SUPREME COURT OF YUKON

Citation: *J.C.* v. *S.A.W.*, 2008 YKSC 95

Date: 20081212
S.C. No. 00-D3306
Registry: Whitehorse

Between:

J.C.

Petitioner

And

S.A.W.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

J.C. — Appearing for herself
S.A.W. — Appearing for himself

REASONS FOR JUDGMENT

INTRODUCTION

[1] These are cross-applications by the petitioner mother and respondent father for variation of the child support provisions in a Consent Corollary Relief Order made on March 5, 2002 ("CCRO"). Both parties are representing themselves. The mother also sought certain financial disclosure from the father, which has since been provided. The father did not object to paying the table amount of child support under the *Child Support Guidelines*, but asked that I make certain corrections to account for overpayments of child support by him arising from changes to the residency schedule of the parties' two children over the last few years. The father also opposed that part of the mother's

application in which she seeks a proportionate payment by him for the children's special or extraordinary expenses under s. 7 of the *Guidelines*.

[2] The hearing took place on November 5 and 18, 2008. On November 5th, I was able to work through the child support overpayment issue with the parties and obtained their agreement on the extent of the overpayment, which totalled a net amount of $1,657.87. That was fully set-off against the amount of unpaid special or extraordinary expenses due from the father to the mother as at October 1, 2008, without prejudice to the father's right to defend against any future claim for such expenses. The father also agreed to pay child support of $1,200 monthly for the two children, commencing June 1, 2008, based on his total gross income for 2007 of $81,404. Finally, the parties agreed that I should order that the records of the Yukon Maintenance Enforcement Program be corrected to indicate that the amount owing by the father to the mother as arrears should be reduced to zero.

[3] The balance of the application was adjourned to November 18th. On that date the parties approved the form of an order prepared by me to reflect the agreements reached on November 5th. That left the remaining dispute as the ongoing special or extraordinary expenses and whether the father should pay his proportionate share of those expenses. During the adjournment, I directed the father to provide further detailed financial information, as he was claiming that, because of his debt load and the increased table amount of child support payable under the order of November 18, 2008, he could no longer afford to pay his share of the children's s. 7 expenses. The father's response to my direction was his affidavit #9, which he filed on November 14, 2008. Unfortunately, this affidavit was not actually received by the mother until just before the hearing on

November 18th, as she was out of Whitehorse over the intervening weekend. Accordingly, I allowed the mother an opportunity to file a further affidavit after the close of the hearing, containing as much information as possible about the claimed s. 7 expenses. The mother did so in her affidavit #11.

[4] Surprisingly, the father responded yet again by filing a further document on December 5, 2008, entitled “Respondent’s Response to Petitioners Affidavit #11”. This is an unsworn document and it was filed without the permission of the Court. Therefore, I give no weight to it, although I will refer to some of the language used by the father in the document at the end of these reasons.

BACKGROUND

[5] This case is an unfortunate example of the kinds of ongoing litigious battles that can occur between couples following a breakdown of their relationship, especially where children and money are involved.

[6] The parties were married in 1993 and separated in October 2000. There are two female children of the marriage, N., born December 12, 1994, and K., born February 27, 1997. Therefore, N. has just turned 14 and K. is now 11. The parties made a written Separation Agreement in May 2001 and the CCRO was consented to in March 2002, effectively reflecting the terms of the Separation Agreement. The parties have joint custody of the children. Initially the primary residence of the children was to be with the mother, with the father having access each weekend and on Wednesday evenings. In November 2004, I allowed an application by the father to vary the CCRO in order to allow the children to live equal amounts of time with each parent. By then, the father had remarried to L.M.-W., and the couple had adopted a young child from overseas. The

father had then indicated that he would continue to pay the existing child support to the mother for a one year period, however he also suggested that he may be reconsidering that position, given his new family's circumstances. Given the lack of clarity on that point, I made no order varying the child support provisions in the CCRO at that time.

