Will it Ever End?

Child support obligations for children over 19

in the age of delayed adulthood

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INTRODUCTION

The implementation of the Federal Child Support Guidelines in 1997 ensured predictability for support of minor children and left the determination of support for adult children subject to judicial discretion. And while it is a generally recognized principle that parents have an obligation to support their children, the question is, when does that end? Historically, that obligation has continued until a child reaches the age of majority, but the socio-economic climate that has developed over that last generation has resulted in delayed independence for young adults, meaning more support is required from their parents. For intact families, they are free to make decisions about supporting adult children based on family values, but recent trends show an increasing inclination on the part of Canadian Courts to impose a legal obligation on separated parents to support their children into adulthood.

A recent Stats Can study measuring the pace of transition into adulthood of 18 – 34-year-olds found that fewer have crossed any of the five traditional bridges: leaving school, leaving home, steady full-time work, a conjugal union and parenthood.[1]. The study confirms what we are all seeing around us, and what some of us are experiencing first-hand, that the path to adulthood is not as straight as it once was. The transitions of todays young adults are described as delayed and elongated. Delayed because they are taking more time to complete the first major transition of leaving school which postpones all subsequent transitions; and elongated because each of the following transitions are taking longer to complete, stretching the process from late teens to their early thirties. I pause here to allow those of you with children reaching their late teens to steady yourself. This is what's coming. Our children are taking longer to start school and longer to leave school. Since 1990 the number of jobs requiring a university degree has doubled,[2] meaning young adults are working towards higher educational levels. High tuition costs and low paying, precarious, part time jobs, are delaying their ability to leave home, to become financially self-sufficient and to enter into their own spousal relationships. In 1971, 80% of young adults were in

[1] **s://www150.statcan.gc.ca/n1/pub/11-008-x/2007004/10311-eng.htm**

[2] Association of Universities and Colleges of Canada. 2007. "Trends in higher education: Volume 1. Enrolment." Ottawa., p. 31. Accessed 1 May 2007.

a conjugal relationship by age 25, by 2001 those numbers had dropped to 40%. 2022 statistics indicate just 14% of those under 25 are either married or living common law[3].

The change in living arrangements of young adults over the last 30 years has been dramatic. Far fewer of them are getting married and having children, and far greater are remaining living at home, or leaving home and returning multiple times. Fertility rates for women under 30 have dropped significantly, in large part because of the pursuit of higher education and participation in the labour force. Those women also remain living longer in the family home. In 1971, three-quarters of 22-year-olds had completed their education, half were married and one in four had children. By 2001, Stats Can reported that half of 22-year-olds were still in school, only one in five was in a conjugal union (usually common-law) and one in eleven had children. By 2021, the statistics regarding youth education and unemployment were drastically impacted by the Covid-19 Pandemic. Stats Can reported that the youth unemployment rate nearly tripled after the initial lockdowns and remained high[4] and in 2019, an all time high of 73% of Canadians aged 18-34 had earned post-secondary education, compared to 59% in 2000.

You don't have to have adult children of your own to have noticed the change. It's harder for young people today to find a job that pays a living wage, and one that makes them feel secure enough to move out of their parent's basement and reach the markers of adulthood.[5] So, what is the corresponding impact on families, and specifically separated parents, when these young adults remain financially dependent? The scope of this paper is to examine how our courts are responding to this change in demographic when the children *cannot* withdraw from the charge of their parents.

STATUTORY REFERENCES

In British Columbia, an order for child support may only be made if the child in question remains a child as defined either by section 1 or 146 of the *Family Law Act*, or a child of the marriage under section 2(a) of the *Divorce Act*.

[3] Estimates of population as of July 1st, by marital status or legal marital status, age and sex (statcan.gc.ca)
[4] The Daily — Study: Youth and education in Canada (statcan.gc.ca)
[5] https://news.harvard.edu/gazette/story/2021/11/why-kids-are-delaying-adulthood

The *Divorce Act* defines "child of the marriage" in s. 2(1):

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
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> (a) is under the age of majority and who has not withdrawn from their charge, or
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> (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.

