# COURT OF APPEAL FOR ONTARIO

CITATION: Titova v. Titov, 2012 ONCA 864
DATE: 20121207
DOCKET: C54800

Goudge, Rouleau and Watt JJ.A.

BETWEEN

Tatiana Titova

Applicant (Respondent in Appeal)

and

Boris Titov

Respondent (Appellant in Appeal)

Aaron Franks and Michael Zalev, for the appellant

Tatiana Titova in person

Heard: October 24, 2012

On appeal from the order of Justice L. Snowie of the Superior Court of Justice, dated November 29, 2011.

**Rouleau J.A.:**

[1] This is an appeal from a trial judge's decision about outstanding disputes between a former husband and wife pertaining to support and custody of their three children. The issues raised in this case are: whether the trial judge erred in a) awarding retroactive child support and s. 7 extraordinary expenses; and b) transferring ownership of a life insurance policy as well as awarding sole custody

of one of the children to the respondent, when neither of those orders was sought.

**FACTS**

[2] In 1985, the respondent's first child Anton was born. He was later adopted by the appellant. In 1987, the parties married and, later that year, their daughter, Natasha, was born. Their youngest son, Andrew, was born in 1995. The parties separated in 2002 and entered into a separation agreement on May 13, 2003.

[3] The separation agreement provided that the appellant would pay the respondent child support of $1249 per month, based on his then annual income of $72,800. The appellant was also to share the children's special and extraordinary expenses proportionate to his income. The agreement allowed child support to be reviewed yearly and to be varied in the event of a material change in circumstances. The appellant was to maintain his children as beneficiaries of extended health insurance provided through his employment while it was available to him. He was also to share any medical expenses not covered by insurance, in proportion to his income. The appellant was also to pay the respondent spousal support of $733 per month until November 30, 2005 and to designate the children as beneficiaries of a $100,000 life insurance policy.

[4] On January 21, 2005, the parties entered into an amending separation agreement that provided, among other things, that the appellant's share of the

children's extraordinary expenses be fixed at $200 per month and that spousal support payments be terminated.

[5] On May 18, 2005, the parties obtained a consent order from Justice Herold. The order contained a number of parenting provisions and also ordered that child support of $1292 per month be paid by the appellant, effective May 1, 2003, based on an annual income of $76,000. Justice Herold set the children's special and extraordinary expenses at $400 monthly as of September 1, 2003. These expenses were to be shared equally by the parties. Spousal support was terminated as of December 31, 2003 in accordance with the amended separation agreement. The agreement provided for a set-off for overpaid spousal support against the arrears of child support and s. 7 expenses. The arrears for all support payments were ordered to be set to zero as of December 31, 2004.

[6] In 2007, both the respondent and the appellant brought motions to change the order of Justice Herold: the appellant, to vary child support, and the respondent, to vary the parenting provisions. These motions were resolved by minutes of settlement. The settlement was incorporated into an October 30, 2008 order of Mossip J. which fixed child support in the amount of $1275 per month for Natasha and Andrew, based on the appellant's deemed income of $88,205 per year. Child support in that amount was to continue from November 1, 2008 to April 30, 2009, without prejudice to the respondent's right to argue for an extension if Natasha continued to post-secondary education. Commencing May

1, 2009, child support for Andrew was to be paid in the amount of $735 per month and the child support for Natasha would terminate. The order also provided that there were no child support arrears as of October 30, 2008 and that the issue of ongoing s. 7 expenses for Natasha and Andrew, was to proceed to trial. The appellant was ordered to pay $200 monthly in the interim without prejudice to the final determination of the s. 7 expense amounts. In addition, the appellant was to pay his proportionate share of any orthodontic expenses not covered by insurance to that date and going forward for Andrew. Finally, the order delegated final decision making authority to the respondent in respect of Andrew, eliminating the requirement that the appellant consent to any applications for passports, official documents, school, medical decisions, or travel.

[7] On December 13, 2010, the respondent brought a motion to vary Mossip J.'s order. The respondent sought, *inter alia*, financial disclosure, an increase in child support as of October 30, 2008, an increase in the payment of s. 7 expenses as of 2007, and proof of Andrew's status as a beneficiary under the appellant's life insurance policy.

