IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

FAMILY DIVISION

JUDICIAL DISTRICT OF WOODSTOCK

**2024 NBKB 212**

Court File No.: FDW-138-2012

BETWEEN:

**J.R.T.**,

Petitioner

– and –

**D.M.T.,**

Respondent



**DECISION**

| | |
|---|---|
| **BEFORE:** | **The Honourable Madam Justice Danie Roy** |
| **DATE OF HEARING:** | **April 26, 2024** |
| **DATE OF POST-TRIAL SUBMISSIONS:** | **May 29 and May 30 2024** |
| **DATE OF DECISION:** | **November 21, 2024** |
| **APPEARANCES:** | **Timothy T. Culbert, for J.R.T.** |
| | **Natacha I. Bosse, for D.M.T.** |

**Roy, J:**

**OVERVIEW**

[1] The parties are J.R.T., Petitioner and D.M.T., Respondent. They married on December 19, 1998, and separated on June 6, 2011. They are the parents of two adult children, J.R., born […], 1999, and L.H.T., born […], 2001.

[2] J.R. graduated from Carleton University in May 2021 and ceased to be a child of the marriage at that time for the purposes of child support. L.H.T. graduated from the Kinesiology program of the University of New Brunswick in the Spring of 2024 with a plan of going back in September 2024 to complete an education program. He is living independently and ceased to be a child of the marriage for the purposes of child support on August 31, 2021.

[3] The parties executed a separation agreement on July 23, 2012. The separation agreement provided for the Respondent to have primary day-to-day care of the children and the Petitioner was to have general and liberal access. During the school calendar year, the children would spend three weekends a month with the Petitioner and one weekend per month with the Respondent. The school summer vacation and holidays were to be shared equally.

[4] As per the agreement, there was no spousal support payable, and the parties divided marital property. The agreement also provided for monthly child support of $500 payable by the Petitioner, acknowledging the parenting arrangement with liberal access and the summer months to be shared equally. The parties also agreed to sharing of special or extraordinary expenses, such as uninsured health services or extracurricular activities, on a pro-rata basis. The Petitioner was to maintain the children under his health and medical coverage, as well as the Respondent until they divorced. The Respondent was to maintain the RESPs for the children, the cost of which was to be shared equally after the divorce.

[5] The Petitioner paid child support pursuant to the 2012 separation agreement until January 2015, but never made any payments after that. The parties did not share the special or extraordinary expenses as agreed. The Petitioner felt the costs associated with the children's involvement in sports should be deducted from his child support payments. He stopped paying child support in the middle of a basketball season.

[6] The parties filed a joint petition for divorce along with a Trial Record with the Court on September 27, 2012, seeking to incorporate the provisions of the separation agreement as corollary relief to the divorce. However, the Trial Record was rejected by the Clerk of the Court at the time because of "deficiencies in the child support calculations." The parties never came to a different arrangement for child support.

[7] The Application filed in September 2012 was never adjudicated. As a result of time passing, the Clearance Certificate from the Central Divorce Registry expired. The original Application was withdrawn/discontinued by order of this Court on September 13, 2021, to allow for a new Application to be filed. The Petitioner filed a new Petition for Divorce on October 25, 2021, and the Respondent filed an Answer and a Counterpetition on November 22, 2021.

[8] The Petitioner acknowledges he has a legal obligation for a retroactive child support order. The Petitioner wants his child support obligation to reflect the separation agreement, that is $500 per month from February 1, 2015. The Respondent seeks a child support order as per the table amount of the ***Federal Child Support Guidelines***, retroactive to February 1, 2015.

[9] The issues to be decided are the amount of child support arrears and the amount of retroactive special and extraordinary expenses, if any. Also, the Petitioner is asking that child support ordered be paid directly to the children.

## FACTS

*Parenting arrangement*

[10] The Petitioner says the parenting arrangement was not truly as the separation agreement provided. He testified he had the children 50% of the time during summer and overall, 45% of the time. Both children were involved in many sports, and L.H.T. particularly in competitive basketball, including college basketball at Holland College and varsity basketball at the University of New Brunswick. The Petitioner testified he was mostly responsible for the sporting activities, and he had the children pretty much every weekend of the year, other than two or three weekends. There were also weekday evenings practices and games.

[11] S.P. and B.M.C. testified on behalf of the Petitioner. Their sons played on the same basketball team. S.P. testified he saw the Petitioner at every game and that the Petitioner and L.H.T. spent probably six to eight hours a week for basketball, not counting tournaments on weekends. B.M.C. testified it was very busy. She does not remember the Petitioner not being present and she would see him at least two to three times every week. They would also go over to his house.

[12] The Petitioner also called the parties' son, L.H.T. to testify. He testified he had basketball practises and games, five or six times a week. It is his father who transported him 80 to 85% of the time. With respect to weekends, he said he could only recall a few times he did not have basketball and would not be with his father. Once he became more independent and had his driver's licence, he would go back and forth equally with each parent. The evidence is unclear as to when he received his drivers' license. He reached 16 years old on September 24, 2017.

[13] The Petitioner also testified that around 2012, he claimed one child on his income tax return, and received a return of approximately $2,300. However, a few months later the Canada Revenue Agency questioned this, they requested a copy of the separation agreement, and then denied he was entitled to claim one child. He had to reimburse the funds he received. He asked if the Respondent would agree to sign a letter so that they each could claim a child, and she refused.

[14] The Respondent testified the children were involved in many activities and the children's activities overlapped. She testified there was more than basketball. She travelled to Campbellton for badminton, to Bathurst for volleyball. She also travelled to Halifax, Moncton, Fredericton, and Grand Falls.

[15] She testified as to her responsibilities. She had to keep calendars. In grade 9, L.H.T. did not stay at school to eat lunch in the cafeteria because he did not feel comfortable. She would leave work, go home, make lunch and have lunch with him. She took the children to the doctors, for their immunization and to the dentist. She paid the out-of-pocket medical expense (the co-payment). She says before they left, they had the next appointment scheduled. She would have to leave work to take the children to these appointments.

[16] Her evidence is also that she left work early for the children's activities. She would have to plan the night before so the children could eat before the activities. She would make lasagna or shepherd's pie.

[17] The Respondent testified she bought the bulk of the children's clothing. They did a shopping trip in August and a trip closer to Christmas and often times during the month of March as well. She said she bought the bulk of their shoes. L.H.T. felt he needed sneakers to keep up and he needed different sneakers for different outfits. The Petitioner testified he also took the children on shopping trips and bought what they asked for. He said he bought sneakers, and he bought cleats for baseball. He says that whatever they asked for, he provided.

*[18]* Still, the Petitioner conceded the Respondent took the children to the majority of the medical appointments because he says she had them more often than he did. He said the children were with him on the weekends and they don't go to those appointments during the weekend.

*Child support*

[19] In the separation agreement, the parties agreed as follows with respect to the financial provisions:

> 5. Financial Provision for the Children
>
> (a) The husband and the wife hereby agree and acknowledge that their respective incomes are approximately equal, and further agree that each shall be considered to have a gross annual income of $80,000 for the purpose of child support calculation.
> (b) The husband and the wife hereby agree and acknowledge that due to the liberal access schedule of the children with their father, which it is acknowledged that during the summer months will amount to a short term shared custody arrangement, the husband will be making a greater contribution to the costs and expenses of the care of the children than would otherwise be the case. The parties therefore agree that any child support payable by the husband to the wife should be reduced to reflect this additional cost to the husband and additional savings to the wife.
> (c) As long as the husband is employed, the husband will maintain in full force and effect the current health and medical insurance coverage available through his employer under which such coverage provides the husband and children indemnification for health and medical expenses. The husband will maintain the wife on the current family health plan until such time as a divorce takes effect. It is acknowledge and

agreed that this health and medical coverage represents a substantial benefit to the children. The parties agree that so long as, and to the extent which, these policies are maintained by the husband, any child support payable by the husband to the wife should be reduced to reflect this additional cost to the husband and additional savings to the wife.