Age of majority is defined as the age of majority determined by the laws of the province where the child habitually resides. B.C, Nova Scotia, New Brunswick, NWT, Yukon and Nunavut all have 19 as the age of majority. In PEI, Quebec, Ontario, Manitoba and Alberta the age of majority is 18, and in Saskatchewan, it is 16.

The *British Columbia Family Law Act* section 1 defines a child as a person who is under 19 years of age, and then at section 146, expands the definition to include:

> a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians.

Once it is determined that a child is eligible for support, the *Federal Child Support Guidelines* are engaged as the statutory provision pursuant to which the Order for support can be made and where the tables are found, which set out the monthly amounts payable.

The *Federal Child Support Guidelines* ("CSG") provide the following at s. 3(2):

> (2) 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
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> *(*a*)* the amount determined by applying these Guidelines as if the child were under the age of majority; or
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> *(*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.

I hadn't considered the language in section 3(2)(b) closely, until I read the case of *Lewi v. Lewi*, in which the presumptive approach to calculating support pursuant to the tables, was explained: [6]

> 127 Section 3(2) provides two ways of determining the amount of child support for a child of majority age. Under s. 3(2)(a), the amount of support for a child over the age of majority is calculated in exactly the same way as that for a minor child. The opening words of s. 3(2)(b) indicate that the amount determined by applying s. 3(2)(a) is the presumptive amount. Section 3(2)(a), by adopting the same approach for children of majority age that applies to minor children, fosters predictability, consistency and efficiency in the resolution of disputes concerning the amount of support for children of majority age.
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> 128 Section 3(2)(b) only comes into play "if the court considers that approach to be inappropriate". It is apparent that the word "approach" was chosen with care, as the word "amount" is used six times in the section. In this way, s. 3(2)(b) differs from s. 4, which provides the court with discretion to depart from the "amount" determined under s. 3 where it considers that amount to be inappropriate. The words "that approach" refer to the technique dictated by s. 3(2)(a)-namely applying the Guidelines "as if the child were under the age of majority". I will refer to that technique as the "standard Guidelines approach". Before resorting to its discretion under s. 3(2)(b), the court must conclude that it is inappropriate to apply the Guidelines as if the child who is actually of majority age were a minor.
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> 129 The word "approach" makes it clear that the court cannot depart from the application of the Guidelines simply because it considers the "amount" determined under s. 3(2)(a), *i.e.*, the table amount or additional expenses under s. 7, to be inappropriate. It must be satisfied that the standard Guidelines approach is inappropriate; clearly an exceptional situation rather than the rule. This further promotes predictability, consistency and efficiency in family law litigation.
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> [emphasis added]

The table amount for child support provides for the parents to pay the ordinary costs related to caring for a minor child, such as food, clothing, shelter, as well as some educational and recreational expenses[7]. Child Support for adult children can be ordered pursuant to section 3(2)(a) or (b), and the court considers whether the table amount (the guideline approach) is inappropriate based on the circumstances of the adult child and the assumptions on which the

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[6] 2006 2006 CanLII 15446 (ON CA), [2006] O.J. No. 1847 (C.A.)
[7] Clarke v. Clarke, 2014 BCSC 824 at paragraph 49

table amounts are based. Those considerations are: the child residing with one or both parents, not earning an income, remaining dependent on a parent. The closer the circumstances of the adult child are to the underlying assumptions of the guidelines, the more likely the table amount will be ordered[8].

