SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. Pink, 2011 NSSC 421

Date: 20111115
Docket: SFNSF - 006545
Registry: Sydney, Nova Scotia

Between:

Susan "Nicole" MacDonald

Applicant

v.

David Pink

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	June 10, 2011 in Sydney, Nova Scotia
Written Decision:	November 15, 2011
Counsel:	Elaine Gibney, for the applicant, Nicole MacDonald Kim Johnson, for the respondent, David Pink

By the Court:

[1] Introduction

[2] Hannah Elizabeth is the 11 year old daughter of Nicole MacDonald and David Pink. Ms. MacDonald and Mr. Pink have been unable to resolve certain maintenance issues. Ms. MacDonald is asking the court to retroactively vary the existing child support order. In so doing, she also seeks to impute income to Mr. Pink, and to obtain an order for s.7 add ons. For his part, Mr. Pink agrees that child support should be varied as of June 2009, but contests most of the other claims. In addition, costs are sought by both parties.

[3] Issues

[4] The following issues will be determined in this decision:

a. Should income be imputed to Mr. Pink?
b. Should Mr. Pink be required to pay s. 7 expenses?
c. Should a retroactive award of child support be granted?
d. What is the appropriate child support award?

[5] Background Information

[6] On July 25, 2001, Mr. Pink was ordered to pay child support to Ms. MacDonald in the amount of $127 per month based upon an income of $14,900. Pursuant to the order, Mr. Pink was also obligated to disclose annual income information to Ms. MacDonald. Mr. Pink did not.

[7] Other than the payment of maintenance and the gifting of Christmas presents in 2006, Mr. Pink has never provided any additional benefit to his daughter. Mr. Pink absented himself from Hannah's life. Therefore, Ms. MacDonald assumed all of the parenting responsibilities. Ms. MacDonald finds this vocation rewarding and challenging. Her efforts have been fruitful as Hannah is developing into an intelligent, talented, and lovely young lady.

[8] Mr. Pink was fairly consistent paying the ordered maintenance. However, he stopped paying child support for several months in 2009 and 2010. These arrears were eventually brought up to date.

[9] In November 2009, Ms. MacDonald filed a variation application in which she sought a retroactive variation of child support. In addition, extraordinary expenses were sought for medical and extracurricular activities. Ms. MacDonald also sought permission to obtain Hannah's passport without Mr. Pink's consent. Mr. Pink agreed to this request during the hearing.

[10] Because Ms. MacDonald was not aware of Mr. Pink's address, she filed a motion for substituted service, which was granted on March 29, 2010. Mr. Pink was served through his parents. The variation application also contained a notice to disclose standard financial information. Mr. Pink did not comply.

[11] On June 28, 2010, Ms. MacDonald appeared before the court. However, as Mr. Pink was absent, and as there was no affidavit of service on file, no action was taken other than confirming filing and trial dates. The court scheduled a pretrial conference on December 20, 2010, and the trial on January 31, 2011.

[12] On June 30, 2010, Mr. Pink appeared before the court indicating his notice stipulated a court appearance on June 30, and not June 28. Mr. Pink was advised of the pretrial conference and trial dates, in addition to disclosure requirements. A notice to appear, and notice to file financial information were subsequently forwarded to Mr. Pink on July 27, 2010.

[13] On December 20, 2010, the pretrial conference was convened. Mr. Pink was not present. The conference proceeded in his absence. Mr. Pink still had not produced the requisite financial information.

[14] On January 31, 2011, Mr. Pink, unrepresented, and Ms. MacDonald, represented by counsel, appeared for trial. Counsel for Ms. MacDonald requested an adjournment because of Mr. Pink's ongoing failure to provide financial disclosure, other than recent pay stubs which did not contain year to date earnings. Mr. Pink had not filed income tax particulars, nor any other information. Mr. Pink promised to immediately remedy the situation. The adjournment was granted given Mr. Pink's promise to comply. The court accepted Mr. Pink at his word because he was an article clerk.

[15] Further, pursuant to the agreement of the parties, an interim, varied child support order issued, retroactive to June 2009, and payable in the monthly amount of $336. This was based on the income which Mr. Pink indicated he earned in the amount of $38,500 per annum. Throw away costs in the amount of $2,000 were awarded against Mr. Pink as the adjournment was caused solely by his repeated failure to disclose income information. The hearing was next scheduled for April 4, 2011.

