School is Not Out for the Summer – Post Secondary Studies?

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Child Support Fundamentals

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"SCHOOL IS OUT FOR SUMMER, SCHOOL IS *NOT* OUT FOREVER":
A Look at Child Support for Adult Children attending Post-Secondary Education

It is much more difficult to identify general principles relating to adult children attending post-secondary education institutions than it is to identify such principles for minor children. Beyond stating that adult children must make reasonable efforts to contribute towards their expenses, and even that principle is of somewhat uncertain application relative to specific issues such as the obligation to apply for student loans, perhaps the only general principle is that each case must be dealt with on its own merits. Justice Veit, Fisher v. Fisher [2007] A.J. No. 364.

The issue of child support for adult children pursuing a post-secondary education is a complicated, fact-driven analysis the outcome which appears to be within the complete discretion of the judge. This is an area in which counsel must be fully prepared from both an evidentiary standpoint as well as in relation to advancing all of the available legal arguments in order to maximize success for their client.

What follows is an overview of the key tests and some relevant decisions which touch on the issue of child support for adult children pursuing a post-secondary education. The paper does not purport to have canvassed every case on this issue and as such, readers are cautioned in this regard.[1]

APPLICATION LEGISLATION: *FAMILY LAW ACT & DIVORCE ACT*

The right of an adult child to obtain child support while pursuing post-secondary studies is purely derived from statute. The general principles of common law or equity cannot be relied upon when advancing an argument for child support. As such, counsel's arguments must be advanced via referencing the statute in question and prior jurisprudence only.[2]

Applications for child support for an adult child resident in Alberta can be brought in one of two ways: under provincial legislation, the *Alberta Family Law Act* or under federal legislation, the *Divorce Act (Canada).* Applications brought under the *Divorce Act* are limited to children of married parents.

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[1] Published articles which were relied upon in completing the research for the within paper and are suggested for further reading include: Nicholas Bala, "Child Support for Adult Children: When does Economic Childhood End?" (2008), Marie Gordon, "Making the Break: Support for Adult Children" (2006); Aaron Franks, "Post-Secondary Education and the 'Twixters'" (2005); Derek Jones, "Post-Secondary Education and the Federal Child Support Guidelines"; and Terry Hainsworth, "Support for Adult Children" (1999).

[2] For an overview of the historical context and development of the law in this area the 2001 paper of Derek A. Jones *Post-Secondary Education and the Federal Child Support Guidelines* is recommended to the reader.

Applications under the *Family Law Act,* can be apply to children of married or unmarried parents. The *Federal Child Support Guidelines* are referenced and relied upon in applications under the *Divorce Act,* and the *Alberta Child Support Guidelines* are referenced and relied upon in applications under the *Family Law Act.* The key differenced between these two acts and relevant applicable *Guidelines* are identified throughout this paper.

It should be noted that child support provisions of the *Alberta Family Law Act* were not amended or revised in the fall of 2011; the provisions relevant to the within issue remain the same.

Who Can Apply

Under section 50(1) of the *Family Law Act* the court may make an order for support on application by a child, parent or guardian, person who has the care and control over the child or any other persons where the court considers the application would be in the child's best interests.

Although there is no clear prohibition from children bringing an application on their own behalf under the provisions of the Divorce Act, case law on this issue is well settled and sets out that a child does not have standing under the Divorce Act, to apply for support; this relief can only be sought by a "spouse": Wahl v. Wahl (2005) (5th) 307 (Alta QB)[3]; Tapson v. Tapson (1970) 2 R.F.L. 305 (Ont C.A.); Busko v. Busko (1990) 28, R.F.L. (3d) 399 (Ont. S.C.); Skolney v. Herman, 2008 SKQB 55

***Divorce Act* Support Orders Have Priority**

Further to the above, it has been determined that an application for support under the applicable provincial legislation cannot be heard as long as there is a valid order for child support under the *Divorce Act.* The order for child support under the *Divorce Act* takes precedent and is trumped by the Supreme Court of Canada rule of "operational conflict".

In the case of Skolney v. Herman, *supra*, dealt with an application to vary an existing order for support made pursuant to the *Divorce Act*. The father had previously brought an application to amend the original support order on the basis that the children no longer lived with the mother. A

[3] The case of Wahl v. Wahl was originally commenced by the adult child. Counsel brought an application seeking a fiat to properly amend the claim so as to make the mother the application.