DISCUSSION

JP Boyd's article, "The expanding meaning of "other cause": Support entitlement beyond the age of majority"[9] summarizes the approach previously taken when considering child support for adult children. JP's writing is so entertaining, it is worth quoting here:

> "Once upon a time, questions about the entitlement of adult children to benefit from the ongoing payment of child support under the act generally called for a fairly straightforward analysis, despite a smattering of pre- and post-Guidelines cases to the contrary. Is the child in full-time attendance at a post-secondary institution aimed toward a remunerative career? No? Alright then, does the child suffer from an illness or disability of such gravity that they are unable to be or become self-sufficient? No? Well then, I'm sorry but that's it for support."

The "once upon a time" refers to cases like Master Joyce's decision in *Farden v. Farden* (1993), 1993 CanLii 2570 (BCSC), 48 R.F.L. (3d), adopted by the BCCA in 1997 and followed in a number of post *Guideline* Cases. The *Farden* factors are well known. In determining whether child support continues for a child pursuing post-secondary studies, the court will consider:

1. whether the course of studies is part time or full time;
2. whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
3. whether the career plans of the child are reasonable and appropriate;
4. the ability of the child to contribute to his/her own support through part-time employment;
5. the age of the child;
6. the child's past academic performance and 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 co-habitation;

[8]Wesemann v. Wessemann (1999) CanLii 5873 (BCSC)

[9] The expanding meaning of "other cause": Support entitlement beyond the age of majority - Slaw http://www.slaw.ca/2020/02/14/

8. 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.

There does not have to be evidence of all of the *Farden* factors for the claim to be successful[10]. They are not seen as a statutory check list, rather they are considerations for the court in assessing whether the situation of the child is consistent with the definition of a child of the marriage. Oh for simpler times.

JP's article suggests the court's approach has softened since the 2006 decision of *D.B.S. v. S.R.G.* 2006 SCC 37 in which the court said,

> "An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status."

JP's paper reviewed the caselaw where expanded definitions of 'other reasons' for continued support were considered and he concluded:

> "If these demographic trends continue, I expect that the presumption against the entitlement of adult children to support expressed in *Geran*, *Szitas* and *D.B.S.* will continue to erode. Counsel should no longer leap to the conclusion that adult children who are neither disabled nor in enrolled in post-secondary studies cease to qualify as "children of the marriage," but pursue a deeper contextual inquiry into the reasons why a child is unable to withdraw from their parents' charge or obtain the necessities of life."

The most common reasons a child is unable to withdraw from their parents charge, are the pursuit of post-secondary education, and illness or disability.

<u>Pursuit of Post-Secondary Education</u>

The pursuit of education necessary to equip a child with a career falls within the definition of "other cause" for continuing dependance of a child over the age of majority[11]. It is not sufficient to simply prove attendance at an educational institution, the court must consider the surrounding circumstances in determining whether a child pursuing an education is unable to

[10] Darlington v. Darlington (1997), 1997 CanLii 3893 (BCCA), 32 R.F.L. (4th) 406
[11] W.P.N. v. B.J.N., 2005 BCCA 7

withdraw from the parents charge while pursuing their first undergraduate degrees. It is interesting to note that there is no general principle that a child pursuing a second degree does not qualify for child support, although as age and scholastic goals advance, the onus of proving dependency is more challenging.[12] In 2005 the BC Court of Appeal upheld the lower court decision finding that a child pursuing a medical degree was still eligible for child support because the parents had anticipated the cost when they were an intact family.[13] In 2013, the BCCA again in *Nordeen v. Nordeen*, 2013 BCCA 178, said that a child who is attending post-secondary education *may* still be a child of the marriage if, "considering all of the child's circumstances, the child's educational pursuits are reasonable" and if they are, "whether it is appropriate that the pursuits be financed by the parents." The standard then, is reasonableness in all of the circumstances of the specific case when considering child support for adult children pursuing post-secondary education.

Something about the term delayed adulthood and young people taking six or seven years to complete a first undergraduate degree at their parents expense smacks of entitlement to me. It brings to mind memes and tic tocs about millennials (1981 – 1996) and those hot on their heels Gen Z'ers (1998 to 2012). But what inspired this paper was a recent trend in my practice, where parents are asking and being asked to pay child support for young adults who *cannot* withdraw from their financial charge, because of illness or disability.