[8] The respondent's sworn affidavit in support of the motion was not provided until February 11, 2011. On January 19, 2011, the parties consented to an order to exchange tax returns and notices of assessment, for the respondent to provide detail of her claim for reimbursement of s. 7 expenses together with proof where

available, and for the appellant to file his answer to the motion by February 15, 2011.

**THE DECISION BELOW**

[9] Following a three-day trial, the judge noted the extended history of this case, dating back to 2002, and noted that the appellant had dragged the matter out. She also found that, although the matter commenced in 2007, the appellant did not provide his tax information and answer until mandated to do so in 2011. The trial judge then made the following orders:

1. The appellant was to pay the respondent child support for Andrew, fixed at $867 per month commencing December 1, 2011, based on an annual income of $98,452.75.

2. Commencing November 1, 2008, the parties were to share s. 7 expenses in proportion to their respective incomes with the respondent paying 16% and the appellant 84%.

3. Arrears of child support were fixed at $18,349.49 and the appellant was ordered to pay $500 per month in respect of those arrears commencing in December 2011 and continuing until paid in full.

4. The appellant was to pay the respondent $528 per month for ongoing s. 7 expenses for Andrew commencing December 1, 2011. This figure was a

projection based on Andrew's actual s. 7 expenses for 2011, to mid October 2011.

5. Arrears of s. 7 expenses for the period between November 1, 2008 and December 1, 2011 were fixed at $48,200, after crediting the appellant for the monthly $200 payments he made pursuant to Mossip J.'s order. The appellant was to pay the respondent $1,000 per month with respect to these arrears commencing December 1, 2011 until the arrears were paid in full.

[10] The appellant was also ordered to ensure that Andrew was fully reinstated on his medical/dental plan through the appellant's employer and to transfer the ownership of his Canada Life Insurance policy to the respondent.

[11] The parties were ordered to deliver their respective T4s annually to one another.

[12] Finally, on consent, the respondent was awarded sole custody of Andrew.

**ISSUES**

[13] The appellant argues that the trial judge erred as follows: she misapprehended the chronology leading up to the trial; did not consider the respondent's actual financial circumstances; failed to apply s. 7 of the *Child Support Guidelines*, O. Reg. 391/97 ("the Guidelines"); failed to consider and apply the applicable legal principles for awarding retroactive support; overruled a

final order in relation to arrears; made substantive orders that were not requested by either party; committed palpable and overriding factual errors; and gave inadequate reasons. As a result of these errors, the appellant submits that this court should:

1. Set aside the award for arrears of child support and s. 7 expenses;
2. Set aside the order awarding sole custody of Andrew to the respondent; and,
3. Set aside the order transferring of the Canada Life Insurance policy to the respondent.

**ANALYSIS**

[14] A trial judge's decision on support is entitled to significant deference. This promotes finality in family law and also recognizes the importance of the appreciation of facts by the trial judge. An appellate court must intervene only when there is a material error, a serious misapprehension of the evidence or an error in law. The appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12.

**1) Child support and s. 7 expenses**

[15] The appellant argues that the trial judge's orders for both arrears and ongoing child support and s. 7 expenses cannot stand. At the outset of the

hearing, he advised that he does not challenge the finding that ongoing child support for Andrew should be set at $867 per month, commencing December 1, 2011, based on an annual income of $98,452.75. Similarly, he does not object to paying 84% of ongoing s. 7 expenses for Andrew.

[16] The appellant has several objections to the orders for arrears and ongoing child support and s. 7 expenses. First, he argues that the trial judge's reasons and approach were tainted due to her misapprehension of the chronology of events leading up to the trial. Specifically, he claims that the trial judge erred when she stated, at para. 4 of her reasons, that the matter had commenced in 2007 and that the appellant had "dragged the matter out for four years." In the appellant's view, this finding was simply incorrect. The trial judge's error bears legal consequences, since a payor's blameworthy conduct is taken into account when ordering retroactive support.

