TAB 5

Child Support - Factoring In The Older Child, The Ill Child And The Child Who Can't Withdraw

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New Developments in Child and Spousal Support

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CHILD SUPPORT - FACTORING IN THE OLDER CHILD, THE ILL CHILD AND THE CHILD WHO CAN'T WITHDRAW

BY

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Urban legend, and indeed anecdotal evidence seems to suggest that children are dependent for far longer today than they have ever been historically. What does the law say the about continuing financial obligations of parent to adult child. This paper examines the often controversial issues which arise when child support for the adult child or disabled must be determined.

1. DIFFERENCES BETWEEN FEDERAL AND PROVINCIAL LEGISLATION

One of the general trends in family law is a convergence of the jurisprudence so as to minimize the differences between the Federal *Divorce Act* and the provincial Family Law statutes when there is an over lap in the remedies available. However, there is one area where there are important legislative differences between the Federal *Divorce Act* and its Provincial counterparts - the obligation of parents to continue to support their adult or near adult children. Generally, the Provincial Family Law regime has clearer - some might say more arbitrary limits - on the support for adult children when compared to the Federal *Divorce Act*, R.S.C. 1985 c.3, as amended, hereinafter referred to as the "*Divorce Act*". The Ontario *Family Law Act*, R.S.O., 1990 c.F.3, (hereinafter referred to as the "*Family Law Act*"), seemingly clearer limits are found at section 31 which reads as follows:

> **Obligation of Parent to support child**
>
> 31(1) Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.
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> 31(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age and has withdrawn from parental control.

The more open ended construct is found in the *Divorce Act,* Section 2(1), which defines a dependent child as a child of the marriage.

> 2(1) Child of the marriage means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is 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 obtain the necessities of life.

(A) Divorce Act Criteria for Support for the Adult Child:

In Booth v. Booth [2002] O.J. No. 257 (Ont. S.C.J Pardu J. January 18, 2002) the Court found that it did not have jurisdiction to order child support under the *Family Law Act* for a child who was over the age of 16 due to the fact that the child was not in full time attendance at school at the time the application was before the Court. However, under the *Divorce Act*, Justice Pardu found that the Court did have jurisdiction to order child support while the child remained with the mother, could not support herself and was planning on attending school in the near future.

In Kennedy v. Kennedy [2000] O.J. No. 1167 (Ont. S.C.J. Master Nolan March 28, 2000) the Master was deciding a motion of interim child support for an adult child who was pursuing his law degree in the United States under the *Family Law Act* and under the *Divorce Act*. The Master provides a useful summary of the case law dealing with the issue of child support continuing when the adult child is pursuing a second post-secondary degree at paragraphs 10 to 18. Master Nolan concluded that the child, and indeed the whole family, required a reality check but ordered child support even when there were difficulties in the inter personal relationship between the father and son since only seven months of schooling remained and the payor had participated in making arrangements for the schooling. Many of the cases cited below were reviewed by Master Nolan.

Trottier v. Bradley (1999), 49 R.F.L. (4th) 432 is a decision under the *Divorce* Act. In this matter the daughter had completed post-secondary studies and was going to pursue doctoral

studies. The father moved to terminate child support based on the parent's Minutes of Settlement or that the daughter no longer qualified as a child of the marriage. While the father was unsuccessful on his application, he was successful before the Manitoba Court of Appeal. The Court of Appeal found that the daughter, because of her level of education, in pursuing doctoral studies and based on the breakdown of the relationship between the father and daughter, was no longer a child of the marriage.

Kembi v. Kembi [1999] B.C.J. No. 165 is a case in which the child was pursuing his first, post-secondary degree. This decision was made under the provisions of the *Divorce Act*. There was an long term estrangement between the child and the father, from whom on-going child support was sought. The court held that the existence of the estrangement between the adult child and the support payor was a factor to be considered, but it was not determinative as to whether the child remained eligible for support when pursuing post-secondary education.

There are also a number of cases that clearly stipulate that a child may continue to be dependent pursuant to the *Divorce Act*, past one university degree, although the onus for proof of dependency becomes heavier. See Martell v. Height [1994] N.S.J. 120, 3 R.L.F. (3d) 104 and Barbeau v. Barbeau [1998] O.J. No. 3580, 41 R.F.L. (3d) 282.

