Ducking for Reasonable Cover: Recent Cases Dealing With Extraordinary Expenses[1]

Section 7 of the *Federal Child Support Guidelines*[2] sets out six categories of expenses for which provision may be made in a child support order. The expenses under s. 7(1)(a), (b), (c) and (e) are referred to as "special" while those under s. 7(1)(d) and (f) are defined as "extraordinary". Determining what is and what is not "extraordinary" has plagued courts across the country since the Guidelines were enacted in 1997.[3]

On May 1, 2006, the definition of "extraordinary expenses" was amended by adding a new section, 7(1.1):

Definition of "extraordinary expenses"

7(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

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[1] Brahm D. Siegel, Nathens, Siegel LLP, The Six-Minute Family Law Lawyer (Law Society of Upper Canada: Toronto, December 2007).

[2] SOR/97-195, as amended (hereinafter "*Guidelines*").

[3] In *McLaughlin v. McLaughlin* (1998), 44 R.F.L. (4th) 148 (B.C.C.A.), the court said, at para. 30:

> "The inability of judges to ascertain what Parliament intended to be included as ordinary expenses for extracurricular activities under the tables has resulted in a variety of approaches to the interpretation of s. 7(1)(f) with an accompanying inconsistency in the results."

(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 the court considers relevant.[4]

The word "extraordinary" modifies only two categories of expenses in section 7(1): extra-curricular activities and primary or secondary school education expenses or expenses for any other educational programs that meet the child's particular needs. Post-secondary expenses, health related expenses that exceed reimbursement by $100 per year and the portion of medical and dental insurance premiums attributable to a child do not have to be extraordinary to merit contribution from the other spouse. The idea here is that no part of these "special" expenses is taken into account in setting the amount payable under the tables. They do, however, need to be necessary in relation to the child's best interests, reasonable in relation to the means of the parties and those of the child and to the family's spending pattern prior to separation. With respect to "extraordinary" expenses on the other hand, it is assumed that some part of the claimed amount has been included in the table amount for "ordinary" expenses – the quantum, however, is not known.[5]

[4] Although this provision was added to the Federal Guidelines in May 2006, Manitoba enacted virtually identical wording prior to that in July 2001.

[5] In *Simpson v. Trowsdale* (2007), 2007 CarswellPEI 5 (P.E.I. T.D.) at para. 13, the court noted that because no one knew how much is provided in the table amounts for ordinary expenses "millions of dollars has undoubtedly been expended determining what is meant by extraordinary expenses".

The new subsection changes the objective tests set out in *Andries v. Andries*[6] and *Raftus v. Raftus*[7] which held that an expense for an extracurricular activity is only extraordinary when it is out of proportion to the usual costs associated with that particular activity. In these cases, the word "extraordinary" was said to refer to expenses which were "not usual", "additional to what is usual" or "exceptional"[8]. In the opinion of these courts, the term must be considered in relation to the nature of the activity and its attendant expense, not in relation to parental income. The test is now substantially different.

ANALYSIS

Although perhaps less than clear at first blush, a thorough reading of sections 7(1) and 7(1.1) reveal the following steps:

1. Is the expense something the requesting spouse can "reasonably cover"? This first step does not involve a consideration of the merits of the proposed extracurricular activity, only an examination of whether the requesting parent can reasonably afford it once table support is factored in. The payor's financial circumstances in this stage are irrelevant.[9]

2. If yes, the expense is not "extraordinary" and no contribution from the payor is ordered unless the definition of "extraordinary" in section 7(1.1)(b) is met.

3. If the expense is something the requesting spouse <u>*can*</u> reasonably cover, is it "extraordinary" having regard to the factors in 7(1.1)(b)?

4. If yes, is the expense "necessary" in relation to the child's best interests and "reasonable" in relation to the means of the spouses and the child and the family's spending pattern prior to separation as per s. 7(1)?[10]

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[6] *Andries v. Andries*, [1998] M.J. No. 196 (Man. C.A.).

[7] *Raftus v. Raftus*, [1988] N.S.J. No. 119 (N.S. C.A.).
[8] Ibid at para. 52.

[9] This step also does not involve a consideration of whether the requesting party's new spouse can assist her in covering the expense: see *Jesse v. Jesse* (2007), 2007 CarswellSask 350 (Sask. Q.B.) at para 17.

[10] "Means" includes the income of a spouse's partner: see *Simpson v. Trowsdale* supra note 5 at para. 59.

5. If it is not necessary and reasonable, the payor will not contribute proportionately.

6. If it is both necessary and reasonable, the expense does qualify under section 7 and the payor will usually contribute proportionately.[11]

Oddly, the analysis starts by examining section 7(1.1) first. Once the court concludes that an expense is "extraordinary" and only if such a conclusion is reached will the court turn to section 7(1). For clarity, only if the expense is not something the requesting spouse can reasonably cover with her own income and table support do we examine whether it is necessary for the child or reasonable in relation to the parties' means.

When viewed from this perspective, counsel for the requesting party has a number of hurdles to overcome. However, in a frightening number of cases across the country, courts have simply found that a certain expense "fits" within the definition of "extraordinary" without any analysis whatsoever or skipped the step of deciding whether the expense is extraordinary and concluded it should be contributed to because it is necessary and reasonable.[12]

What is surprising is how flawed some of the analysis has been. In one case for example, a father earning $192,000 asked the mother who earned nothing except $31,000 of spousal support to contribute to the children's extracurricular activities which were about $200 per month.[13] Instead of asking whether the expenses exceeded those that the father could reasonably cover, the court asked whether they exceeded those that the *mother* could reasonably cover. Finding that it was "obvious" she could not reasonably cover them, the court dismissed the father's motion. It was the right result but the wrong analysis.

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[11] Even if all of the requirements of the two sections are met, the court need not order that an expense be paid/shared as s. 7(1) provides that the court "*may* provide for an amount…". No cases were found, however, where the court found the expense to meet all the criteria but declined to order a contribution.