[17] The appellant explained that the motion was brought in December 2010, not in 2007. Up to that date, all of the disputes between the parties had been resolved through settlements and consent orders as each issue arose. Additionally, and contrary to the trial judge's suggestion, the court did not order the appellant to serve and file his income tax returns for 2007, 2008 and 2009, nor was an order required to have him serve and file his answer. The order for these matters was made on consent and provided that both parties exchange

information. The agreement to do so was reached without any dispute and before the respondent had even filed her sworn affidavit in support of her motion

[18] The appellant submits that the trial judge erred when she indicated in her reasons and her order that the s. 7 expenses she ordered the appellant to pay were for expenses incurred after November 2008. In fact, of the $48,200 in s. 7 expenses awarded, more than half was for s. 7 expenses that pre-dated November 1, 2008. Because the trial judge incorrectly understood that the $48,200 in s. 7 expenses had accrued after Mossip J.'s order, she never considered whether there was a basis for departing from Mossip J.'s settlement of all outstanding issues.

[19] Finally, the appellant contends that the absence of any explicit consideration of the factors relevant to awarding s. 7 expenses and retroactive child support constitutes an error in principle.

[20] In my view, the reasons in this case disclose errors of law. As a result, appellate intervention is necessary. I turn first to the legal errors alleged by the appellant.

**i) Did the trial judge fail to consider the factors relevant to an award of extraordinary expenses?**

[21] The appellant contends that the trial judge erred in failing to consider the factors relevant to ordering s. 7 special and extraordinary expenses. As set out earlier, the October 30, 2008 order of Mossip J. had settled the amount of s. 7

expenses up to the date of the order and had ordered that the issue of s. 7 expenses going forward was to proceed to trial. Despite this order, the trial judge awarded s. 7 expenses for the time both before and after Mossip J.'s order.

[22] I will deal first with the s. 7 expenses for the period following the October 2008 order. The portion of the expenses pre-dating that order will be considered together with the appellant's challenge to the retroactive support order.

[23] In awarding s. 7 special and extraordinary expenses, the trial judge calculates each party's income for child support purposes, determines whether the claimed expenses fall within one of the enumerated categories of s. 7 of the Guidelines, determines whether the claimed expenses are necessary "in relation to the child's best interests" and are reasonable "in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation." If the expenses fall under s. 7(1)(d) or (f) of the Guidelines, the trial judge determines whether the expenses are "extraordinary". Finally, the court considers what amount, if any, the child should reasonably contribute to the payment of these expenses and then applies any tax deductions or credits.

[24] The relevant provision of the provincial Guidelines reads:

> 7. (1) In 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;
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> (c) health-related expenses that exceed insurance reimbursement by at least of $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;
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> (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.

[25] The Guidelines define "extraordinary" as follows:

> 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.

[26] The trial judge considered almost none of the relevant factors. There was no consideration of the parents' means, despite the fact that the respondent's income, as reported in her income tax statements, ranged from a high of $67,250 in 2007 to a low of $18,500 in 2011. And while the appellant argued that the respondent had undisclosed income, there was no discussion of this in the trial judge's reasons. There was also no discussion of the children's means and ability to contribute, or the reasonableness of the expenses. This is so even though at the time of trial, Anton was almost 26 and Natasha was 24. There was some evidence to the effect that Anton was at the time of trial, or had been, employed.

[27] As to whether the expenses sought were properly considered "extraordinary", the only explanation provided by the trial judge was that the "modest structured sports" were "true section 7s in this case" and that although

they “often would not be included as s. 7 expenses, however, due to the mental health issues of the children… they are s. 7s in this case.” It is not clear whether this statement about the appropriateness of the s. 7 expenses pertains to retroactive or future s. 7 expenses, or to both. There is also no explanation for the appropriateness of the non-sports-related s. 7 expenses. These non-sport-related s. 7 expenses included CAA membership driving lessons, school break camps, parking and college fees. Further, the trial judge allowed the claim for babysitting expenses of $5,000 per year with little explanation other than stating that Andrew “requires constant supervision ‘babysitting’” because of his special needs.

[28] It also does not appear that the trial judge turned her mind to the question of whether the expense for items such as school books and school registration qualified as “extraordinary”. As set out in *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.) at para. 64, the use of the word “extraordinary” in s. 7 implies that ordinary expenses are intended to be covered by the basic table amounts.