[7] In January 2008, the mother applied for a further variation of the CCRO, seeking a change in the schedule of shared residence of the children, who were represented by a child advocate and had been interviewed by a family therapist. The children were then 13 and almost 11. In very general terms, they had indicated to both the family therapist and the child advocate that they wished to spend a greater amount of time with the mother. I allowed the mother's application, which resulted in the children residing with the mother approximately 68% of the time and with the father about 32% of the time, in every four week cycle. It is that change in circumstances which has prompted these cross-applications.

THE LAW

[8] Section 7 of the *Child Support Guidelines* was amended on May 1, 2006 to add subsection 1.1, which provides the definition of "extraordinary expenses". For the benefit of the parties, I will set out the entire section:

> "(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking 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 the separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and 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; or

(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.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after

> deducting from the expense, the contribution, if any, from the child.
>
> (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
>
> (4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit."

[9] According to the commentary in J. MacDonald and A. Wilton, *Child Support Guidelines Law and Practice*, 2nd ed. looseleaf (Toronto: Thomson, Carswell, 2004), at p. 7-4 and following, these expenses are special or extraordinary in the sense that they are in addition to the table or basic amount of child support under the *Guidelines*. The jurisdiction to include special or extraordinary expenses in a child support order is discretionary. The expenses are described in specific terms in an exhaustive list of categories. Only an expense which comes within one of the categories is considered special or extraordinary. There is no "catch-all" category. The actual amounts of the expenses should be used in the calculations, but where that is not possible or convenient, the expenses may be estimated. Once an expense has been determined as being either special or extraordinary, the court is then required to assess the contribution, if any, that the payor parent should make towards the payment of those expenses. This assessment is in the discretion of the court, taking 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 parents and those of the child; and
- the family's spending patterns prior to the separation.

[10] The expenses in s. 7(1)(a) to (f) of the *Guidelines* are a mix of both special and extraordinary expenses, with the latter being singled out in paras. (d) and (f). Therefore, the expenses in paras. (a), (b), (c) and (e) are all "special" expenses that relate to daycare, medical and dental insurance premiums, certain kinds of health-related expenses, and the costs of post-secondary education. Because the sub-section refers to expenses for educational programs and extracurricular activities as "extraordinary", the implication is that "ordinary" expenses for these programs and activities are not included in s. 7 for extra payment. The difficulty is in deciding which of these programs and activities are over and above the ordinary, and therefore fall within the class of "extraordinary" expenses.

[11] Prior to the enactment of s. 7(1.1), courts applied either a subjective or an objective approach in interpreting "extraordinary". In the subjective approach, the expense was determined to be extraordinary, or not, by considering the financial circumstances of the particular family in question. With the objective approach, courts would consider whether the expense was disproportionately high in relation to an assumed general standard for all families at the particular level of the payor's income. In *McLaughlin* v. *McLaughlin* (1998), 167 D.L.R. (4th) 39, the British Columbia Court of Appeal came down firmly in favour of the subjective approach. The difference between the two approaches, according to *McLaughlin*, is that the subjective approach "takes into consideration the joint incomes of the parties", whereas the objective approach does not.

[12] Section 7(1.1) has codified the subjective approach. According to *Child Support Guidelines and Practice*, 2nd ed., cited above, at p. 7-7, the Federal Department of Justice provides the following explanation for the amendment to s. 7(1.1):

> "The definition has been added to clarify the meaning of 'extraordinary expenses,' which various courts across the country have interpreted differently.
>
> Under this amendment, and expense is considered extraordinary if it is higher than the parent requesting the amount can reasonably cover. The requesting parent's income, as well as any child support the requesting parent would receive, is considered to determine if the expense is extraordinary.
>
> Or, if the requesting parent can reasonably cover the expense, the expense may still be considered extraordinary when taking into account:
>
> - the income of the parent requesting the amount (including the child support amount);
> - the nature and number of the educational programs and extracurricular activities;
> - the overall costs of the programs and activities;
>
> and any other similar factor this is relevant."

