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2002 CarswellAlta 2104

S. (J.S.) v. S. (W.J.)  
 J.S.S. (Plaintiff) and W.J.S. (Defendant)  
 Alberta Court of Queen's Bench  
 E.A. Hughes J.  
 Heard: March 14, 2002  
 Judgment: September 12, 2002  
 Docket: Calgary 4801-099604

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Counsel: David P. Vallance for Plaintiff

Diann P. **Castle** for Defendant

Subject: Family

Family law --- Support -- Child support under federal and provincial guidelines -- Determination of spouse's annual income -- General principles.

Family law --- Support -- Child support under federal and provincial guidelines -- Retroactive award.

Family law --- Support -- Child support under federal and provincial guidelines -- Determination of award amount -- Extraordinary expenses -- Necessity and reasonableness.

Family law --- Support -- Child support under federal and provincial guidelines -- Enforcement of award -- General principles.

Cases considered by E.A. Hughes J.:

Hauger v. Hauger (2000), [2000] 9 W.W.R. 254, 81 Alta. L.R. (3d) 163, 9 R.F.L. (5th) 46, 2000 ABQB 423, 2000 CarswellAlta 598, 268 A.R. 25 (Alta. Q.B.) -- referred to

Hunt v. Smolis-Hunt (2001), 286 A.R. 248, 253 W.A.C. 248, [2001] 11 W.W.R. 233, 205 D.L.R. (4th) 712, 2001 ABCA 229, 2001 CarswellAlta 1357, 20 R.F.L. (5th) 409, 97 Alta. L.R. (3d) 238 (Alta. C.A.) -- considered

Kowalewich v. Kowalewich (2001), 19 R.F.L. (5th) 330, 155 B.C.A.C. 143, 254 W.A.C. 143, [2001] 9 W.W.R. 626, 92 B.C.L.R. (3d) 38, 2001 BCCA 450, 2001 CarswellBC 1417 (B.C. C.A.) -- referred to

Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, 1997 CarswellSask 679, 160 Sask. R. 212, [1998] 4 W.W.R. 230 (Sask. Q.B.) -- followed

Nesbitt v. Nesbitt (2001), 19 R.F.L. (5th) 359, 156 Man. R. (2d) 238, 246 W.A.C. 238, [2001] 8 W.W.R. 635,

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2001 MBCA 113, 2001 CarswellMan 308 (Man. C.A.) -- referred to

Whitton v. Shippelt (2001), 2001 ABCA 307, 2001 CarswellAlta 1529, 293 A.R. 317, 257 W.A.C. 317, 23 R.F.L. (5th) 437 (Alta. C.A.) -- referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally -- referred to

s. 7 -- referred to

s. 7(1)(a) -- referred to

s. 7(1)(b) -- referred to

s. 7(1)(c) -- referred to

s. 7(1)(d) -- referred to

s. 7(1)(f) -- referred to

s. 7(3) -- referred to

ss. 16-18 -- referred to

s. 17 -- referred to

s. 18 -- referred to

E.A. Hughes J.:

### **Introduction**

1 Mr. and Ms. S. were married for six years when they separated in November, 1993. The children, W. and C., were four years old and two years old. Mr. W.J.S. agreed to pay Ms. J.S.S. child support because the children lived with her, as they do today. He paid support regularly until March, 1998. Ms. J.S.S. claims the child support was not paid regularly after that; she also says Mr. W.J.S. did not pay the proper amount.

2 Therefore, Ms. J.S.S. brings this application to determine the child support payable by Mr. W.J.S. and the extraordinary expenses for this family. A determination of child support and extraordinary expenses allows a calculation of the arrears Mr. W.J.S. owes Ms. J.S.S.. As the parties do not agree on Mr. W.J.S.'s annual income, I must first determine his income.

