
CANADA / JUDGMENT

Truter v. Truter

2017 BCSC 197

COURT

Supreme Court of British Columbia

DECIDED

6 January 2017

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2017 BCSC 197 Truter v. Truter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Truter v. Truter,

2017 BCSC 197

Date: 20170106

Docket: E161706

Registry: Vancouver

Between:

Patricia-Ann Truter

Appellant

And

Hugo Johannes Truter

Respondent

Corrected Judgment: this judgment was corrected at paras. 54 and 55
on March 9, 2017

Before: The Honourable Mr. Justice Schultes

On appeal from: An order of the Provincial Court, dated May 4, 2016

(H.T. v. P.T. (4 May 2016), North Vancouver F7594 (B.C.P.C.))

Reasons for Judgment

Appearing on her own behalf:

P. Truter

Appearing on his own behalf:

H.J. Truter

Place and Date of Hearing:

Vancouver, B.C.

September 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

January 6, 2017

1. INTRODUCTION

- [1] This is an appeal by Patricia-Ann Truter from the decision of a Provincial Court judge on May 4, 2016 (H.T. v. P.T [1]. (4 May 2016), North Vancouver F7594 (B.C.P.C.)), following a family law trial in which she was involved with her former spouse, Hugo Truter.
- [2] Ms. Truter alleges that the trial judge made several significant errors in determining the amounts owed by Mr. Truter for special and extraordinary expenses for their two children pursuant to s. 7 of the Federal Child Support Guidelines, which were to be set off against amounts she owed to him to purchase his interest in their former home.
- [3] Mr. Truter responds that while the trial judgment is not perfect and contains certain errors which go against him, it is overall balanced and fair to both parties and should therefore not be disturbed, particularly in light of the protracted history of this litigation.
- [4] Both parties have represented themselves on this appeal. Mr. Truter had counsel at the trial.

2. BACKGROUND

- [5] The basic chronology of events as summarized by the trial judge provides a helpful framework for considering the issues on this appeal. (The trial judge's rulings concerning parenting time and Mr. Truter's claim for compensation for unreturned household items were not issues on this appeal, so I will omit the underlying facts with respect to them.)
- [6] The parties were married in 1985. They had two children, who were age 17 and 12 at the time of the trial judgment. The family is originally from South Africa and came to Canada in 2005. The parties separated in 2008. Mr. Truter moved out of the family home and Ms. Truter remained there with the children.

- [7] They entered into a written separation agreement in 2009. It was filed with the Provincial Court. Among its other provisions, it provided that Mr. Truter would pay child support in the amount specified for his income at that time, pursuant to the Federal Child Support Guidelines.
- [8] What is important for this appeal is that the agreement also contained a clause in which they each agreed to pay 50% of "special expenses" as defined in the Guidelines and of "agreed upon expenses for extracurricular activities and educational programs" (emphasis added). The method of repayment was that the parent who incurred the special or extraordinary expense would provide the other parent with the receipt for it and was to receive repayment from the other parent within one month.
- [9] There was a written addendum to the agreement in June of 2011, updating Mr. Truter's child support to the Guidelines amounts for his increased income and providing that pursuant to the section of the agreement on special and extraordinary expenses, he would pay \$380 a month towards childcare -- representing 50% of that expense. Mr. Truter had testified that he had signed that document only to assist Ms. Truter to obtain a mortgage, but as I will explain nothing ultimately turns on that position.
- [10] The next significant event had to do with the family home. In 2010, Justice Savage, then a member of this Court, ordered that Ms. Truter pay Mr. Truter \$20,000 per year for four years, starting the following year, for his interest in the family home. This was done in the context of ordering that a notice pursuant to the Land (Spouse Protection) Act that had been filed by Mr. Truter be removed from the property. The purpose of the order for delayed payments was to allow the children to remain in the home with Ms. Truter. In his reasons (neutral citation 2010 BCSC 1159). Savage J. expressly declined to order any interest to be paid to Mr. Truter on these amounts, reasoning that the payment mechanism would avoid the parties having to incur the cost of the sale of the home to a third party, from which they would ultimately receive less.
- [11] When Ms. Truter was unable to make the first \$20,000 payment the following year, the parties came to a further agreement that Mr. Truter would be credited with that amount towards child support payments and his share of the children's childcare expenses. The Family Maintenance Enforcement Program ("FMEP") stopped monitoring his payments from that point.
- [12] The recitals of an unsigned copy of this agreement that was placed in evidence at the trial stated that Ms. Truter was in a position to meet the needs of the children herself without the child support and that the purpose of the agreement was to allow the children to remain in what had been their home.
- [13] Under the agreement he was later credited with the additional \$20,000 amounts that should have been paid by Ms. Truter pursuant to the Savage order in 2012 and 2013 but were not. The 2014 payment was also not made. The reasons for judgment do not refer to it explicitly, but Ms. Truter confirmed in her cross-examination during the trial that it had also not been

