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What *is a* Parent's **Legal Obligation** to Provide for a Child's **Post-Graduate Education?**

The most common approach taken by Family Law practitioners is that parents are generally expected to look after the first degree or diploma of a child's higher education when the parties are living separate and apart, just as they would as if the parties were living together and the particular "child" was living with the parties.

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Some readers might be surprised to learn there is no general principle that a child seeking a second degree does not qualify for child support as stated by Freeman, J.A. for the Nova Scotia Court of Appeal in *Martell v. Height*[1] at paragraph 8 and as adopted by the BC Court of Appeal in *Neufeld v. Neufeld* 2005 B.C.C.A. 7:

> There is no arbitrary cut off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier.

The *Child Support Guidelines* provide two ways to determine the amount of child support for a child of the age of majority or over. Section 3(2) provides:

> Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is:
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the Court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs, and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Of importance to the determination of whether or not a person is a "child of the marriage" is the definition of "child of the marriage." A "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 (a) is under the age of majority and who has not withdrawn from their charge; or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 to obtain the necessaries of life.

By virtue of the definition in subparagraph (b), it is possible for a person of any age over the age of majority to be a child of the marriage as in some cases where the individual is unable by reason of illness or disability to withdraw from the charge of their parents.

Similarly, it is possible for a person to be over the age of majority but, due to the pursuit of education beyond high school, is unable to withdraw from his or her parents' charge. In other words, that individual is reliant upon his or her parents for support and maintenance while he or she is enrolled in post-secondary education.

In a recent decision of the British Columbia Court of Appeal entitled *Neufeld v. Neufeld*[2], the issue in that case concerned the entitlement to child support of an adult child attending university full-time, seeking a post-graduate degree in medicine.

Briefly, the facts in that case are that the parties were married for 27 years before they separated in 1999. They were divorced in 2001. There were two children, the daughter, J., born in 1981, and a son, born in 1984. The father was a medical doctor and the mother was a homemaker.

At the time the appeal was heard, J. had an undergraduate degree and had been accepted into medical school at the University of British Columbia, in accordance with the family's plans for her education before the parents' separation. It is common ground that J. was an "exemplary" student.

In the child support provisions of the Separation Agreement entered into in 1999, the parties agreed the father would pay child support for the two children in the "table amount," then agreed to be $1450 per month. They also agreed that "all costs of education" would be "special or extraordinary expenses" and they would "share the costs of reasonable special or extraordinary expenses, other than medical or dental expenses, equally."

Paragraph 13 of the Agreement provided that the obligation to pay child support ceases in respect of a child who:

> (c) becomes 19 years old, unless the child remains a "child of the marriage" within the meaning of the *Divorce Act* because of inability to become

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> self-supporting due to illness, disability, the pursuit of education, or other cause.

A Supreme Court Judge hearing the matter in Chambers found that the parties' daughter J. was entitled to child support as a "child of the marriage" within the meaning of Section 2(1) of the *Divorce Act*.

The Judge determined the amount of child support payable by the father by applying the Child Support Guidelines as if J. were under the age of majority. The father was ordered to pay both the "table amount" and "special and extraordinary expenses" of 50 percent of J.'s educational and residential expenses.

The father appealed that decision to the Court of Appeal. The father's argument revolved around the issue of the wording "child of the marriage." He argued that J. was not a child of the marriage but if she was, he argued she was nonetheless not entitled to the amount of child support determined by the Chambers Judge.

The Court of Appeal held that the Chambers Judge correctly determined that J. was a "child of the marriage" and did not interfere with the amount of child support determined payable by the father, except to order that he pay it in two lump sums of $11,000 each (less 50 percent of any scholarships, bursaries, and awards received by J.). Such payments were to be made on July 1 and January 1 of each year that J. was in attendance at medical school, commencing July 1, 2004.

In arriving at its decision, the Court of Appeal cited *Martin v. Martin* [3] for the proposition that the pursuit of education necessary to equip a child with a career qualifies as "other cause" for continuing dependence of a child of or over the age of majority.

The Court of Appeal also considered *Ciardullo v. Ciardullo* [4], a decision of the BC Supreme Court with the proposition that in determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessaries of life, a Court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient.

The Court then went on to consider a list of relevant (surrounding) circumstances as formulated in *Farden v. Farden* [5] and referred to by the BC Court of Appeal in *Darlington v. Darlington* [6].

The factors outlined in *Farden* were:

(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;

(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 students;

(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.

The Court of Appeal in *Darlington* made it clear that there does not have to be evidence on all of the factors to establish that a child is a "child of the marriage" because she is pursuing an education. Nor is the list to be considered an exhaustive list of the relevant factors.

The Court in *Neufeld* adopted the reasoning of Martinson, J. in *Wesemann v. Wesemann* [7] where Martinson, J. provided the following rationale for finding the "usual *Guidelines* approach" is inappropriate:

> The usual *Guideline* approach is based on certain factors that normally apply to a child under the age of majority. That is, the child resides with one or both parents. The child is generally not earning an income and is dependent upon his or her parents.
>
> The usual *Guidelines* approach is, in most cases, based on the understanding that, though only the income of the person paying is used to calculate the amount payable, the other parent makes a significant contribution to the costs of that child's care because the child is residing with him or her.
>
> The closer to the circumstances of the child are to those upon which the usual Guidelines approach is based, the less likely it is that the usual Guidelines calculation will be inappropriate. The opposite is also true. Children over the age of majority may reside away from home and/or earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different.

Other factors may also apply…including the means and the financial ability of the parent or spouse to contribute to the support of the child.