[16] On April 4, 2011, both parties appeared and were represented by counsel. Mr. Pink requested an adjournment. His counsel indicated that a doctor had confirmed medical reasons for Mr. Pink's failure to comply with court orders. Counsel for Mr. Pink gave his personal undertaking that Mr. Pink would produce the requisite information. The adjournment was granted. Throw away costs of $1,000 were ordered. The hearing was rescheduled to June 10, 2011.

[17] The hearing finally proceeded on June 10, 2011. Mr. Pink's new counsel sought to admit medical letters during the hearing. This request was denied because the professionals were not in attendance for cross examination, and because the letters were not filed in accordance with the Rules. During the hearing, the parties testified and counsel provided submissions. The matter was adjourned for decision.

[18] **Analysis**

[19] **Should income be imputed to Mr. Pink?**

[20] *Position of the Parties*

[21] Ms. MacDonald seeks to impute income to Mr. Pink commensurate with his income earning capacity, and in keeping with average income statistics as provided by Statistics Canada.

[22] Mr. Pink strenuously disputes this claim. Mr. Pink states that the income he earned represents his income earning capacity. Mr. Pink also notes that at times his income was actually less than $14,900, the figure upon which the 2001 order was based. In such circumstances, it would be inappropriate to impute income.

[23] *Analysis*

[24] Section 19 of the *Guidelines* provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi** 2011 NSCA 65; **Van Gool v. Van Gool**, [1998] 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid

> support obligations by a self-induced reduction in income: **Duffy v. Duffy**, ***supra***; and **Marshall v. Marshall**, 2008 NSSC 11.

[25] In **Smith v. Helppi** 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in **Gould v. Julian** 2010 NSSC 123. Oland J.A. states as follows:

> 16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in Gould v. Julian, 2010 NSSC 123 (N.S. S.C.), where Justice Darryl W. Wilson stated:
>
> > Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson, [1999] B.C.J. No. 2532, as follows:
> >
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.

> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
>
> . . . . .
>
> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[26] In **Gill v. Hurst** 2011 NSCA 100, Bryson J.A. affirmed the trial judge's decision to impute income where the father's attempt to justify his under-employment for health and educational reasons was rejected: paras. 30 and 31. In addition, Bryson J. held that the trial judge made no error by imputing the "modest sum" of $25,000 to the father.

[27] *Decision*

[28] My decision will be based upon the three pronged analysis suggested in **Drygala v. Pauli, *supra***. First, I will determine whether Mr. Pink is intentionally under-employed. Second, I will canvass whether this is caused by the educational or health needs of Mr. Pink. Third, if not, I will decide what quantum of income should be imputed.

[29] *Step One: Under-employment Finding*

[30] Ms. MacDonald has proven, on a balance of probabilities, that Mr. Pink was under-employed for a number of reasons, including the following:

a. Mr. Pink is an articulate, intelligent man. His responses during cross examination confirm his ability to think and process information in a logical, reasonable, and rational fashion. His use of vocabulary was precise and appropriate. He had good problem solving skills. These skills enhance Mr. Pink's ability to obtain and retain employment.

b. Mr. Pink also presented as having suitable social and communication skills. Such skills usually transfer into the work place and enhance one's ability to succeed. Mr. Pink showed no deficits in these areas.

c. Mr. Pink is able to adjust to new experiences and challenges. He was able to successfully integrate into a new culture as evidenced by his living in Thailand while teaching English for about a year in 2002 and 2003. The ability to be flexible and adjust to new challenges are also skills that improve employability.

d. Mr. Pink's inability to earn a better salary has nothing whatsoever to do with his age or lack of skills and abilities. Instead, Mr. Pink's under performance and under-employment stem from his indifference and boredom. I have little evidence that Mr. Pink engaged in good faith efforts to find meaningful employment until June 2009.

e. Although Mr. Pink did not earn a university degree before attending law school, he nonetheless had many skills, talents, and abilities. He had job experience working at a call center, with a landscaping company, teaching, and in other labour intensive fields.

f. Mr. Pink could have easily earned more than $14,900 per annum. Indeed, in 2001, the year the child support order issued, Mr. Pink had actually earned $18, 351.