[12] For some reason most of these cases seem to come out of Saskatchewan: *Segall v. Fellinger* (2007), 2007 CarswellSask 336 (Sask. Q.B.), paras 23, 24 and 25; *Peters v. Peters* (2007), 2007 CarswellSask 195 (Sask. Q.B.) at para 9; *Bosomworth v. Bosomworth* (2007), 2007 CarswellSask 100 (Sask. Q.B.) at para 65.

[13] *Laflamme v. Laflamme* (2006), 2006 CarswellBC 1767 (B.C. Master), para 23.

Section 7(1.1)(a) does not involve any examination of the income of the spouse for whom the expense is requested. If the court finds that $200 per month is easily affordable for a spouse earning $192,000 per year, that ends the enquiry.

In another case, it was held that failure to determine the requesting spouse's income does not preclude a court from deeming an expense "extraordinary". Such was the case in *Griffiths v. Griffiths*[14] where the court found that even though it was impossible to determine the wife's income she "established" that $16,000 per year of secondary school expenses was extraordinary. How the judge was able to determine this without even a passing reference to whether she could afford it is puzzling.

The reverse also happens. In *Sendall v. Sendall*[15], the court did the proper analysis and concluded that even at $50 per month the mother would not be able to reasonably cover the child's tutoring with her income, but failed to turn to whether it was necessary or reasonable. We can only assume the court felt both criteria were met because the wife testified that the teacher told her tutoring would be "of assistance", a far cry from "necessary". The father was ordered to contribute.

Sometimes the court quotes section 7(1.1) but simply fails to do the analysis. Such was the case in *Battershill v. Battershill*[16] where the court deemed the children's sports and dance costs "extraordinary" on the grounds that the family was "exceptionally athletic" and without any regard to the ability of Mrs. Battershill to afford them. In what this writer hopes is the zenith of success for support recipients on issues like this, the court also found that 20% of Mrs.

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[14] *Griffiths v. Griffiths* (2006), 2006 CarswellBC 1780 (B.C.S.C.).

[15] *Sendall v. Sendall* (2003), 2003 CarswellMan 44 (Man. Q.B.).

[16] *Battershill v. Battershill* (2007), 2007 CarswellAlta 92 (Alb. Q.B.).

Battershill's car insurance were "extraordinary" since she used her car a lot to transport the children to and from their various activities.[17]

In another case the court completely disregarded the step of whether the requesting spouse could reasonably cover the expense and simply concluded that unless the children have a "special talent", expenses for extra-curricular activities would be paid from the table child support payment.[18] Not only is the analysis flawed but nowhere in section 7(1.1)(b)(iii) does it say that the child must have exceptional or "special" talent. Obviously the presence of talent should bolster the claim but the lack thereof does not end the inquiry of whether the expense is extraordinary. In this respect, the opinion expressed by the court in *Fong v. Charbonneau* by Yard J. is preferred:

> "In my view, it is not necessary that a child, in order to qualify…for such an expense, be a regional, provincial, national or world-class athlete or champion. To hold otherwise would be to deprive the vast majority of children from the possibility of having expenses for their particular extracurricular activity considered under this section. In my view, this was not the intent of the legislature in enacting the *Guidelines*."[19]

In another case the court said that if the requesting spouse cannot reasonably cover the claimed item "the item is considered to be extraordinary and falls into s. 7 which requires the said cost to be paid *pro rata* to the parents' respective incomes."[20] Really? What about having to show the expense is necessary in relation to the child's best interests and reasonable in relation to the parties' and child's means?

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[17] Ibid at para 40.

[18] *M.(J.A.) v. M.(D.L.)* (2006), 2006 CarswellNB 593 (N.B.Q.B.).

[19] *Fong v. Charbonneau* (2005), 2005 CarswellMan 129 (Man. Q.B.) at para 27; see also *Simpson v. Trowsdale*, supra note 5 at para. 28 where the court noted that s. 7(1)(f) has a "broad meaning and can encompass virtually any activity outside the child's school curriculum, not restricted to activities for which the child has a special talent."

[20] *Frass v. Frass* (2006), 2006 CarswellSask 276 (Sask. Q.B.) at para 8.

In another case the court engaged upon an extremely detailed analysis of whether a proposed expense (BMX camp) was necessary for the child[21]. How many bruises the child had suffered, the nature of his previous injuries from the activity and how safe the sport is were all considered in much detail. All of this would seem to go to the analysis in s. 7(1) and only after the court deemed the expense "extraordinary" right? Wrong. Here the court conducted its inquiry and determined the expense was not extraordinary. Could it be then that concepts of necessity creep into the factors set out in s. 7(1.1)(b), which require the court to consider any special needs of the child, the child's talents, overall cost and "any other similar factor the court considers relevant"?

Not surprisingly, when assessing whether a requesting spouse can reasonably cover a proposed expense, the parent's budget should also be examined. The budget is not only important for current analysis. In the event the budget changes, for example, because a daycare subsidy is lost or the cost of an activity increases, a previously weak claim may turn into a strong one.[22]

Because the word "extraordinary" connotes that a share of ordinary expenses is assumed to be included in the table amount of support, the higher the level of basic child support and the lower the recipient's income, the less likely any claimed extra-curricular or primary or secondary education expense should be considered "extraordinary". Similarly, the lower the support and the lower the recipient's income, the more likely the court should conclude that table support will be going to the necessaries of life and that expenses like gymnastics and swimming will be perceived as things that cannot be reasonably covered. A good example of this is *Niedbala v. Kaarela*[23], an Ontario case where a swimming expense of $209 for the entire year was considered "extraordinary", in large part because the recipient mother's income was only $16,175.

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[21] *Laurie v. Laurie* (2004), 2004 CarswellMan 120 (Man. Q.B.) at paras. 18 and 19.

[22] *Niedbala v. Kaarela* (2007), 2007 CarswellOnt 5895 (Ont. S.C.J.) at para. 79.

[23] Ibid at para 76.