In Farden v. Farden [1993] B.C.J. No. 1315, 48 R.F.L. (3d) 60, (B.C.S.C. Master Joyce June 8, 1993) Master Joyce provides a convenient and frequently cited listing of the factors which should be considered by the Court in determining if an adult child, pursuing post-secondary education, retains the status of a child for the purposes of support under the *Divorce Act*. Master Joyce stated the following:

> Whether or not attendance in a post-secondary institution will be sufficient cause for a finding that the child is still a "child of the marriage" pursuant to the *Divorce Act* requires examination of all of the circumstances. It is not a conclusion which follows automatically from proof of attendance at the institution [McNulty v. McNulty (1976), 25 R.F.L. 29 (B.C.S.C.)]. In my view the relevant circumstances include:
>
> (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
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> (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;

(3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;

(4) the ability of the child to contribute to his own support through part-time employment;

(5) the age of the child;

(6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

(7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;

(8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

This listing of the criteria to determine if an adult child pursuing post-secondary education is entitled to support has been recently used in Johnson v. Johnson [2004] O.J. No. 3567 (Ont. S.C.J. Fam. Ct. Wood J. August 30, 2004), again the context was a determination under the *Divorce Act* as to whether an estrangement between the adult children and the parent from whom on-going support was sought relieved the payor from a support obligation. In that case support was awarded.

(B) When is Part Time Attendance Defined as Full Time – Family Law Act Criteria for Child Support for the Adult Child:

The convergence of jurisprudence in regard to the *Divorce Act* and *Family Law Act* become apparent in determining whether a child is enrolled in "full time attendance" under the *Family Law Act.*

In Wilson v. Wilson [2002] O.J. No. 4308 (Ont. S.C.J. Heeney J. October 7, 2002) the Court is clear that the requirement of full time attendance in an education program pursuant to the *Family Law Act* can be a fairly flexible concept. This flexible interpretation essentially is an

example of the convergence of interpretation applied by the Courts in the determination of dependents pursuant to the Federal and Provincial legislation. The Court looked at both the course load and the extra-curricular activities of the adult child to determine if that child retained the status of a child for the purposes of support pursuant to the Provincial Legislation. Justice Heeney summarizes the case and relevant case law at paragraphs 8 to 20:

¶ 8 Douglas Jr. is unmarried, but he was over the age of 18 during the period in question. The issue, therefore, is whether he was enrolled in a full time program of education.

¶ 9 The child's high school is within the Avon Maitland District School Board. The Board's Standard Operating Procedure No. 74 provides that a student who is taking 6 or more courses is considered to be a full time student, for funding purposes. A student taking less than 6 courses is considered to be a part time student. A maximum course load would consist of 8 courses.

¶ 10 At first glance, this might appear to provide an easy answer to this application. Douglas Jr. took only 4 courses during the year in question, so that he was considered to be a part time student by the Board. Thus, it would seem to follow that he was not "enrolled in a full time program of education", and was not, therefore, entitled to receive child support.

¶ 11 This straightforward approach was adopted by Kozak J. in Milne v. Milne, [1992] O.J. No. 1774 (Ont. Gen. Div.). The child in that case was found not to be enrolled in a full time program of education within the meaning of s. 31(1) expressly because the number of courses she was taking fell below the threshold set by her Board of Education for a full time student.

¶ 12 However, other cases have adopted a flexible approach to determining what constitutes a full time program of education. In Sullivan v. Sullivan, [1999] O.J. No. 3973 (Ont. Div. Ct.), the Divisional Court was considering a 22 year old child with a serious illness, who was only able to complete one or two courses at the university in a year. MacFarland J., speaking for the court, said the following at paragraph 3:

> While such a course load may not be considered "full time" by the university or for another able bodied student, we are satisfied that in the particular circumstances of this case given the nature of her illness and the opinions of her treating doctors, that the Plaintiff is enrolled in a full-time program as is required by subsection 1 of section 31 of the Family Law Act.

¶ 13 Mendes da Costa J. took a similar approach in Giess v. Upper (1996), 28 R.F.L. (4th) 460 (Ont. Gen. Div.). There, the child was enrolled in an "alternative" school, which was affiliated with a regular high school and was designed for students struggling with personal or family issues. Although a full course load would consist of 8 courses, the evidence was that it would be unusual for a student in this particular school to complete that many courses in an academic year. A good student would be expected to take between 3 and 6 courses. The child in question had taken 3 courses the previous year, and was taking 4 courses at the time of trial. It

was mandatory that the students be in attendance all day during regular high school hours, and they would be expected to be researching their subjects and receiving advice and counselling while not in class.