### **Issues**

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1. What is Mr. W.J.S.'s annual income for the years 1998, 1999, 2000, and 2001?
2. What is the amount of child support payable by Mr. W.J.S. for the two children, W. and C.?
3. What is the proper date to award retroactive child support to -- the date of separation, the date the divorce action was commenced, or some other date?
4. What are proper Section 7 expenses? Can I award a sum of monies for Section 7 expenses Ms. J.S.S. did not have the money to incur but says she would have incurred had she received monies from Mr. W.J.S.?
5. Calculation and payment of arrears.
6. Costs.

***Issue No.1 -- What is Mr. W.J.S.'s annual income for the years 1998, 1999, 2000, and 2001?***

4 Mr. W.J.S. is a trucker and contracts his services to other businesses. In 1999, he incorporated [...] Alberta Limited; he is a shareholder of that company with his common-law partner, Ms. B.. The company pays various legitimate business expenses including fees for Mr. W.J.S.'s services and for Ms. B.'s bookkeeping services, fees for the business use of their home, and telephone and electricity costs.

5 The Federal Child Support Guidelines (Guidelines) allow a court to determine a spouse's annual income for the purpose of setting child support payable by using the "total income" line in the spouse's tax return, unless, the court is of the opinion that is not the fairest determination. See Sections 16-18 of the Guidelines.

6 Mr. W.J.S. acknowledges the "total income" line of his tax returns is not the fairest way to determine his annual income. In fact, he says some of his legitimate business expenses should be included in calculating his annual income. As well, both counsel advised me they agreed on a determination of Mr. W.J.S.'s income for 1998 and 1999. That income is:

1998 \$52,800.00  
1999 \$41,946.00

7 The issue for me to resolve is Mr. W.J.S.'s income for the 2000 and 2001. Hopefully, this decision will provide a formula for the 2002 tax year and forward for the parties.

8 Exhibits C and D of Mr. W.J.S.'s supplement affidavit sworn July 11, 2001, set out financial information for the 2000 year of [...] Alberta Limited, including,

1. Business Income \$65,235.00
2. Corporate Tax Return, and

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3. Business Expenses \$60,302.00

9 Using the list of business expenses, Mr. W.J.S. says the following expenses should be added together to determine his personal income:

1. Management and Administration Fees	\$14,856.00
2. Property Taxes	\$1,074.00
3. Rent and Lease	\$5,585.00
4. Salaries and Wages	\$22,605.00
5. Telephone and Utilities	\$2,194.00
Total	\$46,314.00

10 Ms. J.S.S. argues I should use all the pre-tax income of [...] Alberta Limited (\$65,235.00) as Mr. W.J.S.'s annual income for this application. Ms. J.S.S. says this is fairest because prior to 1998 and the incorporation of [...] Alberta Limited, Mr. W.J.S.'s gross income was his total income.

11 In determining Mr. W.J.S.'s income, I am guided by the following principles:

1. Section 18 of the Guidelines may be used to determine a spouse's annual income if the spouse's annual income set out in his or her tax return, is not a fair determination because the spouse is a shareholder of a corporation.
2. The purpose of Sections 17 and 18 of the Guidelines is to allow an impartial assessment of monies available to a spouse to pay child support. *Kowalewich v. Kowalewich* (2001), 92 B.C.L.R. (3d) 38 (B.C. C.A.) paragraphs 42 and 43.
3. The onus is on the shareholder payer spouse to establish the expenses of the corporation are reasonable and fair business expenses. *Nesbitt v. Nesbitt* (2001), 156 Man. R. (2d) 238 (Man. C.A.) at paragraph 19; *Kowalewich v. Kowalewich, supra* at paragraph 44; *Hauger v. Hauger* (2000), 268 A.R. 25 (Alta. Q.B.) at paragraphs 28 and 29.
4. The test to apply is fairness. See Sections 17 and 18 of the Guidelines; *Nesbitt v. Nesbitt, supra* at paragraph 16; *Kowalewich v. Kowalewich, supra* at paragraph 44.
5. In applying this test "... a court might ask what an objective well-informed parent would make available for

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child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the *Guidelines*, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17." *Kowalewich v. Kowalewich, supra* at paragraph 45.