One final note. Although the wording of section 7(1.1) does not make it perfectly clear, a purposive analysis must mean that the *total* amount of the expenses must be examined. As MacDonald J. thoughtfully observed in *Simpson v. Trowsdale*:

> "If one were to look at each individual item, a situation might arise where a number of individual items totally *(sic)* $1,000 might be found, on an individual basis, not to be extraordinary expenses, but, in another case one item costing $1,000 could be found to qualify as an extraordinary expense. If all other factors were similar, it would clearly be unfair to say the individual expense of $1,000 is extraordinary in one instance, but disallow a number of items making up $1,000 in another instance, because individually the expenses are not high."[24]

DIFFICULTIES WITH EVIDENCE

Regardless of the nature of the activity and the incomes of the parties, litigants who do not provide details of the cost of the extracurricular activity usually find their claims denied. Failing to identify the amounts paid towards extraordinary expenses or simply listing the activities without more has proved fatal for litigants in a host of cases.[25]

By now, it is trite that the onus is on a parent seeking a contribution for a special or extraordinary expense to prove that the claimed expense falls within one of the enumerated categories and is reasonable and necessary.[26] Parties who do not come to trial with proof of what they paid for a particular expense run the risk that the claim will be denied even if the court otherwise finds that the expense is

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[24] Supra note 5 at para. 17.

[25] *Campolin v. Campolin* (2007), 2007 CarswellBC 2289 (B.C.S.C.), para 29; *Ferguson v. Thorne* (2007), 2007 CarswellNB 67 (N.B.Q.B.) at para 65.

[26] *Park v. Thompson* (2005), 77 O.R. (3d) 601 (Ont. C.A.).

extraordinary.[27] After all, if there is no evidence of the cost of the expense, it is impossible to determine whether the requesting spouse can reasonably cover it. In *Ferguson v. Thorne*, the court put it this way:

> "A party claiming a contribution to a section 7 expense must support it with some cogent evidence. A payor against whom an additional obligation is being imposed has the right to expect some proof of both the nature of the expense…and the actual amount of the expense…In this case, there is nothing by way of supporting documentation. The necessary inquiry cannot therefore be undertaken, and the claim therefore must be dismissed."[28]

In relation to private school fees for primary or secondary school where the payor objects on the grounds that the child will fare as well in a public school, it is imperative that the requesting spouse provide some independent evidence, preferably in the form of an expert report or educational assessment. The spouse's mere opinion that the child has special needs and would do better at private school is insufficient.

A good example is *Holeman v. Holeman* where the mother unilaterally enrolled the child in private school and asked the court for a contribution from the father. She argued that the child was introverted and required special attention – attention that could only be obtained at a private school. Only anecdotal evidence was supplied however, and the court indicated it needed some medical or psychological evidence before being able to conclude the private school had helped the child's adjustment issues.[29] The claim was rejected.

There are however always exceptions – and lots of them. In one case, swimming lessons, ski passes, French lessons, soccer and Spanish school were

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[27] See for example, *Simmonds v. Simmonds* (2007), 2007 CarswellOnt 1547 (Ont. S.C.J.) at para 12 where the court allowed only $547 of the $1,300 claimed for gymnastics because that was all the mother could prove she paid for. See also *Ferguson v. Thorne,* supra note 25 at para. 65.

[28] *Ferguson v Thorne*, supra note 25 at para 132.

[29] *Holeman v. Holeman* (2006), 2006 CarswellMan 430 (Man. Q.B.) at para 46. See also *Griffiths v. Griffiths*, supra note 14 at para. 40.

all successfully claimed as section 7 expenses.[30] Not only was no proof adduced of any expense but the amount of each expense was not even set out. All we learn at the end of the case is that the total is $30,000.00. The following is the entirety of the judge's comments about the expenses:

> "Each of these claimed expenses falls within the parameters of s. 7, and each is warranted as an extraordinary expense in the context of this family of accomplished children. The language training courses are educational expenses that augment their language education and contribute to their post-secondary pursuits. The sports fees are for activities that provide a necessary balance to the academic work. These expenses are similar in nature to the extracurricular expenses incurred for the children by the parties prior to the separation."

In another case, a Toronto judge ball-parked the recipient father's special/extraordinary expenses at $6,000 per year for the previous seven years and ordered the payor mother, who had contributed nothing, to pay half or $21,0000.[31] He did so despite a lack of evidence from the father who claimed to have spent a total of $45,000 on extra-curricular activities and the child's educational trust. Without knowing more about the case, it seems as though the father did very well in succeeding to have $43,000 or $45,000 worth of expenses deemed "extraordinary" without much in the way of proof. [32]

In another case, a father was ordered to contribute to a child's driver's education costs and keyboarding lessons without any detail as to the cost, whether the expense was something the mother could reasonably cover or whether the expense was necessary and reasonable.[33] In another, a court ordered the father to contribute $2,500 a year per child without any explanation of what the

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[30] *B.(D.C.) v. B. (R.L.)* (2006), 2006 CarswellAlta 186 (Alb. Q.B.), para 41.

[31] See for example, *Haynes v. Haynes* (2006) CarswellOnt 7124 (Ont. S.C.J.) where the court estimated expenses at $6,000 per year for the past seven years and ordered the payor mother to pay half, or $21,000.

[32] Sadly, but not surprisingly, paintball was found not to be a section 7 expense.

[33] *Bosomworth v. Bosomworth*, supra note 12.

proposed expenses *were*, let alone whether the recipient mother could reasonably cover them.[34]

Noticing a disturbing trend of ordering a contribution to section 7 expenses without the necessary proof, a frustrated Carr J. had this to say about common practice in Manitoba:

> "I say all of this because it is not unusual for a court to find itself without the evidence that is required in order to properly adjudicate a s. 7 claim, whether it is for "extraordinaries" or mere "specials". By way of example, and this is the situation in the case before me, a claimant spouse often simply makes a claim for hockey or camp expenses. The amount of the claim is included, as are financial statements of both parties, but there is not a word on "necessity", no reference to facts that would allow a court to determine what is in the best interests of this particular child, and not a word on the couple's prior spending pattern. Is this because there are cases in this province where judges have allowed hockey and camp expenses and (some) counsel have therefore concluded that these expenses are always claimable, *simpliciter*? Surely case law has not reached the point – could it? – where all one has to do when claiming hockey or camp as an "extraordinary" expense is to ask for it."[35]

Faced with what otherwise could be a meritorious claim for an alleged section 7 expense, the court always has the power to adjourn the claim to allow the requesting parent to submit the necessary proof, and this is exactly what the judge did.