paid, and the parties accepted that the entire \$80,000 for the four missed payments was the amount for which Mr. Truter was entitled to credit. Mr. Truter ultimately included 5% interest on the remaining unpaid amounts in his calculations.

- [14] The trial judge accepted that Mr. Truter had provided monthly memos to Ms. Truter, setting out the amounts he had paid for child support and other expenses, both before and after this agreement.
- [15] The trial judge described Ms. Truter providing a list of the children's extracurricular activities and the costs of them to Mr. Truter in January 2013, but without any invoices attached. When he asked why she was doing this, she told him that she was just "updating her files" and that he had "nothing to do." Her testimony at trial was that he was well aware of her request for contribution to the costs contained in the list and had actually agreed to them previously. By the time of trial the updated version of this list, which she was seeking to make part of the set-off against the amount she owed for the home, totalled over \$17,000.
- [16] As of January 2014, Mr. Truter's support obligations were re-registered with the FMEP by Ms. Truter. FMEP took the position that no payments were owed by him from before that date.
- [17] In March of 2014, Mr. Truter sent an email to Ms. Truter asking her to confirm in writing that he would start paying child support again and that as of that point Ms. Truter's balance for the purchase of his share of the home was \$6,761.
- [18] In October 2014, Mr. Truter obtained an order requiring Ms. Truter to instruct her accountant to comply with the reasonable requests from his counsel for information concerning her company. Pursuant to the order, Mr. Truter was made responsible at that point for the cost of obtaining the information.
- [19] The essence of the financial dispute at trial was how much should be credited against the missed payments by Ms. Truter for Mr. Truter's share of the home, in recognition of his childcare and special and extraordinary expense obligations.
- [20] Ms. Truter's calculation of his obligations comes very close to offsetting the entire \$80,000. On the other hand Mr. Truter, in the words of the trial judge, "argued [that Ms. Truter] wanted to avoid paying for his share of the matrimonial home, when, long after the expenditure, she sought payment for expenses he had never agreed to share." (para. 18).

3. THE TRIAL JUDGE'S DECISION

- [21] The trial judge found that the agreement to credit the \$20,000 installments for the family home against Mr. Truter's support obligations had accommodated both parties. She held that: "It may have been an unusual arrangement, but they were not negotiating out of their obligations to support their children." (para. 31).