[29] The requirement that a judge give reasons for decision is clear. It is an inherent aspect of the discharge of a judge’s responsibilities. See *R. v. Sheppard* 2002 SCC 26. As Binnie J. noted at para. 24 of *Sheppard*:

> [T]he requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the

> reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

[30] The need for reasons in the family law context was affirmed by this court in *Young v. Young* (2003), 63 O.R. (3d) 112 and *Bodnar v. Blackman* (2006), 82 OR (3d) 423 at para.11. At para. 27 of *Young*, Laskin J.A., writing for the court, stated:

> The desirability of reasoned reasons in a criminal case rests on three main rationales: public confidence in the administration of the justice system, the importance of telling the losing party the reasons for having lost, and making the right of appeal meaningful. These three rationales also apply to a family law case and are relevant in this case.

[31] The adequacy of reasons is determined on a functional basis. The reviewing court should consider whether the reasons are sufficient given the three rationales stated above. In my view, given the obvious issues disclosed by the record, it was an error to award all the requested extraordinary expenses without any engagement with the test or explanation of why the award was appropriate.

[32] I agree with Justice Gillese's comments at paras. 21 and 22 of *Bodnar* which emphasize that appellate courts must not place an impossible burden requiring perfect reasons on busy trial courts. The reasons, nevertheless, must be adequate.

[33] In this case, the reasons were inadequate in providing any explanation of how the facts of this case interacted with the legislative test, or to provide for meaningful appellate review. As a result, the order for post-November 2008 extraordinary expenses as well as the order fixing the amount of the s. 7 expenses to be paid in the future cannot stand.

**ii) Did the trial judge fail to apply the standard appropriate to retroactive support orders?**

[34] The appellant submits that the trial judge erred in ordering him to pay substantial s. 7 expenses predating Mossip J.'s November 2008 order and in ordering him to make large payments for retroactive child support without considering any of the factors set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37.

[35] A brief background review is in order. In her October 2008 order, Mossip J. set child support at $1275 per month for Natasha and Andrew and ordered that it remain in effect until April 30, 2009. The order then provided that commencing May 1, 2009, the amount would be reduced to $735 per month because only Andrew would qualify for child support at that time. The order also provided that the respondent was entitled to apply for an extension of child support for Natasha, should she continue on to post-secondary education. No steps were taken in this respect until December 2010 when the respondent served her notice of motion.

[36] In the judgment under appeal, the trial judge found that the amount of child support should be varied retroactively, because the appellant's salary for the period from 2008 to 2011 was more than the $88,205 assumed by Mossip J. The trial judge also determined that, for various periods between 2008 and 2011, child support ought to have been paid for each of Andrew, Natasha and Anton. As a result, she ordered the appellant to pay $18,349.49. Most of this amount was found to be owing for the period prior to the December 2010 notice and is, therefore, a retroactive child support award.

[37] In *D.B.S.* the Supreme Court of Canada considered the issue of retroactive awards and cautioned as follows, at para. 95:

> It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard.

[38] In reaching her decision to order the retroactive support payment, the trial judge made no mention of the above caution about retroactive child support awards generally. Instead, she appeared to treat the entitlement to retroactive child support as a given. I note here also that the trial judge's order requiring payment of s. 7 expenses that predate the Mossip J. order is also a retroactive award, considering that Mossip J. made a final resolution, to the date of her order, of the s. 7 expense issue. The trial judge's reasons, however, do not acknowledge that these expenses predate the Mossip J. order and there is no discussion in the reasons of the appropriateness of making this retroactive award.

[39] There is simply no mention or discussion of the factors set out at para. 35 of *D.B.S.* to be weighed before making an award of retroactive child support. The factors are as follows:

1) Whether the recipient parent has supplied a reasonable excuse for his/her delay;
2) The conduct of the payor parent;
3) The circumstances of the child; and
4) The hardship the retroactive award might entail.