FAILURE TO INVOLVE OR CONSULT THE OTHER PARENT

Interestingly, there is a weak correlation between cases where courts have found an expense to be "extraordinary" and the level of involvement by the other parent. For clarity, whether or not the payor was consulted about the activity seems not to matter as much as one would think in terms of whether the court

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[34] *Wilchuck v. Wilchuck* (2007), 2007 CarswellAlta 639 (Alb. Q.B.) at para 22.

[35] *Chambers v. Chambers* (2004), 2004 CarswellMan 456 (Man. Q.B.) at para 10.

deems the expense "extraordinary".[36] In one case the court noted that the spouse who failed to consult was only asking for an equal contribution rather than a 66% (presumably because of the failure to involve).[37]

Although obtaining the other party's input before incurring a section 7 expense may be a polite thing to do, it may be unnecessary depending on the wording of the parties' separation agreement or court order. Such was the case in *Zimmerman v. Doe*[38] where the mother went ahead and spent money on various expenses for the children and then when the father refused to pay went to court and asked for an order requiring him to contribute.

Justice Perrell of the Toronto Superior Court made it clear that while the court remains the ultimate arbiter of whether an expense qualifies, the mother did not need to consult with the father or obtain his consent according to the wording of their previous court order. He did strongly suggest however, that in the future she advise him prior to incurring an expense. This did not stop the court from ordering the father to contribute to various expenses, most of which were for post-secondary education. The father was also ordered to contribute to the child's private secondary school expenses even though he claimed to know of no reason why the child was moved from public school to private school. The court chalked it up to a "failure in communication" and said that the child was "floundering" in public school and that the change to private school "saved" her academic life.[39] However, he denied the mother's request for contributions to dance performance costumes, a Grade 8 school trip, gymnastics and driving lessons, all on the grounds the mother could reasonably cover them with the table child support she received, which was sizable ($2,500 per month).

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[36] *Campolin*, supra note 25 at para 8.

[37] *Correia v. Correia* (2002), 2002 CarswellMan 269 (Man. Q.B.) at para 24.

[38] *Zimmerman v. Doe* (2007), 2007 CarswellOnt 4721 (Ont. S.C.J.).

[39] Ibid at para 30.

This case shows that while it may be good practice to consult and inform prior to incurring the expense, failure to do so is not fatal to the claim which will be assessed on its merits according to the legislation, unless of course the parties' agreement or prior court order requires consent or consultation.

DOES THE ACTIVITY MATTER?

Not surprisingly, hockey is one of the most commonly claimed extra-curricular activities. Due to the wording of the legislation, courts must now be very careful in analyzing such a claim. Patient judges will require the parents to break down what "hockey" means. Does it refer to the fees, the equipment, out of season hockey school or the cost of out of town tournaments? While there is no precise barometer of when hockey will or will not be allowed, the presence of the following all tend to increase the chance it will be found to be "extraordinary":

(i) the child is really into it. A child obsessed with hockey has a better chance of having it deemed a section 7 expense than a child who simply plays to get a free trip to Tim Horton's;

(ii) it is the only winter sport the child participates in. It is better if it is the only sport the child participates in; and

(iii) the city in which the child plays is small. Ideally, it is pretty isolated from the nearest community and requires a lot of travel to and from games and tournaments.

Despite the presence of all of the above in one Ontario case *Olaveson v. Olaveson*[40], the court disallowed the mother's claim for a contribution to equipment, enrolment and hockey school on the grounds that the table amounts she received were intended to cover the "usual common costs of raising children, which would include ordinary expenses for extra-curricular activities."[41] The court distinguished between the cost of enrolment fees, equipment and hockey school on one hand from the cost associated with out of town tournaments which he

[40] *Olaveson v. Olaveson* (2007), 2007 CarswellOnt 3975 (Ont. S.C.J.).

[41] Ibid at para 28.

found unusual for a community team and which arose because of the town's relative distance from its nearest neighbour.

In a similar decision, *Maber v. Maber* the court found the "evidentiary record" so lacking it was impossible to determine with any precision what the mother's reimbursement should be. However, since both parents felt that hockey was very important for their children and contributed to "character-building", the court simply plucked a number representing a substantial amount of the requested expense and warned the parties that in the future receipts should be submitted monthly with each paying their proportionate share in prompt fashion.[42]

Parties must also remember that delay in bringing forward a claim for past extra-curricular activities will be heavily scrutinized. Unless the right to do so is set out in a separation agreement or court order, courts are often reluctant to force a payor to contribute retroactively to such expenses.[43] Based on the writer's sense of the cases, the level of scrutiny seems far more intense when the expense is an extra-curricular activity as compared to when it is a primary or secondary school expense. This is not always the case, however, for, as mentioned above, in a recent case the court allowed a recipient to claim a retroactive contribution for monies paid into a child's educational trust and various extra-curricular activities more than six years later.[44]

In *Correia v. Correia*, the Manitoba Court of Queen's Bench wrestled with whether organized snowmobile racing was a section 7 expense. The father objected on the grounds the sport was too dangerous and too expensive given the parties' means. Having easily determined the cost was something the mother could not reasonably cover, an incredible amount of detail went into the court's analysis as to whether it was necessary and reasonable. The judge

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[42] *Maber v. Maber* (2007), 2007 CarswellNB 171 (N.B.Q.B.) at paras 93-97.

[43] Ibid at para 32.