[13] A request for extraordinary expenses involves the application of both ss. 7(1) and 7(1.1), but in reverse order. First, the court must decide whether the request fits the definition an extraordinary expense in s. 7(1.1). If it does, then the court goes on to look at the necessity and reasonableness of the expense as required by s. 7(1).

[14] According to *Bland* v. *Bland*, 1999 ABQB 236, the court should consider the following in determining the "reasonableness" of a s. 7 expense:

- the combined income of the parties;
- the fact that two households must be maintained;
- the extent of the expense in relation to the parties' combined level of income;

- the debt position of the parties;
- any prospects for a decline or increase in the parties means in the near future; and
- whether the non-custodial parent was consulted regarding the expenditure, prior to the expense being incurred.

See also: *Holeman* v. *Holeman*, 2006 MBQB 278; and *Raftus* v. *Raftus*, (1998) 159 D.L.R. (4th) 264.

[15] A number of other cases have also accepted that, in considering the "means" of each of the parents, courts should look at all of the parent's pecuniary resources, including capital assets and the income of a parent's new partner: *Earles* v. *Earles*, 2006 BCSC 221; *Raftus* v. *Raftus*, cited above; *Cornelius* v. *Andres*, (1998) 170 D.L.R. (4th) 254; *Simpson* v. *Trowsdale* 2007 PESCTD 3; *K(D.J.)* v. *K(C.J.),* 2006 BCPC 326; and *Baum* v. *Baum*, 2000 BCSC 1835. A new spouse's income is not considered in calculating the proportionate amount of each parent's contribution, but it is considered in the context of the necessity and reasonableness of the expense in relation to the means of the parents to afford that expense.

[16] Before moving on to consideration of the particular facts on these cross-applications in the context of the above law, I would simply note that one case from Ontario, *Bertram* v. *Murdock* 2006 ONCJ 69, held that there is no ability to vary, adjust or avoid the obligation to contribute to a parent's proportionate share of the s. 7 expenses on the basis that it would cause undue hardship. On the other hand, it would seem to me to fall within the discretion given to the court under s. 7 to consider whether requiring a

parent to pay would be beyond that parent's ability to pay, taking into account that parent's total household income, debts, capital assets and other financial circumstances.

APPLICATION OF THE FACTS TO THE LAW

The father's financial circumstances

[17] The father made it clear on a number of occasions during this hearing that he is not claiming undue hardship under s. 10 of the *Child Support Guidelines*. As I understand his submissions, one of his reasons for not proceeding with that route is that he does not wish to bring into this litigation the income of his wife, L. M.-W. However, the case law I have just cited indicates that I am to take the father's total household income into account, which of course would include L.M.-W.'s income.

[18] Unfortunately, there is little evidence before me about the income of L.M.-W. In his affidavit #2, filed November 2, 2004, the father attached as an exhibit an "Adoption Homestudy" report respecting the proposed adoption of a female child from China. That report dealt with briefly the couple's financial circumstances as follows:

> "L. and S. [the father] have their own bank accounts but share household expenses. Both state that they believe that credit is necessary for larger purchases such as a house. They both have a credit card but never carry a balance on it, and are good money managers. L. attributes this to her upbringing.
>
> Both log homes [on the couple's property] are mortgage free. L. owns a house in the Riverdale area that is currently for sale and some farmland in Saskatchewan. They own two vehicles, one being a 1997 Honda Civic and the other is a 1990 Nissan Pathfinder. L. and S. are employed at full time jobs and earn a combined annual salary of approximately $130,000.
> They do not feel that adopting a child from another country will place any financial hardship on them, and have ready access to the funds when needed."