Illness or Disability

The first step in the analysis is determining whether or not a child is a child as defined by the DA or the FLA. Once there has been a finding that the child qualifies, the consideration moves on to a determination of quantum. There are a number of cases that have decided that the receipt of benefits, including government assistance for disability (PWD benefits) renders the underage approach to determination of child support under section 3(2)(a) inappropriate particularly when the incomes of the parents are modest.[14] In researching this paper I spoke to a

[12] Martell v. Height (1994), 1994 NSCA 65 (CanLii), 3 R.F.L. (4th) 104

[13] W.P.N. v. B.J.N., 2005 BCCA 7

[14] Kollmuss v. Kollmuss, 2015 BCSC 1101 and Wilms v. Wilms, [2019] B.C.J. No. 2161

number of parents of children with disabilities to get more of an understanding of the BC PWD benefits. To be eligible for PWD:

- You must be at least 18 years of age
- Your disability must be severe and be expected to last for at least 2 years
- Your disability must directly and significantly restrict your ability to perform daily living activities
- Because of your disability, you need significant help from another person, assistive device, or assistance animal

The parents all said that the PWD benefits were wholly inadequate for their child's needs since the benefits cover a huge range of disabilities. When I asked about the gap between expenses and funding, one woman laughed and said it was a canyon not a gap. Nearly all of the intact families had one parent who stayed at home full time to care for the disabled child. Of the separated families I spoke to, half of the primary care parents were struggling to get any financial assistance from the child's other parent, and none (not even one) of them felt they could afford a lawyer to help them. In one group discussion I had, the separated parents were stunned to hear that an adult child without an intellectual disability could qualify for ongoing child support. One parent spoke about BC lawyer, Tim Louis, who is a full-time practicing lawyer, and a quadriplegic. The parent wondered why an adult child without an intellectual disability would qualify for support at all. Good question, I said. So, what is the level of disability required by the Court in order to reach the conclusion that the young adult is eligible for child support?

Caselaw

In the 2020 case of *P.S.C. v. S.C.C.*[15], the Provincial Court of BC considered the circumstances of a child over the age of majority, who was not enrolled in school full time. He suffered from anxiety and depression and had been admitted to hospital under the MHA. The mother was claiming child support, and the father claimed the child was co-dependent. The judge found that their son was a child of the marriage because of his mental health challenges and his continued efforts to complete his grade 12 diploma, and then moved onto concluding that the table amount was not appropriate based on the section 3(2)(b) factors of the *FCSG*. In this case,

[15] P.S.C. v. S.C.C., 2020 BCPC 165

the child had not taken advantage of the benefits available to him as a PWD, he worked part time and had minimal monthly expenses. The custodial (primary) parent mother earned more than the payor father, and the court found that an order of child support would result in the child receiving funds greater than his expenses.

In *Briard v. Briard*, 2010 BCCA 431, the Court of Appeal upheld an order that a father pay $500 per month child support for his daughter who was over the age of majority and had Down's Syndrome. The amount of support was calculated after consideration of her government benefits of $900 per month. Although the payor father had argued that all of the child's needs were met by the receipt of government assistance, the Court found that approach inconsistent with the section 3(2)(b) analysis which required the court to consider the amount of child support that would be 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."

In *Lougheed v. Lougheed*, 2007, BCCA 396 the Court of Appeal upheld the Supreme Court decision that the father pay child support while his child was living in an assisted living facility. That case considered the meaning of the "Necessaries of life" which they described as:

> … a term to be applied to the specific applicant considering that applicant's reasonable expectations. It is not simply a general term defining delivery of the basic food groups, a dry, heated residence and adequate clothing.[16]

In *Moore v. Moore*, 2014 BCSC 2210, the Court reviewed the definition of "necessaries of life" as discussed in *Lougheed* and *Briard* and found that the child remained a child of the marriage and ordered ongoing support, saying that, "While C might survive on the amount he receives in government benefits, the court must consider what is reasonable in light of his family circumstances, not simply a poverty level of necessities[17].