[44] *Haynes v. Haynes*, supra note 31.

considered how many injuries the child had previously suffered from the activity, how talented the child was, the sport's safety standards and injury rates – he even watched some races on video! In the end, the judge was satisfied that the degree of danger and risk of injury was not so high as to warrant overruling the mother's decision that the risks were acceptable for her son. He found it "necessary" in relation to the child's best interests and went on to find it reasonable in relation to the parties' means and spending pattern prior to separation.

Tutoring and privately paid programs to help children with their education are, not surprisingly, much easier to claim as extraordinary. Of all the cases surveyed only one denied the claim. In that case[45] the father's claim for an order that the mother reimburse him a proportionate share for the child's Sylvan Learning Center fees which cost $5,000 was denied. The court found that after paying his support, the father had approximately $219,000 and that this was well within the kind of expense that a parent with that level of income could reasonably cover.

SPENDING PATTERN PRIOR TO SEPARATION

Based on the cases in the attached chart it seems like the family's spending pattern prior to separation is the best predictor of whether the expense, assuming it cannot be reasonably covered by the requesting party, will be deemed to be reasonable and necessary. The cases show that even where a payor earns even less than $50,000 a year, the court may require him to contribute to private school if the parties were somehow managing to pay for it before their separated. However, a large jump in tuition from year to year may require a reconsideration of whether the expense qualifies.

This occurred in *Simmonds v. Simmonds* where the court ordered the payor father to contribute proportionately to $2,400 worth of private primary school expenses but noted that when the tuition jumps to $8,900 next year the parties should give "serious consideration" to whether the child should continue,

[45] *O.(A.E.) v. O.(K.)* (2006), 2006 CarswelBC 1656 (B.C.S.C.) at para 22.

including whether the school allows for payments to be spread out over time or the child can qualify for any bursaries or scholarships.[46]

If the parties spend money on a particular extra-curricular during cohabitation, commit to sharing the expense in their separation agreement and the payor's income later increases materially, it is often difficult to argue the activity is no longer extraordinary where the child flourishes in the activity - even though the table amount of support received will be higher and thus something the recipient may be able to reasonably cover. In *G.(J.) v. L.(F.)* for example[47], the parties committed to dance expenses in their 1999 separation agreement. At the time of the agreement, the payor's income was $52,000. By 2006 it had increased to $74,000. The mother's income had changed minimally, from $30,000 in 1999 to $33,000. The child was now seventeen years old, had been in dance for eight years, had a part-time job dancing and wanted to make a career of it. The dance fees were now over $3,000 per year.

The court found that the mother could not reasonably cover the expense and ordered the father to pay a proportionate share for it, even though the separation agreement said his obligation was 50% and even though the table child support had increased substantially. The court found there was a pattern of both parents contributing to the extra-curricular activities before and after separation.[48] The court also refused to impute more income to the mother on the grounds she was still primarily responsible for the day-to-day care of the children and it was not unreasonable for her to work only twenty-eight hours a week.

On a related note, it is clear that the longer the child has been participating in the activity and the longer the payor has been contributing to it, the harder it will be for a court not to find the expense deserving of contribution. Such was the case

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[46] *Simmonds v. Simmonds*, supra note 27 at para 11.

[47] *G.(J.) v. L.(F.)* (2006), 2006 CarswellBC 2204 (B.C. Prov. Ct.).

[48] Ibid at para 36.

in *Fong v. Charbonneau*[49] where in 2003 the payor's contribution to the child's dance was set at $600 per month, not an insignificant sum. Two years later, however, the contribution was increased by the court over the father's objection to $900 per month. The child's skating expenses had increased to $11,000 per year and the fact she continued to participate, excel and enjoy them seemed to matter to the judge a lot more than the father's complaints that he was not consulted way back when the child started taking lessons, that the child's commitment to skating took significant time away from his parenting and that, according to him, his daughter was not extremely talented and had not progressed very far despite all the money spent on coaching.[50]

MEANS OF THE PARTIES

Counsel for the requesting spouse should always remember that a section 7 expense must be "reasonable in relation to the means" of the parents. Even more important, the word "means" includes more than just income and includes the income of a spouse's partner.

In *Albo v. Albo*[51], for example, the payor husband was ordered to contribute close to $6,000 for various section 7 expenses even though he was retired and had no income. Instead, the court ordered his payment to be made from his share of the proceeds of sale from the matrimonial home.

In a number of recent decisions,[52] courts have adopted the following factors from the 1999 Alberta case of *Bland v. Bland*[53] in determining reasonableness:

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[49] *Fong v. Charbonneau*, supra note 19.

[50] Ibid at para. 26. Hard to imagine the daughter wanting to spend more time with dad once she heard what he had to say about her skills.

[51] *Albo v. Albo* (2006), 2006 CarswellAlta 1383 (Alb. Q.B.) at paras 86 & 87.

[52] *Correia v. Correia*, supra note 37 at para 19; *Holeman v. Holeman*, supra note 29 at para. 47.

[53] *Bland v. Bland*, [1999] A.J. No. 344 (Alta. Q.B.).

- the combined income of the parties;
- the fact that two households must be maintained;
- the extent of the expense in relation to the parties' combined income level;
- the debts of the parties;
- any prospects for a decline or increase in the parties' means in the future; and
- whether the non-custodial parent was consulted regarding the expense prior to it being incurred.

Of course the more factors the court must consider the longer the analysis takes and the more work a judge has to do. A judge who wishes to undertake a correct approach should scrutinize the parties' assets, debts, and, of course, budgets and make some determination as to whether the expense will cripple the payor or leave him with adequate funds to live on. Although less than glamorous, it is hard to see how the statute can be correctly followed without considering these factors. In very few cases, however, do we see judges actually diving into such level of detail. [54]

A good example of a judge who *was* is in the Manitoba case of *Laurie v. Laurie*.[55] The mother was claiming a proportion of her travel costs for the child's snowboarding practices. In rejecting the claim, the judge had to examine her claim for mileage, whether a companion who traveled with her did or did not contribute to the gas, how many kilometers were required per trip and how many trips were the norm. Most judges look to avoid having to deal with this kind of mind-numbing detail but sometimes requiring full compliance with the legislation seems to require it.