[40] The trial judge's reasons make her poor regard for the appellant clear. She was highly critical of his conduct and found his disclosure inadequate. These findings, although challenged by the appellant in the present appeal, clearly

convey that the trial judge was influenced in her decision to order retroactive child support by the second *D.B.S.* factor, namely, the conduct of the payor parent. However, there is a dearth of other findings in the record to assist us in considering the other relevant factors.

[41] The trial judge also failed to consider that the court should not normally order retroactive child support in the absence of a current child support entitlement. As explained at para. 89 of *D.B.S.*:

> one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made … Child support is for the children of the marriage, not adults who used to have that status.

[42] At the time of trial, Natasha and Anton were 24 and 26 respectively, and thus arguably no longer children of the marriage. Whether this fact precluded an award for retroactive child support should also have been considered.

[43] In my view, the trial judge erred in principle by failing to acknowledge any of the necessary cautions associated with making a retroactive spousal support order and failing to consider whether the older children's age was a bar to awarding retroactive support.

[44] Accordingly, the award for retroactive support and retroactive s. 7 expenses cannot stand.

[45] Because of my conclusion on the legal issues, it is not necessary to deal with the appellant's submission that the trial judge misapprehended the chronology of events.

**2) Unrequested substantive orders**

[46] The appellant asks this court to set aside two orders that neither party requested nor made submissions on. The appellant relies on this court's decision in *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 75 (C.A.), at paras. 60-61, where the court stated that "[i]t is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings."

[47] Specifically, the appellant takes issue with the trial judge's order transferring ownership of the appellant's $250,000 life insurance policy to the respondent, when that relief was never requested. He also takes issue with the award for sole custody of Andrew to the respondent "on consent" when there was no such consent by the appellant and when custody was not an issue at trial.

[48] Rule 2 of the *Family Law Rules*, O. Reg. 114/99 provides the court with great latitude to adjudicate cases fairly. There are circumstances, particularly where a party is self-represented, in which unrequested orders are appropriately made. In the circumstances of this case, however, I agree with the appellant that it was an error in law for the trial judge to make both these orders in the absence

of any evidence or submissions on these issues and in the absence of any explanatory reasons.

[49] In my view, a change to the life insurance provision ought not to have been made. The original separation agreement, dated May 13, 2003, provides that the appellant is to keep $100,000 of life insurance in force to secure child support. The specific terms of that obligation are set out in that separation agreement. This provision of the agreement has not been amended. The respondent's December 2010 motion simply sought enforcement of that provision. She made no request to transfer the ownership of a $250,000 life insurance policy to the respondent.

[50] On the issue of custody, Herold J. had ordered joint custody of the children. The October 30, 2008 order of Mossip J. did not effectuate a change in custody, but instead gave the respondent enhanced decision-making authority for Andrew. In her December 2010 motion, the respondent did not ask for any change to the terms of custody.

[51] The trial judge's statement that the change in custody was made "on consent" appears to originate from an exchange that occurred in the course of the trial between the judge and counsel for the appellant. In that exchange, the trial judge asked the appellant's counsel whether there was any reason why "we would not be looking at sole custody?" The appellant's response was to point out

that there had been "*de facto* sole custody for an extended period of time." This was taken by the trial judge as consent when, according to the appellant, it was simply an acknowledgement that the exclusive decision-making authority conferred upon the respondent by Mossip J. already delegated all of the control over Andrew that the respondent might reasonably need.

**REMEDY**

[52] Having concluded that the trial judge's analysis of allowable s. 7 expenses was lacking, that she committed a reversible error by failing to consider the relevant factors before awarding retroactive support, and that she erred in ordering relief that was never requested, this court's usual order would be to set aside the judgment and order a new trial. The trial judge did not make all the findings of fact necessary to carry out a proper legal analysis, leaving only the record to supply many of the relevant facts.

[53] The appellant, however, asks that this court review the record and substitute an appropriate order rather than require the parties to undergo a new trial. He explains that the resources of the parties are limited and that continuing the litigation would be detrimental to both parties. Although the respondent did not specifically address the issue of remedy in the event that the appeal was allowed, she did refer many times to the toll that continuing litigation was taking on her and the children. She is representing herself and has, by her own

admission, spent countless hours working on the issues arising from this litigation.