[19] It appears that report was prepared in May 2003. At that time, the father was earning a gross income of $68,239. He was also receiving rental income, which I understand was in the neighbourhood of $500 a month, or about $6,000 annually. Therefore, if the couple's total income was $130,000, and the combination of the father's income and the rental income was $74,239, then L. M.-W. would have been earning about $55,761 in that year. Alternatively, if I interpret the Adoption Homestudy literally, and the "combined annual salary" of the father and L.M.-W. was $130,000, leaving aside the couple's rental income, then the mother's income would have been $61,761. However, I will assume that the $130,000 figure was intended to reflect the couple's total household income, including the rental income.

[20] Prior to the preparation of the Adoption Homestudy, L.M.-W. had been in the continuous employment of Yukon Government for ten years. The father is also employed by the Yukon Government. His current gross annual income from that employment of $78,704 indicates an increase from 2003 to 2007 of approximately 15%. Assuming the L.M.-W.'s income increased by about the same amount, and assuming she is still employed by the Yukon Government (there is no evidence to the contrary), she would presently be earning in the vicinity of $64,000 gross, annually. That would put the combined salaries of the father and L.M.-W. at approximately $142,800. Adding to that the annual rental income of about $6,000, would result in a grand total of about $148,800 per year.

[21] The mother's gross annual income for 2007 was $52,067.06.

[22] In addition, the father owns property in Whitehorse, on which there are two log houses, one in which the father and his family reside, and the other which is rented out.

Although I am not aware of any recent evidence on the value of this property, the Separation Agreement indicated that it had an appraised value of $66,000 as of January 2001, subject to a payment of $5,100 to the Yukon Government to acquire title to the land. I have no evidence whether that payment was made. Regardless, it would be reasonable to assume the value of the property has increased substantially since then, as real estate prices have done generally in the City of Whitehorse over the last seven or eight years. Furthermore, the property and the houses are mortgage free.

[23] I also note that as of May 2003, when the Adoption Homestudy was prepared, L.M.-W. owned a house in the Riverdale area of Whitehorse, which was said to be "currently for sale" and some farm land in Saskatchewan. However, I am not aware of whether there were any arrangements as between the father and L.M.-W. about whether these properties, or the proceeds of the sale of either of these properties, would come within the definition of "family assets" in the context of the *Family Property and Support Act*, R.S.Y. 2002, c. 83. If L.M.-W. had some sort of prenuptial arrangement with the father (they were married in April 2003) in order to keep those properties in her name, then it may be inappropriate to take their value into account in an analysis under s. 7 of the *Child Support Guidelines.*

[24] In his affidavit #9, the father purported to provide further detailed evidence of the amount of his debt. However, I agree with the mother that this evidence is piecemeal, incomplete, and unsatisfactory. For example, the father claims a total amount of debt incurred from the divorce of $70,616.18; however, he only provides particulars relating to $55,195 worth of the total debt. He states that the "other portions of the debt were incurred by adding an indoor toilet to the house, adding a small addition to the house and

building a cabin." Why he would relate that portion of the debt to the divorce is beyond me. Once again, I agree with the mother that any expenses or debt incurred by the father to improve the value of his own property cannot be considered as a loss, since the improvements have likely increased the value of the property.

[25] Further, the particulars provided by the father for that portion of the debt totalling $55,195 are vague, unsubstantiated, and in some cases simply improper. The father claims a debt of $28,000 for the approximate amount of "property purchase & payout at divorce". I am unsure what this means. If the father is referring to money that he paid to the mother as a result of their division of matrimonial property under the Separation Agreement, in which he also agreed to pay monthly child support for the children as well as his proportionate share of the children's special or extraordinary expenses under s. 7 of the *Guidelines*, then it would seem unfair and illogical for the father to now claim that the amounts he agreed to pay to the mother to settle their property division should be used as an excuse for avoiding his child support obligations.

[26] The father also claims a debt of $2,500 for "limited legal support during early portion of separation agreement negotiations", but has failed to provide any particulars of what he means in that regard or any supporting evidence. As such, it is simply an unsubstantiated claim which I cannot give any weight to.