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[54] For a case where the judge did, see *Fong v. Charbonneau*, supra note 19 at para 31.

[55] *Laurie v. Laurie* (2004), 2004 CarswellMan 120 (Man. Q.B.) at paras. 32 and 33.

Another obvious but not insignificant factor is that what is reasonable and necessary to one litigant may not be so reasonable and necessary to another. Unfortunately, no matter how many steps the legislation requires, at the end of the day it comes down to whether the judge's "values" jive with the claimant's or the payor's. The following excerpt from a 2006 Manitoba case provides a perfect example of how difficult a judge's job can be in having to wrestle with difficult decisions in respect of parties' core values and beliefs:

> "On balance, after examining the facts in light of the three factors (necessity, reasonableness and spending pattern), I find that I am not prepared to provide for an amount to cover the private school expense. While a private school education may be desirable for any child, the *Child Support Guidelines* mandate that it must be found to be a necessity. While I reject the mother's condemnation of the public school, even if I accepted her perceptions of it, the reasons why the children would have to attend that school have arisen mostly due to the mother's life choices in preferring the convenience of having the children spend the same hours at the same institution and because of her desire to save housing costs in order to attend law school. Further, I doubt the reasonableness of the expense when looking at all the factors surrounding parental means, particularly in light of the travel costs for the access visits. Finally, I find that the full-time private school is not comparable to a private, short-term daycare program and that, on the facts in this case, pre-separation spending patterns are irrelevant to the analysis."[56]

PROPOSAL AND CONCLUSION

One would think that because the table amounts subsume a portion of ordinary expenses, the lower the income of the payor the smaller the table amount and therefore the less that will be provided for in the support payment for expenses under sections 7(1)(d) and (f). However, as the attached chart appended to the paper shows, there is unfortunately no trend supporting this view. At this point, the cases are all over the proverbial map. It would be nice to have more predictability in this area.

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[56] *Holeman v. Holeman*, supra note 29 at para. 56.

One interesting idea has been put forth by a judge in Prince Edward Island.[57] Based on his calculation that the percentage allowed for extraordinary expenses under PEI social assistance legislation is 1.2% he suggests that we use a figure of 1% as the cutoff for determining what is an extraordinary expense. The theory is that if the total expenses claimed are greater than 1% of the requesting party's income, then that parent has an extraordinary expense and the case may proceed to an analysis under s. 7(1). Anything under 1% must be assumed by the requesting parent. For example, a recipient earning $15,000 would be responsible for the first $150 under s. 7(1)(d) or (f) before being able to claim them as extraordinary. If the claimed expense was $1,000, the applicant would be considered to have an extraordinary expense in the amount of $850.

Although the idea could be ripe for abuse in that a recipient could claim many more expenses than she otherwise would in order to reach the 1% threshold, courts could deal with this by ensuring claimants strictly prove all expenses. Further, the proposal offers the benefits of predictability, even treatment across parties and is easy to calculate. For this reason it is suggested that for the purpose of giving meaning to the word "extraordinary" 1% of the requesting party's income should be assumed by that party before being able to claim extraordinary expenses.

[57] *Simpson v. Trowsdale*, supra note 5.

TABLE OF CASES

1. *Albo v. Albo* (2006), 2006 CarswellAlta 1383 (Alb. Q.B.).
2. *B.(D.C.) v. B. (R.L.)* (2007), 2007 CarswellAlta 186 (Alb. Q.B.).
3. *Battershill v. Battershill* (2007), 2007 CarswellAlta 92 (Alb. Q.B.).
4. *Bosomworth v. Bosomworth* (2007), 2007 CarswellSask 100 (Sask. Q.B.).
5. *Brown v. Brown* (2006), 2006 CarswellNS 543 (N.S.S.C).
6. *Campolin v. Campolin* (2007, 2007 CarswellBC 2289 (B.C.S.C.).
7. *Correia v. Correia* (2002), 2002 CarswellMan 269 (Man. Q.B.).
8. *Ferguson v. Thorne* (2007), 2007 CarswellNB 67 (N.B.Q.B.).
9. *Fong v. Charbonneau* (2005), 2005 CarswellMan 129 (Man. Q.B.).
10. *Frass v. Frass* (2006), 2006 CarswellSask 276 (Sask. Q.B.).
11. *G.(J.) v. L.(F.)* (2006), 2006 CarswellBC 2204 (B.C. Prov. Ct.).
12. *Griffiths v. Griffiths* (2006), 2006 CarswellBC 1780 (B.C.S.C.).
13. *Haynes v. Haynes* (2006) 2006 CarswellOnt 7124 (Ont. S.C.J.).
14. *Heisler v. Heisler* (2006), 2006 CarswellBC 2002 (B.C.S.C.).
15. *Holeman v. Holeman* (2006), 2006 CarswellMan 430 (Man. Q.B.).
16. *Jesse v. Jesse* (2007), 2007 CarswellSask 350 (Sask. Q.B.).
17. *Laflamme v. Laflamme* (2006), 2006 CarswellBC 1767 (B.C. Master).
18. *Laurie v. Laurie* (2004), 2004 CarswellMan 120 (Man. Q.B.).
19. *M.(J.A.) v. M.(D.L.)* (2006), 2006 CarswellNB 593 (N.B.Q.B.).
20. *Maber v. Maber* (2007), 2007 CarswellNB 171 (N.B.Q.B.).
21. *Neidbala v. Kaarela* (2007), 2007 CarswellOnt 5895 (Ont. S.C.J.).
22. *(A.E.) v. O.(K.)* (2006), 2006 CarswellBC 1656 (B.C.S.C.).
23. *Olaveson v. Olaveson* (2007), 2007 CarswellOnt 3975 (Ont. S.C.J.).
24. *Peters v. Peters* (2007), 2007 CarswellSask 195 (Sask. Q.B.).
25. *Segall v. Fellinger* (2007), 2007 CasrwellSask 336 (Sask. Q.B.).
26. *Sendall v. Sendall* (2003), 2003 CarswellMan 44 (Man. Q.B.).
27. *Shamess v. Berry* (2006), 2006 CarswellOnt 7756 (Ont. S.C.J.).
28. *Simmonds v. Simmonds* (2007), 2007 CarswellOnt 1547 (Ont. S.C.J.).
29. *Simpson v. Trowsdale* (2007), 2007 CarswellPEI 5 (P.E.I. T.D.).
30. *W.(G.F.) v. W. (J.L.)* (2006), 2006 CarswellOnt BC 1565 (B.C.S.C.).
31. *Zimmerman v. Doe* (2007), 2007 CarswellOnt 4721 (Ont. S.C.J.).

