclude that while there are deep-rooted issues in Grace and Mr. Thompson's relationship, he has contributed to those issues. It cannot be said that Grace unilaterally withdrew from the relationship.

- [54] The circumstances in this case are far removed from the circumstances in *Marsland v. Gibbs*, 2000 BCSC 471 or *Turecki v. Turecki* (1989), 57 D.L.R. (4th) 266 (B.C.C.A.), cited therein.
- [55] As explained by the Court of Appeal in *Shaw v. Arndt*, 2016 BCCA 78 at para. 25, Farden does not provide a set of iron-clad requirements that must be met by older children who propose to pursue education with financial assistance from their parents. Citing to *Darlington v. Darlington* (1997), 32 R.F.L. 4th, 405 (B.C.C.A.) and *Neufeld*, the court in *Shaw* said that not all of the Farden factors must be satisfied. They are factors to be considered among others. At para. 26 of *Shaw*, the court cited Justice Pazaratz' comments in *A.C. v. M.Z.*, 2010 ONSC 6473 at paras.140-42:

We no longer ask whether a needy spouse deserves to receive money. Why then do we invite inquiry as to whether a needy adult child deserves to receive money?

And if we are going to consider evidence of the current relationship between the adult child and the estranged parent, how much background information; how much context; how much unpleasantness and recrimination do we want to invite in an otherwise "no fault" system? Parent-child relationships are complex even with intact family units. Current problems and rifts always have antecedents, whether apparent or not.

At what age; at what stage, did the onus shift to each child to assume responsibility for a parental relationship whose flaws were perhaps decades in the making?

- [56] I agree with Justice Pazaratz' conclusion that termination of the parent/child relationship will rarely stand alone as the basis for denying support unless the situation is "extremely grave". This is not an extremely grave situation. I find that the circumstances in this case, like those in *Shaw*, do not approach the egregious circumstances that would justify cutting off support for Grace.
- [57] Mr. Thompson and Grace have not said anything to deliberately hurt the other or to finally end their communications. Grace has not completely rejected her father. Grace does not say in her affidavit that she wants no communication from her father and, indirectly, invites him to ask for her contact number.
- [58] For all of these reasons, I am satisfied that Grace continues to be a child of the marriage and eligible for support.

What Support is Mr. Thompson Obligated to Provide for Grace?

- [59] The Child Support Guidelines provide two ways for determining child support for a child over the age of majority. Section 3(2) provides:
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[60] Section 7 of the Guidelines is also relevant. It provides that a child support order may include "special and extraordinary" expenses, including in s. 7(1)(e), post-secondary education expenses. In making an order for payment of s. 7 expenses, the court must take into account:

the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to separation.

[61] Under s. 7(2) of the Guidelines, the court may order parents to share in the cost of special and extraordinary expenses, in proportion to their incomes, after deducting from the expense, any contribution from the child.

[62] As explained in *Neufeld* at para. 35, where an adult student is living away from home to attend a post-secondary institution, determining child support using the table amount, and adding special and extraordinary expenses as if the child were under the age of majority, is inappropriate. At para. 42, the court concluded that child support for an adult child attending a post-secondary institution should generally be determined under s. 3(2)(b).

[63] In *W.P.N. v. B.J.N.*, 2005 BCCA 7, the court held that, where appropriate, child support determined under s. 3(2)(b) does not necessarily preclude a specific award for special expenses under s. 7.

[64] Of course, the decision about which of the two subsections applies is discretionary and fact specific. In *McClement v. McClement*, 2017 BCCA 416, the court said, in part:

[12] The view taken by this Court is that the burden of proof rests with each party in the ordinary manner to persuade the court which of the two sections is the appropriate one to apply in the particular circumstances before the court. There are of course factors that tend to support the appropriateness of relying on one section rather than another and which guide the exercise of a judge's discretion. For example, the more closely the circumstances of the adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2)(a) will be determined to be inappropriate.

[65] In the circumstances of this case, applying s. 3(2)(a) - the table amount under the Guidelines - would not be appropriate for the following reason:

- a) Grace has a degree of financial independence through her part-time work;
- b) Grace has access to RESP funds and student grants and loans; and

- c) except for during the pandemic, she resides away from both parents' homes while attending university.
- [66] While away at school, Grace's circumstances do not resemble those of a minor child living at home.
- [67] I am satisfied that the amount of support payable by Mr. Thompson should be calculated having regard to the condition, means, needs and other circumstances of Grace and the financial ability of each parent to contribute to her support.