- [22] She noted the significant gap in time between the start of this agreement and Ms. Truter's first list of the children's expenses in 2013, which went back to 2009. She also noted Ms. Truter's belief that Mr. Truter's agreement that the children could engage in a particular activity meant that he was also agreeing to pay his half of the cost of their involvement in it.
- [23] After referring to the prejudice that can result to the payor parent's ability to dispute an expense if the receipt has been submitted long after the expense was incurred, as discussed in *Lee v. Chung*, 2011 BCSC 404, the trial judge noted that there is nevertheless no limitation period restricting claims by a recipient parent for arrears of child support, which includes special and extraordinary expenses, pursuant to s. 7 of the Guidelines.
- [24] She held that the appropriate procedure when s. 7 expenses have been unilaterally incurred is for both parties to present evidence about whether they were valid s. 7 expenses, citing *Barker v. Barker*, 2005 BCCA 177, which was referred to in the *Lee* decision.
- [25] The trial judge also noted that there was no evidence to support Ms. Truter's assertion that she told Mr. Truter about the expenses and provided receipts as she paid each of them, although she acknowledged the evidence of "difficult" communications between the parties about the children's activities and the resulting costs. She found that the evidence of communications between them on the question of expenses was unsatisfactory overall. Some email conversations took place in the Afrikaans language and were not translated for trial and Mr. Truter required that some of the memos confirming his agreement to certain amounts be "without prejudice".
- [26] Ultimately, Mr. Truter took the position that he was responsible for \$3,195 in expenses, but the trial judge found his explanations for why he had agreed with some expenses and not others to be confusing.
- [27] After reviewing s. 7 of the Guidelines, and in particular:
- the distinction between special expenses in ss. 7(1)(a) to (c) and (e), which relate to childcare, medical, dental, health-related expenses; and extraordinary expenses under ss. 7(1)(d) and (f) for post-secondary expenses and extraordinary expenses for educational and extracurricular activities; and
 - the requirement that extraordinary expenses either exceed what the receiving spouse can reasonably cover or can be considered extraordinary in the light of the criteria under s. 7(1.1)(b),
- the trial judge proceeded to review the claimed expenses.
- [28] Health-related, neurofeedback, counselling and orthodontic expenses were not included in her final accounting of amounts owed by Mr. Truter, either because they did not exceed \$100 per year, as required by s. 7(1)(c) of the Guidelines, or because she found the documentation supporting them was unsatisfactory.

- [29] The evidence documenting Ms. Truter's expenses for childcare, including payments to her father for providing this service, were likewise found to be unsatisfactory. As a result, the trial judge credited Mr. Truter with the \$380 per month that he had paid for childcare until November 2013.
- [30] "In the absence of more definitive evidence," the trial judge chose the date of Ms. Truter's father's first deposit of a cheque from her, allegedly for that service, in July 2011[2] as the start date of that expense to her. This gave Mr. Truter a total credit of \$10,640 for what the judge found were his overpayments during that period.
- [31] With respect to extraordinary expenses, the trial judge referred to Ms. Truter's problematic financial disclosure about her own earnings and some unanswered questions about her actual income and expenses in the relevant period. She thought that the income may have been higher than Ms. Truter acknowledged. More importantly, the trial judge found that Ms. Truter was able to cover these expenses herself over the years, before demanding payment from Mr. Truter.
- [32] In light of the state of her financial disclosure, the judge imputed an income equal to Mr. Truter's at that time, \$110,000, which meant that a 50% sharing of expenses between them was still reasonable. Because the expenses did not exceed what Ms. Truter could reasonably cover, the question became whether they met the criteria under s. 7(1.1)(b), which provides that:
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.
- [33] After identifying some discrepancies in Ms. Truter's receipts, and considering only what she termed the "corrected" amounts, the trial judge made Mr. Truter responsible for 50% of certain expenses, with the figure provided representing 50% of the legitimate expenditures for: school fees, all related expenses for music activities that Mr. Truter had agreed to, tutoring, summer camps, fees for application and permits.

[34] Activities to which Mr. Truter objected (I infer that the trial judge meant objected in their entirety) and activities for which there was no receipt or no "direct or indirect evidence of consent" by Mr. Truter were not offset against Mr. Truter's indebtedness.

[35] The trial judge also set aside the order that Mr. Truter pay the costs of the accounting information for Ms. Truter's company, on the basis that it was necessary in order to make the determination of the s. 7 expenses.

[36] Before summing up her accounting of the respective amounts owed by the parties to each other, the trial judge said this, at para. 75 of the judgment:

In the accounting which follows, the numbers I have chosen are as close to the evidence as I can determine. If the parties disagree with my numbers but can agree easily to other numbers, without the need for further court time, they may vary my calculations by consent. Without consent, the following shall be the basis of my decision.

[37] She then concluded that the amount of child support owed by Mr. Truter to Ms. Truter from July 2011 to January 2013 during the currency of their set-off agreement, based on the Guidelines amount from his income from time to time, was "approximately" \$40,224. She also concluded that the \$80,000 owed to Mr. Truter from the unpaid installments for the share of the home should have interest at 5% added to it but not on a declining balance, for a total amount owed to him by Ms. Truter of approximately \$84,000.