In *P.E.R. v. C.A.R.* 2018 BCSC 339, the issue before the court was whether the parties' daughter, age 32, was still a child of the marriage. The mother argued that their daughter was unable to function independently because of her mental illness that required her to have day to

[16] Louise v. Scheuer (1995), 1995 CanLii 2988 (BCSC), 15 B.C.L.R. (3d) 270
[17] Moore v. Moore, 2014 BCSC 2210

day supervision. The father argued that the daughter was unable to be independent because of her own willful acts including use of illicit drugs and refusal of treatment. Through the trial it was revealed that their daughter had been diagnosed with schizoaffective disorder and significant brain damage, and it was the opinion of the expert that her drug dependance was secondary to her mental illness. The father was ordered to pay ongoing and retroactive child support.

In BC courts, the approach taken where the child is receiving PWD Benefits is to determine the amount of assistance that is appropriate from the non-custodial parent, the primary focus being on the needs and circumstances of the child. The line of cases following Briard[18] have established that the receipt of PWD benefits triggers a section 3(2)(b) analysis, and serves as a reminder that the question is not whether care can be offloaded to the state, but instead, examining what level of financial assistance is appropriate from the non-custodial parent.

Being unable to withdraw from a parent's charge due to illness or disability usually requires some form of medical evidence, either physical or psychiatric, to support a finding that a child is unable to withdraw. Where there is an absence of medical evidence, there will likely not be a finding that a child is unable to withdraw from care of parents[19]. However, the *L.L.M* case referenced below, cited *H.M.R. v. D.G.R,* 2010 BCSC 396 at para 23, 25 and 30, which stands for the proposition that there are two important factors to consider in determining whether an adult child with disabilities is unable to obtain the necessaries of life, the child's employability and the extent of the child's disability. Madam Justice Lyster, in *L.L.M.* acknowledged that there was "no expert evidence before the court," but said the *H.M.R.* case supported a finding that a person's disability could be demonstrated in the absence of medical evidence.

The Saskatchewan Court of appeal described the evidentiary requirements in *Ethier v. Skrudland,* 2011 SKCA 17, at paras. 16-17:

> Proof that an adult child remains a "child of the marriage" will, in most circumstances, require the recipient of child support payments to adduce evidence as to the specific nature and consequences of the illness, disability or the other cause of the adult child's failure to withdraw from parental charge or to obtain the necessaries of life and how the nature and consequences of such illness, disability or other cause bear upon the adult child's ability (or inability) to withdraw from

[18] Briard v. Briard, 2010 BCCA 431, C.L.C. v. B.T.C., 2012 BCSC 736, Poehlke v. Poehlke, 2012 BCSC 1029, Ross v. Ross, 2024 BCCA 131 and Carten v. Carten, 2015 BCSC 19

[19] J.V. v C.H, 2018 BCSC 1732

> parental charge or to obtain the necessaries of life. It is not enough to simply state that an adult child has not withdrawn (or cannot withdraw) from parental charge or is unable to obtain the necessaries of life or that a parent pays the adult child's expenses.