12 I reviewed the financial information of Mr. W.J.S.'s corporation for the 2000 tax year. I am not prepared to accept Ms. J.S.S.'s position that the pre-tax income of the corporation is the income to be attributed to Mr. W.J.S.. Mr. W.J.S. does have reasonable business expenses; for example, the safety equipment and supplies expense is such a reasonable expense. Therefore, I examined the business expenses to determine what are not fair and reasonable expenses in this context. The business expense I find is not fair and reasonable and must be added to the expenses acknowledged by Mr. W.J.S. is:

1. Motor Vehicle Expenses -- \$2,797.00. Counsel for Ms. J.S.S. advised the motor vehicle expenses were for personal vehicles and this information was not disputed by counsel for Mr. W.J.S..

13 In addition, I find the net income, the profit, of the corporation must be added into Mr. W.J.S.'s income. That sum is \$4,933.00.

14 Therefore, I find Mr. W.J.S.'s income for the 2000 tax year is \$54,044.00.

15 The parties did not have the 2001 tax information before the Court at the time of the application. However, both counsel in their materials assumed Mr. W.J.S.'s income would be the same for the 2001 year. Accordingly, I find Mr. W.J.S.'s income for the 2001 tax year is \$54,044.00.

***Issue No.2 -- What is the amount of child support payable by Mr. W.J.S. for the two children, W. and C., for the year 1998, 1999, 2000, and 2001?***

16 Counsel agreed Mr. W.J.S.'s income for 1995-1998 inclusive was as follows:

1995	\$49,644.00
1996	\$49,932.00
1997	\$56,180.00
1998	\$52,800.00
1999	\$41,946.00

17 I found Mr. W.J.S.'s income for 2000 and 2001 to be \$54,044.00. The Federal Child Support tables for Alberta set out the child support payable by Mr. W.J.S. as follows:

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Year	Income	Child Support Payable
1998	\$52,800.00	\$736.40
1999	\$41,946.00	\$596.49
2000	\$54,044.00	\$752.57
2001	\$54,044.00	\$752.57

**Issue No.3 -- What is the proper date to award retroactive child support -- the date of separation, the date the divorce action was commenced, or some other date?**

18 Mr. and Ms. S. separated November 15, 1993. As the children, W. and C., lived with their mother, Mr. W.J.S. agreed to pay Ms. J.S.S. child support. Mr. W.J.S. paid approximately \$500.00 per month until March, 1998. However, Ms. J.S.S. said the payments were sporadic after that.

19 Ms. J.S.S. issued a Statement of Claim for Divorce in August, 1998; one of the claims she made was for child support.

20 Counsel for Ms. J.S.S. argues that child support should be made retroactive to the date of separation. Counsel for Mr. W.J.S. submits that November, 1998[FN1] is the proper date to make the child support retroactive from; alternatively, April, 1998, is the proper date as this is when Mr. W.J.S. failed to honour the oral agreement between the parties.

21 Retroactive child support may be ordered from the date of separation to the date the divorce proceedings are commenced in appropriate circumstances. *Hunt v. Smolis-Hunt* (2001), 286 A.R. 248 (Alta. C.A.).

22

Some of the appropriate circumstances cited in **Hunt**, supra, include but are not limited to situations where:

- a) the payor was at fault by failing to recognize or trying to avoid the obvious need for support,
- b) a payor makes it impossible to assess the proper amount of support,
- c) the payor wilfully causes the payees income to cease,
- d) the payor knew of an obligation which did not become the subject of an order due to ongoing negotiations, and
- e) the payor fails to disclose a greatly increased income."

*Whitton v. Shippelt* (2001), 293 A.R. 317 (Alta. C.A.), paragraph 19.

