SUPREME COURT OF YUKON

Citation: *SLH v AWH*, 2025 YKSC 22

Date: 20250501
S.C. No.18-D5076
Registry: Whitehorse

BETWEEN:

S.L.H

PLAINTIFF

AND

A.W.H

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff — Shaunagh Stikeman

Counsel for the Defendant — Kulbir Rahal Vaid (by videoconference)

REASONS FOR DECISION

Overview

[1] The plaintiff in this divorce proceeding is S.L.H., who now goes by the name S.L.S., and the defendant is A.W.H. The parties married on July 4, 2012, and separated on April 3, 2018. There are three children of the marriage: M.H., 10 years old; and A.H. and B.H., both 8 years old.

[2] Following separation, S.L.S. commenced this proceeding. As a part of the litigation, she filed a Certificate Pending Litigation ("CPL") against a property that was in A.W.H.'s name. A.W.H. now lives at the property.

[3] The parties went to trial, with a decision rendered on September 4, 2019[1]. Pertinent to this application, the trial judge imputed income to A.W.H. for the purposes of calculating child support. The trial judge also ordered that the parties equally share the cost of daycare as a special and extraordinary expense.

[4] S.L.S. and A.W.H. have now brought cross-applications. They sought multiple grounds of relief, most of which have been decided. The last issue to be decided relates to child support. S.L.S. seeks a retroactive variation to the trial judge's order on special and extraordinary expenses (also known as s. 7 expenses). Her position is that A.W.H. should pay for more expenses than outlined in the trial judge's order.

[5] A.W.H. also seeks that the trial judge's order be varied. He asks for a retroactive decrease to child support. He also seeks that the CPL be cancelled.

[6] On the CPL, S.L.S. seeks that it either remain in place or that the Court order that the Maintenance Enforcement Program (the "MEP") register the child support order against A.W.H.'s property.

Findings

[7] I find that A.W.H. should no longer be imputed an income; and child support payable should be based on his actual income, retroactive to September 27, 2023.

[8] I also conclude that A.W.H. should pay for some, though not all the special and extraordinary expenses S.L.S. seeks, retroactive to September 8, 2023. Additionally, the CPL should be removed; and there will be no order requiring the MEP to register the order against A.W.H.'s property.

[1] *SLH v AWH*, 2019 YKSC 43 ("*SLH*")

Issues

[9] The issues can be classified into categories of child support, special and extraordinary expenses, and securing the order against A.W.H.'s property.

A. Child Support

i. Is there a material change in circumstances to A.W.H.'s income?

ii. If so, what date should the change to child support take effect?

iii. What is A.W.H.'s income for the purposes of calculating child support?

B. Special and Extraordinary Expenses

i. Is there a material change in circumstances?

ii. If so, what date should the order about special and extraordinary expenses take effect?

iii. Which expenses should be covered?

iv. How should special and extraordinary expenses be divided going forward?

C. Securing the Order Against A.W.H.'s Property

i. Should the CPL be cancelled?

ii. Should the MEP be ordered to register the order against A.W.H.'s property?

Analysis

A. Child Support

i. Is there a material change in circumstances to A.W.H.'s income?

[10] I conclude that A.W.H. has demonstrated a material change in circumstances to his income.

Law

[11] When a payor seeks a retroactive decrease to child support, they must first demonstrate that there has been a material change in circumstances since the original order was made. A material change in circumstances arises where there is a change that is "significant, long lasting, and not one of choice" (*Colucci v Colucci*, 2021 SCC 24 (*"Colucci*") at para. 62).

[12] Additionally, an application for variation is not an appeal or a re-hearing of the original order (*Willick v Willick*, [1994] 3 SCR 670 at 687). Where the judge at the original hearing imputed an income to a payor, it is not open to the payor to claim a material change of circumstances by providing better financial information on a variation application (*Colucci* at para. 63). Similarly, a litigant who disagrees with a court's finding cannot succeed by filing better evidence in an attempt to change the finding.

[13] Thus, where the court imputed an income for the original order, a litigant will not establish a material change in circumstances simply by demonstrating that their declared income is different than the income imputed to them. Rather, they must address the reasons they were imputed an income and show why their income should no longer be imputed (*Trang v Trang*, 2013 ONSC 1980 at paras. 52-53).

[14] It is, therefore, necessary to understand why the judge imputed an income in the original order before the court can consider if there is a material change in circumstances.