Once a child reaches the age of majority, the presumption is that the child is no longer a child and child support is no longer required. If the adult child is still living at home but not ill or disabled and not prevented by any other reason from withdrawing from the charge of the parents, then that adult child is no longer entitled to support. The parent who makes a claim that an adult child remains a "child of the marriage" bears the burden of proof on a balance of probabilities[20]. Recipients are required to establish how the illness prevents the child from working or pursuing a post-secondary education[21] and the wording of the legislation requires more than a "mere lifestyle choice to remain dependant."[22]

In 2015 the BCCA considered ongoing support of an adult disabled child in the case of *Dallas v. Dallas,* argued by our colleagues Jeff Rose, K.C. and Larry Kahn, K.C. The Court said the mother had an ongoing obligation to pay child support for her 24-year-old disabled son who was unable to live independently, and lived with his father. The son received government assistance and had an independent stream of income that was funded by the father. He was also likely to receive a significant inheritance in the form of a life estate to property from both of his affluent parents. The specific issue that was overturned was the lower court's dismissal of the father's application that the mother pays child support. At paragraph 23, the BCCA said,

> " ……But the application does engage a principle, which is that both parents are responsible for the ongoing support of any child of the marriage. With all due respect to the chambers judge, it seems to me that her solution – allowing the mother to escape any financial responsibility merely because Mr. Dallas is financially comfortable and Sebastian has assets that can be resorted to if necessary – overlooked this principle[23].

The Alberta case of *LLM v. PJM*, 2018 ABQB 433, dealt with the mother's application for child support for two children ages 22 and 27, both diagnosed with autism spectrum disorder. The mother relied on the *Divorce Act* to argue that both children were children of the marriage and eligible for ongoing support. The father, who had been estranged from the children for eight

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[20] *T.A.P. v. J.T.P*, 2014 BCSC 2265, at para. 21; *Classen v. Anima*, 2011 BCSC 868 at para 6
[21] H.S.S. v. S.H.D., 2016 BCSC 1300
[22] Kohan v. Kohan, 2016 ABCA 125 at para 14
[23] Dallas v. Dallas, 2015 BCCA 147

years, disagreed on both counts. The Court ordered ongoing support for only one of the children, whose diagnosis was supported by medical evidence.

L.L.M v. D.R.M., 2022 BCSC considered the issue of a 20-year-old child living with his mother and not working and not attending school. He had taken some welding courses but had been advised by his doctor not to work in that field because he had scoliosis. He had tried other jobs but filed an affidavit saying that he had left them all, for health reasons. The father, who was estranged from the child, argued that his son could take other jobs that didn't require heavy lifting. He believed his son was lazy or quit his jobs for reasons unrelated to his health. Despite the complete absence of expert medical evidence, and relying on secondhand evidence about a scoliosis diagnosis, the judge found him to be a child of the marriage and entitled to support.

In *M.C.D. v. D.A.D,* 2017 BCSC 1832 the court declined to order child support for an adult child in the absence of cogent evidence that she was unable to withdraw from her parents charge.

Our colleagues Fiona Robin and Paul Albi, K.C. argued the case of *M.A.T v. K.P.T,* 2017 BCSC 1603 in which Madam Justice Flemming was asked to decide whether the parties daughter, born in 1996 (age 21 at the time of the application) remained a child of the marriage because mental health difficulties prevented her from working or attending school. The court noted that the primary parent father had made deliberate attempts to estrange the children from their mother. His conduct was described as "irresponsible in the extreme." The father argued that the children were estranged because of the mother's suicide attempts. A sad case to be sure. The court referred to the *H.S.S.* case cited above and said that the father was required to show how the daughter's illness prevented her from working. The medical evidence consisted of testimony from counsellors who treated the daughter for anxiety, possible ADHD, and showed disabling symptoms of social anxiety and panic disorder with agoraphobia. The court concluded at paragraph 167 that the daughter remained a child of the marriage because of mental health issues which prevented her from working full time or attending post-secondary school.

In *Friesen v. Friesen,* 2021 BCSC 2447, Madam Justice Forth agreed with the father who relied on the *H.S.S.* case to argue that their son was not eligible for support because the mother had not established how an illness or disability bears upon the adult child's inability to withdraw from the parent's charge.