Grace's Circumstances and the Parties' Financial Ability to Contribute to Her Support

- [68] There is a dispute in the evidence about the value of Grace's RESP. In Mr. Thompson's March 9, 2021 affidavit, he says that during the parties' relationship, they saved approximately \$22,000 in RESPs. This evidence suggests total savings of \$22,000 for both girls.
- [69] In Mr. Thompson's February 4, 2022 affidavit, he says that he believes that there was about \$30,000 in Grace's RESP at the date of separation and that Anna has a RESP with the same company. This evidence suggests that there is \$30,000 available for Grace and another amount for Anna.
- [70] In Ms. Thompson's March 12, 2021 affidavit, she says that Grace had \$20,000 in RESPs and began drawing on them for her university education at the rate of \$3,000 a year. Grace advised Ms. Thompson that \$6,000 remained.
- [71] In Grace's May 12, 2022 affidavit, she says that she has received payments from her RESP in the following amounts: in her first year, \$2,303.51; in her second year, \$2,772.49; in her third year \$2,992.88; and that she expects to receive, in her fourth year, a final payment \$3,048.13. Grace says that she receives the maximum available from her RESP in each year. In total, based on her evidence, she will have received \$11,117.01, exhausting her RESP. This evidence accords with Mr. Thompson's first sworn evidence as set out above.
- [72] Mr. Thompson submits that I should not accept Grace's evidence and draw an adverse inference from Grace and Ms. Thompson's failure to provide clear evidence about Grace's RESP.
- [73] I am prepared to accept Grace's evidence as it is the best available. She attaches exhibits to her affidavit of online records of the payments she received from her RESP and of the remaining expected payout. She also attaches T4As from 2019 and 2020 for the funds she received from RBC Investor Trust Services on behalf of the Canadian Scholarship Trust Plan.
- [74] In any event, in light of the order I make below, requiring ongoing disclosure by Grace to Mr. Thompson, any remaining payouts from her RESP will be clear.

[75] Grace set out the costs of her education to date. In her first year, from September 2019 to March 2020, she lived in residence. Her tuition and residence costs were:

Tuition \$2,885.25 (term 1)

Residence fee \$5,107.00 (term 1)

Tuition \$2,525.25 (term 2)

Residence fee \$5,017.00 (term 2)

Summer tuition \$459.28 + \$200 (mandatory book)

Total \$16,193.78

[76] Grace applied about \$5,000 from her earnings in the summer before starting university to the cost of her education. She did not apply for student loans or grants. She applied RESP funds of \$2,303.51 to the cost of her tuition. She had a shortfall of \$8,890.27 not including expenses for school supplies, cell phone, clothing, and other personal items. I conclude that Grace's shortfall was likely \$9,500 which was funded by her mother presumably, in part, by the regular child support that Mr. Thompson was paying. Ms. Thompson asked Mr. Thompson to contribute 75 percent of Grace's tuition costs, but he did not respond.

[77] Doing the best I can with the available evidence, I order Mr. Thompson to make a retroactive contribution to Grace's first-year university expenses by providing Ms. Thompson with the sum of \$3,000.

[78] In Grace's second year, from September 2020 until March 2021, she lived at home with her mother, and her associated costs would have been covered by Mr. Thompson's regular child support. She did not work during the summer of 2020 because of the court order requiring Anna to return to the Kootenays. Grace's tuition totalled \$5,811.19 made up of \$2,760.89 in term 1, \$2,400.89 in term 2, and \$649.41 for her summer course.

[79] Grace did not apply for student loans or grants in her second year. After applying her RESP, of \$2,303.51, Grace had a shortfall of \$3,507.68. There is evidence that Ms. Thompson was sending Grace about \$700 a month, some of which must have come from the regular child support that Mr. Thompson was paying.

[80] Doing the best I can with the available evidence, I order Mr. Thompson to make a retroactive contribution to Grace's second-year university expenses by providing Ms. Thompson with the sum of \$1,800.