(d) The wife will maintain in full force the current educational plan for the children until such time as a divorce takes effect. At that time, the husband shall pay to the wife, on the 1st of each month thereafter, half of the monthly payment for the educational plan.

(e) In the event special or extraordinary expenses are incurred, such as uninsured health services or for extracurricular activities, the parties shall share the costs of said expenses on a pro-rata basis, based on their agreed incomes for the purposes of child support calculation.

(f) The parties acknowledge that the child support payable pursuant to the Child Support Guidelines for two children at a gross annual income of $80,000 is $1, 136.00 per month. In acknowledgment of the sharing of costs and expenses and the relative benefits to the parties outline above, the parties agree that the husband will pay to the wife commencing on 15th August 2012 and on the fifteenth day of each and every month thereafter, the sum of $500.00 per month for the maintenance and support of the children of the marriage, payable until one or more of the following occurs:

(i) the childe ceases to reside with the wife;
(ii) the child becomes 19 years of age;
(iii) the child marries; or
(iv) the child dies.

[20] The evidence of the parties is that they agreed to a child support order of $500, taking into account their circumstances, including the division of assets, such as the equity in the matrimonial home and the pensions.

[21] The Petitioner testified he agreed to child support of $500 a month, knowing he was paying less than what he ought to pay. He says the trade off was that he agreed to $30,000 equity in the house, which was less than half of the value. He says they bought the house for $180,000, and they put $30,000 in renovations the summer they separated. His evidence is that the house was worth at least $250,000.00 at the time of separation. They had a mortgage of about $40,000, which left about $210,000 in equity. He also said they agreed to divide equally all of the other expenses.

[22] The Respondent's evidence is the Petitioner would not agree to pay more than $500 a month. She also says they were both aware the children were going to spend quite a bit of time

with both of them and in the agreement, there was some openness as to how that might occur. They were trying to meet the needs of the children. It was agreed the children would remain in the marital home.

[23] The Respondent testified they discussed the division of assets. She explained they discussed back and forth about the marital home, the vehicles and the pensions. The Petitioner kept a $30,000 vehicle, and her vehicle was worth $18,000. She testified the $30,000 equalization payment was a fair arrangement, which considered the debts, mortgage, the vehicles, and the pensions, considering her maternity leave. Her evidence is that based on her math there was $185,000 equity in the house.

[24] The sharing of special and extraordinary expenses quickly became contentious. The Petitioner testified he was making about $80,000 and he was struggling. He was paying child support of $500 a month, had a mortgage, and he had expenses related to the children's sports. Although he also testified he took the children on trips, to Manitoba to visit his brother, to Punta Cana, to Boston two or three times to see the Red Sox, and he took L.H.T. to Florida for his graduation.

[25] The Petitioner stopped making his child support payments in the middle of a basketball season, in January 2015. He testified he was frustrated. He was trying to get the Respondent to engage, but she would not respond and ignored him. He testified he was surprised when he stopped making his child support payments because the Respondent did not say a word. He wondered if she needed the money.

[26] The Respondent agrees communication was difficult. It is her evidence that she found communication from the Petitioner to be very aggressive and she shied away from it. She did not always respond.

[27] The Respondent testified that when the Petitioner stopped making child support payments, it was very difficult, because of all the travelling and the expenses that she had to overcome related to the children. She testified she did without to provide for the children. She says she knew she was not going to let the children go without and found ways to get by. It is her evidence that even

before January 2015, there were times the Petitioner held money from the monthly $500 child support payment, for his expenses related to the children.

*Special expenses / post-secondary education*

[28] The parties invested in Registered Education Savings Plans for the children before separation. The separation agreement provided that the Respondent was to maintain the educational plan for the children until they divorced, but that never happened. The RESPs matured prior to a divorce being granted. The Respondent paid $336 monthly for both RESPs and continued to do so until both plans matured.

[29] J.R.'s RESP plan matured in January 2018 with a principal amount of $26,553.42. The second, third and fourth payments received were approximately $12,000 each.

[30] L.H.T.'s plan did not mature when he first attended College. It matured in 2020 with a principal amount of $26 639.57. The Respondent invested this amount for L.H.T. and plans to give it to him upon graduation or before, if he needs it. She invested $20,000 with Manulife and $6,000 into a tax savings account. L.H.T. has received the second, third and fourth payments. In 2021, he received $11,501.30 and in 2022 he received $9,701.77.

[31] The Respondent paid university expenses despite the fact that the children had RESPs. She paid registration fees, some tuition fees and provided credit cards to the children for necessities.

[32] She says she paid expenses totalling $52,588.53 for J.R., which includes various applications for universities, residence costs, tuition, books, storage in Ottawa, moving expenses such as gas and IKEA furniture. Her evidence is also that she paid for L.H.T.'s UNB tuition for $13,963.

[33] The Petitioner felt he was in the dark as he was provided little information with respect to the RESPs. He testified he was surprised to learn of the expenses. He says the children had enough money to support themselves, in addition to the RESPs, they had employment insurance benefits

and employment income. He adds that both boys had enough money to buy their own cars and they paid cash for them. He testified that L.H.T. invested $10,000 for his future.

[34] Still, he felt that as the Respondent had paid for J.R.'s first two years of university, he should support L.H.T. for his first two years. He has deposited $500 per month into his account, and he also made a couple of $1,000 deposits into his account. He estimates he would have given him $8,000 or $9,000. He also paid his tuition in 2023-2024 for the first semester and he still gives him some money when he needs it. He says he is unable to put a figure on it.

[35] The evidence with respect to financial disclosure for both children is as follows:

| **L.H.T.** | **2019** | **2021** | **2022** |
|---|---|---|---|
| Employment income | 3 640 | $8 978.96 | $12 118.20 |
| Employment insurance and other benefits | | $15 407 | $11 900 |
| RESP | | $11 501.30 | $9 701.77 |
| Interest and other investment | | Nil | $64.10 |
| | | | |
| Tuition (Holland College) | | $2 338.08 | |

| **J.R.** | **2017** | **2018** | **2019** | **2020** | **2021** |
|---|---|---|---|---|---|
| Employment income | $3868.80 | 7546.39 | $9585.44 | $10,233.60 | $33,589.93 |
| Employment insurance and other benefits | | 3209.00 | $5237 | $8066.00 | $11,000 |
| RESP | | | $11,359.37 | $11017.93 | |
| Interest and other investment | | | | | |
| Scholarship | $3600 | $4000 | $3000 | | |
| Total Income (line 1500) | | | | | |
| Tuition (Carleton University) | $4219.21 | $8643.54 | $12,438.57 | $7990.50 | $3,953.24 |

*Extraordinary expenses / extracurricular activities*

[36] The children were involved in many sports, some on a competitive level. This meant that a lot of evenings and weekends were dedicated to these activities. There was a lot of travelling and expenses.

[37] J.R. played school sports which were mostly basketball, badminton, and one year he did track and field.