¶ 14 Mendes da Costa discussed the requirement of s. 31(1) that the child be "enrolled" in a full time program of education in the following passage, at p. 465:

> The word enroll signifies more than a mere statement by the child of the child's intention to pursue the course or courses selected and approved. The word refers to the participation by the child in the educational program. The Act requires that the child's participation be meaningful; it must be of such a nature and quality as to be consistent with the program's purposes and objectives.

¶ 15 The child's attendance record and report cards were excellent. It was held that the participation of the child constituted an enrollment within the meaning of the section.

¶ 16 Giess v. Upper (supra) was applied by V. Mackinnon J. in Kapounek v. Brown, [2000] O.J. No. 1301 (Ont. S.C.J.). The child in question was completing a two year program at Algonquin College in three years, with the approval of the program director. She attended field placements in addition to her classes in order to obtain work experience. V. Mackinnon J. noted in paragraph 13 that s. 31 did not require "full time attendance", but rather required that the program be a "full time program", which it was. Since the child's participation in the program was meaningful and of "such a nature and quality as to be consistent with the program's purposes and objectives", it was held that the child met the criteria for support under s. 31.

¶ 17 In Figueiredo v. Figueiredo (1991), 33 R.F.L. (3d) 72 (Ont. Gen. Div.), a similar approach was used in reverse to deny support to a child who was enrolled as a full time student, but failed to put forward any meaningful effort at his studies, such that he was failing 7 out of 8 courses while devoting his attention to his car and his friends. Fitzgerald J. held that mere enrolment in a full time educational program was insufficient to give rise to a support entitlement; the child also owed a duty to pursue that course with due diligence.

¶ 18 Goodearle J. expressly disagreed with the reasoning in Figueiredo in Copeland v. Copeland, [1992] O.J. No. 2677 (Ont. Gen. Div.). He held that s. 31 should be "strictly construed for the benefit of the children whose educational maturity it is intended to benefit". He, therefore, declined to impose the additional requirement of diligence and effort on the part of the child toward his studies, and held that "simple basic enrolment in a full time program of education is sufficient to warrant the continuation of support provided for in this section when a support order is premised on education enrolment" (p. 2).

¶ 19 In attempting to synthesize all of the above cases, I arrive at the following: s. 31 is intended to ensure that parents support their children while they are fully engaged in their education, and should be strictly construed for the benefit of children. While simple enrolment in a full program of courses may be sufficient to entitle the child to support, it is not a necessary precondition. A child can be found to be enrolled in a full time program of education while taking less than a full course load, so long as his or her participation was meaningful and consistent with the program's purposes and objectives.

¶ 20 One principal that clearly emerges from the preponderance of caselaw is that the policy of the board of education where the child is enrolled as to what constitutes full time attendance is not determinative of the issue under s. 31(1). It is simply one factor, among others, to consider.

2. THE ADULT CHILD AS LITIGANT UNDER THE *FAMILY LAW ACT*

Another difference between the *Divorce Act* and the *Family Law Act* in relation to child support, is the fact that under the Provincial legislation, the child himself or herself, being a dependant, can be the litigant seeking support. In Lynch v. Lynch [1999] O.J. No. 4559 (Ont. S.C.J. Perkins J. July 26, 1999) an 18 year old son brought an application for support against his father. The applicant was pursuing his high school education. In this matter, the son was successful in securing both interim child support of $1,000.00 per month and interim disbursements. On the issue of the son's status to commence this application, Justice Perkins found that the son was over the age of majority, was in full time attendance in an educational program and lived with neither parent because of a blameless breakdown, on the child's part, in the son's relationship with the mother and then the father. The son was successful in securing child support and interim disbursements. Thus, unlike the *Divorce Act* in which only the spouses or former spouse may commence proceedings for the support of adult children, the *Family Law Act* provides that the adult child who meets the requirements under Section 31 have independent standing to seek child support.

In Stratton (Guardian ad litem of) v. Gullage [2001] N.J. No. 332 (Newfoundland Pro. Ct. Howe Prov. Ct. J. November 30, 2001) the child in this matter was under the age of majority and

brought this child support application using a *Guardian ad litem* under the Provincial Family Law statute.