[27] The father claims a debt of $13,695 for "legal costs". Once again, it would seem unfair to allow the father to avoid his child support obligations because he incurred legal costs, when the mother also incurred similar costs in the earlier stages of this proceeding, when both parties were represented by counsel. Indeed, the mother estimates that her legal expenses have been in the neighbourhood of $18,000.

[28] The father claims a debt of $5,000 for “apartment rental due to breach of promise of rental support”. He has provided no further explanation, support or other evidence to explain the nature of this claim. The mother has denied that any such obligation existed and relies on the comprehensive nature of the Settlement Agreement as evidence that it was intended to address all the support issues between the parties. In my view, that is a reasonable position.

[29] Finally, the father claims a debt of $6,000 for “spousal support less rental income”. Yet again, he has provided no further explanation or particulars in support of this claim. To the extent that he may be referring to his spousal support obligation under the Separation Agreement and the CCRO, which ceased as of June 1, 2005, it would once again be unfair and inappropriate to use a debt which he voluntarily agreed to pay as an excuse for diminishing the child support he also agreed to pay.

[30] In summary, although it may well be appropriate in theory to take into account all of the financial circumstances of the payor parent, including their debt obligations, the evidence of the father as to the extent and the reasons for his alleged debt is unsatisfactory and insufficient. Therefore, I can give no weight to it in exercising my discretion in determining the “reasonableness” of the special or extraordinary expenses at issue.

[31] The father claims that his retirement savings have been reduced in value by 18 or 19% due to the current downturn in the economy. He hopes to retire in six years. By then, his retirement funds may well have recovered their lost value and, even though that is speculative, the mother is subject to the same risks in that regard. Therefore, I can give the father no special treatment because of this circumstance.

The special or extraordinary expenses claimed by the mother

[32] In her affidavit #11, the mother detailed the various expenses at issue. The first is an orthodontic expense of $7,280 with respect to the child K. That is a "special" expense under s. 7(1)(c) of the *Guidelines*. Therefore, I do not need to consider the definition under s. 7(1.1), since that sub-section only refers to "extraordinary" expenses. Nevertheless, I 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 parents.

[33] In her affidavit, the mother has provided a copy of an "Orthodontic Payment Schedule" for K., confirming that the total fee for the proposed treatment is $7,280. She deposed that the Schedule is from Dr. Anthony Strelzow, a well known Whitehorse orthodontist. I therefore have no difficulty concluding that the proposed treatment is in K.'s best interests. With respect to the reasonableness of the expense, I repeat that the father's gross annual income is $81,404 and the mother's gross income is $52,067. That would indicate that the father should pay a proportionate share of 61% of all special or extraordinary expenses and the mother should pay 39%. The Orthodontic Payment Schedule indicates that the total amount of $7,280 may be paid by making an initial payment of $2,420 when the treatment begins, plus eight quarterly payments of $607.50 over a two year period. Accordingly, in the first year, the treatment will cost a total of $4,850 and the second year will cost $2,430. If the father were to make a proportionate contribution of 61%, in the first year he would pay $2,958.50 and in the second year he would pay $1,482.30. However, according to the mother's affidavit, the father has a Yukon Government employment dental plan, which will pay $3,000 towards the cost of

these orthodontics. That would completely cover the father's contribution for the first year, with a small amount left over to credit towards the second year's payment, resulting in 12 monthly payments of about $120 to satisfy his proportionate contribution towards this expense.

[34] According to the annotation of *MacKinnon* v. *MacKinnon*, (2005) 75 O.R. (3d) 175 (C.A.) in *Child Support Guidelines Law and Practice,* 2nd ed., cited above, s. 7 only requires that "special" expenses be necessary and reasonable. If they are, absent any other reason to order otherwise, the payor parent is required to share the expense proportionately with the other parent. In my view, the orthodontic treatment for K. is in her best interests and the father's proportionate share of the cost of such treatment, specifically $120 monthly for one year, is reasonable in relation to his means.