Trial Judge's Decision

[15] The trial judge found that A.W.H. did not provide complete financial disclosure. Of particular concern was whether A.W.H. was receiving payments on investments he had made into a company called Bore Path Holdings ("BPH"). After reviewing the

evidence, the trial judge found that A.W.H. received approximately $275,000 in 2018 and 2019 from BPH. He then determined that A.W.H. would continue to receive between $52,000 to $65,000 annually from his investment.

[16] At trial, A.W.H. testified that he was concerned he would not receive any further funds from BPH. The trial judge concluded A.W.H.'s concerns were not well-founded. He also stated that, even if A.W.H.'s investment failed, he would not discount the income entirely, as that outcome would reflect A.W.H.'s "own greed and recklessness in making the investment" (*SLH* at para. 56).

[17] Additionally, the trial judge found that A.W.H. was intentionally underemployed. A.W.H. testified that he suffered from permanent physical disabilities from a motorcycle accident he had been in some years before. He stated that, because of his disabilities, he was unable to work more than eight hours per week. At the time of the trial, he was not working at all. The trial judge rejected the evidence that A.W.H. was unable to work, concluding that A.W.H. was capable of working 20 hours per week, and based on his abilities, could earn $40 per hour. He could, therefore, earn $35,000-$40,000 in employment income.

[18] Between the investment income and employment income, the trial judge imputed a yearly income of $90,000 to A.W.H.

Analysis

[19] A.W.H. submits that there has been a material change in circumstances regarding both his investment income and in his ability to work.[2]

[2] A.W.H. included legal arguments in his affidavits on many of the issues about child support and special and extraordinary expenses. My analysis addresses only those legal arguments that are in the Outline and made during oral argument.

Investment Income

[20] A.W.H. attests that, contrary to the trial judge's expectation that he would continue to receive money from his investment, the only money he received from BPH after the trial was $5,000 at Christmas time 2019. Moreover, BPH told him that it would not be paying him any additional money and it was in the process of liquidation; and by at least May 16, 2023, BPH was no longer registered as a business in the Yukon.

[21] In support of his submissions, A.W.H. filed emails between him and the CEO of BPH; correspondence between him and MEP about garnishment orders to BPH for A.W.H.'s payments of child support; and an email from the Registrar of Corporations, dated May 16, 2023, confirming that BPH was not longer registered in the Yukon. A.W.H. also filed his tax returns for the years 2020-2023. The tax returns do not assist in showing whether A.W.H. received payments from BPH, however, because according to A.W.H., they are not considered taxable income and would not be included in tax forms.

[22] At my request, A.W.H. filed bank statements between January 1, 2019, and December 31, 2023, as I concluded they would best show whether A.W.H. received funds from BPH after trial.

[23] The bank statements show that BPH has not paid any more money to A.W.H. BPH's payments in 2019 were deposited directly into his bank account and identified as "Preferred Dividend 536138 YUKON IN" and "Bore Path Services In". There were no more deposits using either identifier into his bank accounts after December 2019.

[24] Moreover, the bank accounts do not show any substantial deposits at all after December 2019, aside from a payment for retroactive Canadian Pension Plan Disability ("CPP-D") benefits. A.W.H. has even carefully accounted for other deposits that were

between the range of $1,000-$2,000. There are some deposits that A.W.H. could not account for, such as one of $4,000. However, given the time that has passed, he cannot be expected to remember all the different instances money was deposited or withdrawn from his account.

[25] Additionally, the point here is to determine whether A.W.H. experienced a significant, long-lasting change to his income, particularly to his investment income. The overall picture his bank statements paint is that A.W.H. received payments up until 2019, but he has not received a sustained income since, other than through CPP-D and social assistance.

[26] S.L.S.' counsel points out that A.W.H. received $275,000 in 2019 which A.W.H. has never accounted for. The implication I believe she seeks me to draw is that he has hidden the money elsewhere. A further implication is that, if invested, then there should be a return on those funds.

[27] She also submits the bank statements show that A.W.H. has other bank accounts into which he deposits money. A.W.H. has, however, responded to the alleged issues counsel raised. Moreover, he has also provided confirmation from the major Canadian banks and other financial institutions operating locally that he does not, and has not had, a bank account with the banks; a credit report showing where he banks presently and where he has banked in the past; and he signed a consent form permitting S.L.S.' counsel to contact any financial institution in the world to confirm if he has ever had an account with them. There is no evidence to support the conclusion that A.W.H., after December 2019, received an income other than CPP-D and social assistance, nor that he re-invested the $275,000 he received from BPH.

[28] The trial judge's conclusion that A.W.H. would continue to receive investment income has, therefore, not come to be. I take no issue with the trial judge's determination that, even if the investment failed, he would not discount the investment income entirely. However, I also conclude that A.W.H. should not suffer the consequences of his bad investments indefinitely. A.W.H. has established that there has been a significant, long-lasting change to his investment income, which was not one of choice.