[38] The evidence is that L.H.T. played just about every sport. He played basketball provincially, which took him to British Columbia, Manitoba, and Montreal. He played on the U-13 team that went to the Atlantic Championship in Halifax. He played in New Hampshire and Portland Maine. He also played college basketball at Holland College and varsity basketball at the University of New Brunswick.

[39] The Petitioner did most of the tournaments with L.H.T and J.R. did not always follow. In the summer he would prefer to stay home with the Respondent.

[40] The evidence of the Petitioner is that he did not foresee the costs of the children being involved in sports. The cost was more than he thought it would be as the children got older. The Petitioner's evidence is that during the busy years, the monthly travelling cost was between $800 and $900. This included gas, hotels and meals for the children. There were times when they travelled three weekends a month.

[41] The Petitioner testified he wanted to deduct the travelling expenses from the monthly child support payment. He testified he covered 90% of all the sports travel costs and the Respondent did not contribute 50%. In his view, the various payments he made was his contribution.

[42] S.P. testified that for his family, the cost was about $1,000 each trip, sometimes between $1,000 and $1,500. B.M.C. testified that for tournaments, single moms would usually travel together and her share for a weekend was around $400.00.

[43] The Respondent testified the children were involved in sports since the age of seven. She said they both knew the expenses were going to be big. She also said the children's activities overlapped and there were activities other than basketball. She also travelled to Campbellton for badminton, to Bathurst for volleyball, and also to Halifax, Moncton, Fredericton, and Grand Falls for activities.

*Health-related expenses*

[44] L.H.T. required braces and the total cost was $7,004.63.

[45] The Petitioner testified he agreed to pay 50% of the costs but then he discovered he had paid for four years of the Respondent's car insurance, which he took as his portion of the braces. He testified a dollar never came to his direction. He said that as he always had to do, he took it from somewhere else.

[46] The Petitioner evidence is that he had asked the Respondent to transfer her car insurance into her own name, but she did not. He sent an email on June 23, 2015, asking for the Respondent to repay the monthly premiums he paid for the previous three years in the amount of $2,028.24 (monthly premium is $56.34/month (*36 months - $2028.24). His evidence is that she just ignored him.

[47] The Petitioner also testified he understood that the cost of the braces was to be $5,000. He says thinks the costs ballooned to $7,000 because the Respondent decided to pay it monthly and not all at once. The Respondent's evidence is not contrary. Her evidence is that she simply could not afford to pay it all at once, without making monthly payments.

[48] The evidence of the Respondent is also that she had eye care expenses for the children in the amount of $1,039.21. The Petitioner did not contribute.

[49] The separation agreement provided the Petitioner would keep the Respondent on the family health plan until a divorce takes effect. The Petitioner removed her in April 2021. The Petitioner's evidence is that they agreed that the Respondent would pay the RESP contribution and he would keep her on his health and dental insurance plan. He did not think the divorce would take this long. Also, in 2021, both RESP plans had matured.

[50] The Respondent is asking for reimbursement of her own health and dental insurance plan from April 2021 forward. She says she has paid $126.01 per month since April 2021.

**POSITION OF THE PARTIES**

[51] The Petitioner acknowledges he owes child support arrears. In his post-trial submissions, he requests an order that he owes no more than $31,500 in child support, pursuant to the separation

agreement from February 1, 2015. In his pre-trial submissions, he says he experienced a change of circumstances in early 2015 about the increased special expenses and time spent with the children. He asks the Court to consider there was shared parenting of one child, L.H.T., in its analysis of the amount of his child support arrears. He also requests that it be paid directly to the children.

[52] Also, in his post-trial submissions, the Petitioner also says he is not asking for arrears of special or extraordinary expenses, specifically, travel costs related to the children's involvement in competitive sports as he says this is now a far too complicated endeavour.

[53] The Respondent says that when the Petitioner stopped paying child support in January 2015, it created a change in circumstances. She seeks a retroactive child support order pursuant to table amount of the ***Federal Child Support Guidelines*** commencing in 2015 until July 2021 in the amount of $103,054.00.

[54] The Respondent also requests retroactive special expenses and extraordinary expenses in the amount of $72,161.99.

## ISSUES

[55] In addition to the request for a divorce, the issues to be decided are the amount of child support arrears and the amount of retroactive special and extraordinary expenses, if any. Also, should child support be paid directly to the children?

## LAW AND ANALYSIS

*Divorce*

[56] Pursuant to sections 8(1) and 8(2) a) of the ***Divorce Act***, the parties are granted a divorce.

*Child support*

[57] It is relevant to start the analysis by reiterating important governing principles as noted by the Supreme Court of Canada in ***Michel v. Graydon***, 2020 SCC 24 at paragraph 10. These are as follows:

i. Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents.
ii. Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together.
iii. The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life".
iv. Retroactive awards are not truly "retroactive," since they merely hold payors to the legal obligation they always had to pay support commensurate with their income.
v. Retroactive awards are not confined to "exceptional circumstances" or "rare cases."
vi. In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for fairness and flexibility. A Court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

[58] The jurisdiction to make a child support order for children of the marriage is pursuant to section 15.1(1) of the ***Divorce Act*** and the Court shall apply the ***Federal Child Support Guidelines***.

[59] The ***Divorce Act*** defines a child of the marriage as a child of two spouses or former spouses, who:

> (a) is under the age of majority and who has not withdrawn from their charge, or
> (b) is at the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

[60] Both children have remained children of the marriage while attending post-secondary education. This is not a contested issued. J.R. graduated from Carleton University in May 2021 and ceased to be a child of the marriage at that time. L.H.T. is living independently and the Respondent says he ceased being a child of the marriage, for the purposes of child support, as of September 2021. The Petitioner did not contest this.

[61] Section 15.1 of the ***Divorce Act*** has been interpreted by the Supreme Court of Canada as precluding a Court from granting an order on an original application for retroactive child support unless the child is a child of the marriage as defined in the ***Divorce Act*** when the application is made. (***Michel***, paragraph 2.)

[62] As a result of time passing, the Clearance Certificate from the Central Divorce Registry expiring, the Application filed in September 2012 was never adjudicated. The original Application was withdrawn/discontinued by order of this Court on September 13, 2021, to allow for a new Application to be filed, which was done on October 25, 2021.

[63] The original Application for child support was filed on September 27, 2012, when the parties filed a joint Petition for Divorce seeking a child support order as corollary relief. At that time, both children were children of the marriage as defined in the ***Divorce Act***.

[64] The presumptive rule with respect to the amount of a child support order for children under the age of majority pursuant to the ***Guidelines,*** is the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought and the amount, if any, determined under section 7.

[65] The ***Guidelines*** provide that where children are the age of majority or over, the amount of the child support order is the amount determined by applying the ***Guidelines*** as if the child were under the age of majority. Or, if the Court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[66] Pursuant to subsection 15.1 (5) of the ***Divorce Act***, the Court may award an amount that is different from the amount that would be determined in accordance with the applicable ***Guidelines*** if the Court is satisfied

> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly

or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

[67] Further, pursuant so subsections 15.1 (7) and 15.1 (8) of the ***Act***, a Court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates. In determining whether reasonable arrangements have been made for the support of a child, the Court shall have regard to the ***Guidelines***. However, the Court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable ***Guidelines***.

*Parenting arrangement*

[68] When the parenting arrangement is not a shared parenting arrangement, the ***Guidelines*** calculate child support payments solely from the payor's parent's income. However, when it is a shared parenting arrangement, that is where each spouse exercises not less than 40% of parenting time with a child over the course of a year the amount of the child support order must be determined by taking into account, the amounts set out in the applicable tables for each of the spouses, the increase costs of the share parenting time arrangement and the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[69] The Petitioner requests the Court consider there was a shared parenting arrangement for one child, L.H.T.

