Family Law News

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Being Extraordinary

We are excited to take over this column from Milka Vujnovic who has done an amazing job at keeping the Hamilton Bar up to date and interested in the issues that affect Hamilton Family Lawyers. As a team, we hope to continue in her footsteps by writing relevant and interesting articles that will provoke thought, start debate and keep you up to date.

This month we have decided to discuss the case of *Homier v. Paquette*, a decision of the Honourable Madam Justice C. Brown dated August 30, 2010. *Homier v. Paquette* starts out simply enough; by the time the last-minute whittling down of issues occurred on the courthouse steps the only remaining issue for trial was whether the Respondent father had an obligation to contribute to a child's retroactive and ongoing expenses at the Oxford Learning Centre.

By way of background, the parties were married for nine years and had two children. The children resided equally with each parent on a week-about basis. The parents had joint custody, but agreed that in relation to educational issues the mother would have final decision-making authority. The father paid full guideline child support and had an obligation to contribute his proportionate 70% to the children's s. 7 expenses. Enrolment in extracurricular activities required the joint written agreement of both parties. All of these provisions formed part of an existing Court Order.

Justice Brown made the following findings of fact as they pertained to the Oxford Learning Centre:

1. The extra educational help for the child was required as a result of a learning disability;

2. The evidence confirmed that the child was benefiting from the program;

3. The Respondent father was provided with proof of the cost and did not contribute;

4. The decision to enrol the child in the learning program was made unilaterally by the Applicant mother, who had authority to do so (as an educational issue) under the existing court order.

However, just as the Respondent father starts to pull his chequebook from his pocket and the mother begins to smile knowingly at her handsome counsel, Justice Brown goes on to rule that the learning centre expenses are not "extraordinary" as a result of the equal time-share arrangement in place and the father's payment of the full table amount of child support.

Yikes! What does this mean?

Justice Brown clearly rules that the learning centre program costs are properly classified as "expenses" pursuant to section 7(1)(d) of the *Guidelines*; that is, educational programs that meet the child's particular needs, but then goes on to rule that they are not "extraordinary" under s. 7(1.1). As family law counsel, we often forget about the s. 7(1.1) part of the analysis. Section 7 (1.1) further qualifies the "extraordinary" nature of expenses that pertain to primary, secondary, or educational program costs, and costs associated with extra-curricular activities.[1] Where these types of expenses are concerned, to qualify as "extraordinary" an analysis must be undertaken which considers, amongst other things, the parties' incomes, the support being paid, and whether the recipient can reasonably cover the cost of the expenses in context of the support that is being received.

In this family, the father was paying the full amount of guideline child support, despite the fact that he had the two children of the marriage living with him approximately half of the time. If a set-off approach to child support were utilized in these circumstances the father would have been paying approximately $350.00 per month less in child support. The total cost of the learning centre program amounted to approximately $330.00 per month. Coincidence? We don't believe this math was overlooked. Justice Brown definitively states that "… if not for the fact that the Respondent is paying full guideline child support despite having the children for half the time, I would have found that the costs for the program were (and are) not excessive as it relates to the Respondent".

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On one hand we applaud this decision because it rewards payor parents who are not motivated to pursue shared custody solely for a potential reduction in table child support payable; a rather disgusting but not totally uncommon tactic. On the other hand it begs the question of whether any expenses would qualify as "extraordinary" in the context of a shared parenting arrangement and the payment of full table support. In this case, a monthly expense of $330.00 is a large burden to bear by a parent earning an income of approximately $20,000.00 per year. The end result may very well be that the child will no longer receive an educational benefit that appears to be needed. We are advised that the case is currently under appeal and we will look forward to the Court of Appeal's perspective on the issue.

Regardless as to how this case plays out, it is undoubtedly an excellent reminder of the nuances of the Guidelines and provides an opportunity for us to review our own care and consideration in drafting minutes of settlement, domestic contracts, etc. when dealing with section 7. We therefore take this opportunity to remind ourselves (and anyone else who has read to the bottom of this article) to heed the following warnings and advice when considering this section:

1. Use precise language; do not use the terms 'special' and 'extraordinary' interchangeably especially in circumstances where the parties are agreeing that consent must be obtained in advance, and ensure that your client understands the difference;

2. Note that child care, health-related expenses, and post-secondary expenses will almost always qualify as a s. 7 expense provided that they are necessary in consideration of the child's best interests and are reasonable in consideration of the means of the parents;

3. Note that educational expenses (not post-secondary) and extracurricular activities must surpass further scrutiny which will involve an additional "extraordinary" analysis of whether (a) it is an expense that the recipient can reasonably cover in light of the table support payable/actually paid, or (b) the cost of the expense in relation to the recipient's income, the table support payable/actually paid, the nature and number of programs and activities, the special needs/talents of the children, the overall cost of the programs and activities, and any other similar factor that the court considers relevant;

4. If possible, fix what educational and extracurricular activities qualify as "extraordinary" without consent to avoid later debate; and

5. If possible, fix the amount of the contribution to the educational and extracurricular activities to assist with enforcement by the Family Responsibility Office; and

6. Beware of subsidies and tax deductions associated with s.7 expenses so that any agreement to contribute will accurately reflect the actual out-of-pocket expenses of the parties.

With hopes that our case review and these tips might assist in limiting your clients' rotations of the revolving door at the family courthouse, we thank you for considering our perspective and look forward to writing further extraordinary articles in the future.

[1] It is important to note that s. 7(1.1) does not apply to the other types of s. 7 expenses under the guidelines including childcare, medical and dental premiums, health-related expenses, and post-secondary education. ■

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