In *C.Y.J. v. V.R.J.* 2022 BCSC 1901 the parties agreed that the adult child had serious emotional and physical limitations which the judge concluded could be characterized as disabilities including PTSD, depression, generalized anxiety, insomnia, migraines and panic attacks. The judge cited *C.A.W. v. K.C.S.*, 2018 BCSC 298 in which Madam Justice Murray found the adult child who lived with and was fully supported by his mother, to be a child of the marriage and entitled to support. The child in the *C.A.W.* case had been diagnosed with general anxiety disorder and recurrent major depressive disorder. Mr. Justice Taylor in *C.Y.J.* found the evidence to be "persuasive" and decided that the child was unable to obtain the necessaries of life and was therefore eligible for ongoing child support despite his more advanced age of 27.

In *James v. James*, 2022 BCSC 1402, Angela Kerslake argued before Madam Justice Burke that her client's obligation to pay child support for their adult child should be terminated based on section 3(2)(b) of the FCSG despite conceding that their son remained a child of the marriage and unable to withdraw from his mother's care or obtain the necessaries of life. She argued that the adult child was receiving the necessaries of life through his PWD benefits and his employment income. At paragraph 31, the court cited the decision of Mr. Justice Voith in *Kollmuss v. Kollmuss*, 2015 BCSC 1101:

> In considering an appropriate amount or level of support, the court engages in the usual condition, means, needs and other circumstances analysis; however, in these cases, the reasonable ability of the child to contribute to those needs is also incorporated, or factored, into the analysis. Ultimately, a court will calculate a child's reasonable costs and deduct the amount of the disability benefit in order to quantify the relevant shortfall. The court will then consider the parents' incomes and the usual table amount. The child's shortfall is then often divided in proportion to the parents' respective incomes.

The Court in the *James* case also cited the *Jensen v. Jensen*, 2018 BCSC 283 case which says, the "receipt of state funded benefits evidences that financial responsibility for disabled adults is being shared by the adult's parents and the state." The conclusion was that the father was ordered to pay ongoing child support of $250 per month which was an equal share of the monthly shortfall in the adult child's expenses.

Similarly, the court was asked to consider the support shortfall of an adult child receiving PWD benefits ($1,410 per month) in the case of *Martin v. Martin*, 2021 BCSC 2015. Their daughter Alicia was 20 years old and suffered from a complex neurological condition called

medically intractable epilepsy. She required full time care and supervision. Following the four part framework described in *Wesemann* above, and relying on *Kollmuss* and the line of cases that followed, the court analyzed the child's reasonable living costs and where there is a shortfall in coverage of those expenses after the PWD benefits are applied, the gap is to be filled by the parents in proportion to their income. After completing that analysis, the court referenced a number of cases that identified the missing consideration of the time and effort contributed by the custodial parent. In *Wright v. Frederickson*, 2017 BCSC 1062, *TAP v JTP*, 2014 BCSC 2265 and *A.M.P. v. T.W.P*, 2017 BCPC 335 the courts factored into their decision the needed constant care that was provided by the primary care parents. In *J.D. v. W.D.T*, 2019 BCPC 21 Judge Gouge noted at paragraph 10 that the budget provided by the mother was reasonable, but deficient in one respect, because it didn't make any allowance for the cost of full-time supervision and care of their child, which she was providing. In that case, the judge added $500 per month to the child's living expense budget. The court in *Martin* concluded that a caregiver allowance of $700 was appropriately added to Alicia's monthly expense budget in assessing the shortfall of $1,229 which was allocated between the parties in proportion to their incomes.

Estrangement

Since the issue of estrangement came up in so many of the cases I read for this paper, I started looking to see whether it impacted the court's findings in relation to child support for adult children. In the 2016 decision of *Shaw v. Arndt*, 2016 BCCA 78, Madam Justice Newberry reviewed a number of authorities that examined whether it was appropriate to consider estrangement in child support cases. Since there is no statutory basis for taking the quality of parent-child relationships into account, she reached the conclusion that only truly egregious misconduct by a child against a parent should be considered relevant when determining support for a child pursuing post-secondary education.