In J.D.F. v. H.M.F. [2001] N.S.J. No. 456 (N.S. Fam. Ct. Levy Fam. Ct. J. November 13, 2001) the applicant was youngest daughter of the respondent parents. There was breakdown in the relationship between the daughter and the parents. She had been living with the father, but he was unable/unwilling to provide adequate living accommodations. The daughter had used part of an $18,000.00 inheritance to fund her pursuit of a college certificate. The daughter also sought, when finished college, to attend university to obtain a Nursing Degree. The Court addressed the somewhat unique issue of the *Child Support Guidelines* regime when the applicant was the child and the respondents were the parents. In this matter, since the daughter would soon be over the age of majority, the Court used the discretion available to vary the amount of support each parent would have to provide. This was based on a finding that the daughter's expenses could be reduced if she so choose. Again, this was an application under the Provincial Family Law Statute.

3. REGAINING THE STATUS OF "CHILD" FOR THE PURPOSES OF SUPPORT UNDER PROVINCIAL OR FEDERAL CHILD SUPPORT LEGISLATION

Another source of controversy in the area of the support of adult children is whether or not an adult child can, in effect, regain the status child of the marriage after a period of time when the adult child did not qualify for support. In Nikita v. Nikita [2002] O.J. No. 1893 (Ont. Ct. of Justice Wolder J. May 3, 2002) the child had a somewhat "chequered" secondary and post-secondary education experience. There had been a period when the adult child did not qualify for child support, but later returned to a full study in general arts at Sheridan College. Thus the issue of regaining the status of child for the purposes of child support was before the Court. Justice Wolder cited Professor MacLeod's annotation:

¶ 22 In Bragg v. Bragg (2000), 188 Nfld. & P.E.I.R. 202, 569 A.P.R. 202, 2 R.F.L. (5th) 344, [2000] N.J. No. 14, 2000 CarswellNfld 22 (Nfld. U.F.C.), Professor James G. McLeod at page 346 [R.F.L.] stated:

> It is trite law that a child may become disentitled to support and then re-establish support entitlement. That the daughter may not have been

> entitled to support while she was out of school and employed full time did not prevent her from re-establishing support entitlement by returning to school.

and at page 347:

> At one time, many courts limited a child's right to support to one post-secondary degree. This no longer seems to be the case: [Morissette v. Ball (2000), 93 A.C.W.S. (3d) 1068, [2000] O.J. No. 73, 2000 CarswellOnt 77 (Ont. C.J.); largely affirmed at (2000), 103 A.C.W.S. (3d) 369, [2000] O.J. No. 4307, 2000 CarswellOnt 4164 (Ont. C.A.)] (obtaining a first post-secondary degree no longer a signal that a parent's obligation to financially assist a child in furtherance of the child's education is at an end).

Child support was ordered pursuant to the *Divorce Act* notwithstanding a two year hiatus and an attempt to return to school prior to the hiatus in which the adult child did not pursue his program with appropriate diligence.

In Bragg v. Bragg [2000] N.J. No. 14 (Nfld. S.C. U.F.C. Noonan J. January 19, 2000) the Court was prepared to award on-going child support under the *Divorce Act* for an adult child who had herself given birth and was living with her mother. The child support would continue until a fixed date or while the adult child completed a full-time education program which was the anticipated plan. Thus, we see a very flexible determination that a child, who her self has become a parent might be able to regain the status of a "child of the marriage" for the purposes of child support. In this matter, the parent was ordered to provide support while the child was awaiting to return to a full-time program of education.

4. CHILD SUPPORT AND A CHILD WITH INHERITANCES OR TRUSTS

As was seen in J.D.F. v. H.M.F. (supra) it is not unusual for the adult child to have access to inheritances/trust funds. Thus, how should the Court deal with those resource when determining entitlement and quantum of child support for the adult child? In Merritt v. Merritt [1999] O.J. No. 1732 (Ont. S.C.J. Fam. Ct. Heeney J. May 11, 1999), a decision under the *Divorce Act* the adult child had a trust fund with $15,000.00 and the quantum of child support

ordered was based upon the child accessing $5,000.00 per annum as the child's contribution to post-secondary education costs.

