

Section 7 Special or Extraordinary Expenses

A Review of Case Law and the Maintenance Enforcement Program's Perspective

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A REVIEW OF CASE LAW AND THE MAINTENANCE ENFORCEMENT PROGRAM'S PERSPECTIVE

INTRODUCTION

Child support may be obtained in Alberta through the *Federal Child Support Guidelines*¹ (“FCSG”) and the *Alberta Child Support Guidelines*² (“ACSG”). The section 3 table child support amounts were designed with the average family in mind and includes the payor’s reasonable contribution to a child’s food, clothing, shelter, health, school/educational expenses and extracurricular activities³. Section 7 of the Guidelines allows parents (or spouses) to seek additional reimbursement for special or extraordinary expenses over and above the regular child support amount. Section 7 expenses may be ordered at the discretion of the court upon the application of the parent seeking reimbursement. These expenses are presumptively split proportionate to income.

A proper analysis of section 7 expenses requires the following steps. Firstly, parties’ should be properly adjusting their income to determine their proportionate share (Schedule III, section 3.1, FCSG; Schedule 3, section 4 ACSG). They must then determine if the expense claimed falls within an enumerated expense (section 7(1)(a) through 7(1)(f) of the Guidelines). If the expense falls within an enumerated category, the courts must then consider if the expense is necessary in relation to the child’s best interests; and reasonable in relation to the means of the spouses and those of the child and to the family’s spending pattern prior to separation. If the expense claimed falls within section 7(1)(d) or (f) being an “extraordinary” expense, the parent seeking reimbursement has the onus to prove the expense meets the definition of “extraordinary.”

Despite expenses being necessary, reasonable and, if required, extraordinary, the court still maintains the discretion to determine whether those expenses are granted and, if so, in what proportion they are paid between the parents. Expenses are shared after taking into account any subsidy, benefit, income tax deduction or credit and after considering if the children should contribute to the payment of that expense. To routinely grant section 7 orders without considering an appropriate analysis of the tests would undermine the objectives of the guidelines as there is a

¹ *Federal Child Support Guidelines*, SOR/97-175 (*Divorce Act*) [FCSG]; *Divorce Act*, R.S.C. 1985, c3 (2nd Supp) [Divorce Act].

² *Alberta Child Support Guidelines*, Alta Reg. 147/2005 (*Family Law Act*) [ACSG]; *Family Law Act*, S.A. 2003, c F-4.5 [Family Law Act].

³ *Cowan v. Cowan*, 2001 ABQB 439 [Cowan] at para 16; *Trueman v. Trueman*, 2000 ABQB 780 [Trueman] at para 39; *McKinnon v. McKinnon*, 1998 ABQB 44 [McKinnon] at para 21-22, cited in *A.R. v. M.W.*, 2005 ABQB 409 [A.R. v. M.W.] at para. 14 and cited in *L.G. v. G.B.*, 2008 ABQB 536 [L.G. v. G.B.] at para. 147.

presumption that the regular child support amounts are adequate⁴. The intent of section 7 is to provide for those special or extraordinary expenses and not to cover ‘everyday’ expenses already afforded in standard child support.

Recently, the Alberta Maintenance Enforcement Program (“MEP”) has prepared a Section 7 Expenses Information and Report (the “Report”)⁵ that determines how they are enforcing section 7 expenses. Specifically, the Report lists “general expenses” that will be enforced automatically by MEP upon submissions of appropriate evidentiary support. The Report was undoubtedly a response to the questions plaguing the organization as to what properly qualifies as a section 7 expense. For reference, the Report is attached to this paper as **APPENDIX “A”**. The Report effectively removes the legislated test from practice by allowing parents to submit expenses without conducting a case specific analysis of whether expenses are necessary, reasonable and extraordinary. It also changes the onus from the parent requesting reimbursement of a section 7 expense, whom normally has to prove the expense to the court, to the parent challenging the reimbursement of a section 7 expense, whom now has to argue against the expense in court.

Michelle L. Pidhirney in her November 2014 paper “Section 7 Expenses” does an excellent summary of the entitlement and quantum of section 7 expenses⁶. I would refer everyone to her paper for more information on section 7 expenses and the case law. This paper is intended to supplement her paper.

This paper is confined to reviewing section 7 expenses under the FCSG and the ACSG. The paper specifically excludes a review of section 7 expenses for post-secondary education being section 7(1)(e) or in relation to children over the age of majority. For this topic, please see Farah Kohorst’s papers⁷.

In this paper, I intend to review the following aspects in more detail:

- (i) Calculating income for the purposes of section 7 expenses;
- (ii) Determining whether the expense falls within one of the enumerated categories of section 7 expenses;

⁴ *Hansvall v. Hansvall*, 1997 CanLII 11079 (SK QB), [1998] 4 WWR 202 (Sask QB), cited in *Johnston v. Johnston*, 2004 ABQB 221 [*Johnston*] at para. 31,

⁵ Alberta Maintenance Enforcement Program, Section 7 Expenses Information and Report, Alberta Government, MEP3690 (2015/08) [**Report**].

⁶ Pidhirney, Michelle L, “Section 7 Expenses” Legal Education Society of Alberta – November 19-26, 2014 [**Pidhirney**].

⁷ Kohorst, Farrah, “School is Not Out for the Summer – Post Secondary Studies” Legal Education Society of Alberta – February 7-9, 2012 and “Post-Secondary Child Support” Legal Education Society of Alberta – February 10-23, 2016.

- (iii) Determining the onus and evidence needed;
- (iv) Determining whether the expense is necessary in relation to the child's best interests **AND** whether the expense is reasonable in relation to the means of the spouses and to those of the child and to the parties' spending patterns prior to separation;
- (v) Discussing the court's discretion, fairness and the idea of consent;
- (vi) If the expense falls within section 7(1)(d) or (f), determining whether the expense meets the definition of "extraordinary"; and
- (vii) Reviewing the Alberta Maintenance Enforcement Program's perspective on section 7 expenses and its' impact on future applications.

LEGISLATION

The *FCSG* and the *ACSG* both have the same presumptive guideline amount and the same various exceptions to that guideline amount. The presumptive rule as set out in section 3 is that the amount of child support is (a) the amount set out in the applicable table (according to the number of children and the income of the payor spouse) and (b) the amount, if any, determined under section 7. The exceptions to the presumptive guideline amount (section 3) are provided under the following sections: section 4 – incomes over \$150,000; section 5 – spouse in place of a parent; section 8 – split custody; section 9 – shared custody; and section 10 – undue hardship.

Section 7 allows parents (or spouses) to seek additional reimbursement for special or extraordinary expenses. Section 7 in both the *FCSG* and the *ACSG* is similarly worded; however, the *ACSG* uses the word "parent" instead of "spouse" and the *ACSG* make reference to payment of child support to a recipient other than a "parent".

The *FCSG* definition is as follows [emphasis added]:

Special or extraordinary expenses

7. (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.

Definition of "extraordinary expenses"

(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.

Sharing of expense

(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.

Subsidies, tax deductions, etc.

(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.

Universal child care benefit

(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.

For reference, the applicable sections of ACSG are attached to this paper as **APPENDIX "B"**.