[31] Ms. MacDonald has thus proven the first step in the sec. 19 analysis. The burden now falls upon Mr. Pink to prove that his under-employment was required to meet his reasonable educational or heath needs. Mr. Pink suggested both factors as justifying his income.

[32] *Step Two (A): Reasonable Educational Needs of Parent*

[33] In **Montgomery v. Montgomery** 2000 NSCA 2, Pugsley J.A. held that in assessing reasonableness, the court must examine the circumstances of both the payor and the child. I have done so. I find that Mr. Pink's under-employment was not related to reasonable educational needs for the following reasons:

a. Mr. Pink paid nominal child support. A monthly payment of $127 equates to about $4.24 a day. The nominal support did little to address Hannah's needs.

b. Mr. Pink absented himself from Hannah's life. He provided no assistance by way of visits or otherwise. Ms. MacDonald, by default, has thus borne the vast majority of the direct and hidden costs associated with Hannah's life. Direct and hidden costs are pertinent child support considerations: **Willick v. Willick** [1994] 3 S.C.R. 670.

c. Mr. Pink was about 23 years old when Hannah was born. He attended university before her birth, but did not complete the courses necessary to obtain a degree. Mr. Pink did not become involved in Hannah's life. Thus, parental responsibilities did not hinder Mr. Pink's earlier completion of a university degree. Further, Mr. Pink could have completed an undergraduate degree on a part time basis.

d. Mr. Pink did not formulate a plan to ensure that Hannah's needs would be met while he attended law school. He did not save money for Hannah. He surely could not have believed that child support of $127 was a reasonable payment. Hannah was a nonissue from Mr. Pink's perspective. Mr. Pink did not act as a reasonable parent because he failed to take Hannah's needs into consideration. Mr. Pink was only concerned about himself.

[34] Given these factors, it was not reasonable for Mr. Pink to attend law school when he did. He should have sought employment so that he could contribute to his daughter's needs in a meaningful fashion that was commensurate with his income earning capacity.

[35] *Step Two (B): Reasonable Health Needs of Parent*

[36] Mr. Pink did not prove that his reasonable health needs prevented him from working to his capacity. In **M.(L.A.) v. M.(K.G.)** 2000 ABQB 80, Smith J. states that an applicant must show a meaningful link connecting that party's health needs to the inability to work at para. 33. Smith J. imputed income of $25,000 despite the father's serious heart condition because the relevant nexus was lacking.

[37] In **McKinnon v. Serroul** 2011 NSSC 386, MacLellan J. imputed income to a father where he failed to produce medical evidence to support his contention that he was unable to work because of health problems.

[38] In **MacGillivary v. Ross** 2008 NSSC 339, this court imputed income to the father in the absence of medical evidence confirming an inability to work. Income of $24,000 was imputed.

[39] In **Vanbeek v. Vanbeek** [2008] O.J. No. 2004 (Ont. S.C.J.), the court held that the father did not establish that health issues prevented him from working full-time, although the medical evidence did corroborate pain and physical limitations. Income in the amount of $25,000 was imputed.

[40] In **Dicks v. Dicks** [2001] N.S.J. No. 302, Murphy J. imputed income in the amount of $21,000 where the medical evidence confirmed that Mr. Dicks would have to limit his employment choices to those involving "non-strength activities." The evidence did not prove that Mr. Dicks was incapable of work.

[41] In **Pamma v. Pamma**, 1999 CarswellBC 2227 (BCSC), Loo J. refused to "make a quantum leap" and say that the father could not work based on the evidence. The evidence consisted of a list of medications being taken, together with the *viva voce* evidence supplied by the father. No medical opinion was proffered. Income of $50,000 was deemed.

[42] An opposite result is found in **Bourque v. Gerlach**, [2006] B.C.J. No. 677 (CA). In that case, Rowles J.A. reversed the trial decision, which imputed income to a parent, because of the expert opinions from psychiatrists, including an independent examination, which confirmed that the parent suffered from long standing panic disorder, anxiety, and recurrent depression which was not amenable to treatment. In light of the substantial medical evidence, a link connecting the health needs to the inability to work had been made.