[70] There was a period when it was very busy, particularly when L.H.T. played competitive basketball, with games, practices, and away tournaments. I accept the Petitioner was mostly responsible for the sporting activities, during this period with respect to L.H.T.

[71] The children's primary residence was with the Respondent. They lived with her during the week for the school year. The Respondent testified she left work early for the children's activities. To make sure the children ate before the activities, she prepared the meals ahead of time, such as lasagna or shepherd's pie. She had to plan the night before. She gave this example of her responsibilities. In grade 9, L.H.T. did not stay at school to eat lunch in the cafeteria because he did not feel comfortable. It is the Respondent who would leave work and go home and make lunch and have lunch with him.

[72] It is also the Respondent who took the children to the doctor, for their immunization, and to the dentist.

[73] The Respondent's evidence is also that she did some travelling with the children for sporting events.

[74] However, the evidence of L.H.T is that his father transported him to 80 to 85% of the time to his sports activities. With respect to weekends, he could not recall a weekend he did not have basketball and would not be with his father. Furthermore, once he had his driver's licence, he would go back and forth equally between his parents.

[75] The Respondent's own evidence is that she and the Petitioner recognized the children were going to spend quite a bit of time with both of them and they were trying to meet the needs of the children.

[76] Looking at the totality of the evidence, I conclude the parenting arrangements for L.H.T. was a shared parenting arrangement from the time he obtained his drivers' license, which I determined to be when he turned 16 years old on September 24, 2017. From that point onward, the evidence convinces me that each spouse exercised no less than 40% of parenting time. I also conclude the Respondent had primary care of J.R.

*The Separation Agreement*

[77] In their 2012 separation agreement, the parties have agreed to depart from the ***Guidelines*** and acknowledged that child support payable pursuant to the table amount for two children, with a gross annual income of $80,000 is $1136 per month.

[78] The Petitioner concedes he owes child support from February 1, 2015, but requests his obligation be limited to $500 a month, pursuant to the separation agreement.

[79] The Respondent submits that when the Petitioner stopped paying child support in January 2015, it created a change in circumstances, allowing the Court to review child support. She seeks retroactive child support pursuant to the table amount in the ***Guidelines***, commencing in 2015 in the amount of $103,054.00.

[80] Neither party is seeking to set aside the separation agreement, or that it should be given little weight under the principles in ***Miglin v Miglin*** 2002 SCC 24 and ***Anderson v Anderson*** 2023 SCC 13.

[81] In any event, child support provisions in separation agreements are not subject to the same level of deference that spousal support provisions enjoy. The fact that we are dealing with children must remain of primary significance in the Court's analysis. Parties cannot contract out of payment of child support except in limited circumstances.

[82] A payor parent who adheres to a separation agreement that has not been endorsed by a Court should not have the same expectation of fulfilling their legal obligations as does a payor parent acting pursuant to a court order. (***DBS v. SRG***, 2006 SCC 37, paragraph 77)

[83] As stated by Justice Doucet in ***J. M. and D.M.*** 2024 NBKB 099, at paragraph 116, courts are not bound by the agreements of the parties with respect to child support (also see ***J.T. v. N.B.*** 2024 NBKB 190, at paragraph 119).

[84] While agreements reached by the parents should be given considerable weight, where circumstances have changed and the actual support obligations have not been met, Courts may order a retroactive award as long as the applicable statutory regime permits it. (***D.B.S.***, paragraph 78)

[85] With respect to separation agreements, our Court made the following comments in ***N. S. v. A.S. and W.D.*** **2024** NBKB 175

> [133] Entrenched in the *Guidelines*, is the authority to uphold negotiated settlements which deviate from them, provided the settlement is true to the exceptions set out in the legislation. This occurs when a court is satisfied that special provisions in an order, judgment, or written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child, and the application of the *Guidelines* would be inequitable (See M.G.H. v. K.L.D.H., para. 32; and M.C.B. v. M.E.B. para 218)
>
> [137] In M.G.H. v. K.L.D.H. at para. 39, the court was of the view, the application judge did not turn her mind to the question of whether the father's sources of income had changed. She applied a mechanical approach to the *Guidelines*, without considering whether the terms of the agreement met the objectives of the *Act* and the *Guidelines*. To alter such agreements, when a court is satisfied there has been full financial disclosure, and when adequate arrangements have been made for the support of the children, defeats the public policy objectives of the *Act* and the *Guidelines*, insofar as settlements are concerned.
>
> [143] To determine whether the application of the *Guidelines* would be unfair or inequitable, the court in *M.C.B. v. M.E.B.* at paras. 225-228 considered several factors. First, the court noted that the mother has received the benefit of the agreement. Secondly, there was no suggestion that the mother has ever encountered difficulty providing for the child. Thirdly, the court noted it could take into consideration the costs relating to the exercise of parenting time pursuant to s. 65 of the FLA, which it did in that case.

[86] In ***D.B.S.***, the Court recognized that retroactive awards may be made where the amount payable under the separation agreement has not measured up to the ***Guidelines*** (***Briggs***, at paragraphs 39 and 43; ***Reid v. Reid*** 2017 BCCA 73 at para. 105).

[87] Because child support under the ***Divorce Act*** is tied to the payor income and income tends to fluctuate, a child support order or agreement reflects a snapshot in time and is never final (***Colucci v Colucci*** 2021 SCC 24, at paragraph 28).

[88] A parent seeking to benefit from an exception to the Guidelines is required to meet a two-part test. Firstly, they must satisfy the court the current provisions directly or indirectly benefit the child, or that special provisions have otherwise been made for the benefit of the child; second, if

part one is met, they must satisfy the court it would be inequitable to apply the ***Guidelines*** (see ***M.D.H. v. K.L.D.H.*** 2020 NBCA 46, at paragraph 24).

[89] The Petitioner refers the Court to the decision of ***Ross v. Vermette***, 2007 SKQB 272, at para. 28 for the following principle. Where parties have mutually established a reasonable alternative arrangement then the court may consider the arrangement as one factor in the decision whether arrears should be cancelled or reduced.

[90] The Petitioner submits the agreed-upon amount of $500 per month was fair under the circumstances. He says he requests fairness in considering the amount of arrears based on several facts, which must be analyzed through ***D.B.S.*** and ***Colucci*** such as: the times the children spent with each parent, the current conditions, means and needs of the children, the agreement between the parties, the petitioner's failure to pay child support from 2015, the respondent's failure to pay 50% of special expenses to the Petitioner and the Petitioner attempts to communicate with the Respondent regarding child support and special expenses. However, it is also relevant that the Petitioner did not contribute to special or extraordinary expenses incurred by the Respondent.

[91] The Petitioner paid $500 per month as per the separation agreement dated July 23, 2012, until January 2015. The table amount based on an annual income of $80,000 was monthly child support of $1,136.00 per month. This is a significant departure from the ***Guidelines***. The Petitioner expenses related to extracurricular activities, particularly for sports, is by no means sufficient to relieve him from his child support obligations.

[92] In a child support order, the Court may provide for an amount to cover all or any portion extraordinary expenses for extracurricular activities. It is not automatic. The extraordinary expense must be both necessary in relation to the child's best interests and reasonable in relation to the financial means of the parents. The Respondent also had expenses related to extracurricular activities and special expenses, and for example the cost of braces.