[35] The annual extraordinary expenses claimed by the mother in her affidavit are as follows:

- "Blue Squad" cross-country skiing – $900
- "Green Squad" cross-country skiing - $150
- Ski passes x 2 - $300
- Swimming lifesaving course - $150
- Swimming fees for K. - $65
- Basketball "RTC" - $200
- Basketball "Steve Nash" - $70
- Ski boots x 2 pair - $500
- Skis x 2 pair - $500
- Ski poles x 2 pair - $140

- Swim suits x 2 - $140
- Basketball shoes x 2 pair - $300

Total: $3,415.00

[36] Applying s. 7(1.1), the first question I must ask about these expenses is whether they are higher than the mother can reasonably cover, taking into account both her income and the table amount of child support she otherwise receives. The mother currently receives $1,200 monthly for the two children, or $14,400 annually, which when added to her gross annual income of $52,067.06, results in a total of $66,467.06.

[37] These expenses total $3,415 annually, or $284.58 monthly. Unfortunately, I do not have a current financial statement from the mother, so it is difficult for me to determine whether she is capable of covering that monthly amount. According to the mother's 2006 Canada Revenue Agency Notice of Assessment, she was taxed at approximately a 10% rate. If she were taxed at approximately the same rate for 2007, her net income would be $46,860.35. Adding to that the amount of child support she receives annually of $14,400 would result in a total net income available for the children of $61,260.35, or $5,105.03 monthly. Thus, the $284.58 per month for the remaining expenses claimed would amount to 5.6% of her net monthly income. Without further information from the mother as to her other monthly expenses, I assume for present purposes that she is capable of covering an average payment of $284.58 per month for these proposed remaining expenses.

[38] However, that is not the end of the matter. Under s. 7 (1.1), even if the requesting parent can reasonably cover the proposed expenses, they may still be considered "extraordinary" when taking into account:

- the amount of the expense in relation to the parent's income, including existing child support;
- the nature and number of the educational programs and extracurricular activities;
- any special needs and talents of the children;
- the overall cost of the programs and activities; and
- any other similar factor that is relevant.

[39] There seems to be no dispute between the parties that the children are good students and talented athletes, particularly in the sports of swimming, skiing and basketball. While I have not had the time to review the multiple affidavits filed by each of the parties over the last several years, my understanding from their submissions, which do not differ on this point, is that the girls are regularly members of advanced teams in all three sports, often qualifying for competitions at the territorial, national and even international (Alaska) levels, and periodically travel to these competitive events. There can be little doubt that these physical activities and sports contribute to the health and well-being of the children. Further, if they go on to post- secondary education, there are reasonable prospects of qualifying for sports-related scholarships. Therefore, I have no difficulty in concluding that the nature and number of these extracurricular activities are not unusual, given the special needs and talents of the children, and that the overall cost of these activities is not unreasonable.

[40] Having said that, the amount of these expenses in relation to the mother's net income, including current child support, is significant, although perhaps technically affordable. In my view, the expenses are beyond what a parent might ordinarily expect to

pay for a child in their care. Looking at these factors globally, I am satisfied that all of the listed expenses qualify as “extraordinary” expenses under s. 7(1.1) of the *Guidelines*.

[41] I must now go back to s. 7(1) to determine whether these expenses are necessary and reasonable in relation to the children’s best interests and the means of the parents, as well as the parties’ spending pattern prior to the separation. I have already concluded that the expenses are in the children’s best interests, which is one reason for concluding that they are also necessary. As for the reasonableness of the expenses, I can now take into account not only the combined incomes of both parents, being $133,471 gross annually, but also the father’s overall financial circumstances, including his capital assets, his debts and his current spouse’s income. I addressed this above and discounted the father’s evidence with respect to his debt load, for the reasons stated.