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Bicycle trip	Albo v. Albo	$362	Mother: Less than $10,000 Father: Nil	Yes.	Yes, but no analysis.
BMX camp	Laurie v. Laurie	$1,100	Mother: $56,958 Father: $68,931	No. Excellent analysis.	
Bowling	M.(J.A.) v. M.(D.L.)	$60	Mother: $34,000 Father: $42,000	No.	
Dance classes	Battershill v. Battershill		Mother: $35,000 Father: $43,750	Yes.	Yes, but no analysis.
Dance costumes	Zimmerman v. Doe	$274	Mother: $41,000 Father: $221,000	No.	
Dance competition fees and costumes	G.(J.) v. L. (F.)	$3,180	Mother: $33,000 Father: $74,000	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Dance	Frass v. Frass	$500	Mother: $29,289 Father: $73,262	No. No real analysis.	
Driving lessons	Zimmerman v. Doe	$832	Mother: $41,000 Father: $221,000	No.	
Driving lessons	Bosomworth v. Bosomworth	Not specified.	Mother: $25,911 Father: $41,525	Yes, but no analysis.	Yes.
Driving lessons	Ferguson v. Thorne	$550	Mother: $44,000 Father: $186,000	No.	
Education fund	Campolin v. Campolin	$1,800	Mother: $77,231 Father: $55,830	Yes, but it was on consent.	Yes, but it was on consent.
Education program (Spell Read)	Simpson v. Trowsdale	$960	Mother: $65,921 Father: $62,826	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Educational trust	Haynes v. Haynes	Prior to separation payor mother had paid $3,600 but nothing after separation. Recipient father paid $10,600 before and after separation.	Mother: $51,264 Father: Not specified.	Yes.	Yes.
French lessons	B. (D.C.) v. B. (R.L.)	Not specified	Mother: $88,828 Father: $34,678	Yes, but no analysis.	Yes, very thin analysis.
Golf & Country Club Membership	W. (G.F.) v. W. (J.L.)	$800	Mother: $20,000 Father: $78,000	Yes.	No.
Guitar lessons	Simpson v. Trowsdale	$500	Mother: $65,921 Father: $62,826	Yes.	Yes.
Guitar lessons	Segall v. Fellinger	$1,008	Mother: $57,368 Father: $50,584	No analysis.	No (no analysis).

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Gymnastics (Level 1 Certification)	Niedbala v. Kaarela	$133	Mother: $31,968 Father: $60,300 (imputed)	No.	
Gymnastics	Zimmerman v. Doe	$96	Mother: $41,000 Father: $221,000	No.	
Gymnastics	Simmonds v. Simmonds	$1,300	Mother: $25,900 Father: $45,900	Yes.	Yes, but only in respect of what mother had proved she paid for.
Gymnastics	M.(J.A.) v. M. (D.L.)	$60	Mother: $34,000 Father: $42,000	No.	
High school sports	Ferguson v. Thorne	$1,500	Mother: $44,000 Father: $186,000	No.	
Hockey	Laflamme v. Laflamme	$1,000 for fees and jerseys $480 for equipment	Mother: $31,200 Father: $192,000	No. Don't ask. See paper.	

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Hockey	Sendall v. Sendall	$3,550	Mother: $37,000 Father: $73,000	No analysis.	No. Expense not reasonable in relation to the parties' incomes or the child's best interests.
Hockey	Olaveson v. Olaveson	Equipment: $462 Enrolment: $370 Tournaments, hotel, food and transportation: $1,500-$1,850 Hockey school: $200 (for 2 children)	Mother: $27,000 Father: $42,341	Equipment: No. Enrolment: No. Tournaments: Yes. Hockey school: No.	Tournaments: Yes, but father only has to pay 50%.
Hockey	Simpson v. Trowsdale	$1,200	Mother: $65,921 Father: $62,826	Yes.	Yes.
Hockey	Maber v. Maber	$660	Mother: $9,996 Father: $51,827	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Hockey	M.(J.A.) v. M.(D.L.)	$162.50	Mother: $34,000 Father: $42,000	No.	
Hockey	Peters v. Peters	$160 (registration) $1,122 (equipment over three years)	Mother: $35,067 Father: $58,827	Yes, but no analysis.	Yes, but no analysis.
Horseback riding lessons	Shamess v. Berry	$1,426	Mother: unemployed (by choice, the court found) Father: $92,631	No.	
Keyboard lessons	Bosomworth v. Bosomworth	Not specified.	Mother: $25,911 Father: $41,525	Yes, but no analysis.	Yes.
Music lessons	Segall v. Fellinger	$1,593	Mother: $57,368 Father: $50,584	No analysis.	Yes, but no analysis.
Music lessons	Brown v. Brown	Not specified.	Mother: $1,728 Father: $88,204	No. No analysis.	