[38] The total of his share of expenses to the date of trial was calculated as \$10,459.50. The trial judge pointed out this worked out to about \$1,800 a year. In addition, interest charged by FMEP was to be credited back to Mr. Truter, since there were actually no arrears resulting from the difference between the debt owed by Ms. Truter for the house and the amounts owed by Mr. Truter for child support and s. 7 expenses, before even considering his overpayment for childcare.

[39] Totalling the various amounts owed, the judge came to this conclusion, at para. 83:

There is a balance owing from [Mr. Truter] to [Ms. Truter] of approximately \$44,000. If [Ms. Truter] continues unable or unwilling to pay [Mr. Truter] a lump sum, I would strongly urge them to return to their credit system for child maintenance (except if that would result in negative changes to the lifestyles of the children). If they cannot agree on such a credit system, the only remedies available for enforcement are in the SCBC, pursuant to Part 5 of the Family Law Act.

4. ISSUES ON APPEAL

[40] As I have said, Ms. Truter alleges numerous errors by the trial judge. I will describe them in a more condensed way than in her written argument. Among the errors that she referred to were that the trial judge:

- Mistakenly referred to her as the respondent and Mr. Truter as the applicant in the reasons, when their actual roles in the litigation were the opposite;

- Remarked that Ms. Truter apparently did not consider that child support had been paid since separation, when in fact Ms. Truter had expressly deducted more than \$29,000 that he had paid through the FMEP in her submissions;
- Gave no indication of how she arrived at the total amount owing by Ms. Truter of \$44,000. This same error is referred to as the last ground of appeal. This figure is also submitted to be inconsistent with Mr. Truter's acknowledgment in May 2014 that her balance in relation to the three missed payments, not including s. 7 expenses, was about \$6,700. Ms. Truter argues that applying that admitted figure, her balance, after crediting the final missed payments in relation to the family home, should have been \$26,671.82, before going on to apply deductions from it for unpaid s. 7 expenses;
- Ignored the fact that the parties' separation agreement did not require Mr. Truter's consent for special expenses, as that term is defined in the Guidelines, only for extraordinary expenses, and also ignored his signed agreement to pay the specific amount of \$380 per month for childcare, which was not varied. This, it is submitted, resulted in an incorrect credit to him for childcare of more than \$10,000;
- Asserted that there was no evidence of when Ms. Truter's father began getting paid for childcare when in fact the cheques made out to him in evidence began in July of 2014;
- Excluded various health-related, dental and orthodontic expenses in the face of the agreement that these would be shared equally;
- Excluded some extracurricular activity expenses despite evidence that Mr. Truter had agreed to them;
- Set aside the interim order with respect to payment by Mr. Truter of the cost associated with her accountant producing her company's information to his counsel, without any indication of what the judge's authority was to do so;
- Failed to calculate Mr. Truter's total support obligation up to the trial date, which was about \$80,000, before deducting the amounts that he had paid to FMEP since being re-registered;
- Awarded Mr. Truter interest on the full amount owed despite the fact that the balance had declined and in the absence of any authority to do so in any of their agreements (and, I might add, in face of the specific refusal of Savage J. to order it originally);
- Made a minor arithmetical error in the amount credited to Mr. Truter for payments of s. 7 expenses; and
- Ordered that Mr. Truter be re-credited with the interest owing to FMEP without giving any indication of what the figure should be and while disregarding the fact that Ms. Truter had actually deducted the full amount paid by Mr. Truter to the FMEP in her calculations.

[41] As a remedy, Ms. Truter seeks to have me make the orders that she says should have been made at trial, which would result in a balance of about \$3,000 owing to her.