[42] I acknowledge the father’s argument that he is due to retire in about six years and plans to eliminate his claimed debt load over that time, in order that he may live comfortably on his remaining retirement savings and investments. The mother’s argument on this point is that, even if the father was relieved of his obligation to pay special or extraordinary expenses, he would still be unable to retire the alleged amount of his debt within six years. According to my calculations, the father would have to pay $120 per month for his proportionate share of K.’s orthodontic expenses for a one year period, totalling $1,440. Further, if the father is ordered to pay his proportionate 61% share of the proposed extraordinary expenses, he will be paying $173.60 monthly, or $2,083.15 annually. Over six years, assuming no variations and assuming both children remain dependent for the full six years (which may not be the case), the father would pay $12,498.90 for extraordinary expenses, plus $1,440 for orthodontic expenses, for a total

of $13,938.90. That is to be contrasted with the alleged amount of the debt which is in the range of $55,000 - $70,000, not including interest which may be accruing on some portions of that debt. Therefore, I agree with the mother's argument.

[43] In addition, the father's affidavit #9 curiously makes no reference to the pension he will likely receive from the Yukon Government, where he has been employed for the past 16 years, approximately. By the time he retires, the father could have up to 22 years of employment with the Yukon Government, which will likely result in a significant pension.

[44] Finally, if the father should find it difficult to live comfortably on his savings, investments and pension upon retirement, he can, as many people do, continue working in some capacity or other, even if only part-time.

[45] There was no disagreement between the parties that the types of extraordinary expenses claimed by the mother are in relation to the same kinds of activities that the two children have been involved in for a number of years. The parties separated in October 2000. At that time N. would have been almost six years old and K. would have been about three and a half. Once again, I haven't had the time to review in detail the several affidavits filed by both parties over the last several years, and I am not aware of any specific information as to the activities of the children prior to the separation. However, it is reasonable to assume that the older child, N., would have at least begun her participation in such activities. As for K., it is not inconceivable that she might have started swimming and/or skiing lessons by the time of the separation. On the other hand, there is little or no evidence of the parent's spending pattern prior to the separation. The point made by the mother in her submissions was that both parents have supported the children's participation in activities such as swimming, skiing and basketball over the

years since the separation, and that there has never been any previous question as to their respective ability to pay their proportionate share of these expenses. I did not hear anything to contradict that from the father. Indeed, he agreed in both the Separation Agreement and the CCRO to pay for such expenses, including extraordinary expenses for extracurricular activities.

[46] However, the father's current position is that, as a result of a recalculation of the table amount of his ongoing child support, he will not be able to afford to pay for the special or extraordinary expenses as well. Pursuant to my order of November 18, 2008, he will be paying $1,200 monthly for both children. Prior to that, I understand the father was paying $857 per month (pursuant to the CCRO), at least until October 1, 2008. Therefore, he is now paying about $343 more in monthly child support than what he was formerly paying. The father says that he continues to support both children in their participation in all of their activities, but he proposes to limit his support to providing transportation for their various weekly activities.

[47] I repeat, the father has made no claim for undue hardship under s. 10 of the *Guidelines*. Rather, he has asked that I consider his debt position and his retirement concerns in exercising my discretion as to whether or not he should be relieved of his existing obligation to pay his proportionate share of the children's s. 7 expenses. He has raised the fact of his new wife's contribution to his family's finances in his affidavit #9, and yet was pointedly reluctant to involve L.M.-W. any further in these cross-applications. In my view, the law compels me to take account of L.M.-W.'s likely income, as part of my consideration of the father's overall financial circumstances. That consideration also includes the probable value of the land and two buildings on the father's property, which I

have found must be significantly more than the 2001 appraisal value of $66,000, and the property is mortgage free.