[93] With respect to the other agreements contained in the separation agreement, the evidence of the parties is that they agreed in the 2012 agreement to a child support order of $500 a month, taking into account their circumstances. However, I am not satisfied that it directly or indirectly

benefited the children or that special provisions had been made for the benefit of the children. Even if I was, I also am not satisfied that it would be inequitable to apply the ***Guidelines***. The Respondent was left with the financial responsibility while the Petitioner benefited from not paying his obligation of child support. When the Petitioner was paying $500 a month, the children were at a young age, the Respondent had primary care and was manding the day-to-day life. I am also not convinced the arrangements with respect to division of property amounts to special provisions for the benefit of the children.

[94] I conclude it is not appropriate to order an amount that differs from the amount that would be determined in accordance with the applicable ***Guidelines***. The evidence does not satisfy me that there are special provisions that benefit the children or that the application of the Guidelines would result in an amount of child support that is inequitable in the circumstances.

[95] I am not satisfied the provisions of the 2012 separation agreement with respect to child support meets the objectives of the ***Guidelines***.

[96] I understand the Petitioner's position is that he accepts he owes child support arrears from February 1, 2015, in the amount of $500 a month. As I have rejected the agreed upon amount of child support, I will therefore conduct the ***D.B.S.*** analysis to determine the date of retroactivity.

[97] Payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe.

[98] Unless compelled by the applicable legislative scheme, Courts should avoid creating any incentive for payor parents to avoid meeting their child support obligation. Permitting retroactive child support awards is consistent with the child support system (***Michel*** at para. 17).

[99] In ***Harras v. Lhotka***, 2016 BCCA 246 at para 17, the Court stated that when there is no prior determination as to child support, the hearing is a hearing *de novo*, conducted pursuant to s. 15.1 of the ***Divorce Act***. Subject to limited exceptions, originating orders must be made in accordance with the requirement of the ***Guidelines***.

[100] A payor who has fallen into arrears cannot resist a retroactive increase based on his interest in certainty, as the payor cannot claim they relied on the order in arranging their affairs. A payor cannot reasonably expect their child support obligations to remain static in the face of material increases in income (***Colucci***, at paragraph 77).

[101] The circumstances have changed. The Petitioner stopped making any child support payments, with his last support payment made in the month of January 2015. In his pre-trial submissions, he says he experienced a change in circumstances in early 2015. Further, an increase in income that would alter the amount payable by a payor parent is a material change in circumstances (***D.B.S***. at paragraph 66). The Petitioner has seen incremental increases in income from $80 000 in 2012 to $92, 394 in 2021 and $98, 537 in the year 2020.

[102] In ***D.B.S***., the Supreme Court of Canada established four factors that Courts must consider before awarding retroactive child support. The factors are:

1. The reason for the recipient parent's delay in seeking child support
2. The conduct of the payor parent
3. The circumstances of the child
4. Any hardship occasioned by a retroactive award

[103] There is no fixed formula; none of the factors is determinative and they must be viewed holistically.

[104] Retroactive awards cannot simply be regarded as exceptional orders to be made in exceptional circumstances. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect. Where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments; this date represents a fair balance between certainty and flexibility (***DBS,***at paragraph 5).

[105] Once a change in circumstances is established, a presumption is triggered that support will be varied, to a certain date; effective notice, up to three years before formal notice. The ***D.B.S.*** factors are then concentrated on one question: should the Court depart from the presumptive date

of retroactivity to achieve a fair result? It is on this question only that the factors of delay, payor conduct, the child's circumstances and potential hardship are brought to bear. (***Colucci***, paragraph 71)

[106] As I have already concluded, I am satisfied there has been a change in circumstances.

[107] In this matter, the Respondent gave formal notice of her claim for retroactive child support when the Petitioner was served with her Answer and Counter Petition, which she filed on November 22, 2021. The Petitioner was served with a copy on November 19, 2021.

*The reasons for the recipient's delay in seeking child support*

[108] There can be many reasons for the delay to apply for child support and these may include: fear of reprisal/violence from the payor parent, prohibitive costs of litigation or fear of protracted litigation, lack of information or misinformation over the payor parent's income, fear of counter-application for custody, the payor leaving the jurisdiction or recipient unable to contact payor, illness/disability of a child or the custodian, lack of emotional means, wanting the child and the payor to maintain a positive relationship or avoid the child's involvement, ongoing discussions in view of reconciliation, settlement negotiations, or mediation, or the deliberate delay of the application or the trial by the payor. (***Michel***, para.85)

[109] In this matter, the Petitioner was aware he was required to pay child support and that it is a legal obligation. He agrees it was not the right decision to stop paying support in January 2015.

[110] The Respondent did not pursue legal proceedings after the Clerk declined to forward the Trial Record to a Judge in 2012 until she filed her Answer and Counterpetition.

[111] The parties did not communicate very well. The Respondent's evidence is that once they met in her office and she told the Petitioner she did not understand why the children were not getting their child support as it is their entitlement.

[112] During cross-examination, when asked why she did not consent to withdraw the original Divorce Application in 2021, as it required a hearing, she testified she was on five lawyers, she

did not have that kind of money and it was hard. When asked why she did not take any active steps, she said she did not have a lawyer and did not trust anybody. She also said she wanted to wait until L.H.T. would graduate as she thought that would be best for him.

[113] The children are no longer dependent children. If the beneficiary is no longer a dependent child because of the recipient parent's delay, it remains open to the recipient parent to show that the delay was reasonable (***Michel***, at paragraph 29).I am of the view the delay was reasonable, taking into account the circumstances and the context in which the Respondent did not pursue retroactive child support before she did.

*The conduct of the payor parent*

[114] The Petitioner's approach was that his financial contribution to various expenses, including the children's involvement in sports, was to be deducted from his child support payments.

[115] In ***Colucci***, the Supreme Court of Canada discussed blameworthy conduct:

> 41 … "Blameworthy conduct", as that concept has developed in the cases, does not simply extend to the most egregious cases of deception or intentional evasion, like this case. It may also extend to cases of mere passivity and "taking the path of least resistance" (Burchill, at para. 30).
>
> 42 Most recently, in Michel, my colleague Brown J. (speaking for the Court on this point) confirmed that "the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness)", including failure to disclose material information (para. 36; see also para. 33). Payor parents are "subject to a duty of full and honest disclosure" (para. 33). Where the payor fails to comply with this duty and leaves the recipient unaware of increases in income, a retroactive award "will commonly be appropriate" because non-disclosure "eliminates any need to protect [the payor's] interest in the certainty of his [or her] child support obligations" (paras. 32 and 34)
>
> 45 In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor's income. A presumption in favour of varying support to the date of the increase would better reflect the recipient's informational disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the *status quo* will be maintained. Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.

> 55…Above all, "the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for payor parents to be deficient in meeting their obligations should be eliminated" (D.B.S., at para. 4). Payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing.

[116] In ***Briggs v. Kasdorf***, 2020 BCSC 1702, F.E. Verhoeven J. concluded the failure to pay child support in breach of an agreement qualified as blameworthy conduct and stated as follows:

> 61 If a finding of blameworthy conduct were required to allow for a retroactive award of child support before the date of effective notice, then Mr. Kasdorf's failure to pay child support in breach of the agreement obviously qualifies. Since there was no agreement or court order, in effect, Mr. Kasdorf unilaterally decided to discontinue making child support payments, notwithstanding the need of the children. This was very serious blameworthy conduct.

[117] The Petitioner acknowledges blameworthy conduct but submits there are mitigating circumstances.