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Paintball equipment	Maber v. Maber	$48.97	Mother: $9,946 Father: $51,827	No.	
Paintball	Haynes v. Haynes	Not specified.	Mother: $51,264 Father: Not specified.	No.	
Piano	Segall v. Fellinger	$585	Mother: $57,368 Father: $50,584	No analysis.	No (no analysis).
Piano	W. (G.F.) v. W. (J.L.)	$1,200	Mother: $20,000 Father: $78,000	Yes.	No. Insufficient evidence.
Preschool fees	Heisler v. Heisler	$1,680	Mother: $67,500 Father: $75,250	No.	
Primary school (Christian)	Simmonds v. Simmonds	$2,400 (current year) $8,900 (next year)	Mother: $25,900 Father: $49,500	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Primary school	Jesse v. Jesse	$3,175 (for 2 children)	Mother: $51,220 Father: $69,160	Yes.	Yes.
Primary school	Holeman v. Holeman	$18,000	Mother: $43,000 (imputed) Father: $91,000	Yes. Excellent analysis.	No. Excellent analysis.
Rowing	Ferguson v. Thorne	Not specified (fatal to claim)	Mother: $44,000 Father: $186,000	Yes.	Yes, but claim still denied because mother failed to provide any evidence with respect to estimated cost.
School activities	Frass v. Frass	$350	Mother: $29,289 Father: $73,262	No. No real analysis.	
Secondary school (private)	Griffiths v. Griffiths	$26,000 for secondary school ($13,000 per child)	Mother: Unknown Father: $276,000	No analysis.	Yes to $13,000 for one child, no to $13,000 for the other.
Secondary school (private)	Zimmerman v. Doe	$9,546	Mother $41,000	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
			Father: $221,000		
Secondary school tuition (deposit only)	Albo v. Albo	$500	Mother: Less than $10,000 Father: Nil	Yes.	Yes, but no analysis.
School exchange	Segall v. Fellinger	$1,987	Mother: $57,368 Father: $50,584	No analysis.	No.
School exchange	Bosomworth v. Bosomworth	Not specified.	Mother: $25,911 Father: $41,525	No.	
School trip	Zimmerman v. Doe	$310	Mother: $41,000 Father: $221,000	No.	
School trip	Ferguson v. Thorne	$1,500	Mother: $44,000 Father: $186,000	No.	
School band travel	Brown v. Brown	Not specified.	Mother: $1,728 Father: $88,204	No. No analysis.	

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Skating (we assume figure)	M.(J.A.) v. M. (D.L.)	$25	Mother: $34,000 Father: $42,000	No.	
Skating (figure)	Fong v. Charbonneau	$11,000	Mother: $41,683 Father: $96,465	Yes. Excellent analysis.	Yes. Excellent analysis.
Skating (figure)	Simpson v. Trowsdale	$1,962	Mother: $65,921 Father: $62,826	Yes. Interesting analysis.	Yes.
Ski passes	B.(D.C.) v. B. (R.L.)	Not specified.	Mother: $88,828 Father: $34,678	Yes, but no analysis.	Yes, but very thin analysis.
Ski equipment	W. (G.F.) v. W. (J.L.)	$900	Mother: $20,000 Father: $78,000	Yes.	No.
Snowmobile racing	Correia v. Correia	$8,450 for first year $4,030 each year thereafter	Mother: $67,556 Father: $102,000	Yes.	Yes.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Soccer	Segall v. Fellinger	$2,325	Mother: $57,368 Father: $50,584	No analysis.	Yes, but must be reviewed annually (no analysis).
Soccer	B. (D.C.) v. B. (R.L.)	Not specified.	Mother: $88,828 Father: $34,678	Yes, but no analysis.	Yes, but very thin analysis.
Soccer	Albo v. Albo	$175 (registration) $21 (socks)	Mother: Less than $10,000 Father: Nil.	Yes, for both.	Yes, but no analysis.
Spanish school	B. (D.C.) v. B. (R.L.)	Not specified.	Mother: $88,828 Father: $34,678	Yes, but no analysis.	Yes, but very thin analysis.
Swimming lessons	B. (D.C.) v. B. (R.L.)	Not specified.	Mother: $88,828 Father: $34,678	Yes, but no analysis.	Yes, but very thin analysis.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Swimming lessons	Niedbala v. Kaarela	$209 (2004) $88 (2005) $150 (2006) $133 (2007)	Mother: $16,175 (2003) $28,307 (2004) $27,681 (2005) $31,968 (2006) Father: $68,564 (2003) $68,880 (2004) $68,880 (for part of 2005) $60,300 (2006 - imputed)	2004 - Yes. 2005 – No. 2006 – No. 2007 – No.	2004 – Yes.
Swimming lessons	M.(J.A.) v. M.(D.L.)	$312	Mother: $34,000 Father: $42,000	No.	
Sylvan Learning Center	O. (A.E.) v. O. (K.)	$5,000 (Father requesting contribution)	Mother: Nil Father: $300,000	No.	

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
Tennis	W. (G.F.) v. W. (J.L.)	$6,700 for lessons and touring (2 children)	Mother: $20,000 Father: $78,000	Yes.	Yes, but only $1,000.
Transportation costs (parent's car insurance)	Battershill v. Battershill	Not specified.	Mother: $35,000 Father: $43,750	Yes.	Yes, but no analysis.
Transportation costs (parent's gas costs)	Bosomworth v. Bosomworth	$4,588	Mother: $25,911 Father: $41,525	No.	
Transportation costs (parent's gas costs)	Laurie v. Laurie	$820	Mother: $56,958 Father: $68,931	Yes. Excellent analysis.	Yes. Lots of analysis.
Tutoring	Griffiths v. Griffiths	$3,000 ($1,500 per child)	Mother: unknown Father: $276,000	No analysis.	Yes.
Tutoring	Brown v. Brown	Not specified.	Mother: $1,728 Father: $88,204	No. No analysis.	
Tutoring	Sendall v. Sendall	$600	Mother: $37,000 Father:	Yes.	Yes, but no mention whatsoever.

Activity	Case	Cost of Expense (per year)	Parties' Incomes	Extraordinary	Necessary & Reasonable (only applies if expense is extraordinary)
			$73,000		
Tutoring	Heisler v. Heisler	$3,456	Mother: $67,500 Father: $75,250	Yes, but no analysis.	Yes, but no analysis
Tutoring	Albo v. Albo	$500	Mother: Less than $10,000 Father: Nil	Yes.	Yes, but no analysis.