[43] There was no credible medical evidence produced on behalf of Mr. Pink regarding his inability to work. Mr. Pink had ample time to obtain medical evidence linking any health concerns to an inability to work. Indeed, the trial was adjourned on two occasions because of Mr. Pink. Mr. Pink has legal training. He was represented by a lawyer as of April. The trial did not proceed until June. No

clear, convincing, and cogent evidence was led by Mr. Pink: **C.(R.) v. McDougall**, 2008 SCC 53, per Rothstein J.

[44] Further, I place no weight on the hearsay comments outlined in Mr. Pink's affidavit regarding his health.

[45] *Step 3: Amount of Income Earning Capacity*

[46] The burden once again falls upon Ms. MacDonald to prove income earning capacity. I find that Mr. Pink had an income earning capacity of $25,000 from December 2006 until June 2009. The evidence supports such a finding, including that which was previously discussed.

[47] Within months of the order issuing, Mr. Pink's income increased to $18,351 from $14,900 - an increase of about 23%. Mr. MacDonald likely would have continued to receive raises, bonuses, or commission in keeping with this type of performance had he stayed at the call center job, or applied himself to any other type of a job.

[48] I further must adjust the Statistic Canada figures provided by Ms. MacDonald for two reasons. First, Mr. Pink did not have a university degree prior to graduating from law school. Some of the statistics were based upon employees with a university education. Second, subjective factors must also be considered in determining what is reasonable in the circumstances. .

[49] Given all of my findings, including the subjective factors related to Mr. Pink, and what is reasonable in the circumstances, I impute an income of $25,000 to Mr. Pink pursuant to sec. 19 (1)(a) of the *Guidelines*.

[50] **Should Mr. Pink be required to pay sec. 7 expenses?**

[51] *Position of the Parties*

[52] Ms. MacDonald seeks sec. 7 add ons. These expenses include some miscellaneous health expenses and expenses associated with extracurricular activities, including those related to dancing, drama, sewing, girl guides, and miscellaneous items. Ms. MacDonald argues that these expenses are extraordinary, necessary, reasonable, and in Hannah's best interests.

[53] In contrast, Mr. Pink argues that the expenses are neither reasonable, nor necessary. Mr. Pink relies upon the definition of necessity as set out in **C.(V.) v. B.(J.D.)** 2009 NSSC 25, and in **S.(T.L.) v. M.(D.J.)** 2009 NSSC 79. Mr. Pink confirmed his willingness to pay $40 towards Hannah's medical and dental expenses in 2010, but contested any further s. 7 add ons. He argued that such expenses were properly included within the table amount.

[54] *Analysis*

[55] To qualify as a sec.7 expense, Ms. MacDonald must meet the thresholds stated in secs.7(1) and 7(1A) of the *Guidelines.* These provisions have been subject to judicial interpretation. The following principles have emerged from the case law:

a. Section 7 of the *Guidelines* provides the court with the jurisdiction to grant a discretionary award: **T.(D.M.C.) v. S.(L.K.)** 2008 NSCA 61 at para. 25, per Roscoe J.A.

b. The starting point is the assumption that the table amount will ordinarily be sufficient to provide for the needs of the child: **T.(D.M.C.) v. S.(L.K.),** ***supra,*** at para. 25, per Roscoe J.A. The burden therefore rests on the party asserting the claim. Proof is on a balance of probabilities and based upon clear, cogent, and convincing evidence: **C.(R.) v. McDougall**, ***supra*****.**

c. The sec. 7 analysis is fact specific - one that must be determined on a case by case basis taking into consideration the necessity and reasonableness of the expense, and the obligation of the noncustodial parent to contribute to the expense: **Staples v. Callender** 2010 NSCA 49, at para. 32, per Bateman J.A.

d. Section 7 cases determined prior to the 2006 amendment may not be applicable: **T.(D.M.C.) v. S.(L.K.),** ***supra,*** at para. 21, per Roscoe J.A.

e. It is preferable to first determine whether expenses are necessary in relation to the child's best interests, and reasonable in relation to the

means of the parents under sec. 7(1) before determining the applicability of sec. 7(1A) of the *Guidelines*: **T.(D.M.C.) v. S.(L.K.), *supra,*** at para. 27, per Roscoe J.A.

f. If the court decides that the expenses meet the requirements of sec. 7(1), then activity expenses must be further scrutinized pursuant to sec. 7(1A): **T.(D.M.C.) v. S.(L.K.), *supra,*** at para. 27, per Roscoe J.A.