In *H.L.U. v. R.C.U.* 2015 BCSC 313, Madam Justice Balance refused the father's application for a cancellation of child support based on his allegation that his daughter had unilaterally terminated her relationship with him. The Judge said the evidence showed that her decision to distance herself from him reflected a reasonable response to his conduct and her situation generally, and went one step further saying that even if there had been a unilateral termination, it didn't meet the threshold for disentitlement to child support.

In researching this issue, it became abundantly clear that our courts have in fact softened their approach, and it is no longer appropriate to advise our clients that child support ends unless the child is in school or has a significant illness or disability. Family structure is changing. Delayed adulthood has impacted an entire generation and has recently been compounded by the effects of the Covid-19 Pandemic. Children are not moving into adulthood as they previously have. They are living at home longer and for reasons other than the pursuit of education, profound illness or disability. Mental health issues are being brought to the forefront, and courts are having to decide how far to extend parents financial obligations in the face of challenges and diagnoses that prevent young adults from being independent. As JP said, we need to be looking at our cases with a more contextual analysis of the facts of the family and the adult child to examine why they are not able to independently obtain the necessaries of life, in order to properly advise our clients on this issue.

Short Summary – key points

In summary, the four-part framework[24] for determining the amount of child support under section 3(2) of the FCSG is as follows:

a. Decide whether the child is a child of the marriage as defined by the Divorce Act. If not, then the matter ends.
b. Determine whether the approach of applying the Guidelines as though the child were under the age of majority (the usual Guideline approach) is appropriate, or has it been challenged. If not challenged, then the usual approach is used.
c. If the usual approach is challenged, determine whether the challenger has proven that the usual Guideline approach is inappropriate, if not, the usual Guideline amount applies
d. If the usual Guideline approach is inappropriate, decide what amount is 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

[24] Wesemann v. Wesemann, 1999 CanLii 5873 (BCSC) [1999] B.C.J. No. 1387

e. If a child has medical issues, there likely needs to be some evidence presented to the court regarding how the illness or disability prevents the adult child from pursuing post-secondary education or from being employed.
f. Where there is state support available for a child, the family is not absolved from all financial contribution. State support does not always cover the necessaries of life, the extent and provision of which are fact and case specific, and the court has discretion to allocate the shortfall between government benefits and the expenses budget, between the parties in proportion to their income. If the child is a PWD and receiving disability benefits, the support award is adjusted, taking into account the child's living expense budget, which can include a caregiver amount to account for the primary parents time.
g. An adult child's pursuit of post-secondary education needs to be reasonable in all the circumstances of the case in order to be eligible for child support.
h. Unilateral Estrangement by a child of a parent will only be considered in the most egregious circumstances when determining parental contribution to child support for adult children pursuing post-secondary education.

*****Postscript - BC Family Law Act vs Ontario Family Act**

The BC *Family Law Act* contains a definition that is consistent with the *Divorce Act*, defining a child of the marriage as a child of the two spouses, (or former spouses) who at the material time is under the age of majority and who has not withdrawn from their charge, or is the age of majority and under their charge by reason of illness, disability or other cause, to withdraw from their charge or obtain the necessaries of life.

Ontario legislation was recently challenged and found to be unconstitutional because it specifically states at section 31, "every parent has an obligation to support his or her unmarried child who is a minor or who is enrolled in a full-time program of education, to the extent that the parent is capable of doing so." The applicant mother *in Coates v. Watson*, 2017 ONCJ 454, successfully argued that section 31 of the FLA discriminates against adult disabled children of unmarried parents on the basis of parental marital status, disability and sex, contrary to section 15 of the Charter. Ontario and Alberta share the title as the last holdouts with provincial legislation that prevents access to child support to adult children of unmarried parents not enrolled in school full time but who remain in a parent's charge or unable to obtain the necessaries of life due to illness, disability or other cause.