23 From the date of separation until March, 1998, Mr. W.J.S. recognized his parental responsibility to support the two children. However, after that he was at fault by failing to pay the agreed amount of child support on a regular basis

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thereby "avoiding the children's obvious need for support." [FN2] I find this is an appropriate circumstance to order retro-active child support from April, 1998 onwards; I note April, 1998 predates the issuance of the Statement of Claim for Divorce by four and a half months.

***Issue No. 4 -- What are proper Section 7 expenses? Can I award a sum of monies for Section 7 expenses Mrs. J.S.S. did not have the money to incur but says she would have incurred had she received monies from Mr. W.J.S.?***

24 Ms. J.S.S. claims for expenses she says fall under Section 7 of the Guidelines for both children. These expenses are:

1. Child care, because Ms. J.S.S. is employed outside the home.
2. Medical, including health care premiums, an ophthalmology assessment for each boy and extra aide time for W..
3. Tutoring for both boys.
4. Tuition for W. at T.[...], a private school.
5. Soccer for C..
6. Bowling for W..

25 In addition, Ms. J.S.S. claims for expenses she would have incurred had she had the money.

26 The two children, W. and C., are presently 12 1/2 years old and 11 years old respectively. W. is a special needs child. [FN3] He receives the assistance of an aide through Alberta Handicap Services 15 hours per week during the school year and 20 hours per week during July and August. W. is now enrolled at a private school, T.[...], in Red Deer. Counsel advise this school assists children like W..

27 Mr. W.J.S. does not dispute he is responsible for his proportionate share of the legitimate expenses. However, he says Ms. J.S.S. should provide proof of the actual expenses to determine his proper share, and his proper share should be calculated on "net dollars". See Section 7(3) of the Guidelines.

28 My ruling on each of the expenses follows. All expenses allowed are to be shared by the parties on a proportionate basis as set out in the Guidelines.

*Child care -- Section 7(1)(a)*

29 Child care, including after-school care, care during the school holidays and care in July and August is a proper Section 7 expense. The cost will be shared by the parties on an after tax basis. [FN4]

*Medical expenses -- Section 7(1)(b) and Section 7(1)(c)*

30 Ms. J.S.S. pays Alberta Health Care premiums for both boys. Thus, she pays the family amount each month. Mr. and Ms. J.S.S. will share the difference in cost between the family rate and the single rate for Alberta Health Care cover- age.

31 Ms. J.S.S. seeks monies for an ophthalmology assessment for both boys. Ms. J.S.S. has not established on evidence

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the necessity for such an assessment. Therefore, that expense is denied; Ms. J.S.S. has leave to renew this part of her application.

32 From my review of the affidavits, I agree with Ms. J.S.S. that extra aide time for W. is a proper section 7 expense. However, there are not unlimited monies available for this expense, as Ms. J.S.S. and Mr. W.J.S. are also sharing the cost of W.'s tuition at a private school. Therefore, once Mr. W.J.S. has paid \$500.00 as his yearly share of this expense, Ms. J.S.S. must discuss any further expenditures with Mr. W.J.S. and he will pay his share if he consents.

*Extraordinary expenses for education -- Section 7(1)(d)*

33 Both parents acknowledge that W.'s tuition for T[...] is a proper Section 7 expense. Mr. and Ms. S. will therefore share this expense. If W.'s tuition is claimed by Ms. J.S.S. as a tax expense, Mr. W.J.S. may apply for an adjustment to his payments for this expense.

34 Ms. J.S.S. also seeks monies for a tutor for W. and C.. The request is not supported by any evidence other than Ms. J.S.S.'s belief in her affidavit. I find Ms. J.S.S.'s belief, without anything more, is not sufficient evidence to order this expense. However, I again grant her leave to renew this part of her application.

*Extraordinary expenses for extra-curricula expenses -- Section 7(1)(f)*

**Soccer and Bowling**

35 The combined income of Ms. J.S.S. and Mr. W.J.S. is more than \$100,000.00 per year. Therefore, I do not find the costs for either activity to be an extraordinary expense.