In Achkewich v. Achkewich [1998] A.J. No. 383 (Alberta Q.B. Rooke J. April 8, 1998) the respondent father argued that he should not have to pay child support for two adult children who had $18,000.00 trust funds from a grandparent. The applicant mother argued that the trust funds should be retained as a "nest egg" following the children completing their education. Justice Rooke found that the existence of the trust funds did not mean the children were not entitled to on-going child support, but the funds should be available to pay some of the education costs of the children.

In Wahl v. Wahl [2000] A.J. No. 29 (Alberta Q.B. Johnstone J. January 14, 2000) the "trust funds" took the form of R.E.S.P. to which the child was the named beneficiary. Again those funds where considered in fixing the quantum of support for the adult child pursuing post-secondary education.

In Welsh v. Welsh [1998] O.J. No. 4550 (Ont. Ct. (Gen. Div.) J.W. Quinn J. November 3, 1998), a decision under the *Divorce Act* the adult child was 31 years of age when the application was heard. She had received one collage diploma and was then taking university courses. The adult child had a number of unusual physical illnesses which made it impossible for her to take a "full" course load and the disabilities also made it impossible for the child to obtain gainful employment with her present skill set. The adult daughter was in receipt of a disability pension. The daughter also received an inheritance during the period of time when the respondent father had unilaterally terminated his child support payments and the hearing of this matter. Justice Quinn adjusted the amount of retroactive child support to take into consideration the inheritance received by the adult child.

5. DISABLED ADULT CHILDREN, CHILD SUPPORT AND SOCIETY'S ROLE

When dealing with the adult child who is permanently disabled and receiving some form of Government Pension or financial support, how are those funds treated in relation to support for the adult child? In Welsh v. Welsh (supra) the adult child was receiving a relatively modest disability payment from the Provincial Government. This decision was made under the *Divorce*

Act. The father argued that when dealing with a disabled, adult child, society/governmental support must replace a parent's obligation once the child has reached adulthood. It is crucial to recall that pursuant to the *Family Law Act* no child support is available to the adult child who is not enrolled "full time" in a programme of education. The issue, simply put, is whether the receipt of disability benefits from the state either disentitles a child to support, or reduces the parental obligation to simply supplement any state funded programme. Justice Quinn found that in Ontario, the financial situation of the support payor and not the qualifying from Government disability payments, should be the focus of analysis. Justice Quinn reviewed the law as follows:

> ¶ 19 In Harrington v. Harrington [See Note 24 below] the Ontario Court of Appeal had occasion to consider the obligation of a father to pay support for a 22-year-old daughter who, five years after separation, became mentally ill. She was receiving a disability allowance from the Ministry of Community and Social Services and under the Family Benefits Act, [See Note 25 below] "covering her basic needs". Morden J.A., who delivered the judgment of the Court, stated: [See Note 26 below]
>
> > I appreciate that Courts have treated a divorced wife's entitlement to welfare benefits as irrelevant with respect to her husband's obligation to pay her maintenance. The primary responsibility for the support of a wife rests on the husband; the State's obligation is a secondary one and comes into play when the husband is unable to meet that responsibility ...
> >
> > In the present case I think it is reasonable to take the daughter's receipt of payments under the Family Benefits Act into account. Having regard to the absence of a general parental obligation to support adult children it can hardly be said, in the particular circumstances of this case, that a parental obligation should come first and the State's second. The illness which has befallen the daughter is one of those misfortunes of life for which, at the present time, it is reasonable to expect some sort of social security response ... It is not unreasonable, depending on the parent's ability to pay, to consider his or her obligation to be of a residual nature.
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> (Emphasis added)

Note 24: (1981), 33 O.R. (2d) 150 (C.A.).

Note 25: R.S.O. 1980, c. 151.

Note 26: Supra at pp. 161-2.

¶ 20 I confess that, but for Harrington, I would have thought the obligation of parents, upon separation, to support disabled children was a primary one and the contribution, if any, by the State, residual or secondary. I would have expected that the for-better-or-for-worse gamble which attends the decision to marry, would have applied to the decision to bring children into the world. Nonetheless, I do not read the Harrington decision to mean that the support obligation of the payor-parent is always secondary to that of the State. The matter depends upon the resources of the parent in question. Obviously, a millionaire-father can reasonably assume his support obligation will be a primary one, whereas a father with modest means would expect his obligation to be secondary. In the case at bar the income of the father places him in the latter category. In any event, because of Harrington, I consider it correct to take Leeann's disability allowance into account when determining her financial needs and those of her mother on her behalf. [See Note 27 below] Having done so, I find that the disability allowance is insufficient to meet those needs. Therefore, if Leeann is a child of the marriage, as defined by s. 2(1) of the Divorce Act, it is appropriate to look to the father to supplement that allowance.