[118] He acknowledges he stopped paying child support in January 2015 but says he was experiencing a difficult financial situation related to the cost of the children's travel for their various sporting events. He says the Respondent refused to communicate with him. I accept the parties did not communicate well and that they did not share the majority of special or extraordinary expenses.

[119] The Petitioner also submits he paid child support of $500 per month directly to L.H.T., starting in approximately December 2019. At one point he said he estimates he would have given him $8,000 or $9,000. He also paid his tuition in 2023-2024 for the first semester. He also said he cannot put a dollar figure on it. I accept that the Petitioner paid some expenses directly to L.H.T. to help him out with university expenses.

[120] The Petitioner submits the Court should consider the uniqueness of the facts. This matter could have been resolved in 2012, but there were delays including delays due to Covid-19, and the Respondent refused to consent to the withdrawal of the original Joint Petition for Divorce in 2021.

[121] The new Application was filed on October 25, 2021, and the hearing of this matter was on April 25 and 26, 2024. While I recognize there is a delay between filing an Application and being assigned trial dates, a delay which is not within the control of the parties, it does nothing to explain why the Petitioner did not pay any child support between February 1, 2015, and 2021.

[122] The circumstances related to this matter do not excuse the Petitioner from fulfilling his legal obligation to pay child support.

*The circumstances of the children*

[123] There is no requirement to prove a need on the part of the children. It is not enough to say that an award of retroactive support should not be granted because the children do not need it. It would be a most unusual circumstance to say that a child will not benefit from the provision of monies to which they are entitled, and which were previously withheld.(***A.A. v. J.A***. NBKB 210, at para. 91)

[124] Child support is the right of the children. The Petitioner stopped making child support payments and failed to meet his obligations. This means the children did not benefit from what they were entitled to.

*Hardship occasioned by a retroactive award*

[125] Hardship is not required for an award of retroactive child support, as it is not exceptional. In ***Michel***, the Supreme Court of Canada said as follows:

> ,,,This is not to say that hardship is required to ground an award for retroactive child support, as there is also nothing exceptional about relief that creates a systemic incentive for payor parents to meet their obligations in the first place. Just as an order of child support is intended to provide children with the same standard of living they enjoyed when their parents were together (D.B.S., at para. 38), an order of retroactive

> child support provides an (albeit imperfect) remedy where that does not occur. And as this Court recognized in D.B.S., "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 31).

[126] Hardship cannot be measured in the abstract but must be grounded in the facts and the totality of the circumstances. It must be taken into account that the payor had the benefit of the unpaid child support. (***Michel***, paragraph 125)

[127] The Petitioner testified he has a good job, making about $100,000 annual income. His evidence is also that he has a mortgage payment, a vehicle payment and he doesn't have a lot of cash on hand. Sometimes he has to wait two weeks for the next paycheque to pay some things off. He testified he has debts but his financial statement of October 2021 is silent as to properties and debts.

[128] In his financial statement sworn October 19, 2021, he reports a monthly deficit of $355.80. He agreed during cross-examination that his monthly credit card payment of $1,600 includes many of his payments such as electricity and internet, which have also been included as items on their own. I understand his evidence to be that for some expenses, they would appear twice on his budget.

[129] The Petitioner also testified that he took the children on trips, to Manitoba to visit his brother, to Punta Cana, to Boston two or three times to see the Red Sox, and he took L.H.T. to Florida for his graduation. He says he also did trip to Main or Portland and bought shoes. He bought what the children asked of him.

[130] The evidence does not convince me that I should make a finding of hardship. In ***J.M.***, Justice Doucet after having concluded there is no hardship, went on to say that if there is any potential hardship, it can be alleviated by requiring the retroactive amount to be paid periodically rather than in the form of a lump sum. I find such approach reasonable.

[131] Having considered the totality of the circumstances, in my view it is necessary to depart from the presumptive date of retroactivity to achieve a fair result. I order retroactive child support from February 1, 2015, when the Petitioner stopped fulfilling his legal obligation.

[132] I have concluded the parties have had a shared parenting arrangement with L.H.T. starting October 1, 2017. I need to make an analysis pursuant to paragraph 9 of the ***Guidelines.*** I need to consider the amounts set out in the applicable tables for each of the spouses, the increased costs of shared parenting time arrangement and the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[133] The parties have similar income. L.H.T. has played competitive sports and the cost was high. J.R. also played sports. Although the Petition was mostly responsible for the expenses related to sports, the Respondent also had expenses related to L.H.T. and J.R. When L.H.T. became more independent with a driver's licence, he moved between both parents freely. Having considered the circumstances in this matter, I am of the view that a straight set off is appropriate considering the Petitioner owes child support for the two children, and the Respondent owes child support for one child for the period of October 1, 2017 to August 31, 2021, I find this approach both fair and reasonable.

[134] The parties are both employed with the Education and Early Childhood Development Department. The Petitioner is vice principal at the Canterbury High School. In her current position, the Respondent oversees school counsellors. Throughout the years both parties have maintained similar income.

[135] Based on the evidence and financial disclosure provide, I understand their income and consequently child support obligations as per the table amount as follows:

| | The Petitioner | The Respondent | Monthly Child Support ***2 children/The Petitioner*** | Monthly Child Support payable pursuant to the ***Guidelines- 1 child /The Petitioner*** | Monthly child Support payable 1 child/The Respondent | Yearly Child Support owing by the Petitioner | Yearly Child support owing by the Respondent | Total Child support arrears due by the Petitioner |
|---|---|---|---|---|---|---|---|---|
| 2015 | $90,315 ($91,075-$760) | $97,671 ($98,481-$810) | $1,273 | | | **$14,003** (11 months from February 1 to December 31) | **N/A** | **$14,003** |
| 2016 | $91,046 ($91,806-$760) | $94,664 ($95,474 - $810) | $1,282 | | | **$15,384** | **N/A** | **$15,384** |
| 2017 | $91,389 ($92,149-$760) | $84,234 ($85 044 – $810) | $1,298 | | **$735** | **$15,576** | **$2,205** | **$13,371** |
| 2018 | $91,025 ($91,785 - $760) | $95,897 ($96,707 - $810) | $1,293 | | **$832** | **$15,516** | **$9,984** | **$5,532** |
| 2019 | $93,893 ($94,653 - $760) | $104,137 ($104,946 - $810) | $1,329 | | **$898** | **$15,948** | **$10,776** | **$5,172** |
| 2020 | $98,537 ($99 297 - $760) | $99,454 ($100,264- $810) | $1,387 | | **$860** | **$16,644** | **$10,320** | **$6,324** |
| 2021 | $91,634 ($92,394 - $760) | $97,403 ($98,213 - $810) | $1,301 | $799 | **$844** | **$8,400** ($5,204 + $3,196) | **$6,752 (8 months)** | **$1,648** |
| **Total child support arrears** | | | | | | | | **$61,434** |

Notes to the Table:
For the years 2015 and 2016, the 2011 Child Support Table was used
For the year 2015, child support owing is calculated from February 1, 2015.
For the year 2017, shared parenting arrangement starts on October 1 2017 (3 months)
For the year 2021, child support for two children is calculated from January until April 30 (4 months) and child support for one child from May 1 until August 31 (4 months)
Union fees of $760 yearly have been deducted as per the Petitioner's financial statement sworn October 19, 2021.
Unions fees of $810 yearly have been deducted as per the Respondent's financial statement sworn November 17, 2021.

[136] I determine the total child support arrears to be $61,434.