36 If Ms. J.S.S. incurs any unexpected Section 7 expenses in the future, such as major dental expenses, she must discuss the expense with Mr. W.J.S.. Mr. W.J.S. will pay his share of those expenses if he consents, but he may not unreasonably withhold his consent.

37 Ms. J.S.S. also claims for expenses she would have incurred had she had the money. I do not accept this submission. Rather, I find a claim for Section 7 expenses must be predicated on actual expenses incurred or those that will be incurred, and an evidentiary foundation is provided. In this regard, I accept the position articulated by McIntyre, J. in *Krislock v. Krislock* (1997), 160 Sask. R. 212 (Sask. Q.B.) at paragraph 16:

¶16 A claim for contribution to expenses as set forth in s. 7 is predicated upon the premise the party is seeking a contribution to actual expenses incurred. Section 7 is not a basis for submitting a shopping list of estimated expenses for a variety of activities for the purposes of simply increasing the monthly child support payable. The party seeking contribution for s. 7 expenses should provide sufficient details to satisfy the court the expense is being incurred, or will be incurred, and particulars of the actual expense involved. The party seeking such contribution also has the burden of ensuring that the evidence or material submitted establishes that the expense meets the qualifying criteria applicable to the specific category of expense claimed as well as the qualifying criteria found in the opening words of s. 7(1).

**Issue 5 -- Calculation and Payment of Arrears**

38 Counsel calculated the amount of support paid by Mr. W.J.S. from 1993 forward and the actual Section 7 expenses incurred by Ms. J.S.S. from 1998 forward. The monies paid by Mr. W.J.S. to Ms. J.S.S. were:



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1998 \$4,500.00  
1999 \$3,323.00  
2000 \$3,780.00  
2001 \$9,840.00

39 The Section 7 expenses paid by Ms. J.S.S. are:

1998 \$1,909.00  
1999 \$3,113.25  
2000 \$3,938.00  
2001 \$8,916.00

40 Counsel advised me they would calculate the actual arrears based on my above findings. Therefore, I leave that calculation to them. However, if for whatever reason, counsel cannot agree on that calculation, they may come back before me within the next 60 days.

41 Unfortunately, it appears there is little communication between Mr. W.J.S. and Ms. J.S.S.. To assist the parties to determine child support in the future, Ms. J.S.S. will provide to Mr. W.J.S. a copy of her filed tax return and Notice of Assessment by June, 30 of each year; Mr. W.J.S. will provide Ms. J.S.S. with a copy of his filed tax return and the filed tax return of [...] Alberta Limited and the Notice of Assessment of each by the same date.

42 The payment of Section 7 expenses will be as follows for the year 2002 and forward: Ms. J.S.S. will provide to Mr. W.J.S. by mail any Section 7 receipts incurred in a calendar month at the end of each month. Mr. W.J.S. will pay Ms. J.S.S. within 30 days of receiving the receipt, his percentage share. If Mr. W.J.S. does not pay within this time period, Ms. J.S.S. may forward a copy of the invoice to Maintenance Enforcement to be enforced as part of a Maintenance Order.

***Issue 6 -- Costs***

43 The parties did not address this issue before me. They may speak to the matter of costs within the next 60 days if they are unable to come to an agreement.

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FN1. It appears the only application filed, returnable September 27, 1998, was a Notice of Motion to Disclose. This application was adjourned twice before it came off the list October 27, 1998. The first application for "interim, interim" child support appears to have been made on November 29, 2000.

FN2. Ms. J.S.S. began to work outside of the home in 1998 and her income for that year was \$18,096.00.

FN3. See Affidavit and Exhibits of Ms. J.S.S. sworn November 14, 2000.

FN4. Ms. J.S.S.'s income in 1998 was \$18,096.00; in 1999 was \$30,203.00; in 2000 was \$43,999.00; in 2001 was \$48,360.

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