Ability to Work

[29] A.W.H. also submits that there has been a material change in circumstances in his ability to work. He attests that, at the time of the trial, he could not work. He believed that he would be relieved of stress once the trial was over and his symptoms would improve. This did not occur, however. A.W.H. explains that he underwent surgery in 2022 to attempt to get some relief for his injuries, but the surgery did not work. His symptoms were, at best, minimally improved. He also filed two notes from his family physician: one from December 3, 2019, and one from June 4, 2023. They both state that A.W.H. is unable to work. The letter of June 4, 2023, provides more detail and perhaps goes further, also stating that A.W.H. will not be able to work in the future.

[30] A.W.H. has also filed evidence that he is in receipt of CPP-D and social assistance, including a supplementary allowance for individuals who are excluded from work due to disabilities, called the Yukon Supplementary Allowance ("YSA").

[31] S.L.S. submits that A.W.H.'s evidence in not new evidence showing a change but is the same evidence he presented at trial.

[32] I agree with S.L.S. that much of the evidence A.W.H. has provided does not demonstrate a change in circumstances. A part of his affidavit simply takes issue with

the trial judge's conclusion that he was able to work and S.L.S.' on-going beliefs that he is not as disabled as he claims.

[33] He further submits that, at trial, he, himself, was overly optimistic about his ability to work. That his assessment of his ability to work was incorrect is not a material change, however. The trial judge rejected A.W.H.'s evidence on the effect his disability had on his ability to work. The trial judge's determination would not have changed if A.W.H. had testified that he could not work at all.

[34] S.L.S. attests in one of her affidavits that the same doctor who provides the notes for this application also testified at trial that A.W.H. was permanently disabled and unable to work. A.W.H. does not dispute S.L.S.' evidence in his affidavit. Thus, the trial judge implicitly rejected the doctor's evidence when he determined that A.W.H. was able to work part-time. In the notes now provided, the doctor reiterates that A.W.H. cannot work and will not be able to work in the future. This is not new evidence.

[35] The doctor's evidence, moreover, is nothing more than a recitation of facts and conclusory statements that A.W.H. has chronic lower back pain and is unable to work. Even if the doctor's notes were new evidence, it does not establish a material change in circumstances.

[36] The failed surgery could mark a change. However, A.W.H.'s evidence is not that his condition worsened but that it has not improved his functioning.

[37] Two other events have occurred since the trial: A.W.H. now receives the YSA and CPP-D. I will consider only the effect of receiving CPP-D, as it is determinative. Under the *Canada Pension Plan*, RSC 1985, c C-8 ("*CPP Act*"), to be eligible for CPP-D a person must have a "severe and prolonged mental or physical disability" (s. 42(2)(a)). "Severe" means the person is "incapable regularly of pursuing any substantially gainful

occupation" (s. 42(2)(a)(i)). "Prolonged" means "the disability is likely to be long continued and of indefinite duration" (s. 42(2)(a)(ii)). A person who is capable of part-time work can not qualify for CPP-D (*Zavarella v Canada (Attorney General)*, 2010 FC 815 at paras. 8 and 17). A.W.H.'s position is that I should accept his eligibility for CPP-D as conclusive proof that he cannot work. It would have been better for A.W.H. to provide medical evidence other than that which he provided in his court application. Ultimately, however, in this case, being in receipt of CPP-D is sufficient to establish a material change in circumstances.

[38] S.L.S. submits that A.W.H.'s claim that he is unable to work even part-time is inconsistent with his evidence about his daily activities: he is able to take the children downhill skiing, he volunteers for school events, exercises, and is involved in community associations. While A.W.H.'s evidence shows that he is involved with his children and the community, it does not reveal that his abilities outstrip what he claims are his impairments. A person who has even significant disabilities is not expected to be a recluse. Moreover, some of the evidence shows that A.W.H. has modified his activities and declined others because of his disabilities. I am satisfied that there has been a material change in circumstances in A.W.H.'s ability to work.

ii. What date should the change to child support take effect?

[39] A.W.H. seeks that the change to child support be retroactive to December 2022. I conclude that the change to child support should be retroactive to September 27, 2023.

Law

[40] Once a payor has established a change in circumstances, presumptively the order will be retroactive to the date upon which the payor provided effective notice to the

recipient that they were seeking a decrease in child support, up to three years before the formal notice (*Colucci* at para. 80).