[81] In Grace's third year, from September 2021 - March 2022, while attending university, she lived in rental accommodation in Victoria. Her tuition expenses were:

Tuition \$3,573.90 (term 1)

Tuition \$3,210.41 (term 2)

Total \$6,784.31

[82] In addition to tuition, Grace also outlined that some of her monthly living expenses were:

Rent \$811.25

Car insurance \$145.29

Groceries \$250

Hydro \$55

[83] Grace did not include in her budget amounts for books, clothing, school supplies, cell phone, and other incidentals.

[84] Ms. Thompson's counsel explained that, due to a shortage of student rental accommodation in Victoria, to ensure that students have a place to live during the school year, they are required to rent for a full year. His explanation was not challenged by counsel for Mr. Thompson.

[85] During her third year, Grace applied for student loans and grants. She received a total of \$13,119 made up as follows: a) Term 1 - \$3,494 in loans and \$3,442 in grants, and b) Term 2 - \$2,740 in loans and \$3,443 in grants. She also applied her RESP in the amount of \$2,992.88 to her tuition.

[86] Based on Ms. Thompson's affidavit, confirmed by Grace's affidavit, Ms. Thompson provided Grace with about \$700 a month as a contribution to her expenses, including direct incidental expenses such as her rent. She also maintains a room in her home for when Grace returns home from university. While Mr. Thompson challenges those expenses to some extent, I accept that Ms. Thompson's assertions are broadly reasonable. As Mr. Thompson was paying full child support during Grace's third year, including for months during which Grace was in rental accommodation, presumably some of what Ms. Thompson sent to Grace came from that child support.

[87] Doing the best I can with the available evidence, I order Mr. Thompson to make a retroactive contribution to Grace's third-year university expenses by providing Ms. Thompson with the sum of \$1,800. I reach this number by presuming that Grace required the \$700 a month her mother was providing to her for the seven months of the school year and deducting for the same seven months the difference in the regular child support Mr. Thompson was paying if he had paid for one child, instead of two, as his contribution to the \$700 a month.

[88] Commencing September 1, 2022, and while Grace is at university and not living at home, Mr. Thompson's child support will be calculated on an income of \$73,400 for one child. If Grace returns to live with Ms. Thompson in the summer months, his child support will be based on two children.

[89] The evidence does not address whether Grace worked this summer, but I presume that she did. Based on her potential full-time earnings during the summer months, which I estimate to be \$8,000-\$9,000, I expect that Grace will be able to contribute \$6,000 to the cost of her education.

[90] For the school year starting September 1, 2022, and ending at the end of April 2023, on the following assumptions:

- a) that Grace's expenses will be at least what she paid last year,
- b) Grace will receive about the same amount in student grants and loans,
- c) Grace will apply the remainder of her RESP to her tuition, and
- d) Grace will use \$6,000 of her earnings towards her education,

I order Mr. Thompson to contribute \$470 a month to assist with Grace's living expenses. That number is 67 percent of the \$700 a month her mother sent to her in the last school year. In living expenses, I include the cost of rental accommodation in Victoria and her utilities, car insurance, food, tuition fees, incidentals, and the cost of her books and other school supplies.

[91] As a result, Mr. Thompson will pay child support for one child for seven months of the year (beginning of September to end of March) and, if Grace lives with her mother in the summer months, for two children for five months of the year (beginning of April to end of August). If Grace does not return to live with Ms. Thompson during the summer, Mr. Thompson's child support will continue to be calculated for one child, and he will contribute to Grace's costs in the amount of \$470 a month.

[92] Mr. Thompson's child support will be calculated on an income of \$73,400 and he is to provide Ms. Thompson with his annual tax return and notice of assessment in each year in which he is required to pay child support. Child support will be adjusted to reflect his annual income for child support purposes retroactive to the date on which he receives his notice of assessment.

[93] For each school year in which Grace remains in full-time attendance at a post-secondary institution, and until she has completed her undergraduate degree, she is to provide Mr. Thompson with a proposed budget outlining her projected expenses, what she receives in student loans and grants, what she earned during the summer months, and any contribution she receives from her RESP. She is also to provide him with an email or a letter explaining her plans for the following year.