Note 27: See also Buckley v. Holden (1990), 32 R.F.L. (3d) 182, at 184 (B.C.S.C.) where it was held that the fact that the State has agreed to partially subsidize a child's "necessaries of life" does not, by itself, relieve the father of his support obligation.

¶ 21 The budget filed by the mother shows monthly child-care expenses of $2,016. Although the budget contains some fat, there is no point in going through the exercise of paring it down since, apart from several expenses which will be considered momentarily under s. 7 of the Guidelines, it is the income of the payor-parent that is material.

This approach in finding that the receipt of a Government disability pension does not, necessarily result in disentitling an adult child to on-going support, but rather may affect the quantum of support was also used in LeBlanc v. LeBlanc [1996] N.B.J. No. 30 (N.B.Q.B. Fam. Div. Smith J. January 19, 1996), B.B. v. D.G. (a.k.a Gurhoe v. Goff [1999] N.B.J. No. 296 (N.B.Q.B. Fam. Div. Graser J. June 3, 1999).

In Grimes v. Grimes [2002] A.J. No. 981 (Alberta Q.B. Langston J. July 26, 2002) the adult child had Downs Syndrome and was in receipt of a Provincial disability pension which provided her with income equal to that which a person receiving the minimum wage and full time employment might earn. In this matter, the child was also pursuing specialized post-secondary education/training. The Respondent was ordered to pay child support to top up the child's expenses.

In Buzon v. Buzon [1999] A.J. No. 371 (Alberta Q.B. Veit J. March 30, 1999) the child was receiving the same disability benefit received in Grimes v. Grimes, but the child was not pursuing any additional education/training. Justice Veit found that upon receipt of the Government benefits, the child was no longer entitled to child support. This proceeding was decided under the *Divorce Act*.

These cases, more than any other, point to the need for uniformity between Federal and Provincial Law in regard to child support.

The courts have been asked to extend the application of support legislation and marriage legislation to same sex spouses. There seems to be little reason for the application of two different legislative criteria. Indeed it is hard to understand why there has not been a challenge under the Charter to broaden the definition of dependency under the *Family Law Act*.

6. SECTION 7 EXPENSES, THE DISABLED CHILD AND RESPITE CARE

The issue of Section 7 expense and the disabled child raises a number of issues for consideration. In Welsh v. Welsh [1998] O.J. No. 4550 (Ont. Ct. (Gen. Div.) J.W. Quinn J. November 3, 1998), Justice Quinn was presented with a number of Section 7 expenses and had to determine if they were health related – what transportation costs are health related and which are personal. It is crucial to stress the importance of having evidence to link the expense to the paragraphs in 7(1) – particularly as the expense relates to the health expense of the child.

In Dunham v. Dunham [1998] O.J. No. 4758 (Ont. Ct. (Gen. Div.) Aitken J. November 18, 1998) the child was in receipt of a Government Pension. Those funds were considered when addressing the issue of Section 7 expenses. Justice Aitken found that the government pension

covered the Section 7 expenses for this child and thus did not order any contribution from the father.

The issue of whether or not respite care for the disabled or adult child can be considered a special/extraordinary expense under Section 7 of the *Guidelines* is a somewhat unsettled question - with motion and trial court decisions going both ways. This unsettled nature of the case law is nicely summarized in A.L.Y. v. L.M.Y. [2001] A.J. No. 506 (Alberta Q.B. Johnstone J. April 23, 2001):