[54] Given the appellant's request and the particular circumstances of this case, it is appropriate for this court to allow the appeal in part and to substitute its own order based on the record. This is consistent with the stated primary objective of the *Family Law Rules*, which is to deal with cases justly: that specifically includes, as enunciated at ss. 2(3)(b), saving expense and time.

[55] I would, therefore, strike paras. 1, 4, 5, 6, 8 and 9 from the trial judge's November 29, 2011 order. These paragraphs relate to sole custody, retroactive child support including s. 7 expenses, s. 7 expenses to the date of trial, the transfer of ownership of the life insurance policy, and setting the amount of s. 7 expenses to be paid going forward.

[56] By the end of December, the appellant will have paid the respondent $19,500 toward the ordered arrears in the form of monthly payments of $1500 ($500 per month for child support plus $1000 per month for s. 7 expenses). Counsel for the appellant has urged us to accept that the payments already made satisfy any retroactive child support obligations. Since the date the appeal was heard, two additional monthly payments have been made. I agree with the appellant's submission that no additional payments on account of arrears need be made. I would, however, require that the scheduled payments continue up to

and including the December 2012 payment. From my review of the appellant's salary during the period from 2008 to 2011, the information that was in the record about the parties and their children's needs and income during the period, and the list of s. 7 expenses claimed by the respondent for the period, a payment for retroactive child support and s. 7 expenses in that amount would be fair to both parties.

[57] For s. 7 expenses going forward, the appellant does not object to the trial judge's order that he pay 84% of eligible amounts. I see no basis, therefore, to make any change in that portion of the order. As to which expenses can properly be claimed as s. 7 expenses, the appellant has made monthly payments of $528 and submits that, in the circumstances, there should be no adjustment for payments already made. I agree and would not interfere with the s. 7 expenses paid by the appellant since the November 29, 2011 order up to and including the December 2012 payment. As to the proper amount to be paid going forward from December 30, 2012, I agree with the appellant that the amount should not be pre-determined.

[58] It is appropriate, however, for this court to give some guidance as to what expenses can properly be regarded as s. 7 expenses. I would not interfere with the trial judge's finding that Andrew is a special needs child. As a result, I would include those s. 7 expenses that were allowed by the trial judge for tutoring and counselling. I would also allow expenses for music and French lessons. These

were consented to by the appellant. I would also allow reasonable expenses for sports activities, but I would disallow claims for school books and school registration which, in my view, are covered by the basic support amount.

[59] The most significant s. 7 expense ordered by the trial judge is $5000 allotted for babysitting. We were provided with very few details on this item. There does not appear to be a receipt in the record that describes the babysitting services that were provided. Andrew is 17 years old and the respondent does not work full-time. Babysitting expenses would not normally be recoverable in these circumstances. It was suggested, however, in the course of the hearing, in our court, that these expenses are more in the nature of tutoring related to Andrew's special needs. I would, therefore, make no finding with respect to that aspect of the claim for s. 7 expenses. If the parties cannot resolve that issue or any other relating to the s. 7 expenses going forward, they will unfortunately have to apply to the Superior Court. I urge the parties in the strongest possible terms, however, to settle any outstanding issues between them without resorting to further litigation. On the issue of the insurance policy and custody of Andrew, I would make no change to the orders as they existed prior to the decision under appeal.

[60] In conclusion, I would allow the appeal and: (a) strike paras. 1, 4, 5, 6, 8 and 9 from the trial judge's November 29, 2011 order, (b) order that all arrears of child support and s. 7 expenses be fixed in the amount of $19,500 being the amount the appellant should have already paid by the date of this decision, and

(c) that the appellant's share of s. 7 expenses for the period December 1, 2011 to December 31, 2012 be set at $528 per month. The appellant's share of s. 7 expenses following December 31, 2012 be 84% of the eligible amounts.

[61] Should the parties be unable to agree on the issue of costs in this court and the court below, I would direct the appellant to make brief written submissions not exceeding five pages within fifteen days of these reasons and the respondent to provide brief written submissions not exceeding five pages within fifteen days thereafter.

"Paul Rouleau J.A."
"I agree S.T. Goudge J.A."
"I agree David Watt J.A."

Released: December 7, 2012