[41] For notice to be considered effective notice, the payor must give the recipient information about how their income has changed and provide reasonable proof of the decrease in income. Proof will be reasonable if it "…is sufficient to allow the recipient to 'independently assess the situation in a meaningful way and respond appropriately'" (*Colucci* at para. 88, quoting from *Gray v Rizzi*, 2016 ONCA 152). Even after providing proof of the change of income, the payor has an ongoing obligation to continue providing information and documentation to the payee (at para. 90).

[42] Where the payor does not provide effective notice before starting the variation proceedings, the presumptive date of retroactivity will generally be the date of formal notice, that is, the date the variation proceedings are commenced.

[43] The court also has discretion to depart from the presumptive date of retroactivity if applying the presumptive date will lead to unfair circumstances (at para. 96). The factors the court may take into consideration in exercising its discretion are: whether there was an understandable reason for the delay in seeking a variation; the payor's conduct; the circumstances of the child; and hardship to the payor (at para. 113).

Facts

[44] In the case at bar, A.W.H. provided an email notice to S.L.S. on November 30, 2022, stating that he was intending on seeking a variation to child support. The email did not provide information about his income or proof that it had changed. He also sent an email to S.L.S., dated February 14, 2022, in which he stated that he lives on approximately $2,100 per month with some additional benefits from social assistance.

[45] A.W.H. filed his notice of application seeking a variation of child support on September 27, 2023. He filed a financial statement on November 29, 2023.

Analysis

[46] A.W.H.'s counsel submits that the email of February 14, 2022, together with the notice of November 30, 2022, provided effective notice to S.L.S.

[47] I am not persuaded by this argument. The email A.W.H. sent S.L.S. was sent over nine months before he sent the notice that he was seeking to vary child support. A.W.H. drew no link between the two pieces of correspondence. It is not reasonable to expect S.L.S. to put the two emails together to consider whether there was a basis to change the child support order.

[48] Moreover, and more importantly, A.W.H. did not provide any proof of his change in income to S.L.S. Proof of change of income would be especially critical in this case because during the original divorce litigation, A.W.H. resisted disclosing his financial information and because, it appears, the parties did not exchange financial information on a regular basis.

[49] In this case, the alternative date of retroactivity is September 27, 2023. It was then that A.W.H. filed his Notice of Application. Shortly thereafter, he also filed his financial statement, thus providing S.L.S. with a clear picture of his finances. At that point she had sufficient information to review and respond to meaningfully. I therefore conclude that September 27, 2023, is the better date of presumptive retroactivity.

[50] I also conclude that I should not use my discretion to set a date of retroactivity to another date. There was no unreasonable delay here. A.W.H.'s conduct also does not suggest that another date for retroactivity would be fair. After A.W.H. provided his formal notice, he continued to provide financial disclosure.

[51] There is no direct evidence of the circumstances of the children. There is also no evidence that the children would experience hardship if S.L.S. were required to repay support or if there were to be a set-off.

[52] In contrast, A.W.H. did provide evidence about the hardship he experienced paying child support on his imputed income. I accept that paying the amount of child support he paid was a hardship. At the same time, I must balance this with his obligation to provide S.L.S. with information when he provided notice to her. Setting September 27, 2023, as the date of retroactivity will not lead to unfairness.

iii. What is A.W.H.'s income for the purposes of calculating child support?

[53] In accordance with s. 16 and Schedule III of the *Federal Child Support Guidelines,* SOR/97-175 (the *"Guidelines*"), A.W.H.'s income was about $15,701 in 2023. The amount of child support payable for that income is $184.96 per month.

B. SPECIAL AND EXTRAORDINARY EXPENSES

i. Is there a material change in circumstances?

[54] An applicant seeking to vary an order for s. 7 expenses must first demonstrate that there has been a material change in circumstances. In this case, I conclude there has been a material change in circumstances.

[55] At trial, the judge ordered that A.W.H. pay only the expenses related to daycare. The decision does not provide the reasoning behind this order. A.W.H.'s counsel states that the parties attended a Case Management Conference ("CMC") after the decision was rendered in which the trial judge explained why he had structured the order as he did, but no transcript of the CMC was filed as a part of this application.

[56] It is not, however, necessary to understand the trial judge's reasons for making his order. More than four years passed between the date the trial judge made his order

and S.L.S. filed her notice of application; and the children were three and five years old at the time the order was made, and seven and nine years old when the notice of application was filed. Given the extent children grow and mature at these ages, the passage of time, in itself, constitutes a significant change. Additionally, the children no longer attend daycare; and their level of involvement in extracurricular activities has increased. This is sufficient to constitute a material change of circumstances.

ii. What date should the order about special and extraordinary expenses take effect?

