

OUT OF THE NEST, BUT NOT THE POCKETBOOK

by Erin Connick

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When parents separate, the non-custodial parent pays child support for dependent children. What happens when the children pursue a post secondary education? Are they still dependent? Does the support obligation cease, continue or change? The answers to these questions vary, but it would be a mistake to assume that the support obligation ceases.

When looking at support for adult students, there are a number of questions: does a support obligation exist, how much support is payable, how long is support payable, and can the child be paid directly.

The *Divorce Act's* definition of a child of the marriage includes a child who is the age of majority or over but unable, by reason of illness, disability or other cause, to withdraw from the parent's charge or to obtain the necessaries of life. Pursuing a post secondary education has been identified as a reason for a child being unable to withdraw from the parent's charge.

Whether a child attending university remains a child of the marriage is decided on a case by case basis. The case law has developed some guiding factors, including:

- the availability of financial assistance, including student loans
- the reasonableness of the child's career plans
- the child's ability to contribute towards his or her support
- the parental plans for the child's education, especially those made during cohabitation
- whether the child has terminated the relationship with the paying parent
- the reasonable expectation of the child that his or her parents would have continued to furnish support if the marriage had not broken down

While the child's conduct towards the paying parent is considered, the fact that the child has terminated the relationship with the parent will not likely, on its own, disentitle the child to support.

Once the entitlement to support is met, the next question is the amount. The Federal Child Support Guidelines provide two options to determine the quantum. The first is to apply the Guidelines as if the child was under the age of majority. If this approach is inappropriate, the Court can order a different amount. This amount is determined by looking at the means, needs and other circumstances of the child and the financial abilities of each spouse.

The case law suggests that we start with the former approach, using the Guidelines' tables in addition to a proportionate share of the extraordinary expenses, including tuition and books. This approach may be inappropriate, for example, if the child is living away from home, or has significant earnings or savings. The possibilities for the quantum of support are endless, and the parents and the Court can be creative to achieve a fair result.

Unlike children under the age of the majority, post-secondary students have an obligation to contribute to their own support. This includes summer and part time employment and obtaining financial assistance if the same is available. When determining the amount of child support it is important to have solid financial information. This includes the parties' incomes, as

well as a detailed accounting of the child's sources of income, bursaries, student loans, and details of expenses, such as living expenses, tuition and books.

The question of how long the support will be paid remains unanswered. It would not be unreasonable to pay support while the child obtains his or her degree. There have been instances where the support obligation extends past a four year degree, but these are the exception rather than the norm. Of course, a change in circumstances will warrant a review of the support obligation. If the child quits school, drops to a part time status, or gets married, it could result in a termination of the support obligation.

It is also possible for a child to regain the status of a child of the marriage. For example, if the child takes a year off to work, and then returns to school, it would be possible, depending on the circumstances, for the child support obligation to recommence at that time, even though it had terminated the previous year.

Another issue that arises is the whether the child support should be paid to the custodial parent, or directly to the child. Once again this is case specific. The presumption, however, is that unless exceptional circumstances exist or the custodial parent consents, child support will not be paid to the child directly. This is especially the case when the child still lives at home. Paying the child his or her support directly may be a reasonable option, however, when the child attends university out of town.

The costs of post-secondary education continue to increase. This means we will likely see more discussion on the issue of child support for children attending post secondary institutions.

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