[137] Having determined child support arrears, the Petitioner should be given the opportunity to make representations concerning his monthly expenses, and to propose for a plan for payment (***A. F. v. R.R.*** 2021 NBCA at paragraph 33). The Petitioner shall file an updated financial statement and an Affidavit with respect to his capacity to pay with a proposal for a plan for payment within the next 30 days.

[138] The Court administrator shall schedule a hearing for the purpose of assessing the Petitioner ability to pay the arrears as soon as reasonably possible after 30 days.

*Special or extraordinary expenses*

[139] In the separation agreement, the parties agreed to share the costs of special or extraordinary expenses, such as uninsured health services or for extracurricular activities, on a pro rata basis.

[140] Pursuant to paragraph 7 of the ***Guidelines***, in a child support order, the Court may provide for an amount to cover special or extraordinary expense as follows:

> 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 employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;
>
> (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.

[141] As noted by the authors Payne and Payne in ***Child Support Guidelines in Canada***, 2022, section 7 of the ***Guidelines*** gives the Court the discretion to order payment of an amount over and above the regular table amount. The expenses must be proven to be "special" or "extraordinary" in some way. The authors provide the following helpful comments at pages 267 and 269:

> …Section 7 of the *Federal Child Support Guidelines* gives the court the discretion to order payment of an amount over and above the regular table amount. However, in order to quality for a section 7 order, the expenses must be proven to be “special” or “extraordinary” in some way. This is because the basic table amounts of child support

are designed to cover all the "ordinary" costs of raising a child. Food, shelter, clothing, and other necessities are all ordinary, as are many educational, extracurricular, and recreational expenses. Recreational sports and other similar extracurricular activities such as dance lessons, community sports leagues, ski trips, etc., will not generally qualify as special or extraordinary expenses unless the child's participation goes beyond that of an ordinary child. "Special," as distinct from "extraordinary", expenses are generally added more or less as a routine matter, provided that they are not unreasonably high, but controversy can arise with respect to the " necessity" for a child to be engaged in extracurricular activities.

Section 7 of the Guidelines is not presumptive; it indicates that a court may on either spouse's request provide for an amount to cover all or any portion of the expenses enumerated, which expenses may be estimated taking into account the necessity of the expenses in relation to the child's best interests and the reasonableness of the expenses in relation to means of the spouses and those of the child and to the family's spending pattern prior to separation. The onus is on the parent seeking a contribution to plead and prove the expense. Although expenses may be estimated, there must be some cogent evidence of a particular expense.

…

Although child are expenses, medical and dental insurance, health-related expenses, and post-secondary educational expenses need not be extraordinary under sections 7(1) (a), (b), (c) and (e) of the *Federal Child Support Guidelines* in order to warrant a judicial allocation, expenses for primary or secondary school education or for any educational programs that meet a child's particular needs under section 7(1) (d) of the Guidelines and expenses for extracurricular activities under section 7(1) (f) of the Guidelines must be extraordinary in order to be allowable. All expenses, however, must meet the tests of necessity and reasonableness set out in section 7(1) of the Guidelines. The onus falls on the Petitioner who seeks special or extraordinary expenses under section 7 of the *Federal Child Support Guidelines* to prove that the expenses are necessary in relation to the child's best interests and reasonable having regard to the parental financial circumstances.

[142] The expense must fall into one of the categories found in section 7 of the ***Guidelines*** and the list is exhaustive. Justice Daigle provides the following helpful summary in ***J.A.R. and M.R.R.*** 2019 NBQB 303 at paragraph 68:

[68] Therefore, to summarize, the expense must fall into one of the categories of expenses found in section 7. This list is exhaustive: See ***Sinha v. Sharma***, 2018 NBQB 11 at para. 153. The expense must be both "necessary" (in relation to the child's best interests) and "reasonable" (in relation to the financial means of the parents (and, where appropriate, the child)as well as the family's spending patterns prior to separation). In addition, if the expense is one listed under subsection (d) or (f) -educational programs or extracurricular

activities -- the party claiming the expense must prove that they are "extraordinary" (as that term is defined at ss. 7(1.1) of the Guidelines).

[143] In her post-trial submission, the Respondent seeks the total amount of $72,161.99 regarding special and extraordinary expenses. I will address each category of expenses for which she seeks contribution.

[144] Firstly, the following expenses do not fall in the categories found in section 7 of the ***Guidelines***; the expenses for special events, clothing, special occasion wear for graduation, renewals of passports, electronic calculator or repairs to L.H.T.'s vehicle. I therefore make no order as to those expenses.

[145] With respect to the school registration fees, the evidence does not convince me that these are extraordinary expenses and I decline to make an order that they be shared.

[146] The Respondent also claims for costs related to university, including registration fees, books, living expenses for the children for groceries and gas and residence, and tuition and travel expenses.

[147] The expenses for post-secondary education do fall into one of the categories of section 7 of the ***Guidelines***. Still, they must meet the test of necessity and reasonableness set out in section 7(1) of the ***Guidelines***. The onus falls on the parent who seeks special or extraordinary expenses under section 7 of the ***Guidelines*** to prove that the expense is necessary in relation to the child's best interests and reasonable having regard to the parental financial circumstances. The children's circumstances also must be considered.

[148] The parties invested in a Registered Education Savings Plan for the children before separation. The Respondent's evidence is that she paid university expenses despite the fact that the children had RESPs.

[149] J.R.'s RESP plan matured in January 2018 with a principal amount of $26,553.42. The second, third and fourth payments received were approximately $12,000 each.

[150] L.H.T.'s plan matured in 2020 with a principal amount of $26,639.57. The Respondent has invested this amount and plans to give it to him upon graduation or before if he needs it. She invested $20,000 with Manulife and $6,000 into a tax savings account. L.H.T. has received the second, third and fourth payments. In 2021, he received $11,501.30 and in 2022 he received $9,701.77. In addition, both children had summer employment and unemployment insurance benefits.

[151] The evidence of the Petitioner is that he also contributed the estimated amount of $8,500 toward L.H.T.'s expenses, he paid tuition fees, and he still gives him some money when he needs it.

[152] The financial disclosure with respect to both J.R. and L.H.T. does indicate that in addition to the RESPs, they had access to employment income and unemployment insurance benefits. Otherwise, the evidence is insufficient to assess J.R.'s and L.H.T.'s budgets or financial needs when attending university.

[153] I decline to make an order with respect to post-secondary education. When considering the totality of the evidence, I am not convinced these expenses meet the test of necessity and reasonableness set out in section 7 of the ***Guidelines***.

[154] The Respondent also claims for the expense of braces for L.H.T. in the amount of $7,004.63 and eye care in the amount of $1,039.21. These expenses fall into one of the categories of expenses covered by section 7 of the ***Guidelines***.

[155] The Petitioner testified he did not refuse to pay half of the braces. In his view, he contributed to the costs of the braces by deducing the Respondent's share of costs he incurred for the children's sports, including travel costs and also because he paid the Respondent car insurance premiums.

[156] He also said he thinks the costs ballooned to $7,000 because the Respondent decided to pay it monthly and not all at once. The Respondent's evidence is that she simply could not afford to pay it without making monthly payments.

[157] The car insurance premiums are not a section 7 expense. It is not appropriate to deduct it from other section 7 expenses. Expenses for extracurricular activities, such as sports is an extraordinary expense, unlike special expenses such as health-related.

[158] The expense for the braces and eye care is both necessary and reasonable. I order that the total cost of $8,043.84 be shared on an equal basis after having considered the similarity in the parties' income over a number of years. As the Respondent was responsible for this expense and has paid it, the Petitioner shall pay $4,021.92, being his equal share, to the Respondent.