[57] S.L.S. seeks that the order for s. 7 expenses be retroactive to September 2019. I conclude, however, that the order for s. 7 expenses should be retroactive to September 2023.

Law

[58] The law applicable to retroactive increases of child support is very similar to that of applications for retroactive decreases in child support. Where a material change in circumstances has been established, the presumptive date of retroactivity is the date of effective notice, up to three years before the formal notice of the application to vary. If no effective notice is provided, then the presumptive date of retroactivity is the date of formal notice (*Colucci* at para. 114).

[59] However, the court has the discretion to depart from the presumptive date of retroactivity where it would be unjust to impose the presumptive date. In determining whether to depart from the date of retroactivity, the court will consider the reasons for the payee's delay, the payor's conduct, the child's circumstances, and hardship for the payor (at para. 114).

[60] While there are similarities in the tests for retroactive increases and decreases in child support, there are some differences as well. Where a recipient is seeking to increase child support, effective notice arises when the recipient broaches the subject of an increase with the payor. The burden is less on a recipient seeking an increase than on a payor seeking a decrease because the recipient has an informational disadvantage. The payor knows when their income increases, and by how much. The recipient, on the other hand, only knows this if the payor tells them (at paras. 86-87).

[61] Because special and extraordinary expenses are a form of child support, some of these principles apply equally to applications for retroactive increases of special and extraordinary expenses. However, where the increase is sought not because the payor's income has changed but because the child's needs have changed, what constitutes effective notice may require a more nuanced analysis. On the one hand, the recipient knows how much they spend on special and extraordinary expenses: it is thus the payor that is at an informational disadvantage. On the other hand, where it is clear that the payor should be contributing, and they are not, then the fact that there is an informational disadvantage may not be as significant. The court may weigh the factors used to determine whether to set the date of retroactivity to a date other than effective notice differently, depending on the facts of a case.

Analysis

[62] S.L.S.' position is not that she provided effective notice to A.W.H. that she was seeking a change in payment of special and extraordinary expenses, but that the order should be varied to September 4, 2019, which was the date of the trial judge's decision. By using this date of retroactivity, S.L.S. is effectively seeking to overturn the trial judge's decision on special and extraordinary expenses. If S.L.S. was unhappy with the

judge's decision, she should have appealed it at the time. I decline to find September 4, 2019, as the date of retroactivity.

[63] The presumptive date of retroactivity is, therefore, the date S.L.S. filed her Notice of Application seeking a change to the order of special and extraordinary expenses, which is September 8, 2023.

[64] In determining whether I should use my discretion to change the date of retroactivity, the factors of delay and conduct do not apply to the facts of the case; and I do not have evidence to determine whether the circumstances of the children have been impacted because A.W.H. has not been paying special and extraordinary expenses.

[65] I accept that, given A.W.H.'s limited means, a retroactive award may cause hardship. However, hardship can be balanced by setting off the amounts he is owed for his overpayment of child support or through periodic payment of special and extraordinary expenses he may owe.

[66] The date of retroactivity is, therefore, September 8, 2023.

iii. Which expenses should be covered?

[67] S.L.S. is seeking that A.W.H. pay half of the special and extraordinary expenses she incurred. These are: the children's eye exams and glasses; counselling; dental appointments for cleanings, check ups and care following dental appointments; the children's attendance at summer camp; school fees; and for the children's registration in gymnastics, baseball, soccer, parkour, and scouts.

[68] A.W.H. submits that he should not be required to pay for all the expenses sought by S.L.S. Instead, he should pay for only those expenses S.L.S. consulted him about before incurring the expense. A.W.H.'s current counsel additionally noted that, although

S.L.S.' financial statement filed on November 27, 2023, may have been delivered to A.W.H.'s previous counsel, he did not pass it on when current counsel took over the file. She then received only a partial copy from S.L.S.' counsel. To her credit, AWH's counsel did not seek that I disregard the portions not provided to her. I will therefore consider the entirety of S.L.S.' financial statement and attachments filed on November 27, 2023.

[69] I conclude that A.W.H. should pay a portion of most of these expenses.

Law

[70] The table amount of child support is meant to cover all the ordinary expenses of child rearing. Special and extraordinary expenses are costs that go beyond the amount the requesting spouse can reasonably cover (*JC v SAW,* 2008 YKSC 95 at para. 9).

[71] Not all large expenses qualify as special and extraordinary expenses; and the court has discretion in ordering that the expenses be shared (at para. 9).