- [42] She also seeks to have me make prospective orders with respect to continuing childcare expenses, as well as orders for financial disclosure.
- [43] Because of a misunderstanding about how long the hearing would be, Mr. Truter did not have all of his material with him on the day the appeal was heard, but he wished to proceed with it nonetheless. This was the 19th time they had been in court in the case since 2010 and he expressed a state of exhaustion by the process and a hope that it could conclude on that day. He took a global view of the issues rather than breaking them down more minutely. In essence, his submission was that the trial judge had had a great deal of information before her and came to a balanced judgment after reviewing all of it. He was not credited with quite as high an amount as he believed he was entitled to, but was content to live with the result and urged Ms. Truter to do so as well. Ms. Truter's submissions, he argued, were not directed to the evidence at the trial or the judge's actual reasoning, but simply to contradicting outcomes that she disagreed with.

5. DISCUSSION

- [44] The standard of review on appeals of this nature was summarized in the recent decision of the Court of Appeal in *MacCarthy v. MacCarthy*, 2015 BCCA 496 at paras. 13-15:
- [13] ... With respect to any alleged error of law or principle the standard of review is correctness. With respect to any alleged error of fact, the issue is whether the error is palpable and overriding, that is, both obvious on the record, and material to the outcome: *Housen v. Nikolaisen*, 2002 SCC 33.
- [14] In *Hickey v. Hickey*, [1999] 2 S.C.R. 518 per L'Heureux-Dubé J. said:
- [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
- [15] This standard of review applies to all family law matters, regardless of the issue under appeal: *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 14-15, per Bastarache J., and has been applied by this Court: *R.E.Q. v. G.J.K.*, 2012 BCCA 146 at para. 33. The authorities make it clear that it is not for an appellate court to re-weigh the evidence or interfere on the basis that it would have decided the issue differently.

[Emphasis added by Savage J.A.]

- [45] Section 233(3) of the Family Law Act sets out the powers of the Supreme Court in hearing an appeal from a Provincial Court:
- (3) After hearing the appeal, the Supreme Court may do one or more of the following:
 - (a) confirm or set aside the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.
- [46] I have considerable sympathy for the predicament that the trial judge found herself in here. She was required to determine the significance of a large amount of documentary evidence as well as to make findings based on sometimes unclear and almost entirely conflicting versions of events. This evidence all dealt with a very lengthy post-separation period. It is clear to me from her reasons and her comments during the trial that her central purpose at all times was to arrive at a fair outcome for both parties, despite the unsatisfactory nature of the evidence.
- [47] I also take note of Mr. Truter's observation that this has been a regrettably protracted proceeding, and that some certainty and the prospect of an end to the litigation would be beneficial both to the parties and their children.
- [48] Despite these considerations, and especially my understanding of the parties' wish for finality, I have concluded that there were some meaningful legal errors in the way that the trial judge approached her task, which I am required to address.
- [49] The first of these is that the trial judge did not correctly analyze the legal effect of the agreement to set off Mr. Truter's childcare responsibilities against the unpaid installments for Ms. Truter to purchase his interest in the home.
- [50] In *Jamieson v. Loureiro*, 2010 BCCA 52, Justice Kirkpatrick made the following observations, in the context of a claim by a payor parent for an equitable set-off of amounts owed for child support against a cost award against the recipient:
- [57] First, I am unable to conceive of a case in which set-off would be allowed against future child support, and consider that it would be a very rare case in which one would consider set-off against arrears of child support. The support is for the benefit of the child and should not be lost because the person to whom the support is paid may owe, in another capacity, amounts to the payor. There is simply an insufficient connection and an absence of manifest injustice in requiring the payor to pay the full amount of support.
- [51] Or, as it was expressed in *Litynsky v. Litynsky*, 2012 BCSC 1160, at para. 56:
- [56] In my view, it is not open to the defendant in this case to barter away child support arrears or special expenses to satisfy his own personal debt. I do not consider it to be a material distinguishing feature in this case that the defendant seeks to set-off child support and special expenses he claims to be owed to him. Whether characterized as reducing child

support that would otherwise be payable, or foregoing receipt of child support that would otherwise be due by setting off those amounts against some other debt, the result is the same. In both cases, what is proposed to be bartered away is the severable and distinct entitlement of the child. In my view, the ruling in Jamieson is applicable to the circumstances before me.