[94] Whether Grace will continue to be considered a child of the marriage, should she decide to pursue a post-graduate degree or diploma, will depend on Grace's then condition, means, needs, and other circumstances, and the financial ability of each parent to then contribute to her support.

Other Special Expenses

- [95] Ms. Thompson makes a claim for retroactive contribution to special and extraordinary expenses she incurred for both girls retroactive to January 1, 2019, and until further order of this Court. She attaches as Ex. N to her affidavit of November 30, 2020, the girls' medical expense reports from the Pharmasave in Invermere, BC.
- [96] Based on those reports, starting in about July 2018, Ms. Thompson began receiving contributions to the girls' prescription costs from a "plan". On the evidence, it is not clear whether the plan is offered by Ms. Thompson's or her partner's employers. The Pharmasave report is unclear as, in some cases, it suggests that the plan paid more than the invoice amount. This was not explained in Ms. Thompson's evidence.
- [97] The claimed expenses are for prescriptions for both girls and orthodontic treatment for Anna. Mr. Thompson does not argue that the expenses were not incurred or that they were unnecessary.
- [98] Rather, he says that he has coverage available to him through his employment and that both girls continue to be covered by the plan. He submits that as a result of Ms. Thompson's failure to provide him with timely copies of original receipts, and proof of other insurance coverage which might be available, he has been unable to submit the receipts for reimbursement from his employer. According to his affidavit, he has coverage for up to \$4,000 a year, but it is secondary to other coverage. Ms. Thompson says that she was not aware that Mr. Thompson had coverage. The terms of Mr. Thompson's employer's benefit plan were not in evidence.
- [99] As explained in *Bodine-Shah v. Shah*, 2014 BCCA 191 at para. 66:
- [66] Special expenses listed in ss. 7(1)(a)-(c) and (e) [of the Guidelines] are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

- [100] On my review of the evidence, the prescription costs incurred by Ms. Thompson and the cost of Anna's orthodontic treatment are special expenses and the amounts sought are reasonable.
- [101] However, on the evidence, I cannot precisely calculate the special expenses that Ms. Thompson has incurred. As the burden is on her to prove the amounts, I find that she has not done so. In addition, because of Ms. Thompson's failure to provide Mr. Thompson with original receipts, and proof of other coverage, he cannot seek reimbursement under his employer's plan that he directly or indirectly pays for. In the circumstances, it would be unfair to retroactively order him to contribute: *Miolla v. Miolla*, 2018 BCSC 2295 at para. 41.
- [102] As a result, I do not make any award for special expenses from 2019 until the beginning of 2022.
- [103] Assuming that Mr. Thompson's plan is an annual plan, it is unlikely that receipts incurred prior to the beginning of January 2022 are now capable of being submitted to the plan for reimbursement.
- [104] For any medical receipts incurred in 2022, and for which Ms. Thompson seeks contribution from Mr. Thompson, she is to provide him with a copy of the receipt together with any amount of reimbursement she has received from an insurer under which the girls are covered. Mr. Thompson is to submit those receipts to his insurer for reimbursement and either to direct the insurer to pay reimbursable amounts directly to Ms. Thompson or, if that is not permitted under the plan, to provide Ms. Thompson with any reimbursement he receives. If any of the receipts are not covered or only partially covered by Mr. Thompson's plan, Mr. Thompson is to pay 67 percent of the cost of those medical expenses.
- [105] Going forward, and on a monthly basis, Ms. Thompson is to provide Mr. Thompson with copies of receipts, and proof of other coverage, for submission to Mr. Thompson's insurer. Mr. Thompson is to contribute 67 percent of any prescription costs for the girls, net of all available insurance coverage.
- [106] Concerning Anna's orthodontic treatment, Ms. Thompson arranged to pay over an extended period and wrote to Mr. Thompson explaining that she had done so. To his credit, Mr. Thompson contacted Anna's orthodontist and arranged to pay 50 percent of the cost of the treatment directly. He has about \$750 remaining to be paid. Based on his income as compared to Ms. Thompson's, his share should have been 67 percent. I, therefore, order Mr. Thompson to pay Ms. Thompson an additional 17 percent of the total cost of the orthodontic treatment. I expect the parties and their counsel to be able to agree on the amount.

Costs

- [107] As the parties have had mixed success on this application, they should each bear their own costs.

"MacNaughton J."

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