The *Guidelines* provides two categories of expenses that fall under the label of special and extraordinary expenses. First, there are special expenses. These include health-related expenses, such as medical, psychological, and dental expenses; childcare; and expenses for post-secondary expenses. The court may order that the payor parent contribute to the costs of the expenses if they are both necessary and reasonable (s. 7(1)).

[72] The factors the court may use in assessing whether an expense is reasonable include: the means of the parents, and the parents' spending patterns pre-separation. (*Delichte v Delichte*, 2013 MBCA 106 ("*Delichte*") at para. 38). The "means of the parents" is calculated not only by looking only at the parties' incomes, it also includes other sources of revenue available to the parent. The income of the parties' spouses,

the amount received for the childcare benefit (“CCB”) and child support, and social assistance and disability income provided for children are all included in determining the parties’ means (*Leskun v Leskun*, 2006 SCC 25 at para. 29).

[73] Whether there was consultation about the expense incurred is also a factor the court can consider, but lack of consultation does not automatically preclude an apportionment of an expense (*Delichte* at para. 44).

[74] The second category of expense include the costs of some extracurricular activities and expenses for primary or secondary school education. To determine if the costs of extracurricular activities and schooling should be covered, the court will consider two questions. First, the court will ask whether the amount of the expense exceeds the amount the requesting parent can reasonably afford (s. 7(1.1)(a)). If the answer to that question is no, the court will then decide whether the costs are nonetheless extraordinary, and, in doing so, will consider: the requesting parent’s income, the nature and number of the programs and extracurricular activities, whether the child has any special needs or talents, and the overall cost of the program (ss. 7(1)-(1.1)(b)) (the “s.7.(1)-(1.1)(b) Factors”).

[75] As with special expenses, the court will also take into account the necessity of the expense and whether it is reasonable (s. 7(1)).

[76] Necessity is given a liberal interpretation when applied to extracurricular activities, and primary and secondary school expenses. If the activities aid the child’s development and health, the activity may be considered necessary (*Delichte* at para. 35). Reasonableness is assessed the same way as for special expenses.

[77] Generally, expenses are shared proportionate to the parties’ incomes (not their means) (s. 7.2), although the court may order otherwise if the facts warrant it.

[78] The income calculated for the purposes of calculating special and extraordinary expenses may be different than that calculated for calculating base child support. For instance, for base child support, the CCB a parent receives is not included to calculate income but for special and extraordinary expenses, it is (*Guidelines*, Schedule III, s. 3.1).

Analysis

[79] I will first determine the parties' means and incomes. I will then decide whether the costs S.L.S. incurred are special or extraordinary expenses.

The Parties' Means and their Incomes

[80] S.L.S. earns approximately $87,034[3] per year and receives about $24,676 for CCB[4]. Her partner earns approximately $69,000. Her total means therefore, are about $176, 885. When examining S.L.S.' partner's income as it adds to S.L.S.' means, I use it to assess how her overall expenses are alleviated by living with another partner. I do not use it to conclude that her partner should be contributing to the upkeep of the children.

[81] For A.W.H., his income for the purposes of calculating child support, which is $15, 701, is different than his means. That income encompasses only the money CPP-D and social assistance provide to him for his needs. CPP-D and social assistance also provide money to A.W.H. specifically earmarked for his children, and which is not considered income for the purposes of calculating child support. Those payments are,

[3] S.L.S. did not file her 2023 Income Tax Return or Notice of Assessment. The income of $87,034 is taken from her Financial Statement filed January 10, 2024. Although it is not corroborated by income tax returns, I accept it, in part, because it is quite a bit higher than her income in 2020-2022. The defendant did not seek that I impute an income to S.L.S. in his Outline or oral submissions.

[4] In her Financial Statement, filed January 10, 2024, S.L.S. states that the CCB she receives is $16,820 per year. The CCB she received, in 2022, as calculated from a "Statement of Account" issued by the Canada Revenue Agency, attached to S.L.S.' Financial Statement, filed November 27, 2023, is $24,676. For determining CCB I used the higher, corroborated number.

however, included for the purposes of determining his means. Including those amounts, A.W.H. earned approximately $34,916 in 2023.

[82] S.L.S.' income for the purposes of calculating s. 7 expenses, rather than her means, is $111,710, (this includes her stated income and the CCB she receives, but not her partner's income). A.W.H.'s income for calculating special and extraordinary expenses is $15,701 (the same as his income for calculating child support).

Special Expenses

[83] The special expenses S.L.S. seeks payment for are eye and dental care, counselling and summer camps.