[159] The Respondent claims the premiums of her own health and dental insurance on the account that the separation agreement provided she would remain on the Petitioner's health insurance plan until the Divorce. She has paid $126.01 per month since April 2021.

[160] This is not a section 7 expense unlike the portion for the medical and dental insurance premiums attributable to the children. While I recognize it was provision of the separation agreement, it cannot be viewed in silo. I accept the evidence of the Petitioner that while he was paying the premiums, the Respondent was paying the RESPs, which had by April 2021 matured. I decline to make an award regarding the Respondent health insurance premiums.

[161] With respect to expenses related to sports, both parties have contributed. I accept that the Petitioner contributed more with respect to this expense. However, the evidence falls short of convincing me that it is both necessary, in relation to the children's best interests and reasonable in relation to the financial means of the parents or that the expense is extraordinary. I decline to make any order with respect to the children's involvement in competitive sports.

*Child support payments made directly to the children*

[162] The Petitioner requests any child support order be paid directly to the children. He submits the following case law is relevant.

[163] In ***Glaspy v. Glaspy***, 2011 NBCA 101, the Court of Appeal confirmed there is authority that supports the notion that payments to an adult child attending university and not living at home may be made directly to the child at paragraph 11:

> 11 Although the cases are not numerous, there is authority that supports the notion that payments to an adult child attending university and not living at home may be made directly to the child (see for example, Smith v. Smith, 2010 NBQB 304, 365 N.B.R. (2d) 165 at para. 60; *Bell v. Bell*, 2011 BCSC 212, [2011] B.C.J. No. 273 (QL) at para. 35). The appellant had the right to expect the motion judge to hear his submission before making a decision. This failure on the part of the motion judge contributed to the creation of a situation in which the appellant, a self-represented litigant, might feel unduly pressured to reach an agreement.

[164] In ***TTB v. PHD*** 2014 NBQB 164, the Court made reference to the ***Glaspy*** decision and where both parties were content that the payments not be made directly to the Petitioner, the Court ordered that the payments be made directly to the children. The Respondent had indicated the preferred method was to have child support paid directly to third parties, such as universities or landlords.

[165] In **TMR v SMS** 2019 NBQB 40**,** the Court also made reference to ***Glaspy*** for support in law for the direct payments to an adult child attending university away from home. In the matter, against a background of default in child support, even where arrears had since been eliminated, the Court ordered the father to pay his portion of special expenses through the Office of Support Enforcement.

[166] **SGD v CES** 2021 NBQB 81, where both parties agreed that child support be paid directly to the children, the Court provided the following comments:

> 18 During the hearing, the father proposed to pay $2,000 per month directly to D. to ensure financial support and the mother agreed that this was acceptable. Consequently, pursuant to subsection 15.1(7) of the *Divorce Act*, I accept that this is a reasonable arrangement regarding the support of D. Also, in *Glaspy v. Glaspy*, 2011 NBCA 11, our Court of Appeal indicated that there is authority to have payment of support made directly to an adult child attending university and not living at home. Therefore, the father shall begin payment of $2,000 a month to D. on May 1st, 2021 and thereafter on the 1st day of each month until further Order of the Court.

> If D. does not attend any post-secondary institution in September 2021, the father's support obligation towards D. shall terminate on September 30, 2021.

[167] In ***Comeau v Newman*** 2021 NBQB 197, regarding an order requiring a spouse to pay support for a child, the Court referred to subsection 15.1 (4) of the ***Divorce Act*** which provides that a Court may impose "terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just."

[168] In ***MacEachern v MacLeod***, 2014 NSSC 238, the Court concluded it was not appropriate for children to be paid child support amounts directly, as the point of the support is to compensate for their living expenses, for which the payee is responsible. The Court provided the following comments:

> 57 With respect to the issue of the children being paid directly, I note the recent case of *Strecko v. Strecko* 2013 NSSC 49. At para. 45 onward, the Court reviews this issue:
>
> > [45] Mr. Strecko argues that any support he is ordered to pay should be paid to his son directly. The authority for doing so is reviewed in *Glaspy v Glaspy* 2011 NBCA 101 (CanLII), 2011 NBCA 101. It is acknowledged that it is unusual to order child support to be paid directly to a child. The policy basis for the Court's reluctance is a desire to avoid involving children in this issue and the accompanying conflict and the need for the parent incurring the expenses relating to rearing a child to receive a contribution from the other parent.
> >
> > [46] I agree that the Court must be reluctant to order child support to be paid to the child, given that the child support payments are to meet some of the parenting costs of the payee parent and associated with the child 'living' in the payee's parent's home all or part of the time.
>
> 58 I agree. Generally speaking, I do not think it appropriate for children to be paid child support amounts directly, as the point of the support is to compensate for their living expenses, for which the payee is responsible.
>
> 59 However, in relation to s. 7 expenses, these do not involve the respondent directly. I do see it as appropriate that those amounts be provided to the child directly, or in the alternative, directly to the university.

[169] In this matter, the order is for the payment of arrears rather than an ongoing obligation to pay support. Both children are no longer children the marriage.

[170] I agree that the Court must be reluctant to order child support to be paid to the child, given that the child support payments are to meet some of the parenting costs of the payee parent and associated with the child 'living' in the payee's parent's home all or part of the time.

[171] I decline to make an order for payment of support to be paid directly to the children.

*Costs*

[172] Rule 59 of the ***Rules of Court of New Brunswick*** gives a broad discretion regarding the award of costs.

[173] In the decision of ***Rademaker v. Rademaker***, 2002 NBCA 47, our Court of Appeal provided some guidance on the question of costs in family matters:

> 28 [...] I agree that in cases involving family disputes regarding the custody and access of children and child and spousal maintenance orders awarding costs under Rule 59 may generally not be appropriate. However in cases where division of property is at issue and an amount involved is easily determined, as in a civil case, then it is appropriate to apply the Tariff under Rule 59.

[174] Also, in ***G. (C.J.) v. T.(L.),*** 2011 NBCA 12, the Court of Appeal made relevant comments:

> 16. Orkin's observations have, of course, been expanded upon in Rule 59.02 of the *New Brunswick Rules of Court*. In fixing an award of costs under that Rule, trial judges may consider, in addition to success or failure, the amount claimed and recovered, the complexity of the proceedings, the importance of the issues, the conduct of any party which tends to lengthen the proceedings, and any improper or vexatious conduct.

[175] In this matter, there is a mix result. Taking into account all of the circumstances, including the unusual delays of the proceedings and the contested motion to withdraw the original application, and the previous order of the Court dated September 13, 2021, adjourning the Petitioner request for costs until a further hearing, I am of the view that each party should bear their own costs and I so order.

**DISPOSITION**

[176] I make the following Order:

1. The Petitioner child support arrears are set at $61,434.
2. The Petitioner shall file an updated financial statement and an Affidavit with respect to his capacity to pay with a proposal for a plan for payment within the next 30 days. The Court administrator shall schedule a hearing for the purpose of assessing the Petitioner's ability to pay the arrears as soon as reasonably possible after 30 days.
3. The parties shall share, on an equal basis, the costs of braces and eye care in the total amount of $8,043.84, each party share being $4,021.92. As the Respondent was responsible for this expense and has paid it, the Petitioner shall pay $4,021.92, being his equal share, to the Respondent.
4. I decline to make an order for payment of support to be paid directly to the children.
5. I make no order as to costs.

**DATED** at Saint John, New Brunswick this day of November 2024.

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Justice Danie Roy
Court of King's Bench of New Brunswick
Family Division