g. Section 7(1A) calls for a two part test. First, the court is to determine whether or not the claimed expenses exceed those which the custodial parent could reasonably cover given her total income, and the amount of child support being received.

h. If the first test is not applicable, then the court must have recourse to sec.7(1A)(b). This second test requires the court to review a number of factors, including a proportionality inquiry, and an inquiry into the nature and number of activities, any special needs or talent of the child, the overall cost of the activities, and any other similar and relevant factors: **T.(D.M.C.) v. S.(L.K.), *supra***, at para. 32, per Roscoe, J.A.

i. The custodial parent does not need to prove that a child is at an elite level in order to have an extracurricular activity included as a sec. 7 expense: **Staples v. Callender, *supra***, at para. 32, per Bateman J.A.

[56] Case law is not consistent in its interpretation of "necessary" in the context of sec. 7 (1) of the *Guidelines*. Some cases espouse a restrictive reading. For example, in **C.(V.) v. B.(J.D.), *supra,*** at para. 32, and **S.(T.L.) v. M.(D.J.), *supra,*** at para. 48, the court held that "necessary means something more than desirable", and referenced the dictionary meaning of "absolutely essential" or "needed in order to obtain a desired result."

[57] An opposite view is advanced in other cases, and as reviewed by Julien and Marilyn Payne in *Child Support Guidelines in Canada, 2009*, at pg. 226 wherein the authors note as follows:

> ... The test for necessity under section 7(1) of the Guidelines is not synonymous with the bare necessities of life; it refers to things suitable to or proper for the child's station in life bearing in mind his or her requirements at the time.

[58] For my part, I prefer the view expressed by Julien and Marilyn Payne.

[59] *Decision*

[60] *Step One: Necessity and Reasonableness*

[61] Ms. MacDonald has proven by clear, cogent and convincing evidence that the sewing, dance, and podiatrist expenses are necessary in Hannah's best interests and reasonable given the means of the parties. Hannah does not have an ability to contribute financially to these expenses given her age. These expenses include estimated costs where receipts were no longer available, or not yet incurred, pursuant to sec. 7(1) of the *Guidelines* which permits such estimates. I did not include any 2006 figures because Ms. MacDonald seeks a retroactive variation effective November 24, 2006. I am not satisfied that sec.7 expenses were incurred during the last 5 weeks in 2006.

[62] The expenses that fulfill the first part of the sec. 7 analysis are listed as follows:

• 2011 Dance Expenses	$1,800
• Sewing Expense	$ 467
• 2010 Dance Expenses	$ 460
• Sewing Expenses	$ 846
• Uninsured Podiatrist Expense	$ 167
• 2009 Dance Expenses	$1,055
• Sewing Expenses	$ 261
• 2008 Dance Expenses	$ 800
• 2007 Dance Expenses	$ 673
Total Allowable Add-Ons	**$6,529**

[63] Further, on a go forward basis, I find that Hannah's dance and sewing expenses, together with uninsured medical and health related expenses, that exceed

$100 annually, also satisfy the sec. 7(1) test. I draw this conclusion after reviewing the law, evidence, and submissions of the parties for the following reasons:

a. The sewing and dancing activity expenses, together with the health related expenses, are a necessity in relation to Hannah's best interests. The evidence establishes that Hannah is an intelligent, creative child who is without a father. Not only are these activities necessary to meet Hannah's talents and abilities, but they are also necessary to help fill any void left because of an absent father.

b. Mr. Pink agreed on cross examination that it was beneficial for Hannah to be involved in the activities chosen by Ms. MacDonald, and that it was in her best interests to do so.

c. Similarly, Hannah's health expenses are in her best interests and must be addressed. Hannah requires orthodics on an ongoing basis to address foot pain. She will likely incur orthodontic expenses.

d. The sewing, dancing, and health related expenses are likewise reasonable in relation to the means of Ms. MacDonald and Mr. Pink. The listed activity expenses are for direct costs only; amounts for gas and transportation are not included. The uninsured health expenses are reasonable.