[84] Regular eye care and dental check ups are necessary. Turning to whether the expenses are reasonable, S.L.S. takes the children to get routine eye exams, the costs of which, in October 2023, were $84 per child. The lenses for A.H.'s glasses cost $189, and the glasses themselves were $214. A.W.H. was not consulted about these expenses. However, considering their necessity, even taking into account the disparity in the parties' incomes, I conclude that A.W.H. should contribute to these costs. I see no reason to depart from the principle that costs should be borne proportionate to the parties' incomes.

[85] As this matter has taken considerable time to get to a hearing and decision, I order that the costs of routine eye exams and glasses be payable once per year, as incurred between September 8, 2023, and the date of the release of this decision. I also order that the payment be calculated proportionate to the parties' incomes. S.L.S.' income is $111,710 and A.W.H.'s income was $15,701 in 2023. Divided proportionately, S.L.S. would pay 88% percent of s. 7 expenses and A.W.H. would pay 12%. To make it

simpler, I will order that S.L.S. pay 90% of the costs, and A.W.H. pay 10%. S.L.S. is to provide A.W.H. with the invoices for any costs she claims.

[86] My analysis with regard to the costs for dental care is similar. The children undergo cleaning and check ups, with associated care sometimes involved. These costs are necessary, and the costs associated are reasonable. I order that the costs for cleanings every six months, and check ups and associated costs once a year, incurred between September 8, 2023, and the date of the release of this decision, be shared proportionate to the parties' incomes. Again, S.L.S. is to provide A.W.H. with invoices for any costs she is seeking.

[87] Turning to S.L.S.' request for counselling, from the evidence, it appears that at the time S.L.S. arranged counselling for the children, both S.L.S. and A.W.H. agreed that the children would benefit from counselling. Dealing with their parents' separation has also had an impact on the children. Thus, I also conclude that it is necessary.

[88] The issue the parties had, however, was who the children should see. S.L.S. proposed a counsellor. A.W.H. wanted to find out if free or less costly counselling was available. S.L.S. ended up arranging for the children to see the counsellor she originally chose. Given the difficulties the parties had in communicating on this issue, I will order that A.W.H. pay 5% of the costs of counselling between October 2023 and the date of the release of this decision. S.L.S. shall provide A.W.H. invoices for the costs of counselling.

[89] With regard to summer camps, they could be special costs because they were used for the purposes of childcare. It appears, however, that the children were enrolled only for the summer of 2023, and not 2024. A.W.H. will therefore not be responsible for any of the costs of the summer camps.

Extraordinary Expenses

[90] S.L.S. is seeking that A.W.H. pay a portion of the children's school fees and extracurricular activities. School fees for public school are part of the ordinary expenses of child rearing and are not extraordinary expenses. The extracurricular activities, however, may be extraordinary expenses.

[91] Although there are several steps in determining whether extracurricular activities should be considered extraordinary expenses, there is considerable overlap in some of the steps. I will therefore first determine whether the amount of the expenses exceeds the amount S.L.S. can reasonably cover. I will then consider necessity and reasonableness. In my analysis of reasonableness, I will incorporate the s. 7(1)-(1.1)(b) Factors, as applicable.

[92] Because some of the activities the children are involved in change from time-to-time, I will examine the activities S.L.S. describes in her affidavit as representative of the kinds and costs of the activities the children are involved in rather than addressing whether each activity should be considered an extraordinary expense. At times, however, I will address A.H.'s gymnastics separately because she is in a competitive program, rather than a recreational program, and because the cost is higher than the other activities.

[93] In 2023-2024, the children took part in baseball, soccer, Beavers, parkour, and gymnastics. The fees for most of the activities were relatively modest: $170 for baseball, and $182.19 for soccer, for instance. Parkour was somewhat higher. The costs for A.H. to take part on the competitive team in gymnastics was almost $3,000 in August 2023. According to S.L.S.' evidence, the total amount she pays for extracurricular activities in

a year is about $3,988. It seems to me, that, given S.L.S.' means, this is an amount S.L.S. can reasonably cover.

[94] I now turn to the assessment of necessity, and reasonableness.

[95] S.L.S. attests that she enrolls the children in activities they express an interest in. Aside from A.H.'s gymnastics, I have no problem concluding that they are necessary.

[96] The issue arising from A.H.'s participation in gymnastics is that, when S.L.S. consulted with A.W.H. about enrolling A.H. in the competitive program, A.W.H. did not agree. Despite A.W.H.'s initial concerns, the evidence is that A.H. really enjoys gymnastics. It is something that benefits her. I conclude that it, too, is necessary.