- [52] Agreements to forego child support on an improper basis, such as an agreement not to seek access to the child, cannot form the basis of an order: *Black v. Black* (1995), 71 B.C.A.C. 233. And the court may inquire into the agreement and set it aside in the best interests of the child: *Humble v. MacKay*, 2012 BCSC 1285 at para. 20.
- [53] Faced with an agreement that purports to set off support in this manner, the trial judge was required to grapple with whether it should be enforced, in light of the undesirable effects described in these decisions. Her simple assertion that the agreement accommodated both parties, her finding that based on her imputed income Ms. Truter was able to pay the extraordinary expenses, and the conclusory statement that the parties were not negotiating their way out of the support obligations, were not sufficient. Nor were the recitals in the unsigned copy of the agreement, suggesting that the children would not be affected and that the agreement was for their benefit, conclusive of the issue.
- [54] The best interests of the children require that the support and expenses be paid in the usual way except in what Kirkpatrick J.A. has described as rare circumstances, and then only in respect to past arrears -- never with respect to an agreement to set them off as they arise. We do not know whether any such basis for a rare exception with respect to the past arrears could be found here, because the trial judge did not ask the question properly.
- [55] If the agreement could not be enforced, Mr. Truter would need to pay support in the usual way and seek his remedy for the non-payment for his property interest in Supreme Court, pursuant to Savage J.'s order.
- [56] Even more fundamentally, the judge did not address her jurisdiction to make an order with respect to child support in the context of a set-off against a debt relating to the division of family property.
- [57] The Provincial Court clearly has jurisdiction to make all necessary orders with respect to child support and s. 7 expenses, including identifying the correct amounts of any arrears or overpayments. But it cannot deal with property division or issues arising from it.
- [58] While the trial judge was, on one level, applying the principles that govern child support and s. 7 expenses when arriving at the amounts that Mr. Truter had paid or still owed, it seems obvious that she was also determining the amount of a set-off under an agreement to address a debt owed by Ms. Truter, arising from an order of the Supreme Court that had facilitated property division.

- [59] In effect, she was determining Ms. Truter's level of continuing indebtedness for her purchase of Mr. Truter's interest in that property and, with respect to the interest order, was also implying a term into it that Savage J. had expressly declined to order.
- [60] The interrelation of these two different areas of jurisdiction was clearly identified in paras. 76-79 of the reasons as well as para. 83, which I have already quoted. Beginning at para. 76:
- [76] The monthly amount owed for child support in July, 2011 was \$1234, which changed to \$1324 in May, 2012 and \$1411 in May of 2013. The total for the 30 months from July 1, 2011, to December 31, 2013 (inclusive), when these parents had agreed to a "credit" system, was approximately \$40,224 payable by HT to PT.
- [77] \$80,000 should have been paid in four \$20,000 installments on June 1st, 2011 to 2014 inclusive but was not. HT shall be credited for the full amount plus 5% interest but not on a decreasing balance, for a total of approximately \$84,000 payable by PT to HT.
- [78] The total of HT's 50% share of expenses paid to the date of trial shall be \$10459.50. That amounts to approximately \$1800 a year over 6 years.
- [79] Interest owing, as calculated by FMEP, should be credited to HT. From July 1, 2011 until January 1, 2014 there was approximately \$40000 in child maintenance and roughly (the time frame is different) \$10,500 for extracurricular expenses owed by HT. On the other side of this imaginary ledger there was then \$60,000 owed by PT for HT's share of the matrimonial home, without the need to consider his overpayment of childcare. There were no arrears, such that any interest charged by FMEP shall be credited to HT. There was no evidence of any attachment of his 2013 income tax refund in their calculations, but if that occurred, that too should be credited to HT.
- [61] In my view, it could not be clearer that the trial judge purported to deal with indebtedness arising out of the purchase of the interest in the family home. I think that in doing so, the trial judge exceeded her jurisdiction. While she was clearly alive to the question of jurisdiction in relation to Mr. Truter's claim for some of the contents of the family home (explicitly citing it as the reason for dismissing that claim), she unfortunately does not appear to have identified its application to this more important issue.
- [62] A third difficulty is that the trial judge never made the critical factual finding about whether Ms. Truter had actually obtained Mr. Truter's consent to any of the extraordinary expenses she claimed, as required by the agreement. This credibility issue was at the heart of the evidence and required a resolution in Ms. Truter's favour before the language of the agreement could be applied to expenses that Mr. Truter denied having agreed to.