[48] In summary, taking all these circumstances into account, I conclude that the special and extraordinary expenses claimed by the mother are necessary, in the children's best interests, and reasonable in relation to the means of both parents. I further agree with the mother that, to minimize uncertainty and disagreement about these expenses in the future, the CCRO should be amended to particularize them to the extent currently possible.

[49] Before concluding, I wish to raise a point that I discussed with the father during the hearing. In his affidavit #9, the father referred to his financial situation and stated "…with most of the debt being due to [the mother's] lies and infidelity leading to a divorce…" That statement is reflective of a theme which the father has raised in his earlier affidavits, at least since he has been representing himself. I specifically challenged the father on the point at the hearing by noting that this was a "no fault" divorce. I informed him that it was improper for him to use his perception that the mother is responsible for the divorce, and for the attendant costs which have since been borne by both parties, as an argument in relation to child support. Indeed, the *Divorce Act* specifically prohibits me from taking the conduct of the parties into account in making a variation of a child support order. Specifically, s. 17(6) states:

> "In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought."

[50] Notwithstanding my admonition of the father on this point, in the document he filed on December 5, 2008, entitled “Respondent’s Response to Petitioner’s Affidavit #11”, the father made the following statement:

> “The sources of most of [my] debt were provided to indicate the bulk of it was incurred due to the Petitioner’s actions and inaction.”

Once again, it appears that the father is continuing to blame the mother for this divorce, some eight years after their separation.

[51] I mentioned at the outset that this action is an unfortunate example of the type protracted litigation the courts see all too often in family law disputes involving children and money. In such disputes, commonly both parties are responsible, at varying times, for raising hurdles to potential resolutions, or simply being difficult in their communications. That would likely be a fair comment to make with respect to this litigation. However, the father is doing himself and his children no favours by continuing to openly harbour his resentment towards the mother over the cause of the divorce. I hope that with time and a fresh sense of perspective, the father can learn to put his resentment behind him and to communicate more constructively with the mother, for the sake of the children.

CONCLUSION

[52] I am prepared to grant the relief sought by the mother in her notice of application filed on October 27, 2008 with respect to the children’s special or extraordinary expenses. More specifically:

1. The amount of such expenses already incurred by the mother, as of October 1, 2008, have already been addressed by my Order of November 18, 2008, in para. 5.

2. Based upon the father's gross annual income for 2007 of $81,404, and the mother's gross annual income for 2007, in the amount of $52,067.06, from October 1, 2008 to June 30, 2009, the father shall pay 61% of the children's special or extraordinary expenses and the mother shall pay 39%.
3. The provisions in paras. 15 to17 of the CCRO will continue to apply, such that the parties will review the amounts of their respective gross annual incomes and adjust the table amount of child support payable by the father, as well as the proportions in which each party will contribute to the children's s. 7 expenses, and this adjustment shall occur on July 1st in each year.
4. The CCRO will be amended by adding s.14.1, which will read as follows:

> "Without limiting the generality of the foregoing, the extraordinary expenses which the parties will share include: swimming programs, skiing programs, basketball programs, special programs offered through the children's schools for higher achieving children, such as the "ACES" program and science programs, as well as any registration fees and reasonable related accommodation and travel costs."

5. The father shall pay his proportionate share of K.'s orthodontic expenses, estimated to be $7,280, to the extent that share exceeds the father's dental insurance reimbursement.
6. As the cross-applications resulted in two orders and mixed success for both parties, I expressly order that each party shall bear their own court costs.

[53] Attached to these reasons as Schedule "A" is a draft order to reflect the foregoing. The parties can indicate to the staff at the Court Registry whether they are prepared to sign their approval as to the order I have made. If there is any disagreement on that point, either party can request a further hearing before me, either on two days notice to the other party, or by agreeing to a date. However, to be very clear, any disagreement about the terms of the order should not be seen as an opportunity to submit further evidence or make further submissions. Any further hearing would only be for the purpose of clarifying the wording of the terms of the order which I have already decided upon.

Gower J.