e. Reasonableness must be assessed in light of the means of the parties. Means includes more than income earned. It requires an inquiry into income earning capacity as discussed in the previous issue, and the financial circumstances of the parties. The evidence supports the finding that Ms. MacDonald struggled as a single parent. Ms. MacDonald worked two jobs for several years in an attempt to meet her budget, which included student loans of approximately $60,000. Ms. MacDonald's financial situation was so difficult that she was forced to cash in her RRSPs in 2010 to pay down debt. I accept Ms. MacDonald's evidence; she was credible. Ms. MacDonald has born a disproportionate share of the direct and hidden costs associated with the parenting of Hannah.

f. Mr. Pink has the means to pay support. As I previously ruled, Mr. Pink had the capacity to earn $25,000 per annum. Further, Mr. Pink has little debt, other than the money he owes relatives for paying the retroactive support and legal costs. In addition, Mr. Pink is about to receive a substantial income tax refund of about $12,000. Mr. Pink also has savings. Further, Mr. Pink will soon pass the bar exam and will be paid as a lawyer, not an article clerk.

g. Mr. Pink paid maintenance of $127 per month from 2001 until January 2010 when a retroactive, interim consent order increased the monthly payment to $336 effective June 2009. The table amount would likely only have made a dent in the basic expenses associated with Hannah's care. The low level of support would not have been sufficient to fund extracurricular activities.

[64] *Step Two: Sec. 7(1A)(a)*

[65] I now must turn to the test set out in sec.7(1A)(a) of the *Guidelines* to determine if the activity expenses are extraordinary. The first part of the test cannot be conducted because I was not provided with a budget for Ms. MacDonald, nor did she testify as to her expenses. I therefore have no way of knowing whether Ms. MacDonald can reasonably cover the activity expenses. I do believe that Ms. MacDonald's financial situation was quite difficult based on the fact that she worked two jobs, and had to cash in RRSPs in 2010 to pay debt. However, in the absence of concrete evidence, I am unable to conclude, on a balance of probabilities, that the activity expenses exceed an amount that could be reasonably covered taking into account Ms. MacDonald's income and child support payable. As in **T.(D.M.C.) v. S.(L.K.),** ***supra***, I must turn, instead, to the second part of the test stated in sec.7(1A)(b).

[66] *Step Three: Sec. 7(1A)(b)*

[67] Ms. MacDonald is unable to pass the proportionality test. Ms. MacDonald paid approximately 1.6% to 3.4% of her net income on extracurricular activities between 2007 and 2010. This percentage increased to about 6% in 2011. These percentages are too low to be considered extraordinary in the circumstances, and in light of the comments of Roscoe J.A. in **T.(D.M.C.) v. S.(L.K.),** ***supra***. It is

therefore unnecessary for me to complete the balance of the inquiry under s.7(1A)(b).

[68] *Summary of Decision on Sec.7 Expenses*

[69] Mr. Pink is required to pay a proportionate share of Hannah's medical and health related expenses, to include the podiatrist expense for orthodics in 2010, and all other health related expenses that exceed insurance reimbursement by $100 annually as will be incurred in the future. If there is a question on future expenses, the matter can be brought to court for further determination in the absence of agreement. Generally, however, orthodontic expenses are appropriate sec. 7 expenses. It is anticipated that Hannah will require braces, although when this occurs has not yet been confirmed.

[70] **Should a retroactive award of child support be granted?**

[71] Ms. MacDonald seeks a three year, retroactive variation effective November 2006. Mr. Pink agrees to a variation that is effective to June 2009.

[72] In **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37 (S.C.C.), Bastarache J. outlined the four factors that a court must balance when determining the issue of retroactivity. They are as follows:

a. The reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment for child support.

b. The conduct of the noncustodial parent. If the noncustodial parent engaged in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. Bastarache J. confirmed that the determination of blameworthy conduct is a subjective one based upon objective factors. The court should not encourage blameworthy behaviour. The court must also determine if the noncustodial parent has contributed to the child in any way that satisfied his or her obligation, or a portion of that obligation.

c. The circumstances, past and present, of the child, and not of the parent. This includes an examination of the child's standard of living.

d. The hardship which may accrue to the noncustodial parent as a result of the noncustodial parent's current financial circumstances and financial obligations, although hardship factors are less significant if the noncustodial parent engaged in blameworthy conduct.