[97] Looking at whether the activities are reasonable, the fees for most of the activities were relatively modest. A.W.H. was consulted about enrollment in some, but not all of the activities. Setting aside gymnastics, taking into account the numbers of the activities and the means of both parties, the expenses are reasonable.

[98] For gymnastics, the question really boils down to whether it is reasonable for A.W.H., with means of about $35,000, to pay 10% of the $3,000 it costs for A.H. to attend gymnastics. I conclude that, on that limited budget, he should not be required to pay 10% of the costs of the program. I also conclude that he should not be required to pay for extracurricular activity costs over $3,000. I do, however, conclude that he should still contribute something. I will therefore order him to pay 10% of extracurricular activities up to a cumulative total of $3,000; and he will not be required to pay any portion over $3,000, for the dates between September 8, 2023, and the date this decision is delivered. S.L.S. is to provide A.W.H. invoices for any costs she claims.

iv. How should s. 7 expenses be divided going forward?

[99] My decision on s. 7 expenses above informs how they should be paid going forward. A.W.H. will pay special expenses proportionate to his income, including counselling. As noted, I concluded that A.W.H. should pay 5% of the costs for counselling for a period of time because, while S.L.S. spoke to him about counselling, she did not adequately consult with him about it. However, the children are benefitting from counselling. At this point, the amount A.W.H. pays should increase to 10%.

[100] With regard to extraordinary expenses, because the children may develop different interests as the grow up, my order will not specify which activities A.W.H. will be required to pay for. Rather, I will place some limits on the total amount A.W.H. is required to pay for extracurricular activities.

[101] My order on special and extraordinary expenses is:

- S.L.S. shall consult with A.W.H. before incurring any special or extraordinary expense, but if the parties disagree, S.L.S. shall have the authority to proceed with the expense and A.W.H. shall be liable for his proportionate share of the expense.
- The parties shall share the costs of special expenses, roughly proportionate to their incomes, with S.L.S. paying 90% and A.W.H. paying 10% of the costs.
- Special expenses includes:
    i. childcare expenses incurred as a result of the employment, illness, disability or education or training for employment for the parties;
    ii. the portion of the medical and dental insurance premiums attributable to the children; and

iii. 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.

- The parties shall share the costs of extraordinary expenses, including for extracurricular activities and for primary or secondary school or other non-post-secondary educational programs as follows:
  i. up to $3,000 per year, the parties shall share the costs of extraordinary expenses, roughly proportionate to their incomes, with S.L.S. paying 90% and A.W.H. paying 10% of the costs; and
  ii. A.W.H. shall not be required to pay for any extraordinary expenses over $3,000 per year.
- S.L.S. shall provide invoices of the expenses to A.W.H., which shall be payable within 15 days of receipt.

[102] For the purposes of both child support and special and extraordinary expenses, I will also include the order that the parties exchange their notices of assessment by June 1st every year. The parties shall re-calculate the amount of child support and apportionment of s. 7 expenses, maintaining a proportionate apportionment, when the parties' incomes change.

C. Securing the Order Against A.W.H.'s Property

[103] Because she is worried that A.W.H. will not pay the child support he owes, S.L.S. seeks that either the CPL remain in place or that I order the MEP to register the order against A.W.H.'s property.

i. Should the CPL be cancelled?

[104] Under the *Land Titles Act*, SY 2015, c.10, a person may register a CPL if the person is a party to an action in which they claim an interest or estate in land (s. 161(1)). A claim for child support is not a claim of an interest in land. Thus, a CPL cannot be used to enforce payments of child support. I will therefore order that the CPL be cancelled.

ii. Should the MEP be permitted to register the order against A.W.H.'s property?

[105] As I understand S.L.S.' counsel's argument, she states that the MEP requires a court order to register the child support order against property, however, no real argument was provided about why a court order was required.

[106] Section 25 of the *Maintenance Enforcement Act,* RSY 2002, c.145 ("*MEA*"), provides that a child support order may be registered with the land titles office against a payor's real property. It does not state that a court order is required. The *MEA* provides the director of the MEP with broad authority and discretion to enforce child support orders. It seems to me that, consistent with that broad authority and discretion, it is up to the director whether to register a property with the land titles office. I also see no basis to interfere with that authority in this instance.

Conclusion

[107] A.W.H. is granted his application for a decrease to child support. The decrease is retroactive to September 27, 2023.

[108] S.L.S. is granted her application, in part, that A.W.H. pay special and extraordinary expenses, and is retroactive to September 8, 2023.

[109] If the parties cannot agree on a schedule for repayment of overpayment of child support and s. 7 expenses, the parties can set down a CMC. Costs may also be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.