> ¶ 41 Now that the FCSG govern the types of expenses which can be properly considered in ordering child support, the question arises as to whether respite care expenses fall within the FCSG.
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> ¶ 42 In Stanton v. Solby, [1999] B.C.J. No. 1348 (B.C.S.C.) the mother applied for child support for her severely disabled 22 year old son, who required 24 hour care. She received the services of a day worker Monday to Friday for a total of 13 hours over 5 days, however she found that was not enough of a break, and needed respite care two weekends each month and two weeks per year. She sought a contribution from her ex-common law spouse for respite care as a s. 7 expense under the FCSG. Master Nitikman reviewed the legislation regarding child support and concluded that respite care did not fall under any of the heads of special or extraordinary expenses, finding that there was no possible way to interpret the various categories of expenses under s. 7 so as to include it. The motion was dismissed.
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> ¶ 43 In Rykert v. Rykert, [2000] O.J. No. 4453 (Sup. Ct. J.) the petitioner made a claim for retroactive payment for daycare expenses for a healthy child pursuant to s. 7 of the FCSG. The Court considered s. 7(1)(a) of the FCSG which provides that a court may order child support to cover child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment. The Court held at para. 37:
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> > I have no doubt that the Petitioner acted reasonably in seeking some respite from child care by having Emily attend day care. However, there was no evidence that these expenses were incurred as a result of any of the enumerated factors in the sub-section and I cannot allow them.
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> ¶ 44 A similar conclusion was reached in Robert v. Robert, [1999] O.J. No. 39 (Gen. Div.).
>
> ¶ 45 In some cases the courts have ordered child support for respite care. In Allard v. Allard, [1999] O.J. No. 3535 (Sup. Ct. J.) the Court had ordered a sum of $25.00 per month for respite care relating to a delinquent child as part of a child support order. In Corkum v. Clarke, [2000] N.S.J. No. 285 (Family Court)

entitlement to respite care in the amount of $85.00 per month was granted as a s. 7 expense, having regard to the child's special needs and around-the-clock requirement for care. The Court held that it was grounded in s. 7(1)(c) as a health-related expense or potentially s. 7(1)(a) if "parental disability" was given a broad definition.

¶ 46 Finally, in Jackman v. Tarrant, [2000] N.J. No. 250 (Prov. Ct. - Fam. Div.) the applicant applied under s. 7 for respite care assistance for her autistic daughter who required constant care and supervision. The applicant received 25 hours per week from Health and Community Services. She claimed that she spent approximately $400.00 per month for additional babysitting costs for Jessica's care and asked that one half of it be payable by the respondent father. Although the Court held that it was reasonable, necessary and in Jessica's best interest that the applicant had some time when she was not working that she was not compelled to be at her daughter's side to attend to her needs, the full amount of the babysitting care was neither necessary, reasonable, nor in the child's best interests. The Court held that costs related to ten hours per month qualified as a special or extraordinary expense.

¶ 47 Despite these latter decisions, having reviewed the case law and the FCSG, I find that s. 7 of the FCSG does not under its current regime contemplate the respite care claimed in this case as a child care expense. That is because these costs are not a direct cost attributable to the child's own need for support.

In A.L.Y. v. L.M.Y. (supra) the Court also provides an excellent summary of the law in which the costs of respite care for a disabled child was shared using an award of spousal support.

Some of the reluctance on the part of the Courts to consider awarding Section 7 expenses for respite care might be related to how that expense was presented to the Court. If the respite care is needed for therapeutic reasons for the child – day programming, focused physical therapy, etc. then there might be the necessary evidentiary basis for finding that this care would qualify as a Section 7 expense.

7. CONCLUSIONS

It should be remembered that there are important procedural and substantive differences in the area of support for the adult child when dealing with the Federal *Divorce Act* and the Provincial *Family Law Act*. The *Family Law Act* does provide clearer – some would say more arbitrary criteria for an adult child to qualify for support. While the introduction of more

flexibility to the concept of full time program of education has lessened the arbitrary nature of support claims under the *Family Law Act*. Counsel must remember that participation in an program of education is required under the *Family Law Act*, while such clear limits are not present in the *Divorce Act*.

The analytical framework found in Farden v. Farden [1993] B.C.J. No. 1315, 48 R.F.L. (3d) 60, (B.C.S.C. Master Joyce June 8, 1993) has been applied by numerous motion, trial and appellate courts when addressing the issue of support for the adult child pursuing post-secondary education. This framework can assist in dealing with support during the first degree, post-graduate studies and the child who leaves and returns to post-secondary education.

With the advent of R.E.S.P.'s and family trusts, one must also consider the resources available to the adult child for his/her own support when dealing with both entitlement to child support and quantum of that support. Finally, one can only hope that the entitlements of disabled adult children under the *Family Law Act* will be expanded to include such children whether or not they are enrolled in educational programs.