[73] In determining that a retroactive award is appropriate, I make the following findings of fact:

a. Ms. MacDonald had a reasonable excuse for failing to request a variation before 2009. She did not have Mr. Pink's address and had no communication with him. Ms. MacDonald was also balancing the heavy demands of being solely responsible for Hannah, while holding down two jobs. She had very little time or emotional energy available to address the maintenance issue. Ms. MacDonald's second pregnancy also complicated the timing of the variation application.

b. Mr. Pink engaged in blameworthy conduct. He consistently failed to provide proof of income as required by the court order. He did not keep Ms. MacDonald aware of his address, nor did he address his mind to his ongoing responsibility to meet Hannah's needs. Mr. Pink has conducted himself in a manner that ensured his interests were "privileged" over the interests of Hannah: **S. (D.B.) v. G. (S.R.)**, ***supra***, para. 99.

c. Hannah requires an appropriate level of support. Ms. MacDonald has struggled in the past to meet Hannah's needs. The court has complete confidence in Ms. MacDonald. Ms. MacDonald has made great sacrifices for Hanna. She will use all maintenance to meet Hannah's needs. Now that Ms. MacDonald is unable to work two jobs, the retroactive support is required more than ever for Hannah.

d. Mr. Pink has the ability to pay retroactive support. He has savings and will also be receiving a substantial income tax refund. Further, his only debt relates to repaying family members for the cost awards and the interim retroactive child support. Mr. Pink has no student

loan, no car loan, and no credit card debt. He is in a position to pay the retroactive order through savings or by financing.

[74] I therefore grant the retroactive child support order based upon the following:

a. The monthly payment of $216 based upon an income of $25,000 for the period commencing December 1, 2006 and continuing until May 31, 2009, less credit for all maintenance paid. The exact calculation will be processed through the Maintenance Enforcement Program who has details of all payments made. I anticipate, based on the evidence, the retroactive payment will total approximately $2,759.

b. The monthly payment of $340 based upon an income of $39,025 for the period commencing June 1, 2009 and continuing monthly thereafter, until Mr. Pink's income increases because he is a practising lawyer, or for any other reason. Mr. Pink has ten days to disclose to the court, and to Ms. MacDonald, the details of his income increase. He will supply proof. Child support will be based on the *Guideline* amount. Mr. Pink will receive credit for all child support payments made.

c. Mr. Pink will have 60 days to pay the retroactive award in full.

[75] **What is the appropriate child support award?**

[76] Mr. Pink will pay Ms. MacDonald retroactive and ongoing child support based upon an income of $25,000 between December 1, 2006 and May 31, 2009; and an income of $39,025 between June 1, 2009 and when Mr. Pink's income increases. Child support thereafter will be based upon the *Guideline* amount and Mr. Pink's increased income. The usual reporting obligations apply.

[77] Mr. Pink will also pay Ms. MacDonald a prorata percentage of all health related expenses incurred on Hannah's behalf which exceed insurance reimbursement by $100 annually, net of taxes. Mr. Pink will pay such sums within 30 days of being presented with a copy of the invoice by Ms. MacDonald.

[78] Mr. Pink will name Hannah on his health, dental, and medical plan. He will provide timely reimbursement to Ms. MacDonald of any claims submitted through his plan. Mr. Pink will provide Ms. MacDonald with details of his plan, and will request direct payment to Ms. MacDonald of all claims submitted by her, if possible under the terms of the plan.

[79] Mr. Pink will name Ms. MacDonald as irrevocable beneficiary of his life insurance to secure the maintenance payment while Hannah remains a dependent child. Mr. Pink will supply proof of compliance.

[80] I will not order an automatic recalculation given Mr. Pink's past history of nondisclosure and the likelihood that his income will increase more than 10% per annum. I am concerned that a recalculation order may benefit Mr. Pink, and not Hannah, because in the absence of disclosure only a 10% increase is deemed by regulation.

[81] **Conclusion**

[82] The court grants the following relief:

a. An order imputing income to Mr. Pink because he was under-employed.

b. An order requiring Mr. Pink to contribute to Hannah's sec. 7 health expenses that exceed insurance reimbursement by $100 annually, and based upon a prorata distribution, net of taxes.

c. An order directing Mr. Pink to pay retroactive and ongoing child support.

[83] Both parties requested to be heard on the issue of costs. The parties will supply written submissions within 10 days. The variation order is to be drafted by Ms. Gibney.

Forgeron, J.