- [63] The trial judge seems, on the whole, to have preferred Mr. Truter's version of events and method of keeping records, calling his accounting "detailed, precise and current" and hers "sloppy, disorganized and late." But she expressed no overall conclusion on the issue and made no finding with respect to the competing assertions about what expenses had been agreed to.
- [64] Instead, she appears to have gone straight to considering the applicability of the expenses sought by Ms. Truter on a freestanding basis under the criteria in s. 7(1.1)(b) as she would have on an application for the court to resolve expenses on which they cannot agree as described in Baker, rejecting Ms. Truter's arguments with respect to health-related expenses and childcare, and awarding those amounts she considered validly "extraordinary" and sufficiently documented. She did this without first addressing the issue of whether the original agreement, which was filed with the court and therefore had the effect of an order, should be varied to permit the extraordinary expenses to be awarded without agreement.
- [65] For example, in para. 68, after finding that Mr. Truter had agreed to pay for some of the children's music activities, the trial judge made him responsible for 50% of all school band music fees and all of the costs associated with both children's enrichment.
- [66] Evidence (or the lack of it) of his agreement was a relevant factor in the judge's analysis, but it was not determinative of his obligation to pay the extraordinary expenses, as it should have been if there was no variation of the order. In fact, the trial judge noted in para. 63 that neither party had requested a variation of the equal sharing of extraordinary expenses under the separation agreement, and held therefore that it would continue.
- [67] To be clear, the trial judge was not entitled to order the payment of extraordinary expenses in the absence of a finding of consent by Mr. Truter, unless she had varied the order.
- [68] This implicit rejection or disregard of the term requiring agreement for extraordinary expenses under the separation agreement, despite the trial judge's assertion that it continued in force, may be why she apparently did not think it necessary to apply Mr. Truter's concessions in his evidence about the state of the arrears or his submissions about the amount of s. 7 expenses for which he accepted responsibility, when she was carrying out her calculations. I think that was a further meaningful error in her analysis. These agreed amounts by Mr. Truter should have formed the baseline for an assessment of whether he was required to pay anything in addition.
- [69] Further, if the trial judge was purporting to order payments for past expenses for which Mr. Truter had actually no previous notice outside of the ambit of the separation agreement, then any order for payment had to consider the principles relating to retroactive payment of special expenses as set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231, which of course was not done in this case.

- [70] As a result of these errors, the order of the Provincial Court must be set aside and a new hearing must be held. The unresolved factual issues mean that the trial record is not sufficiently clear for me to substitute the orders sought by Ms. Truter at this stage. Indeed, different orders than the ones she sought may have been appropriate in any event. And since, pursuant to s. 233(b) of the Family Law Act, I can only make the orders that the Provincial Court should have made, I would have been hampered by the same jurisdictional difficulty that I have identified as restricting the trial judge's orders.
- [71] In view of that difficulty, the parties should seriously consider (and obtain legal advice about) whether these issues would be better dealt with together in this Court, which would be able to address both the question of child support and s. 7 expenses and any remedies that Mr. Truter may have with respect to the unpaid share of his interest in the property. He may also be able to pursue his outstanding claim for a share of the household contents.
- [72] Because my conclusion that a new hearing is required is based on errors that are meaningfully different from those that were argued by Ms. Truter, I will exercise my discretion not to make any order for costs in relation to the outcome of this appeal.

The Honourable Mr. Justice T.A. Schultes

- [1] The parties' names were initialized in the trial judgment.
- [2] This date may be incorrect, because the cheques to Ms. Truter's father that were referred to in the evidence begin in July 2014, as she indicates in her grounds of appeal. As I will discuss however, this error does not affect the outcome of the appeal.

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Prepared on 29 October 2026 · Esheria